

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-000476

Joshua Lee Phillips,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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RESPONDENT'S QUESTION PRESENTED

Did the PCR court correctly find Petitioner's trial counsel were not deficient, and therefore not constitutionally ineffective, because they investigated Petitioner's alibi and made a strategic decision not to call witnesses at trial, and Petitioner failed to prove he was prejudiced by his counsels' alleged deficiency because Petitioner did not present any alibi witnesses at the evidentiary hearing, and his speculation as to their testimony is insufficient to meet his burden of proof?

STATEMENT OF THE CASE

Petitioner is incarcerated in the South Carolina Department of Corrections pursuant to the Marion County Clerk of Court's orders of commitment. Petitioner was indicted at the February 2008 term of the Marion County Grand Jury for two counts each of murder and armed robbery and one count of possession of a weapon during the commission of a violent crime (2008-GS-33-0071). Jack Lawson (Lawson), Esquire,¹ and Hank Anderson (Anderson), Esquire, represented Petitioner. On August 31 through September 3, 2009, Petitioner proceeded to trial before the Honorable Ralph King Anderson and a jury. After the jury convicted Petitioner as indicted, Judge Anderson sentenced him to consecutive terms of life without parole on each count of murder, plus concurrent terms of thirty years for each count of armed robbery and five years for weapons charge.

A notice of appeal was filed on Petitioner's behalf, and an appeal was perfected by Joseph Savitz, III, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division, pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phillips, Op. No. 2012-UP-143 (filed February 29, 2012). The remittitur was returned to the circuit court on March 16, 2012.

Petitioner timely filed his application for post-conviction relief (PCR) on May 24, 2012. Respondent made its Return on December 12, 2012. An evidentiary hearing into the matter was convened on August 30, 2017, at the Florence County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf.

¹ Lawson died on November 2, 2011, and therefore, did not testify at the evidentiary hearing.

Anderson and Ron Smith testified for the State. The PCR court found Petitioner received effective assistance of counsel and dismissed Petitioner's application in its entirety by order signed January 22, 2018, and filed January 29, 2018. Petitioner filed a Petition for a Writ of Certiorari to this Court on March 15, 2019. This Return to the Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

At approximately 5:15 a.m. on the morning of September 29, 2007, a woman approached three officers from the Marion County Sherriff's Department at the Sunny Mart in Nichols. App. pp. 127-129, 177-78. The woman was "hysterical," and reported to the officers she had just left the Nichols Night Life club, where a man was had shot people inside. App. p. 129, 178, 487. The woman also reported the man left in a gold Jeep with three other people. App. pp. 179-80, 478. The woman told the officers the shooter was a black male with twists in his hair, who she knew as Scrappy.² App. pp. 180, 487, 493. Upon arrival and entry to the club, the officers discovered two deceased victims, one male and one female; spent shell casings; and a wallet with dollar bills scattered on the floor. App. pp. 131-34, 183. The lights were on inside the club, and the male victim's red pickup truck was idling in the parking lot. App. pp. 139, 183, 282-83. Both of the victims were shot in the head. App. pp. 739, 744.

Later that morning, the woman who first reported the incident, Jacqueline Love (Love), returned to the crime scene and gave a statement to a detective there. App. pp. 144-45, 225, 230. Based on Love's description of the shooter,³ another officer on scene suggested Petitioner as a possible suspect. App. pp. 255, 494. The officer prepared a photo lineup with Petitioner's picture, and Love immediately identified Petitioner as the man she had seen inside the club. App. pp. 257-58, 494-96, 506. Love also identified Petitioner at trial. App. pp. 477, 499-500, 507-08.

Once Petitioner was identified, officers searched his house and were able to identify Petitioner's codefendants, who were in the car with him. App. pp. 384-85, 602-03, 611.

² Testimony at trial established Petitioner's nickname was Scrappy or Little Scrappy. App. pp. 258, 600-01, 664-65.

³ Petitioner suffers from vitiligo, which is visible around his mouth, and has two tear drop tattoos on his face. App. p. 494.

Petitioner's codefendants testified at trial that Petitioner went into the club after closing, they heard gunshots, then Petitioner ran back to the car, and they drove off. App. pp. 604-08, 659-60, 665-68. One codefendant further testified he helped Petitioner dispose of the gun. App. p. 675. Investigators eventually located a .45 caliber pistol near the 501 bridge in Mullins, which was consistent with shell casings found at the crime scene. App. pp. 367-68, 385-86, 445. Petitioner fled to Kentucky and was apprehended there several weeks later. App. pp. 216-19.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. However, pure questions of law are reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Petitioner must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The PCR court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

The PCR court correctly found Petitioner's trial counsel were not deficient, and therefore not constitutionally ineffective, because they investigated Petitioner's alibi and made a strategic decision not to call witnesses at trial. Further, Petitioner failed to prove he was prejudiced by his counsel's alleged deficiency because Petitioner did not present any alibi witnesses at the evidentiary hearing, and his speculation as to their testimony is insufficient to meet his burden of proof.

Petitioner alleges Anderson and Lawson were constitutionally ineffective because they failed to present a valid alibi defense at trial. PWC p. 3; App. pp. 871-75. However, testimony at the evidentiary hearing established Lawson investigated Petitioner's alleged alibi and made a reasonable strategic decision not to call the witnesses at trial. Additionally, Petitioner failed to offer the testimony of any of his alleged alibi witnesses at the evidentiary hearing. Therefore, the PCR court correctly found Petitioner's trial counsel were not constitutionally ineffective because they were not deficient, nor did Petitioner meet his burden as to prejudice. This Court should therefore deny certiorari and affirm the PCR court's decision denying relief.

As this Court explained in State v. Robbins:

[B]y an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was impossible. To be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime. To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime.

275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). Thus, Petitioner is correct his attorneys at least had a duty to investigate the

potential alibi defense once Petitioner brought it to their attention. Petitioner testified the alibi witnesses were Johnny McLeod, Yolanda Phillips, James Riggins, Stevie Riggins, and Kayla Bellamy, all of whom could verify his whereabouts at the time of the crime. App. p. 871.

Ron Smith (Smith), an investigator for the Public Defender's Office, testified at the evidentiary hearing. Smith testified he accompanied Lawson on several trips to Loris and Green Sea several weeks before trial to attempt to locate the people Petitioner named as potential alibi witnesses. App. pp. 931, 935. Smith testified they were specifically searching for a music producer who had a studio between Loris and Green Sea, as well as a witness from the Loris Pizza Hut who might have seen Petitioner that night. App. pp. 932-33. Smith explained Petitioner told him and Lawson that Petitioner was with the music producer listening to music all night, but they could never corroborate that alibi. App. pp. 935-36. Smith testified they searched for several days from dawn until after dark, but they were unable to locate any of the witnesses Petitioner described, and the music studio building appeared to be abandoned and overgrown. App. pp. 933, 935. Smith further testified he received information the music producer might have gone to Omaha, Nebraska, and Lawson unsuccessfully attempted to track him down through the Nebraska Department of Corrections. App. p. 933. Finally, Smith testified he and Counsel also went to the Conway Housing Authority and interviewed Petitioner's mother, Yolanda Phillips; his sister; and a friend, Johnny McLeod. App. p. 932.

Anderson testified documentation in the case file showed the defense listed Stevie Riggins, Yolanda Phillips, and Johnny McLeod as potential defense witnesses, among others. App. p. 910. Anderson testified some alibi witnesses were present in the

courtroom, and the defense asked to have witnesses sequestered because they had not yet made a decision about whether Petitioner would testify and present witnesses. App. pp. 912-13. Anderson further testified the defense team waited to make the decision about whether to call their own witnesses until after the State had presented its case. App. p. 913. Anderson explained the main defense strategy was to deny Petitioner's involvement and show the State's theory of the crime was not reasonable. App. pp. 919-20. Anderson testified the State relied on witnesses who admitted to smoking marijuana and drinking on the night of the crime, and they gave conflicting, inaccurate statements, all of which the defense attacked on cross-examination. App. p. 920. Anderson also testified he and Lawson repeatedly pointed out poor police work, made motions to limit witnesses' testimony, and objected to the introduction of evidence. App. pp. 926-28. Anderson further testified if the alibi witnesses were not called, it was because Lawson did not find them to be credible. App. p. 929. Finally, Anderson testified Applicant, for strategic reasons, chose not to testify or present witnesses, which allowed the defense to retain the last argument to the jury. App. p. 921.

Based on the testimony of Anderson and Smith, whom the PCR court found to be credible, the PCR court correctly found Petitioner's trial counsel were not deficient in failing to call the alleged alibi witnesses during trial. App. pp. 956-57. Smith detailed the defense efforts to locate witnesses and verify Petitioner's alibi. Although those efforts ultimately proved unsuccessful, the PCR court correctly found Lawson and Anderson fulfilled their duty to perform a reasonable investigation. App. p. 957. Further, Anderson, testified Lawson would have called those witnesses if Lawson had believed they could give credible testimony. App. p. 929. Anderson also credibly testified the defense

formulated a plan to attack the State's case without having to put up their own witnesses, which allowed them to retain the last argument to the jury. App. pp. 919-21. Accordingly, the PCR court correctly found Anderson and Lawson were not constitutionally ineffective because their performance was not deficient. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy); see also Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (“[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include ‘which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.’ What motions to file and ‘whether to put on evidence so as to preserve the final word in closing argument’ are also strategic and tactical decisions to be made by trial counsel.”) (internal citations omitted).

Additionally, Petitioner did not call any alibi witnesses to testify on his behalf at the evidentiary hearing. App. p. 864. Petitioner’s assertion alone these witnesses would have provided favorable testimony is not enough to meet his burden as to this allegation. See Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (“The applicant’s mere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.”). In order to prevail on a claim of ineffectiveness based on trial counsels’ failure to call a favorable witness, this Court has

repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis added). Petitioner's speculation the witnesses' testimony would have been favorable cannot, by itself, satisfy his burden of showing prejudice. Glover, 318 S.C. at 498-99, 458 S.E.2d at 540. Therefore, the PCR court correctly found Petitioner failed to meet his burden of proving he was prejudiced by trial counsels' alleged deficiency. App. p. 959.

Because neither Lawson nor Anderson were deficient in the investigation of the alleged alibi witnesses or the decision not to present the witnesses at trial, and because Petitioner wholly failed to meet his burden of proving he was prejudiced by trial counsels' decision, this Court should deny certiorari and affirm the decision of the PCR court denying relief.


CONCLUSION

For the reasons stated above, this Court should deny the Petition for a Writ of Certiorari and affirm the PCR court's finding Petitioner's trial counsel were not deficient in declining to call alleged alibi witnesses, nor was Petitioner prejudiced by trial counsels' strategic decision. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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August 28, 2019

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CERTIORARI TO MARION COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-000476

JOSHUA LEE PHILLIPS,

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v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
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This 28th day of August, 2018.



KASEY KNOX
Legal Assistant for Respondent