

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

R. Knox McMahon, Circuit Court Judge

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SEP 16 2013

S.C. Supreme Court

KEITH SIMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213330

JOHNSON PETITION FOR WRIT OF CERTIORARI

Tristan Shaffer
Shaffer Law Firm
140 Gibson Road
Lexington, SC 29072

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was Petitioner denied his right to present a full and complete defense when the trial court suppressed evidence that the decedent was previously in a shoot-out and Petitioner attempted to use such evidence to support his claim of reasonable apprehension of fear?

STATEMENT

Procedural History

Petitioner was indicted by the Richland County Grand Jury for murder. App. 1015-1016. On March 20, 2006, Petitioner was called to trial before the Honorable James Johnson and a Jury. App. 1. At that trial, Petitioner was represented by LaNelle DuRant and Stacy Owings. App. 1. The State was represented by John Meadors and Will Bryant. App.1. Petitioner was convicted and sentenced to forty years. Tr. 757, ll.1-4; Tr. 769, ll. 1-5.

Petitioner filed a timely notice of appeal. For his direct appeal, Peitioner was represented by Joseph Savitz. The South Carolina Court of Appeals affirmed Applicant's conviction in *State v. Sims*, 377 S.C. 598, 661 S.E.2d 122 (2008). Petitioner filed a Petition for Writ of Certiorari with this Court. This Court Affirmed in Result in *State v. Sims*, 387 S.C. 557, 694 S.E.2d 9 (2010).

Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 907-911. An evidentiary hearing was convened on August 14, 2012 before the Honorable R. Knox McMahon. App. 918. Petitioner was represented by Tynika Claxton and Charlie Johnson. App. 918. The State was represented by Rob Corney. App. 918. In an order dated October 30, 2012, the PCR court denied relief. Supp. App. 1-12. On November 15, 2012, Petitioner filed a motion pursuant to Rule 59(e), SCRPC. App. 1002-1008. The 59(e) was denied by order dated February 6, 2013. App. 1013-1014.

This petition follows.

Factual History

The on the night of December 30, 2003, Petitioner and his friend, Decedent, left a party at the Adams Mark Hotel in Columbia. Although petitioner and decedent were friends, petitioner was cautious of decedent due to his reputation for violence and a recent dispute over money.

Petitioner was aware of decedent's prior history of violent encounters including a shootout that had occurred two years earlier.

While leaving the party, decedent told petitioner that he was going to settle scores during the New Year. Petitioner took this as a threat because several weeks earlier the two friends had an argument over petitioner owing to the needed money. While decedent was talking, he began to reach under his seat. Petitioner believed Decedent was reaching for a gun. So, petitioner pulled gun and shot Decedent in self-defense.

Petitioner was questioned by police concerning decedent's death. Petitioner initially denied any involvement in the death, but later admitted that he had shot decedent in self-defense.

At trial, Petitioner testified that he had shot Decedent in self-defense. Petitioner testified that he was afraid of Decedent because he knew about Decedent's violent past. Decedent also was aware that in the past decedent had been in shootouts with other people. App. 519, ll. 8-12. While in chambers, trial counsel informed the court of their intent to call Scott McDonald of the Richland County Sheriff's Department to testify that decedent had been in a shootout two years prior to his death. App. 652, l. 23 – App. 653, l. 12. Trial Counsel believed that McDonald would corroborate Petitioner's testimony concerning the decedent's prior shootout. App. 653, ll. 14-21. The Court ruled in chambers that the shootout would have been too remote. App. 655, l. 18 – App. 656, l. 4. Trial counsel put this in chamber's discussion on the record without citing to Petitioner's constitutional right to present a full and complete defense. App. 652, l. 23 – App. 656, l. 4.

At the conclusion of the trial, Petitioner was convicted and sentenced to forty years.

ARGUMENT

Petitioner was denied his right to present a full and complete defense when the trial court suppressed evidence that the decedent was previously in a shoot-out and Petitioner attempted to use such evidence to support his claim of reasonable apprehension of fear.

Relevant Facts

During the PCR, hearing Petitioner argued that his Due Process¹ rights were violated when the trial court refused to allow him to call Scott McDonald of the Richland County Sheriff's Department. McDonald would have testified that decedent was involved in a shootout two years prior to his death. App. 652, l. 23 – App. 653, l. 12. Trial Counsel testified that she believed that this information would have been helpful to the defense. App. 968, ll. 14-24. She testified that if the jury heard McDonald's testimony, "[i]t would have shown that [Petitioner] was telling the truth and really believed that [Decedent] had guns and could hurt [Petitioner]." App. 969, ll. 10-12.

The PCR Court did not address the merits of Petitioner's Due Process Claim, and instead found that "The admission of the testimony could have been properly raised at trial or on direct appeal and the Applicant's failure to do so has waived this allegation as a ground for relief." Supp. App. 6.

Discussion

Petitioner had a constitutional right to present favorable evidence. *See Chambers v. Mississippi*, 410 U.S. 284, 302 93 S.Ct. 1038, 1049 (1973) (holding that a state procedural rule should not be "applied mechanistically to defeat the ends of justice"); *see also Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704 (1987) (the right to present favorable evidence is "[l]ogically

¹ At the PCR hearing, this claim was not raised as ineffective assistance of trial counsel for failure to preserve the constitutional claim, or alternatively, ineffective assistance of appellate counsel for failure to brief the constitutional issue. If this court finds that Petitioner is procedurally barred from raising this as a Due Process claim, the failure to raise these issues at the PCR hearing might later

included in the accused's right to call witnesses."'). Although there are limitations as to what evidence a defendant may present, the limitations "may not be arbitrary or disproportionate to the purpose they are designed to serve." *Id.*, 483 U.S. at 55-56, 107 S.Ct. at 271.

The exclusion of the evidence of decedent's prior shootout violated Petitioner's due process right to present a full and complete defense. *See State v. Boykins*, 119 Wis.2d 272, 279, 350 N.W.2d 710, 714 (Wis. Ct. App. 2004) (holding the exclusion of evidence of the victim's reputation for violence, "was not only an abuse of discretion but also error of a constitutional dimension.'). The trial court excluded McDonald's testimony because it was "too remote in both time and subject matter." However, the Court had previously allowed testimony concerning the shootout into evidence through Petitioner. App. 519, ll. 8-12. However, the trial court *arbitrarily* excluded McDonald's testimony which would have corroborated² Petitioner's trial testimony. With evidence already in the record concerning the shooting, the ruling excluding McDonald's testimony served no legitimate State purpose. *See Rock, supra*.

This issue was properly raised before the PCR court. The PCR Court did not address the merits of Petitioner's Due Process Claim, and instead found that "The admission of the testimony could have been properly raised at trial or on direct appeal and the Applicant's failure to do so has waived this allegation as a ground for relief." Supp. App. 6. In a PCR one may raise a claim "that [their] conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this State." S.C. Code § 17-27-20 (a)(1). Although PCR is not a replacement for a direct appeal, PCR provides a procedural vehicle to correct constitutional violations which are

give rise to a federal habeas corpus claim pursuant to *Martinez v. Ryan*, --- U.S. ---, 132 S.Ct. 1309 (2012).

² Petitioner's testimony concerning this matter was heavily objected to by the State. The only time the jury heard about the shootout was from Petitioner. The corroboration that this even occurred from a police officer would have lent credibility to why Petitioner feared for his life.

not properly reviewable on direct appeal. *See State v. Johnston*, 327 S.C. 435, 439, 487 S.E.2d 228, 231 (Ct. App. 1997).³

The record does not show whether, Petitioner’s constitutional claim was raised to the trial court. App. 652, l. 23 – App. 656, l. 4. Therefore the constitutional claim was not reviewable on direct appeal. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (2004) (To be preserve an issue for appellate review it must be “raised with sufficient specificity.”) (*citing* Jean Hofer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). Therefore, PCR is a proper remedy for the claim. *See Johnston, supra*. However, even if trial counsel had sufficiently preserved the due process issue this would be a case of ineffective assistance of appellate counsel. App. 908, App. 1003.⁴

³ *Overruled on other grounds by State v. Johnston*, 333 S.C. 459, 510 S.E.2d 423 (1999) (“[I]f this Court enforces PCR as the only avenue of relief in this case, there is the real threat that Defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue such a remedy.”).

⁴ In the Motion to Alter or Amend Order, Petitioner asked that the PCR court reconsidered “all issues presented in PCR Applicant (sic).” App.1003. Petitioner’s relation back to the application, re-raises the ineffective assistance of appellate counsel claim. App. 908.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court review the PCR Court's denial of relief.

Respectfully submitted,



Tristan M. Shaffer
140 Gibson Road
Lexington, S.C. 29072

ATTORNEY FOR PETITIONER

This 16th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
R. KNOX MCMAHON, CIRCUIT COURT JUDGE

KEITH SIMS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

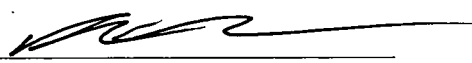
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Keith Sims states:

1. He was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 14, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Keith Sims.

Respectfully submitted,



Tristan M. Shaffer
140 Gibson Road
Lexington, S.C. 29072
ATTORNEY FOR PETITIONER

This 16th day of September, 2013

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

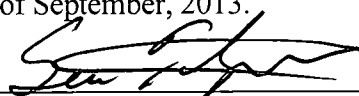
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Megan Harrigan, Esquire Post Office Box 11549 Columbia, South Carolina 29211 and Keith Sims, #314569, at Broad River Correctional Institution this 16th day of September, 2013.



Tristan M. Shaffer
140 Gibson Road
Lexington, S.C. 29072

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of September, 2013.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022