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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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MAY 24 2013

The Honorable D. Garrison Hill, Trial Judge
The Honorable G. Edward Welmaker, Post-Conviction Relief Judge

S.C. Supreme Court

Appellate Case No. 2010-151951

Morris Antonio Sullivan, Petitioner,

v

State of South Carolina, Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have objected when the trial judge did not give a jury charge of language from State v. Burriss.¹

¹ 334 S.C. 256, 513 S.E.2d 104 (1999).

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the September 1998 term of General Sessions for murder (1998-GS-23-4313, count 1) and possession of a weapon during commission of a violent crime (1998-GS-23-4313, count 2)² and at the December 2005 term for possession of a pistol under 21 years of age (2005-GS-23-9999). (App.pp.548-51). Steven W. Sumner, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty of voluntary manslaughter and both weapons charges. On January 20, 2006, the Honorable D. Garrison Hill sentenced Petitioner to concurrent terms of eighteen years for voluntary manslaughter, five years for possession of a weapon during commission of a violent crime, and one year for possession of a pistol under 21 years of age. (App.pp.491-92).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders³ brief. The Court of Appeals dismissed the appeal State v. Sullivan, Op. No. 2008-UP-478 (S.C. Ct. App. filed August 11, 2008).

Petitioner filed an application for post-conviction relief (PCR) on January 28, 2009 (2009-CP-23-0711). (App.pp.494-503). A hearing was convened at the Greenville County Courthouse on November 12, 2009. (App.pp.509-37). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South

² These indictments were originally brought to trial in February 1999. After the jury found Petitioner guilty, he filed an application for post-conviction relief. The Honorable John W. Kittredge granted relief and ordered a new trial in an order dated October 2, 2002. The State was unsuccessful on appeal and the charges were remanded for a new trial.

³ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker denied relief in an order dated December 18, 2009. (App.pp.539-45).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have objected when the trial judge did not give a jury charge of language from State v. Burris.

Petitioner argues trial counsel failed to request "a specific Burris charge" and failed to object when such a charge was not given. (Pet. Cert., p.8). This argument is without merit.

A.

At trial, several State witnesses testified the victim and Petitioner were in Petitioner's living room when they began to argue. (App.pp.143-44; pp.150-51; pp.174-75; p.195, p.206; p.219; p.237). The victim followed Petitioner to a back room of the house. (App.p.144; p.151; p.175; p.196; p.207; p.219; p.237). When the two men returned to the living room, Petitioner was holding a gun. (App.p.144; p.176; pp.196-97; p.219; p.237). Petitioner was holding the gun when the victim advanced and dared Petitioner to shoot him. (App.p.177; p 183). Petitioner fired a warning shot into the floor

but the victim continued to advance towards him. (App.pp.177-78; pp.183-84; p.197; pp.219-20; p.223; p.238). Petitioner shot the victim in the leg and chest, killing him. (App.pp.177-78; pp.223-24). In addition to several other requests to charge, trial counsel twice quoted State v. Burriss in seeking a jury charge that “a person can be acting lawfully even if he is in unlawful possession of a weapon if he was entitled to arm himself in self-defense at the time of the shooting.” (App.pp.341-42; pp.387-88). The trial judge charged the jury on: murder, voluntary manslaughter, involuntary manslaughter, self-defense, defense of habitation, and defense of necessity. (App.pp.435-37; pp.437-39; pp.439-40; pp.442-46; pp.446-47).

B.

At the PCR hearing, Petitioner stated he told trial counsel he wanted a jury charge that he could lawfully arm himself in self-defense, but that he did not receive such a charge. (App.pp.531-32).

Trial counsel testified he argued the following defenses at trial: self-defense, defense of habitation, and necessity. (App.p.513). Trial counsel testified he requested the trial judge charge language from Burriss that a person can act lawfully in self-defense even if they were unlawfully armed at the time. (App.p.519; pp.522-23). Trial counsel stated the exact language from Burriss was not charged to the jury. (App.p.518; p.523). Trial counsel testified, however, that he believed the substance of the Burriss language was given to the jury through the jury charges for involuntary manslaughter, self-defense, defense of habitation, and necessity. (App.p.526)

In denying Petitioner’s application for post-conviction relief, the PCR judge found

Petitioner “failed to meet his burden of proving trial counsel should have insisted on a jury charge from State v. Burriss.” The PCR judge noted trial counsel cited Burriss and found that the essence of the Burriss language was both argued to the jury and contained in the jury charges for involuntary manslaughter, self-defense, necessity, and defense of habitation. (App.p.542)

C.

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984). The PCR applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. at 118, 386 S.E.2d at 625.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citation omitted).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proof. Initially, Respondent notes that – contrary to Petitioner’s assertions – trial counsel did request the Burriss language be charged to the jury. Trial counsel, in fact, made two such requests. (App.pp.341-42; pp.387-88). As such, Petitioner’s argument that trial counsel failed to make a request for the judge to charge the Burriss language is refuted by the record. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App 2007).

Further, there was neither error nor resulting prejudice in trial counsel’s decision not to object or make an exception after the trial judge issued the charges to the jury. The requested Burriss language is that “a person can be acting lawfully even if he is in unlawful possession of a weapon if he was entitled to arm himself in self-defense at the time of the shooting.” (App.pp.341-42; pp 387-88). State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The trial judge charged the jury on the law of: involuntary manslaughter, voluntary manslaughter, murder, self-defense, defense of habitation, and defense of necessity. The substance of the Burriss language, therefore, was provided to the jury. Involuntary manslaughter is the unintentional killing of another without malice. See, e.g., State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010). The involuntary manslaughter jury charge also noted: (1) the State must prove “the defendant unintentionally killed the victim without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or the defendant unintentionally killed the victim without malice while engaged in a lawful activity with the reckless disregard for the safety of others” and (2) that the “reckless disregard” portion of the

offense could be satisfied by the defendant failing to use precautions when handling a dangerous instrumentality such as a gun. (App.pp.439-40). Self-defense is charged to a jury when one (without having brought on the difficulty), is in imminent danger of death or serious injury and must act in order to save himself when there is no other means of avoiding that danger. See, e.g., State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007). The self-defense charge also noted that: (1) words and hostile acts may establish self-defense and (2) one has the right “to use so much force was appeared necessary for complete self-protection.” (App.pp.442-46). The defense of habitation is that one can – in their own residence – use necessary force to protect himself or others from death or bodily harm. See, e.g., State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). The defense of habitation charge also included language that one may defend himself “from imminent attack from another on his own premises, provided that the person has a reasonable belief that he is in imminent danger o[f] attack.” (App.pp.446-47). The defense of necessity is that an emergency arose (not caused by the defendant) that caused fear of death or serious bodily injury that resulted in the defendant having no other choice but to commit the crime. (App.p.447). See, e.g., State v. Sullivan, 345 S.C. 169, 547 S.E.2d 183 (2001). As such, it was not incumbent upon trial counsel to have made an objection or exception to lack of Burriss language after the trial judge issued these comprehensive jury charges.

Regardless of the foregoing, Petitioner cannot prove he was prejudiced by not receiving a jury charge on the Burriss language because Burriss is distinguishable from the instant case. In Burriss, the defendant waited for his friend outside an apartment when the friend arrived with three other men. After being pushed to the ground, Burriss

drew a gun from his pocket and fired twice into the ground. After the second shot misfired, Burriss's assailants retreated. As Burriss attempted to stand, one of the assailants went back towards him, Burriss accidentally fired his gun, and the assailant was killed. This Court held "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Burriss, 334 S.C. at 262, 513 S.E.2d at 108. However, this Court found the facts merely entitled Burriss to the jury charge of accident (in addition to the charge of self-defense that was already given).

In State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003), the defendant stated he was stopping a fight between three women. When Crosby pulled the victim's girlfriend off the other two women, the victim threatened him. The victim charged at Crosby with his hands behind his back, Crosby pulled a gun out of his pocket, closed his eyes, pulled the trigger, and killed the victim. This Court held Crosby was entitled to an involuntary manslaughter charge because there was ample evidence for a jury to infer Crosby did not intentionally discharge the weapon. Id. at 53, 584 S.E.2d at 112-13. In State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010), the defendant struggled over a gun with the victim – the girlfriend he had been fighting with all day. Brayboy claimed the gun "just went off." This Court found Brayboy was entitled to an involuntary manslaughter charge since the jury could determine he was lawfully armed in self-defense and negligently handled the loaded gun. Id. at 183, 691 S.E.2d at 487.

The facts in the instant case are easily distinguishable from those in Burriss, Crosby, and Brayboy. Petitioner did not fire the weapon accidentally or unknowingly.

Petitioner fired a warning shot into the ground and two subsequent shots at the victim while he was being charged. All three shots were intentional and there is no dispute Petitioner was the shooter. The jury in this case was charged on the law of involuntary manslaughter which, based on cases such as Crosby and Brayboy, was not warranted because the shooting was intentional and not accidental or reckless. Where involuntary manslaughter is properly charged to the jury, a charge using the Burriss language would be necessary. But in Petitioner's case, the involuntary manslaughter charge was not necessary or supported by the facts. There was no indication of recklessness or accident – the uncontroverted trial testimony was that Petitioner intentionally shot the victim. This cannot qualify as involuntary manslaughter and the Burriss language would be inapplicable because whether or not the action was lawful would be irrelevant. As Petitioner was not entitled to receive a jury charge on involuntary manslaughter, there can be no prejudice from the fact that the Burriss language was not charged in this case.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying Petitioner's PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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MAY 29 2013

SC Court of Appeals

I further certify that all parties required by Rule to be served have been served.
This 24th day of May, 2013.


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