STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

DOMINIC A. LEGGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001793

Appeal from Georgetown County

Paul M. Burch, Post-Conviction Relief Judge

Opinion No. 6007

PETITION FOR REHEARING

On August 2, 2023, this Court affirmed the circuit court's denial of Petitioner's application for post-conviction relief (PCR). Leggette v. State, Op. No. 5953 (S.C. Ct. App. filed August 2, 2023) (Howard Adv. Sh. No. 30 at 15). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision.

On appeal, Petitioner argued the PCR court erred by finding trial counsel was not ineffective when he failed to object to the jury instruction on the lesser included offense of voluntary manslaughter since there was no evidence Petitioner shot the decedent in the sudden

heat of passion upon sufficient legal provocation, rather the evidence showed Petitioner either acted with malice or in self-defense. Petitioner argued he was prejudiced by counsel's deficient performance because, if counsel had properly objected, there is a reasonable probability the trial judge would have refused to instruct the jury on the lesser included offense, and the jury would have found Petitioner acted in self-defense. He further argued the jury reached a compromise verdict after deliberating for almost twelve hours and receiving an Allen[1] charge.

In its published opinion, this Court at the outset addressed the state's argument that the issue as raised by Petitioner on appeal is not preserved for appellate review. The Court acknowledged that Petitioner's argument before the PCR court was not as specific as Petitioner's argument on appeal, "leaving the PCR court to glean the deficiencies asserted from the pro se application and hearing testimony." Opinion at 21. Nevertheless, the Court addressed the merits "in light of the arguments made before the PCR court, the PCR court's comprehensive analysis of the evidence supporting the voluntary manslaughter instruction, the lack of an amended application, and the failure of either party to ask trial counsel whether seeking the lesser-included charge was a strategic decision."[2] Opinion at 21-22.

This Court correctly held the issue is preserved. Based on its ruling, the PCR court clearly understood the grounds of Petitioner's allegation. In the order of dismissal, the court emphasized

---

[1] Allen v. United States, 164 U.S. 492 (1986).

[2] Trial counsel's comment during sentencing demonstrates counsel misunderstood the law of voluntary manslaughter. See App. 486, ll. 13-15 (referring to recklessness, which is not an element of voluntary manslaughter). Consequently, counsel's failure to object to the instruction on voluntary manslaughter could not have been based on a valid strategic decision. See Abney v. State, 408 S.C. 41, 55, 757 S.E.2d 544, 551 (Ct. App. 2014) (Few, J., dissenting) (stating "No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on . . . an obvious misunderstanding of the law."); Watson v. State, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (Pleicones, J., dissenting) (stating a valid strategic decision cannot be "grounded in a fundamental misunderstanding of the law"); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where "an error of law was involved").

that Petitioner never filed an amended application and "proceeded [on] broad allegations of ineffective assistance of counsel *without objection by the State*." App. 657 (emphasis added). Consequently, the court was "left to draw specifics from the testimony at the evidentiary hearing." App. 657. When ruling on Petitioner's allegation concerning the instruction on voluntary manslaughter, the PCR court cited to State v. Smith, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005), which recognized, "When the record contains no evidence to support it, a voluntary manslaughter charge should not be given." App. 660. Tellingly, in Smith, this Court held the trial judge erred by charging the jury on the law of voluntary manslaughter because, even assuming sufficient legal provocation existed, the evidence clearly did not establish Smith acted in the sudden heat of passion. Smith, 363 S.C. at 116, 609 S.E.2d at 530. After citing the relevant law as stated in Smith, the PCR court then found that while trial counsel did not object to the jury instruction on voluntary manslaughter, a "review of the complete trial record shows that the voluntary manslaughter instruction was appropriate and supported by facts in the record." App. 660.

Based on this finding, it is clear the PCR court understood the nature of Petitioner's allegation and ruled accordingly. Therefore, this Court correctly concluded this issue is preserved for appellate review. See State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-596 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.") (internal citation marks omitted).

As to the merits, this Court held there was evidence to support the PCR court's finding that trial counsel was not deficient in failing to object to the voluntary manslaughter instruction

as a lesser included offense because there was evidence to support the charge. In so holding, this Court acknowledged "the question of whether Petitioner acted in a sudden heat of passion is a close one." Opinion at 24-25. The Court discussed Petitioner and Ingram's testimony about the prior altercations between their respective neighborhoods, including the separate events that occurred two and four days prior to the shooting. Opinion at 25. Regarding the night of the shooting, the Court emphasized the following evidence: (1) Petitioner's testimony that he was surrounded in a threatening manner by several westside men after he arrived at Carnell's and that he feared he was about to be jumped; (2) Petitioner either walked or ran away from the group of westside men, and Ingram and Tisdale followed closely behind him; (3) Petitioner testified when he heard someone come up behind him and ask, "What's up now?" he turned and saw Ingram and Tisdale just three feet from him; (4) Petitioner recalled he was scared when he saw Ingram reach toward his waist because Ingram was known to carry a weapon so Petitioner pulled out his gun and fired two to three times; and (5) Petitioner admitted that Tisdale and Ingram running after him caused him to be fearful and frightened and he was already scared and did not know what to do because the prior incidents indicated hostilities between the opposing groups were escalating. Opinion at 25. Although not directly stated, this Court presumably determined Petitioner's fear caused him to act in a sudden heat of passion. However, the Court never found Petitioner's fear caused him to lose control and created an uncontrollable impulse to do violence.

As to legal provocation, this Court held Tisdale's act of following Petitioner and being "part of the approaching, threatening westside group" was sufficient. Opinion at 25. Finally, the Court concluded, "In light of the prior troubles between Petitioner and the westside group and the menacing actions of the various westside men on the night of the shooting, we find evidence

exists to support the PCR court's finding that trial counsel was not deficient in failing to object to the voluntary manslaughter instruction as a lesser-included offense." Opinion at 26.

For the reasons that follow, Petitioner respectfully requests this Court grant rehearing, hold the PCR court erred by finding trial counsel was not ineffective, reverse Petitioner's convictions, and remand for a new trial.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) (citing State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d. 786, 788 (2009)). "To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter." Id. (citing Wharton, 381 S.C. at 214, 672 S.E.2d. at 788). "If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." Id. (citing Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005)). "Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given." Id. at 597, 698 S.E.2d at 608.

In Starnes, 388 S.C. at 598-599, 698 S.E.2d at 609, the Supreme Court stated:

> We also have held that fear resulting from an attack can constitute a basis for voluntary manslaughter. See State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) ("[F]ear can constitute a basis for voluntary manslaughter."). Yet the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction. **We have consistently held that sudden heat of passion upon sufficient legal provocation is defined as an act or event that "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence."** Pittman, 373 S.C. at 572, 647 S.E.2d at 167.[3] While the act or event "need not dethrone the reason entirely, or shut out knowledge and volition," **it must cause a person to lose control.** Id.

[3] State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

> We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, **the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation and *cause the defendant to lose control and create an uncontrollable impulse to do violence.*** Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence.
>
> **A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear.** Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it. This is the distinction between voluntary manslaughter and self-defense.

Id. (emphasis added).

"In determining whether the act [that] caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011).

This Court held Petitioner's fear caused him to act in a sudden heat of passion. However, this Court never found Petitioner's fear caused him to lose control and created an uncontrollable impulse to do violence, which, pursuant to our Supreme Court's holding in Starnes, is required to find the defendant acted in a sudden heat of passion.

In Cook v. State, 415 S.C. 551, 555, 784 S.E.2d 665, 667 (2015), Cook objected to the state's request for a voluntary manslaughter instruction. The trial judge relied on the following facts in determining that a charge on voluntary manslaughter was supported by the evidence: (1) the defendant was in fear, (2) he shot the decedent twice, and (3) he stated "before I knew it, I

fired a shot." Id. at 557, 784 S.E.2d at 668. However, our Supreme Court held Cook's actions did not suggest he was acting in the sudden heat of passion. Id. at 559, 784 S.E.2d at 669. The Court explained, "We do not believe the fact that Cook shot Victim twice or his statement 'before I knew it, I fired a shot' is evidence that Cook's fear manifested in an uncontrollable impulse to do violence." Id. at 558, 784 S.E.2d at 668. The Court further stated:

> Here, Cook stated he tried to walk away from Victim, but Victim kept cutting him off. The fact that Cook was trying to walk away from the conflict does not suggest Cook was incapable of cooling off. In addition, Bridges testified that Cook and Victim were talking softly and that he could hardly tell they were arguing. This too does not suggest that Cook was acting under an uncontrollable impulse to do violence as surely if one was so enraged to kill, one would not be talking softly with the victim right before the act. Further, at no point during Cook's statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest Cook shot Victim either with malice or in self-defense.

Id. at 557, 784 S.E.2d at 668. The Court also emphasized that there was no physical altercation involved. Id. at 559, 784 S.E.2d at 669.

Likewise, the Supreme Court concluded there was no evidence of sudden heat of passion in Starnes and, therefore, upheld the trial court's refusal to charge the jury on voluntary manslaughter. Starnes, 388 S.C. at 599-600, 698 S.E.2d at 609. Starnes and the two decedents, Bill and Jared, were engaged in a drug purchase with a fourth individual, Jody, at Starnes' home when Jared "pulled a gun on" Jody. Id. at 595, 698 S.E.2d at 607. Starnes testified Jared's action "scared" him, and he went into his bedroom to retrieve his gun. Id. at 595, 698 S.E.2d at 607. As Starnes exited his bedroom, "Bill said 'whoa' and was pointing a gun at him." Id. at 595, 698 S.E.2d at 607. Starnes then shot Bill and Jared. Id. On appeal, the Court acknowledged the evidence of Starnes' fear, but concluded there was no evidence Starnes was "out of control as a result of his fear or was acting under an uncontrollable impulse to do violence." Id. at 599, 698 S.E.2d at 609. The Court also held the evidence showed Starnes

"deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." Id.

In this case, trial counsel was ineffective for failing to object to the jury instruction on voluntary manslaughter where there was absolutely no evidence Petitioner acted in the sudden heat of passion upon sufficient legal provocation when he shot Tisdale, the decedent. While Petitioner testified that he was scared, there was no evidence Petitioner was "out of control as a result of his fear or was acting under an uncontrollable impulse to do violence." See Starnes, 388 S.C. at 599, 698 S.E.2d at 609. At no point during Petitioner's testimony or previous statements to law enforcement did he state that he lacked control over his actions when he fired the fatal shot. Rather, Petitioner acted in a deliberate, controlled manner. All of the witnesses who testified consistently maintained there was no argument, no altercation, and no words exchanged between Petitioner and Tisdale. Consequently, there was no evidence of sudden heat of passion to support the charge on voluntary manslaughter.

Moreover, there was no evidence of sufficient legal provocation. "Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (citing State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951)). "Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter." State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (citing State v. Mason, 115 S.C. 214, 105 S.E. 286 (1920)). "Provocation necessary to support a voluntary manslaughter charge must come from some act *of or related to the victim* in order to constitute sufficient legal provocation." State v. Locklair, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000) (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)) (emphasis added).

"The provocation *of the deceased* must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection." Id. (emphasis in original) (internal citation omitted).

In this case, there was no evidence of sufficient legal provocation to support a charge on voluntary manslaughter. While Petitioner testified that he thought Ingram was reaching for a gun when Petitioner began shooting, there was no evidence of any overt act on the part of Tisdale, the decedent. The provocation necessary to support a charge on voluntary manslaughter must come from the decedent, not a third party. See State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). There is simply no evidence Tisdale provoked Petitioner into shooting. Unlike this Court held, merely being a part of a "threatening" group and following behind someone does not constitute sufficient legal provocation necessary to support a charge on voluntary manslaughter.

Petitioner was prejudiced by counsel's deficient performance because, after deliberating for nearly twelve hours and receiving an Allen charge, the jury compromised and found Petitioner guilty of voluntary manslaughter. If trial counsel had properly objected, there is a reasonable probability the trial judge would have refused to instruct the jury on this lesser included offense, and the jury would have found Petitioner fired the fatal shot in self-defense. In the alternative, if the trial judge had charged voluntary manslaughter over counsel's proper objection, there is a reasonable probability the appellate court would have reversed Petitioner's conviction based on this error.

Consequently, the PCR court erred by finding counsel was not deficient when he failed to object to the jury charge on voluntary manslaughter since there was no evidence Petitioner acted in the sudden heat of passion upon sufficient legal provocation when he shot Tisdale, the decedent. The court further erred by finding Petitioner was not prejudiced by counsel's deficient

performance since there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly objected to the charge, particularly where the jury reached a compromise verdict after nearly twelve hours of deliberations. Petitioner respectfully requests this Court grant rehearing, hold the PCR court erred by finding trial counsel was not ineffective, reverse Petitioner's convictions, and remand for a new trial.

Based on the foregoing, Petitioner respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming the PCR court's denial of his application for post-conviction relief.

Respectfully Submitted,

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2023.

RECEIVED
Aug 17 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

DOMINIC A. LEGGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001793

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon Mark R. Farthing, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 17th day of August, 2023.

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

From: Bryant, Hannah
To: Mark Farthing; dellenelizama@scag.gov; Caudy, Lara
Subject: Dominic Leggette Appellate Case No. 2018-001793 Petition for Rehearing
Date: Thursday, August 17, 2023 1:24:00 PM
Attachments: Dominic Leggette Appellate Case No. 2018-001793 Petition for Rehearing.pdf

---

Dear Mr. Farthing,

Please find attached for service a copy of the Petition for Rehearing in the above referenced case, which will be filed in the Court of Appeals today.

Hannah Bryant
Administrative Assistant
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
(803)-734-1330