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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HAMPTON COUNTY
Perry M. Buckner, Trial Judge
Roger M. Young, Sr., PCR Judge

Appellate Case No. 2024-000375

DANIEL FLUDD,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Questions

Whether the PCR court erred by ruling Petitioner was not prejudiced by defense counsel's failure to object to the improper jury instruction that malice could be inferred from the use of a deadly weapon reasoning that when the jury found petitioner guilty of voluntary manslaughter it determined malice was not involved in the killing since the jury was not instructed that malice was not an element of voluntary manslaughter and the jury's rejection of self-defense could also have been based on an erroneous determination that malice was involved since a deadly weapon was used by petitioner?

Respondent's Counterstatement of Question

Did the PCR court properly find Petitioner did not prove prejudice from the implied malice charge when (1) Petitioner was acquitted of murder—the only offense that required proof of malice, (2) Petitioner's argument that the trial court erred by not charging the jury that voluntary manslaughter does not include malice is not preserved, and (3) Petitioner has not pointed to caselaw that requires a court to charge that voluntary manslaughter does not include malice and thus has not met his burden of proving counsel was ineffective in this regard?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving an aggregate thirty-year sentence. In August 2017, the Hampton County Grand Jury indicted Petitioner for murder (2017-GS-25-00160) and possession of a weapon during a violent crime (2017-GS-25-00161). On December 3-5, 2018, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner. Ian Deysach, Esquire, represented Petitioner, and Assistant Solicitor Tameaka Legette prosecuted the case. The jury acquitted Petitioner of murder but convicted him of the lesser-included offense of voluntary manslaughter and the weapon charge. Judge Buckner sentenced him concurrently to twenty years for voluntary manslaughter and five years for the weapon charge.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender David Alexander. On appeal, Petitioner argued the trial court erred in charging the jury that malice can be inferred from the use of a deadly weapon. The Court of Appeals affirmed, finding this issue was not preserved. State v. Fludd, 2021-UP-165 (S.C. Ct. App. filed May 12, 2021). The remittitur was sent June 4, 2021.

On May 20, 2022, Petitioner timely filed this PCR application. Respondent filed a return requesting an evidentiary hearing. On November 27, 2023, an evidentiary hearing convened before the Honorable Roger M. Young, Sr. Petitioner was present and represented by Chelsey F. Marto, Esquire. Assistant Attorney General Danielle Dixon represented the State. On February 26, 2024, Judge Young issued an Order denying relief and dismissing the application with prejudice.

Summary of Trial Testimony

Prior to trial, Petitioner moved for immunity pursuant to the Protection of Persons and Property Act. At the pretrial immunity hearing, he testified that the evening of the incident, he was at "Bummy's" house along with Bobby Atkins (Victim) and Victim's girlfriend Zaneh Garvin. Petitioner stated he gave Victim a gold chain to see if Victim could fix it. Shortly thereafter, Victim and Garvin left, and Petitioner realized they had stolen his chain. (Tr. 13-16).

Petitioner testified he went after Victim and Garvin and asked for his necklace back, and Victim struck him with a shovel. He stated Victim hit him twice, and the shovel broke. Petitioner testified he believed Victim was going to kill him, so he picked up a piece of the shovel and stabbed Victim in the chest. He then ran away. (Tr. 16-18).

In contrast, Garvin testified Petitioner gave the necklace to Victim to see if Victim could sell it, but Victim could not find anyone to buy it. Garvin stated Petitioner and Victim began arguing over the necklace, and Garvin told Victim to give it back. She stated she took the necklace from Victim and returned it to Petitioner. (Tr. 33-40). According to Garvin, the two continued to argue; she and Victim ran toward Victim's parent's house, and Petitioner ran after them. Once on his parent's property, Victim picked up a shovel and hit Petitioner. Victim and Petitioner continued fighting, and Petitioner pulled out a knife and stabbed Victim in the stomach. (Tr. 43-45).

The trial court denied immunity. At trial, Garvin provided similar testimony. (Tr. 285-331). The pathologist testified Victim had six stab wounds, including a fatal one to the chest. (Tr. 449, 462). She opined the wounds were likely caused by a knife with a blunt edge and a sharp edge, and it was unlikely the wounds were caused by the shovel or a box cutter that was found at the scene. (Tr. 458-59). Petitioner did not testify at trial. The jury acquitted him of murder but convicted him of the lesser-included offense of voluntary manslaughter.

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, the 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 are 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 Petitioner did not prove prejudice from the implied malice charge when (1) Petitioner was acquitted of murder—the only offense that required proof of malice, (2) Petitioner's argument that the trial court erred by not charging the jury that voluntary manslaughter does not include malice is not preserved, and (3) Petitioner has not pointed to caselaw that requires a court to charge that voluntary manslaughter does not include malice and thus has not met his burden of proving counsel was ineffective in this regard.

Petitioner's argument centers on the contention that the trial court erroneously failed to charge the jury that voluntary manslaughter does not include malice as an element. (Pet. 8-9). Petitioner concedes the trial court properly charged voluntary manslaughter (Pet. 8), and Petitioner does not take any issue with the self-defense charge. Rather, Petitioner focuses on the fact the trial court did not instruct the jury that malice is not an element of voluntary manslaughter, which he contends somehow caused the jury to become so confused that it mistakenly convicted him of voluntary manslaughter. However, the PCR court properly found Petitioner was not prejudiced here where he was *acquitted* of murder, and voluntary manslaughter does not include malice—making any erroneous malice charge harmless beyond a reasonable doubt. Further, any argument regarding alleged error in the voluntary manslaughter charge is not preserved. Finally, Petitioner has not pointed to caselaw that requires a voluntary manslaughter charge to include language that it does not include malice in order for the charge to be proper and has thus not met his burden of proving counsel was ineffective in this regard.

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). In evaluating claims of ineffective assistance of counsel, courts apply the two-pronged test outlined in Strickland v. Washington, 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. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," and an applicant must overcome this presumption to receive relief. Id. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove the deficiency prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

a. The PCR court properly found Petitioner did not prove prejudice from the implied malice charge when Petitioner was acquitted of murder—the only offense that required proof of malice.[1]

The PCR court properly found Petitioner did not prove prejudice from counsel's failure to object to the implied malice charge. The jury convicted Petitioner of voluntary manslaughter, which does not include malice aforethought. Thus, the implied malice charge did not impact the jury's decision.

Petitioner's argument is incredulous in light of the fact no one—including Petitioner (based on his statement and pretrial testimony)—disputed that Petitioner killed Victim. Thus, if the jury believed Petitioner acted with malice, it would have convicted him of murder. See S.C. Code Ann. § 16-3-10 ("'Murder' is the killing of any person with malice aforethought, either express or

[1] The State concedes it was improper under the law that existed at the time of Petitioner's trial for the trial court to charge malice could be inferred from the use of a deadly weapon because evidence of mitigation (to voluntary manslaughter) and self-defense was presented. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) ("[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.", overruled by State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) ("A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.").

implied."). In acquitting Petitioner of murder, the jury determined the State did not prove malice aforethought. Because the jury did not find the State proved malice aforethought, it likewise did not infer malice. Based on Petitioner's admission that he killed Victim, the absence of a murder conviction is conclusive evidence that the jury did not believe Petitioner acted with malice. Thus, Petitioner cannot show prejudice from the trial court's improper inferred malice charge.

Finally, Petitioner's argument that the jury somehow thought it could not find Petitioner acted in self-defense based on an erroneous malice charge has absolutely no basis in caselaw regarding self-defense. Specifically, when a defendant alleges self-defense, the State has the burden of disproving the following elements beyond a reasonable doubt:

> (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). The elements of self-defense do not include malice or lack of malice. It is thus incredulous to assert that an improper instruction on inferred malice somehow made the jury believe the State had automatically disproven self-defense—as Petitioner postulates. This Court should not fall for this specious argument.

b. Petitioner's argument that the judge erred by not charging the jury that voluntary manslaughter does not include malice is not preserved.

At its core, Petitioner's argument is effectively that the trial court gave an erroneous voluntary manslaughter charge. To support his argument that he was prejudiced by an erroneous charge for murder—which he was NOT convicted of—Petitioner argues the voluntary

manslaughter charge did not state malice is not an element of voluntary manslaughter. Petitioner—for the first time—takes issue with the voluntary manslaughter charge provided by the trial court. Because Petitioner raises this issue for the very first time in his Petition, it is not preserved. See Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992) ("[W]e are not abandoning the general rule that ***issues must be raised to***, and ruled on by, the post-conviction judge to be preserved for appellate review." (emphasis added)).

c. The voluntary manslaughter charge was proper, and Petitioner has not pointed to caselaw that requires a court to charge that voluntary manslaughter does not include malice and thus has not met his burden of proving counsel was ineffective in this regard.

In charging voluntary manslaughter, the trial court charged:

> If you find, ladies and gentlemen, that the State has failed to prove beyond a reasonable doubt that the defendant committed murder, you may consider whether the State has proved beyond a reasonable doubt that the defendant committed the lesser-included offense of voluntary manslaughter. Included within the offense of murder is the lesser offense of voluntary manslaughter. To prove voluntary manslaughter, the State must prove beyond a reasonable doubt that the defendant took the life of another in the sudden heat of passion on sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter. Sudden heat of passion may, for a time, affect a person's self-control, and temporarily disturb a person's reason. The sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions, and would produce an uncontrollable impulse to do violence.
>
> Sufficient legal provocation must be the type that would make a person of ordinary reason, ordinary caution, to become enraged and to lose control temporarily. This provocation needed for voluntary manslaughter must come from some act of, or be related to, the victim. Words alone, however vulgar, however insulting, are not enough to be legal provocation. The exercise of a legal right, no matter how offensive it is to another, is never sufficient legal provocation for voluntary manslaughter.
>
> I'll also charge you that if the heat of passion had cooled, or if there

> was enough time between the provocation, if any, and the killing, for the passion of a reasonable person to cool, the killing would not be voluntary manslaughter.
>
> In deciding whether a reasonable person would've had enough time to cool off, you should consider all of the circumstances surrounding the killing. You may consider the nature of the provocation, if any; the defendant's mental and physical state; and the circumstances and relationships between the parties, based on evidence introduced during the trail of the case.

(App. 534-36). This charge was proper under the law. See, e.g., State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation."). Petitioner has not pointed to caselaw that requires a court to charge a jury that voluntary manslaughter does not include malice aforethought and thus has not met is burden of proving deficiency or prejudice related to the voluntary manslaughter charge. Cf. Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) ("Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective *at the time of the alleged error*." (emphasis added)).

CONCLUSION

Based on the foregoing, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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This 31st day of March, 2025