

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

MORRIS ANTONIO SULLIVAN,

RECEIVED

PETITIONER FEB 18 2014

V.

SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2010-151951

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

Opinion No. 5190

PETITION FOR REHEARING

Pursuant to Rules 221 and 224, SCACR, counsel requests a rehearing on this Court's holding in this case that neither an involuntary manslaughter charge nor a Burriss¹ charge (self-defense is a lawful activity under involuntary manslaughter) was warranted in the case, **despite the fact that the trial judge charged involuntary manslaughter**, based on the rationale that the three gunshots fired by petitioner were intentional warning shots because the second and third shots

¹ 334S.C. 256, 513 S.E.2d 104 (1999)

fired (last shot killed the aggressor) were not intentional warning shots, but rather shots that were fired sans malice and in self-defense. The following points support this position.

1.) An altercation between the aggressor Jervis Powers and petitioner occurred at petitioner's home at noon on January 16, 1998, during which time Powers was shot and killed. Eyewitnesses Octavious Barksdale, Ronica Butler, Ronnie Cook and Cedrick Evans were present at petitioner's house and described the misunderstanding between Powers and petitioner which led to the shooting. Butler, Cook, Barksdale, and Evans testified that the incident began when Powers questioned petitioner about whether he (petitioner) fired gunshots into his (Powers') home earlier on that day. Petitioner denied doing this. Thereafter, petitioner and Powers began arguing and moved down the hallway and into a room. At some point while in the room, petitioner armed himself with a gun and began backing out of the room and down the hall away from Powers. However, Powers continued to advance toward petitioner as petitioner backed away. Petitioner fired a warning shot onto the floor, but Powers continued to advance and told him to use the weapon. Ultimately, petitioner fired two more low shots in Powers' direction. One shot hit Powers' leg and the other shot hit him in the chest as he fell down. App. 169, l. 16 – p. 181, l. 21; App. 186, l. 87 – p. 205, l. 6; App. 210, l. 3 – p. 234, l. 8; App. 135, l. 12 – p. 150, l. 5. At the close of all testimony, the trial judge entertained requests to charge. The trial judge charged the jury on the law of self-defense, necessity, defense of habitation, voluntary manslaughter, and involuntary manslaughter, but omitted a Burriss charge explaining how self defense would impact the offense of involuntary manslaughter. App. 336, l. 14 – p. 349, l. 3; App. 380, l. 11 – p. 390, l. 17.

2.) Petitioner's case was affirmed on direct appeal. On PCR appeal, petitioner alleged that counsel erred in failing to request a specific Burriss charge in connection with the trial judge's involuntary manslaughter charge submitted to the jury after the PCR court ruled that trial counsel

was not ineffective in failing to specifically request a Burriss charge because the essence of the Burris charge was conveyed within the trial judge's charges on the law of involuntary manslaughter, voluntary manslaughter, self-defense, necessity, and defense of habitation. App. 541-542. In the appellate opinion issued in this PCR appeal, the Court of Appeals held as follows:

“We find there is evidence to support the PCR court's finding under the second prong of Strickland, [i.e. that counsel's failure to request a Burris charge was not prejudicial error]... because [petitioner] was not entitled to an involuntary manslaughter charge in the first place.”

3.) The Court of Appeals' rationale for concluding that petitioner was not entitled to an involuntary manslaughter charge or a Burris charge was that “petitioner fired the gun three times intentionally [to scare the aggressor] and [that there was] no evidence to the contrary.” In other words, the Court surmised that petitioner fired all three shots intentionally as warning shots as the aggressor advanced. The Court used the following text from the record in support of its position

A few minutes later, petitioner entered the living room, holding a gun and walking backwards away from Powers, while Powers advanced toward [petitioner]. [Petitioner] told Power to “get out of here,” but Powers said, “I don't give a f--- about that gun” and that “if [petitioner] had the gun out he better use it .” [Petitioner] then fired a “warning shot” into the floor. Powers “kept walking toward [petitioner], so he shot again” in a downward direction, hitting Powers in the leg. Powers “continued to walk toward [petitioner]” and [petitioner] fired a third shot that hit aggressor in the chest (and he) “was falling over holding his leg” when [petitioner fired the third shot].....[petitioner] shot in the floor to scare [the aggressor] and shot two more times.

4.) The Court of Appeals' holding that petitioner was not entitled to an involuntary manslaughter charge or a Burriss charge via the opinion that petitioner fired the gunshots intentionally by characterizing all three gunshots as intentional warning shots constituted a mischaracterization that did not take into account the entire record and totality of the evidence presented in the case.

5.) Arguably, the first shot could be viewed as a shot fired by petitioner to scare the aggressor after he (aggressor) stated the he was not afraid to die, but thereafter, the aggressor

continued his onward march advancing toward petitioner despite the firing of the first shot by petitioner. The fact that the aggressor kept moving forward laid the foundation for the crux of the case as the undaunted aggressor charged directly on his approach toward petitioner even after the first shot was fired. At this juncture, another warning shot was no longer a remedy or resolution as it became clear that petitioner (who was in his own home and had no duty to retreat) had no choice but to act in self-defense by firing off two quick additional shots in self-defense. Thus, there were no three intentional warning shots fired. Rather, there were two final and rapid shots fired in self-defense in order to stop this seemingly invincible mad man's pursuit of petitioner. Note that the aggressor stated he was not afraid to die.

6.) Note further that the trial judge charged involuntary manslaughter at trial because there was evidence in the record in support of petitioner's defense that the killing was unintentional, i.e. sans malice and in self-defense, despite that fact that he was in unlawful possession of a weapon² since he armed himself in self-defense.³ Hence the need for a Burriss charge accompanying the trial judge's involuntary manslaughter charge were clearly necessary as petitioner lawfully arming himself in self-defense or had the gun lawfully, but handled it recklessly. The unintentionally killing in self-defense in this case undoubtedly begged a Burriss charge.

7.) In State v. Burriss, supra, the Court held that a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he were entitled to arm himself in self-defense at the

² Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of other. *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011).

³ In order to establish self-defense, the defendant must have been without fault in bringing on the difficulty and was or believed he was in actual imminent danger of losing his life or sustaining serious bodily injury, which a reasonably prudent person would have so believed, and he had no other means of avoiding the danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).

time of the shooting, because this would have made said act (arming oneself) lawful within the meaning of the definition of involuntary manslaughter. See also State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (2010); and State v. Lihgt, 378 S.C. 641, 664 S.E.2d 465 (2008) Here, the trial judge correctly charged the jury on the law of involuntary manslaughter, but failed to highlight how self-defense and involuntary manslaughter were disconnected via Burriss.

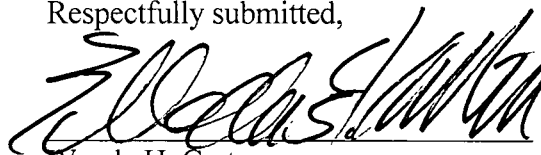
Under Burriss and its progeny, there is a specific instruction explaining how self defense would impact the offense of involuntary manslaughter. In other words, the jury needed to know that arming himself in self-defense is a consideration to be made in conjunction with the issue of lawful and unlawful activity within the definition of involuntary manslaughter. For example, the judge should have specifically explained that one can be found guilty of involuntary manslaughter when one unintentionally kills another while recklessly engaged in a lawful activity and that possession of a firearm while acting in self defense can be considered a lawful activity. Additionally, the judge should have charged that one can be found guilty of involuntary manslaughter when one unintentionally kills another while engaged in an unlawful activity such as unlawful possession of a weapon because arming oneself in self defense would make the unlawful possession of a weapon a lawful possession of the weapon. Had the Burriss charge been requested and given, or had counsel objected to the judge's failure to give a Burriss charge in the case, then a reasonable probability exists that the jury might have found petitioner guilty of involuntary manslaughter rather than issuing a verdict of guilty on the offense of voluntary manslaughter.

8.) The PCR judge erred in denying petitioner's claim that counsel erred in failing to request a specific Burriss charge in connection with the involuntary manslaughter charge, both of which were supported by the evidence presented in the record in the case; and the Court of Appeals overlooked evidence in the record supporting an involuntary manslaughter charge and hence a

Barris charge to follow as all three of the gunshots fired were not equal in character because the final two shots fired, the last of which killed the aggressor, were fired in self-defense sans malice.

WHEREFORE, inasmuch as this Court misinterpreted the character and nature of the three gunshots fired as intentional shots fired, appellate counsel would respectfully request a rehearing on petitioner's behalf in the case on appeal for consideration of the totality of the evidence in the entire record that would clearly support both involuntary manslaughter and Barris charges at trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

This 18th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

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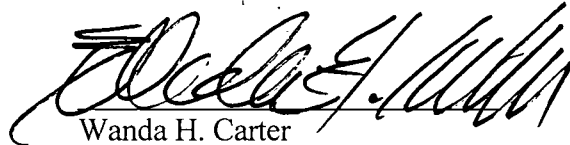
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CERTIFICATE OF SERVICE

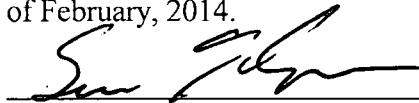
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Morris Sullivan, 115 Thrift Drive, Fountain Inn, SC 29644, this 18th day of February, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 18th day
of February, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.