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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-001863

Barry Evans, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Is Certiorari necessary to review whether probative evidence supports the PCR Judge's finding that Petitioner failed to prove counsel was ineffective in his opening statement?

2. Is Certiorari necessary to review whether the PCR Judge erred in finding Petitioner failed to prove counsel was ineffective for failing to object to the Trial Judge'?

STATEMENT OF THE CASE

Petitioner was indicted at the November 2007 term of the Anderson County Grand Jury for assault with intent to kill "AWIK" (2007-GS-23-3493) possession of a weapon during commission of a violent crime (2007-GS-04-3496) and at the July 2008 term for assault and battery with intent to kill "ABWIK" (2008-GS-04-1541). He was represented by Fletcher N. Smith, Esq.

After the State called the case to trial, the Petitioner was found guilty as for ABWIK and the weapons charge but was acquitted for AWIK. On October 8, 2008, the Petitioner was sentenced by the Honorable J.C. Nicholson, Jr. to concurrent terms of five (5) years for possession of a weapon during commission of a violent crime and twenty (20) years suspended on the service of fourteen (14) years and five (5) years probation for ABWIK.

A notice of appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. LaNelle C. DuRant, Esq., of the Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Evans, Op. No. 2011-UP-147 (S.C. Ct. App. filed April 11, 2011). The South Carolina Supreme Court denied the subsequent Petition for Writ of Certiorari by order dated July 13, 2012.

Applicant filed an Application for post-conviction relief (PCR) on September 4, 2012. The State filed its responsive pleadings. A hearing was convened on May 8, 2012 at the Anderson County Courthouse. Petitioner was present at the hearing and represented by W. Norman Epps, III, Esq. Walt Whitmire, Esq., of the Office of the Attorney General

represented the State. The Honorable R. Lawton McIntosh denied and dismissed Petitioner's PCR Application in an order filed on July 31, 2013. Petitioner's discretionary appeal now follows.

STATEMENT OF THE FACTS OF PETITIONER's CONVICTION

On September 14, 2007 an altercation took place in front of Linda Evans's home. Petitioner cut the victim, Billy Craft, twenty-six times. Billy Craft had twenty-six knife wounds on his head, chest, abdomen, back, hand, hand, legs and feet. The injuries caused the victim to go into shock; he lost a significant amount of blood. The blood loss could have resulted in the victim's death.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is not warranted where ample probative evidence supports the PCR Judge's finding that Petitioner failed to prove counsel's performance in his opening statement constituted ineffective assistance of counsel.

Petitioner stated counsel should not have told the jury in his opening statement that he would prove self-defense because it shifted the burden of proof to him. Counsel

testified he did not shift the burden of proof in his opening statement. Counsel testified he learned the technique he employed in his opening statement in a University of Virginia seminar. In counsel's professional assessment, he opined that his opening statement counsel not have harmed Petitioner's case in light of the Trial Judge's sound jury instruction.

Effective Assistance of Counsel

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The First Circuit recited that U.S.S.C. has not considered ineffective assistance claims in the context of broken promises from the opening statement. Sleeper v. Spencer, 510 F.3d 32 (1st Cir. 2007). The court upheld the state disposition finding no ineffectiveness where the jury would have no basis to be disappointed when all the evidence was considered. Id. Furthermore, "strategic choices are given greater latitude

during trial when time is short." Phoenix v. Matesanz, 233 F.3d 77, 84 (1st Cir. 2000).

Discussion

First, the PCR Judge correctly found that counsel's opening statement did not function as a burden shift. In his opening statement, trial counsel said "[w]e're going to prove to you in this case that [the Applicant] acted in self-defense on that day." The Record supports the PCR Judge's finding of law where the Trial Judge properly charged the jury that the burden was on the State to prove the Applicant's guilt and disprove the Applicant's defense of self-defense. Coogler v. Thompson, 286 S.C. 168, 169, 332 S.E.2d 215, 216 (Ct. App. 1985) ("When an instruction has been corrected by the court and it appears with reasonable certainty the jury was not misled, it will be presumed on appeal that the jury accepted the correction as the law of the case and applied it.").

Regardless, counsel provided a sound reason for his strategy and fully explained that he learned this technique at a seminar. Counsel further explained that it aided his performance in prior representations. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

II.

Certiorari is not warranted where the PCR Judge correctly found Petitioner failed to prove counsel was ineffective for deciding not to object to the Trial Judge's jury instruction on mutual combat where counsel, the Trial Judge, and the PCR Judge all correctly assessed that instruction was supported by the evidence.

Petitioner alleged counsel should have objected to the Trial Judge's issuance of jury instructions on both mutual combat and self-defense. Counsel disagreed with Petitioner's *post hoc* assessment because evidence supported the charges at issue.

Effective Assistance of Counsel

Counsel has an obligation to understand the law. Joseph v. Coyle, 469 F.3d 441, 460 (6th Cir. 2006). It is not ineffectiveness to fail to object to an instruction that was proper at the time it was given." Gaston v. Whitley, 67 F.3d 121, 123 (5th Cir.1995). If, however, an instruction as given is legally accurate, failure to request additional instructions is not ineffective assistance. Aparicio v. Artuz, 269 F.3d 78, 99-100 (2d Cir. 2001). Failure to object to an instruction is not ineffective assistance where the instruction had no substantial or injurious effect or influence. Galvan v. Cockrell, 293 F.3d 760, 766 (5th Cir. 2002).

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct. App.1990). ADD another sentence about non-moving party.

Mutual Combat

The apparent willingness of each party to engage in an armed encounter with the other, sustains an inference that they were engaged in mutual combat at the time of the [underlying offense], and requires that the issue be submitted to the jury for determination. State v. Graham, 260 S.C. 449, 452, 196 S.E.2d 495, 496 (1973). To constitute mutual combat there must exist a mutual intent and willingness to fight. Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511; and this intent may be manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973).

In Taylor, this Court revisited mutual doctrine framework and announced the instruction is limited to instances where (1) The parties had an antecedent agreement to fight on equal terms; (2) The parties were armed with deadly weapons; (3) Each party knew the other was armed; (4) Each party contributed to the combat. State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003).

"If the defendant is engaged in mutual combat, self-defense is unavailable unless the defendant withdraws from the conflict before the [degree harm necessary to establish the offense in question] occurs." Taylor, 356 S.C. at 232, 589 S.E.2d at 3. However, mutual combat and self-defense are not mutually exclusive. State v. Jackson, 384 S.C. 29, 38, 681 S.E.2d 17, 22 (Ct. App. 2009) (emphasis added).

Discussion

The PCR Judge correctly rejected Petitioner's perfunctory assignment of error to the Trial Judge for issuing mutual combat and self-defense instructions that were both

soundly within the ambit of the unique evidence offered at trial appropriately described as a "melee" by Petitioner's PCR counsel. **App.p.296, ln. 18**.

First, this Court adopted the Texas and Colorado adherence to an "antecedent agreement to fight" must exist for the court to charge mutual combat. Taylor, 356 S.C. at 233, 589 S.E.2d at 4 (internal citations omitted). Petitioner directs this Court to Petitioner and Billy Craft's coy testimonies about the feud in support of his assertion that there was no evidence of an antecedent agreement to fight. See PWC p.22. The argument is entirely unpersuasive. See State v. Montanez, 894 A.2d 928, 936 (2006) ("Although the present case lacks direct evidence of an agreement to fight, the jury nonetheless could have inferred an implicit agreement to fight from the evidence."). Petitioner incorrectly employs a qualitative analysis of the evidence reserved to the province of the jury. See Jackson, 384 S.C. at 39, 681 S.E.2d at 22 (finding "only that more than one reasonable inference may be drawn as to whether the accused was the aggressor or provoked the assault and that these inferences must be resolved by the jury, not the court.").

Evidence was introduced that established an Anderson County equivalent "Hatfield McCoy" feud between Petitioner and Billy Craft. "The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs." Taylor, 356 S.C. at 232, 589 S.E.2d at 4 (citing State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977)). The historical animosity between Petitioner and Billy Craft was saturated with a mutual hatred. Petitioner and Billy Craft married each other's ex-wives, which turned bigamous; domestic tensions led to violent encounters. Petitioner testified Billy Craft pulled a gun

on him in an incident involving crack cocaine. **App.p.198.** Petitioner testified "he's always been known as bad ass Billy." **App.p.197, ln.24**. A State's witness even testified that Billy Craft had pulled a gun on the witness several years prior to the incident because "Billy Craft thought I was [Petitioner] knocking on his door." **App.p.105, ln.15-16**. It was explained that that prior altercations conditioned Billy Craft to automatically arm himself when he thought Petitioner was at his front door. **App.p.107**. Thus, the evidence showed a mutual expectation that problems would be sorted through the use of deadly weapons. See State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973) ("There was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point.").

Evidence was introduced that showed Petitioner confronted Billy Craft and kill him. Days after Linda kicked Petitioner out of the family home, Billy Craft took up residence with Linda in Petitioner's absence. Petitioner decided to confront Billy Craft after Petitioner casually him in Linda's home. App.p.109. Petitioner's son-in-law Mark Durham gave a statement that Petitioner approach Billy Craft, knife in hand. **App.p.94, ln.17-20**. Billy Craft testified Petitioner threatened to kill him when Petitioner approached him with brandishing a knife. App.p.114. Other witness offered similar accounts. Additionally, the evidence here also served to show that Petitioner's conduct contributed to the incident.

Similarly, evidence was introduced that established Billy Craft had the willingness to fight and kill Petitioner. Petitioner testified that he planned to report Linda and Billy Craft's narcotics enterprise to law enforcement. **App.p.206, ln.12-13**. Even State

witnesses testified Billy Craft was Linda's wholesale narcotics supplier. **App.p.104**. Petitioner testified that he approached Linda's home to visit their daughter when Billy Craft attacked him with a knife. **App.p.197**. John Johnson, another resident in the trailer park and friend of Petitioner, witnessed the incident from his front porch and testified Billy Craft told Petitioner, "that he was going to get him." **App.p.178, ln. 19**. John had known Billy Craft for over twelve years and testified "anybody knows if [Billy Craft]'d of come out he's always got a knife or a gun. **App.p.188, ln. 4-5**. Additionally, the evidence of adultery and narcotics distribution in a home occupied by Petitioner's child showed Billy Craft's conduct also contributed to the incident.

Second, evidence was introduced that each side offered parties deadly armed into the fight. In Taylor, this Court looked to Georgia, the jurisdiction with the most developed case law on mutual combat, in adopting its standard that "mutual combat arises only when the parties are armed with deadly weapons, and that mutual combat does not arise from "a mere fist fight or scuffle." State v. Taylor, 356 S.C. 227, 233, 589 S.E.2d 1, 4 (2003) (emphasis added) (citing Flowers v. State, 247 S.E.2d 217, 218 (1978); Grant v. State, 170 S.E.2d 55, 56 (1969). Georgia further applies its mutual combat doctrine to accomplice liability. "Participation in mutual combat by providing a weapon to one of the other parties is sufficient to support a conviction for voluntary manslaughter as a party to the crime." Mitchell v. State, 225 Ga. App. 26, 27, 482 S.E.2d 419, 421 (1997).

Applying Mitchell, the relevant matter here is not whether Petitioner and Billy Craft were both armed with deadly weapons during the fight[1]. Instead, the dispositive

[1] Petitioner and Billy Craft both claim the other combatant brought the knife into the fight; ergo, only a single weapon. However, their testimonies established the element that each party knew that the other was

inquiry here is whether any evidence sustains the inference that Billy Craft acted in concert with other deadly armed combatants in a fight against an armed Petitioner[2]. John Johnson witnessed Linda strike Petitioner with her car that she was sitting in when the fight began. **App.p.181**. Thus, evidence sustained an inference that Linda entered the "melee" armed with a deadly weapon based on her use of the vehicle. Similarly, numerous other witnesses testified Kevin Lavoie, armed with a machete, and Mark Durham, armed with a gun, were other parties in the faceoff against Petitioner.

The evidence sustained an inference that Linda, Mark Durham, and Kevin Lavoie acted under the direction of Billy Craft during the fight. The other two armed parties, Mark Durham and Kevin Lavoie, made admissions about their illegal narcotics transactions involving Billy Craft. Furthermore, Billy Craft testified that he directed Mark Durham to shoot his own father-in-law. Certainly, Billy Craft's posture in directing a third party to shoot and kill a family member sustained an inference that Billy Craft exercised his rank in the narcotics outfit to marshal the other parties to use their deadly weapons to kill Petitioner.

Petitioner's testimony that he was going to alert the police about the narcotics operation alternatively sustained an inference that the other deadly armed parties were acting under Billy Craft's control against Petitioner where Petitioner's posture implicated

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armed with deadly weapons.

[2] In the event that this Court rejects Mitchell and the progeny of other Georgia case law here, Petitioner cannot as a matter of law prove counsel's performance deficient where he is not bound by a duty of clairvoyance to anticipate a novel issues of law. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial. Certainly, it is objectively reasonable performance to reason that an objection to the mutual combat charge would have proved fruitless based on this Court's past reliance on jurisprudence from Georgia in this area of law.

criminal prosecutions on each one of them. The statement sustained an inference that Petitioner believed the fight involved more than the love triangle and a single hostile party. The day after the incident, Petitioner gave a statement to police that in part noted, "I think [Linda]'s tried to run over me because I told her I was going to turn her in for selling drugs." **App.p.205, ln.12-14**.

Counsel explicitly presented a defense theory that Linda, Kevin, and Petitioner's son-in-law acted on behalf of Billy Craft and commented on the matter in his closing argument.

> At least 3 people had weapons out against [Petitioner]. It's undisputed there was a gun that Mark Durham had. It's undisputed that Linda Evans ran him over with a car, and its undisputed that someone came at him with a machete. And under all those circumstances it only happed within an 8-minute period of time.
>
> ***
>
> How to do you get away when you are being boxed in by three or four druggies. Three or four druggies. How do you get away from three or four druggies? They know he's a supplier so they're going to do it.

App.p.216, ln. 22—p.217, ln.2; p.221, ln.3-6 (emphasis added). Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the prong of Strickland – that he was prejudiced by counsel's performance. It was a melee.

As Petitioner failed to meet this burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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S.C. Bar # 100793

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By: _____
ATTORNEYS FOR RESPONDENT

Oct 22nd, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Hon. J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2013-001863

BARRY A. EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in ~~the United States mail, postage prepaid.~~ Inter-Agency Mail:

Ms. Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211

This 22nd day of October, 2014

Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

October 22, 2014

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

RE: **Barry A. Evans v. State of South Carolina**
Appellate Case No: 2013-001863

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/lg
Enclosures

cc: Lara M. Caudy, Esquire

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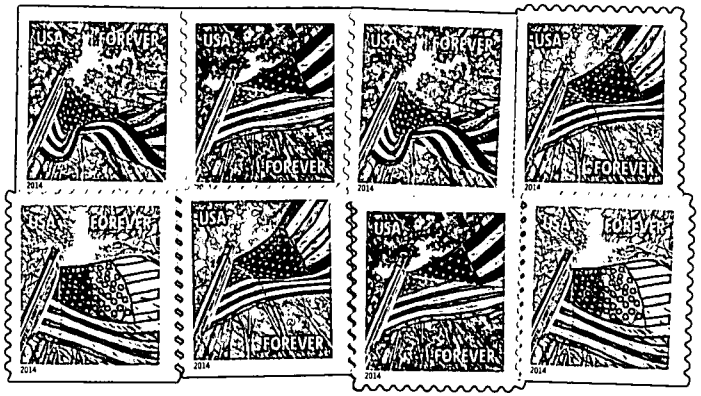

Hon. Daniel E. Shearouse
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