

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY
Robert E. Hood, Trial Judge
Brian M. Gibbons, PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2021-000846

HOLLY JO THOMPSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Question

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.

Respondent's Counterstatement of Question

Did the PCR court properly find Petitioner did not prove trial counsel was ineffective for not requesting a pretrial immunity hearing when (1) Petitioner, by her own testimony, was at Victim's home engaged in unlawful activity at the time of the incident, making the presumptions of the Protection of Persons and Property Act inapplicable, (2) Petitioner's trial testimony was inconsistent with the blood spatter evidence, making it not reasonably likely a trial court would have granted pretrial immunity, and (3) evidence supports the PCR court's finding that counsel was not deficient because counsel testified he engaged in a pro/con analysis when deciding whether to pursue immunity?

STATEMENT OF THE CASE

Procedural History

Petitioner Holly Jo Thompson is presently confined in the South Carolina Department of Corrections serving a forty-five-year sentence. In April 2014, the Richland County Grand Jury indicted her for the murder of James Solomon (Victim). On February 16-19, 2016, Petitioner proceeded to a jury trial before the Honorable Robert E. Hood. Public Defenders Robert Bank, Alicia Goode, and Rhodes Bailey represented Petitioner, and Assistant Solicitors Luck Campbell, Meghan Walker, and Laura Gregg prosecuted the case. Petitioner was convicted as indicted, and the trial court sentenced her to forty-five years' imprisonment.

Petitioner filed a direct appeal that was perfected by Appellate Defender Kathrine Haggard Hudgins. On appeal, Petitioner argued the trial court erred in (1) not instructing the jury on involuntary manslaughter, (2) not requiring the State to provide defense counsel with rap sheets of jurors with convictions, and (3) refusing to allow defense counsel to recross the forensic pathologist but allowing the prosecution to recross Petitioner. On June 13, 2018, the Court of Appeals issued an opinion affirming. See State v. Thompson, 2018-UP-258 (S.C. Ct. App. filed Jun. 13, 2018). The remittitur was sent June 29, 2018.

On August 29, 2018, Petitioner filed this application for post-conviction relief (PCR). On October 29, 2019, an evidentiary hearing was held before the Honorable Brian M. Gibbons. Jonathan Waller represented Petitioner and Assistant Attorney General Samuel Key represented the State. On July 28, 2021, Judge Gibbons issued an order denying relief.

Trial Testimony

At trial, Odell Middleton, Victim's friend since the 1960's, testified he stopped by Victim's home one afternoon to visit. (App. 96-101). He testified the front door was locked but the back

door was open. (App. 101-02). Middleton noticed an odor and went inside, where he found Victim deceased on the living room floor. (App. 103-04). Middleton called 911. (App. 104).

Amy Durso, the pathologist, testified Victim had multiple blunt-force trauma injuries, including three lacerations on the right side of his head, six lacerations on the top of his head, two lacerations on the back of his head, three lacerations “kind of going towards the neck,” two lacerations on his forehead, a laceration over his nose, and a fractured nasal bone. (App. 309-13). Additionally, Victim had two sharp-force injuries on the back of his neck, a sharp-force injury next to his chin, two sharp-force injuries on his lower chest, five sharp-force injuries on his left thigh, seven sharp force injuries on his right hand, three sharp-force injuries on his right arm, three sharp force injuries on his right shoulder, and nine sharp-force injuries to his left-arm. (App. 312-22). Dr. Durso opined Victim died of exsanguination, or extreme blood lose, approximately two to three days before his body was discovered. (App. 322, 324).

Law enforcement testified about the bloody scene that spanned Victim’s home from the bedroom, down the hall, and into the living room. (App. 115-16, 148-51, 167-70, 263, 490). Law enforcement collected a knife from the bedroom floor containing Victim’s blood (App. 122, 165, 172, 200, 267, 396) and glass fragments from the hallway near a back door. (App. 116-17, 168). One of the glass fragments contained Petitioner’s palmprint. (App. 358-60).

Stan Richards, an expert in bloodstain pattern analysis, opined the incident began in the bedroom and ended in the living room. (App. 288). He based this opinion on the fact the bedroom contained a smaller amount of blood, signaling the beginning of the blood-letting event. (App. 288-89). Richards testified the volume of blood increased as it moved down the hall away from the bedroom. (App. 289). He testified the area around the glass shards in the hallway contained an increased amount of blood, which was consistent with Victim being “stationary for a little

while.” (App. 289, 292). Richards opined that spherical blood spatter located on an HVAC in the hall indicated an impact occurred at the same level as the HVAC, which was below waist level. (App. 294-95).

Petitioner testified in her defense. (App. 524). She stated she was a prostitute, and Victim often gave her crack-cocaine in exchange for sex. (App. 522-23). According to Petitioner, she had been at Victim’s home that evening smoking crack-cocaine with him. (App. 526-27). When they tried to engage in sex, however, Victim could not obtain an erection and became angry. (App. 528-30). Petitioner stated she attempted to leave but Victim accused her of stealing from him. (App. 529-30). She testified Victim started swinging a knife at her and “caught” her right hand, cutting it. (App. 530, 535). Petitioner stated they were in the living room, and she grabbed a glass vase to protect herself. (App. 530-31). She testified, “I swung the vase at him, and he swung at me again. The next thing I know, we’re fighting with a vase and a knife.” (App. 531).

Petitioner testified Victim had threatened to shoot her¹ and she was “scared for her life.” (App. 530, 534). She stated she was only wearing jeans and shoes; her shirt, bra, and jacket were at the end of the couch. (App. 534). Petitioner testified she attempted to get her clothes and her crack pipe, which she “never left . . . anywhere”; as she bent over to pick up her pipe, Victim swung and hit Petitioner’s left hand, bruising it. (App. 535). Petitioner testified she then swung the vase at Victim, hitting him in the face and head. (App. 535). She clarified Victim was “coming around the end of the coffee table” when she picked up the vase. (App. 534). Petitioner was unsure how many times she hit Victim but thought it was five or six times. (App. 535). She stated Victim fell and she fell on top of him; she stopped hitting him when they fell and the vase broke. (App. 537). After they fell, she “got up real quick, grabbed [her] clothes, [and] went out the front

¹ Investigators did not testify to finding a gun in the home.

door,” which was located in the living room. (App. 536). Petitioner testified Victim was still yelling and threatening to kill her as she left. (App. 536). She maintained none of the fighting occurred in the bedroom. (App. 538).

On cross-examination, when asked what prevented her from running out the front door when she crossed the living room to grab the vase, she replied, “It was cold outside and I really didn’t want to run out there with no clothes on like that.” (App. 559-61, 563). She testified she did not continue hitting Victim after he fell. (App. 566). Likewise, she claimed he was facing her at the time. (App. 567).

At Petitioner’s request, the trial court charged self-defense. (App. 749-52). The jury convicted Petitioner of murder, and the trial court sentenced her to forty-five years’ imprisonment. (App. 758, 773).

PCR testimony

At the PCR hearing, Petitioner maintained she had been acting in self-defense. (App. 799). However, she stated counsel never discussed a pretrial immunity hearing. (App. 807). Petitioner acknowledged the evidence indicated Victim’s back door had been left open, which contradicted her trial testimony that she ran out the front door; however, Petitioner stated she would not have left out the back door because Victim kept a large dog in his back yard that she was afraid of. (App. 801). Petitioner averred “[s]omeone else had to have been in that house because . . . the back door was open.” (App. 811). She also asserted the knife that police found in the bedroom was in the living room when she left, and a screwdriver that police found by the back door was not on the floor while she was there. (App. 803).

Robert Bank (trial counsel) testified Petitioner told him Victim had accused her of stealing crack-cocaine and attacked her with a weapon, and Petitioner defended herself by “grabbing a

glass vase and hitting him multiple times.” (App. 813). Trial counsel also stated Petitioner told him that Victim was still alive when she left. (App. 813). He stated they proceeded on self-defense. (App. 814). Trial counsel did not recall whether he discussed the Protection of Persons and Property Act with Petitioner. (App. 816). He stated his initial concern would have been whether she was in a place that she had a right to be, although he averred evidence showing Petitioner “was invited [to Victim’s home] not only this night but regularly” could show she was in a place she had a right to be. (App. 816). Trial counsel could not recall why he did not pursue a pretrial immunity hearing. (App. 823). When asked why he didn’t pursue pretrial immunity, trial counsel elaborated, “Sitting here today, I don’t specifically remember anything regarding her case other than kind of typical pros and cons you do in any case. But, no, I don’t remember anything specific in this case in terms of why we didn’t do that.” (App. 823).

The PCR court found Petitioner failed to prove counsel was deficient for not seeking a pretrial immunity hearing because counsel articulated a valid strategy of focusing on a theory of self-defense, and counsel chose not to pursue an immunity hearing through a pro/con process performed in any case. The PCR court did not evaluate prejudice.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found trial counsel was not ineffective for not requesting a pretrial immunity hearing when (1) Petitioner, by her own testimony, was at Victim’s home engaged in unlawful activity at the time of the incident, making the presumptions of the Protection of Persons and Property Act inapplicable, (2) Petitioner’s trial testimony was inconsistent with the blood spatter evidence, making it not reasonably likely a trial court would have granted pretrial immunity, and (3) evidence supports the PCR court’s finding that counsel was not deficient because counsel testified he engaged in a pro/con analysis when deciding whether to pursue immunity.

Petitioner asserts the PCR court erred in denying relief when trial counsel “inexplicably failed to pursue a pre-trial immunity hearing under the Protection of Persons and Property Act.” (Pet. 8-10). She contends evidence does not support the PCR court’s finding that counsel articulated a valid strategy of focusing on self-defense. (Pet. 8-9). However, evidence *does* support the PCR court’s finding that counsel was not deficient because counsel testified he engaged in a pro/con analysis when deciding whether to pursue immunity. Further—and critically—Petitioner cannot show prejudice because (1) Petitioner, by her own testimony, was at Victim’s home engaged in unlawful activity at the time of the incident, making the presumptions of the Protection of Persons and Property Act inapplicable, and (2) Petitioner’s testimony was inconsistent with the blood spatter evidence, making it not reasonably likely a trial court would have granted pretrial immunity.

“There is a strong presumption trial counsel provided adequate assistance.” Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, “the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.”

Green, 351 S.C. at 192, 569 S.E.2d at 322. “A reasonable probability is one sufficient to undermine confidence in the trial's outcome.” Id.

The General Assembly enacted the Protection of People and Property Act (the Act²) to codify the common law Castle Doctrine. State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). “Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity.” Id. at 371, 752 S.E.2d at 266. “This includes all elements of self-defense, save the duty to retreat.” Id.

“[T]he legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act.” State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Thus, upon motion, the issue of immunity under the Act must be decided prior to trial. Id. A party seeking immunity under the Act must show entitlement to immunity by a preponderance of the evidence. Id. at 411, 709 S.E.2d at 665. Notably, the Act is a procedural provision that “does not contain any substantive provisions of law”; thus, it “is not relevant to the work of a jury.” State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 154 (Ct. App. 2013).

The Act sets forth two statutory presumptions for establishing immunity:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

² S.C. Code Ann. § 16-11-410 to -450.

(2) who uses deadly force knows or has reason to believe that an unlawful or forcible entry or unlawful and forcible act is occurring or has occurred.

(B) The presumption provided in subsection (A) does not apply if the person:

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling . . . ; or

. . .

(3) who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person

§ 16-11-440.

A. Petitioner, by her own testimony, was at Victim’s home engaged in unlawful activity at the time of the incident, making the presumptions of the Act inapplicable as a matter of law.

Petitioner cannot show prejudice from trial counsel’s failure to request a pretrial immunity hearing because the presumptions of the immunity statute do not apply.³ Initially, the presumption of subsection 16-11-440(A) does not apply because this incident occurred at Victim’s home. § 16-11-440(B)(1) (providing the presumption of §16-11-440(A) does not apply when the force is used against a lawful resident of the dwelling).

Likewise, the presumptions of subsection 16-11-440(A) and (C) do not apply because the uncontradicted evidence showed Petitioner was engaged in unlawful activity at the time of the

³ The State acknowledges the PCR court did not make any finding of prejudice in its Order related to this issue. However, this Court can affirm for any reason appearing in the record.

incident. Petitioner testified she was a prostitute who had been invited to Victim's house to engage in sex in exchange for crack-cocaine. (App. 522-23). According to Petitioner, she had been at Victim's home that evening smoking crack-cocaine. (App. 526-27). Petitioner admitted to two unlawful activities she was engaging in at the time of this incident: prostitution and drug use. Because Petitioner was engaged in unlawful activity, the presumptions of subsections 16-11-440(A) and (C) do not apply. See § 16-11-440(B)(3) (providing the presumption of subsection 16-11-440(A) does not apply if the person using deadly force was engaged in unlawful activity); § 16-11-440(C) (providing "[a] person who is **not engaged in unlawful activity**" has no duty to retreat in certain circumstances (emphasis added)). Thus, it is not reasonably likely a trial court would have granted pretrial immunity, and Petitioner cannot show prejudice.

B. Petitioner's testimony was inconsistent with the blood spatter evidence, making it not reasonably likely a court would have granted Petitioner immunity.

At trial, Stan Richards, an expert in bloodstain pattern analysis, opined the incident began in the bedroom and ended in the living room. (App. 288). He based this opinion on the fact the bedroom contained a smaller amount of blood, signaling the beginning of the blood-letting event. (App. 288-89). Richards testified the volume of blood increased as it moved down the hall away from the bedroom. (App. 289). He testified the area around the glass shards in the hallway contained an increased amount of blood, which he believed was consistent with Victim being "stationary for a little while." (App. 289, 292).

Contrary to Richards' testimony, Petitioner denied any fighting occurred in the bedroom. (App. 538). Petitioner's description of the fight encompassed events she contended occurred in the living room. Petitioner stated they were in the living room, and she grabbed a glass vase to protect herself. (App. 530-37). Petitioner's description of the fight is inconsistent with the blood

spatter evidence, making it not reasonably likely a trial court would have granted her pretrial immunity. Additionally, Petitioner's testimony that she ran out the front door contradicted Middleton's testimony that the front door was locked and the back door was open when Middleton discovered Victim's body. (App. 101-02). Because Petitioner's testimony was contradicted by blood spatter evidence and Middleton's testimony, it is not reasonably likely a trial court would have granted Petitioner pretrial immunity, and Petitioner thus cannot show prejudice.

C. Evidence supports the PCR court's finding that Petitioner did not prove counsel was deficient because counsel conducted a pro/con analysis when deciding not to pursue a pretrial immunity hearing.

The State acknowledges pursuing pretrial immunity would not preclude pursuing self-defense at trial. The State likewise acknowledges trial counsel testified a pretrial immunity hearing would not have precluded Petitioner from pursuing self-defense at trial. (App. 816).

However, the State contends evidence supports the PCR court's finding that counsel was not deficient because counsel conducted a pro/con analysis when deciding not to pursue pretrial immunity. Specifically, when asked why they did not pursue pretrial immunity, counsel testified, "Sitting here today, I don't specifically remember anything regarding her case other than kind of typical pros and cons you do in any case. But, no, I don't remember anything specific in this case in terms of why we didn't do that." (App. 823). Based on this testimony, counsel *did* conduct a pro/con analysis when determining whether to request an immunity hearing. Because counsel conducted a pro/con analysis when determining whether to request an immunity hearing, Petitioner failed to meet his burden in overcoming the strong presumption that trial counsel rendered adequate assistance. See Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case."); Cherry v. State, 300 S.C.

115, 118, 386 S.E.2d 624, 625 (1989) (“The defendant is required to overcome the presumption that counsel was effective in order to receive relief.”).⁴

⁴ If this Court believes counsel was deficient and this Court cannot evaluate prejudice, the State submits the proper remedy is a remand for an immunity hearing rather than a new trial.

CONCLUSION

Based on the foregoing, the PCR court properly found Petitioner failed to prove trial counsel was ineffective for not requesting a pre-trial immunity hearing. Thus, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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This 23 day of September, 2022