STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Michael G. Nettles, Circuit Court Judge

TYRUS RASHAWN WOODRUFF,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001838

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel failed to conduct a reasonable investigation, including interviewing an available alibi witness whose credible testimony established that Petitioner was with her and others on the day of the burglary and armed robbery, making it physically impossible for Petitioner to have committed the crime, and where Petitioner was prejudiced because if counsel had interviewed this witness and secured her testimony, Petitioner would not have pled guilty, but would have proceeded to trial?

STATEMENT OF THE CASE

Around noon on July 14, 2015, three armed men forced their way inside Marlon Davis' house where he lived with his family. One of the armed men forced Davis to the floor while the others ransacked the home and repeatedly demanded money and drugs. Davis was shot twice before the men fled in a black Dodge Avenger with several wallets and phones. A fourth man acted as the getaway driver. App. 117, l. 16 – 118, l. 16.

Within minutes of the burglary, one of the occupants of the home tracked his iPhone to a residence approximately 3.6 miles away. An investigator with the Spartanburg County Sheriff's Office immediately responded to this residence and observed a black Dodge Avenger and four males outside. Officers surrounded the residence and arrested Petitioner and his three codefendants. Wallets belonging to Davis and his son, including their credits cards, driver's licenses, and social security cards, were found in the backseat of the Dodge Avenger. One of the stolen iPhones was found inside the house, which was owned by Demelta Dewberry, the mother of one of the codefendants. App. 118, l. 17 – 119, l. 14.

A Spartanburg County grand jury indicted Petitioner on August 24, 2015 for attempted murder, three counts of armed robbery, first degree burglary, and possession of a weapon during the commission of a violent crime. App. 276-285. His case was called to trial on February 21, 2017 before the Honorable J. Derham Cole, and a jury. App. 1. On the morning of February 22, 2017, after a jury had been selected and pretrial motions were heard, Petitioner pled guilty to attempted murder, one count of armed robbery, first degree burglary, and possession of a weapon during the commission of a violent crime. App. 94. Solicitor Barry Barnette and Assistant Solicitor Spencer Smith represented the state. App. 94. Clay Allen and Paul Neely represented Petitioner. App. 94. Judge Cole sentenced Petitioner to twenty-five years for attempted murder,

armed robbery, and first degree burglary, and five years for the weapons offense, based on a sentence recommendation from the state. The state dismissed the other two counts of armed robbery as part of the plea deal. App. 125, l. 7 – 126, l. 6.

On November 7, 2017, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 128-137. The state filed a return to this application dated January 11, 2018. App. 138-148. An evidentiary hearing was convened on February 21, 2018 before the Honorable Michael G. Nettles. App. 149. Assistant Attorney General Valerie Giovanoli represented the state, and Rodney Richey represented Petitioner. App. 149.

Petitioner, who has always maintained his innocence, testified that he was at Taylor Dawkins' house with Dawkins, Christina Booker, Ebony Tubbs, and another friend, when the home invasion occurred. He went to Dawkins' house on the night of July 13, 2015 and stayed there until around noon the next day when Dawkins and Tubbs drove him to Demelta Dewberry's house. Shortly after he arrived at Dewberry's house, he was arrested and charged in this case. App. 193, l. 13 – 195, l. 11; App. 203, l. 21 – 204, l. 3. Petitioner shared this information with plea counsel and asked counsel to contact Dawkins, Booker, and Tubbs in order to establish an alibi defense. App. 195, ll. 9-11.

Petitioner only pled guilty because plea counsel came to him on the morning of the second day of trial, after a jury had been selected and pretrial motions had been heard, and told him the judge had denied his motion to present third party guilt, that they had no defense, and that he would be convicted and sentenced to life without parole if he went forward with the trial. App. 196, l. 9 – 198, l. 4. Petitioner felt coerced after plea counsel and Clay Allen, the circuit public defender, demanded he accept the state's plea offer. App. 198, ll. 18-25. Petitioner

testified that he only pled guilty to avoid being sentenced to life without parole, which plea counsel guaranteed would happened if he proceeded to trial. App. 202, ll. 12-19.

Paul Neely, Petitioner's plea counsel, likewise testified that Petitioner consistently maintained his innocence and asserted he was not there when the burglary and armed robbery occurred. App. 161, ll. 2-7. Petitioner and Neely talked at length about an alibi defense. Petitioner told Neely that he was at Taylor Dawkins' house with Dawkins and Christina Booker on the night of July 13, 2015 until about noon the following day after the crime had occurred. Petitioner provided Neely with addresses and telephone numbers for both women. Neely claimed he and his investigator contacted Dawkins and Booker and scheduled office appointments with them so they could discuss the case. However, both Dawkins and Booker repeatedly failed to show up for the scheduled meetings. Consequently, Neely was never able to discuss the substance of the case with them or establish an alibi defense. App. 161, ll. 8-25; App. 180, l. 1 – 181, l. 25. Because Neely was not able to communicate with Dawkins and Booker to confirm Petitioner's alibi, he did not provide the state with the proper ten day notice that he intended to present an alibi defense. App. 162, ll. 4-22.

Neely testified that because the alibi defense never materialized, his strategy at trial was to present a third party guilt defense, which he believed was a very strong defense based on the evidence collected by law enforcement. App. 163, l. 12 – 165, l. 18. However, after the trial judge heard the pretrial motions, he indicated in chambers on the morning of the second day of trial that he intended to deny the motion to present third party guilt. App. 165, l. 22 – 168, l. 3. Neely testified, "[S]o this entire defense that I had prepared for fifteen months that I had worked hard with Tyrus [Petitioner] to prepare was . . . ripped out from underneath me at the last moment." App. 167, l. 25 – 168, l. 3. At this point, Neely strongly believed that if Petitioner

went to trial, where he had no defense, the jury was "definitely" going to find him guilty and, based on the nature of the underlying allegations, the judge would sentence him to life without parole. App. 168, ll. 3-25; App. 185, l. 22 – 186, l. 6. Consequently, he advised Petitioner to plead guilty and accept the state's offer to recommend a sentence of twenty-five years "so he can get out [of prison] when he's 44 or 45 years old and still have some semblance of a life." App. 168, ll. 15-25. He believed pleading guilty was in Petitioner's best interest. App. 186, ll. 7-23; App. 191, ll. 14-18.

Clay Allen, who was second chair and only became involved in the case when it was put on the trial docket, testified that he likewise advised Petitioner to plead guilty. He agreed with Mr. Neely's assessment that pleading guilty and accepting the state's offer to recommend a sentence of twenty-five years was in Petitioner's best interest and would lead to the best outcome for Petitioner. App. 207, ll. 3-22.

At the conclusion of the hearing, Judge Nettles ordered the record remain open to allow Petitioner the opportunity to present an alibi witness. See App. 233, l. 24 – 234, l. 8. A second evidentiary hearing was held on May 31, 2018 before Judge Nettles. App. 237. Assistant Attorneys General Jordan Cox and Lindsey McCallister represented the state, and Rodney Richey represented Petitioner. App. 237.

Ebony Tubbs testified at this hearing that she and Petitioner along with several other friends were at a "get-together" on Dean Street in Spartanburg on the night of July 13, 2015 until approximately noon the following day. Tubbs dropped Petitioner off at another residence around 12:15 p.m. on that day, July 14, 2015. App. 246, l. 20 – 247, l. 16. She asserted Petitioner could not have committed the burglary and armed robbery because he was with her when it occurred. App. 245, ll. 21-23.

Tubbs would have been willing to talk to Petitioner's attorney and testify in Petitioner's defense, but she was never contacted by anyone from the public defender's office. App. 244, l. 20 – 245, l. 20. No one from the solicitor's office or law enforcement contacted her either. App. 244, l. 20 – 245, l. 7; App. 247, l. 19 – 248, l. 10.

By order filed October 4, 2018, Judge Nettles denied Petitioner relief. App. 259-275. The judge found Petitioner failed to prove counsel was deficient for failing to investigate and interview Ebony Tubbs as a possible alibi witness because Petitioner "failed to show that she was offered to counsel as a potential witness." App. 271. The judge found Tubbs' testimony was not credible because it conflicted with the record, Petitioner's own testimony, and counsel's credible testimony. App. 271. The judge further ruled Petitioner failed to prove prejudice because "no evidence was presented to show that absent the deficiency of counsel, [Petitioner] would have proceeded to trial." App. 271. Rather, the judge emphasized that Petitioner testified he pled guilty in order to avoid a possible life sentence, not because of any failure of the part of counsel. App. 271.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to plea counsel's deficient performance in failing to interview Ebony Tubbs, an alibi witness whose credible testimony established that Petitioner was with her and others on the day of the burglary and armed robbery, making it physically impossible for Petitioner to have committed the crime, and since Petitioner was prejudiced because if counsel had interviewed this witness and secured her testimony, Petitioner would not have pled guilty, but would have proceeded to trial, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel failed to conduct a reasonable investigation, including interviewing an available alibi witness whose credible testimony established that Petitioner was with her and others on the day of the burglary and armed robbery, making it physically impossible for Petitioner to have committed the crime, and where Petitioner was prejudiced because if counsel had interviewed this witness and secured her testimony, Petitioner would not have pled guilty, but would have proceeded to trial.

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to plea counsel's deficient performance in failing to interview Ebony Tubbs, an alibi witness, whose credible testimony established that Petitioner was with her and others on the day of the burglary and armed robbery, making it physically impossible for Petitioner to have committed the crime. Petitioner was prejudiced because if counsel had interviewed this witness and secured her testimony, Petitioner would not have pled guilty, but would have proceeded to trial, particularly where he consistently maintained his innocence.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989)

(citing Strickland, 466 U.S. at 668). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-688. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

"The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea." Hyman v. State, 397 S.C. 35, 43, 723 S.E.2d 375, 379 (2012), *abrogated by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Hill v. Lockhart, 474 U.S. 52, 58 (1985)). "In the guilty plea context, the inquiry with respect to counsel's alleged deficiency turns on whether the plea was voluntarily, knowingly, and intelligently entered." Id. (citing Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000)). "The second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. (citing Hill, 474 U.S. at 59). Consequently, a "defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Id. (quoting Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011), *abrogated by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (internal citation omitted). Therefore, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000) (internal citation omitted).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland, 466 U.S. at 691) (internal quotation marks omitted) (alteration in original). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Id. (citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991)).

In Walker, this Court affirmed the PCR court's grant of relief based on trial counsel's failure to investigate a potential alibi witness. Id. at 407, 756 S.E.2d at 147. Walker was convicted of kidnapping and first degree criminal sexual conduct based on allegations that occurred on the evening of March 2, 2002 and into the early morning hours of March 3, 2002. Shortly after his arrest, Walker gave a statement to law enforcement denying any knowledge of the crime. Id. at 403, 756 S.E.2d at 145. He told police that he spent the afternoon and evening at a friend's house and then returned to his girlfriend's, Robina Reed's, home around 9:30 or 10:00 p.m. for the remainder of the night. Id. Walker's counsel admitted she was aware of Walker's statement and that her notes contained the name Robina Reed as a person to interview.

However, she never interviewed Reed. Id. at 403, 756 S.E.2d at 146. She testified that her investigator spoke with or tried to speak with Reed, but she never followed up with her investigator. Id. at 403-404, 756 S.E.2d at 146.

Reed testified at Walker's PCR hearing that she was never contacted about Walker's case until she heard from his PCR counsel. Id. at 404, 756 S.E.2d at 146. She stated that in March of 2002, she was in a romantic relationship with Walker, but he disappeared near the end of that month, as she later discovered, when he was arrested. Id. "While she vacillated in her testimony and was unable to provide details about specific days and times she was with Walker, she was ultimately asked: 'Prior to the last time that [you] saw Mr. Walker did y'all spend every weekend together?' and she responded: 'Yea, we spend [sic] every weekend together.'" Id.

The PCR court granted Walker relief, finding his trial counsel was ineffective in failing to interview Reed. Id. The court also found Reed was credible, counsel was deficient in failing to interview her as an alibi witness, and Walker was prejudiced because Reed's alibi testimony created the reasonable probability of a different outcome at trial had she testified. Id.

This Court held Reed's testimony that prior to Walker's arrest, she and Walker spent every weekend together provided evidence to support the PCR court's conclusion that Reed offered alibi testimony that reasonably could have resulted in a different outcome at trial. Id. at 406, 756 S.E.2d at 147. This Court asserted, "If true and construed as meaning at least that Walker and Reed spent every night together on the weekends prior to his arrest, it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. While the Court acknowledged, as did the PCR court, "that Reed's testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker

spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. Consequently, this Court affirmed the PCR court's grant of relief. Id.

In this case, plea counsel admitted he did not contact Ebony Tubbs or make any efforts to do so. While he supposedly contacted Taylor Dawkins and Christina Booker, he maintained these potential witnesses never showed up to scheduled office appointments so he was unable to develop Petitioner's alibi defense. However, counsel would have been able to present a strong alibi defense if he had conducted a reasonable investigation and interviewed Ebony Tubbs. Counsel's failure to contact Ebony Tubbs, despite the fact that she was available at the time of trial and willing to testify in Petitioner's defense, constitutes deficient performance.

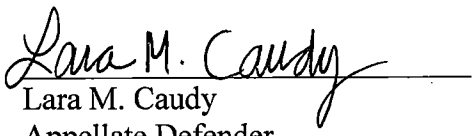
Petitioner was prejudiced by counsel's deficient performance because if counsel had secured Tubbs' testimony, Petitioner would not have pled guilty but would have proceeded to trial. Counsel maintained he advised Petitioner to plead guilty because he believed the jury would find Petitioner guilty since he had no defense to the charges. However, if counsel had secured Tubbs as a witness, Petitioner would have had a viable defense and, consequently, counsel's advice would have been different. There is also a reasonable probability that if Petitioner had proceeded to trial and presented Tubbs as an alibi witness, a jury would have acquitted him.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to counsel's deficient performance, this Court should reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of April, 2019.

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IN THE SUPREME COURT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrus Rashawn Woodruff states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearings, which were held on February 21, 2018 and May 31, 2018 before the Honorable Michael G. Nettles, and, in her opinion, seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests the Court relieve her as counsel for Tyrus Rashawn Woodruff.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of April, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Lara M. Caudy
Appellate Defender

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ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served on Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Tyrus Rashawn Woodruff, #353331, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 11th day of April, 2019.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of April, 2019.

Scott Swatt (L.S)

Notary Public for South Carolina
My Commission Expires: September 27, 2028.