STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Mar 06 2023

S.C. SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

WAYNE A. SCOTT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001080

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

I.

Trial counsel erred in failing to specifically object to the trial judge's failure to issue a jury re-charge that answered the jury's question as to whether the state was required to disprove all elements (or one element) of self-defense, and in failing to move for a mistrial in the matter.

II.

Trial counsel erred with respect to his advice given to petitioner on the issue of his right to testify at trial.

STATEMENT

Petitioner Wayne A. Scott was convicted of murder and possession of a weapon during the commission of a violent crime per jury trial held during the October, 2013 term of the Florence County General Sessions Court before Judge George C. James. Petitioner was sentenced to life without parole on the murder conviction and five years on the weapon conviction. App. 111-688. A pre-trial hearing was held on petitioner's behalf per his Castle Doctrine claim under the Protection of Persons and Property Act before Judge Howard King on September 19, 2013, but relief on this claim was denied. App. 1-109. Petitioner was represented at trial and the pre-trial hearing by William Grove, and Assistant Solicitor Matthew Ozment appeared on behalf of the state in the case at trial and during the pre-trial hearing.

Appellant Defender LaNelle Cantey Durant represented petitioner on direct appeal and argued error with respect to the Castle Doctrine ruling and the trial judge's failure to submit the Castle Doctrine claim as a jury question in the case. Petitioner's case was affirmed on appeal. See State v. Scott, Op. No. 2015-UP-513 (S.C. Ct. App. Filed November 12, 2015), and State v. Scott Op. No. 2017-MO-010 (S.C. Sup. Ct. filed May 31, 2017). App. 690-783.

On October 30, 2017, petitioner filed a PCR application with the Florence County Office of the Clerk of Court. App. 784-792. The respondent filed a return dated March 12, 2018. App. 793-797. A PCR hearing was held on June 25, 2019, at the Florence County Courthouse before Judge William H. Seals. App. 799-876. Petitioner was present at the hearing and represented by Jonathan D. Waller, and Assistant Attorney General Samuel L. Key appeared at the hearing on behalf of the state. On July 21, 2022, Judge Seals signed an Order of Dismissal in the case. App. 877-930. Petitioner appealed. This petition follows.

QUESTION I

Trial counsel erred in failing to specifically object to the trial judge's failure to issue a jury re-charge that answered the jury's question as to whether the state was required to disprove all elements (or one element) of self-defense, and in failing to move for a mistrial in the matter.

In the instant case, there were ongoing cellular phone communications between petitioner and Steve Springs over an affair that Springs, who was married at that time, was having with petitioner's stepdaughter, who was also married at that time. There was concern over whether the stepdaughter's children would learn of the affair. These arguments led to a shooting. Springs drove to petitioner's home and place of business on the day in question and aggressively advanced toward petitioner despite warnings to stop, which ultimately resulted in petitioner firing his gun at Springs in self-defense. App. 213, l. 23 – p. 214, l.18.

At trial, Larry Michael Bruce testified that he was with petitioner on September 24, 2012 and heard Springs arguing with petitioner over the cellular phone and threatening to come to petitioner's place to beat his (petitioner's) butt. App. 361, l.14-p. 370, l.18. Petitioner's wife testified that she called 911 after arriving at the place of the shooting, and then took petitioner home. App. 376, l.3 - p. 393, l.6. Apparently, petitioner gave police a statement to the effect that Springs had cursed and screamed at him earlier on the day in question; and that later on that day while waiting for his wife, he observed Springs arrive, get out of his vehicle, and start to argue with him. Petitioner stated that he told Springs to leave and warned him not to approach, but that he had to fire his gun when Springs continued to advance toward him. Petitioner stated to police that he saw something in Spring's left hand (screwdriver). A knife and screwdriver were found near Spring's body. App. 290, l. 20 – p.298, l. 25; App. 181, l.10 - p.183, l.24; App. 223, l.23 - p.

228, l.25. Also, petitioner did not testify at trial. After the charge on the law, the jury presented the following question to the trial judge:

> The Court: Question five, for self-defense elements do they all have to apply and then in parenthesis are they quote and close quote statements in close parenthesis orders only one or some of the elements need to be met? App. 656, l.23-p. 657, l.2

Pertinent portions of the colloquy between the trial judge and defense counsel follow:

> The Court: [Defense Counsel] You want to push forward with your Berkhart (sic) claim that they have to disprove all the elements I assume.
>
> Defense Counsel: Again, your honor, I would obviously make note of that. Question five seems to fall right in line with my interpretation [of] Berkhart (sic). App. 658, l.7-12.

The trial judge issued the following re-charge to the jury:

> The Court: Okay. Ladies and gentlemen, I do have your last two or your next two questions. I'm going to refer to these or address these in reverse order. And perhaps it will clarify some things for you. And again, if my answers don't help you, don't hesitate to let me know. You got question five it says for self-defense elements do they all have to apply. And you got in parenthesis are they and parenthesis excuse me – in quotes statements. Then it says or does only one or some of the elements need to be met. And then question four if both parties are at fault in bringing on the difficulty, can self-defense be claimed? As I mentioned to you in the charge on self-defense, self-defense is a complete defense. And the State must disprove it. The defendant need not prove it. For self-defense to apply as I mentioned to you first of all, it must be that the defendant was without fault in bringing on the difficulty. And the defendant was actually in eminent danger of death or serious bodily injury or actually believed he was. And that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as he did. So those three things element number one and element number two and element number three in order for self-defense to apply. Your question as to if both parties are at fault in bringing on the difficulty, can self-defense be claimed. The State in disproving self-defense must prove that self-defense does not apply. In order for self-defense to apply, the defendant must have been with without fault in bringing on the difficulty. And the defendant was actually in eminent danger of

> death or serious bodily injury or reasonably believed he was or the defendant excuse me -- and the defendant had no probable - other probable way to avoid the difficulty. Again, those three elements must be present in order for self-defense to apply. And the State must disprove the defense of self-defense. I believe that's the clearest way I can answer that question. And if you would please retire to your jury room. If can make it any clearer, I'll try do that, but I believe that answers your questions as clearly as I possibly can. All right. Tr. 663, l.9-p. 664, l.24.

Defense Counsel entered a generic objection to the trial judge's re-charge, but omitted a specific objection to the trial judge's failure to answer the jury question, which was whether all elements of self-defense needed to have been disproved by the state. Furthermore, counsel failed to follow up with a motion for a mistrial because of the given defective re-charge. App. 665, lines 2-6. Note that after the re-charge, the solicitor made to following comment:

> Solicitor: For what it's worth, from the look on the juror's faces, they appeared very confused still when they left the courtroom.
>
> Trial Court: I agree. App. 665, l.9-12.

During the PCR hearing, trial counsel testified that he did have a conversation with the trial judge as to whether each and every element of self-defense must be disproved with respect to his jury self-defense re-charge, but that the trial judge did not agree with him. App. 851, l. 16 - p. 852, l. 11; App. 857, l. 2 – p. 858, l. 10. App. 868, l. 16 – p. 869, l. 25. In short, defense counsel argued that the state had to disprove all elements of self-defense, but the trial judge ruled that the state had only to disprove in effect one element of self-defense and re-charged the jury accordingly. Nonetheless, defense counsel failed to object to the specific error on the defective re-charge and to move for a mistrial thereafter.

In State v. Burkhart, 350 SC 252, 565 S.E.2d 298 (2002), the Court held that because the state has the burden of disproving self-defense beyond a reasonable doubt (citing to State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), the trial judge erred in charging that the

defendant need not prove self-defense; and stated the requirement for a clearer charge using language such as "the state must disprove self-defense" or "that the state must prove the elements of self-defense are not present" in the self-defense jury charge. Note that the Burkhart Court referred to "elements" of self-defense. The Burkhart Court went on to approve of defense counsel's closing argument that "you must find the defendant not guilty unless the state proves to you beyond a reasonable doubt that each of the elements of self-defense do not exist in this case" as an acceptable statement of the law. This is precisely on point with respect to the jury question presented in this case to the extent that the jury asked whether the state had to disprove one or some (in effect all) elements of self-defense. This specific question was not answered in the trial judge's jury re-charge. The trial judge merely stated in the re-charge that the state had to disprove self-defense. This error was particularly egregious because self-defense was basically petitioner's sole defense in the case, which meant that the correct statement of law on self-defense was critical in the case. Therefore, the error at issue was not only an erroneous and incorrect statement of the law on self-defense based on the jury question, but the same was greatly prejudicial to petitioner's defense. Defense counsel erred in failing to specifically object to the improper self-defense re-charge, and in failing to move for a mistrial based on the error.

Clearly, trial counsel's performance with respect to the mishandling of the self-defense re-charge constituted legal representation below the competency standard required of criminal attorneys under the Sixth Amendment as interpreted in Strickland v. Washington, 466 U.S. 668 (1984); and furthermore, but for counsel's ineffective representation in this regard, a reasonable likelihood exists that the outcome of petitioner's trial would have been different.

QUESTION II

Trial counsel erred with respect to his advice given to petitioner on the issue of his right to testify at trial.

Petitioner did not testify at trial; however, he testified in his defense during the pre-trial Castle Doctrine hearing held in the case. App. 50, l. 15 – p. 84, l. 20. During that hearing, petitioner testified that earlier on the day of the shooting, Springs kept calling repeatedly while cursing and threatening to beat him. Petitioner stated that he stopped listening and disconnected his phone. Petitioner added that after hunting on that day, he arrived home (still in possession of his gun) and sat on the porch because he was locked out. Petitioner was waiting for his wife to arrive. Petitioner stated that at some point as he waited, Springs drove into the yard, jumped out of his vehicle, and started cursing at him. Petitioner stated that he asked Springs to leave, but Springs became angrier and threatened to "wrap that gun around [his] f_____ neck," and then yelled that he (Springs) was not afraid. Despite the warning, Springs came around the door and continued to advance toward petitioner in a menacing way. Petitioner stated that he responded by firing a single gunshot at Springs, who died there near his (Springs') vehicle. Petitioner stated that Springs was bigger (240-260 lbs.) and taller than he. Note that in petitioner's statement given to police, it was related that he saw something in Springs' hand and somehow it was relayed that a screwdriver was in his hands. Petitioner recalled that Springs had something in his hand and that in petitioner's statement to police, he only stated that he saw something in Springs' hand. App. 818, lines 12 – 19.

During the PCR hearing held in the case, petitioner testified that he didn't challenge the fact that he shot Springs, but remained steadfast that he fired the gun in self-defense. Petitioner added that he learned after the shooting that Springs had "started back drinking" and

that Springs' blood alcohol on the night in question was "19,19.9," and that Springs' size was more like 250 pounds. App. 809, l. 6 – p.811, l. 20. At the PCR hearing, petitioner stated the following about his decision regarding whether to testify at trial:

> Question: What led to that decision to not testify during the trial?
>
> Answer: Because I had to prove to the state that I wasn't guilty.
>
> Question: Okay, why did you think you had to prove anything?
>
> Answer: That's what I'm saying so if I had got up on the stand and didn't know who or what I was trying to prove, I could sunk myself in worse.
>
> Question: Okay. Did you and Mr. Grove discuss potentially testifying before you got to your trial?
>
> Answer: He told me that was left up to me
>
> Question: Okay. Did he discuss what would happen if you did testify? What the State could use against you or what you think to cross-examine you?
>
> Answer: He said the State could use anything I said against me. App. 812, l.14 – p. 813, l. 813, l. 6.
>
> Question: What was your understanding of how you could present a self-defense without testifying?
>
> Answer: All I was told about self-defense was we go in the courtroom and sit down and the state's got to disprove self-defense nothing about no evidence, nothing about me testifying, you know, but he stated that you he testify if you want to. I mean, I can't tell you to do it, and I can't tell you not to do it. He did say is that, but that was as far as I knew. I didn't know what to do. I'd never been in any courtroom or no serious situation. I mean, I didn't know I had [no] idea. I was letting him run the show and because I knew no better. App. 824, lines 5-17.

Defense counsel testified at the PCR hearing and explained that petitioner did not want to testify after they had a conversation about this, particularly because of concerns within consistencies highlighted referencing petitioner's statement to police and his prior testimony

given during the pre-trial Castle Doctrine hearing held in the case. App. 852, l. 12 – p. 853, l.14. Trial counsel's testimony regarding this matter follows:

> Question: Okay. In a self-defense case, what preparation do you look at as far as proving your defense of raising your defense in defending [petitioner] without his testimony?
>
> Answer: Well, size disparity is one that obviously I failed to bring in the record. The scene itself was another one that was critical for us because he was at his home, the positioning of the decease[d] versus the positioning of petitioner. Those sorts of factors can play towards a self-defense case even without the testimony of the defendant. App. 853, lines 5-14.

Apparently, counsel believed petitioner's statement was sufficient to support his self-defense claim. App. 866, l. 14 – p. 867, l. 3.

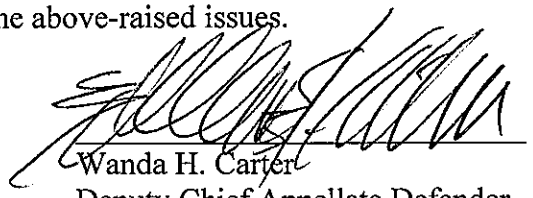
As a rule, the right to testify on one's behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments. Rock v. Arkansas, 483 U.S. 44 (1987). The right to testify is essential to due process of law in a fair adversarial process. Faretta v. California, 422 U.S. 806 (1975). A person's right to be heard in his defense during his day in court is basic to our system of jurisprudence. Chambers v. Mississippi, 410 U.S. 284 (1973). State v. Wright, 416 S.C. 353, 785 S.E.2d 479 (2016) State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013).

Here, petitioner stated that he never told police that Springs had a screwdriver in his hands on that night, but that the truth was that he (Springs) had something in his hand. Petitioner's testimony at trial would have cleared-up this matter. A knife and screwdriver were found at the crime scene. Also, note that counsel admitted that he did not raise the matter of the size disparities to the extent that Springs was bigger and taller than petitioner. In addition, petitioner admitted that although the State had to disprove self-defense, he would rather have presented evidence himself on his own by testifying before the jury about his case. App. 834, l. 14 – p. 835, l. 5. A defendant has a right to present his own version of the case in his defense.

Rock v. Arkansas, supra. Clearly, petitioner's testimony would have strengthened his self-defense, which meant counsel erred in relying on petitioner's statement alone to present at trial on the self-defense claim. Counsel's error in not fully exploring the question of petitioner's right to testify at trial in light of the self-defense claim, which was critical to the case, meant that petitioner did not voluntarily and intelligently waive his right to testify at trial, and that counsel's deficient legal representation regarding this issue was obvious. Additionally, but for counsel's error in this regard, a reasonable probability exists that petitioner might have testified at trial had he been given the proper advice regarding the same and if so, the outcome of petitioner's trial might have been different. See Strickland v. Washington, supra.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised issues.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of March, 2023.