


THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

 ORIGINAL

THE STATE,

RESPONDENT,

V.

DESMOND J. SAMS,

PETITIONER

**RECEIVED**

OCT - 9 2014

**S.C. Supreme Court**

Appellate Case No. 2011-195886

---

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

---

Opinion No. 27447

---

PETITION FOR REHEARING

---

On September 24, 2014, this Court affirmed Petitioner's conviction and sentenced in a published opinion. Pursuant to Rule 221, SCACR, Petitioner requests this Court rehear the matter in light of the several points overlooked or misapprehended, which will be explained in greater detail below.

First, this Court's decision denied Petitioner his right to a trial by a jury as guaranteed by the Constitutions of the United States and South Carolina. The Sixth Amendment guarantees all

criminal defendants the right to a trial by an impartial jury. U.S. Const. amend. VI.<sup>1</sup> The South Carolina Constitution provides “The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury.” S.C. Const. Art. I, § 14. This Court violated Petitioner’s constitutional right to a jury trial by weighing the evidence when it examined the reasonableness of Petitioner restraining the deceased for a period of time. This was beyond the power of this Court and violated Petitioner’s right to a trial by a jury. See Alleyne v. United States, 133 S.Ct. 2151 (2013); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000). It was not for this Court or the trial court to weigh the evidence. In fact, Petitioner was entitled to the jury instruction because there was evidence in the record to support the charge. “It has long been the law in this State that ‘to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter.’” Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (citing State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564 (1969)); see also State v. Crosby, 335 S.C. 47, 51, 584 S.E.2d 110, 112 (2003) (“A trial court should refuse a lesser included offense only where there is no evidence the defendant committed the lesser rather than the greater offense.”).

Specifically, this Court held that if Petitioner initially intended only to restrain the deceased, “at some point, when he maintained the chokehold on him for well over ten minutes, ... [Petitioner]’s prolonged and continued hold on the [deceased]’s neck ... was intentional and the type of conduct highly likely to result in serious injury or death.” This was a factual finding that was within the sole province of the jury. The evidence demonstrated that Petitioner believed the

---

<sup>1</sup> In Duncan v. Louisiana, 391 U.S. 145, 154 (1968), the United States Supreme Court held the Fourteenth Amendment extended the right to jury trials to defendants charged with violations of state law.

deceased required restraining in order to prevent further fighting. This was clear from the responding officer's testimony - Petitioner refused to release the deceased due to his fear that the deceased would fight again. R. 57, lines 23-24.

This Court continued to usurp the role of the jury by determining that Petitioner, even if acting lawfully in self-defense, but doing so in a reckless manner, was not be entitled to a charge on involuntary manslaughter because the argument of acting in self-defense in a reckless manner was "tantamount to imperfect self-defense," which only mitigates murder to voluntary manslaughter. This runs counter to South Carolina's law governing voluntary manslaughter, which is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. See State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). Acting recklessly or negligently while defending oneself does not amount to sudden heat of passion or sufficient legal provocation. Instead, acting recklessly while engaging in self-defense meets the definition of involuntary manslaughter exactly.

Second, this Court's decision violated Petitioner's right to due process of law, as guaranteed by the Constitutions of the United States and South Carolina by construing involuntary manslaughter in a manner that was unexpected and indefensible by reference to the law expressed by this Court in prior decisions.

In Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), the United States Supreme Court held that an individual's due process rights are violated by a judge's determination of a matter that is within the sole province of the jury. In Hicks, trial judge instructed to the jury regarding a mandatory sentence if the defendant were found guilty of the charged offense based upon a state statute that fixed an individual's sentence based on a prior record. Id. at 344-345. The jury found Hicks guilty and sentenced him as the judge had instructed. Id. at 345. Subsequently, the statute was ruled

unconstitutional after the defendant's trial. Id. The state appellate court affirmed the sentence because it was within the range of punishment that the jury could have imposed even after the declaration of the mandatory sentencing provision as unconstitutional. Id. The Supreme Court found the instruction to the jury violated the defendant's right to due process of law. Id. at 346. The Court explained "[w]here, however, a state has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law." Id. According to the Court, "[t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion ... and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state." Id.

In Bouie v. City of Columbia, 378 U.S. 347, 349 (1964), the United States Supreme Court considered whether this Court's retroactive application of its construction of the criminal trespass statute to the defendants in that case violated due process. During the Civil Rights Era, this Court held the statute extended to patrons of a drug store who had received no notice prohibiting their entry into the store, but had refused to leave when asked. Id. at 357. Previously, this Court had required proof of notice before entry in order of the trespass statute to apply. Id. The Supreme Court noted that none of this Court's prior cases construing the criminal trespass statute gave the "slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave." Id.

The Supreme Court held this Court's retroactive application of its construction to the drug store patrons violated due process. Thus, the Court concluded that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed

prior to the conduct in issue,' [the construction] must not be given retroactive effect." Id. at 354. The Court held this Court's construction of the statute violated due process because it was clearly at odds with the statute's plain language and had no support in prior South Carolina decisions. Id. at 356.

Similarly, this Court's decision violates Petitioner's right to due process by applying a new construction of the voluntary manslaughter law to his case. The cases previously considered by this Court never indicated that an individual in Petitioner's position would not be entitled to a jury instruction on voluntary manslaughter where the record contained evidence that the killing was without malice and unintentional and the conduct was either lawful and reckless or unlawful and not tending to cause death. This Court's decision in State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999) illustrates the prior construction of involuntary manslaughter by this Court in a case very similar to this one. Chatman had the deceased in a face-to-face choke hold, which ultimately resulted in death. Id. at 151-152, 519 S.E.2d at 101. This Court held Chatman was entitled to have the jury instructed as to involuntary manslaughter because he was engaged in an assault and battery that "was not such that naturally tends to cause death or great bodily harm." Id. at 152, 519 S.E.2d at 101. The assault and battery was Chatman's shoulder pressing into the deceased's neck. "This [was] not a traditional strangulation type situation." Id. at 153, 519 S.E.2d at 102.

The decision in Petitioner's case uses a construction of involuntary manslaughter in a manner that was unexpected and indefensible by reference to the law expressed by this Court in prior decisions; therefore, this Court has violated Petitioner's right to due process of law by applying this construction in a retroactive manner.

Third, this Court's decision demonstrates a fundamental misunderstanding of voluntary manslaughter. As indicated by the dissent, this Court focused on "whether defendant intended to

commit the act which led to the victim's death, rather than on whether he intended the consequence of his intentional act, that is, the victim's death."<sup>2</sup> By the very definition of voluntary manslaughter – the killing of another without malice and unintentionally - it is clear that the law does not look to whether the act was intentional, but to whether the killing was intentional. As noted by the dissent, “[r]ecklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating.” State v. Sams, Op.No. 27447 (filed. Sept. 24, 2014)(Pleicones, J. dissenting)(quoting State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007)). By focusing on the intent to commit the act, this Court turns involuntary manslaughter on its head. Rarely will a person not intend to commit the act that results in the person's death, and involuntary manslaughter does not require such. Instead, involuntary manslaughter only requires that the killing be unintentional. The acts resulting in death are governed by separate parts of the definition of involuntary manslaughter. The acts may be (1) unlawful, but not naturally tending to cause death or great bodily harm, or (2) lawful, but reckless. The defendant's intent to commit the act that results in death is irrelevant.

Finally, this Court erred in holding Petitioner's request for a jury charge under the first definition of involuntary manslaughter was unpreserved.<sup>3</sup> This Court determined that at trial,

---

<sup>2</sup> This is the same error the trial judge made in his ruling denying the request. Specifically, the judge ruled that “[u]nintentional doesn't mean, and we sometimes get this confused in our law, it does not mean whether or not you had the intent to kill.” The judge explained “it also means that you did not intend for anyone to be seriously injured.” R. 124, line 18 – R. 125, line 2.

<sup>3</sup> Petitioner's argument that this Court erred in failing to consider the first definition of involuntary manslaughter is not a waiver to Petitioner's argument that he was entitled to a charge of involuntary manslaughter based upon the second definition. Put simply, Petitioner's argument is that due to the nature of the cause of death and the circumstances surrounding the death, it was for the jury to determine whether he was engaged in some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm or doing an lawful act with a reckless disregard of the safety of others. The jury may have found that Petitioner's restraint of the deceased was an unlawful act or a lawful act depending upon the jury's view of the evidence.

Petitioner “asked for a charge on involuntary manslaughter because the killing was unintentional and [Petitioner] might have been criminally negligent because, even if he wasn’t really in danger, he believed that he was.” In light of Petitioner “never expressly assert[ing] to the circuit court ... that his actions were *not* of a type naturally tending to cause great bodily harm or death,” this Court held any argument that Petitioner was entitled to a jury charge under the first definition of involuntary manslaughter was unpreserved for appellate review. This is error.

To preserve an argument, it must be made on specific grounds “if the specific ground was not apparent from the context.” See State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) (citing Rule 103(a)(1), SCRE). The record demonstrates that Petitioner requested the jury be charged involuntary manslaughter based upon the clear evidence in the record supporting such a charge. Petitioner defined involuntary manslaughter as “the unintentional killing of somebody with criminal negligence,” which is certainly a common understanding of the offense. Without question, there was evidence in the record that Petitioner did not intend to kill the deceased, and Petitioner pointed to this evidence for his argument. Further, Petitioner pointed to evidence in the record that some may have determined that his act – restraining a person for a certain period of time by use of an arm lock or other physical restraint – was unlawful, but not naturally tending to cause death or great bodily harm due to Petitioner’s belief that the deceased posed a danger to him. R. 122, line 20 – R. 123, line 13. Furthermore, the judge understood the request as going to both definitions of involuntary manslaughter as evidenced by his ruling encompassing both definitions. R. 124, lines 11-17.

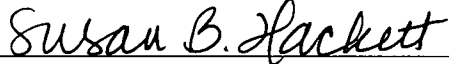
Thus, this Court’s finding that the issue was unpreserved fails to consider the clear indications in the record concerning the request and the trial court’s ruling. Quite simply, the error was preserved for review where Petitioner requested the charged, argued the facts supporting the

charge, and the context demonstrated that he sought the charge based on both definitions. Therefore, at a minimum, this Court should re-hear the matter to clarify the preservation argument and address Petitioner's claim under the alternate definition of involuntary manslaughter.

Analyzing Petitioner's request under the first definition, it is clear that Petitioner was entitled to a jury charge on involuntary manslaughter. In State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999), this Court found that a "face-to-face 'choke hold'" was not an action that would naturally tend to cause death or serious bodily harm. This Court noted that the choke hold used by Chatman, "[was] not the traditional strangulation type situation. [Chatman] was not attempting to strangle [the victim] by placing his hands around [the victim's] neck." Id. at 153, 519 S.E.2d at 102. Petitioner's restraint of Jake was not "the traditional strangulation type situation" that was described in Chatman. R. 58, ll. 21-24; see Chatman, 336 S.C. at 153, 519 S.E.2d at 102. Similar to the "face-to-face choke hold" used by Chatman, Petitioner wrapping his arms around Jake's neck to restrain him was not the type of activity naturally tending to cause death or serious bodily harm. Not only was there evidence that Petitioner did not intend to kill Jake, there was also evidence that Petitioner never intended to choke Jake. Petitioner repeatedly said that he did not intend to kill Jake, but he also testified that he "wasn't trying to choke him." R. 100, l. 22. Therefore, Petitioner was entitled to a jury instruction concerning involuntary manslaughter under the first definition of the offense as well as the second definition.

Based upon the forgoing reasons, Petitioner respectfully requests this Court rehear in the matter for the significant points overlooked or misapprehended which resulted in a violation of Petitioner's state and constitutional rights.

Respectfully submitted,

  
\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender

This 9th day of October, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Colleton County  
Perry M. Buckner, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

DESMOND J. SAMS,

PETITIONER

\_\_\_\_\_  
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 Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Desmond J. Sams, #332938, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of October, 2014.

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 9th day  
of October, 2014.

[Signature] (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.