

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable G.D. Morgan, Circuit Court Judge

BRITTANY PEARSON,..... PETITIONER,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT.

Appellate Case No. 2023-000561

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Whether counsel was ineffective for failing to preserve Pearson's Castle Doctrine claim for appellate review where the issue was raised on appeal, the State did not argue the issue was unpreserved, and the court of appeals ruled on the issue.
- II. Whether the PCR court correctly found Pearson failed to show prejudice from counsel's failure to present additional evidence at trial to bolster her self-defense claim.

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Petitioner Brittany Pearson for murder and possession of a firearm during the commission of a violent crime. On May 23, 2016, Pearson proceeded to a trial before the Honorable J. Derham Cole and a jury. Thomas Quinn, Esquire, represented Pearson, and Assistant Solicitors Timi Poulos, Russell Ghent, and Grady Anthony represented the State. The jury found Pearson guilty of the lesser included offense of voluntary manslaughter and possession of a firearm during the commission of a violent crime, and Judge Cole sentenced her to twenty-four years' imprisonment for voluntary manslaughter and five years' imprisonment for the weapon offense, to be served concurrently. (Tr. 326, 330–31).

Pearson's conviction was affirmed on appeal in an unpublished opinion. State v. Pearson, Opinion No. 2018-UP-324 (S.C. Ct. App. Filed July 18, 2018). Pearson raised one issue: whether the trial court erred by refusing to grant her immunity from prosecution under the Protection of Persons and Property Act. Pearson filed a PCR application on April 5, 2019. An evidentiary hearing was held on April 20, 2022, at the Spartanburg County Courthouse before the Honorable G.D. Morgan, Circuit Court Judge. Susannah C. Ross, Esquire, represented Pearson. Assistant Attorney General Chelsey F. Marto represented Respondent. The PCR court denied relief in a written order on March 16, 2023. Pearson filed a petition for writ of certiorari on October 27, 2023. This return follows.

STATEMENT OF FACTS

The State's presentation of the facts can be found on pages 342–44 of the record.

ARGUMENT

I.

No evidence supports Pearson’s claim that counsel failed to preserve her Castle Doctrine claim for appellate review where the issue was raised on appeal, the State did not argue the issue was unpreserved, and the court of appeals ruled on the issue.

Pearson alleges counsel failed to preserve her immunity claim for appellate review because counsel did not request specific findings from the trial court, and that the appellate court did not have a sufficient record to conduct “meaningful appellate review.” RPWC at 10. The record does not support this assertion. Appellate counsel raised the immunity issue, the State did not argue the issue was unpreserved, and the court of appeals ruled on the issue. State v. Pearson, Opinion No. 2018-UP-324 (S.C. Ct. App. Filed July 18, 2018). There is no indication the appellate court believed the issue was unpreserved.

If the appellate court believed the record was insufficient, it could have remanded the case, as the appellate courts did in State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019), State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), State v. McCarty, 437 S.C. 355, 878 S.E.2d 902 (2022), and State v. Ford, 439 S.C. 261, 271, 886 S.E.2d 710, 715 (Ct. App. 2023). These cases were all remanded for factual findings because the trial court abdicated its duty as fact-finder. The issue of immunity was not found to be unpreserved in any of these cases; they were simply remanded for further factual findings. In this case, there is no indication the appellate court believed the issue itself was unpreserved, even though the trial court did not make on-the-record findings. The appellate court could judge the merits of Pearson’s immunity claim on direct appeal based on the evidence presented at the immunity hearing.

Given the scant presentation by Pearson at the pretrial Duncan hearing, the fact that the victim was unarmed, the fact that Pearson had no visible injuries, and the fact that Pearson told

police she should not have shot the victim, it is unsurprising the trial court found Pearson failed to meet her burden to show she was entitled to immunity. State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (explaining “when a defendant raises the question of statutory immunity pre-trial, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches”). The record was more than adequate to support that finding. Pearson has not shown a request for more specific findings would have had any effect on the outcome of the case. Strickland v. Washington, 466 U.S. 668 (1984) (explaining ineffective assistance claims require a showing of a “reasonable probability of a different outcome”). Certiorari should be denied on this issue.

II.

The PCR court correctly found counsel was not ineffective for failing to present additional evidence to bolster Pearson’s self-defense claim.

Pearson claims trial counsel was ineffective because he did not present three additional pieces of evidence: Petitioner’s 911 call, decedent’s toxicology report, and the testimony of Dustin Lawson, a witness whose statements corroborated Petitioner’s version of events. In his closing argument at trial, counsel questioned why the State did not produce these pieces of evidence and argued the State failed to meet its burden of proof, having previously noted the State’s case was “briefer than I expected.” App. 181. Counsel had emphasized in his opening statement that it was the State’s burden to introduce evidence to convince the jury of Pearson’s guilt beyond a reasonable doubt. App. 106. Petitioner failed to show a substantial likelihood this evidence would have changed the result of trial. Certiorari should be denied.

As to counsel’s failure to introduce the victim’s toxicology report, Pearson has failed to show prejudice. During a pretrial hearing, defense counsel argued the toxicology report was admissible. App. 15. The report showed the victim had a .15% blood-alcohol concentration.

App. 418. Counsel stated at a pretrial hearing that he did not have the necessary witness under subpoena, and seemed to doubt whether he would be able to admit the report. The State did not admit the report, and defense counsel did not attempt to admit it. There was little discussion of the issue at the PCR hearing, with counsel testifying that he may have been able to admit the report through the forensic pathologist, but offering no explanation for why he did not attempt to do so. App. 391–92. However, Pearson has failed to show prejudice sufficient to warrant reversal on this issue. Pearson did not present any expert testimony at the PCR hearing to explain the probable effects of this level of alcohol on the victim’s demeanor. In her original application, Pearson recognized the probative value of the report depended on a toxicologist explaining “how victim’s alcohol level affected her reactions that night.” App. 425.

Additionally, witnesses testified both Pearson and the victim were drinking that day and thus the jury was aware alcohol was a factor. App. 132. Pearson testified alcohol influenced the victim’s behavior in the verbal argument leading up to the shooting. App. 204.

As to Pearson’s 911 call, there was no dispute that Pearson called 911 and reported she shot the victim. Trial counsel did not attempt to admit the recording of the call. Pearson argues the recording of the call would have had a greater impact on the jury because the jurors would have been able to hear that she was hysterical and remorseful. RPWC at 17. Pearson has failed to show prejudice sufficient to warrant reversal. The responding officer testified Pearson was “extremely hysterical, very upset, shaking, crying on the phone.” App. 109. Pearson testified she “was shaking so bad [she] couldn’t even unlock [her] phone.” App. 206. Thus her 911 call was largely cumulative.

Pearson further argues the 911 call made by witness Dustin Lawson would have corroborated Pearson’s testimony. Lawson’s 911 call was likely inadmissible hearsay, as

Lawson had a calm demeanor and his statement likely did not qualify as an excited utterance. Applicant's Exhibit #4. Lawson made no mention of a "banging" noise in his 911 call, but stated there was a domestic dispute and he thought he heard a gunshot. The PCR court did not specifically rule on the failure to present Lawson's 911 call, only Lawson's "witness statement." App. 436. Thus this claim is not preserved for review. Moses v. State, Opinion No. 6041 (S.C. Ct. App. Filed Jan. 3, 2024) (explaining issue must be raised and ruled on by trial court to be preserved for review).

As to Dustin Lawson's written statement, wherein he told police he heard a sound like someone "banging on something possibly a door," this was inadmissible hearsay. App. 420. Counsel could not have introduced the statement even if he tried. To the extent Pearson argues counsel should have called Lawson as a witness, the PCR court only ruled on counsel's failure to introduce the statement, and made no finding about counsel's failure to call Lawson himself as a witness. App. 436-37. Thus this issue is not preserved for review. If the issue is preserved, Pearson still failed to show prejudice because she did not proffer Lawson's testimony. PCR counsel should have called Lawson as a witness at the PCR hearing. Without calling Lawson as a PCR witness, there was no evidence what his actual trial testimony would have been. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (explaining "a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial").

The evidence cited by Petitioner was potentially relevant to her self-defense claim, but the record supports the PCR court's finding that it would not have affected the result of trial. The State did not dispute that the victim attacked Pearson with non-deadly force. Instead, the


State focused on the disproportionate deadly response. The evidence cited by Pearson would not have fundamentally altered the nature of the State or defense case at trial. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

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