STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, PCR Judge

Appellate Case No. 2019–000424

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S.C. SUPREME COURT

JOHNNY NEAL SEXTON, II,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Did the PCR judge err in finding that trial counsel was not ineffective for failing to call Petitioner's aunt to testify where she was Petitioner's only alibi witness and could have testified that Petitioner had moved out of the home prior to the alleged criminal activity taking place there?

RESPONDENT'S QUESTION PRESENTED

Did the PCR court correctly determine trial counsel was not constitutionally ineffective for failing to call Petitioner's aunt as an alibi witness where Petitioner's aunt told trial counsel she could not account for Petitioner's whereabouts at all times and trial counsel articulated a valid strategic reason for deciding not to present the aunt's testimony?

STATEMENT OF THE CASE

Johnny Neal Sexton, II (Petitioner) was arrested in July of 2014 following an investigation into a suspected methamphetamine lab in the camper he lived in with his wife and children. During its April 2015 term, the Lexington County Grand Jury indicted for three counts of unlawful conduct towards a child (2015-GS-32-0989, -0990, -0991). (App 388–89, 391–92, 394–95). Assistant Public Defender David M. Mauldin (Counsel) represented Petitioner. Senior Assistant Solicitor Rhonda W. Patterson and Assistant Solicitor Shannon A. Davis prosecuted the case. On April 15, 2015, Petitioner's case was called to trial before the Honorable Thomas A. Russo. Petitioner failed to appear for trial, and Judge Russo found Petitioner had proper notice his case would be called to trial and would be tried in his absence should he fail to appear. (App. 43). The case proceeded *in absentia* the following day. (App. 60–61).

A. Summary of Evidence Adduced at Trial

The State presented testimony establishing Petitioner was the children's father, and the family, including the three children, lived in a small camper between November 1, 2013, and February 21, 2014. The children's mother and Petitioner's wife, Jamie Norris (Norris), testified Petitioner manufactured methamphetamine in the camper and his van during that time, and she and Petitioner smoked methamphetamine inside the camper while the children were present.[1] (App. 80–110).

Stephen Blair, a Lexington County Deputy, testified he went to the camper on January 23, 2014, and served eviction paperwork on Petitioner personally. (App. 111–12). When he returned to the camper in February 2014 to eject the family, he met a Department of Social Services (DSS)

[1] Norris was also charged with three counts of unlawful conduct towards a child, and entered a guilty plea prior to Petitioner's trial.

caseworker who was going to the camper as well. (App. 113–14). Petitioner was not at the camper when they arrived, and the deputy served the writ of ejectment on the mother, who consented to the deputy and caseworker entering the camper. (App. 114–16). The children were sitting inside the camper, and the deputy saw items he believed may be related to manufacturing methamphetamine sitting in the kitchen area, so he immediately got everyone outside and contacted narcotics investigators. (App. 116–17).

Agent Michael Merckle of the Lexington County Sheriff's Department testified he had sixteen years' experience in law enforcement; he had worked with the Department's Narcotics Enforcement Team for five years; and he had received specialized training in the identification and detection of methamphetamine labs. (App. 168–170). Agent Merckle has attended federal training and was certified as a methamphetamine technician to locate, identify, and safely handle methamphetamine. (App. 169). As of the date of trial, he had worked over a hundred methamphetamine labs, and testified ten to twelve times in General Sessions Court. Over Petitioner's general objection, the court qualified Agent Merckle as an expert regarding clandestine methamphetamine labs. (App. 169).

Agent Merckle testified he responded to the camper location in February 2014 to investigate the possibility of a methamphetamine lab. (App. 170–72). After describing the different types of methamphetamine labs, he stated the chemicals required to manufacture methamphetamine are very toxic and flammable, and having them around children, especially in a small, confined space like the camper, would be extremely dangerous. (App. 173–77, 180).

The camper contained items associated with a methamphetamine lab, including mason jars containing liquid substances, coffee filters, and a coffee grinder containing what appeared to be ground pseudoephedrine, which is a central ingredient in methamphetamine. (App. 177–79, 181).

Over Petitioner's objection, Agent Merckle testified, based on his training and experience, the mason jars contained Coleman camp fuel and ether, which he identified by the smell and appearance. (App. 179). He further testified the chemicals in the jars were destroyed because they are potentially harmful, and they cannot be stored in an enclosed evidence storage facility to be handled by personnel who are not specifically trained to do so. (R. 181–84).

Olivia Woods, the DSS caseworker who was present at the camper in February 2014, testified she was there to investigate an allegation of child abuse or neglect received by DSS. (App. 203–205). She described the "deplorable conditions" of the camper—that there was trash strewn throughout the camper, there was little to no food inside the home, and the children were only "minimally clean." (App. 208–11). The children were placed in emergency protective custody that day due to the circumstances and risk of harm to them. (App. 212). There were several subsequent hearings regarding the children' custody, and the mother, who was incarcerated, attended each one. (App. 212).

The State then asked Woods if Petitioner had attended any of the hearings or shown any interest in getting his children back, and she indicated that he had not. (App. 212–13). Counsel objected, arguing all the custody hearings occurred outside the dates included in the indictments and the State's question elicited "improper bad act evidence," and moved for a mistrial. (App. 213). The State responded that the question related to Petitioner's allegation he came to get the children in February 2014 because he wanted to take care of them due to the mother's drug use, and it showed he had no interest in the children. (App. 213–14). The court denied the mistrial motion, finding the question was an appropriate response to the State's allegations against Petitioner. (App. 214).

B. Verdict & Subsequent Proceedings

On April 17, 2015, the jury returned a verdict of guilty on each indictment. (App. 261). Judge Russo sealed Petitioner's sentence and issued a bench warrant for his s arrest. (App. 267). Petitioner subsequently appeared before the Honorable R. Keith Kelly for sentencing on May 6, 2015. (App. 269). Upon unsealing the sentence, Judge Kelly imposed a sentence of three consecutive terms of eight years' imprisonment for each charge. (App. 272).

Petitioner filed a timely notice of appeal. Appellate Defender LaNelle Cantey DuRant perfected Petitioner's appeal by briefing the following issues for the Court of Appeals:

> I. The court erred in allowing Agent Mike Merckle to give his opinion that the substances in two mason jars were Coleman fuel and ether, both necessary ingredients for making "meth," when the substances were never tested in [Petitioner's] case although Agent Merckle had tested similar substances in prior cases; therefore, the opinion was not reliable as shown by the judge instructing the jury on the spoliation of evidence; thus, the judge failed to fulfill his role as gatekeeper of the reliability of the evidence.
>
> II. The court erred by ruling admissible the testimony that [Petitioner] did not attend the subsequent DSS legal hearings on his three children, which were outside the time period stated in the indictments, and therefore irrelevant to the crime of unlawful conduct towards a child, as well as the witness's testimony that [Petitioner] did not show interest in getting his children back, since this testimony was a gratuitous attack, and was highly prejudicial.

Following briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished *per curiam* opinion on December 6, 2017. *State v. Sexton*, Op. 2017-UP-454 (S.C. Ct. App. filed December 6, 2017). The case was returned to the circuit court on December 28, 2017.

Petitioner commenced this PCR action on April 3, 2018, and filed an amended application

on January 20, 2019. (App. 317–25, 334–35). An evidentiary hearing into the matter convened before the Honorable Walton J. McLeod, IV, on January 24, 2019. (App. 337–68). Petitioner was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Kelly Oppenheimer represented the State. On March 1, 2019, after reviewing the entire record and testimony presented, the PCR court issued an order denying relief and dismissing the action with prejudice. (App. 370–87). This appeal follows.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence 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 applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant 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). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove 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 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

ARGUMENT

The PCR court correctly determined trial counsel was not constitutionally ineffective for failing to call Petitioner's aunt as an alibi witness where Petitioner's aunt told trial counsel she could not account for Petitioner's whereabouts at all times and trial counsel articulated a valid strategic reason for deciding not to present the aunt's testimony.

Petitioner contends Counsel was constitutionally ineffective for failing to call Petitioner's aunt, Debbie Wright (Wright), as an alibi witness. Specifically, Petitioner claims Wright could have testified that Petitioner had moved out of the house prior to the alleged criminal activity taking place. The PCR court rejected this claim, finding Counsel made a strategic decision not to present any evidence and Petitioner could not establish prejudice based on overwhelming evidence of guilt. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

Alibi evidence is presented to establish that a defendant *could not have* committed the crime because "he was not at the scene of the crime at the time of its commission." As this Court has stated:

> 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.

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

Petitioner cites *Martin v. State*, 427 S.C. 450, 832 S.E.2d 277 (2019), in support of his

claim that Counsel's failure to elicit testimony from Wright amounted to deficient performance. (Pet. 7). In *Martin*, the applicant was convicted of crimes that occurred in Aiken County and sought PCR on the basis that trial counsel failed to elicit specific testimony from an alibi witness who would have established the applicant was in Atlanta at around 11:15 or 11:30 A.M. on the day the crimes were committed. *Id.* at 453–54, 832 S.E.2d at 279. Despite trial counsel's knowledge the witness could testify to the specific time she last saw Martin at the bus stop in Atlanta, which would have precluded his presence in Aiken County at the time of the crime, he elicited only general testimony that the witness dropped Martin off sometime "in the morning." *Id.* This Court found that because the crimes occurred at 12:20 P.M. and the drive between the applicant's last known location in Atlanta and Aiken County was at least two hours, it would have been physically impossible for the applicant to have committed the crimes. *Id.* Therefore, this Court concluded trial counsel was deficient for failing to elicit the "*specific alibi timeline* testimony" which would have established an alibi defense. *Id.* at 456, 832 S.E.2d at 280.

In Petitioner's case, however, the witness he alleges Counsel should have called at trial was unable to establish an alibi for him. At the PCR hearing, Counsel testified he spoke with Wright prior to trial in an effort to support Petitioner's contention he had moved out before the camper was used as a meth lab. (App. 354). However, Wright could not account for Petitioner's whereabouts at all times during the period alleged in the indictment, which spanned from November 2013 to February 2014. (App. 354, 357). Wright further informed Counsel that Petitioner occasionally spent the night at the camper with Norris, even after he moved into Wright's house. (App. 354). Counsel therefore planned for Petitioner to testify at trial that he had moved out, and Wright's testimony would have been used only to supplement Petitioner's testimony. (App. 354–55). Petitioner, however, failed to appear at trial. Counsel testified he did

not believe Wright's testimony alone would have been useful to the defense. (App. 355).

The timeline here, unlike *Martin*, consisted of a 113-day period between November 1, 2013 and February 21, 2014. Wright could not have provided "specific alibi timeline testimony" at trial, as she admitted to Counsel that she could not account for Petitioner's whereabouts at all times after he moved in with her, and she had knowledge that he returned to the trailer regularly even after moving out. Officer Blair's testimony at trial regarding the eviction paperwork he personally served on Petitioner at the trailer in January of 2014 further undermines Petitioner's purported alibi. (App. 111–12). *See State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("[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."). The only testimony Wright could have provided was that Petitioner moved out of the camper at some point during the time period alleged in the indictment. Additionally, Counsel was able to challenge whether Petitioner lived in the camper during that time period through his cross-examination of Norris, so he had no need to call Wright. (App. 105).

Petitioner further relies on *Martin* in support of his claim he was prejudiced by Counsel's failure to present Wright's testimony because it would have strengthened Counsel's closing argument that Petitioner was not living in the house and was therefore not guilty of the offenses charged. However, as discussed above, Counsel testified he did not believe Wright's testimony would have been beneficial without Petitioner's testimony. Her testimony that Petitioner continued to return there to spend the night with Norris in fact *weakens* Counsel's argument the State had not proven Petitioner had access to the trailer at the relevant times. Thus, when Petitioner failed to appear at trial, Counsel made a reasonable strategic decision not to elicit testimony from Wright. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or

substantially influenced by the defendant's own statements or actions."). This decision was reasonable in light of Counsel's knowledge from speaking with Wright that Petitioner still spent time at the camper with Norris even after he moved out. Therefore, the PCR court correctly found Counsel was not deficient for choosing not to call Wright as a witness at trial.

Petitioner further relies on *Martin* in support of his claim the PCR court erred in finding Petitioner failed to show prejudice because he did not present testimony from Wright at the evidentiary hearing.[2] (Pet. 5, 7). In *Martin*, this Court noted that ordinarily "the absence if a purported alibi witness's testimony is fatal[;]" however, in that case counsel admitted he was aware of the information regarding the specific timeline that the alibi witness could have testified to based on notes in his file, but he failed to ask the appropriate question when the alibi witness testified at trial. 427 S.C. at 453, 832 S.E.2d at 278. Here, Counsel similarly admitted he was aware of the testimony Wright could have provided at trial. The critical difference in Petitioner's case is that Wright's testimony did not establish an alibi. Petitioner simply cannot show prejudice because Wright's testimony would not have been sufficient to establish an alibi.

Therefore, the PCR court correctly denied relief based on a lack of both deficiency and prejudice, and this Court should deny certiorari.

[2] To the extent Petitioner contends this finding constituted an error of law, the State notes that *Martin* was decided over six months after the PCR court issued the Order of Dismissal.

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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