STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran Jr., Circuit Court Judge

Appellate Case No. 2014-000302

Michael Lamont Watts, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the post-conviction relief judge properly find trial counsel was not ineffective in failing to request a jury charge on voluntary manslaughter where Petitioner was not entitled to the charge because he presented no evidence he was in a sudden heat of passion at the time he shot the victim?

STATEMENT OF THE CASE

In May 2005, the Chesterfield County Grand Jury indicted Petitioner for murder, two (2) counts of assault and battery with intent to kill, discharging a weapon into an occupied building, possession of a weapon in a public building, escape, and possession of a weapon during the commission of a violent crime. (App. pp. 519-26; p. 11, lines 4-18). James P. Rogers, Esquire, ("trial counsel") represented Petitioner. (App. p. 1). On July 30, 2007, Petitioner proceeded to trial before the Honorable Paul M. Burch and a jury. (App. p. 1). After the State rested its case, Judge Burch directed a verdict on one (1) assault and battery with intent to kill indictment and on the possession of a weapon in a public building indictment. (App. p. 273, line 15-p. 274, line 9). The jury found Petitioner guilty on the remaining indictments. (App. p. 411, lines 1-24). Judge Burch sentenced Petitioner to concurrent terms of life in prison without the possibility of parole for murder, twenty (20) years for assault and battery with intent to kill, five (5) years for possession of a weapon during the commission of a violent crime, and ten (10) years for discharging a firearm into an occupied building, and one (1) year for escape. (App. p. 416, line 8-p.417, line 2). Robert M. Dudek, Esquire, perfected Petitioner's appeal in the form of an Anders[1] brief, and the South Carolina Court of Appeals dismissed the appeal on January 25, 2010. State v. Watts, Op. No. 2010-UP-019 (S.C. Ct. App. filed January 25, 2010).

Petitioner filed an application for post-conviction relief on July 2, 2010. (App. pp. 419-26). Tara D. Shurling, Esquire, represented Petitioner. (App. p. 432). The Honorable R. Ferrell Cothran Jr. ("the post-conviction relief judge") convened an

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

evidentiary hearing on the application at the Darlington County Courthouse on July 16, 2013. (App. p. 432). The post-conviction relief judge denied relief in an order dated October 18, 2013, and filed October 23, 2013. (App. pp. 623-30).

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding trial counsel was not ineffective for failing to request a jury charge on voluntary manslaughter.

Petitioner asserts the post-conviction relief judge erred by finding trial counsel was not ineffective for failing to request a charge on voluntary manslaughter. However, the trial record contains no evidence Petitioner was acting in a sudden heat of passion when he shot the victim. Therefore, the post-conviction relief judge properly found Petitioner was not entitled to a charge on voluntary manslaughter.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trail counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

The post-conviction relief judge properly found Petitioner would not have been entitled to a charge on voluntary manslaughter because the trial record is devoid of any evidence Petitioner was acting in a sudden heat of passion when he shot the victim. "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) (citing State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)). Both sufficient legal provocation **and** a sudden heat of passion are required to mitigate a murder to manslaughter. Id. (citing Wharton, 381 S.C. at 215, 672 S.E.2d at 788). Petitioner devotes much discussion in his Petition to the fact he was assaulted prior to retrieving the gun from his car.[2] However, this discussion belies the fact he presented no

[2] Respondent notes much of the testimony regarding the extent of this alleged assault came in the form of Petitioner' testimony. Although Petitioner described a constant and extended assault, the remaining

evidence he was suffering under the heat of passion at the time he returned to the building. Id. at 597, 698 S.E.2d at 608 ("[A] defendant is not entitled to voluntary manslaughter merely because he was legally provoked." (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007))).

Petitioner testified at trial he returned to his car and retrieved a gun after being evicted from the building. (App. p. 316, line 22-p. 317, line 1). He testified he retrieved the gun to return to the building and gather his friends. (App. p. 317, lines 9-12). He testified he loaded the gun as he walked into the building in order to scare anyone who may have designs to hurt him. (App. p. 318, lines 15-21; p. 319, lines 13-16). Petitioner testified he did not return to the area where he was assaulted, but went to a different part of the building. (App. p. 320, lines 4-7). He then proceeded to search for his girlfriend. (App. p. 320, lines 12-17).

Petitioner's actions after being evicted from the club do not demonstrate he was "overcome by a sudden heat of passion as would produce 'uncontrollable impulse to do violence.'" State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). The mere fact Petitioner was engaged in an altercation prior to his eviction does not automatically entitle him to a voluntary manslaughter charge. Instead, his actions, in his own words, demonstrate he was calmly returning to the building in an effort to retrieve his friends. His actions in going to the car and retrieving a gun demonstrate calm reflection. State v. Cole, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000) ("Even if Appellant had been in the heat of passion during the confrontation in his apartment, three to five minutes had passed in which he had time to go to his mother's apartment and find his gun. Far from

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eyewitnesses merely testified Petitioner was struck a few times while intervening in a fight between third parties.

passion, these actions indicate 'cool reflection.'" (citing Walker, 324 S.C. 257, 478 S.E.2d 280)). Although the assault on Petitioner may have constituted adequate provocation, his actions after his eviction are not the product of a sudden heat of passions. Starnes, 388 S.C. at 599, 698 S.E.2d at 609 ("A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not.").

Furthermore, Petitioner's testimony he fired a shot when he saw something he believed to be a gun does not entitle him to a voluntary manslaughter charge. Cole, 338 S.C. a 102, 525 S.E.2d at 513 ("On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self defense, not heat of passion."). According to Petitioner, he armed himself for protection, not to commit an act of violence. He did not testify he was angry as he returned to the building. State v. Rogers, 275 S.C. 485, 486, 272 S.E.2d 792, 793 (1980) ("Furthermore, appellant testified he was not angry when he shot the women, and the trial court determined there was no showing of heat of passion or provocation to warrant the requested charge. We conclude the facts of this case do not support a charge of voluntary manslaughter and the trial court did not err in refusing to so charge."). According to Petitioner, he was not angry when he entered the building, he did not enter the building looking to do violence, and he did not shoot the victim out of anger. Under the factual scenario posited by Petitioner, he was not acting under a sudden heat of passion. State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011) ("According to Smith, he was not enraged, incapable of 'cool reflection,' or acting 'under an uncontrollable impulse to do

violence.' Because of the absence of any evidence of heat of passion, the trial court properly declined the voluntary manslaughter charge."). His actions of leaving the building, retrieving a gun, and returning to the building demonstrate he was acting rationally and with a purpose to **avoid** violence. See Starnes, 388 S.C. at 599, 698 S.E.2d at 609 ("Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence."); Cole, 338 S.C. at 102, 525 S.E.2d at 513 ("Appellant admitted that in the time between when Pennington and the victim went out the front door and he went out the back, he had 'time enough for me to get my head together.' Most significantly, the men had been gone for several minutes when Appellant shot and killed the victim."); Walker, 324 S.C. at 260, 478 S.E.2d at 281 ("Because there was no evidence presented that Walker acted in sudden heat of passion, he was not entitled to a charge on voluntary manslaughter.").

The mere fact Petitioner alleged he was assaulted in the building does not automatically render him incapable of calm reflection. See State v. Holland, 385 S.C. 159, 170, 682 S.E.2d 898, 904 (Ct. App. 2009) ("The requirement that we view the evidence in the light most favorable to the defendant does not allow us to throw out all reason from our analysis[.]" (citing Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998))). Thus, the trial record contains no evidence Petitioner was acting under a sudden heat of passion when he returned to the building and shot the victim. Because Petitioner was not entitled to a charge on voluntary manslaughter, he has not demonstrated trial counsel was deficient in failing to request one.[3] See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency

[3] Respondent is aware trial counsel's testimony at the evidentiary hearing failed to articulate his reasoning for failing to request a voluntary manslaughter charge. Respondent submits this is yet another troubling

where "it would have been futile for Attorney to have made such arguments"). Likewise, Petitioner was not prejudiced by the failure to request a voluntary manslaughter charge because he was not entitled to one. Accordingly, the post-conviction relief judge properly found trial-counsel was not ineffective in this regard.

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example of a competent attorney's attempt to offer tailored testimony to his former client's *post hoc* benefit. Such testimony is particularly troubling when, as the present case demonstrates, a non-credible Applicant requests relief based upon grounds wholly incompatible with the trial record, yet bolstered by his former competent attorney's "failing to recall" his trial strategy. See Allen v. Mullin, 368 F.3d 1220, 1243 n.22 (10th Cir. 2004) ("The shifting sands of recent memory are an unstable foundation and [...] of dubious utility.").

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

December 8, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2014-000302

Michael Lamont Watts,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Joshua L. Thomas, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 8th day of December, 2014.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

December 8, 2014

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

Re: **Michael Lamont Watts v. State of South Carolina**
Appellate Case No. 2014-000302
Lower Court Case No. 2010-CP-13-0255

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Joshua L. Thomas
Assistant Attorney General
S.C. Bar # 100777

JLT/jacc
Enclosures

cc: Lara M. Caudy, Esquire
Trisha Allen, Victim Services