



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

FEB 18 2014

February 18, 2014

S.C. Supreme Court

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

Re: Levon Mintz, #303362 v. State of South Carolina
Appellate Case No. 2012-212935
Lower Court Case No. 2010-CP-38-1698

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. This Return was due on February 12, 2014, but due to the inclement weather resulting in the closing of both the Court and our office, I am submitting it on the next business day.

Sincerely,

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

MEH
Enclosures

cc: Jeremy A. Thompson, Esquire
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge

2010-CP-38-1698
Appellate Case No. 2012-212935

LEVON MINTZ, #303362,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

RECEIVED

FEB 18 2014

S.C. Supreme Court

INDEX

ISSUE PRESENTED2

STATEMENT OF THE CASE3

STANDARD OF REVIEW6

ARGUMENT.....7

CONCLUSION14

ISSUE PRESENTED

Did the post-conviction relief court err in determining that appellate counsel as not ineffective for submitting an Anders brief on Petitioner's behalf, where the trial court properly ruled that Petitioner was not entitled to a jury instruction on the lesser included offense of voluntary manslaughter and Petitioner can show no resulting prejudice from this alleged deficiency of appellate counsel?

STATEMENT OF THE CASE

Petitioner was indicted during the May 2003 term of the Orangeburg County Grand Jury for Murder (2003-GS-38-0887). Petitioner was represented by Glenn Walters, Sr., Esquire. On April 19, 2005, Petitioner proceeded to trial before the Honorable James C. Williams, Jr. and a jury. On April 20, 2005, the jury convicted Petitioner as indicted. Judge Williams sentenced Petitioner to fifty years imprisonment for murder. No direct appeal was taken.

Petitioner filed a timely application for post-conviction relief on September 30, 2005 (C.A. No. 2006-CP-38-1023). In his application, Petitioner set forth the following grounds for relief:

1. Ineffective assistance of counsel.
 - a. "Failing to object to defective murder indictment."
 - b. "Failing to object to sentence that was handed down."
2. Trial counsel failed to file an appeal.
3. Denial of Due Process.

The State filed its Return on May 17, 2006, requesting an evidentiary hearing be held. An evidentiary hearing was convened on August 6, 2008, before the Honorable Perry M. Buckner. Petitioner was present and represented by Robert E. Hood, Esquire. Respondent was represented by Assistant Attorney General Daniel E. Grigg of the South Carolina Attorney General's Office. At this hearing, testimony was taken from Petitioner and trial counsel. By Order filed on September 15, 2008, Judge Buckner denied and dismissed all of Petitioner's claims except for Petitioner's claim that he was entitled appellate review pursuant to White v. State¹, on which relief was granted. On September 24, 2008, Petitioner filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRPC. Respondent filed its Return to Petitioner's motion on October 3, 2008. By written Order dated October 6, 2008, Judge Buckner denied and dismissed the motion.

¹ 263 S.C. 110, 208 S.E.2d 35 (1974)

Petitioner appealed the denial of his post-conviction relief application to this Court. He was represented by Appellate Defender Katherine H. Hudgins from the South Carolina Office of Appellate Defense. Appellate Defender Hudgins filed a certiorari petition raising two issues and a White v. State brief pursuant to Anders v. California.² In response to the Anders brief, Petitioner filed a *pro se* brief. Following the review of counsel's filing's and Petitioner's *pro se* brief, this Court denied the certiorari petition's non-White claim, granted review pursuant to White on Petitioner's other claim, and dismissed the appeal pursuant to Anders. Mintz v. State, Op. No. 10-MO-026 (S.C. Sup. Ct. filed October 25, 2010). The Remittitur was sent on November 10, 2010.

On November 24, 2010, Petitioner filed a second application for post-conviction relief, alleging that "appellate counsel was ineffective for failing to raise on belated direct appeal that the judge erred in allowing the prosecutor to make an indirect comment on defendants [sic] right to remain silent and put the state to its burden of proof." On February 10, 2011, Petitioner filed a "Notice of Amendment to Post Conviction Application," seeking to amend his application to include two grounds of ineffective assistance of trial and post-conviction relief counsel. On May 17, 2011, Respondent filed its Return and Motion to Dismiss, seeking to summarily dismiss the application as barred by the statute of limitations and successive pursuant to S.C. Code. Ann. §§ 17-27-45, -90 (1985). Following the entry of a Conditional Order of Dismissal, the matter was set for a hearing per the request of the Chief Administrative Judge for the First Judicial Circuit. A hearing was convened on May 21, 2012 at the Orangeburg County Courthouse before the Honorable DeAndrea G. Benjamin. Petitioner was present and was represented by Jeremy A. Thompson, Esquire. Respondent was represented by Senior Assistant Attorney General David

² 386 U.S. 738 (1967).

A. Spencer of the South Carolina Attorney General's Office. Testimony was taken from Petitioner and Petitioner's appellate counsel. Thereafter, Judge Benjamin denied Petitioner's application by written Order filed August 3, 2012, finding that Petitioner was not entitled to a voluntary manslaughter jury instruction and could not satisfy the requisite prejudice from this alleged deficiency; the Order does not address or rule upon whether appellate counsel was deficient. Petitioner did not file any subsequent motions.

Petitioner's Petition for Writ of Certiorari was filed on November 12, 2013. This Return follows.

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). This Court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). An applicant alleging ineffective assistance of appellate counsel bears the burden of showing that counsel’s performance was deficient based on prevailing professional norms and that he was prejudiced by this deficiency. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (citing Strickland v. Washington, 466 U.S. 668 (1984)). In order to show that he was prejudiced by appellate counsel’s performance, an applicant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Bennett v. State, 383 S.C. 303, 309-10, 680 S.E.2d 273, 276 (2009) (citing Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625). When an applicant is unable to prove any resulting prejudice from an alleged deficiency of appellate counsel, post-conviction relief must be denied. Tisdale, *supra*.

ARGUMENT

The post-conviction relief court correctly determined that appellate counsel as not ineffective for submitting an Anders brief on Petitioner's behalf, where Petitioner was not entitled to a jury instruction on the lesser included offense of voluntary manslaughter, and Petitioner can show no resulting prejudice from this alleged deficiency of appellate counsel.

Petitioner argues that the post-conviction relief court erred by not finding appellate counsel ineffective based on her submission of an Anders brief on Petitioner's behalf. Petitioner contends that the facts presented at trial warranted a jury instruction on the lesser included offense of voluntary manslaughter, and as appellate counsel did not raise this issue in a merits brief, the post-conviction relief court should have found her deficient.³ Petitioner further asserts that he was prejudiced by appellate counsel's alleged deficient performance because he would have been successful on his appeal had the issue been raised through a merits brief. However, the post-conviction relief court correctly found that appellate counsel was not ineffective for submitting an Anders brief, as no evidence presented at trial supported a jury instruction on the lesser included offense of voluntary manslaughter and Petitioner failed to establish any resulting prejudice. As there is evidence of probative value in the record to support its ruling, this Court should affirm the post-conviction relief court.

A. The facts adduced at trial do not support a jury instruction on the lesser included offense of voluntary manslaughter

Petitioner argues that the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter, as he satisfied the requisite elements. However, the

³ As discussed below, the post-conviction relief court did not make any findings of fact or conclusions of law regarding whether appellate counsel was deficient, instead focusing on Petitioner's failure to satisfy the prejudice prong as required by Strickland. As Petitioner did not file a Rule 59(e), SCRCP, Motion to obtain a ruling on this issue as required by Marlar v. State, 375 S.C. 407 653 S.E.2d 266 (2007), this issue is not preserved for appellate review.

post-conviction relief court properly determined that Petitioner was not entitled to a jury charge on voluntary manslaughter.

The law to be charged to the jury is to be determined by the evidence presented at trial. State v. James, 386 S.C. 650, 653, 689 S.E.2d 643, 645 (Ct. App. 2010) (citing State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)). “A request to charge a lesser included offense is proper only when the evidence could support a reasonable inference that the defendant committed the lesser rather than the greater offense. A mere contention that the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge.” State v. Morris, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991) (internal citations omitted).

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). This Court has consistently held that both heat of passion and sufficient legal provocation must be present at the time of the killing. Id. at 215, 672 S.E.2d at 788. A defendant is not entitled to a jury instruction on the lesser included offense of voluntary manslaughter merely because he was in a heat of passion. See id. (holding the State's request for a voluntary manslaughter charge was not warranted where there was no evidence of sufficient legal provocation, even though the defendant may have been acting under heat of passion). Conversely, a defendant is not entitled to voluntary manslaughter charge simply because he was legally provoked. See State v. Pittman, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion). Additionally, evidence that the heat of passion was caused by sufficient

legal provocation must be present. State v. Starnes, 388 S.C. 590, 596-97, 698 S.E.2d 604, 608 (2010). “When death is caused by the use of a deadly weapon, words alone, however opprobrious, cannot constitute sufficient legal provocation. Rather, the offending words must be accompanied by some overt threatening act which could have produced the heat of passion.” State v. Johnson, 324 S.C. 38, 40, 476 S.E.2d 681, 682 (1996) (internal citations omitted).

In the present case, Petitioner cannot satisfy the requisite element of sufficient legal provocation to warrant a jury instruction on voluntary manslaughter. The testimony presented at trial was that Petitioner and decedent, along with others, got into approximately two verbal altercations at a club immediately before the shooting. (App. pp. 83-84; pp. 172-173). After going their separate ways, Petitioner and decedent both ended up outside the club. (App. pp. 86-87). Decedent proceeded to get out of his car and approach Petitioner. (App. p. 87; p. 174). Petitioner, without seeing a weapon on decedent, elected to brandish a weapon and show it to decedent in a threatening manner. (App. p. 87). Upon seeing the weapon, decedent began to retreat and Petitioner shot twice, killing decedent. (App. p. 87; pp. 174-175).

Despite a request from trial counsel, the trial court refused to instruct the jury on the lesser included offense of voluntary manslaughter, finding no evidence of sufficient legal provocation present and it would require mere speculation from the jury to find Petitioner guilty of voluntary manslaughter. (App. pp. 254-256). The trial court was correct in its ruling. The mere words of decedent coupled with his approach of Petitioner do not amount to sufficient legal provocation. See State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011) (holding that decedent approaching victim with “real serious demeanor” coupled with hostile words were not enough to satisfy the sufficient legal provocation requirement of voluntary manslaughter). Petitioner

argues in his petition that “it can be inferred that the Petitioner felt endangered by the decedent’s overt threatening acts” of returning to the scene and getting out of his vehicle. However, this argument is flawed, as it improperly requires the same speculation that the trial court concluded would be necessary for the jury to find Petitioner guilty of voluntary manslaughter rather than murder.

Based on the foregoing, the trial court correctly determined that Petitioner was not entitled to a jury instruction on the lesser included offense of voluntary manslaughter and the post-conviction relief court properly found the same based on its review of the record.

B. The post-conviction relief court did not rule as to whether appellate counsel was deficient, and therefore, the issue is not preserved for appellate review; however, assuming *arguendo*, that the issue were preserved, appellate counsel was not deficient.

Petitioner argues that appellate counsel was deficient for submitting an Anders brief on Petitioner’s behalf rather than a merits brief. In support of this position, Petitioner asserts that appellate counsel testified that she did not file a merits brief based on a mistaken belief that the issue was not preserved, which was in error. However, the post-conviction relief did not rule as to whether appellate counsel was deficient, finding instead that Petitioner did not establish the requisite prejudice and relief must be denied. Petitioner did not file a motion pursuant to Rule 59(e), SCRPC, requesting a ruling on this issue, and therefore, it is not preserved for appellate review. See Marlar v. State, 375 S.C. 407 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review in that defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations). In his petition, Petitioner’s counsel, who also represented Petitioner at his post-conviction relief hearing, acknowledged that the issue as to whether appellate counsel was deficient was not ruled upon by the post-conviction

relief court. Because he failed to secure a ruling on this issue below, Petitioner is barred from pursuing this issue on appeal.

However, assuming *arguendo* that the issue is properly before this Court, Petitioner did not meet his burden of establishing that appellate counsel was deficient for filing an Anders brief on his behalf. At the evidentiary hearing, appellate counsel testified that she could not recall precisely why she elected to file an Anders brief in lieu of a merits brief, but speculated it could have been because she believed the issue was not preserved for appellate review. (App. pp. 496-498; p. 504). Petitioner's assertions that appellate counsel affirmatively stated that this was the reason she did not file a merits brief is erroneous and not supported by the record. Because the only evidence Petitioner presented was appellate counsel's mere speculation as to her reasoning for filing an Anders brief on this issue, Petitioner has not satisfied his burden of establishing deficiency. See Burt v. Titlow, 134 S.Ct. 10, 17 (2013) ("It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.")

As the post-conviction relief court did not make sufficient findings of fact and conclusions of law regarding counsel's deficiency, this issue is not preserved for appellate review. Regardless, Petitioner failed to meet his burden of establishing deficiency.

C. Petitioner failed to establish any resulting prejudice from appellate counsel's alleged deficiency.

To establish that he was prejudiced by appellate counsel's deficiency, an applicant must show a reasonable probability but for counsel's errors, he would have prevailed on his appeal. Southerland v. State, 337 S.C. 610524 S.E.2d 833 (1999). In McHam v. State, this Court

reviewed the procedure that is followed when an Anders brief is submitted on a defendant's behalf:

“Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit. See State v. Williams, 305 S.C. 116, 117, 406 S.E.2d 357, 358 (1991) (Upon the receipt of an Anders brief and “the receipt of the *pro se* brief or the expiration of the period to file a *pro se* brief, this Court will then proceed to review the record as required by Anders. If no issue of arguable merit is discovered, the appeal will be dismissed and counsel's petition to be relieved will be granted. In the event the Court finds any issue(s) of arguable merit, the parties will be directed to submit new briefs.”); State v. Lawrence, 349 S.C. 129, 130, 561 S.E.2d 633, 634 (Ct.App.2002) (stating “[a]fter a thorough review of the record in accordance with Anders v. California and State v. Williams, we find the only *preserved* issue at trial is whether the trial court erred in denying Lawrence's motion for a directed verdict on the charge of discharging a firearm into an occupied structure” (emphasis added) (footnotes omitted)).”

McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46-47 (2013)

Here, Petitioner has failed to establish any resulting prejudice from this alleged deficiency of appellate counsel. The post-conviction relief court correctly determined that Petitioner failed to prove any resulting prejudice, as there was no reasonable likelihood that had appellate counsel submitted a merits brief as opposed to an Anders brief, the outcome of Petitioner's appeal would have been different. Upon receipt of appellate counsel's Anders brief and Petitioner's *pro se* brief, this Court reviewed the entire record for any potentially meritorious issues. Appellate counsel testified that based on her numerous years as an appellate defender, this Court does request full briefing any meritorious issues following the submission of “no-merit” briefs if warranted after reviewing the entire record. (App. p. 507). This Court reviewed Petitioner's entire record, along with his *pro se* brief, when it received Petitioner's Anders brief

and concluded that there were no preserved, meritorious issues on which Petitioner could succeed. Petitioner acknowledges that his argument could be construed as an assertion that this Court was derelict in its duty pursuant to Anders; Respondent contends that Petitioner's argument can only be reasonable interpreted in this light, but rejects any notion that this Court did not fully satisfy Anders requirements here.

Furthermore, as discussed in detail above, the trial court correctly determined that Petitioner was not entitled to a jury instruction on the lesser include offense of voluntary manslaughter, and therefore cannot establish any resulting prejudice. Based on the foregoing, there is evidence of probative value to support the post-conviction relief court's finding that Petitioner failed to establish prejudice.

In conclusion, there was clear evidence of probative value in the record to support the post-conviction relief court's findings. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the post-conviction relief court's Order of Dismissal should be upheld and this petition should be denied.

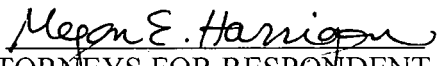
CONCLUSION

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

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

February 18, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2012-212935

LEVON MINTZ, #303362,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

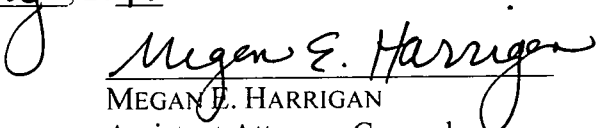
PROOF OF SERVICE

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:

Jeremy A. Thompson, Esquire
Law Office of Jeremy A. Thompson, LLC
Post Office Box 12891
Columbia, South Carolina 29211

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

This 18th day of February, 2014.


MEGAN E. HARRIGAN
Assistant Attorney General
S.C. Bar No. 100108

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737