



ALAN WILSON
ATTORNEY GENERAL

December 2, 2013

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

RECEIVED

DEC 02 2013

S.C. Supreme Court

Re: Eunice McCall v. State of South Carolina
Appellate Case No. 2012-213542

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lee County
Court of Common Pleas
W. Jeffrey Young, Circuit Court Judge

2009-CP-31-0136
Appellate Case No. 2012-213542

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DEC 02 2013

S.C. Supreme Court

EUNICE MCCALL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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ISSUES PRESENTED

- I. Did the post-conviction relief court properly find that Counsel was not ineffective for not requesting a jury instruction on accident, where Counsel testified that he successfully argued to the trial court that Petitioner was entitled to jury instructions on self-defense, involuntary manslaughter, and voluntary manslaughter, and Petitioner's trial testimony was that he never had a weapon in his possession?

STATEMENT OF THE CASE

Petitioner was indicted during the November 2005 term of the Lee County Grand Jury for Murder and Possession of a Firearm during a Crime of Violence (2005-GS-14-0102).¹ He was represented by W. S. Watts, III, Esquire (hereafter "Counsel"). Petitioner, alongside his co-defendants, proceeded to a jury trial before the Honorable Clifton Newman. On April 6, 2006, Petitioner was convicted as indicted of Possession of a Weapon during a Crime of Violence and the lesser included offense of Voluntary Manslaughter. Judge Newman sentenced Petitioner to eighteen years imprisonment for Voluntary Manslaughter and five years imprisonment for Possession of a Weapon during a Crime of Violence, sentences to be served concurrently.

A notice of appeal was filed, and an Anders² brief was submitted on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. McCall, Op. No. 2009-UP-077 (S.C. Ct. App. February 11, 2009). The Remittitur was sent on March 2, 2009.

Petitioner subsequently filed an application for post-conviction relief on June 29, 2009 (2011-CP-18-2176). Respondent filed its Return on March 1, 2012. An evidentiary hearing into the matter was convened at the Sumter County Courthouse on September 19, 2012, before the Honorable W. Jeffrey Young. Petitioner was present at the hearing and represented by Hemphill Pride, II, Esquire. Testimony was presented from Petitioner and Counsel. On November 19, 2012, Judge Young denied Petitioner's application with prejudice.

Petitioner thereafter filed a Petition for Writ of Certiorari. This Return follows.

¹ Applicant was indicted along with co-defendant Efrain Thomas for Murder and Possession of a Firearm During a Crime of Violence. The indictment also included a charge of Accessory After the Fact of Murder as to a third co-defendant, Chad James.

² Anders v. California, 386 U.S. 738 (1967).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘*any* evidence’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland. The petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner 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.

ARGUMENT

- I. **Evidence of probative value exists in the record to support the post-conviction relief court's finding that Counsel was not ineffective for not requesting a jury instruction on accident, where Counsel testified that he successfully argued to the trial court that Petitioner was entitled to jury instructions on self-defense, involuntary manslaughter and voluntary manslaughter, and Petitioner's trial testimony was that he never had a weapon in his possession.**

Petitioner argues the post-conviction relief court erred in its determination that Counsel was not ineffective for failing to request a jury instruction on accident. Petitioner asserts that Counsel's performance was deficient for failing to request the charge on accident, as the evidence presented at trial could have supported a jury instruction on accident. Additionally, Petitioner asserts that he was prejudiced by Counsel's deficiency, as the trial court would have instructed the jury on accident and "the jury could have reached a different verdict." (PWC p. 13). However, there is evidence of probative value to support the post-conviction relief court's determination that Counsel was not ineffective, as Counsel testified that he successfully argued that Petitioner was entitled to jury instructions on self-defense and two lesser included offenses and Petitioner testified at trial that he never shot a weapon or possessed a weapon.

There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel's performance was reasonable in regards to requested jury instructions. Counsel testified that he thought the jury was properly charged based on the evidence presented at trial, including the affirmative defense of self-defense, voluntary manslaughter and involuntary manslaughter. (App. p. 790-791). Counsel testified that he made the request for jury instructions on self-defense and the lesser include offenses of voluntary manslaughter and involuntary manslaughter, which he testified was "hard to get" based on the evidence presented at trial. (App. p. 790 line 24 – p. 791 line 1). Counsel acknowledged that

evidence was presented that there was a struggle between Petitioner and the victim. (App. p. 785 line 22 – 16). This supports the trial court’s jury instruction on involuntary manslaughter. See Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008) (finding that evidence of a struggle over a weapon between a defendant and a victim supports a jury instruction on involuntary manslaughter).

However, a defense of accident “requires showing that the harm caused was unintentional, the defendant was acting lawfully at the time of the incident, and due care was exercised while handling the weapon.” State v. Harris, 382 S.C. 107, 116, 674 S.E.2d 532, 537 (2009). Here, evidence presented at trial showed that the weapon was never in Petitioner’s hands before, during, or after the struggle. Petitioner testified during the trial that he did not shoot the victim, accidentally or otherwise. (App. p. 606 lines 5-10). Therefore, an accident charge was not warranted based on the evidence adduced at trial.

Additionally, the case at hand is distinguishable from Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008), upon which Petitioner relies. In Tisdale, the petitioner’s own testimony reveals that he was left holding the weapon when the altercation concluded. Petitioner’s assertion in his Petition for Writ of Certiorari that “the defendant testified that the gun was never in his hands” is inaccurate. See Tisdale, 378 S.C. at 125, 662 S.E.2d at 412. In the present case, Petitioner testified emphatically that he never shot the Petitioner and the weapon was never in his hands at any point during the altercation. (App. p. 606 lines 5-10).

Based on the testimony presented, Counsel’s performance was reasonable and effective in requesting the jury charges given. Therefore, there is evidence of probative value to support the post-conviction relief court’s finding that Counsel was not ineffective should be affirmed.

CONCLUSION

For the foregoing reasons, the State submits that the Petition for Writ of Certiorari should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: Megan E. Harrigan
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EUNICE MCCALL,

PETITIONER,

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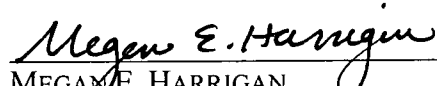
PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 2nd day of December, 2013.


MEGAN E. HARRIGAN
ASSISTANT ATTORNEY GENERAL

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