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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Colleton County
The Honorable William H. Seals, Post-Conviction Relief Judge
The Honorable D. Craig Brown, Trial Judge

Appellate Case No. 2020-000560

SINCERE J. OWENS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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ISSUE PRESENTED

Petitioner's Issue

Whether the PCR court erred in finding trial counsel was not deficient for failing to object to a jury charge on voluntary manslaughter and that the deficiency substantially prejudiced the petitioner?

Respondent's Counterstatement of Issue

Did the PCR court properly find counsel was not ineffective for not objecting to the voluntary manslaughter charge when (1) evidence supported the charge, making counsel's decision to not object reasonable under prevailing professional norms, (2) counsel articulated a valid strategic reason for not objecting, and (3) because the charge was proper, it is not reasonably likely an objection would have changed the outcome?

STATEMENT OF THE CASE

Sincere J. Owens (Petitioner) is presently confined in the South Carolina Department of Corrections serving a cumulative thirty-two-year sentence. In June 2009, the Colleton County Grand Jury indicted Petitioner for murder (2009-GS-15-0305) and possession of a weapon during the commission of a violent crime (2009-GS-15-0306). These charges arose from the fatal shooting of Keith Williams (Victim) on April 22, 2009.

On September 13-15, 2010, Petitioner proceeded to a jury trial before the Honorable D. Craig Brown. Public Defender David S. Matthews represented Petitioner, and Deputy Solicitor Sean P. Thornton prosecuted the case. The jury acquitted Petitioner of murder but convicted him of the lesser-included offense of voluntary manslaughter. The jury also convicted him of the weapon charge. Judge Brown sentenced Petitioner consecutively to twenty-seven years for voluntary manslaughter and five years for the weapon charge.

Petitioner filed a motion to reconsider the sentence. A hearing convened on May 29, 2012, before Judge Brown, who later recused himself. On November 13, 2012, a hearing convened before the Honorable Perry M. Buckner, III. Judge Buckner denied the motion.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender Kathrine H. Hudgins through the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal pursuant to Anders. The remittitur was sent November 21, 2014.[1]

On June 19, 2015, Petitioner timely filed a PCR application. On April 1, 2019, an evidentiary hearing convened before the Honorable William H. Seals, Jr. On October 18, 2019, Judge Seals issued an order denying Petitioner's application. Petitioner then filed a Motion to

[1] The appellate records are publicly available on c-track. See Appellate Case No. 2012-213550.

Alter or Amend the Judgement, and a Supplemental Motion to Alter or Amend on January 13, 2020. On March 16, 2020, the PCR court issued an order denying the motion.

Petitioner filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. On November 13, 2020, Respondent filed its return. Thereafter, the matter was transferred to the Court of Appeals. On October 6, 2023, the Court of Appeals issued an order granting certiorari on the question of whether counsel was ineffective for not objecting to the voluntary manslaughter charge and denying certiorari on the remaining questions.

SUMMARY OF THE FACTS

On April 22, 2009, Victim was fatally shot in the upper buttocks. (App. 105). At trial, Shante Glover testified she had a child by both Petitioner and Victim. She stated on the day of the shooting Williams had visited her at work, upset that she and Petitioner were together. Thereafter, Shante asked Petitioner to pick up her children from her grandmother's home, who lived near Victim. (Supp. App. 113-16, 119). On cross-examination, she acknowledged Victim had an "attitude," had been confrontational with her and Petitioner, and had sent a text saying, "he was gonna [F] [Petitioner] up when he saw him." (Supp. App. 122).

Mark McCune, who witnessed the shooting, testified Victim had just arrived home and was checking his mail when Petitioner pulled up. He continued:

> [Petitioner] got out the car. He came and said something about—they must have had confusement or something about his mother or something, and [Victim] was like—[Victim] was like, "What you say? What you say? You know, and after that, you know, all I seen was a gun and he said—
>
> Q. Allright. Who had the gun?
>
> A. [Petitioner].
>
> . . . And he wasn't trying to shoot him 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 [Victim] was like, "Oh, so you got a gun? You got a gun?" and he started walking off and [Petitioner] fired three times at the ground, you know, trying to scare him. And he ran and he must be got hit in the back.

(Supp. App. 94). Although McCune maintained Petitioner shot at the ground, he acknowledged he did not initially tell police that Petitioner shot at the ground. (Supp. App. 95-97).

Petitioner gave the following written statement, which was introduced at trial:

> I 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 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. [Victim] was the one with the gun.

(Supp. App. 155, emphasis added). Petitioner also provided a video-recorded statement, which was played for the jury. (Supp. App. 157).

Responding paramedics Richard Sheffield and Joseph Campbel both testified they did not see a gun near Victim when they arrived. (Supp. App. 68, 75). Likewise, neighbors Charlene Rowes and Kevee Rowes, who heard the gunshots and went outside, testified they did not see a gun on or near Victim. (Supp. App. 80, 88).

Petitioner did not testify or present any witnesses. During closing argument, trial counsel argued Petitioner acted in self-defense. (Supp. App. 216-18). Alternately, he argued, "He didn't intend for anybody to be hurt. If you believe that he went there looking for problems, then he probably—you look at that sudden heat of passion, okay, that's voluntary." (Supp. App. 220). The judge instructed the jury on murder, self-defense, and the lesser-included offense of voluntary manslaughter. (Supp. App. 232-49). The jury acquitted Applicant of murder but convicted him of voluntary manslaughter.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found counsel was not ineffective for not objecting to the voluntary manslaughter charge when (1) evidence supported the charge, making counsel's decision to not object reasonable under prevailing professional norms, (2) counsel articulated a valid strategic reason for not objecting, and (3) because the charge was proper, it is not reasonably likely an objection would have changed the outcome.

Petitioner contends the PCR court erred in finding counsel was not ineffective for not objecting to the voluntary manslaughter charge because no evidence supported this charge. Contrary to this assertion, however, evidence *did* support the voluntary manslaughter charge. Specifically, Petitioner in his statement to law enforcement stated Victim pulled a gun on him, and evidence showed Victim had threatened Petitioner. Further, counsel articulated a valid strategic reason for not objecting and thus was not deficient. Finally, because evidence supported the charge, the charge was a proper charge, and thus it is not reasonably likely an objection to the charge would have changed the outcome.

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating claims of ineffective assistance of counsel, courts apply the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668 (1984). First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," and the applicant must overcome this presumption to receive relief. Id. at 117-18, 386 S.E.2d at 625. Second, an applicant must prove counsel's deficient performance prejudiced the applicant such

that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

"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. 5 1 5, 522, 772 S.E.2d 877 (2015).

> 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.

State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). "In determining whether the act which 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." Leggette v. State, 440 S.C. 590, 602–03, 892 S.E.2d 153, 160 (Ct. App. 2023).

"[F]ear can constitute a basis for voluntary manslaughter." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998). In Wiggins, the South Carolina Supreme Court determined the trial court properly charged voluntary manslaughter when the defendant "was in a heated argument with Victim" and "testified he was afraid for his life because Victim physically threatened him." Likewise, in State v. Nichols, 325 S.C. 111, 116, 118, 481 S.E.2d 118, 121-22 (1997), the Court found evidence supported voluntary manslaughter when the defendant and the victim had been arguing and the defendant "claimed he saw a shiny object in the victim's hand and he thought it was a gun." Finally, in State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993), the Court found the trial court erred in not charging voluntary manslaughter when evidence showed Lowry

and the victim had been arguing, and Lowry's witnesses testified the victim "moved toward Lowry in a menacing fashion with his arms and hands outstretched toward Lowry as if to grab him."

A. Petitioner's statement that Victim pulled out a gun along with other evidence was sufficient to support voluntary manslaughter.

Here, evidence supported voluntary manslaughter. Admittedly, the text messages from Victim, in and of themselves, are not sufficient legal provocation. See State v. Hernandez, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010) ("Sufficient legal provocation must include more than 'mere words' or a display of a willingness to fight without an overt, threatening act.").

However, in his statement, Petitioner indicated Victim "pulled out a black gun" and told him to run. This overt act, coupled with evidence that Victim had "attitude," had been confrontational, and had sent threatening text messages to Petitioner, is sufficient to support a finding of sufficient legal provocation. See State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951) ("An overt, threatening act or a physical encounter may constitute sufficient legal provocation); Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) ("[W]hen death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault—by some overt, threatening act—which could have produced the heat of passion."); id. (finding "testimony which, if believed, tends to show that the decedent and Lowery were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred" supported voluntary manslaughter).

Further, evidence supported a finding of sudden heat of passion. According to Petitioner's statement, Petitioner ran and shot immediately after he saw Victim with a gun. This is sufficient to support sudden heat of passion. See Walker, 324 S.C. at 260, 478 S.E.2d at 281 ("[S]udden heat of passion, . . . 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.").

Petitioner attempts to refute a finding of "sudden heat of passion" by asserting, "If indeed [Petitioner] went to Francis Street 'looking for problems,'" such evidence would constitute malice. (Pet. 8). However, no evidence was presented that Petitioner went to Francis Street for the purpose of confronting Victim. Rather, Shante testified—consistent with Petitioner's statement to police—that she asked Petitioner to go to the area to pick up her children. (Supp. App. 113-16, 119, 155). In his statement, Petitioner told police he was leaving Shante's grandmother's house and walking toward his truck when Victim approached him and pulled a gun. (Supp. App. 155). The foregoing was sufficient for the jury to find Applicant acted in a sudden heat of passion upon sufficient legal provocation.[2]

The facts here are different than Niles. Unlike Niles—who approached the victim with the intent to rob him—the facts here showed Applicant had an innocent purpose in being in the same area as victim. 412 S.C. at 523, 772 S.E.2d at 881. Specifically, Shante testified (consistent with Applicant's statement to police) that she asked Petitioner to pick up her children from her grandmother, who lived near Victim. (Supp. App. 11-16, 119). Contra id. ("The scheme to rob the victim, coupled with Niles's decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act[ed] in a sudden heat of passion.").[3] This case is thus

[2] For purposes of determining whether evidence supports the charge, it is not relevant that other evidence contradicted Petitioner's version of the facts. Ultimately the jury gets to decide what it believes the facts are. The role of the court, in determining whether a charge is proper, is whether evidence supports the charge. Here evidence was presented that could support a finding that Petitioner acted in a sudden heat of passion upon sufficient legal provocation.

[3] In other words, it strains credibility to suggest that someone would be acting in sudden heat of passion by shooting a victim he was in the process of robbing—even if that victim pulled a gun. Here, however, if the jury believed Petitioner's version of the facts, it could have found he was in the area to pick up Shante's children (an innocent purpose) when Victim approached with a gun.

distinguishable from Niles.

Likewise, this case is distinguishable from Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (2015).[4] In Cook, the Supreme Court of South Carolina found no evidence supported sudden heat of passion when (1) Cook stated he tried to walk away but the victim "kept cutting him off," which did not suggest Cook was incapable of cooling off; (2) a witness testified Cook and the victim were "talking softly and that he could hardly tell they were arguing," which did not suggest Cook was acting under an uncontrollable impulse to do violence; and (3) in his statement, Cook never indicated he lacked control over his actions. Id. at 557, 784 S.E.2d at 668. Here, however, nothing suggested Petitioner was calmly attempting to walk away. Likewise, McCune's testimony indicated Petitioner got out of the car and said something to Victim; if believed, the jury could have determined Petitioner was incapable of cooling off or under an uncontrollable impulse to do violence—especially in light of testimony about Victim's prior threats and statements. (Supp. App. 94, 122). Finally—and critically—unlike Cook's statement, Petitioner's statement indicated he lacked control over his actions: "Then he 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**. (App. 155, emphasis added). Based on the foregoing, evidence supported a finding that Petitioner acted in a sudden heat of passion.

Likewise, State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010) is distinguishable. There, Starnes "testified when he turned around and saw Bill pointing a gun at him, "I shot Bill Welborn

[4] The procedural posture in Cook is also different. Although Cook was a PCR action, it addressed a direct appeal issue pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In Cook, the defendant objected to the giving of the charge, and Cook did not address the reasonableness of counsel's decision in this regard. Here, however, the Court must consider—in addition to whether the charge was proper—whether counsel's decision to not object was reasonable under prevailing professional norms. As set forth below, counsel articulated a valid, strategic reason for not objecting.

and then turned and shot Jared Champlin." He added, "I was scared and I was frightened. When Jared pulled the gun on Jody, it scared me." Id. at 599, 698 S.E.2d at 609. The Court concluded that although this testimony supported a finding that Starnes was afraid, it did not support a finding that Starnes "was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence." Id. at 559, 698 S.E.2d at 609. Here, however, Petitioner stated Victim "pulled out a gun" and in response, Petitioner began "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. 155, emphasis added). The foregoing supports a finding that Petitioner was afraid and acted in a sudden heat of passion as a result. See id. at 590, 698 S.E.2d at 609 ("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.").

Petitioner asserts that based on the evidence presented, he "was either guilty of murder or not guilty because he acted in self-defense." (Pet. 9). He further contends that if his statement was true, then he necessarily lacked criminal intent—making self-defense appropriate. (Pet. 8). However, these arguments overlook the fact that the jury can choose to believe all or only a portion of evidence. Likewise, the jury can draw reasonable inferences from the evidence. Here, the jury could have reasonably concluded evidence supported criminal intent. Specifically, the jury could have reasonably inferred Petitioner was in the area picking up Shante's children when he saw Victim, Petitioner approached Victim to confront him (based on McCune's testimony),[5] Victim pulled out a gun (based on Petitioner's statement), and Petitioner acted in a sudden heat of passion and upon sufficient legal provocation (based on Petitioner's statement that Victim had a gun,

[5] McCune stated Victim was walking to his mailbox when Petitioner pulled up and got out of his vehicle.

evidence of Victim's prior threats, and Petitioner's statement that he "didn't know where [he] was at" and he "just ran and shot"). See Leggette, 440 S.C. at 602–03, 892 S.E.2d at 160 ("In determining whether the act which 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.").

Although Petitioner's statement could also support self-defense, the jury—as the factfinder—ultimately concluded the State disproved self-defense.[6] The fact the statement *could* support self-defense does not mean it could not also support voluntary manslaughter. Cf. Starnes, 388 S.C. at 599, 698 S.E.2d at 609 (providing "evidence that fear caused a person to kill another person *in a sudden heat of passion* . . . is the distinction between voluntary manslaughter and self-defense" (emphasis added)).

Finally, although voluntary manslaughter is not a lesser-included offense of self-defense, the two charges are not mutually exclusive. See State v. Nichols, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997) ("Self-defense and voluntary manslaughter are not mutually exclusive and should both be submitted to the jury if supported by the evidence."). Because evidence supported voluntary manslaughter, the trial court properly charged voluntary manslaughter, and counsel was not deficient for failing to object.

[6] The jury could have reasonably concluded that McCune's testimony that Petitioner was in his car and got out to confront Victim refuted a finding that Petitioner was without fault in bringing on the difficulty. Likewise, the jury could have reasonably concluded evidence that Victim was shot in the behind showed he was retreating, which could have reasonably refuted self-defense.

B. Counsel articulated a valid reason for not objecting to voluntary manslaughter.

This Court recently addressed the reasonableness of a trial counsel's failure to object to a voluntary manslaughter charge in a murder case where the defendant proceeded on self-defense. Legette, 440 S.C. at 590, 892 S.E.2d at 153. There, trial counsel expressed concern during the PCR hearing "about the jury's rejection of self-defense." Id. 601 n.5, 892 S.E.2d at 159 n.5. Although counsel was never questioned about whether he had a strategic reason for not objecting to the voluntary manslaughter charge, this Court noted his failure to object could have been part of a valid strategy:

> [R]equesting a voluntary manslaughter instruction would have been a legitimate strategic attempt to mitigate the consequences of the sentence Petitioner faced on the murder charge if the jury were to reject his theory of self-defense, as it ultimately did. A murder conviction carries a sentence of thirty years to life (day-for-day) while the sentencing exposure for voluntary manslaughter is two to thirty years computed at 85%. S.C. Code Ann. § 16-3-20(A) (2015) (punishment for murder); § 16-3-50 (2015) ("A person convicted of manslaughter ... must be imprisoned not more than thirty years or less than two years."). Challenging the voluntary manslaughter instruction at trial would have been a huge risk in light of Petitioner's very contradictory statements to law enforcement and his decision to obtain an illegal firearm and go out that night—armed—despite his escalating beef with Ingram and his anticipation that "something was going to happen."

Id. at 590, 601, 892 S.E.2d at 159.

Here, counsel testified he did not object to the voluntary manslaughter charge because he believed self-defense was not a viable outcome. Specifically, counsel noted Victim was shot in the behind. (App. 95). Based on evidence Victim was shot from behind, counsel's conclusion that self-defense would likely not be a viable defense was reasonable under prevailing professional norms. Further, based on this conclusion, counsel was reasonable in not objecting to the voluntary manslaughter charge. See id. ("Challenging the voluntary manslaughter instruction at trial would

have been a huge risk in light of Petitioner's very contradictory statements to law enforcement and his decision to obtain an illegal firearm and go out that night—armed—despite his escalating beef with Ingram and his anticipation that 'something was going to happen.'"). Thus, the PCR court properly found Applicant did not prove deficiency.

C. Because the charge was proper and supported by the evidence, it is not reasonably likely an objection would have led to the court not giving the charge.

Finally, Petitioner did not prove prejudice. As set forth above, evidence supported voluntary manslaughter. Thus, even if counsel had objected, it is not reasonably likely the court would have declined the charge,[7] or that the outcome would have been different. Thus, Petitioner did not prove prejudice.

[7] Because evidence supported the charge, it would have been error for the court to refuse to charge it. See Starnes, 388 S.C. at 596, 698 S.E.2d at 608 ("To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter.").

CONCLUSION

For the foregoing reasons, this Court should affirm the PCR court.

Respectfully submitted,

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This 4th day of March, 2024