

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

RECEIVED

Sep 18 2023

SC Court of Appeals

Honorable Courtney Clyburn-Pope, Circuit Court Judge

RAPHAEL L. PONTOO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-001217

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the PCR court err finding trial counsel was not ineffective for failure to request the trial court include the element “in the absence of mitigating circumstances” in its charge for failure to stop for a blue light resulting in death where there was mitigating evidence presented to the jury and where this Court, on direct appeal, found the issue was not preserved for appellate review?

STATEMENT

In May 2014, a Lexington County grand jury indicted petitioner for failure to stop for a blue light resulting in death and armed robbery with a deadly weapon. App. 637-641. Petitioner's case was called to trial on January 26, 2015, before the Honorable Thomas A. Russo. David Mauldin represented petitioner and assistant solicitors Robby McNair and Shawn Graham represented the state. App. 1. Judge Russo sentenced petitioner to consecutive terms of ten years imprisonment on the charge of armed robbery and twenty years imprisonment on the charge of failure to stop for a blue light involving death. App. 471.

Subsequently, appellate counsel, Donald McCune, filed a brief with this Court arguing the trial court "err[ed] when it required the appellant to prove his duress defense by a preponderance of the evidence, as contemplated by *Dixon v. United States*, 548 U.S. 1 (2006), despite the fact that the duress defense negates one of the statutory elements of the crime."¹ Supp. App. 6; 13-17.

Following briefing and oral argument, this Court affirmed petitioner's convictions and sentences finding "the circuit court correctly instructed the jury on the affirmative defense of duress, and the instructions were consistent with the relevant and applicable South Carolina law. Supp. App. 80. Additionally, this Court found petitioner's argument, that the court failed include the element "in the absence of mitigating circumstances" in its charge for failure to stop for a blue light resulting in death where there was mitigating evidence presented to the jury was not preserved for appellate review "because [petitioner] did not raise the argument to the circuit court." Supp. App. 80.

¹ Appellate counsel also argued that (1) the trial court erroneously allowed the state to impeach petitioner with his post *Miranda v. Arizona*, 384 U.S. 436 (1966), silence, and (2) the in-court identification of petitioner was unduly suggestive. Supp. App. 6; 17-24.

Petitioner filed an application for post-conviction relief on December 11, 2018. App. 474. The state filed a return, partial motion to dismiss and motion for more definite statement on March 22, 2019. App. 480-492. Petitioner filed an amended application for post-conviction relief on June 7, 2021. App. 493-495. An order of continuance and order denying the substitution of counsel signed by the Honorable Judge Brooks P. Goldsmith IV and dated July 13, 2019, was issued. App. 496-500. Petitioner filed a second amended application for post-conviction relief on June 16, 2021. App. 501-503.

An evidentiary hearing was held before the Honorable Courtney Clyburn Pope on July 2, 2021, via Webex Videoconference. Ola Johnson represented petitioner. Lillian L. Meadows, assistant attorney general, represented the state. App. 504.

On September 22, 2021, Judge Pope signed an order denying PCR. App. 582-636. The PCR court held petitioner failed to establish any constitutional violations or deprivations that would require the court to grant his application for post-conviction relief and denied relief on all allegations and dismissed his PCR action with prejudice. App. 634-635. Specifically, the PCR court found trial counsel was not ineffective for failure to request the court include the element “in the absence of mitigating circumstances” in its charge on failure to stop for a blue light resulting in death. App. 626. The court reasoned, that even if the mitigating language constituted an element of the alleged offense the language was immaterial in the context of a duress defense. App. 628.

The petition for writ of certiorari was filed April 11, 2022. The state filed its return on September 2, 2022. On August 18, 2023, this Court granted certiorari and ordered briefing.

The brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. *Smalls v. State*, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them. *Id.* (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. *Id.*

“In reviewing jury charges for error, this Court must consider the [trial] court’s jury charge as a whole in light of the evidence and issues presented at trial.” *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). “If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.” *Id.* “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” *Id.* “To warrant reversal, a [trial] court’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *Id.*

ARGUMENT

The PCR court erred finding trial counsel was not ineffective for failure to request the trial court include the element “in the absence of mitigating circumstances” in its charge for failure to stop for a blue light resulting in death where there was mitigating evidence presented to the jury and where, on direct appeal, this Court found the issue was not preserved for appellate review.

Trial testimony

At trial the state alleged that on January 24, 2014, at bar in West Columbia petitioner held Jonathan Ruple at gunpoint, stole a gun from Ruple, and rode away in a vehicle with four other men.² App. 71, ll. 3-7; 82, l. 12-83, l. 6; 253, l. 17-254, l. 9; 262, l. 21-264, l. 6; 269, ll. 4-11. Ruple called 911 and reported the tag number of the vehicle. App. 83, ll. 6-15; 86, l. 17-87, l. 20. A state trooper stopped the vehicle petitioner was in and began ordering the individuals out one by one until only petitioner and Alexander Clemmons were left in the car. App. 127-134. Petitioner drove away from the stop and eventually ran the car into a ditch. App. 134, ll. 16-22; 136, l. 19-138, l. 15; 139, ll. 2-19. Clemmons died as a result of the accident. App. 231, l. 25-232, l. 2; 234, ll. 16-20.

Trooper Brandon Lee testified he was on patrol the day of the incident and he responded to a “be on the lookout” [BOLO] for a vehicle in reference to an armed robbery. App. 125, ll. 19-20; 126, ll. 3-14. Lee stopped the vehicle and with his weapon drawn asked the driver to get out of the car. App. 131, l. 15-132, l. 22. Then Lee began methodically ordering the other occupants out of the car. App. 132, l. 23-134, l. 13. After three men came out of the car the

² Ruple was unable to identify petitioner as the robber on either of two photo line-ups he was shown and in fact identified another person. App. 83, l. 21-86, l. 6; 94-95; However, Ruple was still permitted, over objection, to make an in-court identification of petitioner as the robber at trial. App. 86, ll. 17-24.

vehicle drove away from the stop. App. 134, ll. 15-22. Lee testified that he and another officer pursued the fleeing car and later found the car had wrecked. App. 135, ll. 1-22.

Petitioner testified at trial that he was at a bar in West Columbia playing pool with his friends. App. 365, ll. 1-15; 368, ll. 12-21. Petitioner denied he was the person that robbed Ruple. App. 414, ll. 7-13. He testified two of the men with him, Alexander Clemmons and Patrick Johnson, had the bag containing the gun stolen from Ruple.³ App. 369, l. 23-370, l. 18.

Petitioner testified they were stopped by a state trooper and three of his friends got out of the car, but Clemmons demanded petitioner drive away from the stop. Clemmons stated, "it was his birthday and that he wasn't going to jail," and he grabbed a gun, put it to petitioner's head, and demanded he drive. App. 371, l. 16-372, l. 3. Petitioner, afraid for his life, drove away from the traffic stop. Petitioner said Clemmons yanked the wheel and that is the last thing he remembered. App. 372, l. 5-373, l. 8.

Defense counsel said the following during closing statements:

[Petitioner] felt like he had no other choice at the time. Mr. Clemmons pulled out the gun. He didn't know if he was going to be harmed. He knew from prior experience that Mr. Clemmons could be violent. . . . [Petitioner] felt like he had no other choice. And the state has offered nothing to disprove this.

During the charge conference defense counsel agreed that the charge on the affirmative defense of duress was correct but contended that it was still objectionable under the Sixth Amendment because it shifted the burden to petitioner. App. 428, l. 16-429, l. 14.

During jury instructions the trial court charged the jury on failure to stop for a blue light as follows.

In order to prove this crime, the state must prove beyond a

³ Clemmons is referred to by his middle name, "Kewon," throughout the trial. App. 55, l. 15; 114, ll. 20-23; 328, ll. 1-8; 364, ll. 13-18.

reasonable doubt that the defendant was driving the motor vehicle on a road, street or highway of this state; that the defendant was signaled to stop by a law enforcement vehicle by means of a siren and/or flashing light, and that the defendant did not stop. An official signal requiring a motorist to stop may be a siren or flashing lights, but both are not required. An attempt to increase speed of a vehicle or in some other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light may be considered as evidence of failure to stop for a blue light. However, it is merely an evidentiary fact to be taken into consideration by you along with the other evidence in this case and is to be given whatever weight that you think it should receive. If you find that the state has proved beyond a reasonable doubt that the defendant failed to stop for a blue light and his actions resulted in the death of another, that would satisfy the elements of the offense of failing to stop for a blue light resulting in death.

App. 452-53. Defense counsel made no further objection to the jury instructions. App. 458, l. 5.

PCR testimony

Defense counsel admitted that he should have objected to the trial court's jury instruction on failure to stop for a blue light resulting in death because it did not include, "in the absence of mitigating circumstances." App. 541, ll. 22-23. Counsel explained that he asked for the affirmative defense of duress to be charged but failed to object to the jury charges as given by the court. App. 541, l. 15-542, l. 4.

Discussion

The PCR court erred finding petitioner failed to show counsel was deficient for failure to request the trial court include the "mitigating circumstances" language in the charge on failure to stop for a blue light resulting in death and in finding no prejudice resulted as a matter of law because the jury was properly instructed on the affirmative defense of duress as related to the charged offense of failure to stop for blue lights.

To establish a claim of ineffective assistance of counsel, petitioner must show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that, but for

counsel's error, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992).

The PCR court erred finding that trial counsel was not deficient for failure to object to the court's instruction. The judge failed to charge the current and correct law when he failed to properly charge all the elements of the crime for which petitioner was charged and counsel was deficient for failure to object. Counsel's earlier objection to the court's instruction that "the defendant must prove the affirmative defense of duress by preponderance or greater weight of the evidence," did not lessen the impact or cure counsel's failure to object to an incorrect instruction of the charged offense. Counsel admitted he should have objected to the court's erroneous instruction. While there was no strategic reason given for counsel's failure to object, counsel contended, at the evidentiary hearing, that the affirmative defense of duress constituted the mitigative circumstances. There was mitigating evidence presented through petitioner's testimony that he was held at gunpoint and instructed to drive by Clemmons.

In criminal cases the burden of proof is on the state to prove every element of the crime beyond a reasonable doubt. *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975).

The failure to stop vehicle when signaled by law enforcement statute provides:

In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

S.C. Code Ann. § 56-5-750(A) (emphasis added).

Generally, the burden is on the defendant to prove an affirmative defense by preponderance of the evidence. *See Dixon v. United States*, 548, U.S. 1, 8 (2006) ([A]t common law, the burden of proving affirmative defenses—indeed all circumstances of justification, excuse or alleviation, rested on the defendant.”). Our Supreme Court adopted the rationale of *Dixon* in *State v. New*, 371 S.C. 523, 640 S.E.2d 871 (2007).

However, if the affirmative defense negates an element of the crime, the burden rests with the state to disprove the existence of the affirmative defense. This is because “it would be an extreme inconsistency to consider an element of the crime as an affirmative defense, for where the crime is not proven there is no need for defenses.” *Attardo* at 551-52, 211 S.E.2d 870. Therefore, whereas here, if an element of the crime is implicated by the affirmative defense it is the state’s burden to disprove the existence of the affirmative defense beyond a reasonable doubt.

The PCR erred in finding the element “in the absence of mitigating circumstances” was “immaterial in the context of a duress defense.” The order cites *New*, in support of this proposition. The PCR court further found “[d]uress excuses the crime but does not negate any element of the offense.” *Id.* at 526, 640 S.E.2d at 873. Here, unlike in *New*, duress negates the very first element of the offense and therefore the burden rests with the state to disprove the existence of affirmative defense. The trial court’s instruction to the jury omitted “in the absence of mitigating circumstances” element and defense counsel failed to object to the omission of an element of the charged offense.

The PCR court erred finding petitioner was not prejudiced by trial counsel’s failure to object to the court’s instruction. On direct appeal, the Court of Appeals found petitioner’s argument, that the trial court failed to charge the “current and correct law for the offense of

Failure to Stop for a Blue Light—specifically, that an element, ‘in the absence of mitigating circumstances,’ was omitted from the jury instruction—[was] not preserved” for appellate review because it was not raised to the lower court. Supp. App. 80.

However, petitioner does not argue “that he is entitled to relief merely because this particular issue was not preserved for appellate review.” App. 628. Rather, it is because, as argued in the final brief of appellant, there is an exception to the requirement for the defendant to prove affirmative defenses and the failure to properly instruct the jury on the offense erroneously shifted the burden of proof on to defendant.

In general, the trial court is required to charge only the current and correct law of South Carolina, *Cohens v. Atkins*, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998), and the law to be charged to the jury is determined by the evidence at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). To warrant reversal, a trial court’s charge must be both erroneous and prejudicial. *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). Counsel’s failure to object to the absence of that language where there was mitigating evidence presented—that petitioner was forced at gunpoint to drive away from a traffic stop— was both erroneous and prejudicial and “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

CONCLUSION

By reason of the foregoing argument, petitioner respectfully requests this Court reverse the lower court's denial of post-conviction relief and remand his case for a new trial.



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ATTORNEY FOR PETITIONER

This 18th day of September, 2023.

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RESPONDENT.

APPELLATE CASE NO. 2021-001217

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above-referenced case has been served upon Donald J. Zelenka, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Raphael Lamarr Pontoo, #362840, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 18th day of September, 2023.



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ATTORNEY FOR PETITIONER