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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge
The Honorable Edgar W. Dickson, Plea Judge

Appellate Case No. 2019-000138

ANTONIO DESMOND FAIREY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

I. Whether the PCR court erred in denying relief, where plea counsel failed to contact multiple witnesses provided by Petitioner, where two of the witnesses provided exculpatory testimony at the PCR hearing, where their testimony cast doubt on the allegations giving rise to Petitioner's arrest, and where Petitioner would have gone to trial had plea counsel interviewed these witnesses?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

I. The PCR court properly denied relief because plea counsel investigated and contacted the witnesses provided by Petitioner and the two purported alibi witnesses who testified at the PCR hearing failed to provide an alibi for Petitioner during the time the crime occurred.

STATEMENT OF THE CASE

Petitioner Antonio Desmond Fairey is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Petitioner waived presentment to Orangeburg County Grand Jury for kidnapping (2016-GS-38-1073), attempted murder (2016-GS-38-1074), and domestic violence second degree (2016-GS-38-0517). Jim Adams, Esquire, represented Petitioner on all charges, and Assistant Solicitor Sarah Ford, Esquire, prosecuted the case. On December 14, 2016, Petitioner appeared before the Honorable Edgar W. Dickson, circuit court judge, and pled guilty as indicted to all charges with a recommended sentence of twenty years suspended to a range of ten to fifteen years and probation from the State. Judge Dickson sentenced Petitioner to a concurrent sentence of twenty years suspended to thirteen years imprisonment for attempted murder and kidnapping, and a concurrent sentence of three years imprisonment for domestic violence second degree. Petitioner did not pursue a direct appeal.

On April 13, 2017, Petitioner filed an application for post-conviction relief alleging:

1. "Ineffective Assistance of Counsel"
    a. "Counsel failed to investigate the facts and prepare for a trial"
    b. Counsel "failed to investigate a present a 'self-defense' defense"
    c. Counsel "failed to investigate alleged victim and a very similar incident approximately a year prior to this incident"
    d. Counsel's "failure to investigate fact witnesses and potentially exculpatory witnesses"
2. "Involuntary Guilty Plea"
3. "Due Process Violation"
    a. "Sixth and Fourteenth Amendments to the U.S. Constitution; Art. I, §§ 3 & 14 of the S.C. Const."

Respondent made its Return, Partial Motion to Dismiss, and Motion for More Definite

Statement, on August 14, 2017[1]. An evidentiary hearing was convened on July 9, 2018 at the Dorchester County Courthouse, before the Honorable Robin B. Stilwell. Petitioner was present at the hearing and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office represented Respondent. Petitioner testified on his own behalf. Two witnesses, Angela Kitt and Adrienne Felder, also testified on behalf of Petitioner. Jim Adams, Esquire, testified on behalf of Respondent. Prior to the start of the evidentiary hearing, Respondent withdrew its Motion to Dismiss based on the allegation of "Due Process Violation," which the court accepted, finding that the allegation was based on Petitioner's claim of ineffective assistance of counsel. During the evidentiary hearing, Petitioner went forward on his allegation that his plea was involuntary because he did not trust plea counsel to represent him at trial and his allegation that plea counsel did not investigate his purported alibi witnesses or prepare a self-defense defense on his behalf. Judge Stilwell, in an order filed January 18, 2019, denied and dismissed the application with prejudice finding Petitioner's plea was freely and voluntarily entered, plea counsel investigated the potential witnesses and found they provided no alibi, and that Petitioner did not provide any credible evidence to support a theory of self-defense given the facts of the case.

Petitioner filed a notice of appeal from the denial of his claim for relief, and, through counsel, filed a petition for writ of certiorari on September 16, 2019. This return follows.

[1] Respondent requested a partial motion to dismiss as to Petitioner's PCR allegation of "Due Process Violation."

STATEMENT OF THE FACTS

The first incident occurred on the night of March 6, 2016, and gave rise to the domestic violence second degree charge. There, Petitioner got into a physical altercation with the victim by striking her with a closed fist in her face, causing her lip to split. This altercation occurred in the presence of the victim's two minor children, ages ten and twelve. At that time, Petitioner and the victim had lived together for several months. (App'x p. 30).

The second incident occurred on June 9, 2016, and gave rise to the attempted murder and kidnapping charges. There, officers with the Orangeburg County Sheriff's Office were dispatched to the Regional Medical Center to meet with the victim. She had been brutally beaten by Petitioner for hours during the night. The victim stated to the officers that she had been talking to a neighbor outside the home, and when she came inside Petitioner accused her of cheating and forced her into the bedroom. There he tied her arms and legs with shoe laces and an apron, and then began to beat her all over her body and face. This attack lasted hours, and Petitioner escalated the attack by kicking her, beating her with his fists, and then cutting her with a knife, which resulted in severed tendons in her hands. Throughout the ordeal, Petitioner threated to kill the victim. The victim was only able to escape from the home when Petitioner's brother came to the house that morning to take him to work, after which she ran to her mother's house and was taken to the Regional Medical Center. (App'x p. 30-31).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, they must present evidence to satisfy the two prong test enumerated in *Strickland v. Washington,* 466 U.S. 668, 687 (1984), to determine whether counsel's "assistance was so defective as to require a reversal of" applicant's sentence. First, the applicant must show counsel's performance was deficient; and second, the applicant must show they were prejudiced by that deficiency. *State v. Stalk*, 383 S.C. 559, 560-61, 681 S.E.2d 592, 594 (2009) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)) (extending the Court's two prong *Strickland* test to apply to guilty pleas).

In order to prove deficient performance under the first prong of *Strickland*, the burden is on applicant to show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Id.* In considering whether counsel's performance was reasonable:

> Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was

> unreasonable.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.

Strickland, 466 U.S. at 689; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

"[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (*quoting Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Even if the applicant can establish that counsel's performance was deficient, they must still overcome their burden to demonstrate prejudice from that deficiency. The second prong of *Strickland* requires the applicant to prove that counsel's deficient performance prejudiced applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Cherry*, 300 S.C., at 117-18, 386 S.E.2d, at 625 (citing *Strickland*, 466 U.S., at 694).

Hill v. Lockhart extended the application of the two-part *Strickland* test "to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. 52, 58 (1985); *See also Stalk v. State*, 382 S.C. 559, 560, 681 S.E.2d 592, 594 (2009). The analysis of counsel's performance under the first prong of the *Strickland* test remains unchanged. *Hill*, 474 U.S., at 59. The second requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* The applicant must "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S., at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the applicant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.*, 466 U.S., at 696-97.

ARGUMENT

I. The PCR court correctly denied relief because plea counsel investigated and contacted the witnesses provided by Petitioner and the two purported alibi witnesses who testified at the PCR hearing failed to provide an alibi for Petitioner during the time the crime occurred.

Petitioner argues on appeal that the PCR court erred in finding plea counsel was not ineffective regarding his investigation into the two purported alibi witnesses, Angela Kitt and Adrienne Felder[2], because had plea counsel properly investigated and utilized them as alibi witnesses, Petitioner would not have pled guilty, but instead proceeded to trial. This contention is not supported by the record before this Court. Petitioner failed to establish any constitutional ineffectiveness of plea counsel, and the PCR court properly denied relief. Therefore, this Court should deny certiorari.

"[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) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003); *Cf. McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (counsel was not ineffective for not investigating potential alibi witness for an entrapment defense because the witness did not know what happened between petitioner and law enforcement officer when the crime occurred).

[2] Felder also went by the name Adrienne Jackson. (App'x p. 71, ll. 15-16).

A PCR petitioner is not prejudiced by his counsel's failure to interview a potential alibi witness who cannot present testimony that meets the legal definition of an alibi, "[s]ince 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, 405-6, 756 S.E.2d 144, 147 (2014) (*citing Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

As this Court stated in *State v. Robbins*:

> The literal significance of the word 'alibi' is 'elsewhere'; as used in criminal law, it indicates that line of proof by which an accused undertakes to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime. In other words, by 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. It is not enough for the accused to say that he was not at the scene and must therefore have been elsewhere. The latter statement does not constitute an alibi. And 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.

Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am.Jur.2d Criminal Law § 136 (emphasis added)).

"The evidence of alibi must be addressed to the exact time when the offense was committed, and it must show, not merely the improbability of accused's presence at that time, but the impossibility thereof. If the evidence as to alibi, although taken to be true, *does not cover sufficient of the time at or before the crime to render the presence of accused impossible or highly improbable, then it proves nothing*, and is of no avail to him on that part of his defense, although it still remains in the case for all other purposes." *Id.* at 377, 271 S.E.2d at 321 (quoting 23 C.J.S.

Criminal Law s 923, pp. 656-657 (emphasis added)); *Accord, State v. Nicholson*, 228 S.C. 300, 89 S.E.2d 876 (1955).

In *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995), this Court held that a failure to interview an alibi witness is only prejudicial where the witness's testimony, if true, would actually establish an alibi defense by making it physically impossible for the defendant to have committed the crime. *Id.* at 237–39, 723 S.E.2d at 616–17. The facts in *Glover* are quite analogous to the case at bar. There, the petitioner was convicted of crimes that occurred in Williamsburg County and sought PCR on the basis his trial counsel failed to contact alibi witnesses who would have testified that he was in Florida at 8:00 a.m. on the day the crimes were committed. *Id.* at 497, 458 S.E.2d at 539. This Court found that because the crimes occurred at 8:30 p.m. and the drive between the petitioner's location in Florida and Williamsburg County was only approximately six and a half hours, the fact he was allegedly in Florida that morning did not make it physically impossible for him to have committed the crimes, and therefore, the alibi witnesses were not sufficient to create an alibi defense and the petitioner was not prejudiced by his counsel's failure to interview them. *Id.* at 498, 458 S.E.2d at 540.

Here, the record reflects plea counsel took reasonable steps to investigate the witnesses provided by Petitioner. At the evidentiary hearing, plea counsel first explained that Petitioner asked him to look into Ms. Angela Kitt. (App'x p. 102, ll. 6-8). Plea counsel testified that Ms. Kitt's provided phone number was not active, however Ms. Kitt did come to plea counsel's office and spoke with him regarding Petitioner's case. (App'x p. 102, ll. 11-14). "With Ms. Kitt, I talked to [her about the CDV 2nd]. And she told me that the victim had a drug problem and an alcohol problem; that the victim had an attitude problem; and that the victim hits people all the time; and she had seen her punch a bartender before." (App'x p. 110, ll. 19-24).

Next, plea counsel stated he was also aware of Adrienne Felder. However, Petitioner did not provide plea counsel with her telephone number or an address, moreover, Petitioner "did not tell me that was his neighbor." (App'x p. 103, ll. 19-21). Plea counsel explained it was his practice to always contact potential alibi witnesses, as long as he was provided their contact information: "I can't speak to a witness I can't find." (App'x p. 104, ll. 1-5).

Moreover, the testimony provided by both Felder and Kitt – even if entirely believed – fails to establish an alibi for Petitioner on either March 6, 2016 or June 9, 2016. Kitt testified that on March 6, 2019, she was over at the house where the victim and Petitioner were living. Kitt reasoned that the two minor children who were at the home "couldn't witness nothing, because they were sleeping when we [victim, victim's sister, and Kitt] got back to the house." "It was in the a.m. hours. [Victim] and her sister were arguing. And they walk outside to they father house. So when I was there, they were still in the bed, sleep." (App'x p. 92). Kitt stayed at the home for around an hour, and then left and went home. (App'x p. 93).

Further, Petitioner's alibi defense the night of June 9, 2016, was in complete contradiction to the testimony that his purported alibi witness, Adrienne Felder, gave at the evidentiary hearing. Petitioner testified he was asleep the entire night, however, waking between one and two a.m., at which point he went outside to find Felder walking home. (App'x p. 77, ll. 22). "And I [told plea counsel] to go to interview Adrienne, because Adrienne was walking home. Because I woke up and I talked to Adrienne. And told Adrienne I had to go to sleep." (App'x p. 77, ll. 13-18). Felder's testimony, on the other hand, failed to corroborate Petitioner's version of the night in question:

> So I was outside between 11:30/twelve o'clock. I see the victim walking down the road, cigarette, beer can in her hand. Me and her was talking. And we were outside, just talking. She said, "Well, let me go back in the house...." We [were] outside, talking. And she was, like, "Let me go back in the house before [Petitioner] think[s] I'm outside talking to a dude." I said, "No. Let me go over there and let him know." So when I went over there and let him know that... [victim] was out here, talking

> to me, so me and [victim] stayed at the door till about 2/2:30 in the morning. And [victim] was like, "I'm going to kill me,' you know, going in there to fight, 'I'm going to kill me so-and-so.' And I told [victim], before anything happened, [victim] and the girls come to my house.

(App'x p. 95-96).

Felder did not see the victim again until after she had learned of the crime. (App'x p. 96-97).

Here, as in *Glover*, it is patently clear that the testimony given by Petitioner's purported alibi witnesses, and Petitioner himself, did "*not cover sufficient of the time at or before the crime to render the presence of accused impossible or highly improbable.*" Petitioner never had a perfect alibi defense because the two witnesses – Felder and Kitt – were not there the entire time when the crime(s) occurred. (App'x p. 112, ll. 18-25). Moreover, their testimony left huge gaps of time unaccounted for, where Petitioner was alone with the victim, which this Court has held to be no defense at all. Accordingly, Petitioner failed to establish plea counsel was constitutionally ineffective for not further investigating Kitt and Felder as alibi witnesses, and therefore failed to show prejudice as Petitioner freely and voluntarily decided to plead guilty to the charges and forgo trial. Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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2.3., 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Taylor Davis Gilliam, Esquire
S.C. Commission on Indigent Defense
P.O Box 11589
Columbia, SC 29201

This 3rd day of February, 2020.

Katie Wade
Legal Assistant for Respondent