THE STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO LEXINGTON COUNTY
Hon. Gary E. Clary, Trial Judge
Hon. Brian M. Gibbons, Post Conviction Relief Judge

Appellate Case No. 2016-000885

Willie J. Richardson, ... Respondent,

vs.

State of South Carolina, ... Petitioner.

BRIEF OF RESPONDENT

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar № 06188
(864) 229-5010

Attorney for Respondent

Index

Table of Authorities

Cases:

Other Authorities:

STATEMENT OF THE CASE

Willie J. Richardson agrees with the Statement of the Case as set forth in the Brief of the Petitioner.

Argument

Question Presented

The Post Conviction Relief judge did not err in finding Respondent satisfied his burden of proving Trial Counsel was ineffective for failing to interview and call the alibi witnesses who testified at the Post Conviction Relief hearing.

"Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR Court's factual findings. Ordinarily, the appellate court is not free to make its own factual findings." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). The Post Conviction Relief judge had ample evidence from which he could conclude that trial counsel was ineffective in failing to call the alibi witnesses and introducing the related exhibits. First, it should be noted that trial counsel testified he knew of witnesses who were not called to testify. He stated concerning his investigator, "I don't recall who he talked to and things of that nature, but the gist of it was that a number of people were able to establish that Mr. Richardson was in New York." App. at 659, ll 4-7. He stated he talked to Greg Huge, the brother who testified at the PCR hearing. Trial counsel testified:

> Q. (By Mr. Wise) And did you have a conversation with a brother of Mr. Richardson who lived at the time in California?
> A. (By Mr. Young): I think that is a brother who changed his name or .
> Q. That's correct.
> A. I believe I did.
> App. at 665, ll 13-19.

Mr. Young knew enough to know that Mr. Richardson's brother had changed his name.

Obviously he was aware of Mr. Huge as a potential witness.

The State argues that Michelle Richardson, Mr. Richardson's sister, was "adamant that she wasn't able to come." Br. of Pet. At 8; App. 657, ll 11-2. From the entire testimony, this obviously refers only to her not being able to come because the trial was changed. Ms. Richardson testified she was planning on coming to testify until the date was moved up. She testified no one ever told her the date had been moved up. In fact, her testimony was that no lawyer or investigator ever contacted her. App. at 725, l 21 to 726, l 19. When the date was changed at the last minute, trial counsel did not request a continuance to enable her to testify. App. at 664, ll 5-9. The trial transcript does not show any request for continuance was made by defense counsel in order to obtain the testimony of this alibi witness.

The PCR Judge heard the testimony of the witnesses. He reviewed the exhibits introduced by Mr. Richardson. He read the transcript of the trial. He was in the position to observe the witnesses who testified and make a determination as to whether they could have had an impact on the jury verdict. He concluded, "[T]here is a reasonable probability that the result in the murder trial would have been different if the witnesses had testified and the exhibit presented." App. at 743. The record in this case is not devoid of any evidence to support this conclusion. In fact, having observed the witness demeanor during their testimony, the record more than supports the factual findings of the Post Conviction Relief judge.

The State's reliance upon *Bergmann v. McCaughtry*, 65 F.3d 1372, 1380 (7th Cir. 1995) is misplaced. The Court said:

> Bergmann's counsel testified that he decided not to call William Scott to testify about the guns because William Scott failed to mention the guns at a preliminary hearing. William Scott had

> further testified at the preliminary hearing that Bergmann left the house at a time which was consistent with Trawitzki's version of events. Counsel decided that in light of the preliminary hearing, William Scott could be a "dangerous" witness for Bergmann, and he therefore declined to call him. Such a considered decision is also well within the realm of sound trial strategy. *Id.* at 1380.

No such rational trial strategy was presented in this case. The case hardly supports the blanket proposition that "trial counsel was not ineffective for failing to call family members who would easily have been impeached for bias." Pet. of Resp. at 14-15. To so hold would mean that no trial counsel would ever be ineffective for failing to call a family member as a witness. Such a blanket finding is not sound.

Nor is *McCauley-Bey v. Delo*, 97 F.3d 1104, 1106 (8th Cir.1996) helpful to the State. The Eighth Circuit said:

> McCauley-Bey's three uncalled witnesses were all subject to impeachment. Neither James Massey, Tyrone Mitchell, nor Eva Washington came forward promptly. James Massey could have been impeached with a prior assault conviction. Tyrone Mitchell was the brother of McCauley-Bey's girlfriend, Sharon Mitchell. Further, Tyrone Mitchell's ability to observe could have been challenged. Initially, based on his testimony at the evidentiary hearing, Mitchell would have testified at trial that he saw the shooting, that he saw McCauley-Bey and Sharon Mitchell running from the shooting, and that he was ducking during the shooting. In addition, details of Tyrone Mitchell's account are not consistent with the testimony of other witnesses who testified that the shooting took place at night with the shooter firing into the van while standing between a truck and the van. By contrast, Mitchell would have stated that the shooting took place at dusk and that he saw no truck. Mitchell was approximately three blocks away from the shooting; if the truck was there, it likely would have blocked Mitchell's view. *Id.* at 1106

No such impeachment existed against the witnesses in this case. Here the PCR judge specifically noted that the witnesses had not been impeached and they held responsible

positions. In fact Ernest Richardson submitted an affidavit dated August 9, 2013, well before the January 22, 2014. Supp. App. at 1. The affidavit was submitted in a request for a continuance during the previous PCR term of Court for Lexington County. If there were material to impeach Mr. Richardson's witnesses, the State had time to locate it. The testimony of the witnesses was consistent that Mr. Richardson had been in New York before the shooting and was in New York after the shooting. No witnesses testified that Mr. Richardson left New York at any time during the week-end of the shooting.

In *Romero v. Tansy*, 46 F.3d 1024, 1029 (10th Cir. 1995) the importance of any alibi testimony was undercut by the defendant's own statements to his attorney. The Court found "Importantly, James [trial counsel] further testified that appellant told him that Ms. Montoya could not identify him because he was wearing a hat and sunglasses and because she could not see very well. James inferred from this statement that appellant was at the crime scene and probably committed the robbery." *Id.* at 1029.

As noted by the PCR Judge, this case is controlled by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014). In that case South Carolina Supreme Court said:

> That testimony provides evidence supporting the PCR court's conclusion that Reed offered alibi testimony that reasonably could have resulted in a different outcome at trial. 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.* at 406, 756 S.E.2d at 147.

Here, the witnesses offered testimony that reasonably could have resulted in a different outcome. The PCR Judge, as in *Walker*, found the witnesses credible and therefore the record contained ample evidence to support the decision of the PCR court.

The State, in trying to make the facts of this case fit into the principles of *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995), is attempting to fit the proverbial square peg into a round hole. In *Glover* the crime occurred about 8:30 pm in Williamsburg County. The alibi witness placed Mr. Glover in Florida between 8:00 to 8:30 am. The witness lived only about six and a half hours from Williamsburg County, as noted by this Court in footnote 1. In this case, using Google Earth, the distance from Brooklyn, NY, where Mr. Richardson was, and Meadowlark Rd, in Chapin, SC, where the shooting occurred is 740 miles.[1] The ability for Mr. Richardson to be at a party in Brooklyn, NY on the afternoon of the day of the shooting and then leave and arrive in Chapin, SC in time for a 1:30 to 2:00 am shooting has not been shown by the State. The witnesses testified he was in Brooklyn the next day also. As Mr. Richardson was in Brooklyn, NY the day of the shooting, the witnesses did in fact provide him with an alibi. To hold that Mr. Richardson could have hopped an after midnight flight, flown to Columbia, made it to the club where the shooting occurred and hopped another flight back to New York without any family member knowing he had left New York, frankly stretches credibility to the breaking point.

The failure to call other family members was also prejudicial to Mr. Richardson because his mother testified other family members were present. App. at 474, ll 9-17. The jury could easily have raised the question of why the other family members did not testify. There was no attempt to explain why they were not present.

The State has argued, "Trial Counsel would have to be clairvoyant to be aware of the existence of the photographs." Br. of Pet. at 16. All trial counsel had to do is simply ask if there

---

[1] The South Carolina Supreme Court took judicial notice of the distance between Gary, TN and Johnson City, TN in *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), n. 3.

were pictures as part of his investigation. Asking about pictures at a birthday party is hardly being "clairvoyant." Asking for pictures at a birthday party is simply being a competent trial lawyer properly investigating the case he has. Mr. Richardson testified he had never thought about picture until he was asked in preparation for the PCR. App. at 705, ll 2-9.

The State had made an issue of the fact that Mr. Richardson had dread locks at the time of trial and did not have them in the picture. Br. of Pet. at 9. This trial was not held until some four years and eight months after the crime. What relevance would a change in hair style have after that much time had elapsed. There was no testimony that made dread locks relevant to any issue in the trial. It is simply a non-issue.

The State concedes that Mr. Richardson told his trial counsel that he had gone to New York well before the shooting to attend the funeral of a close friend. Counsel did not need to be clairvoyant to obtain a copy of the funeral program to introduce at trial. Apparently trial counsel concluded it was not important.

Overwhelming Evidence of Guilt

As the South Carolina Supreme Court has said,"In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error." *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018). The standard for such a case is described as, "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* at 191, 810 S.E.2d at 845. This case is not one of those rare

cases. The evidence in this case was not overwhelming. In fact, during the deliberations, the jury advised the Court they could not reach a verdict. App. at 519. They requested additional statements if they were available. App. at 518. They deliberated from 10:36 am until 4:14 pm. In addition, one of the key witness for the State, Kirby Blooker, testified he knew Willie Richardson, but did not tell the officers when he was interviewed that he knew Mr. Richardson. App. at 437, l 19. There was no DNA in this case. There were no fingerprints. Except for the testimony of a jailhouse informant, there was no confession.[2] The police interviewed the girl friend of Willie Richardson and found the automobile seen at the crime scene was at the house where she was staying. App. at 317, l 2 to 318, l 23. Mr. Richardson was not there. They never asked her where she was the night of the incident. Shortly after the shooting, she vanished. App. at 322, l 23 to 323, l 7.

The only evidence against Mr. Richardson was eye witnesses who gave very vague and general descriptions the night of the incident. They also arrested Mr. Richardson in New York which in a sense actually helped to confirm his alibi. App. at 323, ll 8-12. The State never produced any evidence that Mr. Richardson went to New York on the day of or anytime after the shooting. They knew he was in New York because they arrested him there. Any reasonable investigation would have included an investigation of flights out of Columbia to determine if Mr.

---

[2] "The use of jailhouse informants to obtain information from defendants represented by counsel is problematic for a number of reasons. As noted by the United States Supreme Court, the jailhouse is an unusual environment where a sense of camaraderie can mask real interests, where defendants may be particularly vulnerable, and where scheming and bravado are higher on the hierarchy of values than reporting the truth" *State v. Marshall,* 882 N.W.2d 68, 81 (Iowa 2016); "Jailhouse snitch testimony is arguably the single most unreliable type of evidence currently used in criminal trials." Russell D. Covey, *Abolishing Jailhouse Snitch Testimony,* 49 WAKE FOREST L. REV. 1375 (2014)

Richardson was on one. They did not so investigate.

Serious and substantial evidence in this case shows that Mr. Richardson went to New York well before the shooting to attend the funeral of a friend. The State in its investigation never produced a single record to show Mr. Richardson ever came back other than when they arrested him after the shooting. In August of 1995, the evidence should have been relatively easy to find. Serious and substantial testimony was presented at the Post Conviction Relief hearing that Mr. Richardson never left New York after his arrival before the shooting. All of the witnesses had a reason to remember Mr. Richardson being in New York as on Sunday after the shooting they were told that Mr. Richardson was wanted in a shooting in South Carolina. They all knew he could not have committed the murder. The Post Conviction Relief judge, having watched the witnesses testify and upon reviewing the exhibits, concluded that there was in fact a reasonable probability that the result would have been different.

The State argues the alibi witnesses were relatives and, therefore, would not be believable. The State is simply arguing the facts at the Post Conviction Relief Hearing were not sufficient. They also argue that the additional witnesses were merely cumulative. The Post Conviction Relief judge found as a fact that while to some extent they might have been cumulative, the pictures certainly were not cumulative. The judge considered all the facts, as he should, and concluded the result would probably have been different. The factual findings by the judge cannot by reversed by this Court unless there are no facts upon which the judge could have made such a finding. "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls* at 180, 810 S.E.2d at 839. The evidence in the record supports the factual findings of the Post Conviction Relief judge.

CONCLUSION

Ample evidence exists in the record in this case to support the factual findings of the Post Conviction Relief Judge. The evidence certainly exceeds the "any evidence" standard of review in a Post Conviction Relief case. Nor did the Post Conviction Relief Judge make any error of law in his opinion that would be reviewed de novo by this Court. This Court should, therefore, affirm the decision of the Post Conviction Relief judge and give Willie Richardson a new trial..

July 26, 2019

C. Rauch Wise
305 Main St.
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 06188
Attorney for Willie Richardson