STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. Robin B. Stilwell, Circuit Court Judge
Appellate Case Tracking No. 2018-000602

David W. Chiles, Jr., Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED

I. The PCR Court correctly determined trial counsel did not render ineffective assistance of counsel by failing to call Petitioner's mother as an alleged alibi witness where her testimony at the PCR hearing was not credible and failed to provide an actual alibi. Further, trial counsel was never made aware of the possible alibi defense even with multiple meetings with Petitioner and his family.

STATEMENT OF THE CASE

Procedural History

In April 2012, the Greenville County Grand Jury indicted Petitioner for conspiracy (2012-GS-23-0965), armed robbery and possession of a weapon during the commission of a violent crime (2012-GS-23-0966). Marcus L. Smith, Esquire represented Petitioner. Assistant Solicitor Jeff Weston, Esquire prosecuted the case. On November 5, 2014, Petitioner proceeded to trial before the Honorable Alexander S. Macaulay and a jury. The jury found Petitioner guilty as indicted. Judge Macaulay sentenced Petitioner to imprisonment for fifteen years for armed robbery, five years for conspiracy and five years for possession of a weapon during the commission of a violent crime.

Petitioner filed a timely notice of appeal. Kathrine H. Hudgins, Esquire South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders brief. The Court of Appeals dismissed the appeal. State v. Chiles. Op. No. 2016-UP-108 (S.C. Ct. App. filed March 2, 2016). The Remittitur was sent on March 18, 2016.

On March 7, 2017, Petitioner filed a PCR application with the Greenville County Clerk of Court. The State filed a return dated November 3, 2017. A PCR hearing was convened on December 15, 2017, before the Honorable Robin B. Stilwell. Petitioner was present at the hearing and represented by Rodney Richey, and Assistant Attorney General DeShawn Mitchell appeared on behalf of the State. On March 21, 2018, Judge Stillwell issued an Order of Dismissal denying Petitioner's allegations of ineffective assistance of counsel in the case. App. 667-675.

STANDARD OF REVIEW

An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "We do not defer to a PCR court's rulings on questions of law. 'Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law.'" Mangal v. State, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017) (internal citations omitted)(quoting Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

I. The PCR Court correctly determined trial counsel did not render ineffective assistance of counsel by failing to call Petitioner's mother as an alleged alibi witness where her testimony at the PCR hearing was not credible and failed to provide an actual alibi.

Petitioner contends his trial counsel was ineffective for failing to call his mother as an alibi witness. The testimony presented by Petitioner's mother did not provide an alibi for the armed robbery. Further, any potential alibi was very equivocal and lacked credibility. As a result, the PCR court correctly determined trial counsel was not deficient in his representation and any testimony presented would not have reasonably affected the outcome of the trial.

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the

attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

In the instant case, Petitioner failed to put forth sufficient evidence and testimony to establish a proper alibi for the crime. When first asked about Petitioner's whereabouts at the time of the robbery and whether he was with her, she responded: "Well, it's been a while and I can't recall that. But he stayed with me. He was at my house, he stays with me. But it's been a long time since this been going on so." (App. 642). Petitioner's mother was asked whether she and Petitioner discussed the fact he was with her at the time of the armed robbery of the McDonald's and she responded: "Yeah, because he - - as far as I remember, like I said, it's been years but he was there. He stays there with me." (App.644). The testimony presented by Petitioner's mother did no establish an alibi for Petitioner. Even if true that he stayed with her, her equivocal statements and lack of a recollection of whether he was home at the time of the robbery was insufficient to demonstrate counsel was deficient in failing to call her to testify. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) ("[S]ince an alibi derives its potency as a

defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." (citing State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980)).

Further, trial counsel testified that he met with the family multiple times in preparing for the trial. (App. 653). He testified that he was never told Petitioner was not present and was instead with his mother at the time of the robbery. (App.653-654). He also specifically testified: "If I had known about that I would have talked to her and probably had her on the witness stand." (App. 659). Counsel reiterated there was nothing about an alibi in the letters from Petitioner to counsel, nor was an alibi ever mentioned during his meetings with Petitioner and his family. (App. 660). See Thomas v. Gilmore, 144 F.3d 513, 515 (7th Cir. 1998) ("**It is reasonable for a lawyer to place a certain reliance on his client**") (emphasis added). Counsel cannot be deficient for failing to call a witness when he was never informed of the need to call the witness, and in this case, Petitioner and his family could have informed counsel of the mother's testimony if it would have provided an alibi. See Strickland, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on **information supplied by the defendant.**")(emphasis added); see also, United States v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because **the client rendered him so** .... That is not the sort of 'ineffectiveness' for which relief can be granted") (emphasis added).

Additionally, the PCR court found the testimony to be lacking in specificity and, in effect, found it lack credibility towards establishing an alibi. The Court concluded: "This Court finds Applicant's mother's testimony at the hearing in this Post-Conviction Relief Application

was, at best, equivocal. She would not say clearly and with any certainty that Applicant was with her at the date and time of the offense." (App.673). This finding is certainly supported by the record and supports the court's finding trial counsel was not deficient for failing to call Petitioner's mother as a potential alibi witness. See Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (The PCR court's evaluation of witness credibility is to be afforded great deference.).

Based on Petitioner and his family's failure to inform trial counsel of the alleged alibi, even with several documented meetings with both, trial counsel provided reasonable assistance under the circumstances of the case. Further, the testimony provided by Petitioner's mother failed to actually establish an alibi, certainly not one with the credibility and specificity sufficient to reasonably call into question the outcome of the case. Accordingly, the PCR court did not err in dismissing Petitioner's claim of ineffective assistance of counsel and this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: _____
for William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 5, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. Robin B. Stilwell, Circuit Court Judge
Appellate Case Tracking No. 2018-000602

David W. Chiles, Jr., Petitioner,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I, Judy A.C. Carey, certify that I have served the within Return to Petition For Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 5th day of April, 2019.

JUDY A.C. CAREY
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 05 2019
S.C. SUPREME COURT

April 5, 2019

Wanda H. Carter, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

Re: **David W. Chiles, Jr. v. State of South Carolina**
Appellate Case Tracking No. 2018-000602

Dear Ms. Carter

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Victim Advocacy Division (enclosure)