STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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May 04 2023

S.C. SUPREME COURT

Certiorari to Cherokee County

Honorable G.D. Morgan, Jr., Circuit Court Judge

EDDIE MOTTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001264

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate and utilize the affirmative defense of self-defense at trial where Petitioner testified that he only shot the owner of the bar after the owner pointed a gun at him and where there was additional evidence that the owner had a knife and attempted to strike Petitioner with a pool cue minutes before the shooting since there is a reasonable probability the outcome of Petitioner's trial would have been different if self-defense had been properly presented and argued to the jury?

STATEMENT OF THE CASE

During the early evening hours of March 26, 2018, Petitioner, who suffers from Parkinson's Disease and mental illness, visited Harold's Restaurant, a restaurant and bar in downtown Gaffney.[1] App. 187, ll. 3-11; App. 188, l. 11 – 189, l. 15; App. 191, ll. 8-19; App. 196, l. 17 – 198, l. 11. He had several drinks while sitting at the bar talking to Kathy Calvert, the bartender. App. 91, l. 21 – 92, l. 6. Tony Lipscomb, the owner of the establishment, was also there that evening. He had worked at the restaurant all day. When he finished his shift around five o'clock, he went to the "bar side to watch the ballgame and drink a few beers." App. 87, ll. 2-10. Lipscomb claimed he did not notice Petitioner until Petitioner stood up, looked around, and told the bartender, "Nobody in this bar can kick my ass." App. 95, ll. 13-17. When Lipscomb heard Petitioner's alleged outburst, he walked up to Petitioner, told him "we didn't have any trouble in here," and ordered him to leave. App. 95, ll. 18-20. Lipscomb claimed Petitioner became more agitated after Lipscomb asked him to leave and began "cussing" and threatening Lipscomb and others in the bar. App. 95, l. 23 – 96, l. 9. Petitioner said he was going to finish his beer before leaving. App. 97, ll. 13-18.

While Petitioner was sitting at the bar finishing his beer, Lipscomb pulled out a knife from his pocket and held it in his right hand. App. 138, ll. 2 – 139, l. 15. Lipscomb eventually put the knife away and then picked up a pool cue and imitated striking Petitioner with the cue behind Petitioner's back. Lipscomb claimed he did this out of "frustration" and never intended to hit Petitioner. App. 97, l. 19 – 98, l. 3; App. 139, l. 12 – 140, l. 16. He said he pulled the knife out because Petitioner was threatening him. Yet, at the time Lipscomb pulled the knife, Petitioner was sitting peacefully at the bar finishing his beer. App. 138, l. 3 – 139, l. 15.

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[1] Before the shooting, Petitioner was prescribed numerous medications to manage his illness including Seroquel, Xanax, Lexapro, and Hydroxyzine. App. 191, ll. 8-19.

Petitioner eventually stood up from the bar and left the establishment with another patron. Lipscomb claimed that on his way out, Petitioner threatened Lipscomb and Brandon Ramsey, another patron who Petitioner had previously had some sort of altercation with. App. 98, l. 7 – 99, l. 9; App. 141, ll. 8-12. According to Lipscomb, several patrons had offered to drive Petitioner home and Lipscomb assumed Petitioner had gotten a ride. App. 98, l. 24 – 99, l. 15. After Petitioner was gone for several minutes, Lipscomb resumed watching the "ballgame" and "everything [went] back to normal." App. 99, l. 10 – 100, l. 4.

Lipscomb claimed that shortly thereafter, Petitioner walked back into the bar. He continued to threaten Lipscomb and Ramsey. App. 100, ll. 5-18. Petitioner eventually pulled out a gun and pointed it at Lipscomb. App. 100, ll.16-24. Ramsey immediately called 911 and Lipscomb walked to the bar and grabbed his own gun from underneath the counter. App. 101, ll. 1-2. Lipscomb claimed he pleaded with Petitioner not to shoot, told Petitioner he did not have to leave, and offered to buy him a beer. App. 101, ll. 3-25.

Petitioner demanded Ramsey get off the phone. When Ramsey would not put the phone away, Petitioner allegedly chased Ramsey out the door and fired three shots. Ramsey was shot once in the back of the thigh. App. 152, l. 5 – 153, l. 25. Lipscomb claimed that once Petitioner shot Ramsey, Lipscomb tried to return fire, but Lipscomb's gun jammed. Petitioner then shot Lipscomb twice: once in the chest and once in the stomach. App. 102, l. 3 – 108, l. 7.

Petitioner testified in his defense. He was on disability at the time of the shooting due to severe injuries he suffered from two separate accidents. He broke his back in three places after he fell thirty-five feet from a frozen scaffold while working. Then a few years before the shooting, Petitioner fell sixty-two feet from a deer stand. As a result of this fall, Petitioner cracked his skull, suffered brain bleeding, and crushed all the bones in his feet and ankles. He

was in a coma for six months and hospitalized for another six months after he finally woke up. App. 210, l. 1 – 211, l. 25. In addition to his physical injuries, Petitioner also suffers from Parkinson's Disease and hallucinations. App. 212, ll. 1-24.

Petitioner explained that he went to Harold's that evening after helping a friend all day who was recovering from knee surgery. Petitioner sat on a stool at the bar and began reminiscing with the bartender, Kathy. Petitioner had known Kathy's family for years. App. 216, l. 19 – 219, l. 21. After a while, Petitioner saw Kathy bring Lipscomb a beer and whisper in his ear. Kathy then grabbed something from underneath the counter of the bar. Petitioner thought it was a pistol. Shortly after that, Lipscomb came up to Petitioner and told him he had to leave. Lipscomb was "cussing" at Petitioner. Then Ramsey started "hollering fuck that damn Jerome [Petitioner], that son of a bitch." App. 220, l. 1 – 221, l. 15.

Petitioner heard Lipscomb say he had a gun. He heard the men behind him and knew what they were planning. Petitioner explained that everyone was siding with Lipscomb. They were "all a gang" getting "together to where they could murder [Petitioner]." App. 221, l. 22 – 222, l. 24. Petitioner was convinced "beyond a shadow of a doubt" that they planned to kill him. App. 222, ll. 14-24. He felt threatened and intimidated. App. 222, l. 25 – 223, l. 3.

Petitioner always carried a gun on his person. He had a gun tucked into his waistband that evening. App. 223, ll. 4-13. Petitioner explained that he did not intend to kill anybody. App. 224, ll. 11-16. He was merely defending himself when he shot Ramsey and Lipscomb. App. 228, l. 2 – 230, l. 22.

The trial judge gave the jury four verdict options—not guilty by reason of insanity, guilty but mentally ill, guilty, and not guilty—and charged the jury accordingly. The judge also

charged the jury on the defense of self-defense and several lesser included offenses of attempted murder. See App. 321, l. 3 – 337, l. 13.

A Cherokee County grand jury indicted Petitioner on December 20, 2018 for two counts of attempted murder and possession of a weapon during the commission of a violent crime. App. 437-440. His case was called to trial on September 9, 2019 before the Honorable J. Mark Hayes, and a jury. App. 1. Solicitor Barry Barnette represented the state. App. 1. Dean Cook and Trent Pruett represented Petitioner. App. 1.

On September 11, 2019, the jury found Petitioner guilty as indicted. App. 340, l. 19 – 341, l. 8. He was sentenced to thirty years for each count of attempted murder and five years for the weapons offense. The sentences were ordered to be served consecutively for an aggregate sentence of sixty-five years imprisonment. App. 356, ll. 8-18.

Petitioner did not appeal his convictions or sentence.[2] On March 13, 2020, Petitioner filed an application for post-conviction relief (PCR). App. 358-364. The state filed a return to this application and a motion for a more definite statement on August 6, 2020. App. 365-375. An evidentiary hearing was convened on April 18, 2022 before the Honorable G.D. Morgan. App. 376-377. Assistant Attorney General Chelsey Marto represented the state. App. 377. Rodney Richey represented Petitioner. App. 377.

Petitioner testified at the evidentiary hearing that he shot Tony Lipscomb in self-defense after Tony pointed a gun at him. He denied shooting Brandon Ramsey. Petitioner explained that before shooting Lipscomb, he fired three shots toward some large plate glass windows. App. 392, l. 3 – 395, l. 15. One of these bullets struck Ramsey. Petitioner testified that he only fired

[2] It is not clear from the record whether Petitioner knowingly and voluntarily waived his right to a direct appeal. For whatever reason, Petitioner did not seek a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), during post-conviction relief.

that night in an effort to defend himself because Lipscomb and Ramsey were "planning on murdering me." App. 395, ll. 5-15. Petitioner told trial counsel he was defending himself, but counsel "wouldn't let [him] put forth a self-defense case." App. 396, ll. 3-24.

Dean Cook, Petitioner's trial counsel, testified that he discussed self-defense with Petitioner, but Cook did not think self-defense was a viable defense based on the evidence. He explained that the shooting was recorded by surveillance cameras inside the bar and the video did not support self-defense. App. 415, ll. 3-17. Cook testified that he chose to present an insanity defense given Petitioner's prior medical history. Petitioner suffers from Parkinson's Disease and frequently has hallucinations. App. 417, ll. 4-10. Cook believed it was apparent Petitioner was suffering from mental illness both at the time of the shooting and during his jury trial. App. 418, l. 25 – 419, l. 5.

By order filed August 29, 2022, the PCR court denied Petitioner relief. App. 424-436. The court found Petitioner failed to prove trial counsel was deficient for failing to pursue the defense of self-defense. App. 432. The court found counsel credibly testified that the facts of the case "as backed by the video evidence," did not support self-defense. App. 433. The court determined that counsel reasonably decided to present an insanity defense instead. App. 433. The court further found Petitioner failed to show how additional argument regarding self-defense would have changed the outcome of his trial. App. 433. Consequently, the court concluded Petitioner failed to prove he was prejudiced by counsel's alleged deficient performance. App. 433.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated by trial counsel's failure to utilize a self-defense defense at trial, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate and utilize the affirmative defense of self-defense at trial where Petitioner testified that he only shot the owner of the bar after the owner pointed a gun at him and where there was additional evidence that the owner had a knife and attempted to strike Petitioner with a pool cue minutes before the shooting since there is a reasonable probability the outcome of Petitioner's trial would have been different if self-defense had been properly presented and argued to the jury.

Trial counsel was ineffective for failing to investigate and employ a self-defense defense at trial. Petitioner testified that he only shot Tony Lipscomb after Lipscomb pointed a gun at him. There was additional evidence that Lipscomb had a knife and also attempted to strike Petitioner with a pool cue minutes before the shooting. Petitioner believed Lipscomb, Ramsey, and the other patrons of the bar were planning to murder him. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if self-defense had been properly presented and argued to the jury.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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 v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable

professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"To establish self defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger." State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000) (citing State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999)).

Trial counsel was deficient for failing to investigate and employ the defense of self-defense at trial. Petitioner testified at the evidentiary hearing that he shot Tony Lipscomb in self-defense after Tony pointed a gun at him. He denied shooting Brandon Ramsey, but acknowledged that he fired three shots toward some large plate glass windows before shooting Lipscomb. App. 392, l. 3 – 395, l. 15. One of these three bullets must have struck Ramsey. Petitioner testified that he only fired that evening in an effort to defend himself because Lipscomb and Ramsey were "planning on murdering me." App. 395, ll. 5-15. Petitioner told

trial counsel he was defending himself, but counsel "wouldn't let [him] put forth a self-defense case." App. 396, ll. 3-24. Instead, counsel chose to employ an insanity defense. He did so without hiring any independent experts to evaluate Petitioner and present evidence to support an insanity defense. This strategy was completely unreasonable. No competent criminal defense attorney would employ an insanity defense without securing the necessary expert testimony to support the defense.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly developed a self-defense defense and argued it to the jury at trial. Based on Petitioner's testimony at the evidentiary hearing, there was evidence to support all four elements of self-defense.

Respectfully, this Court should reverse the decision of the PCR court, reverse Petitioner's convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented. Ultimately, Petitioner requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of May, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eddie Motts 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, which was held on April 18, 2022 before the Honorable G.D. Morgan, Jr., and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

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

Therefore, counsel requests that the Court relieve her as counsel for Eddie Motts.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of May, 2023.

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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."

s/ Lara M. Caudy
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Appellate Defender

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