STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable D. Craig Brown, Circuit Court Judge

TYKEEM KALANI MAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000524

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation where the court found counsel made "adequate and reasonable attempts" to obtain a receipt from Walmart that could have corroborated petitioner's alibi defense, where counsel did not subpoena the receipt until after the trial had begun, since counsel has a duty to undertake a reasonable investigation?

STATEMENT

On February 14, 2014, an Orangeburg County Grand Jury indicted petitioner for the offenses of armed robbery and possession of a weapon during the commission of a violent crime. App. 868 – 871. Petitioner was tried before the Honorable Deadra L. Jefferson and a jury, from August 11 – 15, 2019. App. 1; App. 166; App. 384; App. 558; App. 640. Breen Stevens and Doug Mellard represented petitioner. App. 2. Harrison Bell and Ashley Cornwell represented the state. App. 2.

The state alleged that around 1:47 p.m. on September 8, 2013, petitioner robbed a convenience store in Orangeburg called "The Keg" of $281, while he wore a disguise and brandished an assault rifle. App. 238, l. 25 – 239, l. 4; App. 241, ll. 8-14; App. 243, l. 1-2; App. 41, ll. 16-21; App. 266, ll. 4-5.

Conversely, petitioner's then-girlfriend, Emonie Ford, said she was with petitioner at Walmart around the time of the robbery. App. 444, l. 18 – 445, l. 2. Ford explained the couple left home around 1:40 p.m. to go to Walmart and returned home at around 3:40 p.m. App. 457, l. 16 – 459, l. 6. However, Ford conceded she had estimated these times and she was unsure of the exact times. App. 464, l. 2 – 465, l. 18.

At the beginning of the first day of trial, the court heard a motion to relieve counsel. App. 12, ll. 14-19. Petitioner explained that he had asked counsel to look "for a receipt purchase to prove that I purchased the phone, the phone card like I said . . ." but that counsel had failed to do so. App. 28, ll. 17-22. Counsel claimed that based on his conversations with petitioner, the time that petitioner purchased the phone card at Walmart was after the robbery at The Keg had occurred. App. 29, l. 21 – 30, l. 12. Counsel also noted that petitioner's purchase was made in

cash, and that he had unsuccessfully attempted to obtain a copy of the receipt from Ford. App. 39, ll. 6-17.

As part of the motion to relieve counsel, the trial court asked counsel whether he had tried to obtain the receipt from Walmart and counsel said he had not done so. App. 42, ll. 20-23. The trial judge ordered counsel to contact Walmart and attempt to get a copy of the receipt. App. 42, l. 25 – 43, l. 1; App. 52, ll. 2-5.

On the second day of trial, the judge asked counsel whether he had been able to retrieve the receipt from Walmart. App. 205, ll. 21-24. Counsel said he had spoken with Walmart management and was trying to obtain a copy of the receipt. App. 206, ll. 1-8. On the third day of trial, the court again asked counsel about the status of his attempt to obtain the receipt. App. 496, ll. 1-2. Counsel said that "this morning they've [Walmart] been totally unresponsive," but that he would attempt contact again. App. 496, ll. 5-17.

Petitioner was convicted as indicted and he was sentenced to concurrent terms of imprisonment for fifteen years and five years, respectively. App. 683, ll. 12-16; App. 872 – 873.

After his convictions and sentences were affirmed on direct appeal, petitioner timely filed an application for post-conviction relief (PCR) and the state made its return. App. 747 – 762. On October 3, 2018, a hearing was convened before the Honorable D. Craig Brown. App. 763. Jonathan Waller represented petitioner and Christian Saville represented the state. App. 763.

At the PCR hearing, petitioner testified that he had an alibi: near the time of the robbery he went to the Walmart electronics department with his girlfriend, where he purchased a phone card. App. 776, ll. 1-19; App. 780, l. 21 – 781, l. 2. Petitioner explained, "I told [counsel] to get the receipt from the electronics department to verify I bought the phone card at that time." App. 780, ll. 9-11. Petitioner said, "you can get all of these things to verify my alibi." App. 780, ll. 19-

20. Petitioner also recounted that the trial court had ordered counsel to attempt to obtain the receipt, pursuant to petitioner's motion to relieve counsel.

> Q. The—the judge ordered [counsel] to investigate some more information from Walmart on the – on the Monday your trial was starting; is that right?
>
> A. Yes. Yes, sir.

App. 777, ll. 15-18.

Trial counsel agreed that, "I kn[e]w [petitioner] wanted me to turn around and get a copy of a receipt from Walmart wherein he told me and acknowledged it was cash he paid." App. 814, ll. 14-16. However, counsel claimed that based on his conversations with petitioner, the purchase at Walmart was likely after the incident occurred. App. 814, ll. 6-9. Counsel alleged that he did not want to produce evidence that would show petitioner used a "large amount of cash" "shortly after" the robbery. App. 814, ll. 18-25.

Nevertheless, counsel told the PCR judge that he did subpoena the receipt based on the trial court's order. App. 834, ll. 17-18. Although counsel said that he was in "constant contact with Walmart" during and after the trial, counsel never got a copy of the receipt. App. 834, ll. 17-20.

In its order of dismissal, the PCR court wrote that petitioner "wanted [t]rial [c]ounsel to present a receipt for phone minutes [petitioner] purchased from the Walmart to show he was at Walmart as an alibi." App. 853. "Trial [c]ounsel explained he attempted to obtain the receipt, but Walmart did not keep their receipts that long[1] and he was never able to find a record of the purchase." App. 853. The order of dismissal continued that petitioner "paid in cash for the phone

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[1] This finding is not supported by the evidence, as there was no testimony that Walmart did not keep their receipts that long. Instead, there was testimony that Walmart only kept their video surveillance footage for a limited time period. App. 35, ll. 11-24; App. 811, ll. 23 – 812, ll. 5.

minutes, and [petitioner] was at Walmart after the time of the incident. Trial [c]ounsel explained even if he were able to obtain the receipt, he would not want to introduce a receipt from after the incident purporting to show [petitioner] bought phone minutes with a substantial amount of cash after an alleged robbery."[2] App. 853.

The PCR court addressed in its order of dismissal the allegations that counsel failed to properly investigate the case and failed to present a defense. The order stated:

> Trial [c]ounsel credibly testified that by the time he was appointed to this case and able to meet with [petitioner], the receipt would have no longer been in the system.[3] Notwithstanding, this [c]ourt also finds [t]rial [c]ounsel's testimony credible that he did attempt to obtain the receipt but Walmart was unable to produce it. This [c]ourt therefore finds [petitioner] has failed to prove deficiency as to this allegation as [t]rial [c]ounsel made adequate and reasonable attempts to investigate this evidence. Notwithstanding, this receipt would not have been helpful to [petitioner's] defense. [Petitioner] paid cash for phone minutes at a nearby Walmart in the time shortly after he allegedly robbed the store. Surveillance footage from the Walmart revealed [petitioner] was at Walmart in the time following the robbery.[4] The receipt would not have shown it was impossible for [petitioner] to have been at The Keg during the robbery. Furthermore, this [c]ourt agrees with [t]rial [c]ounsel's assertion it would have been harmful to the defense to show the jury a cash receipt for phone minutes purchased shortly after [petitioner] was alleged to have robbed The Keg of a sum of cash. Therefore, [petitioner] has also failed to establish prejudice from [t]rial [c]ounsel's inability to obtain the receipt.

App. 859.

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[2] The order of dismissal also stated that the PCR court found trial counsel's testimony to be "credible and persuasive" and petitioner's testimony to be "self-serving and not credible." App. 855.

[3] As noted above, this finding is entirely without support in the record. There was no testimony about how long Walmart retained receipts. Instead there was testimony about how long Walmart retained video surveillance footage. App. 35, ll. 11-24; App. 811, ll. 23 – 812, ll. 5.

[4] This sentence is entirely without factual support in the record. No surveillance footage was ever retrieved from Walmart. Instead, there was surveillance footage of the robber from the surveillance cameras at The Keg. App. 340, ll. 4-15.

The order of dismissal also stated, "[t]rial [c]ounsel credibly recounted his efforts to obtain the Walmart receipt from [petitioner's] purchase the day of the incident." App. 860. "This [c]ourt finds [t]rial [c]ounsel investigated this case in an exemplary manner and [petitioner] has offered no competent evidence of deficiency in this regard." App. 860. The order continued that petitioner "has provided no credible evidence of what further investigation on the part of [t]rial [c]ounsel would have discovered. To the contrary, this [c]ourt finds [t]rial [c]ounsel's testimony credible that even if he had been able to obtain the receipt from Walmart, it would have been harmful to the defense." App. 861.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation where the court found counsel made "adequate and reasonable attempts" to obtain a receipt from Walmart that could have corroborated petitioner's alibi defense, where counsel did not subpoena the receipt until after the trial had begun, since counsel has a duty to undertake a reasonable investigation.

Counsel's performance was deficient where he failed to subpoena a copy of a receipt from Walmart that might have verified petitioner's alibi until he was ordered to do so by the trial judge. Counsel claimed he did not seek the receipt because he thought it would show petitioner was at Walmart after the robbery instead of during it. However, without getting the receipt, counsel could not be certain at what time petitioner made the purchase.

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.

A criminal defense attorney has a duty to conduct a "reasonable investigation." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). "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). "This Court has stated previously that criminal 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." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Ard v. Catoe*, *supra*).

The PCR court ruled that "[t]rial [c]ounsel made adequate and reasonable attempts to investigate this evidence [the Walmart receipt]." App. 859. Petitioner submits that the PCR court's ruling on this matter was error—counsel's performance was deficient. Counsel failed to conduct a reasonable investigation since he waited until the trial had begun—which was nearly a year after the crime occurred—to subpoena the receipt. App. 1; App. 868 – 871.

"[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions . . ." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Id.* Here, counsel spoke with petitioner; petitioner asked counsel to obtain a copy of the receipt because he believed it would bolster his alibi defense. Counsel's failure to subpoena the receipt in a timely fashion was deficient performance, given this request by petitioner.

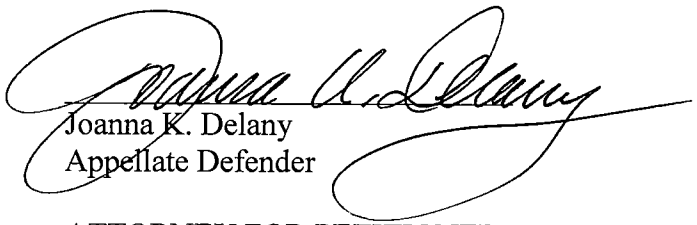
"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting *Strickland*, 466 U.S. at 691) (internal alterations and quotations omitted). Here, it cannot be said that counsel made a reasonable decision to proceed without investigating the receipt, since counsel did try (albeit unsuccessfully) to obtain the receipt by the easiest method—counsel said he asked Emonie Ford for a copy. Counsel's failure to take the step of subpoenaing the same document from Walmart in a timely manner was deficient performance.

"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).

Here, petitioner demonstrated he was prejudiced, since the receipt might have corroborated his alibi. *See Walker v. State*, 407 S.C. at 406, 756 S.E.2d at 147 (failure to investigate alibi testimony that reasonably could have resulted in a different outcome at trial prejudiced defendant). Moreover, petitioner should not be penalized for failing to produce the receipt at his PCR hearing, since trial counsel's failure to subpoena the receipt from Walmart in a timely fashion likely rendered it lost forever.

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 2nd day of December, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tykeem Kalani May 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 D. Craig Brown, which was held on October 3, 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 Tykeem Kalani May.

Respectfully Submitted,

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of December, 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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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 Sara Gunton, 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 Tykeem Kalani May, #361073, at Fairfield County Detention Center, 10 Faith Lane, Winnsboro, SC 29180, this 2nd day of December, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of December, 2019.

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