

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

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

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S.C. Supreme Court

LEVON MINTZ, #303362,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether there is any probative evidence to support the lower court's decision that appellate counsel was not ineffective for failing to file brief on the merits instead of an Anders¹ brief with regard to the trial court's refusal to charge voluntary manslaughter?

¹ Anders v. California, 386 U.S. 738 (1967).

STATEMENT OF THE CASE

The Petitioner, Levon Mintz,² was indicted in Orangeburg County for one count of murder. On April 19-20, 2005, the Petitioner proceeded to trial on this charge. He was represented at this proceeding by Glenn Walters, Esquire. At the conclusion of the trial, the Petitioner was convicted as charged. The Honorable James C. Williams, Jr., presiding circuit judge, sentenced the Petitioner to fifty years' imprisonment. The Petitioner did not file a direct appeal from this conviction and sentence.

On September 30, 2005, the Petitioner filed an Application for Post-Conviction Relief with the Orangeburg County Clerk of Court. The State served its Return on May 17, 2006. An evidentiary hearing into the matter was convened on August 6, 2008, before the Honorable Perry M. Buckner, presiding circuit judge. The Petitioner was represented at this proceeding by Robert E. Hood, Esquire. On September 15, 2008, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims with the exception of a grant of a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). On September 24, 2008, the Petitioner filed a Rule 59(e), SCRCP, motion to alter or amend the judgment. On October 3, 2008, the Respondent made its Return to this motion. On October 6, 2008, the PCR court filed an order denying the Rule 59(e) motion.

The Petitioner timely appealed the denial of his first PCR application to this Court. Katherine H. Hudgins, Appellate Defender with the South Carolina Office of Appellate Defense, represented the Petitioner on both the PCR appeal and on the belated direct appeal. Appellate counsel filed a certiorari petition raising two issues and a White v. State brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Petitioner filed a *pro se* brief pursuant to Anders as well.

² The Petitioner is also referred to as "Lavon" Mintz throughout the course of the proceedings. However, the proper spelling of his name is Levon. See Supp. App. p. 3

See Second Supp. App. pp. 1-10. In a memorandum opinion filed October 25, 2010, this Court denied the certiorari petition's non-White claim, granted review pursuant to White, and dismissed the appeal pursuant to Anders. State v. Mintz, Op. No. 2010-MO-602 (S.C. Sup. Ct. filed Oct. 25, 2010).

On November 24, 2010 the Petitioner filed a second Application for Post-Conviction Relief with the Orangeburg County Clerk of Court. The State served its Return and Motion to Dismiss on May 17, 2011. An evidentiary hearing into the matter was convened on May 21, 2012, before the Honorable DeAndrea G. Benjamin, presiding circuit judge. The Petitioner was represented at this proceeding by Jeremy A. Thompson, Esquire. On August 3, 2012, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims on the merits. The Petitioner timely filed a notice of appeal from this order with this Court.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). This guarantee includes the effective assistance of counsel in the defendant's first appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). In the context of an allegation of ineffective assistance of appellate counsel, the operative question becomes whether but for appellate counsel's errors and omissions, the result on appeal would have been different. Smith v. Murray, 477 U.S. 527 (1986). This includes claims of ineffective assistance of appellate counsel who have filed a brief pursuant to Anders instead of on the merits. See Smith v. Robbins, 528 U.S. 259, 285 (2000) ("[T]he proper standard for evaluating Robbins' claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in Strickland v. Washington"); Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (footnote 6) ("Appellate counsel filed an Anders brief, as opposed to a brief on the merits. Even in this context, when analyzing a claim of ineffective assistance of appellate counsel, we apply the Strickland test").

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

I. The PCR court erred in finding that appellate counsel was not ineffective for failing to file a merits brief on the issue of whether or not the trial court erred in refusing to charge the lesser-included offense of voluntary manslaughter.

A. How the Issue Arose Below

In the late night hours of December 8, 2002, and into the early morning hours of December 9, 2002, the decedent, Alfredo Lewis, was at a club in Orangeburg, South Carolina, called the Pub. Richard Terrell Parker, a friend of the decedent, went to the Pub that night with another individual named Troy Benjamin. App. p. 80, line 23-p. 81, line 4. Parker testified at the Petitioner's trial that the Petitioner, the decedent, and another individual named Andre Gooden were all at the Pub when he arrived. App. p. 81, line 25-p. 82, line 22. The Petitioner was known as "Le Le." App. p. 82, lines 11-13.

At some point during the night, Gooden and the Petitioner got involved in a verbal argument with the decedent and an individual named Guinyard while inside the bathroom of the Pub. App. p. 83, line 6-p. 84, line 6. After the parties left the bathroom, a second incident occurred inside the Pub. App. p. 172, line 25-p. 173, line 6. In response to the arguments, a decision was made to close the Pub an hour early. App. p. 150, lines 15-23. The decedent and Parker then began to leave in the decedent's vehicle, but they returned to the Pub to pick up another individual. App. p. 86, line 7-p. 87, line 2. When they came back, the decedent got back out of his vehicle and reapproached Gooden and the Petitioner to renew the fight. App. p. 87, lines 6-8; p. 174, lines 14-22. Parker testified that the Petitioner then showed the decedent a revolver in a threatening manner. App. p. 87, lines 10-15. He further testified that as he attempted to get back into the vehicle, the Petitioner pulled out the firearm and shot the decedent

twice. App. p. 87, lines 16-24; see also App. p. 174, line 14-p. 175, line 15. The decedent later died from the gunshot wounds.

At trial, the Petitioner requested that the jury be charged on the lesser-included offense of voluntary manslaughter at the close of the State's case. App. p. 254, line 23-p. 256, line 13. In support of this request, the Petitioner argued that the jury could conclude that "there was a heated argument" that "spilled over into the parking lot" which would permit them to find the Petitioner guilty of voluntary manslaughter. App. p. 255, lines 5-8; see also p. 256, lines 7-13 ("I believe that the jury can infer ... that there was some type of confrontation that ensued after someone came out of a bath room"). The State opposed the request. App. p. 255, line 19-p. 256, line 5. The trial court refused to give the charge, finding that "I think it would be pure speculation on the part of the jury to find him guilty ... of voluntary manslaughter under the circumstances." App. p. 256, lines 15-18.

While the Petitioner did not appeal his conviction immediately after his trial, the first PCR court granted him a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). On that appeal, appellate counsel filed an Anders brief arguing that the trial judge erred in failing to charge the jury on the lesser-included offense of voluntary manslaughter. App. p. 478. This Court dismissed the appeal pursuant to Anders. State v. Mintz, Op. No. 2010-MO-602 (S.C. Sup. Ct. filed Oct. 25, 2010).

The Petitioner subsequently filed for PCR, arguing that appellate counsel was ineffective for failing to file a merits brief with regard to the voluntary manslaughter claim. Appellate counsel testified at the PCR hearing that she believes that she filed an Anders brief because she thought that the issue was unpreserved for appeal due to trial counsel's failure to renew his objection at the end of the trial court's instructions to the jury. App. p. 496, lines 19-25; see also

App. p. 497, lines 14-22. She further testified that “if that’s the reason I submitted this as an Anders brief, that’s wrong.” App. p. 496, lines 24-25. She indicated that had she realized that the issue was preserved for appellate review, then she would have filed a brief on the merits. App. p. 497, lines 23-25. Finally, she testified that her brief would have been much more substantial had she filed a merits brief as opposed to an Anders brief. App. p. 506, lines 4-15.

The PCR court denied relief on this issue, finding that there was no “evidence presented ... to show an overt threatening act that would give rise to heat of passion.” App. p. 534. The PCR court concluded that the Petitioner was not prejudiced by appellate counsel’s performance:

[T]his Court finds that Applicant was not prejudiced by the failure to not raise the issue as a merits issue, as no evidence supporting the lesser included offense was presented at trial. Accordingly, as a merits issue, the appeal would not have been successful.

App. p. 536.³ The Petitioner now contends that there is no probative evidence supporting the PCR court’s findings on this issue.

B. Discussion

The Petitioner contends that appellate counsel was ineffective for failing to file a brief on the merits instead of an Anders brief with regard to the denial of the Petitioner’s request for a charge on the lesser-included offense of voluntary manslaughter. Inasmuch as the evaluation of appellate counsel’s performance and prejudice flowing therefrom derives from the vitality of the Petitioner’s voluntary manslaughter claim, the Petitioner will begin his analysis of this issue by first discussing voluntary manslaughter’s applicability to this case. The Petitioner will then examine appellate counsel’s performance before turning finally to the issue of prejudice.

³ Despite denying relief on the merits, the PCR court found that ineffective assistance of appellate counsel claims arising out of a belated direct appeal are cognizable PCR claims. See App. p. 533.

1. The Trial Court Erred in Denying the Petitioner's Request to Charge Voluntary Manslaughter

“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). Sudden heat of passion and sufficient legal provocation are separate elements of voluntary manslaughter which must both be shown to warrant the charge. State v. Pittman, 373 S.C. 527, 572-576, 647 S.E.2d 144, 167-170 (2007). If there is any evidence warranting a charge of voluntary manslaughter, then the charge must be given. See State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994).

It is clear that the Petitioner met voluntary manslaughter's sudden heat of passion element because he was involved in multiple verbal arguments with the decedent throughout the course of the night, including one immediately before the shooting. This Court has repeatedly held that a heated argument between the defendant and the decedent prior to the killing gives rise to the sudden heat of passion. See State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (affirming decision to charge voluntary manslaughter because “Appellant was in a heated argument with Victim”); State v. Johnson, 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998) (concluding that voluntary manslaughter was warranted because “Johnson and the victim had ‘had words’ and were engaged in a fight at the time the shooting occurred”); State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (holding that voluntary manslaughter should have been charged where the evidence “tends to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred”). Here, two arguments between the Petitioner and the decedent occurred inside the club, see App. p. 83, line 6-p. 84, line 6; p. 172, line 25-p. 173, line 6, which resulted in the club closing early. A third argument occurred outside the club after the decedent reapproached the Petitioner and

Gooden to renew the argument. See App. p. 87, lines 6-8; p. 174, lines 14-22. Since there were several arguments that preceded the fatal shooting, as well as an argument that was ongoing at the time of the fatal shooting, the evidence demonstrates that the Petitioner was “overcome by a sudden heat of passion as would produce an ‘uncontrollable urge to do violence.’” State v. Cole, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000).

Furthermore, the evidence satisfied voluntary manslaughter’s sufficient legal provocation element. “[A]n overt, threatening act or physical encounter *may* constitute sufficient legal provocation.” State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011) (emphasis in original). “Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter.” State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996). Here, the Petitioner engaged in multiple arguments with the decedent throughout the course of the evening. Immediately prior to the final argument, the decedent had gotten in his vehicle and was in the process of leaving the scene when Parker, who was driving the vehicle, turned back around and went back to the club. App. p. 86, line 1-p. 87, line 1. The decedent then got out of the vehicle and reapproached the Petitioner and Gooden. App. p. 87, lines 3-13. From the Petitioner’s point of view, then, what he witnessed was the decedent leaving the scene, returning, getting back out of his vehicle, and resuming the fight. Under these circumstances, it can be inferred that the Petitioner felt endangered by the decedent’s overt threatening acts such that he needed to respond violently. Under these circumstances, where “the decedent and [the defendant] were in a heated argument and ... the decedent was about to initiate a physical encounter when the shooting occurred,” the decedent committed an overt threatening act which constituted sufficient legal provocation. State v. Lowry, *supra*, 315 S.C. at 399, 434 S.E.2d at 274.

Accordingly, the Petitioner respectfully submits that he has demonstrated that evidence of both sudden heat of passion and sufficient legal provocation were submitted at trial. Having satisfied both elements of voluntary manslaughter, the Petitioner submits that the trial court erred in refusing to charge that lesser-included offense in this case. Concordantly, since there was clearly evidence supporting the charge, there also is no probative evidence to support the PCR court's finding that "no evidence supporting the lesser included offense was presented at trial." App. p. 536.

2. Appellate Counsel's Performance was Deficient

Appellate counsel testified that the reason she submitted an Anders brief in this matter was because of her belief that the issue was not preserved for appeal due to trial counsel's failure to renew his objection to the trial court's refusal to charge voluntary manslaughter at the close of the charge to the jury. App. p. 496, lines 19-25; see also App. p. 497, lines 14-22. This was a mistake, as she acknowledged,⁴ because this Court has made it clear that a party need not renew its objection to a jury charge to preserve the claim for appellate review. See State v. Johnson, supra, 333 S.C. at 64, 508 S.E.2d at 30 (footnote 1) (observing the "long-standing rule that where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at the conclusion of the court's instructions"). Appellate counsel believed the Petitioner's claim was meritorious, but she just mistakenly thought it was unpreserved for appeal. Had she realized her

⁴ This Court has found that a trial attorney's admissions of error can be relevant in determining whether or not that attorney was ineffective. See Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998); Martinez v. State, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991).

error, she would have filed a merits brief. See App. p. 506, lines 4-15. Under these circumstances, then, the Petitioner has demonstrated deficient conduct.⁵

3. Appellate Counsel's Deficient Performance Prejudiced the Petitioner

To demonstrate prejudice, the Petitioner “must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.” Smith v. Robbins, *supra*, 528 U.S. at 285. While this Court will obviously be the final arbiter of this inquiry, as this Court reviewed the Anders brief in the first instance and is thus in the best position to judge what effect the presentation of this case had on this Court's ruling, the Petitioner respectfully submits he has met this high burden. As has been shown, the trial court erred in refusing to charge the jury on the lesser-included offense of voluntary manslaughter. Inasmuch as the proper relief for such an error is a new trial, the Petitioner contends that he would have prevailed on his appeal had appellate counsel filed a merits brief on his behalf with this Court. Furthermore, since the PCR court concluded that the Petitioner was not prejudiced because it improperly found that voluntary manslaughter was not warranted on these facts, the PCR court's conclusion regarding prejudice is not supported by any probative evidence.

The Petitioner is also mindful that this Court is required, pursuant to Anders, to review the entire record to determine if there are any issues of arguable merit, and that this Court discharged that duty in this case. See Mintz v. State, *supra*, 2010-MO-026 (“Petitioner's appeal is dismissed, after review pursuant to Anders”). The Petitioner acknowledges that the argument that he makes to this Court could be construed as a contention that the Court was derelict in its

⁵ It does not appear that the PCR court ruled on the issue of deficient conduct, which it did not need to do, as it found that the Petitioner was not prejudiced by appellate counsel's failure to file a merits brief. See Strickland, *supra*, 466 U.S. at 697 (“Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one”). To the extent that the PCR court did rule that appellate counsel was not deficient, the Petitioner submits that finding is clearly unsupported by any probative evidence and should be reversed by this Court.

duties under Anders. The Petitioner, however, does not believe that his argument that he was entitled to a charge on voluntary manslaughter necessarily leads to the conclusion that this Court failed to adequately review the record pursuant to Anders. Instead, the Petitioner believes that a merits brief, which would have more fully set forth the Petitioner's arguments, would have aided this Court in determining whether or not his appeal presented a claim of merit. See generally United States ex rel. Kessler v. Watkins, 163 F.2d 140, 141 (1941) ("We have received much aid and clarification of the issues from [appellate counsel's] able brief and admirable argument"). Appellate counsel's argument on the merits consisted of three paragraphs: a paragraph summarizing the facts, a paragraph setting forth the elements of voluntary manslaughter, and a paragraph containing four sentences arguing that voluntary manslaughter should have been charged. App. p. 480. Appellate counsel did not even argue that the Petitioner acted with the sudden heat of passion; instead, appellate counsel confined her argument to the sufficient legal provocation element of voluntary manslaughter. With such an inadequate brief presented on such an important claim, it certainly was not unreasonable for this Court to agree with appellate counsel that the appeal presented no issues of arguable merit. The Petitioner only hopes that this petition has rectified the deficiencies present in appellate counsel's brief, and that this Court agrees with the Petitioner that voluntary manslaughter should have been charged at the Petitioner's trial.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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This 12th day of November, 2013.

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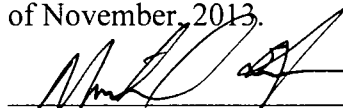
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petition for a Writ of Certiorari has been served upon opposing counsel, Megan E. Harrigan, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 12th day of November, 2013.



JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 12th day
of November, 2013.



(L.S.)
Notary Public for South Carolina

My Commission Expires: 7/10/2022