

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

LARRY BRAYBOY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002171

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate Tony as a potential alibi witness and present his testimony at trial since there is a reasonable probability the outcome of Petitioner's trial would have been different if Tony had testified he picked Petitioner up from McDonald's shortly before the armed robbery occurred thereby making it impossible Petitioner committed the robbery?

STATEMENT OF THE CASE

Shortly before 11:00 pm on December 6, 2008, three masked intruders entered a Pizza Hut in Lake City. App. 101, l. 18 – 105, l. 4. One of the intruders was armed with a sawed off shotgun. Another was armed with a pistol. App. 105, ll. 5-10. The intruder with the shotgun struck one of the employees on the head with the butt of his gun and ordered him to open the cash register. App. 72, l. 24 – 73, l. 7; App. 75, l. 1 – 76, l. 14. When the employee was unable to do so, the intruders ordered the employees to undress and turnover their wallets, cell phones, and other possessions. App. 76, l. 16 – 78, l. 2. The intruders fled when they realized law enforcement had arrived. App. 78, ll. 11-17; App. 297, ll. 1-3.

Robin Turner and Quennell Brown were apprehended while fleeing the Pizza Hut. App. 174, l. 3 – 178, l. 17; App. 297, l. 11 – 298, l. 24; App. 339, l. 9 – 341, l. 23. Both confessed to being involved in the armed robbery and claimed Petitioner was the third intruder. App. 290, l. 3 – 301, l. 20; App. 334, l. 14 – 342, l. 21. Petitioner was arrested almost a month later. Turner and Brown ultimately testified against Petitioner at trial. App. 278, l. 10 – 318, l. 7; App. 325, l. 1 – 353, l. 3. Their testimony was the sole evidence against Petitioner as there was no forensic evidence connecting Petitioner to the robbery and the employees were unable to identify any of the assailants.

Both Turner and Brown received a significant benefit in exchange for their testimony. All of Turner's state charges were dropped while Brown's armed robbery charge was reduced to attempted armed robbery and his kidnapping charge was dismissed. App. 279, ll. 21-25; App. 325, l. 18 – 326, l. 4.

A Florence County grand jury indicted Petitioner on April 2, 2009 for armed robbery, kidnapping, and assault and battery of a high and aggravated nature (ABHAN). App. 620-621.

His case was called to trial on August 24, 2009 before the Honorable Thomas A. Russo, and a jury. App. 1. Assistant Solicitor Fitzlee McEachin represented the state, and Barbara Pratt represented Petitioner. App. 1. On August 26, 2009, the jury found Petitioner guilty as indicted. App. 448, ll. 3-16. He was sentenced to eighteen years for armed robbery, eighteen years for kidnapping, and ten years for ABHAN. App. 463, ll. 8-21.

The Court of Appeals affirmed Petitioner's convictions and sentence. State v. Brayboy, 401 S.C. 207, 736 S.E.2d 679 (2012). By order dated May 11, 2014, this Court denied his petition for writ of certiorari to review the Court of Appeals' decision. App. 528. Assistant Appellate Defender Kathrine Hudgins represented Petitioner. App. 528.

On December 31, 2014, Petitioner filed an application for post-conviction relief raising the claim argued in this petition. App. 529-540. The state filed a return to this application dated October 28, 2016. App. 541-548. An evidentiary hearing was convened on January 31, 2018 before the Honorable Michael G. Nettles. App. 549. Assistant Attorney General Lindsey McCallister represented the state, and Jonathan Waller represented Petitioner. App. 549.

Petitioner testified at the evidentiary hearing that he told his trial counsel he had an alibi witness, but she failed to investigate this witness or present his testimony during trial. App. 559, l. 12 – 560, l. 2. Barbara Pratt, Petitioner's trial counsel, admitted Petitioner told her about a potential alibi witness named Tony. She claimed she contacted Tony, who was Petitioner's friend, on August 21, 2009, three days before trial, and concluded that his testimony would not be helpful to the defense. App. 586, l. 21 – 587, l. 22. Pratt explained that Tony, whose house Petitioner was found hiding in when he was arrested, picked Petitioner up from McDonald's on the night of the robbery. However, Tony did not know the precise time he picked Petitioner up. Pratt also explained that the McDonald's was very close to the Pizza Hut and she was concerned

about placing Petitioner close to the scene of the robbery around the time that it occurred. App. 587, ll. 4-17.

By order filed November 20, 2018, the PCR judge denied Petitioner relief. App. 605-618. He found trial counsel articulated a valid strategic reason in choosing not to call Tony as an alibi witness. App. 617. The judge found counsel's decision was reasonable given that Tony could not recall the exact time he was with Petitioner, his testimony would have placed Petitioner very close to the location of the robbery, and Petitioner was arrested weeks later after he was found hiding in Tony's house. App. 617. Further, because Petitioner did not call Tony as a witness during his evidentiary hearing, the judge concluded Petitioner failed to establish any prejudice resulting from counsel's performance. App. 617.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate Tony as a potential alibi witness and present his testimony at trial, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate Tony as a potential alibi witness and present his testimony at trial since there is a reasonable probability the outcome of Petitioner's trial would have been different if Tony had testified he picked Petitioner up from McDonald's shortly before the armed robbery occurred thereby making it impossible Petitioner committed the robbery.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate Tony as a potential alibi witness and present his testimony at trial. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if Tony had testified he picked Petitioner up from McDonald's shortly before the armed robbery occurred thereby making it impossible Petitioner committed the robbery.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d

624, 625 (1989) (citing Strickland, 466 U.S. at 688). “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) (citing Strickland, 466 U.S. at 668).

“[C]ounsel 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) (alterations in original); See 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.” Id. (citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991)). “When evaluating the reasonableness of counsel’s conduct, ‘the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.’” Ard, 372 S.C. at 331, 642 S.E.2d at 597 (quoting Strickland v. Washington, 466 U.S. at 690).

In Walker, this Court held the PCR judge properly found trial counsel ineffective when she failed to interview a potential alibi witness who was made known to counsel before trial. Walker, 407 S.C. at 403-404, 756 S.E.2d at 146. Walker was accused of first degree criminal sexual conduct and kidnapping that occurred on the night of March 2, 2002 and into the early morning hours of the following day. Id. at 403, 756 S.E.2d at 145. Counsel admitted her notes contained the name Robina Reed as a person to interview but that she never interviewed Reed. Id. at 403, 756 S.E.2d at 146. Reed testified at the evidentiary hearing that she was in a romantic relationship with Walker during March 2002 and that she and Walker spent every weekend together during that time. Id. at 404, 756 S.E.2d at 146. The PCR judge found Reed was

credible, counsel was deficient in failing to interview her as an alibi witness, and Walker was prejudiced because Reed's alibi testimony created the reasonable probability of a different outcome at trial had she testified. Id. This Court affirmed the decision of the PCR judge holding, "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. at 406, 756 S.E.2d at 147.

In this case, trial counsel was ineffective for failing to properly investigate Tony as a potential alibi witness and present his testimony during trial. Counsel admitted Petitioner told her about Tony. However, she claimed she contacted Tony shortly before trial and, while he admitted to picking up Petitioner that night, he could not remember the exact time. Counsel ultimately decided not to call Tony as an alibi witness because he was not precise as to time and because the McDonald's was in close proximity to the Pizza Hut that was robbed. This constitutes deficient performance as counsel's strategic decision was unreasonable. Any competent criminal defense attorney would have called Tony as a witness because his testimony that he picked Petitioner up before the robbery would have created reasonable doubt in the minds of the jurors.

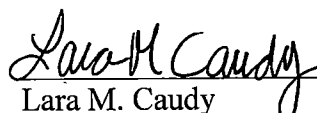
Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if trial counsel had called Tony to testify that he picked Petitioner up from McDonald's shortly before the armed robbery thereby making it impossible Petitioner committed the robbery.

Consequently, this Court should reverse Petitioners convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. He ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of September, 2019.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Larry Bradley Brayboy states:

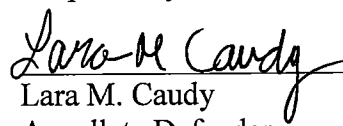
1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on January 31, 2018 before the Honorable Michael G. Nettles, 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 Larry Bradley Brayboy.

Respectfully Submitted,



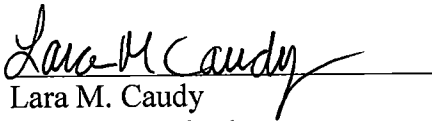
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of September, 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

South Carolina Commission on Indigent
Defense
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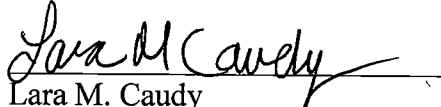
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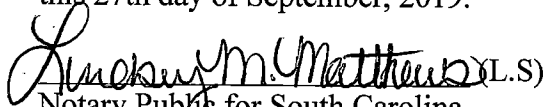
CERTIFICATE OF SERVICE

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 have been served upon Lindsey McCallister, 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 upon Larry Bradley Brayboy, #336486, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 27th day of September, 2019.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 27th day of September, 2019.

 (L.S)
Notary Public for South Carolina

My Commission Expires: October 22, 2024.