

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Clarence Gibbs, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-137347

ON WRIT OF CERTIORARI

Appeal from Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27253
Submitted June 1, 2012 – Filed May 15, 2013

AFFIRMED

Appellate Defender Katherine H. Hudgins, of Columbia,
for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, and Christina
J. Catoe, all of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the denial of Clarence Gibbs's (Petitioner) second application for post-conviction relief (PCR). We hear this matter pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), for PCR counsel failed to seek certiorari review following the denial of Petitioner's first PCR application. After being convicted by a jury of kidnapping, armed robbery, and possession of a deadly weapon during the commission of a violent crime, and unsuccessfully pursuing a direct appeal, Petitioner sought PCR on two grounds: (1) trial counsel was ineffective for failing to contemporaneously object to the introduction of a lineup, a show-up, and in-court identifications; and (2) trial counsel was ineffective in failing to request a jury instruction on the law of alibi as part of the defense strategy. We affirm.

I.

On the evening of April 10, 2005, a robbery occurred at a grocery store in Georgetown, South Carolina. The police arrived to the scene shortly after the robber fled. Three different witnesses were interviewed about the incident. One witness, John Fowlkes, described the robber as a middle-aged or older black man with a "scruffy beard with distinct gray colorings in it." He also noted the robber wore a black hat and blue jacket. Another witness, Greg Morton, indicated the robber was wearing a black hat and a blue or black jacket. Eric Sessions, the third witness, informed police the robber was wearing a blue hat and a blue jacket. Officers also reviewed a surveillance tape that captured the robbery, and a black jacket found at Petitioner's home was positively identified by all three witnesses as the jacket worn by the robber.

Approximately ten days after the robbery, police officers presented two photographic lineups, each containing six pictures of people generally matching the description given by the witnesses, to each witness individually.¹ The first photographic lineup contained a picture of Petitioner. Upon viewing the lineups, Fowlkes and Morton identified Petitioner as the robber. Sessions, however, was unable to identify the perpetrator via the lineups.

Nearly one week later, Petitioner was transported to the police station for questioning. The three witnesses were brought to the station to view Petitioner.

¹ At the time of trial, the second lineup had been lost. However, two police officers and two of the witnesses testified that the photographs in the second lineup were similar to the photographs contained in the first.

According to Fowlkes, he was taken to a one-way mirror to determine whether Petitioner had any involvement in the robbery. Fowlkes testified he saw a white male and Petitioner behind the glass and that he instantly recognized Petitioner as the robber. Likewise, Morton testified Petitioner was in the room with two police officers and was able to identify Petitioner as the robber. When Sessions viewed Petitioner, however, he informed police he was sure Petitioner was *not* the perpetrator.²

Petitioner was subsequently charged with kidnapping, armed robbery, and possession of a deadly weapon during the commission of a violent crime.

Petitioner moved to suppress the evidence related to the photographic lineup, show-up, and any potential in-court identifications. Following a pretrial *in camera* hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972), the trial court denied Petitioner's motion to suppress. The trial court found the photographic lineup and show-up identifications were not unduly suggestive and permitted the witnesses to make in-court identifications at trial.

At trial, both Fowlkes and Morton identified Petitioner as the robber.³ Fowlkes's photographic lineup identification, show-up identification, and in-court identification were admitted into evidence without contemporaneous objection by the defense.⁴ When the State sought to introduce Morton's photographic lineup

² All three witnesses were also permitted to hear Petitioner's voice during the show-up. Again, Fowlkes and Morton stated they recognized Petitioner's voice from the robbery, while Sessions stated it was not the robber's voice.

³ Sessions, however, testified Petitioner was not the robber.

⁴ Defense counsel later objected to the introduction of the photographic identifications after the State requested the store surveillance footage be admitted into evidence, stating, "I mean, Your Honor, for clarification when the lineup was introduced into evidence previously I think I did not voice an objection. I would like the record to reflect that the lineup that was introduced was subject to a previous objection. The court has ruled and admitted that lineup but I'd like the record to reflect that that is subject to our previous objection."

identification into evidence, defense counsel raised a contemporaneous objection.⁵ However, defense counsel did not object to the introduction of Morton's show-up or in-court identifications.⁶

Following the State's case-in-chief, Petitioner presented an alibi defense. Specifically, Petitioner testified he was at home with his mother and girlfriend watching television at the time the robbery occurred. Petitioner's mother and girlfriend corroborated his story. Both testified they were home with Petitioner on the night of the robbery watching the television show *JAG* between 9:00 and 10:00 p.m. The State presented two rebuttal witnesses who testified that the only two stations available to Petitioner did not air *JAG* on the night of the robbery.⁷

During closing arguments, both defense counsel and the State presented arguments to the jury regarding Petitioner's alibi. The trial court held a charge conference outside the presence of the jury. Defense counsel did not request a jury instruction on the law of alibi testimony. In its charge, the trial court provided instructions to the jury on the burden of proof in criminal cases and reasonable doubt and informed the jury they should consider only competent evidence and determine the credibility of the witnesses. Additionally, the trial court instructed the jury on identification and that the State had the burden of proving identity beyond a reasonable doubt.⁸

Petitioner was convicted by the jury on all three counts and sentenced to concurrent terms of twenty years' imprisonment for the armed robbery and the kidnapping, and five years' imprisonment to run consecutively for the possession

⁵ Specifically, defense counsel stated that his objection was "[s]ubject to [his] previous objection."

⁶ Defense counsel did object to the introduction of the lineup itself into evidence.

⁷ Petitioner's mother and girlfriend testified that the only channels available on Petitioner's television were ABC and FOX. Petitioner, however, testified that his television also received two other channels, including the local CBS channel, which could have aired the CBS affiliated show.

⁸ The court explained that identification testimony is "an expression of belief or impression by a witness," and the accuracy of the identification must be determined by considering the believability of each identification witness.

of a firearm during commission of a violent crime. On direct appeal, the court of appeals affirmed Petitioner's conviction and sentence. *State v. Gibbs*, Mem. Op. No. 2007-UP-333 (S.C. Ct. App. filed June 27, 2007).

Subsequently, Petitioner filed two applications for PCR, which were consolidated into one action. In seeking relief, Petitioner alleged defense counsel was ineffective for failing to contemporaneously object to the introduction of the photographic lineup, show-up, and in-court identifications and for failing to request an alibi charge.

At the PCR hearing, defense counsel testified he believed Petitioner's best defense was to challenge the witnesses' inconsistent identifications but admitted he should have objected to the introduction of the identification evidence and preserved the issue for appellate review. However, he assumed the identifications would be admitted, and he was solely concerned with rebutting the identifications. Counsel also testified that he did not request the jury instruction on the law of alibi because he believed the identification issues was the stronger defense strategy. He nonetheless acknowledged that he should have requested an alibi charge.

The PCR court found defense counsel was deficient for failing to contemporaneously object to the introduction of the photographic lineup, show-up, and in-court identifications because counsel's mistake foreclosed review of the issues on appeal. However, the PCR court found Petitioner was not prejudiced by counsel's deficiency because the trial court admitted the identifications after conducting a thorough *Neil v. Biggers* hearing.

Regarding the alibi charge, the PCR court found defense counsel's performance was deficient because he failed to ensure that an alibi instruction was given to the jury. However, the PCR court found that Petitioner had not proven prejudice because the jury charge given "was sufficient to inform the jury that the State had to prove beyond a reasonable doubt that [Petitioner] was not at home at the time of the of the crime, and that he was, in fact, at the scene of the crime."⁹ Thus, the PCR court denied Petitioner relief. No appeal was taken.

⁹ The PCR court also noted that the critical issue in the case was credibility, and not alibi "because the jurors could believe *either* the State's identification witness, *or* they could believe the alibi witnesses, *but not both*." (emphasis in original).

Following his initial PCR application and hearing, Petitioner filed a subsequent PCR application. Petitioner alleged his PCR counsel failed to file a notice of intent to appeal the denial of relief in his first PCR. The State filed an amended return requesting a hearing pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). After an evidentiary hearing, the PCR court found Petitioner was entitled to belated review of the denial of his first PCR application. Thereafter, Petitioner filed an *Austin* petition for writ of certiorari from the first PCR court's order denying him relief. This Court granted the petition for writ of certiorari as to the order granting a belated appeal and from the order denying Petitioner PCR pursuant to Rule 243, SCACR.

II.

To establish a claim for ineffective assistance of counsel, "the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). An applicant may demonstrate prejudice by establishing, by a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (citation omitted).

In reviewing the findings of the PCR court, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The "PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514 (citing *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626).

III.

With respect to both issues on appeal, the PCR court found trial counsel was deficient, but that Petitioner was not prejudiced by his counsel's deficient performance. We hold these findings are amply supported by the evidence. We address each in turn.

A.

Petitioner contends the PCR court erred in finding he was not prejudiced by counsel's failure to contemporaneously object to the introduction of the photographic lineup, show-up, and in-court identifications. We disagree.¹⁰

The purpose of an *in camera* hearing when the State offers identification witnesses is for the trial court to decide "whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." *Id.* (citing *State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001)). When analyzing the admissibility of an out-of-court identification, courts utilize a two-pronged analysis. *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). First, a court must determine "whether the identification process was unduly suggestive." *Id.* (quoting *Curtis v. Commonwealth*, 396 S.E.2d 386, 388 (Va. Ct. App. 1990)). Second, a court must determine "whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Id.*

After conducting a thorough *in camera Neil v. Biggers* hearing, the trial court determined the identification procedures utilized by the police, specifically the photographic lineup and the suggestive show-up, were not unduly suggestive.

We find support for the PCR court's determination that the trial court did not abuse its discretion in finding the photographic lineup identifications were reliable, as there was not a substantial likelihood of misidentification. *See Moore*, 343 S.C. at 286, 540 S.E.2d at 447. Moreover, we concur with the assessment that the failure of one witness to positively identify Petitioner as the robber does not require a contrary result, as the credibility of the witnesses was thoroughly vetted and put to the jury. *See, e.g., Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 614–15 (Ct. App. 1984) (citations omitted) ("Assessment of the credibility of witnesses is a question for the jury, not the court, and it is the jury that decides the weight to be afforded the testimony.").

¹⁰ The PCR court correctly held that defense counsel's failure to make a contemporaneous objection constituted deficient performance. *See State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (reiterating that "[a] contemporaneous objection is required to properly preserve an error for appellate review").

As to the show-up identifications, Petitioner argues that the trial court erroneously admitted these identifications and trial counsel's failure to object was prejudicial. In general, "one-on-one show-ups have been sharply criticized, and are inherently suggestive." *Moore*, 343 S.C. at 287, 540 S.E.2d at 448 (quoting *Jefferson v. State*, 425 S.E.2d 915, 918 (Ga. Ct. App. 1992)). Nevertheless, there is no bright line rule concerning show-ups, as the ultimate decision is controlled by the particular facts and circumstances. For example, courts have deemed a show-up procedure proper "where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching." *State v. Mansfield*, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000) (quoting 22A C.J.S. *Criminal Law* § 803). "The closer in time and place to the scene of the crime, the less objectionable is a show-up." *Id.*

Thus, the inquiry turns upon "whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." *State v. Moore*, 343 S.C. at 287, 540 S.E.2d at 448 (quoting *Jefferson v. State*, 425 S.E.2d at 918). In other words, "[s]uggestiveness alone does not mandate the exclusion of evidence." *Mansfield*, 343 S.C. at 78, 538 S.E.2d at 263 (citations omitted). Instead, "[r]eliability is the linchpin in determining the admissibility of identification testimony." *Id.* (citations omitted); *see also State v. Moore*, 343 S.C. at 287, 540 S.E.2d at 448 ("[T]he identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure." (quoting *Jefferson v. State*, 425 S.E.2d at 918)).

While the show-up procedures used here were unduly suggestive, the finding of the PCR court that the identifications were reliable under the circumstances is supported by the evidence. Because the two witnesses previously identified Petitioner as the robber from the photographic lineup, the subsequent show-up may be characterized as merely confirmatory and therefore reliable, despite the suggestive procedure. *See Moore*, 343 S.C. at 287, 540 S.E.2d at 448–49 ("Although one-on-one show-ups have been sharply criticized, and are inherently suggestive, the identification need not be excluded as long as under the [the totality of the] circumstances the identification was reliable notwithstanding any suggestive procedure.").

In sum, the failure of trial counsel to contemporaneously object to the identification testimony did not result in any prejudice to Petitioner. The probative

evidence in the record supports the PCR court's finding that the trial court did not abuse its discretion in admitting the evidence because the identifications were not so unduly suggestive as to create a likelihood of misidentification. Thus, a contemporaneous objection by trial counsel would not have changed the outcome of Petitioner's case on appeal.

B.

Petitioner also contends the PCR court erred in finding Petitioner was not prejudiced by his counsel's deficient performance in failing to request a jury charge on alibi. We disagree.

In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed "in its entirety and not in isolation." *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

At trial, Petitioner asserted an alibi defense, but defense counsel failed to request an alibi instruction. The PCR court determined that trial counsel's failure to request an alibi instruction constituted deficient representation, but Petitioner "has not proven that he suffered prejudice from the lack of an alibi charge." The PCR court relied on the jury charge as a whole to support its finding of no prejudice.

The relevant portion of the jury charge was:

Now, at issue in this case is the identification of the Defendant as the person who committed the crimes charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict the Defendant. . . . You must determine the accuracy of the identification of the Defendant. You must consider the believability of each identification witness in the same way as you do any other witness. . . . Once, again, I instruct you the burden of proof is on—the burden of proof is on the State and extends to every element of the crime and this specifically includes the burden of proving beyond a reasonable doubt the identity of the Defendant as the person who committed the crimes. If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the Defendant not guilty.

Given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt, the PCR court's finding of no prejudice must be sustained under the any evidence standard of review.

AFFIRMED.

HEARN, J., concurs. PLEICONES, J., concurring in result only. TOAL, C.J., dissenting in a separate opinion in which BEATTY, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. While I agree that the PCR judge correctly found defense counsel ineffective for failing to request a jury charge on alibi, I would find the PCR court erred in finding Petitioner was not prejudiced by counsel's deficient performance because (1) the evidence presented at trial warranted an alibi charge and (2) the State did not present overwhelming evidence of Petitioner's guilt.

An alibi charge is required where the defendant claims to be elsewhere at the time the crime was committed. *State v. Robbins*, 275 S.C. 373, 374–75, 271 S.E.2d 319, 319–20 (1980). Generally, the failure to give an alibi charge under these circumstances constitutes reversible error. *Id.* However, if the State presents overwhelming evidence of a defendant's guilt at trial, then there is no reasonable probability that the result of the trial would have been different had trial counsel requested an alibi charge, and reversible error is not present. *Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994). "An alibi charge places no burden on the defendant, but emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime." *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994) (citing *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943)).

It is the settled law of this State that to avoid a finding of ineffectiveness for failing to request an alibi charge, defense counsel "must articulate a valid reason for employing a certain strategy" and therefore, not requesting the charge. *Roseboro*, 317 S.C. at 293–94, 454 S.E.2d at 313 (citation omitted). While our prior cases may have suggested a *per se* rule of prejudice based on the mere failure of defense counsel to request an alibi charge, see *Commonwealth v. W. Hawkins*, 894 A.2d 716, 732 n.21 (Pa. 2006) (noting that this Court's ruling in *Roseboro* "approaches a rule of *per se* prejudice under the circumstances" but "did not rule out that a reasonable basis for declining the instruction might occur"), it is my opinion that claims of ineffectiveness based on the failure to request an alibi instruction have been and should continue to be evaluated on a case-by-case basis under an objective standard of reasonableness, *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313. In *Roseboro*, this Court reiterated that "[a]n alibi charge is considered especially crucial when the evidence is entirely circumstantial," and "[t]he Solicitor's disparagement of [the] petitioner's alibi further renders counsel's strategy unreasonable since an alibi charge would have corrected any impression [the] petitioner bore any burden of proof at trial." *Id.* at 294, 454 S.E.2d at 313. In another instance, this Court found that the failure to request an alibi charge is not prejudicial where the State has presented "overwhelming evidence of the

petitioner's guilt." *See Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994). All of these circumstances are contributive factors towards a determination that "counsel's professed strategy" in a given case is either valid or "invalid under an objective standard of reasonableness." *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313.

In the present case, Petitioner argues that the evidence of guilt was not overwhelming because Sessions testified that Petitioner was not the robber; there was conflicting evidence concerning the color of the jacket found in Petitioner's home; and there was no other evidence connecting Petitioner to the robbery and that the State's reference to Petitioner's alibi testimony meant that the jury was not properly instructed that alibi "was not an affirmative defense imposing upon the defendant the burden of proof." On the other hand, the State argues that defense counsel and the State both referenced the alibi testimony in their closing arguments, and the State acknowledged that it had the burden of proving its case. In addition, the State argues that the trial judge gave a jury charge which included instructions on the burden of proof and the credibility of witnesses. Therefore, the State contends, the jurors would have understood that, if they found the testimony of Petitioner, his mother, and his girlfriend credible, a verdict of not guilty would be required.

The PCR court adopted a position consistent with the State's view that the jury charge on the whole, including standard instructions on the burden of proof and the credibility of witnesses, prohibited a finding that Petitioner suffered prejudice in this case.¹¹

¹¹ Likewise, the majority relies on this portion of the jury charge to support its conclusion that the PCR court's finding of no prejudice is supported by evidence in the Record. However, the legal concepts of alibi and credibility are not the same. While credibility deals with the believability of the witnesses, alibi testimony is presented for the purpose of proving that it was impossible for the defendant to commit the crime charged. *Compare, e.g., State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission."), *with Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997) ("The fact finder is imbued with broad discretion in determining credibility or believability of witnesses."). As discussed *infra*, I disagree with the majority that

However, in my view, the State did not present overwhelming evidence of Petitioner's guilt. The police did not find a gun, money, a black fishing hat, or any other physical evidence linking Petitioner to the robbery, with the exception of the jacket. While all three witnesses identified the jacket found in Petitioner's home as the one worn by the robber at trial, this evidence contradicted the witnesses' statements concerning the jacket's appearance. Finally, the identity evidence was conflicting.

Moreover, as in *Roseboro*, an alibi charge here was necessary to correct any indication the Solicitor may have given in his closing remarks that Petitioner "bore any burden of proof at trial." *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313 (emphasis added); see also *Riddle v. State*, 308 S.C. 361, 364, 418 S.E.2d 308, 310 (1992) (finding that the defense counsel's error in failing to request an alibi charge, coupled with the remarks made by the solicitor during closing arguments, were prejudicial to the defendant because "the absence of a charge on alibi gave rise to a conclusion by the jury that it was impermissible for them to consider the alibi defense."). In this case, there is no doubt the State's closing argument gave the impression that Petitioner bore some burden of proof on the issue of alibi, as the Solicitor referenced whether Petitioner could *prove* that he was at another place during the crime. Moreover, the Solicitor went out of his way to disparage the alibi witnesses, referring to them as liars and suggesting that Petitioner's girlfriend was high on drugs during her testimony.

During the PCR hearing, defense counsel stated he made a tactical decision to focus on the identification issues instead of the alibi evidence but that the law on alibi "certainly should have been charged to the jury." In light of the circumstantial nature of the State's case, the lack of overwhelming evidence proving Petitioner's guilt, and the State's disparagement of Petitioner's alibi testimony, in my view defense counsel's rationale for failing to request the alibi instruction was not reasonable under the circumstances. Therefore, I would find the PCR court erred in finding Petitioner suffered no prejudice by his counsel's failure to request an alibi instruction.

BEATTY, J., concurs.

the instruction provided, absent an explicit instruction on the law of alibi, was sufficient to overcome the concerns outlined in *Roseboro* and present in this case.