

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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DEC 30 2013

Appeal from Horry County

S.C. Supreme Court

Honorable Larry B. Hyman, Jr., Circuit Court Judge

APPELLATE CASE NO: 2013-001577

JIMMY LEE WILLIAMS,

PETITIONER,

v.

THE STATE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

John Mobley, Esquire
THE MOBLEY LAW FIRM, P.A.
925 Calhoun Street
Columbia SC 29201
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ATTORNEY FOR THE PETITIONER

QUESTIONS FOR REVIEW

Whether the Lower Court erred in determining Trial Counsel was not ineffective by using a strategy of self-defense based on the evidence and when it conflicted with Petitioner's choice to exercise his right not to testify.

STATEMENT OF CASE

During the week of November 14, 2008, Petitioner pled not guilty and was convicted of Murder after a jury trial and received a sentence of thirty (30) years. After exhausting direct appeals, on December 2, 2011 Petitioner made a timely claim for Post Conviction Relief on the grounds of Ineffective Assistance of Counsel. In April 2013, a hearing on this matter was held before the Honorable Larry Hyman Sr. of Horry County. At the hearing both the Petitioner and his trial counsel testified.

According to trial counsel, the prosecution's evidence at Petitioner's trial was circumstantial. The Petitioner and his co-defendant had a verbal dispute with the victim over the telephone. Later after the verbal dispute, Petitioner and his co-defendant rode together to victim's house resulting in an exchange of gunfire between the victim and the occupants of the vehicle with the victim being killed. A handgun was found near the victim's body and it was concluded that he possessed and fired the handgun during the exchange. There were no eyewitness to the shooting; there was no evidence at trial of any statements from either Petitioner or his co-defendant regarding the shooting or even being present at the scene. There was no evidence regarding who fired the first shots or that the Petitioner had even fired a weapon. A rifle which was involved in the shooting was found in the woods behind the neighborhood of the home where Petitioner lived. There was no evidence linking Petitioner to the rifle. Based on the handgun being found near the victim, trial counsel decided to exclusively use a trial strategy of self-defense from the very beginning. Petitioner conveyed to trial counsel his disagreement with the strategy based on the lack of evidence against him. Furthermore, when Petitioner and trial counsel discussed Petitioner testifying, Petitioner made it clear to trial counsel he did not want to testify.

Nonetheless, trial counsel insisted on employing a strategy of self-defense and in his opening statement trial counsel stated to the jury that Petitioner shot the victim in self-defense. Trial counsel presented no witness and conduct cross examination of the State's witness consistent with his theory of self defense.

At the close of the State's case the trial judge ruled that there was not sufficient evidence of self-defense and refused to allow trial counsel to argue self-defense in his closing statement. At some point prior to deliberations, Trial Counsel and Petitioner discussed whether or not

Petitioner would testify and Petitioner continued to exercise his Fifth Amendment right not to testify. Petitioner was subsequently convicted of murder.

ARGUMENT

For an applicant to be granted Post Conviction Relief as a result of ineffective assistance of counsel, he must show both 1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and 2) he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996).

In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

The Lower Court erred in finding trial counsel was not ineffective in using a self-defense strategy.

A. Trial counsel was ineffective in using a strategy of self-defense based upon the State's questionable evidence.

Throughout the hearing on this matter, Trial Counsel consistently stated he decided to use self-defense from the time he reviewed discovery and that there was no other defense, Transcript, p. 27, lines 24-45; Transcript, p. 28, line 1; Transcript, p. 27, line 16; and Transcript, p. 29, lines 15-16.

Based upon the evidence in the record and trial counsel's own testimony, not only was self-defense not the only defense, but it is not even a reasonable defense. "[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). For several reasons, counsel's decision was not reasonable and any strategic reason asserted would not excuse the deficient conduct.

Under cross examination, trial counsel admitted the following risks by employing a self-defense strategy in this case; 1) he admitted the Petitioner was at the scene, 2) he admitted the Petitioner fired shots at the victim, and 3) by admitting all of the above, if the jury did not believe the Petitioner acted in self-defense, then Petitioner would be convicted of murder, Transcript, p. 7, lines 15-25, p. 8, lines 1-2.

When questioned about the lack of evidence he admitted 1) there were no witnesses who identified the victim as firing a weapon at the Petitioner, Transcript, p. 9, lines 13-16; 2) no forensic evidence that the victim fired first, Transcript, p. 10, lines 1-8; 3) no witness saw Petitioner fire a weapon at the victim, Transcript, p. 10, lines 16-19; 4) no witness at trial identified Petitioner as being present at the scene of the crime, Transcript, p. 10, line 25, p. 11, lines 1-3; 5) no forensic evidence that Petitioner ever fired a weapon, Transcript, p. 11, lines 4-8., 6) the only connection Petitioner had to a weapon believed to be used in the shooting is that it was the woods behind the Petitioner's neighborhood, Transcript p. 14, lines 8-10; and 7) although shell casings were found in a car Petitioner had been in, Petitioner was not the only person in the car, Transcript, p. 15, lines 19-21.

Trial counsel further testified there was no evidence at the trial that excluded the co-defendant as having fired the weapon, Transcript, p. 17, lines 1-6, and there was no testimony of any admissions or statements from Petitioner implicating himself in the crime, Transcript, p. 17, lines 19-25.

Based upon the state's circumstantial evidence and the significant gaps between evidence that merely raised a suspicion of Petitioner's guilt, counsel's "all or nothing" approach and opening statement that Petitioner was not only at the crime scene but also fired the fatal bullet was unreasonable.

While attempting to give a valid reason for employing a certain strategy does provide trial counsel with some degree of latitude, a blanket statement by counsel at a PCR hearing that he employed 'strategy' does not automatically insulate the lawyer from being found ineffective." Id. at 228, 565 S.E.2d 284, Brown v. State, 652 S.E.2d 765, 375 S.C. 464 (S.C.App. 2007).

B. Trial counsel was ineffective in insisting on a trial strategy which conflicted with the Petitioner's Fifth Amendment right to exercise his right not to testify.

The lower court also found that Petitioner sabotaged his defense and failed to cooperate with trial counsel with his decision not to testify.

First and foremost, such a finding is not supported by all the facts in the records as a whole. When asked about his decision to testify as part of the self defense strategy during the Post Conviction Relief hearing, the Petitioner stated he made it clear he never intended to testify, Transcript, p.45, lines 1-2, 24-25.

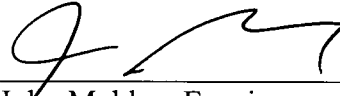
Second, the position taken by the lower court completely disregarded the Petitioner's right not to testify. There are certain decisions the trial counsel has the right to make during a criminal trial (trial strategy, which witnesses to call, etc.), and there are certain fundamental or personal decisions that an accused has control over. The defendant has the right to make the ultimate decision to testify or not. Jones v. Barnes, 463 U.S. 745, 751 (1983), United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991).

In this case while trial counsel had the right to make the decision to employ a trial strategy of self-defense, that choice was limited to the Petitioner's absolute right to choose whether or not to testify. The lower court tried to reframe the question and analyze the issue in the context of the Petitioner to choosing not to cooperate with his defense, Transcript. p. 45, lines. 3-13. By adopting the lower court's interpretation of resolving conflicts between a trial counsel limits any meaningful choice a defendant makes regarding his decision to testify by making it inferior to and at the mercy of his trial counsel's defense strategy.

CONCLUSION

For the aforementioned reasons, the lower court erred in determining trial counsel was not ineffective for using self-defense at the trial in this matter and the lower court's decision should be reversed and the Petitioner's request for Post Conviction Relief should be granted and his underlying conviction reversed.

Respectfully submitted,



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ATTORNEY FOR THE PETITIONER

Columbia, South Carolina
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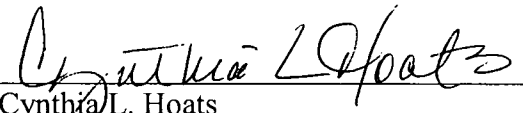
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THE STATE,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 30th day of December, 2013, a copy of the *Petition for Writ of Certiorari* in the above-referenced case has been served upon Joshua Thomas, Esquire, of the SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina, 29211, by depositing same in the U. S. Postal Service receptacle, with sufficient postage affixed thereto.


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Columbia, South Carolina
December 30, 2013.

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HAND DELIVERY

Daniel E. Shearhouse, Clerk of Court
The Supreme Court of South Carolina
1231 Gervais Street
Columbia SC 29201

Re: Appellant's Writ of Certiorari and Appendix to Appellant's Writ of Certiorari
The State v. Jimmy Williams – Appellate Case No. 2013-001577

Dear Mr. Shearhouse:

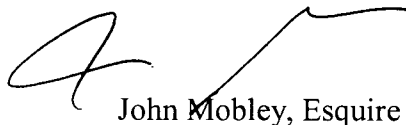
Enclosed please find for filing an original and one (6) copies of the *Appellant's Writ of Certiorari* and *Certificate of Service* and an original and two (2) copies of the *Appendix to Appellant's Writ of Certiorari* and *Certificate of Service* in the above-captioned case.

By copy of this correspondence, I am serving Joshua Thomas, Assistant Attorney General of the SC Attorney General's Office, a copy of same.

Should you have any questions, please feel free to contact me.

Sincerely,

THE MOBLEY LAW FIRM, P.A.



John Mobley, Esquire

JM/clh

Enclosures

cc: Joshua Thomas, Esquire