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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to
Jasper County
J. Cordell Maddox, 2012 PCR Action Judge
Kristi F. Curtis, 2019 PCR Action Judge

Appellate Case No. 2023-001228

TARA MARIE WEBER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO AUSTIN PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Question

Did the post-conviction relief (PCR) court err by finding trial counsel was not ineffective when counsel refused the trial judge's offer to instruct the jury on self-defense, which the judge ruled was supported by the evidence presented, because it was in conflict with the defense theory of accident, since there is a reasonable probability the outcome of Petitioner's trial would have been different if self-defense had been properly charged to the jury?

Respondent's Counterstatement of Question Presented

Did the PCR court properly find counsel was not ineffective for not requesting the self-defense charge when counsel articulated a valid strategic reason for not requesting the charge and thus was not deficient, and it is not reasonably likely the jury would have found Petitioner acted in self-defense?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving a twenty-three-year sentence. In August 2011, the Jasper County Grand Jury indicted Petitioner for voluntary manslaughter (2011-GS-27-0378). On September 12-14, 2011, Petitioner proceeded to a jury trial before the Honorable Michael G. Nettles. Robert M. Hughes, Esquire, represented Petitioner, and Assistant Solicitors Robert Ferguson and Tameaka Legette prosecuted the case. The jury found Petitioner guilty as indicted, and Judge Nettles sentenced her to twenty-three years.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender Robert M. Pachak 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, and the remittitur was sent February 21, 2013.

On May 6, 2013, Petitioner filed a PCR application. On July 30, 2014, an evidentiary hearing convened before the Honorable J. Cordell Maddox, Jr. Petitioner was present at the hearing and represented by Tristan M. Shaffer, Esquire. Assistant Attorney General Ashleigh R. Wilson represented the State. On May 1, 2017, Judge Maddox issued an order denying and dismissing the application with prejudice. On August 7, 2017, Petitioner untimely appealed the denial of her first PCR application. On July 2, 2019, the Court of Appeals dismissed the appeal as untimely.

On August 6, 2019, Petitioner filed a second PCR application seeking a belated appeal of his first PCR action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). On July 20, 2022, an evidentiary hearing convened before the Honorable Kristi Curtis. James Falk, Esquire, represented Applicant, and Assistant Attorney General Lauren Mims represented the State. On

July 6, 2023, Judge Curtis issued an order granting Petitioner a belated appeal of her first PCR action.

Trial Testimony

Petitioner's charges arose from the fatal stabbing of her boyfriend Kyle Way (Victim) on December 31, 2010. At trial, Dustin Roberts testified he and Petitioner were involved in a sexual relationship, and Victim found them together on the night of the stabbing. (App. 171-72). Roberts testified Petitioner and Victim began arguing, and Victim grabbed Petitioner and "drug her out" of the trailer. (App. 172).

Petitioner stabbed Victim later that night at their home. According to her statements to police, she was planning to cut herself with the knife when Victim approached from behind; she turned around and accidently stabbed him. (App. 144-45; 182-83; 229). Petitioner consistently told law enforcement the stabbing was an accident and never indicated Victim tried to attack her. She told responding officer Kevin Smith she accidentally stabbed Victim in the process of turning around. (App. 144-45). She likewise told responding officer Raymond Moran

> she went in the kitchen, she got a knife and she was saying she was going to hurt herself, and [Victim] came up behind her telling her to give him the knife. So she finally turned around and said—stated that she was trying to hand him the knife and as he reached for the knife, the knife got—stabbed him in the shoulder.

(App. 188). Petitioner later gave a third statement that was audio recorded and played at trial.

Joshua Ayers and Kimberly Powell were in Victim's home the night of the stabbing; they testified they were awakened by Petitioner and Victim arguing. (App. 154, 163). Neither witnessed the stabbing, but both testified to hearing Petitioner remark she was going to stab Petitioner if he did not leave her alone. (App. 156, 163-64). Powell testified Petitioner and Victim asked them to call 911 after the stabbing. (App. 164). Detective Crosby testified Petitioner did not appear to have

any injuries. (App. 241). The pathologist testified the knife wound was 3.2 inches deep. (App. 254, 263).

During trial, a charge conference was held in chambers. Judge Nettles explained on the record that the parties had agreed to charges of voluntary manslaughter, involuntary manslaughter, and accident. (App. 298). Regarding self-defense, Judge Nettles stated:

> There is a – was a snibbit of testimony that was – seemed to indicate that – just a bare snibbit of testimony that would – might could substantiate a self-defense charge. That was discussed in chambers and we came to the conclusion that it was not a theory of the defendant that it was self-defense, that it was an accidental incident that took place. And more importantly, it's not consistent with what the defendant said, who was the only witness to the altercation. And as a result of that, although it had been discussed, the charge of self-defense is not in the charge. It is – although it was discussed based on this snibbit of testimony, is that the defense's position?

(App. 298). Trial counsel affirmed that was the defense's position. (App. 299). Judge Nettles charged the jury on accident but not self-defense.

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, 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. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). 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 requesting the self-defense charge when counsel articulated a valid strategic reason for not requesting the charge and thus was not deficient, and it is not reasonably likely the jury would have found Petitioner acted in self-defense.

Petitioner argues trial counsel was ineffective for waiving a self-defense charge. However, counsel articulated a valid, strategic reason for not requesting self-defense and thus was not deficient. Further, based on the evidence presented—including Petitioner's testimony—it is not reasonably likely the jury would have found Petitioner acted in self-defense. Thus, Petitioner cannot show deficiency or prejudice, and the PCR court correctly found Petitioner did not prove counsel was ineffective in this regard.

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A PCR applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

a. Counsel articulated a valid, strategic reason for not requesting self-defense in that it was inconsistent with strategy of accident, inconsistent with Petitioner's statements to law enforcement, and inconsistent with Petitioner's statement to trial counsel.

At the PCR hearing, trial counsel testified he did not want a charge on self-defense because he was pursuing an accident defense, and self-defense was contrary not only to their strategy of accident but also to what Petitioner told trial counsel and police. (App. 362-63, 372-73). Trial counsel explained he did not feel Petitioner had a valid self-defense claim. Specifically, he stated he did not request self-defense

> [b]ecause I was going for an accident defense, and the hardest thing to explain to a jury is it was an accident but if it wasn't an accident she did it in self-defense. I was trying to not — I did not want the jury to have the idea that she did it on purpose. There was not enough, including her testimony, that was in self-defense. So, having a self-defense charge in there, especially if I tried to argue it in closing, would have basically admitted to the jury that it wasn't an accident and I was going for an accident defense which is what she told me.

(App. 362-63).

Trial Counsel testified Petitioner maintained throughout their many meetings that the stabbing was an accident. (App. 360). He stated all of Petitioner's statements to law enforcement claimed the stabbing was an accident. (App. 361). Furthermore, counsel testified he spoke with Petitioner about her version of the facts multiple times, and the facts did not indicate self-defense. (App. 372). When questioned about whether any evidence suggested Victim was armed or had shown aggression toward Petitioner before the stabbing, counsel replied, "No. Other than—I don't remember if it was actually forcing her to leave the other place, but basically escorting her from the other place where she had been sleeping with the third party. But that was the only thing that could have even been considered aggressive." (App. 373). Trial counsel explained he did not want the jury to hear the self-defense charge and get the idea that Petitioner actually meant to stab Victim

because the whole point of the accident defense was there was no intent whatsoever. (App. 374).

Based on the foregoing, counsel articulated a valid, strategic reason for not requesting self defense and thus was not deficient. See Strickland v. Washington, 466 U.S. 668, 689 ("It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.* (emphasis added)); Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second guessing counsel's trial tactics; and where trial counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."). As counsel explained, self-defense contradicted the accident theory that the defense had relied upon up to that point because "the whole point of an accident argument is there was no intent whatsoever." (App. 374). Counsel's PCR testimony that he considered this charge and chose not to request it because it contradicted the defense of accident is bolstered by the statement of the trial court indicating the parties had discussed a self-defense charge but concluded it contradicted the defense of accident. (App. 298). Further, the PCR court found counsel's testimony credible, and this Court should defer to that finding. Finally, counsel's closing argument centered on a theory of accident, showing that was in fact his defense strategy. (App. 296-97). Based on the evidence as well as Petitioner's statements to counsel, counsel made a reasonable strategic decision in declining a self-defense charge that contradicted the defense of accident and thus was not deficient.

b. Based on the evidence presented, including Petitioner's own statements, it is not reasonably likely the jury would have found Petitioner acted in self defense.

Based on the evidence presented at trial, including Petitioner's statements to police, it is not reasonably likely the jury would have concluded Petitioner acted in self-defense. Thus, Petitioner cannot show prejudice from counsel's waiver of this charge.

To prove self-defense, the following must be met:

> (1) The defendant was without fault in bringing on the difficulty;
> (2) The defendant … actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief …; and
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). App. p. 399.

In her petition, Petitioner relies on the testimony of Roberts, Ayers, and Powell to support self-defense. (Pet. 9-10). While Roberts' testimony that Victim drug her out of the trailer and Ayers' and Powell's testimony that Petitioner said she would stab Victim if he did not leave her alone could *arguably* constitute the "snibbet" of evidence the trial court referred to when considering self-defense, any finding of self-defense is directly contradicted by Petitioner's own statements to law enforcement. Petitioner maintained in her statements that the stabbing was accidental. (App. 144-45, 182-83, 229). In fact, she told Officer Moran that she was *handing* Victim the knife when she accidentally stabbed him. (App. 188). It is not reasonable to conclude that a person in imminent fear for her life would hand a knife to her aggressor. Petitioner did not offer any testimony at trial or the PCR hearing to contradict her statements to law enforcement that

the stabbing was accidental. Thus, it is not reasonably likely the jury would have concluded she acted in self-defense had it been given that charge, and Petitioner did not prove prejudice.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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May 6th, 2024