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

January 21, 2014

RECEIVED
JAN 24 2014
S.C. Supreme Court

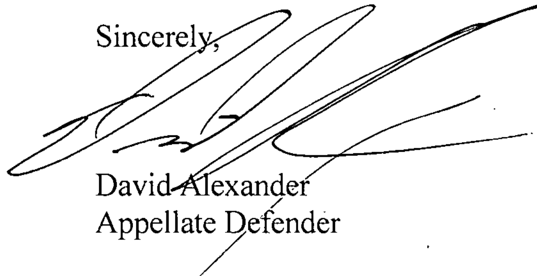
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Re: Jwan T. Smith v. State of South Carolina

Dear Mr. Shearouse:

Enclosed is the original, 6 copies, and 1 clocked copy to be returned to Appellate Defense of the return to petition for writ of certiorari in the above case that I filed with the S.C. Supreme Court today.

Sincerely,



David Alexander
Appellate Defender

DAA/dlw

Enclosure

RECEIVED

JAN 24 2014

S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Clifton Newman, Circuit Court Judge

JWAN T. SMITH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-000018

RETURN TO PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT

INDEX

INDEX 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT 4

CONCLUSION 14

QUESTION PRESENTED

Whether ample evidence supports the PCR court's findings and conclusions that trial counsel rendered ineffective assistance because he (1) failed to investigate the case; (2) failed to present a defense of self-defense and defense of others; and (3) failed to object to grossly inadmissible hearsay and character evidence?

STATEMENT OF THE CASE

On May 23, 2006, respondent Jwan Tyree Smith was indicted by an Anderson County grand jury for murder and a related weapons charge. App. 653. On May 7, 2007, respondent was tried before the Honorable Alexander S. Macaulay and a jury. App. 1. Rame Campbell represented the State. App. 1. Robert A. Gamble represented respondent. App. 1. The jury convicted respondent. App. 394, l. 16 – 395, l. 6. Judge Macaulay sentenced respondent to thirty years' imprisonment for murder and a concurrent term of five years' imprisonment for the weapons charge. App. 400, ll. 12 – 20. Respondent's conviction was affirmed on appeal after the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 416.

On May 21st 2010, respondent filed a PCR application. App. 417. On September 26, 2012, respondent filed an amended PCR application. App. 427. On October 3, 2012, a hearing was held before the Honorable Clifton Newman. App. 434. Karen C. Ratigan represented the State. App. 434. Druanne White represented respondent. App. 434. On December 10, 2012, Judge Newman granted respondent a new trial. App. 630. The State petitioned this Court for certiorari.

ARGUMENT

Ample evidence supports the PCR court's findings and conclusions that trial counsel rendered ineffective assistance because he (1) failed to investigate the case; (2) failed to present a defense of self-defense and defense of others; and (3) failed to object to grossly inadmissible hearsay and character evidence.

Introduction

Decedent Sammy Martin ("Martin") attacked a woman in a nightclub. In their statements to police that night, multiple witnesses described Martin's attack on the woman as beginning inside the nightclub and continuing in the parking lot. Martin's autopsy revealed a blood alcohol level of 0.15 and that Martin had ingested crack cocaine. In full view of numerous people who knew him, seventeen-year-old Jwan Tyree Smith ("Smith") came to the woman's aid and eventually shot Martin. Smith knew Martin was a violent man with a history of assaulting women. Smith also knew Martin usually carried a weapon.

Despite the obvious strategy of self-defense and defense of others necessitated by the evidence, which included multiple people who identified Smith as the shooter, trial counsel Robert A. Gamble ("Gamble") used a mistaken identification defense. He never sought jury charges on self-defense or defense of others. Before trial, Gamble only met with the youthful Smith two times for a total of approximately forty minutes. Gamble interviewed no witnesses. The PCR judge correctly concluded that trial counsel's ineffectiveness prejudiced Smith. Ample evidence supports this conclusion.

The PCR Court's Findings and Conclusions Regarding Deficient Performance

The PCR court's central finding was that Gamble's lack of investigation led him to adopt the unreasonable strategy of mistaken identification. App. 642-643. The PCR court held this was

not a reasonable strategic decision. App. 643. Judge Newman held, "Using the wrong defense was not a trial strategy employed by Mr. Gamble; it was the result of abysmal effort at best by Applicant's trial attorney to investigate and try the case, resulting in uneducated legal judgments." App. 643. Judge Newman found that a "reasonable attorney would have known just from reading the discovery provided by the State that the Applicant's only viable defenses were defense of others and self-defense." App. 643.

The proper standard of review of a PCR court's order is whether "any evidence of probative value" exists to support the court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Ample evidence from the trial and the PCR hearing support Judge Newman's findings and conclusion about the unreasonableness of Gamble's course of action. Judge Newman found that Gamble "failed to interview a single witness." App. 642. During the PCR hearing, Smith's attorney questioned Gamble about twenty-two witnesses whose names were known to him before the trial or were easily available. Gamble could not remember interviewing a single one of them. App. 448, ll. 4 – 7 (Clyde Clemmons). App. 455, l. 20 – 456, ll. 7 (Landis Bolden). App. 457, ll. 5 – 13 (Angela Brownlee). App. 461, l. 20 – 462, ll. 7 (Janis Cherry). App. 463, ll. 10 – 20 (Fred Chiles). App. 465, ll. 12 – 24 (Patricia Clinkscales). App. 467, ll. 7 – 18 (Cammy Dennis). App. 468, l. 15 – 469, l. 12 (Steven Glenn). App. 469, ll. 13 – 18 (Alphonso Haley). App. 471, ll. 7 – 14 (Bason Haley). App. 474, ll. 1 – 8 (Mary Ann Hall). App. 474, l. 20 – 475, l. 5 (Samika Hall). App. 475, ll. 16 – 23 (Anthony Massey). App. 478, ll. 18 – 23 (Janis Morris). App. 479, ll. 16 – 25 (Tim Mule). App. 480, ll. 9 – 15 (Carl Oglesby). App. 481, ll. 7 – 13 (Latorrey Pearson). App. 484, ll. 4 – 12 (Denise Peterson). App. 485, ll. 2 – 13 (James Pickens). App. 493, l. 8 – 494, l. 2 (Michael Vance). App. 497, ll. 3 – 13 ("Jennifer" from 911 call). App. 501, ll. 16 – 18 (Sheila Lomax). The failure to conduct a full and independent investigation constitutes deficient

performance under the Sixth Amendment. Wiggins v. Smith, 539 U.S. 510 (2003); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008); Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).

As Judge Newman correctly found, the statements provided to Gamble by the State in discovery for many of these witnesses supports defense of others and self-defense. App. 643. Judge Newman found that a "reasonably competent attorney would not have ignored the numerous witness statements that were provided in discovery that indicated that the applicant had acted to defend another." App. 643. Gamble never disputed that he was provided statements from the witnesses in discovery. He had notice of the facts supporting a defense of others argument.

At multiple points in the PCR hearing, Smith's attorney confronted Gamble with witness statements that were in his possession that supported a theory of defense of others. Fred Chiles' ("Chiles") statement described Martin pushing his girlfriend, Angela (Sally) Brownlee ("Brownlee"), in the parking lot. App. 463, l. 17 – 464, l. 23. Martin repeatedly accused Brownlee of cheating on him. App. 464, ll. 2 – 22. Chiles saw a man say "something to Sammy" before firing shots. App. 464, ll. 19 – 23. In his statement, Alfonso Haley ("Haley") described Martin as calling Brownlee a whore, yelling at her, and slapping her several times in the parking lot. App. 470, ll. 11 – 25. Haley said Smith asked Latorrey Peterson to borrow a gun. App. 470, ll. 11 – 25. Bason Haley described the same events. App. 471, ll. 7 – 473, l. 19. Latorrey Peterson said he saw Martin hit Brownlee "a couple of times." App. 482, ll. 11 – 17. Peterson gave Smith a gun. App. 482, ll. 22 – 25. In his statement, he identified Smith by name as the shooter and also said Smith admitted that he shot Martin the next day. App. 43, ll. 1 – 12.

Gamble received a statement from Michael Vance in discovery. App. 493, ll. 8 – 23. Vance described Martin as pushing Brownlee and "trying to get her inside a car." App. 494, ll. 15 – 22.

He saw a "kid" run from the side of the night club. App. 494, ll. 16 – 19. Vance thought that the kid and Martin "had words." App. 494, l. 20.

Gamble also had access to the statements of James Pickens a/k/a "Turk" ("Pickens"). App. 485, ll. 2 – 16. Pickens described Martin as hitting, slapping, and grabbing Brownlee. App. 486, ll. 21 – 24. Martin continued to try to hit Brownlee after she got into her car. App. 487, ll. 1 – 2. Pickens saw "another black female" with Martin and Brownlee. This woman told Martin to "leave his girlfriend alone." App. 487, ll. 11 – 13. Pickens identified Smith as the shooter. App. 487, ll. 15 – 19. The existence of these statements and Gamble's access to them amply supports the PCR court's conclusion that abandoning a defense of others strategy in favor of a mistaken identity theory that had no chance of success was unreasonable.

This other "black female" at the car was Shiela Lomax ("Lomax"). App. 565, l. 24 – 566, l. 3. Lomax did not testify at trial, but testified at the PCR hearing. She described Martin as "real aggressive." App. 569, ll. 21 – 24. Martin used his vehicle to block in Brownlee. App. 571, ll. 2 – 10. He exited his car and began "cussing" at Brownlee. App. 571, ll. 9 – 23. Lomax thought that Brownlee was in danger and that an attempt to help her would have been reasonable. App. 572, ll. 10 – 19. Failing to locate and call favorable witnesses is deficient performance. In Martinez v. State, 304 S.C. 39, 41, 403 S.E.2d 113, 113-14 (1991), this Court held trial counsel ineffective for failing to subpoena a witness who could have testified favorably for the defense. In Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998), trial counsel was held ineffective for failing to call a triage nurse in a rape case. Similarly, failing to locate and call Lomax constituted deficient performance.

The State argues that Gamble's actions were justified because Smith told him he did not murder Martin. App. 593, ll. 4 – 22. This argument is without merit. Gamble failed to explain to

Smith the evidence against him. App. 589, ll. 9 – 11. Gamble only met with Smith two times for forty minutes. App. 577, l. 16 – 578, l. 4. Smith was only seventeen years old at the time of the shooting and eighteen at the time of the trial. App. 575, l. 22 – 576, l. 1. Smith had never been arrested. App. 576, ll. 6 – 9. Gamble did not explain to Smith possible defenses—including defense of others—suggested by the evidence. App. 577, l. 17 – 578, l. 15.

In fact, during the trial court's colloquy with Smith regarding whether he would testify, Gamble showed his lack of preparation for the case and the law. Gamble told the trial judge that he informed Smith that "by pleading not guilty had indicated he didn't do this act and that was all he can say on the stand. Basically, other than to say he's young and went to Florida for some reason, I don't know." App. 338, ll. 1 – 5. Gamble denied that an attorney has a categorical duty to investigate the case and discuss defenses with a client. App. 509, ll. 19 – 24. Gamble said he did not explain the possible defenses to Smith because Smith denied murdering Martin. Gamble said "I don't bother to go into it." App. 510, ll. 1 – 6.

The solicitor's actions at trial further bolster the PCR court's conclusion that Gamble's actions were unreasonable. The solicitor clearly anticipated that Smith would claim self-defense or defense of others. In his opening statement, the solicitor attempted to take the sting out of the defense's case by telling the jury about Martin and Brownlee's fight. App. 48, l. 9 – 49, l. 13. For each witness, the solicitor asked questions that set up a counterargument to self-defense. The solicitor asked Brownlee if Martin had a weapon or if anybody stepped in and tried to intervene in the argument. App. 61, ll. 1 – 13. He asked Vance if the shooter said anything to Martin before firing and whether Martin had a weapon. App. 71, ll. 1 – 16. He asked Chiles if Smith and Martin exchanged words or got into a fight. App. 89, l. 22 – 90, l. 4 He asked Chiles if anyone tried to break up the fight between Smith and Brownlee. App. 93, ll. 9 – 94, l. 24. The solicitor asked

Bassen Hailey and Latorrey Peterson whether Smith and Martin exchanged words or if Martin had a weapon. App. 121, l. 11 – 122, l. 3 (Bassen Hailey). App. 171, ll. 19 – 25 (Latorrey Peterson). He asked James Pickens and Alphonso Hailey whether Martin had a weapon and whether Smith was trying to help Brownlee. App. 202, l. 24 – 203, l. 1. App. 219, l. 22 – 220, l. 2. App. 250, ll. 17 – 23.

Even though no self-defense or defense of others charge was requested by Gamble, the solicitor still felt compelled to address the issue in his closing argument. The solicitor stated:

> Now, when we prepare a case as a prosecutor, we go and present the evidence and **we also try to think of what the defense would come up with** to try and say that he is not guilty of this crime. We could only think about four them. **One of them was self-defense,** which we know that's not the case. All the witnesses testified there was no conflict between Mr. Smith and Mr. Martin.
>
> In fact, Detective Reeves, even after he was arrested, went back in his investigation and said there is no documented report of any conflict between these two individuals.
>
> **Well, it's not self-defense. Was it defense of others?** There is testimony at no point nobody at that place jumped in between Ms. Brownlee and Mr. Martin during their fussing or argument. So he didn't play the white knight and go to her rescue.

App. 356, l. 14 – 357, l. 5 (emphasis added). If the solicitor knew the appropriate defense was self-defense and defense of others, then the trial court's conclusion that Gamble should have known the same thing is amply supported by the evidence.

The PCR court also found trial counsel was deficient for failing to object to numerous hearsay statements during the testimony of Detective Reeves. App. 636-40. In its Order of Dismissal, the PCR court thoroughly listed each of these instances and cited to the transcript. App. 636-40. The State argues many of these statements are not hearsay and were used to show why the police took certain actions. This argument is without merit. A statement is hearsay when it is made out of court for the truth of the matter asserted. SCRE 801(c). Detective Reeves on multiple

occasions repeated what witnesses at the scene told him. For example, the solicitor asked Detective Reeves "as a result of your conversations" with unidentified people at the club, "were you able to form the identity of a suspect in this case?" App. 290, ll. 10 – 12. Detective Reeves replied that "Two distinct individuals brought up the name they had heard on scene of Buster." App. 290, ll. 13 – 16. This statement is actually double hearsay. Unlike a question of "What did you do as a result of talking to people at the scene," the detective was asked to repeat hearsay statements. Trial counsel's failure to object to these hearsay identifications as listed by the PCR court demonstrate that he did not even comply with his claimed "strategy" of challenging the identification of his client.

Finally, the PCR court correctly found that trial counsel failed to object to inadmissible evidence regarding Smith's character. App. 640-42. Gamble failed to object to a witness's statement that Smith had a reputation as a "troublemaker." App. 92, ll. 15 – 17. Gamble also failed to object to witness's statements that Smith asked them if he could buy marijuana. This testimony was irrelevant and highly prejudicial, and therefore inadmissible pursuant to Rules 404(b) and 403, SCRE. Trial counsel's failure to lodge objections to this testimony cannot be defended as part of any strategy but are signs that he neglected his duty as an advocate.

The PCR Court Correctly Concluded that Smith Was Prejudiced by Gamble's Deficient Performance

The PCR court properly held that because Smith would have been entitled to a charge on self-defense and defense of others, he suffered prejudice by trial counsel's inaction. App. 643-650. The State argues these findings were incorrect because the evidence at trial and at the PCR hearing does not show that Smith was entitled to a charge of either self-defense or defense of others. The State's argument is not supported by the evidence or the legal standards applicable to these claims.

The State's argument is essentially a jury argument—that under these facts, Smith's self-defense claim would fail. This argument misses the point. Gamble's failure deprived Smith of the only defense he had. Furthermore, under the "any evidence" standard applicable to jury charges, Smith would certainly have been entitled to jury charges on self-defense and defense of others.

Smith testified that he knew Martin's history of violence against women. Smith experienced it firsthand because Martin lived with Smith while he was dating Smith's mother. App. 579, ll. 2 – 6. His mother pressed charges against Martin for assaulting her. App. 579, ll. 2 – 6. Smith described seeing Martin hit his mother "in the face, smush her head against the wall. He'd beat on her for no reason." App. 579, ll. 15 – 18. He saw Martin pull a knife on her. App. 579, ll. 19 – 20. Smith testified Martin "always kept a weapon. When I used to live with him, he always kept a gun. He always carried a knife with him or a gun." App. 581, ll. 4 – 6.

The night of the shooting, Smith saw Martin striking Brownlee and "pulling her by the collar." App. 582, ll. 10 – 12. Martin was "hostile." App. 582, ll. 13 – 15. Smith had seen Martin's hostile demeanor on "plenty" of other occasions. App. 582, ll. 16 – 18. He described the encounter between Martin and Brownlee as "a fight." App. 582, l. 23 – 583, l. 2.

Smith saw Martin use his car to block Brownlee's car from escaping the nightclub's parking lot. App. 583, ll. 10 – 21. Martin "jumped out and continued his assault." App. 583, ll. 22 – 23. Martin "was trying to force her against her will to go somewhere." App. 585, ll. 5 – 9. From his experience, Smith knew that if Martin were able to get the woman alone it would "be a very bad thing." App. 585, ll. 10 – 13. Smith walked up to Martin and told him "leave the female alone." App. 586, ll. 4 – 10. Martin wheeled on him. App. 586, l. 23 – 587, l. 4. Martin stepped toward Smith and the look on Martin's face showed Smith that Martin was not afraid of him and was not going to retreat. App. 586, l. 23 – 587, l. 8. Martin was intoxicated and high on crack cocaine.

App. 301, l. 9 – 302, l. 3. Smith fired a warning shot at Martin's legs "to get him to stop." App. 587, ll. 19 – 24. Martin then lunged at him. App. 598, ll. 3 – 10. Only then did Smith fire the fatal shots. App. 588, ll. 2 – 4. Smith testified that the encounter only lasted seconds. App. 598, ll. 16 – 19.

Smith's testimony alone would have insured a jury charge on self-defense. State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). Smith would have been entitled to charges that he could act on appearances and that the jury could consider Martin's prior conduct in determining whether Smith acted reasonably. Id. at 417-18, 535 S.E.2d at 435. In Day, this Court reversed because the defendant did not receive an adequate self-defense charge. Id. The defendant in Day knew the decedent was a violent person and shot him because he believed the decedent was about to shoot a third person. Id. Just like Day, Smith would have been entitled to a self-defense charge. See also State v. Jackson, 384 S.C. 29, 681 S.E.2d 17 (Ct. App. 2009); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005). Had trial counsel explained that self-defense and defense of others were viable, he would have discovered Smith's version of events and presented this testimony at trial. It is a likely that given a self-defense charge, the jury would have acquitted Smith.

Had trial counsel bothered to interview the available witnesses, he would have been able to elicit testimony favorable to his client. Pickens testified at PCR that Martin was "very violent" to Brownlee immediately before shots were fired. App. 521, ll. 15 – 17. He feared for Brownlee's safety. App. 522, ll. 5 – 10. Vance testified that he heard Smith and Martin exchange words before the shooting. App. 537, ll. 12 – 24. Vance said Martin was acting in a threatening manner and was aggressive toward Brownlee. App. 540, ll. 17 – 25. Alphonso Hailey testified that it was reasonable for Smith to come to Brownlee's aid. App. 546, ll. 14 – 16. Bassen Hailey testified that he could tell Martin was intoxicated and aggressive. App. 552, ll. 9 – 11. Bassen Hailey also

testified that it was clear that Smith's intention in obtaining the gun "was to stop the argument." App. 553, ll. 8 – 19. Lomax described Martin as "real aggressive." App. 569, ll. 21 – 24. Martin used his vehicle to block in Brownlee. App. 571, ll. 2 – 10. He exited his car and began "cussing" at Brownlee. App. 571, ll. 9 – 23. Lomax thought that Brownlee was in danger and that an attempt to help her would have been reasonable. App. 572, ll. 10 – 19. The testimony of these witnesses clearly established Smith's right to a defense of others charge to the jury. The failure to elicit this testimony, obtain a defense of others charge, and argue this position to the jury prejudiced Smith. Their testimony more than surpasses the "any evidence" required to affirm the PCR court's ruling.

Finally, the failure to object to inadmissible evidence prejudiced Smith. In Holman v. State, 381 S.C. 491, 674 S.E.2d 171 (2009), the Court reversed and remanded for a new trial because trial counsel failed to object to the admission of an unrelated firearm into evidence. The Court stated, "We hold that the failure to object to this clearly inadmissible evidence was ineffective assistance of counsel. We reject the suggestion that the failure to object to the unrelated pistol can be justified as a valid trial strategy." Id. at 493, 674 S.E.2d at 172. Like in Holman, Gamble's failure to object to the hearsay statements from Detective Reeves, the evidence that Smith was a "troublemaker," and evidence that Smith attempted to buy marijuana prejudiced Smith. This clearly inadmissible evidence created the likelihood that the jury convicted Smith on grounds other than the evidence relevant to the alleged crime.

CONCLUSION

For the foregoing reasons, this Court should deny the petition and allow the PCR court's order to stand.

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 21ST day of January, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Clifton Newman, Circuit Court Judge

JWAN T. SMITH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-000018

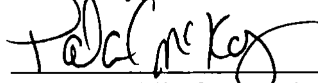
CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on John Walt Whitmire, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, and also served upon Mr. Jwan T. Smith #321800 Lee Correctional Institution 990 Wisacky Hwy. Bishopville, SC 29010 this 21st day of January, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 21st day
of January, 2014.


________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.