STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

DARYL L. GRAY

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013- 002623

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the PCR judge erred by ruling there was no evidence of self-defense in this case and therefore defense counsel was not ineffective for failing to further investigate and for advising petitioner to plead guilty where petitioner had a viable self-defense claim since petitioner told the plea judge the decedent was "coming at me" and I was "defending myself" and where the decedent had gunshot residue on his hands?

STATEMENT OF FACTS

Petitioner was indicted at the October 26, 2010 term of the Anderson County Grand Jury for the offenses of murder and possession of a weapon during a violent crime. App. 88-89. He appeared before the Honorable J. Cordell Maddox on April 16, 2012 Andrew Potter represented petitioner. Elizabeth Huffstetler Byford was the assistant solicitor. App. 1. Petitioner entered a guilty plea to the crime of voluntary manslaughter. App. 8, l. 10-13.

The solicitor told the judge that petitioner and his girlfriend were returning a cell phone to the decedent at the time of the incident in this case. App. 6, l. 24 – 7, 4. Petitioner's girlfriend got into an argument with the decedent, and the decedent hit petitioner's girlfriend. App. 7, ll. 5-10. The solicitor offered that that the decedent's mother would claim the decedent abandoned the argument, and that he was walking away when petitioner shot him. App. 7, ll. 11-23.

The judge asked petitioner if the solicitor gave a correct rendition of what had occurred. Petitioner took exception, significantly, to the assertion that the decedent was walking away when he shot him. Petitioner told Judge Maddox that the decedent and he were both in the road and the decedent was "*coming at me*, that's the only reason this happened. You know, I'm sorry that it happened, but *I was defending myself.*" App. 8, ll. 17-25. (emphasis added).

Defense counsel Potter told the judge that in petitioner's statement he said he shot the decedent "low," and the second shot was also low. . . [P]etitioner "closed his eyes -- and -- fired off four more rounds." App. 11, ll. 1-5. Judge Maddox accepted the guilty plea to voluntary manslaughter, and imposed a sentence of twenty-five years imprisonment. App. 18, ll. 2-6.

Petitioner filed an application for post-conviction relief on July 31, 2012. App. 20-26. Petitioner alleged, inter alia, that defense counsel was ineffective in not advising him to pursue a viable self-defense claim. App. 22-25; 28.

To this application, the state filed a return dated December 6, 2012. App. 27-31. An evidentiary hearing was convened on September 17, 2014 before the Honorable R. Lawton McIntosh. Charles Anderson represented petitioner and John W. Whitmire was the Assistant Attorney General. App. 33.

Counsel Whitmire told the judge that petitioner alleged defense counsel was ineffective for failing to fully investigate his claim of self-defense. App. 35, l. 20 – 36, l. 4. Defense counsel Potter testified at the PCR hearing he talked with petitioner about asserting "stand your ground" prior to trial, and seeking immunity from prosecution. Petitioner could appeal immediately – at that time -- if immunity was denied. He could assert self-defense at trial if that failed. App. 39, l. 22 – 41, l. 23.

Potter also testified it boiled down to that petitioner having the option to pleading guilty to voluntary manslaughter, or going to trial. App. 41, l. 5 – 43, l. 16; 44, l. 3 - 46, l. 7; 49, ll. 1-6; 51, ll. 7-18.

Petitioner testified they were planning to raise self-defense at trial. Petitioner remembered defense counsel talking to him about the Trayvon Martin case in Florida as apparently being similar to his case on the right to stand your ground. Petitioner also said defense counsel Potter told him he had the right to defend his girlfriend "but he never explained to me the true meaning of what I had, [self-defense or the defense of others] I had to know about it." App. 55, l. 10 – 56, l. 10.

At the conclusion of the hearing the judge ruled that the facts of petitioner's case did not support self-defense or stand your ground. "Quite frankly . . . self-defense probably would not be available to you and stand your ground would not either." App. 70, l. 23 – 71, l. 8.

A written order of dismissal was issued on November 26, 2013. App. 75-86. This order stated that defense counsel reasonably advised petitioner that pursuing a self-defense strategy

"would have been futile in this case." "Applicant failed to show any beneficial evidence that could have aided his defense *in any of the four elements*. Although applicant testified he felt he was subjectively in imminent danger of serious bodily injury or death, his statements provided to the police after he killed the victim *completely negated that testimony*. Applicant attempted to shoot the victim at least three different instances during the offense, two of which resulted in the victim being shot. The first instance the victim was shot, the eyewitness statements along with the pathologist's findings showed the victim was shot while he retreated from Applicant. (plea transcript p. 8)." App. 81. The judge also ruled that petitioner had failed to show he was entitled to the presumption of imminent danger under the Protection of Persons and Property Act had be pursued immunity from prosecution. App. 82-83.

From this order petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

ARGUMENT

The PCR judge erred by ruling there was no evidence of self-defense in this case and therefore defense counsel was not ineffective for failing to further investigate and for advising petitioner to plead guilty where petitioner had a viable self-defense claim since petitioner told the plea judge the decedent was "coming at me" and I was "defending myself" and where the decedent had gunshot residue on his hands

Discussion

It was apparent at the guilty plea proceeding, as seen above, that petitioner had a viable self-defense case. Petitioner told the plea judge that the decedent was coming towards him, and he shot him while defending himself -- in self-defense. The PCR court erred as a matter of law by ruling petitioner completely negated self-defense, and that he failed to provide any evidence of any of the four elements of self-defense where petitioner told the plea judge that he shot the decedent as the decedent was coming at him. Petitioner, in fact, showed evidence of all of the elements of self-defense in this case given his assertion at the plea proceeding:

> (1) He was without fault in bringing on the difficulty because the decedent hit his girlfriend, and the decedent was coming towards him menacingly;
>
> (2) [P]etitioner . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he was actually in such imminent danger;
>
> (3) If petitioner's defense was based upon his actual belief of imminent danger a reasonable prudent man of ordinary firmness and courage would have entertained the same belief because the decedent was coming towards him in a threatening fashion ....; and,
>
> (4) Petitioner had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury other than to act as he did in this particular instance.

It is not clear from this record *what exactly petitioner said* that the judge ruled negated self-defense. If it was that petitioner closed his eyes and continued to fire that was a legally erroneous conclusion since petitioner was entitled to keep shooting as long as he reasonably thought he was in danger. Regardless, petitioner would have received a self-defense instruction if he testified consistently with his statement to the plea judge even if his statements to the police were inconsistent. See State v. Knoten, 347 S.C. 296, 306, 555 S.E.2d 391, 397 92001) (if any of the inconsistent evidence is evidence of a lesser-included offense or self-defense the defendant is entitled to that jury instruction notwithstanding his greatly conflicting statements). The PCR court was therefore incorrect as a matter of law in its ruling that there was no evidence of self-defense, and that petitioner's statement negated self-defense.

Further, defense counsel has a duty to undertake reasonable investigation or to make a decision that renders a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691 (1984). Here, defense counsel erred, as did the PCR Court, by finding petitioner did not have a colorable self-defense claim, and therefore he failed to further investigate it and advised petitioner to plead guilty. Cf. Taylor v. State, 404 S.C. 350, 745 S.E.2d 97 (2013)(there was evidence to support the PCR court's finding that counsel's investigation was reasonable in light of the circumstances of that case).

Further, the failure to investigate in this case was prejudicial to petitioner since he had a complete defense to the crime -- self-defense -- but he waived it by entering his plea of guilty. Cf. Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984) (the record established the defendant was criminally responsible and therefore the failure to further investigate or raise a lack of competence defense was not ineffective assistance of counsel).

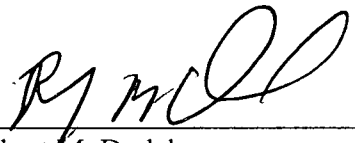
Moreover, the guilty plea transcript in this case strongly supports petitioner's assertion that he had a viable self-defense claim rather than refutes it. Cf. Dalton v. State, 376 S.C. 130, 140 654 S.E.2d 870, 875 (Ct.App. 2007). The PCR Court erred as a matter of law by ruling petitioner did not have a self-defense claim, and that his statements to law enforcement **negated** any claim of self-defense. Again, inconsistent evidence does not bar a jury instruction if any evidence supports it. State v. Knoten, supra.

Further, the jury was not bound to accept the opinion of an expert witness – the pathologist – and just because a decedent is shot in the back does not automatically negate a self-defense claim. Moreover, the jury is free to decide which parts of inconsistent evidence it believes. Because the judge erred as a matter of law by ruling the facts of this case did not support as self-defense claim, this Court should respectfully reverse the PCR court. Further, petitioner would not have pled guilty had he been properly advised that he had a viable case of self-defense, and his guilty plea therefore should be vacated. See Hill v. Lockhart, 474 U.S. 52 (1985).

CONCLUSION

By reason of the foregoing arguments, the PCR Court should be reversed because it erred as a matter of law in finding there was no evidence of self-defense in this case, and therefore defense counsel could not be found ineffective. Further, petitioner's guilty plea should be vacated, and this case remanded to the Anderson County Court of General Sessions for a new trial based upon trial counsel's ineffective representation as argued above.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2014.

STATE OF SOUTH CAROLINA
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CERTIORARI TO ANDERSON COUNTY
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

DARYL L. GRAY

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Daryl L. Gray states:

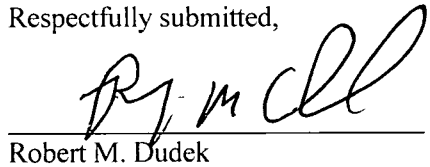
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 17, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Daryl L. Gray.

Respectfully submitted,



Robert M. Dudek
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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and upon Daryl L. Gray, #317285, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 14th day of July, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of July, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.