

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Steven H. John, Circuit Court Judge

JULIA SHAWNETTE GORMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000908

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel where he failed to adequately investigate Petitioner's alibi defense, where trial counsel failed to interview alibi witnesses and failed to review security camera videos that would have corroborated Petitioner's alibi defense?

STATEMENT

During the September 2008 term, the Horry County Grand Jury indicted Petitioner for homicide by child abuse. App. 1306 – 1307. During the February 2010 term the Horry County Grand Jury indicted Petitioner for unlawful conduct towards a child. App. 1308 – 1309. During the May 2010 term, the Horry County Grand Jury indicted Petitioner for “knowingly aid[ing] and abet[ting] another to commit child abuse,” that resulted in homicide. App. 1310 – 1311.

On November 14 – 18, 2011, Petitioner’s trial was held before the Honorable Larry B. Hyman, and a jury¹. App. 1. James C. Galmore and J. Andrew Ritner represented Petitioner. Id. Candice A. Lively and Nancy G. Cote represented the state. Id.

Petitioner was found guilty as indicted. App. 1124, l. 18 – 1125, l. 4. The judge sentenced Petitioner to ten years’ imprisonment for unlawful conduct towards a child, twenty years’ imprisonment for aiding and abetting homicide by child abuse, and thirty-five years’ imprisonment for homicide by child abuse. App. 1167, ll. 5 – 16.

Petitioner appealed her convictions and sentences. On February 12, 2014, the Court of Appeals affirmed Petitioner’s conviction for homicide by child abuse and unlawful conduct toward a child, but reversed as to aiding and abetting homicide by child abuse. State v. Palmer and Gorman, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014).

This Court granted certiorari. The Court of Appeals decision was affirmed in part; reversed in part. State v. Palmer and Gorman, 413 S.C. 410, 776 S.E.2d 556 (2015). This Court affirmed the directed verdict for aiding and abetting homicide by child abuse in favor of Petitioner. Id. at 423, 776 S.E.2d at 564. This Court also affirmed the denial of Petitioner’s

¹ Petitioner was the grandmother to the decedent minor and co-defendant Palmer was her boyfriend. Petitioner and co-defendant Palmer were tried jointly. Their appeals, while handled by two different attorneys at SCCID, were consolidated at oral argument. All of the indictments are related to the same minor.

directed verdict motions on the charges of homicide by child abuse and unlawful conduct towards a child. Id.

On November 18, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 1172 – 1177. Petitioner alleged that trial counsel was ineffective for failure to adequately investigate into her alibi defense. Id. On May 5, 2016, the state filed its Return. App. 1179 – 1182.

On February 21, 2018, Petitioner's PCR hearing was held before the Honorable Steven H. John. App. 1184. Petitioner was represented by Steven W. Fowler. Id. The state was represented by Johnny E. James, Jr. Id.

An Order of Dismissal was filed on April 5, 2018. App. 1285 – 1305. The PCR court found that Petitioner failed to present evidence of what trial counsel could have discovered or what other defenses Petitioner could have requested trial counsel develop and present had counsel been more prepared. App. 1293; Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008).

ARGUMENT

Trial counsel provided ineffective assistance of counsel where he failed to adequately investigate Petitioner's alibi defense, where trial counsel failed to interview alibi witnesses and failed to review security camera videos that would have corroborated Petitioner's alibi defense.

Relevant Facts

The state alleged the facts as follows. On July 14, 2008, the decedent minor suffered severe head trauma. App. 13, l. 20 – 14, l. 3; App. 1306 – 1311. On July 16, 2008, minor died as a result of the head trauma. App. 486, ll. 3 – 7. Petitioner was the minor's grandmother and Palmer, Petitioner's co-defendant at trial, was her boyfriend. App. 85, ll. 21 – 23; App. 184, ll. 20 – 22.

Petitioner told defense counsel that she had an alibi defense. App. 1210, l. 20 – 1210, l. 22; App. 1211, ll. 12 – 17. Petitioner's alibi was that she was not at home at the time the decedent minor suffered the injuries that killed him. App. 1209, l. 19 – 1210, l. 15.

Petitioner testified at her PCR hearing that she informed trial counsel of her alibi. App. 1210, ll. 14 – 19. However, defense counsel did not perform an adequate investigation into it. *Id.* Petitioner provided defense counsel with her timecard from work and a bounced check she wrote at the grocery store on the day of the incident to help establish a timeline. App. 1209, l. 23 – 1210, l. 3.

Petitioner told defense counsel that simply having her work timecard and the bounced check from the video store were not going to be enough to accurately show the timeline of her alibi defense. App. 1201, ll. 3 – 7. Petitioner worked at Bass Pro Shops. App. 93, ll. 9 – 10. On the day of the incident, she traveled from her work to a video store to rent a video, where she bounced a check. App. 1239, l. 19 – 1240, l. 1.

Petitioner testified, “[I]n the grocery store, there's gonna be a camera, my job there's a camera because I worked in the cash office. So, I am constantly videotaped. By the time I leave that

area with the case until I go... out to... the parking lot, we're videotaped. It would have showed the timeline there too." App. 1210, ll. 8 – 14.

Petitioner stated that the trial counsel's investigation amounted to measuring the time it took to drive between the places that Petitioner visited on the day of the incident. App. 1210, ll. 17 – 19. "They didn't go to the store to get any video tapes or even pull a receipt. They didn't go to the video store where I rented... movies. They didn't do anything." App. 1210, ll. 14 – 16. She furthered that, "the only thing we have is just ... my timecard and... the cancelled check from the store [that Petitioner provided to defense counsel]. That's it and the timecard... isn't even a complete one because [its] still missing a day." 1217, ll. 14 – 20.

Defense counsel Galmore testified at Petitioner's PCR hearing as well. App. 1224, l. 2. Defense counsel stated, "[Petitioner] was working earlier [on the day of the incident]... at the Bass Pro Shops in North Myrtle beach." App. 1227, ll. 16 – 22. He explained, "the timeline is a very difficult concept in this case because the state could not provide a time when the injuries occurred. The best that the state was able to say through their expert witnesses at MUSC was the injuries occurred... no more than three hours prior to when 911 was called." App. 1228, l. 21 – 1229, l. 1.

Petitioner told defense counsel that she got off work, went home, and checked on [minor]. App. 1229, ll. 2 – 9. Then Petitioner went to the grocery store and went to the video store in Aynor.

Id.

Defense counsel explained the complications with the timecard and the cancelled check, "[T]he problem with the [bounced] check was that the time that was stamped on the check, I think it said 3:52 and it was highly improbable that [Petitioner] could have gotten off work at Bass Pro ... [and] could drive from Myrtle Beach to Aynor in nine minutes." App. 1229, l. 16 – 1230, l. 3. In other words, the timecard from when Petitioner clocked out at Bass Pro Shop and the time stamped

on the bounced check only showed a nine-minute difference. According to defense counsel, the drive from the Bass Pro Shop should have taken longer. Id. Therefore, either the time stamp on Petitioner's timecard from work was wrong or the time stamped on the bounced check was wrong, but defense counsel never investigated the discrepancy.

Although defense counsel knew these complications existed, he did not conduct any additional investigation into Petitioner's alibi defense. App. 1230, ll. 5 – 19. During the PCR hearing, defense counsel admitted, "I guess we could've called a manager from Bass Pro Shops to confirm the time on the timecard... [and] perhaps we should've called a witness from the video store to testify that the timestamp was off, but... I thought it was a reasonable explanation that the timestamp on the check might've been off." Id.

Defense counsel underlined the importance of the timeline when he explained the defense's main theory, "[M]y defense was [Petitioner] was not around [Minor] throughout most of the day in question, she did have this alibi in the form of a bounced check where it indicates that she's not in the house during the relevant time the child was injured... therefore, it must have been [co-defendant]." App. 1234, ll. 15 – 21.

On cross-examination during the PCR hearing, defense counsel testified that he could've called witnesses to testify about the timeline. App. 1238, l. 15 – 1239, l. 1. Moreover, defense counsel did not ever speak to any of Petitioner's coworkers from the Bass Pro Shops. App. 1239, ll. 2 – 5.

PCR counsel gave a closing argument where he reiterated the shortcomings in defense counsel's representation of Petitioner, "[defense counsel] could've called the Bass Pro Shops manager... to verify [Petitioner's timeline]." App. 1275, ll. 18 – 19. PCR counsel reminded the

PCR court of trial counsel's testimony where, "by his own admission... [Petitioner's alibi defense was] not brought up adequately on the trial level." App. 1275, l. 25 – 1276, l. 1.

During the PCR hearing, the court denied Petitioner's failure to investigate allegation because PCR counsel failed to call witnesses from the Bass Pro Shop or the video store. App. 1281, ll. 4 – 10. Petitioner also did not provide video surveillance evidence from the places she visited seven years ago². Id.

In the order of dismissal, the PCR court cited Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-146 (2008) which held that in order to prevail on a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses Petitioner could have requested counsel develop and present had counsel been more prepared. Id.

Discussion

Defense counsel provided ineffective assistance of counsel when he failed to adequately investigate Petitioner's alibi defense. That ineffective assistance prejudiced Petitioner because but for defense counsel's deficient performance her trial would have resulted differently. Had Petitioner's alibi defense been properly investigated it would have shown that she was not at home at the stated time of death of decedent minor.

The United States Supreme Court has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; See Wiggins v. Smith, 539 U.S. 510, 527 (2003) (noting "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must not

² While PCR counsel did not present evidence that he attempted to procure video surveillance evidence, from either the Bass Pro Shops or the video store, it is unreasonable to think that he could locate surveillance footage from seven years ago, where defense counsel never gathered such evidence nor admitted such evidence to trial.

only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further”).

This Court has also held that defense counsel has a duty “to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); See Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (finding “while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case”) (internal quotations omitted).

Here, defense counsel admitted that he did *not* attempt to interview any of the potential alibi witnesses. App. 1230, ll. 5 – 19. Defense counsel failed to review the video surveillance evidence at Petitioner’s work or the video store she visited on the day of the incident. Id. Accordingly, the PCR court erred in finding that trial counsel conducted a reasonable investigation in preparation for Petitioner’s trial because trial counsel’s performance was not reasonable “under prevailing professional norms.” App. 1285 – 1305; See Strickland, 466 U.S. at 687-88; Cherry, 300 S.C. 115, 386 S.E.2d 624.

The PCR court found that because Petitioner did not call her alibi witnesses to the PCR hearing that her claim of ineffective assistance for failure to investigate was barred. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-146 (2008). However, Petitioner’s case is distinguishable from Harris, because Petitioner’s testimony at the PCR hearing cleared any speculation as to how defense counsel’s deficient investigation prejudiced her. App. 1209, l. 19 – 1210, l. 19.

The Court in Harris stated, “Harris did not offer any evidence or argument as to how

counsel's lack of preparation prejudiced him." Harris, at 75, 659 S.E.2d at 145. Here at the PCR hearing, Petitioner offered extensive arguments about how the lack of investigation into her alibi prejudiced her. Namely, that the failure to investigate into her alibi defense left her unable to prove she was not around the deceased minor at the stated time of injury. App. 1209, l. 19 – 1210, l. 15. Petitioner also clarified as to what defense counsel would have uncovered had an adequate investigation been conducted. App. 1210, ll. 4 – 15. Furthermore, the Harris Court found that his trial counsel's testimony directly refuted Harris's testimony. In the present case, trial counsel admitted he could have done more to conduct an adequate investigation into her alibi defense. App. 1230, ll. 5 – 19.

The United States Supreme Court has held that "prejudice is presumed" when defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 659 (1984); See Nance v. Ozmint, 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (holding that "pre-se prejudice occurs if there has been a constructive denial of counsel," which arises when defense counsel's deficient performance constitutes "a classic example of a complete breakdown in the adversarial process"); see also Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an applicant "must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary").

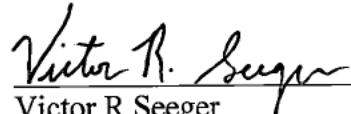
Here, defense counsel "abandoned his role as defense counsel" and "failed to act as an adversary to the prosecution," as he did not attempt to investigate into Petitioner's alibi defense nor interview the relevant witnesses. See Cronin, 466 U.S. at 659; App. 1209, l. 19 – 1210, l. 19. Defense counsel admitted as much at the PCR hearing when he stated that the entirety of his investigation into Petitioner's alibi defense was measuring the travel time between locations

Petitioner had been on the day of the incident. App. 1230, ll. 5 – 19. Moreover, he also admitted that he could have done more to adequately conduct the investigation into Petitioner’s alibi defense. Id.; Nance, 367 S.C. at 557-58, 626 S.E.2d at 883.

Petitioner was prejudiced because trial counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” App. 1038 – 1039; Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

By reason for the foregoing arguments, Petitioner respectfully requests that this Court remand her case to the circuit court for a new trial, or in the alternative, grant certiorari to allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable Steven H. John, Circuit Court Judge

JULIA SHAWNETTE GORMAN,

PETITIONER

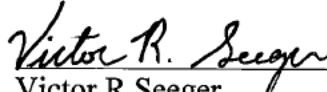
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STATE OF SOUTH CAROLINA,

RESPONDENT

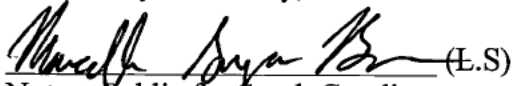
CERTIFICATE OF SERVICE

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 Johnny Ellis James, Jr., 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 Julia Shawnette Gorman, #348815, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 7th day of January, 2019.



Victor R Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 7th day of January, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028