THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Appellate Case No. 2020-000560

Sincere J. Owens,

Petitioner,

v.

State of South Carolina,

Respondent.

FINAL BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON APPEAL

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STATEMENT OF THE CASE

The Petitioner was tried on September 13-14, 2010 in Colleton County for murder and possession of a weapon during the commission of a violent crime. The jury specifically acquitted the Petitioner on the charge of murder on a special verdict form. The jury did, however, convict the Petitioner of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The trial court sentenced the Petitioner to twenty-seven (27) years on the voluntary manslaughter and five (5) years on the possession of a weapon during a violent crime to be served consecutively.

The Petitioner filed a timely appeal. Office of Appellate Defense perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). Office of Appellate Defense was relieved as counsel and the remittitur was returned to the circuit court on November 21, 2014.

The Petitioner timely filed and served his Application for Post Conviction Relief (PCR) on June 19, 2015. Owens raised the issue of ineffective assistance of counsel for failing to objection to the voluntary manslaughter charge in his PCR Application. The State filed its Return to the Application on October 26, 2018. Petitioner's PCR hearing occurred on April 1, 2019 before the Hon. William H. Seals, Jr. The PCR was denied in an email sent April 4, 2019, as were all other

PCRs heard on April 1-3, 2019. Judge Seals' email instructed the Attorney General to prepare all the orders denying PCR without any further instruction to the A.G's office. (App. at p. 118). An Order dismissing the Petitioner's PCR Application was filed on October 18, 2019.

The Petitioner filed and served a Motion to Alter or Amend the Judgment on October 18, 2019 under Rule 59(e) of the South Carolina Rules of Civil Procedure. The State posted its Return to the Petitioner's Motion to Alter or Amend on January 13, 2020. The Petitioner supplemented his Motion to Alter or Amend on January 10, 2020 to address the issues raised in the State's informal Return to Petitioner's pending Motion. In the Rule 59(e) Supplemental Motion, Owens moved to Amend his PCR Application to conform with the evidence presented at the PCR hearing under Rule 15(b) (SCRCP) to address the concurrent issues raised for both the voluntary and involuntary manslaughter jury charges.

The PCR Court filed a Form 4 Order denying the Petitioner's Motion to Alter or Amend on March 16, 2020. (App. at p. 154-156). The Form 4 Order did not address any of the issues raised in the Petitioner's Rule 59(e) Motion or Supplemental Motion to alter or amend pursuant to Rule 15(b) SCRCP. This Petition follows.

STANDARD OF REVIEW

"In a PCR case, the [Appellate] Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." Thompson v. State 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018)(citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "However, this Court gives no deference to the PCR court's conclusions of law, and we review those conclusions de novo." Id. (citing Jamison v. State , 410 S.C. 456, 465, 765 S.E.2d 123,

127 (2014) ; Mack v. State, 433 S.C. 267, 858 S.E.2d 160 (S.C. 2021).

FACTS

The State's theory of the murder case was that on April 22nd 2009 Sincere Owens shot and killed Keith Williams. A single bullet struck Williams in the buttocks. Owens fired the shot somewhere in between Annie Glover's residence and the decedent's residence both of which are on Francis Street in the City of Walterboro, South Carolina. The Petitioner and the decedent, Keith Williams, each had a child with Shante Glover. (App. at p. 13, l. 1-14, p. 14, l. 1-9). Shante Glover's grandmother, Annie Glover, provided afternoon childcare for Shante's children, one fathered by Owens and the other by Williams. The grandmother lived only a few houses from Williams' residence.

Earlier in the day Williams was at Shante's workplace (Subway Restaurant), he was upset and talking disrespectfully to Shante. Williams was apparently upset about the fact that she and Owens were back together as a couple. Williams was still upset when he left Shante's workplace. Because of this, Shante thought it would be better for her not go near Williams' residence and asked Owens to pick up her kids from Annie Glover's residence instead of her to avoid any further confrontation with Williams. (App. at p. 16, l. 14-23). Owens took Shante's SUV and went to Francis Street to get the kids from Annie Glover's house. Shante kept a pistol in the glove-box of the SUV. (App. at p.17, l. 23- p.18, l. 1-6).

There was only one witness, other than the Petitioner, that saw the events of the shooting

unfold, and that was Mark McCune[1], a witness called by the State. According to McCune, Williams just got home from work, checked his mailbox and Williams verbally confronted Owens by saying, "what did you say? What you say?" (App. at p. 6, l. 16- 8, l. 14). McCune saw Owens with a gun. (App. at p. 8, l. 15-16). McCune then testified at the jury trial when being questioned by the State as follows:

> Q. "All right. Who had the gun?
>
> A. Sincere.
>
> A. Okay. And he [Owens] wasn't trying to shoot him [Williams] or nothing, you know. He pulls the gun and he was like, "Man, I should - - " and then he stopped. He didn't finish his statement. He was like - - and Keith was like, "Oh, so you got a gun? "You got a gun?" and he started walking off and Sincere fired three times at the ground, you know, trying to scare him. And he ran and he must be got hit in the back."

(App. at p. 8, l. 17-23). McCune further testified:

> Q. "All right. So your testimony, now, is that this was an accidental shooting? That he just shot at the ground to try to scare him?
>
> A. Yeah, the first shot was at the ground, and then, you know, he just kind of like aimed, like he was shooting, but he was still shooting at the ground. He was still shooting - - not towards like trying to shoot him, but he was shooting at the ground."

(App. at p. 9, l. 10-17). Still further, McCune testified:

> A. "Yeah, that he was shooting at him at the - - you

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[1] Mr. Mark McCune was incorrectly referred to as "Martin" McCune at the PCR hearing.

know, he wasn't pointing at him. He was shooting at the ground.

Q. And that's what your testimony is?

A. Yeah." (App. at p. 10, l. 2-5).

The State introduced Owen's written statement and published it to the jury. The published statement read as follows:

> "I [Owens] pulled up to my child's grandmother's house to pick up my baby and they told me the kids were still at daycare. So I started walking back to my baby mother's truck when somebody said, "Look." He was walking from his house on Francis Street towards the truck, reaching. Then he [Williams] pulled out a black gun and started - - and told me to run. I was shooting and ran. I didn't know where I was at. I didn't know what he could have did to me. I just ran and shot. Showtime [Williams] was the one with the gun." (App. at p. 26, l. 1-10).

At the Petitioner's trial, his counsel told the jury in his opening statements that, "[s]ome killings are, sadly, justified; and some are accidents, and there was no intent to kill at all." (App. at p. 2, l. 17-19). Trial counsel told the jury in closing argument that Owens "didn't intent for this to happen." (App. at p. 27, l. 1). Trial counsel continued on saying, "If you [jury] believe he [Owens] went looking there for problems, the he probably - - you look at that sudden heat of passion, okay, that's voluntary manslaughter . . .." (App. at p. 27, l. 2-5). Trial counsel argued further, " . . . the State has not proven intent, certainly not. Sudden heat of passion, he didn't intend to kill anybody. He was trying to defend himself." (App. at p. 27, l. 16-20). There were no facts adduced at the jury trial that there was "sufficient legal provocation," and no facts that Owens acted out of a "sudden heat of passion."

I. THE PCR COURT ERRED IN NOT FINDING TRIAL COUNSEL DEFICIENT FOR FAILING TO OBJECT TO A JURY CHARGE ON VOLUNTARY MANSLAUGHTER AND THAT THE DEFICIENCY SUBSTANTIALLY PREJUDICED THE PETITIONER.

The trial court, in addition to a set of standard jury charges, specifically charged: 1) Murder and malice aforethought (App. at p. 39, l. 18- p. 40, l. 20); 2) Voluntary Manslaughter, sudden heat of passion and sufficient legal provocation (App. at p. 40, l. 27- p. 42, l. 2); and 3) Self-defense. (App. at p. 42, l.1- p. 46, l. 1). Trial counsel had no objections to the jury charge as given. (App. at p. 48, l. 18-19). Trial counsel failed to request jury charges on involuntary manslaughter. More importantly, however, trial counsel failed to object to submitting voluntary manslaughter as a possible verdict when no facts adduced at trial supported such a charge.

At the PCR hearing trial counsel conceded several times that there were facts adduced by the State in the jury trial record that supported a charge on involuntary manslaughter. (App. at p. 97, l. 4 - p. 98, l. 9). Trial counsel specifically conceded that McCune's trial testimony supported a request to charge involuntary manslaughter. (App. at p. 98) Counsel further testified that, " . . .the most probable outcome at trial looked to me to be voluntary manslaughter and that's sort of what I went with." (App. at p. 95, l. 2-4). The only evidence trial counsel had to say about the elements of voluntary manslaughter was that Owens' mother (or mother of his child) was disrespected much earlier in the day. Owens was not present when Williams disrespected Shante nor did it occur during the brief encounter between Owens and Williams. (App. at p. 95, l. 6-13). Trial counsel did not object to voluntary manslaughter being charged to the jury, notwithstanding the lack of facts to support "sufficient legal provocation," or "sudden heat of passion." Oddly, trial counsel testified that he went with voluntary manslaughter simply because Williams was struck in the buttocks. (App.

at p. 95, l. 14- p. 96, l. 3).

The PCR court found, "[c]ounsel testified that he did not see facts supporting proper[2] provocation." (App. at p. 122, ¶ 2). In a complete contradiction, the PCR court found, "[c]ounsel testified that he did not object to the charge of voluntary manslaughter because there were facts presented during the trial that 'could' support that charge." (App. at p. 122, ¶ 2). The PCR court made no findings of fact from the trial record or PCR hearing record as to the elements of "sufficient legal provocation," and "sudden heat of passion," i.e. "an uncontrollable impulse to do violence," both of which must be *concurrently* present in order to charge voluntary manslaughter. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). Owens requested the PCR court to make specific findings of facts in his Rule 59(e) Motion, which the PCR court summarily denied. (App. at p. 135-142).

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Niles, 412 S.C. 515, 522, 772 S.E.2d 877 (2015). To receive a voluntary manslaughter charge, "there must be evidence of sufficient legal provocation and sudden heat of passion." Id. In State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996) the Court in defining the elements of voluntary manslaughter stated:

> "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, it 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*." [Emphasis added].

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[2] Proper, meaning "sufficient legal" provocation, Petitioner Owens assumes.

"Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court." State v. Hernandez, 386 S.C. 655, 662, 690 S.E.2d 280, 281 (S.C. Ct. App. 2010). Trial counsel argued to the jury, "if he [Owens] went there looking for problems, that's 'sudden heat of passion.'" (App. at p. 27, l. 2-5). If indeed Owens went to Francis Street "looking for problems" with Williams, that argument is the anthesis of sudden heat of passion and would constitute evidence of malice toward Williams. Trial counsel's argument to the jury makes no sense legally. Trial counsel testified that he thought voluntary manslaughter was the "most probable" outcome, "so I went with that." (App. at pp. 95-96). Williams testified that he had no input as to his counsel's decision to roll the dice in hopes of a compromise verdict.

McCune's testimony was that Owens was aiming at the ground, "just trying to scare him." (App. at p. 8, l. 17-23). Owen's statement was that Williams was approaching him with a gun, and "I just shot and ran." (App. at p. 26, l. 1-6). This Court in Niles, 412 S.C. at 523, held that since Niles' "own testimony was that he shot at the men to scare them away, appears to support a charge of self defense, not heat of passion." "Voluntary manslaughter, by definition, requires a criminal intent to do harm to another." Id. According to McCune and inferentially by Owens' statement, there was no criminal intent to do harm. If Owens' statement were as he suggests, that Williams was approaching him with a gun and he just shot and ran, "surely the defense of self-defense would be appropriate." Id. Notably, self-defense was charged by the trial judge. As stated in Niles, "Without any evidence supporting the view that the defendant fired the fatal shots while under an 'uncontrollable impulse to do violence,' the trial court properly declined to charge the law of voluntary manslaughter." Id. The jury's not guilty verdict on the murder charge is dispositive on the fact that Owens acted without malice in the incident.

This Court held in Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (2015) that merely being in fear of a decedent, does not support a finding of "sudden heat of passion," or more aptly, "an uncontrolled impulse to do violence." Firing a gun in self-defense is generally considered a rational, controlled act; an act that is not based upon "an uncontrolled impulse to do violence." In State v. Starnes, 388 S.C. 590, 598-99, 698 S.E.2d 604, 609 (2010), the Court, "affirmed the principle that 'to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." Cook 415 S.C. at 558; See also, State v. Sims, 426 S.C. 115, 825 S.E.2d 731 (2019).

In this case there was no physical altercation between Owens and Williams. Owens' statement to police (which was published to the jury, and thus in evidence) was that someone said "look," and he saw Williams advancing on him with a black gun.[3] Owens went to the SUV, got a gun from the glove-box, and stated, "I was shooting and ran. I didn't know where I was at. I didn't know what he could have did to me. I just ran and shot." (App. at p. 26, l. 1-10). McCune backs up Owens statement, by testifying that Owens was firing at the ground, did not intent to hit Williams and was just trying to "scare" Williams. (App. at p. 9, l. 1-10). The PCR court committed error by ignoring this evidence from the trial record and trial counsel's testimony at the hearing.

Based upon the facts presented at trial, Owens was either guilty of murder or not guilty because he acted in self-defense. "Voluntary manslaughter is not a lesser included offense of self-defense." State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). "South Carolina has not expressly adopted the doctrine of imperfect self-defense." State v. Chhith-Berry, 437 S.C. 527, 878

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[3] Just as in the Cook case, no gun was found on or near the decedent.

S.E.2d 352 (S.C. App. 2022). In State v. Scott, 414 S.C. 482, 779 S.E.2d 529 the Court reiterated the following:

> "We recently rejected this argument in State v. Sams, wherein the defendant "argue[d] that he acted lawfully in self-defense, but that he perhaps acted excessively and recklessly in doing so." 410 S.C. at 314, 764 S.E.2d at 517. We found that argument "tantamount to imperfect self-defense," which is a doctrine that "South Carolina has not expressly adopted." Id. at 315, 764 S.E.2d at 517 (citations omitted)."

From the trial record and trial counsel's testimony it is clear that counsel was arguing self-defense but his back-up plan was an imperfect self-defense verdict of voluntary manslaughter. There is nothing in the trial record to suggest that the Petitioner was aware of this tactic or consented to a voluntary manslaughter charge. (App. At p. 122) There is nothing in the trial record as to either "sudden heat of passion," which was *based* upon "sufficient legal provocation." Based upon the body of law in South Carolina, the facts of this case presents a clear proposition: Murder or nothing.

The trial record is silent as to who led the parade as to the charge of voluntary manslaughter; the State or trial counsel for Owens. Trial counsel failed to recognize the lack of evidence which could support voluntary manslaughter charge in Owens' case, and because of that failure, Owens was prejudiced by counsel's unprofessional errors, both at trial and on direct appeal, under the standard of Strickland v. Washington, 466 U.S. 668 (1984) and its' progeny.

In State v. Cooley, 342 S.C. 63,70, 536 S.E.2d 666 (2000), this Court warned the State against improperly moving for an unwarranted charge of voluntary manslaughter in a murder case by stating, "[t]his is a cautionary tale for solicitors as to the pitfalls of requesting a potential 'compromise' charge which is unsupported by the evidence." Mr. Owens' case should likewise be "a cautionary tale," which applies to trial counsel for not objecting to a 'compromise' charge of

voluntary manslaughter when such a charge is factually unwarranted. The PCR court failed to analyze the evidence submitted, and therefore committed an error of law and made findings of fact not supported by the evidence.

CONCLUSION

WHEREFORE the Petitioner prays that this Court will reverse his convictions on voluntary manslaughter and possession of a weapon during a violent crime.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

This 6TH day of November, 2023

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