

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

JEFFREY ALLAN GRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001779

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred when it denied Petitioner's request for a continuance to procure the presence of his alibi witness, but allowed Petitioner "wide latitude" to testify as to what the alibi witness would have said had she been present at the hearing since the alibi witness was crucial to Petitioner's PCR claims, and where the PCR court considered the absence of the alibi witness when it denied relief and also improperly ruled he would only consider the plea colloquy when ruling on the voluntariness of the plea?

STATEMENT

During the July 2014 term, the Florence County Grand Jury indicted Petitioner for armed robbery. App. 69 – 70.

On September 9, 2015, Petitioner pled guilty as indicted before the Honorable Steven H. John. App. 1. Emily Crayton represented Petitioner. Id. John Holt represented the state. Id.

Petitioner had multiple alibi witnesses who would have corroborated his claim that he was living in Greenville at the time of the armed robbery in Scranton; however, plea counsel failed to interview and subpoena those witnesses. App. 38, l. 3 – 39, l. 18. Since his alibi witnesses were not available, Petitioner thought he had no choice but to plead guilty. App. 42, ll. 10 – 22.

Judge John accepted Petitioner's guilty plea as freely, voluntarily, knowingly, and intelligently made. App. 12, ll. 7 – 12. The state recommended ten years' imprisonment. App. 12, l. 23 – 13, l. 14. Petitioner was sentenced to ten years' imprisonment. App. 15, ll. 2 – 18.

On February 1, 2016, Petitioner filed a post-conviction relief (PCR) application. App. 17 – 23. Petitioner alleged that plea counsel provided ineffective assistance of counsel when she failed to interview and subpoena alibi witnesses. Id. The state filed its Return on January 17, 2017. App. 24 – 27.

Petitioner's evidentiary hearing was held on November 16, 2017 before the Honorable Michael G. Nettles. App. 29. Jonathon Waller represented Petitioner. Id. Lindsay McCallister represented the state. Id.

At the outset of the hearing, PCR counsel Waller moved for a continuance because he was unable to contact Petitioner's alibi witness to testify at the hearing. App. 33, ll. 13 – 20.

Judge Nettles denied the motion for continuance, but said he would give Petitioner, “wide latitude,” to testify as to what the alibi witness would have said. App. 34, ll. 3 – 7.

Judge Nettles made an in-court finding that even if the alibi witness had been at the hearing and had established Petitioner’s alibi, “the colloquy that took place between [Petitioner] and [the plea court] is determinative.” App. 57, l. 19 – 59, l. 8. He ruled, “regardless of what the [alibi witness] would’ve said, even if she was present today and [established Petitioner’s alibi], he gave up those rights, and there was a thorough discussion of his jury trial rights.” App. 58, ll. 22 – 25.

In an order filed on September 7, 2018, Judge Nettles denied Petitioner’s PCR allegations. App. 61 – 68. Judge Nettles found that, “[Petitioner] has failed to prove Counsel was deficient in any way.” Id.

This petition follows.

ARGUMENT

The PCR court erred when it denied Petitioner's request for a continuance to procure the presence of his alibi witness, but allowed Petitioner "wide latitude" to testify as to what the alibi witness would have said had she been present at the hearing since the alibi witness was crucial to Petitioner's PCR claims, and where the PCR court considered the absence of the alibi witness when it denied relief and also improperly ruled he would only consider the plea colloquy when ruling on the voluntariness of the plea.

Relevant Facts

The state alleged the facts as follows: On March 13, 2014, Petitioner and a co-defendant accosted the complaining witness Abdullah Mused. App. 10, ll. 4 – 21. Mr. Mused was a store owner in the town of Scranton, SC. Id. Petitioner allegedly struck the complaining witness with a firearm in the face. Id. The pair took money from him and fled. Id.

Mr. Mused called the police and told them that he could identify both alleged attackers because they shopped in his store in the past. Id.

Prior to Petitioner pleading guilty, he spoke to plea counsel regarding multiple alibi witnesses who would testify that Petitioner was in Greenville at the time of the incident. App. 38, l. 3 – 39, l. 18. Plea counsel never personally interviewed these witnesses, but had an investigator do that for her. App. 39, l. 9 – 40, l. 8. However, the investigator asked the alibi witnesses if they knew of Petitioner's whereabouts at 2:30 p.m. on the day of the incident, rather than 11:43 p.m. when the alleged incident occurred. Id. Due to the investigator mistakenly questioning the alibi witnesses about the wrong time of day that the armed robbery occurred, the alibi witnesses could not corroborate Petitioner's claim. App. 41, ll. 10 – 22.

At the PCR hearing, PCR counsel Waller moved for a continuance because he was unable to contact Petitioner's alibi witness to testify at the hearing. App. 33, ll. 13 – 20. Judge Nettles denied the motion for continuance, but said he would give Petitioner, "wide latitude," to testify as to what the alibi witness would have said. App. 34, ll. 3 – 7.

Petitioner testified at his PCR hearing that both his sister and his brother-in-law could have been used as alibi witnesses to testify that Petitioner was in Greenville on the night of the incident. App. 38, l. 3 – 39, l. 18. Petitioner stated that his sister would have told the court that he was at her home during the night of the incident had his alibi witnesses been asked about the pertinent time of day, they would have told that to plea counsel's investigator. App. 41, l. 17 – 42, l. 7. Most importantly, Petitioner stated that the only reason he pled guilty was because his alibi witnesses were not used by plea counsel. App. 42, ll. 10 – 22.

Petitioner explained that he was out job hunting in Greenville during the day, so his alibi witnesses could not testify to his whereabouts at 2:30pm; however, he went back to their home that night and played video games with his brother-in-law. App. 39, l. 19 – 40, l. 5. Petitioner testified that he did not know the investigator asked about the wrong time of day until after he pled guilty. App.49, ll. 8 – 19. Therefore, he could not be in Scranton, South Carolina, on the other side of the state, while the crime was being committed.

Plea counsel testified at Petitioner's PCR hearing as well. App. 47, l. 21. Plea counsel claimed that she sent an investigator to interview Petitioner's alibi witnesses. App. 49, ll. 12 – 22. She stated that the investigator told her none of the alibi witnesses could corroborate his alibi. App. 51, ll. 15 – 17. However, plea counsel did not testify to what time the investigator asked the alibi witnesses about.

Judge Nettles made an in-court finding that, “even if [the alibi witnesses] would have testified and established alibi, I think the colloquy that took place between [Petitioner] and the [plea judge] is determinative.” App. 57, l. 19 – 59, l. 8. Judge Nettles gave, “great weight to the testimony of [plea counsel].” *Id.* He furthered, “regardless of what the sister would’ve said and even if she was present to day and [corroborated Petitioner’s alibi] he gave up those rights.” App. 58, ll. 22 – 25.

The order of dismissal issued on September 7, 2018 by Judge Nettles reflected his in-court ruling finding that even if the alibi witness corroborated Petitioner’s alibi, the plea colloquy was determinative. App. 61 – 68.

Discussion

The PCR court erred when it denied Petitioner’s motion for a continuance because Petitioner presented good cause where the reason for the continuance was to contact the alibi witness upon which Petitioner’s PCR allegation hinged.

The PCR court’s in-court finding and its order of dismissal both show that the PCR court did not take into account the evidence presented at the PCR hearing, as they were required, but rather rested their entire decision on the plea colloquy. *Elmore v. Ozmint*, 661 F.3d 783, 868 (4th Cir. 2011), as amended (Dec. 12, 2012) (citing *Porter v. McCollum*, 558 U.S. 30, 41 (2009)); App. 57, l. 19 – 59, l. 8; App. 61 – 68. The plea judge stated in his in-court ruling that he disregarded the evidence presented at the plea hearing because regardless of what was presented at PCR the plea colloquy controlled. App. 57, l. 19 – 59, l. 8. That was an error of law. *Id.*

“The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of

litigants.” Williams v. Bordon’s, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon “a showing of good and sufficient legal cause.” Rule 7(c), SCRCrimP.

As such, “[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.” State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law”).

In Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016), this Court held the trial judge erred when he denied Winkler’s continuation to investigate evidence of brain damage. Id. at 663, 795 S.E.2d at 697. After his conviction, Winkler filed an application for post-conviction relief and was appointed counsel. Id. at 659, 795 S.E.2d at 695. Two months into the representation counsel suspected Winkler suffered from brain damage. Id. at 660, 795 S.E.2d at 695. Counsel requested funding to investigate, which was approved, and hired a neuropsychologist. Id. Counsel moved to extend the deadlines in the scheduling order by ninety days. He explained that testing and analysis would require approximately ten weeks. Id. at 660-661, 795 S.E.2d at 696. The judge extended the deadline for filing an amended application but refused to extend the PCR trial date. Id. at 661, 795 S.E.2d at 696.

Winkler was unable to obtain the recommended PET scan because of elevated blood glucose levels. Id. Thereafter, counsel helped Winkler get treatment for his previously undiagnosed diabetes. Id. Despite receiving weeks of diabetes treatment, Winkler’s blood sugar

was still too high to perform an accurate study of his brain and additional time was needed for treatment and analysis. Id. Counsel requested a continuance of six months to file his final amended PCR application and to adjust other dates, which included the trial. This request was denied. Id. at 662, 795 S.E.2d at 696

This Court explained that the PCR statute, much like the Rules of Criminal Procedure, stated additional time should be granted, “if ‘*good cause is shown to justify a continuance.*’” Id. at 662, 795 S.E.2d at 697, (quoting S.C. Code Ann. § 17-27-160(c)) (emphasis added). This Court found the PCR court abused its discretion when it denied Winkler’s second motion for additional time because Winkler presented, “good cause,” for the continuance. Id. at 663, 795 S.E.2d at 697. The Winkler Court found no evidence to support the PCR judge’s finding that PCR counsel had, “‘ample opportunity,’” to investigate and develop the evidence related to potential brain damage. Id. Thus, Winkler provided, “good cause,” to justify a continuance. Id. According to the Court, the PCR court’s denial of the continuance request, “left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler’s brain damage.” Id.

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), this Court held the trial court abused its discretion when it denied McMillian’s motion for continuance to obtain the transcript of his first trial. McMillian made a timely request for the transcript of his first trial, but his second trial started before he received it. Id. at 19, 561 S.E.2d at 603.

McMillian moved for a continuance to obtain the transcript in order to impeach a witness against him, but his request was denied. Id. The Court found the PCR court abused its discretion because, “[t]he only ‘neutral’ witness for the state during McMillian’s second trial was Dorothy Williams Rumph.” Id. at 21, 561 S.E.2d at 604. Therefore, the Rumph’s credibility, “was

essential to McMillian's defense," and the crucial nature of Rumph's testimony could not be overstated. Id. The Court concluded that, "the verdict hinged upon her credibility," and without the transcript from the first trial, "McMillian was hindered in his ability to impeach her." Id. at 23, 561 S.E.2d at 605.

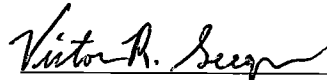
In the instant case, the PCR judge's denial of Petitioner's motion for continuance, as in Winkler, prevented Petitioner from accessing the evidence necessary to support his claim of ineffective assistance of counsel. Petitioner testified at the PCR hearing that he would not have pled guilty had plea counsel used his alibi witnesses in preparation for trial. App. 42, ll. 10 – 22. Petitioner's PCR hearing, similar to McMillian, hinged on a single witness's testimony. The alibi witness' testimony was crucial to Petitioner's PCR claim and, like in McMillian, the denial of the motion for continuance hindered Petitioner's ability to present his allegations.

The order of dismissal and the in-court ruling both show the error in the PCR court's denial of Petitioner's PCR claim. The PCR court disregarded the evidence presented at the evidentiary hearing when it said the plea colloquy was determinative regardless of the evidence presented at PCR. App. 57, l. 19 – 59, l. 8; App. 61 – 68. A PCR court *must* take into account all of the evidence presented at both the underlying trial, or plea, and at the PCR hearing. Elmore v. Ozmint, 661 F.3d 783, 868 (4th Cir. 2011), as amended (Dec. 12, 2012) (citing Porter v. McCollum, 558 U.S. 30, 41 (2009)).

Accordingly, there was good cause for Petitioner's motion for continuance because Petitioner needed his alibi witness present at the PCR hearing to prove plea counsel handled his case ineffectively and his testimony as to what she would testify to could not substitute for her testimony. Therefore, the PCR judge abused his discretion when he denied Petitioner motion for continuance.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant Certiorari to allow for full briefing on this issue.



Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeffrey Allan Gray states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Michael G. Nettles, which was held on November 16, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 that the Court relieve him as counsel for Jeffrey Allan Gray.

Respectfully Submitted,



Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of May, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



Victor R. Seeger
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ATTORNEY FOR PETITIONER

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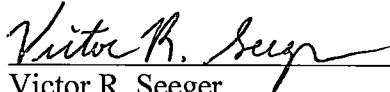
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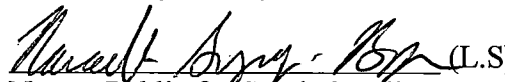
CERTIFICATE OF SERVICE

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 has been served upon Lindsey McCallister, 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 Jeffrey Allan Gray, #311734, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of May, 2019.



Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of May, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028