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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Lawton McIntosh, Circuit Court Judge

FILIBERTO GARCIA CAMPOS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000777

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

In derogation of the Sixth and Fourteenth Amendments to the United States Constitution, did trial counsel provide ineffective assistance by failing to request a jury instruction on the complete defense of accident where evidence in the record supported the instruction?

STATEMENT

On May 5, 2014, a Lexington County grand jury indicted Petitioner for homicide by child abuse. App. 875-876. The state, represented by Suzanne Mayes and Robert McNair, called Petitioner's case to trial before the Honorable Thomas A. Russo and a jury on June 1-3, 2015. App. 1. Aimee Zmroczek represented Petitioner. App. 1. Laura Cahue served as Petitioner's interpreter during the trial. App. 1. The jury found Petitioner guilty as charged. App. 652, ll. 11-16. Judge Russo sentenced Petitioner to the Department of Corrections "for the remainder of [his] natural life." App. 671, ll. 16-20.

Petitioner filed a timely notice of appeal, which was perfected by David Alexander. App. 737-750. On appeal, Petitioner challenged the trial judge's decision to allow the jury to see unfairly prejudicial photographs of the deceased. App. 737-750. During Petitioner's trial and in his appellate brief, Petitioner noted that when his co-defendant, Tracy Roach, entered a guilty plea, the plea judge had to take a break after looking at the photographs. App. 732, ll. 14. The plea judge described the photographs as "haunting and the kind of thing you don't ever forget." App. 732, ll. 10-13. He described the case as the worst he had seen in fifteen years on the bench. App. 733, ll. 7-13. Later, the judge compared the photographs to those showing "one of the most evil things in the world," "Buchenwald and Auschwitz and places like that." App. 733, l. 20 – App. 734, l. 5. In an unpublished opinion, the Court of Appeals affirmed. App. 785-789. Remittitur was issued on March 28, 2018. App. 790-791.

Thereafter, on December 3, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 792-798. Through counsel, he amended his application on August 20, 2021. App. 811-812. The Honorable R. Lawton McIntosh convened a hearing on December 13, 2021. App. 813. Lillian L. Meadows represented the state, and Ashley McMahan represented Petitioner.

App. 813. Sandra Ardar-McDermott served as Petitioner's interpreter. App. 813. By an order filed May 9, 2022, Judge McIntosh denied Petitioner relief from his conviction and sentence. App. 849-874. On June 1, 2022, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

In derogation of the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to request a jury instruction on the complete defense of accident where evidence in the record supported the instruction.

Relevant facts

Trial

Petitioner met Tracy Roach in 2001. App. 561, l. 1. Their friendship developed into a romantic relationship, and the two began living together in 2005. App. 562, ll. 3-10. In 2006, the couple had their first child, a boy named Cameron. App. 562, ll. 15-23. The family moved from Chester to Lexington County in 2009. App. 564, ll. 13-16. Tracy got pregnant with their second child, a daughter, soon after the move. App. 564, ll. 17-19.

The couple learned their daughter would be born with problems, including Down Syndrome. App. 163, ll. 18-19; App. 165, ll. 19-22; App. 564, l. 20 – App. 565, l. 2. Although Tracy wanted to abort, Petitioner convinced her to keep their child. App. 565, ll. 3-10. Their neighbor, Donna Kelly, indicated that when Tracy learned their child would have Down Syndrome, Tracy acted differently – she was not happy and was more distant. App. 176, ll. 2-17. Having been born prematurely and underweight, their daughter stayed in the hospital for some period of time. App. 565, ll. 19-22; App. 567, ll. 9-10. Daughter also had a heart condition from her birth, which required consultation with a cardiologist. App. 339, ll. 6-9.

Shortly after daughter's birth, Easter Seals of South Carolina sent an early intervention specialist to the family's home to provide developmental training to them. App. 298, ll. 6-16; App. 299, ll. 20-23. Between September 2012 and December 2012, someone from Easter Seals

was in the family home interacting with daughter six times. App. 300, ll. 1-14. Thereafter, Tracy requested to end services. App. 302, ll. 14-22.

Daughter received medical services from Brookland Pediatrics, which was part of Eau Claire Cooperative Health. App. 329, ll. 15-19. Her first visit was when she was only twenty-four days old. App. 330, l. 23 – App. 331, l. 5. Thereafter, on November 9, 2012, the medical staff expressed concern because daughter was not gaining weight as she should. App. 332, l. 6 – App. 333, l. 12. Due to this concern, Tracy took daughter back to the doctor's office on November 12, 2012, for a weight check. App. 341, ll. 5-16. Her weight was up considerably during this visit. App. 342, ll. 9-14. Unfortunately, however, daughter was still not on the standardized growth charts, even for children with Down Syndrome, and as a result, she had been diagnosed with failure to thrive. App. 345, l. 15 – App. 347, l. 16.

When their daughter did not gain much weight, Petitioner told Tracy to make sure she was feeding her well. App. 567, ll. 15-18; App. 568, ll. 9-10; see also App. 163, ll. 20-24. Tracy assured him that she was. App. 567, ll. 17-22. Petitioner and Tracy performed traditional husband-wife roles in their family. Petitioner worked and paid for the family's needs while Tracy stayed at home to care for their children. App. 568, ll. 11-25; App. 585, ll. 8-11; App. 586, ll. 2-9.

In July 2013, Tracy began acting weird – not like herself. App. 570, ll. 1-13. She began neglecting her household chores; therefore, Petitioner began doing some of them, such as grocery shopping and washing dishes. App. 569, ll. 19-23; App. 570, l. 17 – App. 571, l. 2. Toward the end of August, Tracy refused to allow Petitioner to see his daughter, insisting she needed to sleep. App. 576, l. 12 – App. 577, l. 2. On September 2, 2013, Tracy assured Petitioner that their daughter was fine, that she was sleeping, and not to wake her up. App. 597,

ll. 8-11. Later that evening, Petitioner checked on their daughter because he did not hear her. App. 573, ll. 4-5. He found her dead and called for help. App. 573, l. 6 – App. 575, l. 24; see also App. 148, l. 22 – App. 149, l. 12. When the ambulance arrived, the paramedics found Petitioner holding his lifeless daughter. App. 166, ll. 15-22. Petitioner never intended for his child to die. App. 579, ll. 20-21.

Beginning in January 2013, someone from the mentor program associated with the Department of Social Services began visiting the family home. App. 515, ll. 5-25. These visits continued regularly until May 14, 2013. App. 516, l. 1 – App. 518, l. 8. None of the mentors ever expressed any concern with daughter's health. App. 518, ll. 13-22.

Although Tracy did not testify during Petitioner's trial because she asserted her Fifth Amendment privilege against self-incrimination, the parties stipulated to the jury hearing a statement given by Tracy. App. 554, ll. 8-13. According to Tracy, in the week before her daughter's death, she was "on autopilot." App. 554, ll. 17-19. Tracy "would feed her children, but had stopped self-care, grooming, and regular bathing." App. 554, ll. 19-21. On September 2, 2013, Tracy fed her daughter at noon and placed her in her crib. App. 555, ll. 1-3. Tracy was not feeling well that day, so she spent most of it napping. App. 555, ll. 1-3. She last checked on her daughter around one or two in the afternoon and saw that she was sleeping. App. 555, ll. 8-11.

She was surprised when Petitioner checked on their daughter and told her that their daughter had died. App. 55, ll. 20-22. Although Tracy denied giving any psychiatric medications to daughter, it was undisputed that numerous prescription drugs were found in daughter's system at the time of her death. App. 556, ll. 20-23; App. 390, l. 5 – App. 392, l. 8. It

was further undisputed that these antidepressants had been prescribed to Tracy. App. 259, l. 16 – App. 260, l. 23.

Amended PCR application

On August 20, 2021, Petitioner, through counsel, amended his application to include a claim that trial counsel provided ineffective assistance by failing to request jury charges on lesser-included offenses. App. 811. Further, Petitioner requested to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the courts of the hearing. App. 811.

PCR hearing

At the beginning of the PCR hearing, PCR counsel reiterated the grounds for relief being pursued: "Our grounds are, in the amended application and also in the post-conviction relief application, the amended application, that's ineffective assistance of counsel for failure to request jury charges on a lesser included offense." App. 816, ll. 9-13. The judge asked for clarification: "That's involuntary and accident?" and counsel responded affirmatively. App. 816, ll. 14-15.

Petitioner's wife and co-defendant, Tracy Roach, testified during the hearing. App. 817, ll. 6-18. Tracy was emphatic that Petitioner "didn't know nothing" about the cause of their child's death. App. 817, ll. 19-21. She explained that she was suffering from post-partum depression and had a psychotic break. App. 817, ll. 21-23. When her psychiatrist abruptly quit, she was left without medication for two months. App. 817, ll. 23-24. It was then that she started self-medicating with alcohol. App. 817, l. 25 – App. 818, l. 1. Tracy told the PCR judge that Petitioner did not know anything about her neglect of their daughter and that she actively hid it from him. App. 818, l. 2. According to Tracy, Petitioner, who worked all day, while she stayed

home with their children, "really believed [she] was taking care of her." App. 818, ll. 11-19. Succinctly, Tracy explained that Petitioner was "a victim just as well" because he had no idea she had neglected their daughter. App. 821, ll. 12-16.

Petitioner testified similarly to Tracy. App. 824, ll. 11-12. Petitioner was "shocked at the state of [his] daughter and how she died." App. 825, ll. 19-21. He believed his wife was taking care of her because she assured him she was. App. 825, ll. 22-25. Petitioner told his trial counsel that his daughter had trouble gaining weight, which masked his ability to determine the level of neglect his daughter was suffering. App. 827, ll. 3-6.

Trial counsel testified that their "defense was that he was working. He was the main breadwinner. He relied upon his wife." App. 834, ll. 6-8. Tracy "was the primary caretaker," and as a result, she "should have noticed" the signs of malnutrition that the deceased was exhibiting and that because of Petitioner's reliance on his wife to care for the children, "he wouldn't have noticed it." App. 836, ll. 12-16. Trial counsel's defense "was always that she [Tracy] was in charge." App. 838, ll. 11-12. Petitioner told trial counsel that "he worked all the time and that, if he wasn't working, he was outside with his six-year-old." App. 839, ll. 6-8. According to Petitioner, it was Tracy's job to take care of their children as he worked to provide financially for the family. App. 839, ll. 8-12. Petitioner relied on Tracy to care for their daughter. App. 843, ll. 4-5. She also discussed that in Petitioner's culture, childrearing is a duty for the mother, and this is especially true for female children. App. 839, ll. 14-23.

Trial counsel determined that she would not request a jury charge on accident because "none of his behavior would have fallen under the definition of accident." App. 838, ll. 12-14. According to trial counsel, "[t]o say he accidentally forgot to feed her just wouldn't go with the facts." App. 838, ll. 14-15.

Order denying relief

The PCR judge found Petitioner "failed to establish Counsel Zmroczek provided constitutionally ineffective assistance by failing to request a jury charge on the defense of accident." App. 871. The PCR court explained that "[t]he defense of accident protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another." App. 872. Thereafter, the PCR judge quoted trial counsel's PCR testimony that "she could have requested a jury instruction on accident because 'you can't say you forgot to feed your child by accident.'" App. 872. The PCR judge construed counsel's testimony to be that there was "simply no evidence the child's death occurred by accident." App. 872. Furthermore, the PCR judge noted that Petitioner "failed to provide any basis upon which Counsel Zmroczek could have requested a jury charge on accident, and further failed to point to any evidence in the record that would have warranted a jury charge on accident." App. 872.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (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." Id. at 686.

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. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

Here, trial counsel provided ineffective assistance by failing to request a jury instruction regarding the complete defense of accident. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised

by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). A trial court's refusal to grant a jury instruction based upon a sound principle of law applicable to the case before the trial court is an error of law. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). If there is any evidence to support a jury charge, the trial judge should give the charge in question. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008).

"In South Carolina, the defense of accident requires a showing that the harm caused was unintentional, that the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon." State v. Harris, 382 S.C. 107, 116, 674 S.E.2d 532, 537 (Ct. App. 2010); see also State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) (citing Burriss, 334 S.C. at 259, 513 S.E.2d at 106); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994); State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945); State v. Williams, 400 S.C. 308, 316, 733 S.E.2d 605, 610 (Ct. App. 2012). In the context of a death caused by a gunshot wound, the homicide is excusable as an accident when the evidence shows the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun. Goodson, 312 S.C. at 281, 440 S.E.2d at 372 (citing State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990)). "[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." Burris, 334 S.C. at 262, 513 S.E.2d at 108. Thus, a person armed in self-defense is entitled to a charge of accident if the killing was unintentional. Id.

In State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999), this Court affirmed a trial court's refusal to instruct the jury on accident. The evidence showed Chatman was holding another person in a non-traditional chokehold. Id. at 152-153, 519 S.E.2d at 101-102.

Analyzing the requirement that a defendant must act lawfully in order for accident to apply, this Court reasoned that Chatman "was not acting lawfully, since he was engaged in an assault and battery, unless he was acting in self-defense." Id. at 153, 519 S.E.2d at 102. Thereafter, this Court analyzed the evidence of Chatman's conduct to conclude he was not acting in self-defense. This Court reasoned "[i]f [the defendant] was not acting in self-defense, then he could not have been acting lawfully and he was not entitled to an accident charge." Id. at 154, 519 S.E.2d at 102.

In Tisdale v. State, 378 S.C. 122, 124, 662 S.E.2d 410, 412 (2008), this Court held defense counsel provided ineffective assistance by failing to request an instruction as to accident. Id. At the trial, the defendant testified that when he refused to drive the alleged victim where he wanted to go, the alleged victim began yelling and punched him in the face. Id. Then, the alleged victim pulled a gun. Id. The two struggled over the gun. Id. The gun went off while it was still in the alleged victim's hand. Id. The defendant testified that the gun was never in his hand. Id. This Court held that evidence indicated the alleged victim was the aggressor as shown by him punching the defendant in the face and presenting a gun. This evidence along with evidence that the gun discharged accidently supported the charge of accident. Id. at 126, 662 S.E.2d at 412-413.

The facts presented during trial supported a jury charge on accident. The death of Petitioner's daughter was unintentional. Petitioner testified at his trial that he was not neglecting his daughter as her care had been left in the hands of his wife. Further, shortly before daughter's death, Tracy refused to allow Petitioner to see his daughter, which prohibited Petitioner from seeing her condition or ensuring her health and safety. There was no dispute that Petitioner provided financially for the family in order for Tracy to give daughter the necessary sustenance.

Petitioner never withheld money, food, shelter, or medical care from his daughter. These were the acts and omissions of Tracy, and Tracy alone.

Furthermore, Petitioner was acting lawfully at the time of daughter's death. Petitioner acknowledges that this Court held that child abuse is an unlawful act. See McKnight v. State, 378 S.C. 33, 51, 661 S.E.2d 354, 363 (2008). This Court addressed whether involuntary manslaughter was a lesser included offense of homicide by child abuse. Id. After reciting the twin definitions of involuntary manslaughter, this Court held that "only the 'unlawful activity' definition of involuntary manslaughter could potentially apply in the arena of child abuse because child abuse is an unlawful act." Id. at 51-52, 661 S.E.2d at 363. This Court also held that "child abuse could never be defined as an unlawful activity 'not tending to cause death or great bodily harm." Id. at 52, 661 S.E.2d at 363. Thus, this Court concluded, that involuntary manslaughter was not a lesser included offense of homicide by child abuse.

Acknowledging this Court's holding in McKnight, Petitioner maintains that he was not engaged in an unlawful activity at the time of his daughter's death. Petitioner relied upon his wife to care for their daughter, and his wife assured him that their daughter was being cared for properly. In light of daughter's problems at birth, which persisted during her first year of life, it was not surprising or alarming to Petitioner that daughter was small for her age. Petitioner was working and providing financially for his family. He made sure there was plenty of food for his family to eat, and his wife had transportation to take his daughter to any medical appointments. Petitioner's conduct was lawful.

Here, the evidence supported an instruction on the complete defense of accident where the testimony in the record showed he was acting lawfully, and his daughter's death was unintentional. Trial counsel's failure to request this instruction left the jury with no choice but to

find Petitioner guilty of homicide by child abuse. Had trial counsel requested the jury be instructed on the complete defense of accident, there is a reasonable probability that the outcome of the trial would have been different. Thus, trial counsel provided ineffective assistance by failing to request a jury instruction on accident.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari and order full briefing on the issue presented.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of December, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Lawton McIntosh, Circuit Court Judge

FILIBERTO GARCIA CAMPOS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Filiberto Garcia Campos states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing before the Honorable R. Lawton McIntosh, which was held on December 13, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Filiberto Garcia Campos.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of December, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 14th day of December, 2022.