STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

R. Ferrell Cothran, Jr., Circuit Court Judge

MICHAEL LAMONT WATTS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000302

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on voluntary manslaughter where there was evidence Petitioner fired his weapon in the heat of passion after he was struck several times during a physical altercation that broke out in a small nightclub?

STATEMENT

A Chesterfield County Grand Jury indicted Petitioner at the May 2005 term of General Sessions for murder, two counts of assault and battery with intent to kill (ABIK), discharging a firearm into an occupied building, possession of a firearm in a public building, escape, and, at the April 2006 term, for possession of a weapon during the commission of a violent crime. App. 517-526; App. 508-509. His case was called to trial on July 30, 2007 before the Honorable Paul M. Burch, and a jury. App. 1. Assistant Solicitors Franklin Joyner and Kevin Hales represented the state, and James P. Rogers represented Petitioner. App. 1.

After the state rested, Judge Burch granted a directed verdict for the possession of a firearm in a public building charge and for one count of ABIK. App. 273, l. 15 – 274, l. 9. On August 1, 2007, the jury found Petitioner guilty of the remaining charges. App. 411, l. 1 – 412, l. 1. He was sentenced by Judge Burch to life without parole for murder, twenty years concurrent for ABIK, five years concurrent for possession of a weapon during the commission of a violent crime, ten years concurrent for discharging a firearm into an occupied building, and one year concurrent for escape. App. 416, l. 8 – 417, l. 2.

The South Carolina Court of Appeals dismissed Petitioner's direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Watts, Op. No. 2010-UP-019 (S.C. Ct. App. Filed January 25, 2010).

On July 2, 2010, Petitioner filed an application for post-conviction relief (PCR). App. 419-426. The state filed a return to this application dated September 28, 2010. App. 427-431. The matter proceeded to an evidentiary hearing on July 16, 2013 before the Honorable R. Ferrell Cothran, Jr. App. 432. Assistant Attorney General Karen C. Ratigan represented the state, and Tara

Shurling represented Petitioner. App. 432. By order dated October 18, 2013, Judge Cothran denied Petitioner relief. App. 508-516.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on voluntary manslaughter where there was evidence Petitioner fired his weapon in the heat of passion after he was struck several times during a physical altercation that broke out in a small nightclub.

Relevant Trial Facts

The charges against Petitioner stemmed from a shooting at Club Matrix, a small nightclub located in Pageland, South Carolina. It was undisputed that a physical altercation broke out on the dance floor after midnight on November 28, 2004 and that Petitioner was involved in this fight. Immediately after the altercation, Petitioner left the nightclub, retrieved a gun from his car, reentered the club, and fired a single shot on the dance floor. The state's theory of the case was that this shot struck and killed the decedent who was standing near a wall on the dance floor. However, there was some evidence that another person was in the club that night with a firearm and was also shooting.

Petitioner, who took the stand in his own defense, testified that he was dancing on the dance floor with his girlfriend when he saw his friend, Michael McIlwain, in an argument with another man, Charles Miller, across the dance floor. [1] Petitioner explained that he went over to McIlwain and asked him, "What's going on?" McIlwain tried to explain what happened, but Petitioner could not hear him because the music was so loud. Petitioner then said he was "having a few words" with Miller's group "as far as ain't nobody going to do nothing to anybody," when somebody grabbed his arm, spun him around, and punched him in his right eye. He testified that as soon as he was hit,

[1] Michael McIlwain's last name is also spelled MacElwane and McElwain in various places in the record.

he began to fall backward and was struck by a second person on the left side of his jaw. After he fell to the floor, the two men continued to strike him while Petitioner "covered [him]self up." App. 306, l. 14 – 308, l. 7; App. 311, l. 13 – 313, l. 14.

Petitioner testified that eventually the fighting stopped, but he was uncertain as to why the men suddenly stopped assaulting him. After he was helped up off the floor, Petitioner explained he was walking off the dance floor when, near the bar, he saw a man strike another one of his friends, Shawn Robinson, who fell face first to the floor. As he was helping Robinson up, he was pushed down by a man near the bar. He was eventually able to help Robinson up and was "pulling him towards the side door" when a man "hit [him] in the back of [the] head" . . . which "caused [him] to drop to the floor." Finally, Petitioner was able to make it outside the club. App. 313, l. 15 – 315, l. 17

Once outside, Petitioner testified that he walked to the car he came to the nightclub in, retrieved a gun from the backseat, and reentered the building. He explained that he went back into the club "to get my friends out, but at the same time I didn't want them to assault me any further." App. 317, ll. 6-12. He said, "As I walked [to] the dance floor . . . I looked in the corner where I [had been] dancing with my girlfriend. I didn't see her . . . As I was looking to the right side of the club I [saw] something with a very shiny effect which I feel was a handgun. I still to this day feel it was a handgun being raised in my [direction]." App. 320, ll. 11-20. When he saw what he thought was a gun, Petitioner fired a shot "in the right side upward corner." App. 321, ll. 23-25; App. 322, l. 14. As soon as he shot, Petitioner testified that he turned and ran back out the same door he entered. App. 322, ll. 17-19.

David Evans, the first state witnessed, testified that he was employed by Club Matrix as a bouncer, but he was there on the night of the shooting as a patron because it was his birthday.

However, when a fight occurred on the dance floor Detective Larry Brown asked him to assist. Evans said that he stood near the bar with McIlwain as Detective Brown escorted a man named Rick out of the club.[2] He continued, "After that Mr. Watts [Petitioner] and two ladies was coming from the dance floor towards the front of the club . . . [M]oments later another staff member was dragging another person out that he was found on the dance floor unconscious." Evans claimed he did not know who was dragged out of the club, but "[b]y that time someone screamed, 'He's got a gun. He got a gun.' And the side entry, the subject [Petitioner] came in with a handgun." App. 44, ll. 8 – 46, l. 10.

Evans testified that Petitioner "stood approximately four to 5 feet away from me and was looking around like he was looking, searching for someone. He walked towards the back towards the dance floor . . . stopped looked towards his right. He started saying some words, raised the handgun up. I could see it was somebody in the corner. I couldn't tell who it was. And at the time he just said - - I could see he was mumbling something and then he fired one shot." App. 47, l. 20 – 48, l. 6.

Tyrone Miller, who testified for the state, explained that he was in the nightclub when he witnessed his cousins, Dewayne Miller, Charles Miller, and Kevin Johnson in a physical altercation. Shortly thereafter, Tyrone claimed that a man, who he later identified as Petitioner, "came to me with a gun. A black pistol in his hand and pointed at my head and asked me who hit him. And I told him I hadn't seen him . . . shortly after that I walked to the men's bathroom. I heard a shot fired." App. 93, l. 12 – 95, l. 8

Charles Miller, another state witness, testified that he was at the club when he noticed a "belt buckle" on the floor so he picked it up thinking it belonged to his brother. A man came up to

[2] Rick Simpson was Petitioner's friend who drove Petitioner to the club that evening.

him and asked him, "[W]hat the hell you doing with my belt?" During this verbal dispute, Charles claimed Petitioner approached and asked, "What's popping? And . . . my cousin came up and said, 'Man, you know what's popping,' and they just started swinging and start swinging." App. 103, l. 10 – 104, l. 24. Charles testified that after the fight broke up, Petitioner came through the club with a gun and "then [he] heard a shot and [he] took off running . . ." He did not actually see the shooting. App. 105, l. 3 – 106, l. 12.

Kevin Johnson testified that Charles was dancing on the dance floor when he saw a "belt buckle on the floor." Charles "told the girl [he was dancing with] to pick it up. And a few gentlemen [including Petitioner] approached Charles talking about a belt buckle and then the altercation started - - [they] started fighting." Johnson claimed that after "blows" were exchanged, security broke up the fight and escorted Petitioner outside. According to Johnson, Petitioner then returned to the club and "came in shooting." App. 127, l. 17 – 129, l. 1. Johnson said, "He fired some rounds into the dance floor area and that's when I ran out the club." App. 130, ll. 12-13. He did not see the decedent get shot. App. 132, ll. 5-16.

Dewayne Miller, also a state witness, testified he and his cousin, Charles, were "dancing with two females" when Charles saw "a belt laying on the floor similar to his brother's belt. And he picked the belt up." Dewayne claimed "some little black guy come up" and "got to fussing, cussing, for no reason." Then, according to Dewayne, Petitioner came up and asked, "What's popping," and then swung first. He and Petitioner "got tangled or whatever fighting . . . probably about . . a good 50 seconds." Dewayne testified that security broke up the fight and escorted Petitioner out, but then Petitioner reentered the club "with a handgun." He claimed Petitioner "walked straight up to [his] cousin and put the gun in his face and said, 'Where's that nigger at that hit me?' Those exact words. And my cousin replied, 'What nigger? I don't even know what you're

talking about?' And as he turned away from Tyrone I jumped over the bar and took cover and I heard a gunshot . . . but after that happened I didn't see anything else or know nothing else." He did not see Petitioner shoot. App. 142, l. 14 – 145, l. 24.

Tameka Austin testified that a fight started between Petitioner and Dewayne and that security took Petitioner outside. She claimed, "I remember him [Petitioner] entering back in the club and shortly after that gunshots started going everywhere." However, she did not see the shooting. App. 165, l. 17 – 167, l. 6.

Investigator Larry Brown, who was employed with the Pageland Police Department, but was working as private security the night of the shooting, testified that he "was talking to the DJ about something" when he saw fighting on the dance floor. He explained that security broke up the fight and he escorted a man named Ricky out of the club. App. 186, l. 14 – 188, l. 6. Brown claimed while he was standing out front, he saw Petitioner come "out the door in a rush" and he "rushed by us." Petitioner got into his car and sat in the back passenger seat. Brown testified that Petitioner then got out of the car with a gun in his right hand and approached the door to the club. Brown heard a "click, click" as Petitioner entered the club. App. 188, l. 15 – 190, l. 4. However, he did not see what happened inside the club. App. 209, ll. 17-24.

Crystal Jones, Petitioner's girlfriend, testified for the defense. She explained that she was on the dance floor dancing with Petitioner when she saw McIlwain and Charles arguing about a belt. She said she told Petitioner to go over there to "see what was going on and to stop it . . . So he [Petitioner] went over there and next thing I know Charles Miller hit him and Fuzz [Charles Miller's cousin] came over and jumped on him." App. 284, l. 25 – 286, l. 24. After the fight ended, Jones claimed Petitioner never left the club before she heard gunshots. She maintained Petitioner would

not have had time to go to the car and come back before she heard the gunshots. App. 286, l. 25 – 287, l. 25.

At the conclusion of the testimony, no lesser included offenses were requested by trial counsel nor charged to the jury. See App. 381, l. 17 – 399, l. 20; see also App. 401, l. 21 – 402, l. 18. While the jury was deliberating, it sent a handwritten note to the court asking, "Do we have to stick to the charge against Michael Watts or can they be lessor charges?" App. 403, ll. 16-17. In response, the trial court instructed the jury, "In this case there is no charge to you of any possible lessor included offenses.[3] You have to base your decision on the charge before you and on the evidence that has been presented to you in Court." App. 405, ll. 14-19.

The jury subsequently found Petitioner guilty of murder. App. 411, ll. 16-19.

PCR Hearing

Trial counsel, Jimmy Rogers, testified at the PCR hearing that he could not recall why he did not request a jury instruction on voluntary manslaughter. App. 457, ll. 19-25. He said, "I don't remember what happened . . . I can't tell you why I did not request one." App. 460, ll. 18-24. However, he agreed that the facts presented at trial were that there was a verbal altercation over a belt buckle that escalated into a fist fight, that Petitioner was struck twice during this altercation, got "put out of the club, goes to the car and gets a gun, and comes right back in and shots ensure leading to these charges." App. 458, ll. 3-16. Rogers said he could not recall whether he considered that there was no substantial cooling off period between the time of the initial physical altercation and the shooting. He also could not recall whether he considered requesting a voluntary manslaughter

[3] The incorrect spelling of lesser is presumably an error made by the court reporter as there are numerous other errors throughout the trial transcript.

charge on the basis that Petitioner acted during a "sudden heat of passion based upon sufficient legal provocation." App. 458, l. 17 – 459, l. 5.

Petitioner testified that trial counsel never discussed with him the lesser included offense of voluntary manslaughter. However, he maintained that if he would have understood he could request a voluntary manslaughter charge based purely on the fact that at least one reasonable interpretation of the evidence was that he acted in the sudden heat of passion upon sufficient legal provocation, he would have wanted that jury instruction. App. 487, l. 22 – 488, l. 16; see App. 493, ll. 2-7.

Order of Dismissal

The PCR court held Petitioner "failed to meet his burden of proving trial counsel should have requested" a jury charge on voluntary manslaughter finding the charge was not "supported by the facts of this case." The court summarized its view of Petitioner's account of events as follows: "[Petitioner] stated he left the club, got a weapon, and went back into the club while holding his weapon. [Petitioner] said he believed someone pointed a gun at him, so he fired into a crowd of people in order to protect himself." The court concluded a voluntary manslaughter charge was not "warranted under these facts." App. 514-515.

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on voluntary manslaughter where there was evidence Petitioner fired his weapon in the heat of passion after he was struck several times during the altercation at the nightclub (a sufficient legal provocation). See State v. Locklair, 341 S.C. 352, 359, 535 S.E.2d 420, 424 (2000).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel should have requested a jury charge on the lesser included offense of voluntary manslaughter because there was evidence in the record to support the charge.

In determining whether the evidence required a charge on voluntary manslaughter, this Court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). "To warrant a court eliminating the defense of voluntary manslaughter, it should **very clearly appear** that there is **no evidence whatsoever** tending to reduce the crime from murder to manslaughter." State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 273 (1993) (citing State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969)) (emphasis added).

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." Locklair, 341 S.C. at 359, 535 S.E.2d at 424 (quoting State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998)) (internal quotations omitted). "Both heat of passion

and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter." Id. at 360, 535 S.E.2d at 424 (citing State v. Walker, 324, S.C. 256, 478 S.E.2d 280 (1996)). "Sudden heat of passion upon sufficient legal provocation that mitigates a felonious killing to manslaughter must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called 'an uncontrollable impulse to do violence.'" Id. (citing State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951).

In this case, there was evidence Petitioner was sufficiently provoked when he was struck numerous times inside the nightclub and that, during the heat of passion, he immediately returned to the nightclub with a gun and shot the decedent. Petitioner testified that during the physical altercation, he was struck in the right eye, the left side of his chin, and the back of the head. He was also knocked to the ground twice. Moreover, there was evidence, and it was the state's theory of the case, that **immediately** after being physically assaulted, Petitioner went to his car, retrieved a firearm, reentered the club, and opened fired on who he thought was the man who had struck him during the fight. This evidence supports a jury instruction on voluntary manslaughter and trial counsel was ineffective for failing to request the charge.

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to request a jury instruction on voluntary manslaughter prevented the jury from considering this lesser included offense. Notably, during its deliberations, the jury sent a handwritten note to the court asking whether it could find Petitioner guilty of any lesser included offenses. Therefore, it is likely that if trial counsel would

have properly requested the charge, and the court instructed the jury accordingly, the jury would have found Petitioner guilty of voluntary manslaughter instead of murder. Instead, the jury was forced to compromise and find Petitioner guilty of murder likely because it did not want to set Petitioner free when he admitted to firing a shot inside the nightclub.

The PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Chesterfield County
R. Ferrell Cothran, Jr., Circuit Court Judge

MICHAEL LAMONT WATTS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of September, 2014.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day of September, 2014.

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