

8/2/13

Dear Mr Daniel E. Shearouse,

Dealing With Appellate case No. 2012-212846

RECEIVED

I pray to the courts to allow me to amend

AUG 09 2013

the petition for writ of Certiorari to include issues that my Appellate counsel refused to brief on my behalf.

SC SUPREME COURT

If its not so much to ask can you also forward a copy of the said forth amendments to the correct party

Asst Attorney General Ashleigh R. Wilson / Matthew Friedman.

As well please send me a true bill notification that my amended brief is included with the original brief

that Mr David Alexander has filed with the courts.

I know your a busy person, please assist me with my situation.

P.S., Please send me a certificate of service to let me know that my amended arguments are being documented for the courts

Sincerely,

Date: 8/2/13 Lord Shih

MCI / SMU B-24
386 Redemption Way
McCormick, SC, 29844

Sworn to and subscribed before me this 2nd day of August, 2013

Penny White (L.S.)
Notary Public

My Commission Expires: Feb 28, 2018

(Amended Brief Petition for writ of Certiorari)

State of South Carolina
In The Supreme Court

Certiorari to Charleston County
J. Dendra L. Jefferson Circuit Court Judge

#279992
Lord Byron Slater,
Petitioner,

v.

State of South Carolina,
Respondent

Appellate Case No. 2012-212846

Petition For Writ Of Certiorari

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense

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Issues Presented

1. Did the PCR judge err in refusing to find trial counsel ineffective during opening argument by admitting guilt, failing to advance any theories of the defense, and only attempting to establish that the defendant killed victim without malice?
2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to request lesser included offenses of involuntary manslaughter and accident?
3. Did the PCR judge err in refusing to find trial counsel ineffective for not challenging the information within the search warrant affidavit under *Franks v. Delaware*, when a false statement was used to obtain evidence against defendant?

Statement

Would be the same as the original brief of Writ of Certiorari
as Mr. David Alexander Appellate ~~def~~ender of applicant.

Arguments

1. The PCR judge erred in refusing to find trial counsel ineffective during opening argument by admitting guilt, failing to advance any theories of the defense, and only attempting to establish that the defendant killed victim without malice.

Trial counsel's opening statement prejudiced defendant's defense when he stated in opening that defendant killed victim without malice, which is stating to the jurors and trial judge that defendant was guilty of manslaughter. The problem with trial counsel's opening was it made it impossible for the jury to take in consideration any lesser included offenses. Trial counsel failed to lay the foundation to establish self-defense, involuntary manslaughter as well as accident. And applicant notes that the order of dismissal dealing with trial counsel's opening argument was not supported by fact. The Order of Dismissal stated that it was effective counsel to argue in opening statement that defendant shot victim in self-defense. Counsel never testified to arguing in his opening self-defense at applicant PCR hearing he testified that the defense was there was no malice.

Q. Okay. I believe you testified that the defense was there no malice?

A. Yes. Right. And that we did argue for self-defense.
(PCR transcript pg 19 line 3-4)

Trial counsel testimony at PCR hearing was focused on manslaughter as a lesser included offense and he only requested self-defense after defendant got on the stand to give his side of what led up to the shooting. (PCR transcript pg 19 line 19-25, pg 20 line 1-18)

(Also review trial transcript pg 111-120) Trial counsel didn't make any reference to self-defense. And applicant contends

that trial counsel's ineffectiveness during opening argument is what led to the trial judge refusing to allow the jury to deliberate on whether or not defendant's life was in danger after an unknown gunman shot at applicant first which ~~is what~~ led up to the shooting. The jury should have been able to hear applicant's defense. And furthermore it is not a sound trial strategy to admit guilt by stating defendant was guilty of manslaughter. Then attempt to argue self-defense only after the defendant took the stand to give his side of what led up to the incident. And citing State v. Slater Op. No 3855 (Ct App Aug. 9, 2004) Applicant was entitled to present his defense to the jury. And furthermore the dissenting opinion is controlled by error and that was manifested by trial counsel's ineffectiveness during opening arguments. If it's effective counseling to argue self-defense in opening argument, than what is it when trial counsel failed to do so on behalf of his client?

Citing Gilchrist v. State (2002) 350 S.C. 221, 565 SE.2d 281

In Gilchrist the judge instructed that opening argument is not evidence, but the Supreme Court ruled that the trial counsel was ineffective for failing to object to improper opening arguments.

And it relates to applicant's case, because trial counsel's ineffectiveness painted the defendant in a corner, by stating that his client was guilty of manslaughter during opening argument. Defendant pled not guilty to murder and the lesser included offense of Manslaughter.

And by defendant pleading not guilty, he is entitled to a defense.

Trial counsel's opening argument could not be a harmless error, when his actions made it impossible for the jury to even consider any lesser-included offenses other than manslaughter.

To establish a claim of ineffective of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

Trial counsel testified at PCR hearing that the defense was that there was no malice. He also testified that the lesser included offense focused on man's laughter, and that he didn't argue for self-defense until after defendant took the stand. (PCR transcript pg 20 line 4-7) and referencing (trial transcript pg 179 line 10-15) which states: I had submitted and supplied to the clerk a copy of 17 proposed charges. The ones that I would particularly call to the Court's attention that we would request, in light of Mr. Slater's testimony, is the charges that relate to self-defense.

It was deficient to admit guilt during opening argument. There is a reasonable probability that the outcome of trial would have been different if the jurors were allowed to deliberate on self-defense, and further more the dissenting opinion in State v. Slater mis-understood what applicant defense was based on. He wasn't trying to say he killed victim in self-defense. Applicant's defense was he was shooting only to protect himself from being shot, by an unknown gunman, who shot at the defendant first. And trial counsel, nor Appellate counsel attempted to clear up that mis-understanding. Furthermore, PCR court was in error for concluding that the South Carolina Supreme Court dissenting opinion in State v. Slater is cause to show trial counsel performance was not defective during opening argument. (PCR transcript pg 43 line 10-17) Applicant contends that the Supreme Court's opinion in State v. Slater has no bearings over whether trial counsel was ineffective or not during opening argument. It only deals with the trial judges decision to instruct the jury or not.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to request lesser included offenses of involuntary manslaughter and accident.

Trial counsel was ineffective for failing to advance any theories of the defense. Trial counsel testified at PCR hearing that he did not attempt to request any lesser offenses. And through cross by PCR counsel, it was established there were no other lesser included offenses. (PCR transcript pg 12 line 6-16)

Furthermore, the Order of dismissal stated that counsel did not see any evidence to support charges on involuntary manslaughter or reckless homicide, was not supported by fact. The only testimony from trial counsel was there was no lesser included offenses requested. (Review PCR transcript) And citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108

(1999) Slater could have also presented involuntary manslaughter and accident as a valid defense. And the not presenting these arguments before the jurors once again falls back on the ineffective assistance of counsel during defendant's opening argument. By trial counsel's admitting guilt by stating his client is guilty of manslaughter. Was prejudice to his client's defense because it made it impossible for a lesser included offense other than Manslaughter to be deliberated on by the jurors. How then could a defendant prove his innocence before a jury of his peers, when the jurors wasn't allowed to deliberate on self-defense, involuntary manslaughter, or accident, due to trial counsel's ineffectiveness during opening argument.

1. In State v. Slater, the defendant did not shoot victim in self-defense.

The defendant shot in self-defense, of the Aggressor who with others were committing a felony. And the victim was shot accidentally which makes the killing involuntary manslaughter. Which would have shown evidence to charge the jury accidental death also, because the jury would not be charged the implied malice instruction based on the use of a deadly weapon.

3. The PCR judge erred in refusing to find trial counsel ineffective for not challenging the information within the Search Warrant Affidavit under Franks v. Delaware, when a false statement was used to obtain evidence against defendant.

Trial counsel was ineffective for not challenging the Search Warrant Affidavit under Franks v. Delaware. By stating that on the night of February 3rd, 2001, while in the area of Jenkins Ave. and Crawford St. in North Charleston a shooting occurred which took the life of one Mark Nelson. This incident occurred after a dance at the North Charleston High School. The victim was attempting to leave the dance when he was approached by the defendant and others, and the defendant demanded the money of the victim. The victim was shot twice. (see search warrant Affidavit)

At PCR hearing trial counsel testified that Mark Nelson was not the victim in defendant's case. (PCR transcript pg 14 line 7-22)

The shooting, the ~~kill~~ killing of one Mark Nelson never occurred. The 6th amendment states that the defendant has the right to have effective counsel before, during, and after trial. And by trial counsel not challenging the information within the Search Warrant Affidavit, by moving the trial court to conduct a Franks hearing, constitutes ineffective assistance of counsel. Trial counsel also testified at PCR hearing that there was no Franks motion and he did not raise the defect in the wrong name of victim. (PCR transcript pg 14 line 23-25, pg 15 line 1-9)

The order of dismissal stated, that counsel testified that he did not raise this in a motion to suppress the evidence.

based on the affidavit because he believed it was an error and did not rise to the level of a defect.

Again order of dismissal, not supported by fact.

(review PCR transcript) Trial counsel never testified to why he didn't challenge the information. The Search Warrant Affidavit was defective and lacked probable cause, because the information within the Affidavit centered around one Mark Nelson.

The PCR court stated that the search warrant affidavit was sufficient and it was a scrivener's error that Mark Nelson was named on the affidavit rather than the victim and that no prejudice resulted from this error. Applicant cites State v. Jenkins², 398 S.C. 215, 727 S.E. 2d 761 (2012)

The Court of Appeals ruled that the trial court erred in finding the search warrant for sample of Jenkins DNA was valid. The case is remanded for an evidentiary hearing on the applicability of the inevitable discovery doctrine and determination of whether the illegally seized evidence should have been suppressed. The applicant contends that the PCR court was in error for determining that the defective Affidavit was a scrivener's error, without conducting a Franks hearing. Trial counsel was ineffective for not challenging the information within the search warrant. And it prejudice defendant because the weapons could have been suppressed, and the outcome of trial would have been different. Because the state case was based on the inferred or implied jury charge that instructed the jury that it could imply or infer malice from the use of a deadly weapon.

2. PCR judge was the same trial judge in said forth case and applicant contends that PCR judge has a history of errorness interpretation of law.

Conclusion

Petitioner is entitled to relief on each of the three issues. Additionally, the cumulative effect of the three errors as well as whatever issue applicant's appellate attorney raised establishes prejudice requiring a new trial.

See Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002).

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing on the issues.

Respectfully submitted,

Lord Shuter

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Certificate of Service

Dear Mr Shearouse, can you please forward a copy of my amended brief to be included with the original brief to the correct party dealing with my case. And again I pray to the Supreme Court to allow my amended brief to be included in my Petition For Writ Of Certiorari.

Sworn to and subscribed before me this 2nd
day of August, 2013

Remy G. Mota (L.S.)
Notary Public

My Commission Expires: Feb 28, 2018

Date: Respectfully Submitted
8/2/13 Lord Slater

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