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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2016-CP-08-1168

Johnny Irby, #360844 Appellant,

v.

State of South CarolinaRespondent.

NOTICE OF APPEAL

Johnny Irby appeals the Order of the Honorable Clifton Newman, filed July 23, 2024 dismissing his Application for Post Conviction Relief. Appellant’s counsel received notice of entry of this Judgment on August 1, 2024.

August 5, 2024



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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Johnny Irby, SCDC #360844,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2016-CP-08-1168

ORDER OF DISMISSAL

LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

2024 JUL 23 PM 4:13

FILED

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Johnny Irby (Applicant) on May 23, 2016. On March 24, 2021, an evidentiary hearing convened. Applicant was present and represented by Leslie T. Sarji, Esquire. Assistant Attorney General Benjamin H. Limbaugh represented the State. At the hearing, Applicant testified on his behalf and called expert Mary Ann Boehm and trial counsel Chad Shelton. Following a thorough review of the record, testimony, and the evidence presented, I the Applicant did not meet his burden of proof. Thus, this Court denies the relief requested and dismisses this application with prejudice.

Procedural History

Applicant is incarcerated in the South Carolina Department of Corrections serving a thirty-year sentence. In November 2012, the Berkeley County Grand Jury indicated Applicant for murder (2012-GS-08-2100) and attempted murder (2012-GS-08-02101). On June 21, 2014, Applicant had a jury trial before the Honorable Roger M. Young, Sr. Chad Shelton and David Schwacke represented Applicant. Anne Miller and Matt Ozment prosecuted the case. The jury convicted Applicant and Judge Young sentenced him to concurrent terms of thirty years on each charge.

EMAIL: L. SARJI, D. DIXON 07/23/2024

Applicant filed a timely notice of appeal, which was perfected by Appellate Defender Lara Caudy through the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The appeal was dismissed by the South Carolina Court of Appeals pursuant to Anders, and the remittitur was sent on April 29, 2016.

SUMMARY OF PERTINENT TRIAL TESTIMONY

The charges against Applicant arose from the fatal shooting of Telly Irby (Telly), the son of Applicant, on August 16, 2012. At the time of the shooting, Telly, his girlfriend Michelle Wiggins, and Wiggins's three daughters had been living with Applicant since early August 2012. (R. 480).

At trial, Elijah Haynes, Applicant's friend, testified he was at Applicant's home the evening of the shooting; Applicant and Telly had been arguing. (R. 132-34). He stated Telly and Applicant had a verbal argument near the screen door, and Haynes then heard "bam bam." (R. 134). After he heard the second shot, Haynes stated Wiggins ran to the porch yelling, "You shot my boyfriend." Haynes stated he could not see what happened on the porch, but when Wiggins returned, "she was holding her arm, like carrying it." (R. 135-36). Haynes stated Haynes left with her children; thereafter, Applicant fired three shots into the air. (R. 139). He stated police arrived and arrested Applicant at the scene. (R. 140).

Wiggins testified that on the evening of the shooting, Applicant and Telly had been arguing. She testified Applicant pulled a gun out, and Telly replied, "I know you ain't pulling that motherf**ing firearm out in front of these girls," and he went for the gun." (R. 283). Wiggins clarified Telly was trying to get the gun from Applicant. (R. 314). She stated as Applicant and Telly were wrestling for the gun, they fell and the gun went off. (R. 283). She stated they stood up, and Applicant "lifted the gun and shot [Telly]." (R. 283). Thereafter, Wiggins testified, "[H]e

lifted the gun and he point[ed] it at me and he shoots me." (R. 283-84). Both Telly and Wiggins were shot in the chest.

Destiny, the daughter of Wiggins, recalled seeing Applicant and Telly wrestle over the gun. (R. 264). She testified Applicant shot Telly and then shot Wiggins; they ran to a neighbor's house, and Applicant "shot again" but missed. (R. 364). Diamond, Wiggins' other daughter, recalled sitting inside with her sisters when Applicant came inside and told them to go outside. She stated Applicant was "falling around a little bit" and "walking toward his bedroom." (R. 371-72). Diamond testified she and her sisters went outside and Applicant followed them. She recalled Telly saying, "Are you going to pull that firearm in front of these girls?" (R. 374). Thereafter, she stated Applicant and Telly began wrestling over the gun, and the gun discharged. Diamond stated Applicant then fired the gun at Telly and fired again at Wiggins. (R. 374-75). She testified they ran to the neighbor's house; Applicant fired two more times but missed. (R. 375). Deanna, Wiggins' other daughter, recalled seeing Applicant with a gun and hearing shots. (R. 387-88).

At trial, Applicant argued self-defense. He testified that on the evening of the shooting, he came home around 8:00 pm to find Telly, Wiggins, and his brother drinking in his front yard. This angered Applicant, who had told Telly he did not want him drinking in front of his neighbors. Applicant confronted Telly and told him if he did not respect his rules, he, Wiggins, and Wiggins' daughters would have to move out. (R. 496). Applicant testified that when he told Telly to leave, Telly stood up and stated he was a man and "he [would] do what he want[ed] to do." (R. 496). Applicant testified he walked to the front porch and noticed Wiggins's children watching television; Applicant told them to go outside. When the girls went outside, Telly told them to go back inside, and a back and forth ensued where Applicant ordered the girls outside while Telly ordered them inside. (R. 498). According to Applicant, Applicant went to his bedroom and

retrieved his firearm. (R. 498). After retrieving the firearm, Applicant walked back outside, and Telly was standing on the front porch in front of Applicant. Telly lunged for the gun and the two men struggled over it. (R. 499-502). He testified the gun discharged during the struggle, although he could not recall if he pulled the trigger. (R. 501).

The trial court charged self-defense. Ultimately, the jury convicted Applicant of murder and attempted murder.

Current Application

In his PCR application, Applicant alleges he is being held in custody unlawfully based on:¹

1. "4th, 5th, 6th, 8th, 13th, 14th Amendment Violation"
2. "Due Process Violation"
3. "Fraud upon the Court"
4. "Subject Matter Jurisdiction"
5. "Ineffective Counsel"

On May 26, 2021, Applicant amended his application to allege counsel was ineffective for:

- a. Failing to test DNA on the 9-millimeter semi-automatic pistol prior to trial;
- b. Failing to procure and listen to Applicant's jail cell calls in advance of trial to determine if they contained exculpatory evidence or information pertinent to cross-examination;
- c. Failing to request a pretrial immunity hearing.

At the evidentiary hearing, Applicant presented testimony and evidence only on the claims in his amended application. To the extent the allegations set forth in Applicant's original application can be construed as separate grounds for relief, this Court finds Applicant abandoned those claims, and they are therefore denied and dismissed with prejudice.

¹ On February 21, 2017, while his PCR application was pending, Applicant filed a pro se Forensic DNA Testing motion to obtain DNA and gun residue testing on pistol and Tellys clothing. On April 18, 2017, a hearing was held before the Honorable Kristi Harrington. Judge Harrington denied Applicant's motion, finding Applicant "Failed to demonstrate how his own identity was or should have been an issue in this case" and thus "failed to satisfy all requirements of the 2008 Access to Justice Post-Conviction DNA Testing Act."

FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has had the opportunity to review the records, including the Berkeley County Clerk of Court records of the underlying conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the records from this PCR action. This Court has further had the opportunity to observe the witnesses presented at the hearing, pass upon their credibility, and weigh their testimony. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are the findings of fact and conclusions of law of this Court as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). In a PCR action, an applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. 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 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided

representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to Request DNA Testing on Firearm

Applicant first contends counsel was ineffective for failing to request DNA testing of the firearm prior to trial to support his testimony that Telly struggled with Applicant over the gun prior to the shooting. This Court finds Applicant did not prove this ground.

At the PCR hearing, Applicant recalled informing counsel that he and Telly had been arguing. Applicant stated he had his gun, and Telly—who was larger than him—approached him from behind and attempted to take the gun. (PCR 10-13). Applicant testified he was sure he informed counsel that Telly had tried to take the gun from him and Telly’s hands had been on the gun. (PCR 13-14). Applicant also testified he informed counsel that he told Telly to leave and Telly refused. (PCR 14).

Applicant assumed he discussed the possibility of Telly’s DNA on the gun but could not specifically recall. (PCR 14-15). Applicant did not know whether the gun was tested for DNA before trial. (PCR 15-16). He averred that if Telly’s DNA was on the gun, it could corroborate his version of events. (PCR 23-24). Applicant acknowledged Wiggins also testified that Applicant and Telly struggled over the gun. He believed that although there was

no dispute about the struggle, DNA evidence could establish that the gun went off when Telly tried to take the weapon from him. (PCR 19-20).

Boehm, a stipulated expert in DNA analysis, analyzed swabs from the gun after trial. She opined the results contained a mixture of at least four individuals, with the major contributor being Applicant. (PCR 27).. Boehm was unable to determine the minor contributors and could not conclude Telly contributed to the mixture. (PCR 25-28). She testified she had concerns about testing the gun because it had been handled by the firearms department prior to trial and used in trial. (PCR 29). She explained that if the State or defense had requested DNA analysis of the gun prior to trial, the gun would have been swabbed before to being handled by the firearms department. (PCR 30).

Trial counsel recalled Applicant informing him that he and Telly struggled over the gun and Telly touched the gun. (PCR 32-33). He stated he considered having the gun tested for DNA but decided against it because Wiggins corroborated Applicant's claim of struggling with Victim over the gun, and counsel was unsure if the tests would be helpful. (PCR 33). Trial counsel testified Wiggins—who had no reason to lie—testified Telly and Applicant struggled over the gun. (PCR 43-44). Counsel acknowledged he could have retained an expert and had no obligation to tell the State about the findings. (PCR 34-35). He averred that even if Telly's DNA had been on the gun, that would not necessarily corroborate the struggle because Telly could have touched the gun before that night. (PCR 43).

Based on the testimony of trial counsel, which this Court finds credible, trial counsel articulated a valid reason for not requesting further testing. Specifically, counsel explained Wiggins herself—who had no reason to lie—corroborated Applicant's testimony that he and Telly struggled over the gun. Thus, Applicant did not prove deficiency.

Moreover, Applicant did not show how such testing would have benefited him or caused a different result in the outcome of his trial. At the PCR hearing, Boehm stated she could not conclude Telly's DNA had been on the gun. Even if prior testing had revealed the presence of Telly's DNA, this Court finds it is not reasonably likely that finding would have impacted the outcome of trial—especially since Wiggins and two of her daughters corroborated the struggle over the gun. Thus, Applicant failed to prove deficiency or prejudice, and this claim is denied.

Failure to Subpoena Jail Calls

Applicant next contends counsel was ineffective for failing to subpoena his jail calls prior to trial. He contends counsel did not have sufficient time to review all the calls to determine if any helpful evidence existed. This Court finds Applicant did not prove this claim.

At the PCR hearing, Applicant did not recall any issue about the jail calls at trial. (PCR 16). Applicant likewise did not recall a call wherein he stated Telly was only trying to take the weapon from him and did not attack him. (PCR 21).

Trial counsel testified the State gave him 1,000 jail calls to review at the last minute, and he requested a continuance. (PCR 35-36). He stated he did not subpoena the calls in advance of trial because he was not aware of evidence that could have come from the calls. (PCR 37). Trial Counsel testified he had about ten days to review the calls and did not have time to review all of them. (PCR 38). He testified his motion for conitnuance was denied, and he was not aware of any calls that would have been helpful at trial. (PCR 44).

This Court finds counsel's testimony credible. This Court further finds counsel's failure to subpoena Applicant's jail calls did not fall below prevailing professional norms and was not deficient. Likewise, Applicant did not enter any calls at the PCR hearing that could have been

helpful in his defense and merely speculated the calls may have been helpful. Applicant thus did not meet his burden of proving prejudice, and this claim is denied.

Failure to Request Pretrial Immunity Hearing

Finally, Applicant contends counsel was ineffective for failing to request a pretrial immunity hearing under the Protection of Persons and Property Act² (the Act). This Court finds Applicant did not prove this claim.

Pursuant to the section 16-11-440 of the South Carolian Code,

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(B) The presumption provided in subsection (A) does not apply if the person:

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder;

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to

² S.C. Code Ann. § 16-11-410 to -450.

prevent the commission of a violent crime as defined in Section 16-1-60.

The General Assembly enacted the Act to codify the common law Castle Doctrine. State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). “Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity.” Id. at 371, 752 S.E.2d at 266. “This includes all elements of self-defense, save the duty to retreat.” Id.

“[T]he legislature intended for defendants to be shielded from trial if they use deadly force as outlined under the Act.” State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Thus, upon motion, the issue of immunity under the Act must be decided prior to trial. Id. A party seeking immunity under the Act must show entitlement to immunity by a preponderance of the evidence. Id. at 411, 709 S.E.2d at 665. Moreover, the Act is predicated on the absence of aggression or fault on the defendant’s part in bringing on the difficulty. State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), citing State v. Grantham, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953). Notably, the Act is a procedural provision that “does not contain any substantive provisions of law”; thus, it “is not relevant to the work of a jury.” State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 154 (Ct. App. 2013).

At the PCR hearing, Applicant recalled discussing self-defense with counsel but did not recall discussing a pretrial immunity hearing. (PCR 16-18). Applicant acknowledged the argument began in the front yard, and Applicant went inside to get his gun. (PCR 21-22).

Trial counsel testified he read the Act and concluded the presumption in subsection (A) did not apply because Telly was a lawful resident. (PCR 39). Trial counsel was not sure if subsection (C) would apply based on the State’s argument that Applicant caused the events.

(PCR 39-40). Counsel reiterated that Telly was a resident of the home—not a guest. He explained Telly’s children were registered at school as living with Applicant. (PCR 40-41). After reviewing State v. Brown,³ counsel testified this case would have impacted his decision about whether to request an immunity hearing, and he regretted not requesting one. (PCR 41-42). Trial counsel did not believe Applicant intended to shoot Telly, but there was alcohol involved, Applicant was stubborn, and Telly was bigger than Applicant. (PCR 46).

Trial counsel testified that although Applicant informed him Telly was temporarily in his home, counsel determined Telly was a resident based on the facts. (PCR 53). Trial counsel further testified Telly was bigger than Applicant, and Applicant stated Telly advanced on him when he told Telly to leave. (PCR 54-55). Trial counsel testified Applicant believed Telly had a history of domestic violence. (PCR 55)

See State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016) (Court denied the defendant the Castle Doctrine presumption where she stabbed her live-in boyfriend while in their shared living space).

Initially, based on counsel’s foregoing testimony—which this Court finds credible—this Court finds counsel articulated a valid reason in not requesting a pretrial immunity hearing. Counsel properly concluded the presumption in subsection (A) would not apply because Telly was a resident of the home. See S.C. Code Ann. § 16-11-430(3) (defining a person’s residence as a “dwelling in which a person resides *either temporarily or permanently or is visiting as an invited guest*” (emphasis added)); 16-11-440(B) (providing the presumption in subsection (A) does not apply if the person “against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling”). Likewise, although counsel was unsure if the presumption of subsection (C) would apply, counsel properly determined Applicant would not be entitled to immunity if he

³ 321 S.C. 184, 467 S.E.2d 922 (1996) (holding a lawful guest has a duty to retreat when attacked by the homeowner).

was at fault in bringing on the difficulty. By his own testimony, Applicant went inside to retrieve the gun when he and Telly began arguing. Based on this, this Court finds Applicant was at fault in bringing on the difficulty, and counsel was not deficient for concluding he would not be entitled to pretrial immunity. See Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (providing a defendant must be without fault in bringing on the difficulty to establish self-defense).

This Court further finds Brown is inapplicable to the question of whether counsel was ineffective for not requesting a pretrial immunity hearing. In Brown, the South Carolina Supreme Court concluded the trial court did not err in declining to charge that an invitee has no duty to retreat from the owner as part of its self-defense charge. 321 S.C. at 187-88, 467 S.E.2d at 924. Brown predated the Act and did not deal with the Act; rather, it dealt with the self-defense charge. Here, Applicant received a self-defense charge, and he has not raised any issue with the charge provided by the Court. Thus, Brown is inapplicable to the question before this Court. Cf. Marin, 404 S.C. at 625, 745 S.E.2d at 154 (providing the Act is a procedural provision that “does not contain any substantive provisions of law” and “is not relevant to the work of a jury”).

Finally, this Court finds it is not reasonably likely Applicant would have been granted immunity had counsel requested a pretrial immunity hearing, and Applicant thus did not prove prejudice. Initially, this Court had the opportunity to assess Applicant’s demeanor at the immunity hearing and finds the testimony of the Applicant that he was afraid of Telly not credible. This Court further finds Applicant retrieved the gun *after* arguing with his son Telly, and based on his testimony about the evening, a reasonably prudent person would not have believed he was in imminent danger prior to him retrieving the gun. Thus, I find that Applicant did not show a reasonable likelihood he would have been granted immunity and he did not prove prejudice. Therefore, this allegation is **DENIED** and **DISMISSED** with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to the assistance of an appellate counsel on appeal. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to appeal, PCR counsel must serve and file a notice of appeal on behalf of Applicant. Rule 71,1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 5th day of July, 2024.


CLINTON NEWMAN
Presiding Judge

Columbia, South Carolina