



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 26, 2013

RECEIVED

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S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Eric Brown v. State; **Appellate Case No. 2013-000001**

Dear Mr. Shearouse:

Please accept the attached document that Mr. Brown asked me to submit on his behalf.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosure

cc: Eric Brown (w/enclosure)

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

ERIC BROWN, #272336,

APPLICANT,

Vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE # 2005-CP-18-1566

Proposed

FINAL ORDER
FAVORABLE TO APPLICANT

Dates of Hearing: March 3, 2010, December 10, 2010
Presiding Judge: Diane S. Goodstein
Applicant's Attorney: Donald J. Budman
State's Attorney: Mary S. Williams
Court Reporter: Bonnie H. Kelly

Applicant, Eric Brown, is presently confined in the South Carolina Department of Corrections pursuant to an order of commitment of the Dorchester County Clerk of Court. Mr. Brown was indicted at the January 2003 term of the Dorchester County Grand Jury for Murder (03-GS-18-0013). Ms. Marva Hardy-Thomas (Trial Counsel) represented Mr. Brown. On November 2, 2004, Mr. Brown offered to the Court of General Sessions a guilty plea of voluntary manslaughter in the death of Stacy Fogle. He alleges that plea to be involuntary, as set forth herein. He was sentenced by the Hon. Steven H. John to confinement for a period of twenty-five (25) years. Mr. Brown did not appeal his conviction or sentence. This PCR was filed on October 11, 2005, within one year of his sentencing. The facts of the case relate to the death of Stacy Fogle, who died on the evening of November 9, 2002 in her home. Eric Brown lived with Stacy Fogle in a mobile home on her family's property in Branchville, SC. Eric Brown and

Stacy Fogle had a marriage license, but had not yet formally married. Stacy Fogle died as a result of a gunshot wound to the head.

Eric Brown alleged the following errors which rendered his assistance of counsel to be ineffective, caused him to be prejudiced and his guilty plea to be considered involuntary:

1. Ineffective assistance of counsel in failing to investigate and interview fact and expert witnesses.
2. Ineffective assistance of counsel in advising Mr. Brown to plead guilty to Voluntary Manslaughter without discussing the defense of "accident" or the lesser included charge of Involuntary Manslaughter with Mr. Brown, or investigating facts which could have led to a reasonable doubt on the charge of voluntary manslaughter.
3. Ineffective assistance of counsel in failing to consult with an expert to investigate and report upon the findings of the State's forensic pathologist.
4. Ineffective assistance of counsel in failing to investigate facts which could have led to a reasonable doubt on the charge of voluntary manslaughter. The investigative file was replete with evidence which could have been used to rebut the element of "willfulness."
5. The trial court lacked subject matter jurisdiction to try Mr. Brown for murder based upon a failure to charge all of the essential elements of murder pursuant to S. C. Code Ann. §17-19-30 which requires that the allegation of murder state that it was committed "feloniously and willfully."

Based upon my review of the guilty plea record and the evidence presented at the PCR hearings in this case, I make the following findings of fact:

1. Kleiman Rasberry was Stacy Fogle's uncle. Roosevelt Rasberry was Stacy Fogle's great uncle, and father of Kleiman Rasberry. Kleiman and Roosevelt Rasberry lived on the same property as Stacy Fogle. Their families, Stacy Fogle, her children and Eric Brown were the only people that lived on the property in November 2002. Stacy Fogle lived in a mobile home. Kleiman Rasberry lived in a separate mobile home. Roosevelt Rasberry lived in a brick home on the property. Each man testified to the following at the PRC hearing:

- (a) That they did not live far from Stacy Fogle's mobile home.
- (b) That when it was quiet, they could hear people talking in Stacy's home while in their own home.
- (c) That from what they could see, in the days leading up to her death, Stacy and Eric Brown got along "just fine".
- (d) That they never heard Stacy and Eric Brown arguing or bickering.
- (e) That they never saw Eric Brown get physical or abusive toward Stacy.
- (f) That Stacy and Eric Brown seemed to be a happy couple.
- (g) That on the night of the shooting each man heard a sound which later was determined to be the fatal gunshot.
- (h) That prior hearing the gunshot they did not hear any fussing or screaming coming from Stacy's home.

I find that despite having potentially exculpatory testimony, neither gentleman ever spoke to Eric Brown's trial counsel, or her investigator Oscar Douglas, prior to Eric Brown's guilty plea. Their testimony was never discovered by defense counsel despite the fact that they lived on the

property where the shooting occurred, the fact that their names were known to Eric Brown, the fact their names appeared in the investigative file, and appeared on the State's witness list.

2. I find that the words "feloniously" and "willfully" do not appear anywhere in Eric Brown's Indictment for murder referenced above, or in the transcript of his colloquy with Judge John during his guilty plea hearing.

3. At no time in his discussions with his trial attorney, was Eric Brown asked to discuss his version of how Stacy Fogle lost her life. Applicant and his trial attorney spoke at a "minimum" about the defense of "accident." When Applicant brought the subject up- this defense was never explored by his trial counsel. Applicant's trial counsel never requested the names and addresses of potential witnesses. Eric Brown told his trial counsel that there were witnesses that could be interviewed to support his version of what happened. Trial counsel never interviewed any of Applicant's potential witnesses – including but not limited to Kleiman or Roosevelt Raspberry, or Stacy Fogle's son, Sean, who was in Stacy Fogle's home at the time of the shooting.

4. Trial counsel did provide Applicant with a copy of the report from Applicant's firearms expert, Kelly Fite, who opined, "[The SLED] report of gunshot residue on Stacy Fogle's hands does not negate the possibility that there was a struggle over the weapon resulting in an unintentional discharge." Applicant never saw, nor heard from Mr. Fite again after he was provided with his report. Mr. Fite was not present in the courtroom on the day Applicant's case proceeded to trial. There does not appear to have been any follow-up with Mr. Fite prior to trial.

5. Several days after her death, the State conducted an autopsy on Stacy Fogle. The autopsy was conducted by Dr. Inez Yacoub, a forensic pathologist. Dr. Yacoub was interviewed by Detectives from the Dorchester County Sheriff's Department.

6. Other than Kelly Fite, trial counsel did not consult with any other expert, such as a forensic pathologist, to seek support for Applicant's defense(s), or to determine the integrity of Dr. Yacoub's report. This is true even though the State's forensic pathologist told a detective that the Stacy Fogle "could have grabbed the barrel" (causing an unintentional discharge). Dr. Yacoub further stated in her autopsy report that the gun was pointed "upward, backward and to the right" at the time of the discharge. These statements could have assisted defense counsel, because grabbing the barrel, and/or firing at such an awkward angle, is not consistent with the leveling of a gun before an intended shot. There was no follow up by trial counsel to either of these possible exculpatory statements.

7. Trial counsel attended the PCR hearing without the aid of her file on Eric Brown.

8. Trial counsel discussed the different sentences with Eric Brown prior to trial, but never discussed the elements of the various charges of murder, voluntary manslaughter and involuntary manslaughter with him.

9. Applicant wanted to proceed to trial. The only plea deal offered to Applicant

prior to the day of trial was 30 years for voluntary manslaughter. Two juries were selected, but those juries were ultimately struck after Batson motions.

10. Before selecting a third jury, trial counsel went "in the back" (of the courtroom). ~~When she returned, she told Applicant, "If we go to trial today, somebody gonna (sic) pay. Its~~ not gonna be the judge; its not gonna be the solicitor; its not gonna be the family. That only leaves one person: me (Eric Brown)". Trial counsel told Mr. Brown that "they (sic) about to give me (Eric Brown) a life sentence".

11. As a third jury was about to be selected. Trial counsel asked Applicant if he would agree to 17 years for voluntary manslaughter. Believing that the sentence had been offered by the State, Applicant said he would agree to that, with credit for 2 years already served.

12. At the time the trial was about to begin, trial counsel did not appear to be prepared to go to trial. She only spoke to Applicant for about 10 minutes. None of the Applicant's suggested witnesses were in the courtroom. They had not been had been subpoenaed. A list of witnesses shown to Applicant, was the Solicitor's witness list. Kelly Fite was not present.

13. Rather than pleading guilty to voluntary manslaughter and being sentenced to 25 years, Applicant would have preferred to proceed with his trial. He did not know that Judge John was about to sentence him to 25 years. When the sentence was rendered, Applicant was "shocked."

14. After receipt of Kelly Fite's report stating the possibility of an "unintentional discharge," there was no investigation by trial counsel on Applicant's behalf to attempt to establish a defense of "accident," to discover evidence which might reduce the charge to involuntary manslaughter, or to discover facts which would show a lack of "willfulness." The court notes that there was 11 months of inaction between the issuance of Kelly Fite's report and the time Eric Brown's case went to trial.

15. Regarding Applicant's colloquy with Judge John, Applicant admits that he did not tell the truth when asked if the plea was "free and voluntary". Applicant was instructed by trial counsel not to say "nothing to make the judge mad" and to "follow what I say." When asked at the PCR hearing whether he was giving his plea, and answering Judge John's questions, freely and voluntarily, Applicant stated:

No. That was her (trial counsel's) answers. That wasn't my answer. That was - I said that because I was scared. I don't know what she - I said what she told me to say. (T. pg. 35, lines 18-20)

16. According to the SLED Trace Evidence Report there were "metals detected on the palms and backs of both hands of Stacy Fogle which may be associated with gunshot residue." I find the gunpowder residue on the back of Stacy Fogle's hands to be pertinent.

17. After hearing testimony from the Applicant's witnesses, and Applicant, the court heard testimony from trial counsel at the PCR hearing. The opinion letter from firearms expert, Kelly Fite, was admitted into evidence. Counsel for Applicant asked trial counsel for a copy of

the documents which formed the basis of Mr. Fite's opinions, such as the autopsy report and associated documents. Those documents were not in trial counsel's possession. Counsel for the State advised the court that the Dorchester County Sheriff's Department had its investigative file, and that the documents could be in there. Applicant requested permission of the court to review the investigative file. The court granted the request, continued the PCR hearing, and instructed Applicant's counsel to specifically look for any evidence in the file which would shed light on the forensic evidence in the case, as it may relate to any possible defenses.

18. At a hearing on December 10, 2010, the court was advised that there is forensic, and possibly exculpatory, evidence in the investigative file. Information in the file showed that Stacy Fogle's wounds could have been suffered as a result of an accident or an un-intentional discharge of the weapon. A defense of accident, or lesser charge of involuntary manslaughter, could have been pursued by trial counsel had there been any follow up to Kelly Fite's report. Applicant pled guilty to voluntary manslaughter when there was forensic and lay witness testimony available to support the lesser charge and defense. That evidence had never been discovered or followed up by trial counsel.

19. The evidence found in the investigative file showed the existence of the following which constituted, or could have led to, exculpatory evidence:

A. There were quantities of metals detected on the palms and backs of both hands of Stacy Fogle, which may be associated with gunshot residue.

This statement was found in the Report of SLED Trace Evidence Department January 30, 2003. This supports Kelly Fite's opinion of the possibility "that there was a struggle over the weapon resulting in an un-intentional discharge."

B. The State's pathologist reports that the gun was fired from a distance of 2 – 4 feet. Measurements show that both the trigger on shotgun, and the muzzle to wound are both within that range. Det. Marshall asked Dr. Yacoub, "Could victim have grabbed barrel?" Dr. Yacoub said, "Could have."

~~This evidence was found in the handwritten and typed notes of Det. Miller, noting his observation of the autopsy dated 11/10/02; the Investigative report of Det. Marshall dated 11/21/02; and the report of SLED Firearms Department dated 12/02/02.~~

C. No items of Eric Brown's clothing or shoes contained blood spatter that would be consistent with "impact spatter."

This information came from the Report of SLED Latent Prints Department 10/03/03. This is evidence that could have been used to show that Eric Brown was not standing 2-4 feet from Stacy Fogle at the time of the gunshot.

D. Statements by Applicant and others referencing the unintentional nature of this shooting: These statements came from Statement of unknown officer 11/10/02; Statement of Tony Rasberry 11/13/02; Report of Det. Marshall 11/15/02; Supplementary report – Det. Marshall 12/03/02; Statement of Eric Brown 11/26/02.

All of these statements refer to the unintentional discharge of the weapon, consistent with a lack of willfulness, such as an accident or involuntary manslaughter. All of the statements are made within one month of the shooting, which occurred on 11/09/02.

20. This potential evidence, in combination with the letter of the defense firearms expert, Kelly Fite, and the autopsy file, should have been discovered, followed up and used to pursue a reduction in charges or defenses for Applicant, Eric Brown. The inaction of trial counsel led to severe prejudice to the Applicant.

CONCLUSIONS OF LAW

1. 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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).
2. The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

3. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

4. ~~"To find a guilty plea is voluntarily and knowingly entered into, the record must establish~~ the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.'" Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

5. A criminal defense attorney has the duty to conduct a reasonable investigation to discover

all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State. Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (quoting Wiggins, 539 U.S. at 524-25, 123 S.Ct. 2527).

6. In Holden v State, 393 S.C. 565, 713 S.E. 2d 611 (2011), our Supreme Court found that the Applicant was not denied effective assistance of counsel. However, Eric Brown's case can be distinguished in several ways which convinces me that he was denied effective assistance of counsel, and that the sentencing court did not have subject matter jurisdiction due to a defective Indictment.

7. Eric Brown, unlike the Applicant in Holden, was read a defective Indictment at the guilty plea hearing. The words "feloniously" and "willfully" are required by statute and appear nowhere in Eric Brown's record. S.C. Code Ann. §17-19-30 (1976). The plea court's colloquy with the Applicant fails to cure this deficiency. Eric Brown should have been told, somewhere before or during his plea to voluntary manslaughter, that he was admitting to the "willfulness" of the allegations against him- and given the opportunity to admit or deny that he acted willfully.

8. Eric Brown, unlike the Applicant in Holden, testified in his PCR hearing that he would not have pled guilty if plea counsel had properly explained the charges, the elements of each charge, and reviewed the State's evidence with him. (T. p.31, lines 16-17).

9. I therefore conclude that the trial court lacked subject matter jurisdiction over the

Indictment of Eric Brown, because the Indictment failed to charge all of the essential elements of murder pursuant to S.C. Code Ann. §17-19-30, which specifically requires that the allegation of murder state that it was committed "feloniously and willfully". This deficiency was not cured by Applicant's colloquy with the court during his guilty plea. Applicant never admitted that he was willfully involved in the death Stacy Fogle.

10. Consequently, I conclude that trial counsel's performance was deficient by failing to move the court to dismiss the Indictment for lack of subject matter jurisdiction, or moving to quash the Indictment on this basis. This deficient performance has clearly prejudiced the Applicant.

11. The words "feloniously and willfully" do not appear in the Applicant's Indictment for murder. The words do not appear anywhere in Applicant's colloquy with Judge John in the guilty plea transcript. These words are required by statute and are extremely pertinent here, where Applicant has serious concerns regarding the "willfulness" of this offense. In fact, Applicant spoke of Stacy Fogle's family during his sentencing and stated twice "I didn't mean to do that". (Plea T. pg.13, lines 3-4).

12. The further deficiencies of trial counsel leading to a conclusion that Applicant received ineffective assistance of counsel are:

- A. Failing to investigate and interview fact and expert witnesses.
- B. Failing to discuss the defense of 'accident' or the lesser charge of involuntary manslaughter with Applicant.

- C. Failing to investigate facts which could have led to a reasonable doubt on the charge of voluntary manslaughter. The investigative file was replete with evidence which could have been used to rebut the element of "willfulness."
- D. Failing to consult with or retain an expert to investigate and report upon findings of the State's forensic pathologist.
- E. Failing to move to dismiss the case or quash the Indictment based upon the State's failure to allege all of the elements of murder.

13. These deficiencies prejudiced Applicant by requiring him to proceed to trial, and to proceed to trial without the benefit of any evidence mitigating the element of "willfulness". But for trial counsel's deficiencies, no mitigating evidence was developed, and no witnesses, lay or expert, could have been called on Applicant's behalf at trial, other than Kelly Fite, to establish reasonable doubt. In essence, trial counsel's deficiencies were causing Applicant to cast his fate to the wind on the voluntary murder charge. As a result of trial counsel's deficient performance, Applicant recognized that no evidence had been developed to circumvent a maximum sentence of 30 years, and he thereby felt forced to accept a guilty plea hoping, at best, for a 17 year sentence, expressing all the while during his plea that he "didn't mean to do it". Clearly, Applicant was prejudiced by trial counsel's deficient performance and ineffective assistance of counsel.

Therefore, based upon the above, it is

ORDERED that the conviction of Eric Brown on the charge of voluntary manslaughter dated November 2, 2004, be vacated without prejudice upon the grounds of a lack of subject matter

jurisdiction due to a defective Indictment, and upon the grounds that Eric Brown's constitutional rights were violated, having received ineffective assistance of counsel; and it is further

ORDERED that Eric Brown be released from the custody of the South Carolina Department of Corrections, forthwith.

Diane S. Goodstein, Judge
First Judicial Circuit

St. George, South Carolina

___ day of _____, 2012