STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Sumter County

Honorable R. Knox McMahon, Circuit Court Judge

WAYNE D. COOPER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001507

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where counsel failed to establish an alibi defense through a time, speed, and distance calculation which showed it was impossible for Petitioner to have shot the decedent, driven over twenty-eight miles, and arrived at work sixteen minutes later as evidenced by video footage viewed by the state's lead investigator?

STATEMENT

Petitioner was indicted by a Sumter County grand jury for murder on or about April 5, 2007. He proceeded to trial before the Honorable Howard P. King on November 10, 2008. App. 1. Arthur Wilder represented Petitioner, and Jason Corbett served as the assistant solicitor. After a four-day trial, the jury found Petitioner guilty as indicted. App. 803 ll. 1 – 7. Judge King sentenced him to forty years' imprisonment. App. 817 ll. 18 – 22.

Petitioner's conviction was affirmed. State v. Cooper, Op. No. 2011-UP-544 (S.C. Ct. App. filed December 6, 2011. On or about June 25, 2012, Petitioner filed a timely application for post-conviction relief. App. 820 – 827. It contained a handwritten addendum which articulated allegations of ineffective assistance of counsel. Id. The state made its Return on or about January 25, 2013. App. 828 – 832.

An evidentiary hearing took place before the Honorable R. Knox McMahon on October 1, 2013. App. 833. David Holler represented Petitioner, and Daniel F. Gourley appeared on behalf of the state. Trial counsel testified at the hearing. At the conclusion of the evidentiary hearing, the PCR judge requested proposed orders within thirty days. App. 942 ll. 1 – 2. On December 9, 2013, an Order of Dismissal was filed. App. 946 – 953. The PCR court found in a rather nondescript fashion, that counsel sufficiently argued in favor of an alibi defense. App. 950 – 951. A notice of appeal was not filed following the issuance of that Order.

As a result, Petitioner filed a second application for post-conviction relief, on December 8, 2014. App. 954 – 958. He requested relief in the form of an appeal from the denial of his post-conviction relief application. App. 957. The state made its Return on March 30, 2015. App. 959 – 962.

A hearing was held before the Honorable Steven H. John on July 15, 2015. App. 963. F. Casey Dale Cornwell represented Petitioner, and Daniel Gourley again appeared on behalf of the state. The state submitted that Petitioner was entitled to belated review, which the court granted. App. 967 ll. 9 – 24. An Order Granting An Appeal Pursuant to Austin v. State[1] was filed on September 7, 2015. App. 973 – 975. A notice of appeal was not filed following the issuance of this Order.

Petitioner filed a third application for post-conviction relief on January 29, 2018. App. 977 – 998. The state made its Return on June 25, 2019. App. 1000 – 1004. The state consented to the granting of Austin relief for the original PCR action. Id. An Order Granting An Appeal Pursuant to Austin v. State signed by the Honorable R. Ferrell Cothran was filed in July 2018. App. 1009 – 1012.

This petition follows.

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[1] 305 S.C. 453, 409 S.E.2d 395 (1991).

ARGUMENT

The PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where counsel failed to establish an alibi defense through a time, speed, and distance calculation which showed it was impossible for Petitioner to have shot the decedent, driven over twenty-eight miles, and arrived at work sixteen minutes later as evidenced by video footage viewed by the state's lead investigator.

It was near impossible for Petitioner to make the drive from where the shooting took place to his place of employment where he was seen clocking in on video, a drive of over twenty-eight miles, in the timeframe offered by the state at trial. Counsel failed to establish reasonable doubt through an alibi defense, thus depriving Petitioner, a man with no prior record charged with murder, of effective representation.

Relevant facts

At the outset of the evidentiary hearing, PCR counsel requested a continuance; he had not had a chance to "adequately review" the transcript and prepare. App. 836 l. 8 – App. 838 l. 18. The state responded that the case had already been continued once, and the motion was denied. Id.

Trial counsel was appointed to represent Petitioner on September 18, 2006 and represented him through trial. App. 840 ll. 8 – 11; App. 901 ll. 12 – 24. Counsel filed a notice of alibi. App. 850 ll. 5 – 8. Counsel hired an investigator, John Johnson. App. 840 ll. 12 – 22. Based upon an alleged confession, counsel pursued a self-defense theory. App. 845 ll. 6 – 22. At the evidentiary hearing, however, PCR counsel methodically established an alibi defense that could have been utilized at trial.

On the morning of September 2, 2008, Petitioner clocked in to work at 6:12 a.m. App. 848 ll. 7 – 24. While counsel was unable to obtain the videotape of Petitioner arriving at work, the state's lead investigator, Jamie Turner, looked at the surveillance video and testified accordingly. App. 850 ll. 9 – 23. The 911 call was made at 5:58 a.m., five minutes after the shooting. App. 867 ll. 2 – 20; App. 868 l. 10 – App. 869 l. 15. Therefore, the time of the shooting was established as 5:53 a.m. App. 889 ll. 10 – 19. Petitioner arrived at his place of employment at 6:09 a.m. and clocked in three minutes later. App. 881 ll. 1 – 25.

Turner testified at Petitioner's trial that it took him approximately thirty-two minutes to make the drive from where the shooting occurred to Petitioner's employer. App. 872 ll. 2 – 22; App. 419 l. 19 – App. 420 l. 15. He also testified that he made the drive "one night late at night coming back from Columbia" in twenty-two minutes. Id. Counsel declined to cross-examine Turner on the assertion that he was able to complete the drive in twenty-two minutes.

The distance calculated by PCR counsel was approximately twenty-eight and a half miles. App. 878 l. 6 – App. 879 l. 11. The state stipulated to the same. Id. Based upon a speed of seventy miles per hour, it would have taken an individual almost twenty-eight minutes to reach Petitioner's place of employment. App. 883 l. 25 – App. 885 l. 13. At sixty miles per hour, it would have taken over thirty-two minutes. App. 885 l. 19 – App. 886 l. 12. At fifty miles per hour: almost thirty-nine minutes. App. 886 ll. 4 – 12. Therefore, in order to comply with the state's timeline established at trial, Petitioner would have had to traveled over one hundred and twenty miles per hour to be in the parking lot at work on time:

> Consistent with that, if we take 5:53 as the time of the shooting, we know that if the State's case is right, Mr. Cooper has to go 28.2 miles to clock in at work. If we used our time, speed, distance calculator, he would have had to have averaged 121.69 miles per hour on his trip to Columbia.

App. 889 ll. 10 – 19. In response, counsel remarked that he did the best he could under the circumstances. App. 889 l. 10 – App. 890 l. 13. He vacillated when asked whether a reasonable defense attorney could have argued that the time, speed, and distance formula showed it was impossible for Petitioner to be at the location where the shooting occurred, although he admitted it could have changed the outcome of the trial. App. 890 ll. 5 – 19.

As noted by trial counsel, "[m]ath … has been available since Archimedes." App. 888 ll. 11 – 15. PCR counsel thoroughly explained the calculations which plainly set forth the reasonable doubt surrounding the state's suggestion that Petitioner drove almost thirty miles in approximately twenty minutes. He was equally meticulous in pointing out how counsel could have made this argument to the jury at Petitioner's trial:

> And a reasonable criminal defense attorney coming out of school would rely upon something as simple as time, speed, and distance to figure out whether he'd been there. You didn't have your investigator measure the distance, you didn't cross examine Jamie Turner who said it could be done in 22 minutes. You didn't put up anything about the distance and the time it would take to travel?

App. 891 ll. 3 – 23. In turn, counsel remarked that he trusted Turner and believed he told the truth. Id. PCR counsel then calculated the speed required to travel twenty-eight and one fifth miles in twenty-two minutes: over eighty-eight miles per hour. App. 892 ll. 1 – 25. Counsel responded, "I kind of doubt he went 88 miles an hour." Id.

When asked whether he had adequately argued the alibi defense, trial counsel answered in the negative: "If I had adequately address it, he would have been found not guilty." App. 917 ll. 7 – 10.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86 (1984).

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRCP). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 687. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

This Court recently reversed the denial of a PCR application and remanded for a new trial in Martin v. State, Op. No. 27900 (S.C. Sup. Ct. filed July 17, 2019) (Shearouse Adv. Sh. No. 29 at 8). In that matter, trial counsel failed to elicit a specific timeframe from Martin's mother which would have established that he was 150 miles away from a bank one hour and five minutes before it was robbed. Using the speed, distance, and time calculation, Martin would have had to traveled one hundred and thirty-eight miles per hour to reach the bank in North Augusta from Atlanta. Martin alleged that his trial attorneys were ineffective for failing to elicit specific testimony from his mother regarding the specific timeline of his alibi, and this Court held that as a matter of law, "Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother." Id.

In Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995), the applicant presented the testimony of the two witnesses who he claimed would have testified that he was in Florida at 8:30 *a.m.* on the day when the crimes were committed. A majority of this Court found that the witnesses' testimony did not foreclose the possibility that Glover could have committed the crimes at 8:30 *p.m.* in light of testimony that Williamsburg County was only a six and a half hour drive from the witness' home in Florida. 318 S.C. at 498, 458 S.E.2d at 540. Thus, Glover's witnesses did not provide an alibi. Id.

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), this Court reversed the Court of Appeals' holding that the applicant was not prejudiced by trial counsel's failure to interview the defendant's former girlfriend as a potential alibi witness. Walker was accused of kidnapping and sexual assault. 407 S.C. at 403, 756 S.E.2d at 145. The Victim reviewed surveillance footage from the gas station where she alleged that she met her assailant, who offered to help her when her car would not start. Id. A gas station employee identified Walker as the man pointed out by the Victim on the video. Id. When interviewed by police, Walker admitted going to the gas station but denied offering any help to anyone there or any involvement with the alleged victim. Id. He said he spent the afternoon and evening at a friend's home and then returned to his girlfriend Robina Reed's home around 9:30 or 10:00 p.m. for the remainder of the night. Id.

Following his conviction, Walker filed for PCR, alleging that his trial counsel was ineffective in failing to conduct an adequate investigation. 407 S.C. at 403, 756 S.E.2d at 146. Walker's trial counsel admitted reviewing video of the police interview and had "Robina Reed" in her notes to interview but never did. Id. Though she said that her investigator spoke with or tried to speak with Reed, trial counsel never followed up with her investigator. Id. at 403-04, 756 S.E.2d at 146. Reed testified that she was never contacted about Walker's case and did not

know why he disappeared in May 2002 until his PCR attorney contacted her. Id. at 404, 756 S.E.2d at 146. Though she could not provide specific dates and times, she testified that she and Walker spent every weekend together prior to his arrest. Id. The PCR court granted Walker's application, but the Court of Appeals reversed, finding that Walker's trial counsel was deficient but that Walker was not prejudiced. Id.

This Court recognized that Reed's testimony at Walker's PCR hearing vacillated but finally settled on an answer that "prior to Walker's arrest, she and Walker spent every weekend together." 407 S.C. at 406, 756 S.E.2d at 147. Thus, there was evidence to support the PCR court's conclusion that Reed's testimony reasonably could have resulted in a different outcome at trial. Id. "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. "In other words, unlike *Glover* where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-07, 756 S.E.2d at 147.

While Walker involved a failure to investigate, trial counsel's failure to utilize alibi evidence that was in plain sight is no less egregious than a failure to investigate alibi altogether. Here, like Walker, had the jury been presented with and believed testimony that Petitioner would have had to drive over one hundred miles per hour to clock in at 6:12 a.m., it could have concluded that Petitioner was not the shooter. Trial counsel knew the timeframe involved and knew or could have determined the distance between the two locations; his investigator could have measured the distance, or counsel could have used a mapping service such as Google Maps.

The resulting calculations would have shown the impossibility of Petitioner changing clothes and arriving at work after supposedly having shot the decedent.

When asked on cross-examination to characterize the state's evidence against Petitioner, trial counsel bluntly described the eyewitness testimony as lousy. App. 923 . 20 – App. 924 l. 20. He refused to refer to it as overwhelming evidence of guilt. Id.

Here, there is a reasonable probability, sufficient to undermine confidence in the outcome, that Petitioner's trial would have been different had the alibi defense been properly presented to the jury. "[T]he Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146 (1986).

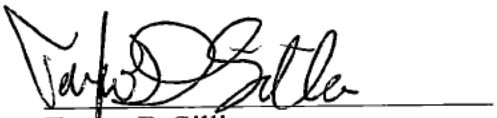
One witness at trial, Mary Green, testified that she knocked on a door and called 911 five minutes after the shooting. App. 238 l. 8 – App. 239 l. 23. If the call was made at 5:58 a.m., five minutes after the shooting, Petitioner would have had to have traveled over twenty-eight miles in sixteen minutes at a speed of over one hundred miles per hour. App. 927 l. 17 – App. 13. Near the end of the evidentiary hearing, trial counsel appeared to accept PCR counsel's rationale: "Now, Mr. Holler may have a point. Maybe I should have put the math up there, maybe that would have helped." App. 929 ll. 21 – 23.

Petitioner was prejudiced by trial counsel's failure to elicit details or even put in an expert witness to offer the mathematical calculations showing the impossibility of Petitioner arriving at work in the timespan offered by the state. Petitioner was also prejudiced by counsel's refusal to cross-examine Turner on the accuracy of his claim that he made the drive in approximately twenty minutes. With that as the benchmark, the jury could have believed that Petitioner made the drive after supposedly shooting the decent.

Had trial counsel pushed back or calculated the required speed for Turner to have completed the drive in that amount of time, the jury would have realized the impossibility of the state's timeframe and found Petitioner not guilty. The remaining evidence, including "lousy" eyewitness testimony which trial counsel repeatedly questioned at the evidentiary hearing, was not overwhelming. Petitioner is entitled to relief based upon trial counsel's ineffective representation regarding the alibi defense.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issue raised herein.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable R. Knox McMahon, Circuit Court Judge

WAYNE D. COOPER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Wayne D. Cooper, #469184, at 18701 Roxbury Rd., , Hagerstown, MD 21746, this 22nd day of July, 2019.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 22nd day of July, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2027