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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Brian M. Gibbons, Circuit Court Judge

HOLLY JO THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000846

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in denying relief where trial counsel inexplicably failed to pursue a pre-trial immunity hearing under the Protection of Persons and Property Act?

STATEMENT OF THE CASE

On January 27, 2014, Odell Middleton discovered the body of James Solomon (Decedent)[1] on the floor of the Decedent's trailer and called 911. App. 103, l. 20-App. 104, l. 7; App. 112, ll.13-17. Middleton saw that there was blood and broken glass around the decedent's head. He also noted signs of a struggle in the home, such as the rugs being "kicked" and "tangled" up and the "sheets and stuff" having been "tore up on the bed." App. 104, l. 18-App. 105, l. 18; App. 109, ll. 5-13.

Investigators with the Richland County Sheriff's Department responded and processed the scene. Evidence collected included various blood swabs from the hallway, bedroom, and living room, a knife from the bedroom with blood on it, the bedroom sheets, and pieces of a glass vase. App. 267, l. 5-App. 268, l. 21. The blood evidence recovered from the home matched the Decedent. App. 382-398. A palm print in blood on the neck piece of the glass vase was matched to Holly Jo Thompson (Petitioner). App. 172, l. 24-App. 174, l. 4; App. 360, ll. 10-16.

An autopsy revealed that the Decedent had died from exsanguination due to multiple blunt and/or sharp force injuries. App. 322, ll. 21-24. The blunt force injuries were contained to the head with several superficial or shallow cuts to other parts of the body. App. 312, ll. 19-24; App. 318, ll. 11-18. A toxicology of the Decedent revealed alcohol, cocaine, and cocaine metabolites were present in his blood at the time of his death. Based on the levels of cocaine and cocaine metabolites in his blood, an expert with SLED opined that it was very possible the Decedent had taken multiple doses of cocaine on the day of his death and that the drug was influencing him at the time of his death. App. 612, ll. 7-23; App. 614, l. 23-App. 615, l. 8.

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[1] Decedent was found approximately two to three days after his death. App. 324, ll. 4-5.

Petitioner was arrested for the murder of Decedent. At the time of her arrest, Petitioner told officers that she had been at the Decedent's home the night of the incident but that she "didn't kill the man." App. 628, ll. 10-14. Both before and during trial, Petitioner stated that she worked as a prostitute and that the Decedent was a regular client of hers. He would generally provide her with drugs in exchange for sex. App. 522, ll. 2-13; App. 523, ll. 21-25. In the roughly nine months to a year that Petitioner had known the Decedent, they had engaged in sex for drugs and/or money over one hundred times. App. 522, l. 22-App. 523, l. 2; App. 635, ll. 19-22.

On the night of the incident, Petitioner received a message from her then boyfriend/pimp, Michael Richardson, that the Decedent wanted her to come over to his trailer. App. 420, ll. 1-4; App. 524, ll. 13-16; App. 538, ll. 19-20. When she arrived, the Decedent let her into his home where the two began conversing. Petitioner noted it was extremely warm in the trailer, and she started to undress. She also thought that the Decedent was acting funny when she arrived and was not himself. The two used crack cocaine together, and Petitioner tried multiple times to engage the Decedent in various forms of sex, but he was unable to achieve or maintain an erection. App. 526, ll. 16-App. 527, l. 7. As the evening progressed the pair continued smoking crack cocaine. Petitioner would attempt to arouse the Decedent, but he was unable to perform sexually and began to become angry. App. 528, ll. 10-App. 529, ll. 10.

After attempting to engage the Decedent in sex multiple times without success, Petitioner decided it was time for her to leave. However, when she tried to leave, the Decedent started to yell at her to give him his money and crack back, and repeated stated that he was going to kill her. He grabbed a knife that he had been using to cut the crack cocaine with and began to swing it at Petitioner. App. 529, l. 21-App. 530, ll. 13; App. 534, ll. 10-12. Petitioner sustained

defensive wounds on her hands and arms from where she attempted to avoid the knife Decedent was swinging at her. App. 530, ll. 7-13; App. 340, ll. 4-10. To protect herself, Petitioner grabbed a glass vase and swung it at the Decedent. The two continued to fight, he with a knife and her with a vase, until they both fell to the floor and the vase broke. At that point Petitioner got up, grabbed the remainder of her clothing, and left the trailer. When Petitioner fled from the Decedent's trailer, the Decedent was on his hands and knees, still yelling that he was going to kill her. App. 530, l. 17-App. 531, l. 19; App. 534, l. 1-App. 536, l. 22.

Petitioner thought she had struck the Decedent five or six times in the head with the vase prior to it breaking but was not sure. Petitioner maintained that she only grabbed the vase to defend herself against the Decedent's attack with the knife, that she was scared for her life, and that she did not feel she had any other option than to strike the Decedent with the vase. App. 534, ll. 20-App. 537, ll. 10. After she left the Decedent's trailer, she went back to Richardson's house and then called for Moses Warren to come pick her up. Both Richardson and Warren testified that Petitioner admitted to getting in a fight that night but that she did not offer any details about the event. Additionally, both men testified that they noticed marks or scratches on Petitioner. At trial, Warren confirmed he picked up Petitioner from the side of the road in the rain and took her to his home. Once there, he told Petitioner to shower so that she could warm up, and he noted that "she had all these blue marks on her, looked like somebody was throwing her around or knocking her out or something." He stated the marks were on Petitioner's arms, back, and legs. App. 421, l. 12-App. 422, l. 3; App. 439, l. 10-App. 442, l. 7.

The case was called to trial on February 16, 2016, before the Honorable Robert Hood and a jury. The state was represented by Luck Campbell, Meghan Walker, and Laura Gregg. Petitioner was represented by Robert Bank, Alicia Goode, and Rhodes Bailey. App. 1. As she

had from the beginning, Petitioner asserted she acted in self-defense when she killed the Decedent. App. 95, ll. 22-24. After a four-day trial, Petitioner was found guilty of murder and sentenced to forty-five years imprisonment. App. 758; App. 773, ll. 3-5.

Petitioner's conviction and sentence was affirmed on appeal. State v. Thompson, Op. No. 2018-UP-258 (S.C. Ct. App. filed June 13, 2018). Petitioner filed an application for post-conviction relief on August 29, 2018, alleging ineffective assistance of counsel for failing to call character witnesses and for failing to request Petitioner submit to a mental health evaluation. App. 776-781. The State filed a return dated January 10, 2019, requesting an evidentiary hearing. App. 783-790. A hearing was convened on October 29, 2019, before the Honorable Brian M. Gibbons. Petitioner was represented by Jonathan Waller. The State was represented by Samuel Key. App. 791. At the hearing, Counsel Waller proceeded on the claims of ineffective assistance of counsel raised in the original application. At the close of the hearing, Counsel Waller moved to amend the pleadings to conform to the evidence to include that counsel was also ineffective for failing to seek immunity prior to trial. App. 794-795; App. 836, ll. 4-10.

At the hearing, Petitioner testified that her claim had always been consistent, that she had been acting in self-defense, and that the Decedent was alive when she left his house. She confirmed that she had discussed the events of the incident with her lawyers many times. App. 799, ll. 4-20; App. 802, l. 20-App. 803, l. 7; App. 811, ll. 16-25. However, Petitioner did not remember talking with her attorneys about pursuing an immunity hearing and stated that she did not know such a thing existed, so she did not ask them about it. App. 807, ll. 15-22; App. 809, ll. 5-7.

Counsel Banks testified that the case was assigned to him and as trial drew near, he brought in Counsel Goode and Counsel Bailey to assist him with the defense of Petitioner. He

stated they had discussed the case many times, and he felt that Petitioner was always honest in her answers with him. He further testified that they had committed to asserting self-defense early-on in the case. App. 812, ll. 20-25; app. 815, ll. 3-25. Counsel Banks could not recall having a specific discussion with Petitioner about pursing immunity under the Protections of Persons and Property Act (the Act). He did not have anything in his case file notes concerning the matter. He stated

> I don't remember anything specifically other than just my general knowledge of the 30(b) (ph) statute in South Carolina. My first concern would probably we whether it was a place that she had a right to be, but I think it would have been. This was a place that she was invited into not only this night but regularly. So, I think it's definitely something that could have been explored.

He further clarified that it was his understanding that pursuing an immunity hearing pre-trial would not prevent him from asserting a claim of self-defense at trial. App. 816, ll. 4-22. When questioned by the State, Counsel Banks confirmed he was aware of the Act and that he could not recall a specific reason, "other than kind of typical pros and cons you do in any case" as to why he did not pursue an immunity hearing in Petitioner's case. App. 823, ll. 11-23.

Counsel Goode testified that she was technically the second chair during Petitioner's trial. She handled the opening statement and some of the crime scene witnesses. App. 828, ll. 8-10. She also testified she worked with Petitioner to prepare her for testifying at trial. App. 829, l. 17-App. 830, l. 8. Counsel Goode was not asked about whether they discussed pursuing an immunity hearing. Counsel Bailey stated he was brought in as third chair to assist and supervise as Counsel Banks was "still pretty new" as a lawyer, and he believed this was his first murder case. He testified that he did not think they discussed seeking immunity in Petitioner's case, and he did not recall having an immunity hearing in Petitioner's case. App. 834, ll. 4-22.

The PCR court issued an order of dismissal on July 28, 2021, finding that Petitioner had failed to meet her burden of proof. App. 840-858. Regarding the failure to seek immunity claim, the court found that Petitioner's trial lawyers were not deficient because they "articulated a valid strategy of focusing the defense efforts on pursuing a theory of self-defense." App. 857.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in denying relief where trial counsel inexplicably failed to pursue a pre-trial immunity hearing under the Protection of Persons and Property Act.

The PCR court incorrectly found that Petitioner's counsel was not ineffective because counsel did not articulate a valid strategy for failing to pursue immunity under the Act. In its ruling the PCR court misconstrued Counsel Banks testimony taking his statements of what he *should have done* as what he did do. The testimony of Counsel Banks, Counsel Rhodes, and Petitioner make it evident that an immunity hearing under the Act was neither considered nor discussed, and there was no valid strategy offered to excuse such a failure.

"The Sixth Amendment guarantees every criminal defendant the reasonably effective assistance of counsel." Stone v. State, 419 S.C. 370, 379, 798 S.E.2d 561, 566 (2017) citing U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 683, (1984). "The benchmark for judging any claim of ineffectiveness must be whether 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 at 686 (1984). 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. "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 has held that trial counsel's decision to employ a certain strategy will not be found to be deficient performance *if counsel articulates a valid reason for employing the strategy*. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017) (emphasis added). "The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound." Id.

The PCR court found that counsel for Petitioner was not ineffective in failing to pursue an immunity hearing because Counsel considered the relevant factors of the Act and decided to instead focus on asserting self-defense at trial. This testimony does not exist in the record. What Counsel Banks testified to was that he did not recall having discussions with Petitioner or his co-counsel about an immunity hearing, that he had no notes regarding discussions about an immunity hearing, and that his first concern *if he would have considered a hearing* probably would have been whether the Decedent's home was a place Petitioner had the right to be. App. 816, ll. 4-19. Further, neither Counsel Rhodes nor Petitioner had any recollection of discussing pursuing immunity from prosecution under the Act.

The court further found Counsel Banks' failure to file for immunity pursuant to the Act was not deficient performance by ruling that he articulated a valid strategy of focusing on self-defense. However, again, this testimony does not exist in the record. Notably, Counsel Banks testified a hearing under the Act was "something that could have been explored." He confirmed that he understood he could have pursued immunity from prosecution under the Act and *still asserted self-defense at trial.* App. 816, ll. 20-22. At no point did he, or anyone else, testify that

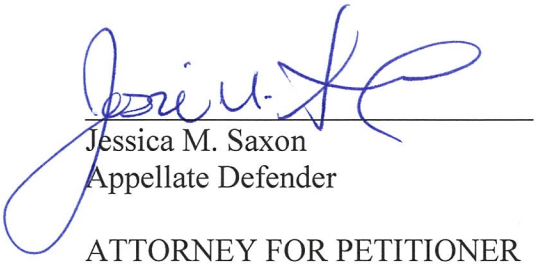
there was an affirmative decision to forgo a hearing under the Act to focus on self-defense at trial.

Even if there had been some affirmative decision to forgo a hearing and focus on self-defense, Counsel Banks was still required to articulate a valid reason for *not* pursuing immunity under the Act. While there are no appellate court decisions on this matter in South Carolina, the Supreme Court of Georgia has found that counsel was not ineffective for failing to file for immunity when counsel *explicitly stated* that the reason for not pursuing pretrial immunity was to avoid exposing the defendant to pre-trial cross examination from the State. Dent v. State, 810 S.E.2d 527 (Ga. 2018). Unlike the clear reasoning stated in Dent, the record in the matter *sub judice* is utterly devoid of any strategic reasoning for failing to file for a hearing under the Act.

Counsel's failure to even consider, much less pursue, immunity under the Act was deficient performance. Considering Petitioner's unwavering claim of self-defense, it was not reasonable under prevailing professional norms to not move for immunity under the Act. Petitioner was prejudiced, in that she could have been found immune from prosecution under on the lesser standard of preponderance of the evidence. Further, if she had been denied immunity, the appellate courts of our State could have reviewed that decision for errors or abuses of discretion. Finally, despite the finding in the order of dismissal Counsel Banks offered no reason for failing to move for immunity under the Act. The failure to move for immunity under the Act was ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



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This 13th day of June, 2022.