STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO SUMTER COUNTY
Honorable R. Knox McMahon, Post-Conviction Relief Judge

Appellate Case No. 2018-001507

WAYNE D. COOPER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL[1]

The PCR Court correctly found Counsel was constitutionally effective, where there was a confession made by Petitioner indicating he committed the crime which was admitted at trial after a *Jackson v. Denno* hearing, where specific testimony regarding the timeline of events was provided by multiple witnesses, and where Counsel argued an alibi theory in closing arguments.

[1] Respondent concedes that the PCR Court properly granted Petitioner a belated PCR appeal pursuant to Austin v. State, but denies that Petitioner's issue on PCR appeal has merit.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was indicted at the April 2007 term of the Sumter County Grand Jury for murder (2007-GS-43-277). Arthur Wilder, Esquire, represented Petitioner. On November 10-13, 2008, Petitioner proceeded to a jury trial before the Honorable Howard P. King. On November 13, 2008, Petitioner was found guilty as indicted. Judge King sentenced Petitioner to forty years' imprisonment.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed the lower court's conviction. State v. Wayne Darnell Cooper, No. 2011-UP-544 (Ct. App. filed December 6, 2011). The Remittitur was sent on December 22, 2011.

2012-CP-43-1286

On June 25, 2013, Petitioner filed his first application for post-conviction relief, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

Respondent made its Return on January 24, 2013. An evidentiary hearing into the matter was convened on October 1, 2013, at the Sumter County Courthouse before the Honorable R. Knox McMahon. Petitioner was present at the hearing and represented by David Holler, Esquire. Petitioner's trial counsel testified. By Order filed December 9, 2013, Petitioner's PCR application was denied and dismissed with prejudice. Petitioner did not file a notice of appeal in this matter.

2014-CP-43-2626

Petitioner filed his second application for post-conviction relief on December 8, 2014, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of PCR Counsel
    a. PCR Counsel failed to file an appeal or 59(e)

b. Austin Appeal – Austin v. State, 409 S.E.2d 395

Respondent made its return and motion to dismiss all claims except failure to file an appeal from the denial of his first PCR action on March 27, 2015. An evidentiary hearing was convened on July 15, 2015 at the Sumter County Courthouse before the Honorable Steven H. John. Petitioner was present and represented by Casey Cornwell, Esquire. Daniel Gourley, Esquire, of the South Carolina Office of the Attorney General, represented Respondent.

At the evidentiary hearing, Respondent consented to the granting of an appeal pursuant to Austin v. State of the first post-conviction relief application (2012-CP-43-1286). Judge John issued an Order granting Austin relief, signed on July 27, 2015, and filed September 17, 2015. Petitioner's PCR counsel did not file an appeal pursuant to the order to obtain the relief that was granted.

2018-CP-43-00114

Petitioner filed a third application for post-conviction relief on January 29, 2018. Respondent submitted its Return June 25, 2019. Respondent consented to the granting of Austin relief for the original PCR action. An Order Granting an Appeal Pursuant to Austin v. State signed by the Honorable R. Ferrell Cothran was filed in July 2018. Petitioner filed a Petition for Writ of Certiorari and Petition for Writ of Certiorari Pursuant to Austin v. State on July 22, 2019. This Return follows.

STATEMENT OF THE FACTS

Victim and his aunt, Mary Green, were walking home after attending a get-together at the mobile home of their relative, Wanda Rogers. (App. 226, l. 2-3). Victim and Green left Rogers' mobile home at approximately 5:10-5:15 a.m. (App. 226, l. 22-24). A vehicle with two passengers, later identified as Petitioner and his co-defendant and brother, Derrick Cooper, drove past Victim and Green "real fast." (App. 227, l. 16-18). Victim had a beer bottle in his hand because he planned to give it to his mother. (App. 227, l. 20-23). According to Green, it appeared that the beer bottle somehow made contact with the vehicle. (App. 227, l. 1-25). Petitioner and his co-defendant stopped along the side of the road to inspect their vehicle. (App. 227). Subsequently, there was a verbal altercation between Victim and Petitioner and his co-defendant. (App. 229, l. 1-5). Victim and Green turned away from Petitioner and continued to walk away. (App. 228, l. 6-12). Subsequently, Petitioner and co-defendant shot once, but Green was unsure whether they aimed at her and Victim or whether they fired into the air. (App. 227, 232). The vehicle eventually turned around and came back toward Victim and Green, and fired three shots. (App. 229-230).

Victim collapsed, but Green initially could not tell that Victim had been shot. (App. 232, l. 23- 233, l. 25). Green testified she sat with Victim approximately five minutes before she ran to get help. (App. 238). After unsuccessfully trying to wake up Victim, Green ran to her residence to wake up her family. (App. 233). After banging on the front door, Tameka Green (Tameka) and Green's sister, Theresa Green (Theresa) eventually woke up. (App. 233; 285). Green returned to Victim to assist him. (App. 233, l. 21-25). Green testified approximately fifteen-to-twenty minutes elapsed between the time she began to look for help and when law enforcement arrived.

(App. 238-240). Green further testified she believed ten minutes had elapsed between the time she was able to instruct Tameka to call 9-1-1 and when law enforcement arrived. (App. 239).

Green testified that the individuals were African-American and drove a green car with tinted windows and a silver lining on the side of the vehicle. (App. 235, l. 22-App. 236, l. 11). Green testified she had seen this car around prior occasions in the neighborhood. (App. 236-237).

Tameka testified she left her residence and knocked on her next door neighbor's door for an unknown amount of time before the next door neighbor answered her door. (App. 280, l. 9-20). Tameka asked the neighbor to call 9-1-1 but the neighbor indicated they did not have a phone. (App. 280, l. 18-20). Tameka testified she proceeded to run to Wanda Roger's house, which was in the immediate area. (App. 280). Tameka knocked on Wanda's door for "probably a minute or so" before someone came to the door. (App. 280-81). Tameka testified Wanda called the police. (App. 281). On cross-examination, Tameka testified she was not sure what time police arrived at the scene, but she estimated it took approximately ten minutes from the time Wanda called 9-1-1 and when police arrived. (App. 282, l. 12-25).

Theresa testified she simultaneously left the residence in search of someone to call 9-1-1. (App. 285). Theresa testified she went to a different neighbor's house and knocked on that neighbor's door, and that it took the neighbor "a while" to answer the door. (App. 286, l. 13-15).

Investigator Erin Boland of the Sumter County Sheriff's office testified the 9-1-1 phone call came in a "few minutes before 6:00 a.m." (App. 288, l. 14-16). Boland's incident report stated she and another officer arrived to the scene at 6:01 a.m., and that the call came in at 5:58 a.m. (App. 291).

Turner testified that after the shooting, law enforcement received a call indicating that a car matching the description of the assailant's vehicle was located in the neighborhood. (App. 384, l. 19-24). Two guys and two girls were packing things into the car. (App. 384, l. 19-23).

Subsequently, law enforcement surveilled the area and located a dark green Plymouth Accord matching the description behind a home, which was listed as the address on Petitioner's drivers' license. (App. 87, l. 9-25). The vehicle was a dark green sedan, with a silver lining at the bottom, just as Ms. Green described. (App. 393). Law enforcement indicated they saw window tint laying on the ground in front of the green vehicle. (App. 394). Petitioner and his brother Derrick were present at the home. (App. 387, l. 19). Law enforcement asked permission to enter the home, but Petitioner and Derrick denied this request. (App. 386, l. 25- 387, l. 3). Law enforcement subsequently obtained a search warrant. (App. 388, l. 1-25).

Investigator Turner testified Derrick and Petitioner arrived at work at "around 6:12," according to the time stamp on the surveillance video Turner viewed. (App. 404, l.16-23). According to Turner, the first 9-1-1 call regarding the incident was made at 5:55 a.m. (App. 408).

Derrick testified they arrived at approximately 6:07 and 6:08 a.m., and subsequently clocked in for work at 6:12 p.m. (App. 559, l. 1-8). Derrick testified employees have to park across the parking lot so they do not take up parking spots for the customers. (App. 559). Derrick testified it took him and Petitioner approximately 28 or 29 minutes to get from Petitioner's home to Fire Mountain, and that they were driving average speed because Derrick "could not afford" to speed. (App. 561, l. 17-19). Derrick denied he and Petitioner had any involvement in the shooting. (App. 568).

Turner testified he made a trip to Fire Mountain from the scene at approximately 4:30 p.m., and drove sixty miles per hour. (App. 419, l. 20-25). Turner testified traffic was heavy and that

he "hit every light," so it took him 32 minutes. (App. 420, l. 1-4). On another occasion, Turner testified he made the trip at around 11:00 p.m. and made it in 22 minutes by driving seventy miles per hour, and due to the light traffic and not hitting any red lights. (App. 420, l. 1-10). Turner testified the trip was approximately twenty-seven miles. (App. 420).

Petitioner originally confessed to shooting Victim. (App. 463-465). Petitioner's statement reads:

> "On Saturday September the second, 2006 at approximately 5:15 am I was on my way to work when I received a call on my cellphone from my brother, Derrick Cooper. He said that he needed for me to come to his residence to help him get his vehicle started.
>
> I arrived at his residence, Cedar Hill Mobile Home Park. We got his vehicle started. I then decided to ride with him because my vehicle started. I then decided to ride with him because my vehicle was messing up. My brother was driving a four door Chrysler green in color. We were leaving out and a black male walking down the street threw a beer bottle at our vehicle striking it on the windshield.
>
> Someone was walking with the black male, but I couldn't tell if the person was a male or a female, only that the person was black. We stopped the vehicle and my brother Derrick asked him did he throw something at our vehicle, and the black male shot at us.
>
> We then jumped into my car and was in the process of leaving when I turned to my left and fired one shot from my gun which I believe was a 22 revolver. I didn't shoot but once because my gun fell apart. We then drove out of Cedar Hill Mobile Home Park and started toward Columbia.
>
> Once we got on to Highway 378 and 76, I tossed the gun out of the window near James Ervin's Auto Sales. We went on to work. We worked at Fire Mountain which is on Garners Ferry Road in Columbia." (App. 463-464).

Petitioner testified he typically worked at Fire Mountain from 8:00 a.m.-4:00 p.m. Monday to Friday, and 5:30 a.m.-3:00 p.m. on the weekends. (App. 620, l. 1-8). Petitioner testified on the day of the incident he left his house at 5:20 a.m. (App. 520, 1. 13). According to Petitioner, he was driving a 1993 white Plymouth Acclaim. (App. 620). Petitioner testified he drove from his residence to the Cedar Hill Mobile Home Park by taking Route 378. (App. 621, l. 19-22). Petitioner testified he did not see anything unusual during his drive to Derrick's home in Cedar

Hill. (App. 622). Petitioner stated he arrived to Derrick's trailer at approximately 5:35 or 5:36 a.m. (App. 622, l. 9). Petitioner testified he and Derek drove straight to work at Fire Mountain, and arrived at approximately 6:09 a.m. before briefly smoking a cigarette in the parking lot and ultimately clocking in to work at 6:12 a.m. (App. 623). According to Petitioner, he and Derrick were not speeding on their way to work that day. (App. 624, l. 9-20). Petitioner testified that although they were running late, they just had to "deal with the supervisor penalizing [them]" when they eventually arrived to work late. (App. 624, l. 21-25). Petitioner denied he was involved in any altercation involving Victim, or even knowing who Victim was prior to his arrest. (App. 630). Petitioner testified he merely signed the statement form because Officer Barron told him to and he did not read the form he was signing. (App. 638). According to Petitioner, the only accurate portion of the statement indicated Petitioner and Derrick had to jump start Derrick's car. (App. 638). With respect to the rest of the written statement, Petitioner stated he "[didn't] know where [Officer Barron] got that from." (App. 638, l. 22-25).

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the Petitioner sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the Petitioner must prove "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 (quoting Strickland, 466 U.S. at 694).

ARGUMENT

The PCR Court correctly found Counsel was constitutionally effective, where there was a confession made by Petitioner indicating he committed the crime, which was admitted at trial after a *Jackson v. Denno* hearing, where specific testimony regarding the timeline of events was provided by multiple witnesses, and where Counsel argued an alibi theory in closing arguments.

Petitioner alleges he was denied effective assistance of counsel due to a failure to fully develop the defense of alibi. This argument is without merit. Where the trial counsel articulates a valid reason for employing a certain trial strategy, such conduct should not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Additionally, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's alleged conduct, and to evaluate the conduct from counsel's perspective at the time. State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985), citing Strickland v. Washington, 104 S.Ct. 2052, 890 lE.2d 674 (1984). Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id. Petitioner has not shown that Counsel was deficient in his choice of tactics. Counsel demonstrated a normal degree of skill, knowledge, and professional judgment that is expected of an attorney who practices criminal law.

Counsel testified he conducted a multi-year investigation into the case. Counsel testified he filed for and reviewed discovery with Petitioner. Counsel testified this was a difficult case to present an alibi defense because Petitioner confessed to shooting Victim in self-defense prior to Counsel's representation. (App. 843). This confession as ruled as admissible evidence following a *Jackson v. Denno* hearing. (App. 170). However, Counsel testified at the PCR hearing Petitioner ultimately changed his story and claimed he was not present at the scene. (App. 843). Therefore,

Counsel had no other option but to pursue an alibi defense. However, Counsel also argued that it could be self-defense, due to the confession given by Petitioner. (App. 845). Counsel testified he tried to establish the case as a "telephone defense scenario." (App. 845, l. 17-18). Counsel testified, "it was unfortunate that the defendant did not elect to pursue self-defense as his primary defense." (App. 855, l. 1-2). Counsel testified it would have made more sense to argue self-defense because the defense would not have had to pin law enforcement against Petitioner and Derrick. (App. 855). However, at his trial, Petitioner denied making the statement to Officer Barron and denied there was any incident involving an altercation with Victim. (App. 630). Therefore, the Court denied charging the jury with a self-defense charge. (App. 845).

Counsel testified he did not have any reason to disbelieve Barron or Turner's testimony about the time it took them to drive from the scene to Fire Mountain Grill. (App. 855, l. 6-9). Counsel testified he has cross-examined Investigator Barron on many occasions, and would have accused him of not telling the truth through cross-examination if he felt his testimony was questionable, as he had done so before. (App. 856, l. 12-20). Counsel testified he trusted Turner's testimony because he had worked with Turner for over thirty years and never found Turner to tell "anything except the truth." (App. 891, l. 16-20).

Counsel testified his trial strategy was to argue to the jury that the Petitioner could not have committed the crime. Counsel further testified he argued to the jury that the descriptions given by the two witnesses did not match either Petitioner or Derrick. This is made clear by the trial transcript. (See e.g. App. 626-630). Counsel further argued there were various descriptions of the car used to commit the crime. Counsel testified the video footage showed Petitioner clocked in for work at Fire Mountain Restaurant at 6:12 a.m. (App. 851). Counsel testified that the time-stamp on the video could have been incorrect, but he attempted to corroborate the time-stamp on

the footage by interviewing Petitioner and his brother Derrick about the time that they arrived. (App. 851-52). Counsel also indicated he attempted to subpoena the individuals in charge of the records, but was unsuccessful. (App. 852). Counsel testified much of the records had been destroyed and witnesses were unavailable. (App. 852, l. 12-17). Counsel testified he attempted to contact an individual named Chris Porter to see if he recalled encountering Petitioner in the parking lot as Petitioner arrived for work that day. (App. 847, l. 10-19). Counsel further testified that a call to 9-1-1 was made at approximately 5:58 a.m. Counsel testified he attempted to obtain information regarding other employees at Fire Mountain who could have established what time Petitioner had arrived that day. (App. 847). Counsel testified he did this to attempt to push the timeline as much as he could to support Applicant's defense. Counsel therefore argued that Petitioner could not have committed this crime given the time frame presented at trial.

Petitioner's argument is at best a speculative hindsight argument: that had Counsel explained to the jury the speed Petitioner would have had to drive to arrive at Fire Mountain by the approximate 6:12 a.m. time, Petitioner would have been acquitted. As previously discussed, the purpose of post-conviction relief matters is not to critique a trial counsel's performance by using hindsight. However, as Counsel testified, he attempted to establish the timeline such that it would have made it impossible for Petitioner to have committed the crime. Although Counsel did not cross-examine Jamie Turner regarding his excursions between the Cedar Hill Mobile Home Park and Fire Mountain Grill, Counsel examined Petitioner and Derrick extensively regarding the route they took to Fire Mountain Grill and the timing of their trip. (App. 545-70; 612-640). Additionally, Counsel testified that he had no reason to disbelieve Jamie Turner's testimony. Additionally, Wanda Rogers, Mary Green, Tameka Green, Theresa Green, and Investigator Erin Boland provided information that helped establish the most accurate timeline possible. (App. 225-

40; 278-85; 288-289). Counsel used this information to argue to the jury throughout his closing statement that it would have been difficult for Petitioner to have committed the crime. (See App. 716-740).

Petitioner compares his case to that of Martin v. State, 427 S.C. 450 (2019). However, Martin is fundamentally different than Petitioner's case in several respects. In Martin, this Court found trial counsel was ineffective for failing to elicit testimony from the Petitioner's mother, which would have established that he was 150 miles away from a bank one hour and five minutes before it was robbed. More specifically, the bank was robbed at approximately 12:20 p.m. on April 23, 2009. Id. at 453. Martin's mother testified at the petitioner's trial that she dropped him off at a bus stop on the morning of the bank robbery. Id. at 453. Trial counsel did not elicit testimony about the exact drop-off time, despite the fact that Martin's mother previously indicated to trial counsel that she recalled dropping him off at the bus stop at 11:15-11:30 a.m. Id. at. 453. This Court found trial counsel was ineffective because trial counsel failed to elicit testimony from the mother regarding specific timing of the crime. However, that is not the case here. An approximate timeline of the crime itself was established by a combination of testimony from Green, Tameka, Theresa, Investigator Boland, and Investigator Turner. Importantly, Trial Counsel carefully examined Derrick and Petitioner regarding the timeline of their drive to work on the morning of the shooting, and it was determined they arrived at Fire Mountain Grill a few minutes before 6:12 a.m. The timeline established was as specific as it could be given the fact that no single individual could tell the exact time of when the shooting occurred.

Additionally, the evidence linking Petitioner to the crime in Petitioner's case is more significant than the evidence linking the petitioner to the crime in Martin. In Martin, the Court found it significant that the only evidence linking the petitioner was the testimony of other co-

defendants. Id. at 456. This is not the case here. The individuals who identified Petitioner were not petitioner's co-defendants. In fact, Petitioner's co-defendant, Derrick, testified for the defense. Additionally other circumstantial evidence pointed to Petitioner's guilt such as the fact that the car matching a rather specific description was found behind Petitioner's home, and the fact that Petitioner confessed to the crime.

Furthermore, trial counsel in Martin did not present an alibi defense in his closing argument, which is not the case here. In Petitioner's case, Counsel clearly established an alibi defense by developing a timeline through various witness testimony, and subsequently argued an alibi defense throughout his closing argument. For the reasons discussed above, Petitioner's case is fundamentally different than Martin.

Finally, Petitioner argues his case is similar to Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). However, once again, this case is distinguishable from Petitioner's case. In Walker, Counsel failed to elicit any testimony from the petitioner's girlfriend regarding a potential alibi. The girlfriend testified at the PCR hearing that she would have testified that she and Walker "spent every weekend together." Id. at 406. This Court determined, "if true and construed as meaning at least [the petitioner] and [the petitioner's girlfriend] spent every night together on the weekend's prior to his arrest, it would be physically impossible for [the petitioner] to commit [the crimes.]." Id. at 406.

Walker is fundamentally different than Petitioner's case here. Petitioner presented no alibi witnesses at his PCR hearing who could have additionally supported his alibi defense. Petitioner is merely alleging that Counsel should have provided specific miles per hour calculations to support Petitioner's alibi defense. However, Turner testified as to the distance in miles between the crime scene and the Fire Mountain Grill. (App. 419). Additionally, testimony from

Investigator Boland, Petitioner, Derrick Cooper, Tameka Green, Mary Green, and Wanda Rogers provided testimony to establish the most plausible timeline of events. Accordingly, the jury had significant information to consider in support of Petitioner's alibi defense, unlike Walker. Accordingly, Petitioner's argument is without merit.

Even assuming for the sake of argument, Counsel was deficient for failing to fully assert an alibi defense, Petitioner has failed to prove any resulting prejudice. An alibi charge is required where the defendant claims to be elsewhere at the time the crime was committed. State v. Robbins, 275 S.C. 373, 374-75, 271 S.E.2d 319, 319-20 (1980). Generally, the failure to give an alibi charge under these circumstances constitutes reversible error. Id. "An alibi places no burden on the defendant, but emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime." Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994). In the instant case, Counsel required and the trial judge charged the jury on the defense alibi. (App. 780). Counsel also argued this defense throughout trial and further discussed the alibi defense in his closing argument. (App. 757, 761-63). Furthermore, Petitioner jeopardized his case himself by making a statement to law enforcement in which he admitted to shooting Victim. Accordingly, Petitioner has failed to prove that he was prejudiced by any alleged deficiency of Counsel.

CONCLUSION

Based on the foregoing arguments, the PCR Court properly found that Counsel was not deficient and Petitioner was not prejudiced by any alleged deficiency. Therefore, the State requests certiorari be denied.

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ATTORNEY FOR RESPONDENT

December 6, 2019

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CERTIORARI TO SUMTER COUNTY
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CERTIFICATE OF SERVICE

I, Kaitlyn Slice, certify that I have served the within Return to Petition for Writ of Certiorari Pursuant to Austin v. State by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 6th day of December, 2019.

Kaitlyn A. Slice
KAITLYN S. SLICE
LEGAL ASSISTANT