

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

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MARION POWELL,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001923

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation where counsel claimed he failed to call Jarvis Watson as an alibi witness because he did not believe Watson's alibi was "strong enough," since a "viable interpretation" of the testimony which Watson might have provided was that petitioner was with him in North Carolina when the crime occurred?

STATEMENT

On April 21, 2011, a Beaufort County Grand Jury indicted petitioner for armed robbery; five counts of kidnapping; first degree burglary; and possession of a weapon during a violent crime.¹ R. 875 – 896. Petitioner was tried before the Honorable Brooks Goldsmith and a jury, from November 18 – 22, 2013. R. 1. Petitioner was represented by Scott Lee, and the state was represented by Benjamin Sheldon and Benjamin Coppage. R. 2.

The state's case against petitioner was not an airtight one. No physical evidence connected petitioner to the crime scene, and he did not confess to police officers. The state relied on eyewitness identifications of petitioner by the victim and her then-ten-year-old daughter. R. 288, l. 11 – 289, l. 8; R. 239, ll. 6-7; R. 250, ll. 7-17. However, expert testimony established the photographic lineup in this case had a “suggestibility problem.” R. 640, l. 6 – 641, l. 8. The state also introduced the testimony of a jailhouse snitch who claimed that petitioner confessed to him. R. 488, ll. 5-19.

Petitioner was convicted as indicted, and he was sentenced to concurrent terms of twenty-seven years for armed robbery; twenty-seven years for each count of kidnapping; twenty-seven years for first degree burglary; and five years for possession of a weapon during the commission of a violent crime. R. 723, l. 25 – 724, l. 19; R. 897 – 904; R. 738, ll. 9-16.

After his conviction was affirmed on direct appeal, petitioner timely filed an application for post-conviction relief (PCR) and alleged ineffective assistance of counsel. R. 785 – 787; R. 788 – 801. The state made its return on August 3, 2017 and petitioner filed an amended PCR application on January 15, 2018. R. 802 – 811; R. 812 – 813. A hearing was held on the matter

¹ Petitioner was also indicted for possession of a firearm by a person convicted of a violent crime, and two counts of pointing and presenting firearms at a person. However, it appears the state nol prossed those charges. R. 600, l. 25 – 601, l. 25; R. 723, l. 25 – 724, l. 19.

January 31, 2018, before the Honorable R. Lawton McIntosh. R. 814. Ashley McMahan represented petitioner and Julie Coleman represented the state. R. 815.

Petitioner testified that he had an alibi for the date the crime was committed, which was October 25, 2010. R. 875 – 896. Petitioner explained he was with a friend, Jarvis Watson, in Vanceboro, North Carolina, from June of 2010 until March of 2011. R. 826, ll. 1-10. Petitioner candidly said he was in North Carolina because he was “evading” two other armed robbery charges and a parole violation. R. 826, ll. 1-4.

Q. “Okay. Where were you that day?”

A. “I was hiding in Vanceboro, North Carolina.”

R. 832, ll. 23-24.

Counsel testified that he believed “there wasn’t a whole lot of true investigation that needed to be done.” R. 845, ll. 14-15. Counsel said he had “some limited discussion” with Jarvis Watson, but he did not believe Watson “could provide us with an alibi that was strong enough to—to carry the day.” R. 837, ll. 14-24. “[M]y concern was that nobody could pinpoint that on I think it was October 10, 2010 that [petitioner] was in Goldsboro [sic], North Carolina at such and such.” R. 837, ll. 16-18. Counsel also claimed that Watson “wasn’t exactly crawling over broken glass to come talk with us or come to court. So, I think [it was] more of a strategy decision more than anything else . . .” R. 837, l. 23 – 838, l. 1.

The PCR court held the record open to allow the parties to depose Jarvis Watson and supplement the record with his testimony. R. 858, l. 18 – 859, l. 5. However, on October 18, 2018, the PCR court issued an order of dismissal. R. 861 – 874. The order reflected that petitioner was not able to submit Watson’s testimony. R. 864. The order also stated that counsel “credibly testified that he did investigate and attempt to speak to Jarvis Watson as a potential

alibi witness, but Watson did not really want to help. Trial [c]ounsel further testified that he could not accurately pinpoint [petitioner] as being in North Carolina on the date of the crime, so he made a strategic decision not to call him as a witness.” R. 870 – 871.

The order continued, “To qualify as an alibi, a witness’s testimony must account for the defendant’s whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. *Walker v. State*, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012).”² R. 871. “This [c]ourt finds [t]rial [c]ounsel’s decision not to call Jarvis Watson as an alibi witness was not deficient, as he was unable to get Watson to cooperate and Watson’s testimony would not have qualified as an alibi regardless. Most importantly, [petitioner] cannot meet his burden of proving prejudice because he failed to present the testimony of Watson as an alibi witness.” R. 871.

This petition for writ of certiorari follows.

² Importantly, as discussed in the argument *infra*, the decision by the Court of Appeals in *Walker* was reversed by this Court in *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014).

ARGUMENT

The PCR court erred where it found counsel provided effective representation where counsel claimed he failed to call Jarvis Watson as an alibi witness because he did not believe Watson's alibi was "strong enough," since a "viable interpretation" of the testimony which Watson might have provided was that petitioner was with him in North Carolina when the crime occurred.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced petitioner. *Id.* at 687.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Alibi testimony may be critical to the outcome of a criminal trial, and thus counsel had a duty to investigate potential alibi witnesses and present their testimony if it was helpful. Here, counsel's failure to call Jarvis Watson as an alibi witness was deficient performance. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. 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.” *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (internal quotations and alterations omitted) (quoting *Strickland*, 466 U.S. at 691). See *Martin v. State*, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019) (counsel’s failure to elicit specific alibi testimony from a witness was deficient performance).

The PCR court’s order of dismissal cited *Walker v. State*, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012), *rev’d*, 407 S.C. 400, 756 S.E.2d 144 (2014), for the proposition that in order “to qualify as an alibi, a witness’s testimony must account for the defendant’s whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime.” R. 871. As discussed *infra*, this was an erroneous basis upon which to deny petitioner’s claim.

In *Walker*, the defendant’s ex-girlfriend, Reed, testified at his PCR that “Walker had a key to her house and spent most weekend nights with her. When asked if she and Walker spent the night together on March 2, 2002, [she] answered: ‘I guess I did.’” *Id.* at 232, 723 S.E.2d at 613. However, due to the lengthy gap in time between the crime and the PCR hearing, Reed could not specifically recall the “particular day.” *Id.* at 233, 723 S.E.2d at 614.

The Court of Appeals found Walker could not show prejudice because Reed’s testimony at the PCR hearing “did not meet the definition of alibi.” *Id.* at 237, 723 S.E.2d at 616. “To qualify as an alibi, a witness’s testimony must account for the defendant’s whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995).” *Id.* The Court of Appeals quoted *Glover*, *supra*: “a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.” *Id.* at 238, 723 S.E.2d at 616.

However, this Court reversed, finding Walker had established prejudice. “[T]he Court of Appeals relied on this Court’s language in *Glover* that ‘since 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’” *Walker v. State*, 407 S.C. 400, 405-06, 756 S.E.2d 144, 147 (2014). This Court determined that the Court of Appeals “misapprehended the applicability of *Glover* to this case.” *Id.* at 406, 756 S.E.2d at 147.

“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.* “In other words, unlike *Glover* where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed’s testimony to be true and for Walker to have committed the crime.” *Id.* at 406-07, 756 S.E.2d at 147. “While we acknowledge, 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 (emphasis added).

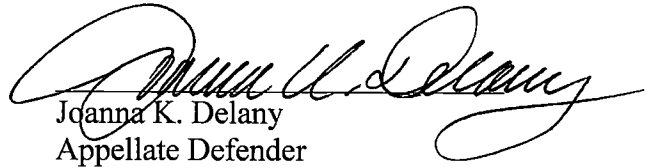
Here, although Jarvis Watson may not have been able to recall exact dates due to the passage of time, if the jury believed that petitioner had been with him in North Carolina during the entirety of the time from June 2010 to March 2011, it was impossible for petitioner to have committed this crime on October 25, 2010 in Beaufort County.

Because a viable interpretation of Watson’s testimony would have been that he was with petitioner in North Carolina when the offense occurred, counsel was ineffective when he failed

to call Watson as a witness in petitioner's defense. *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014); *Martin v. State*, 427 S.C. 450, 832 S.E.2d 277 (2019).

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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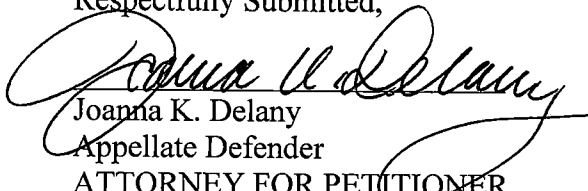
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marion Benjamin Powell states:

1. She is 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 hearing before Judge R. Lawton McIntosh, which was held on January 31, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 that the Court relieve her as counsel for Marion Benjamin Powell.

Respectfully Submitted,

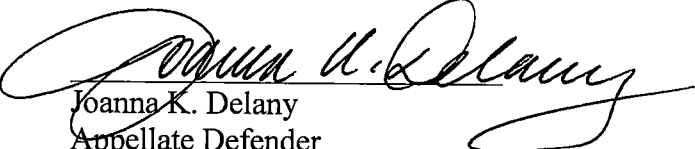


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of November, 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."


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Appellate Defender

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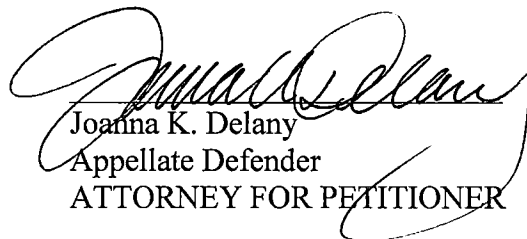
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

—————
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 Benjamin Limbaugh, 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 Marion Benjamin Powell, #333610, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 12th day of November, 2019.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of November, 2019.

Marey Allgood (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.