

The State of South Carolina

In The Supreme Court

Appeal From Williamsburg County

Court Of Common Pleas

R. Knox Mc Mahon, Circuit Court Judge

Case # 2013-002647

Javon Rivers Sr,

petitioner

v.

State Of South Carolina

Respondent.

Pro-se

Petitioner For A Writ Of Certiorari

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S.C. SUPREME COURT

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Argument.

Is there any evidence of Probative Value which support the PCr Court's conclusion that trial counsel was not ineffective for failing to make himself aware of the existence of the Protection of Person's and Property act to argue to the trial court on this point and, in turn, failing to request any review, especially a pre-trial "in camera" hearing, to determine the applicability of the protection of Person's and Property Act to the facts of the Defendant's case..... Page 3

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S.C. SUPREME COURT

State of Case

On March 12 2009 petitioner was convicted of Murder and possession of a weapon during the commission of a violent crime, and was sentenced to 35 years. On direct appeal his conviction was Affirmed by South Carolina Court of Appeals.

State v. Rivers 2012-up-199 (S.C. Ct. App Filed March 21, 2012.

Petitioner then brought this action seeking Post-Conviction relief in March 27, 2012. He alleged.....

Counsel ineffective for failing to prepare for trial adequately and consequently in conducting trial. The petitioner amended his application to further explain issues. The state filed a return on September 10, 2012. On October 3, 2013, an evidentiary hearing was held before the honorable R. Knox McMahon. Charles T. Brooks represented petitioner at the hearing. Mary Williams was presented on behalf of the state. In a written order signed November 26, 2013, Judge McMahon denied relief and dismissed the Application. A timely notice of intent to appeal was served on December 12, 2013. This petition for Writ of Certiorari follows.

Issue 1

Is there any evidence of Probative Value which support the PCR Court's Conclusion that trial counsel was not ineffective for failing to make himself aware of the existence of the Protection of Person's and Property Act to argue to the trial court on this point and, in turn, failing to request any review, especially a pre-trial "in camera" hearing, to determine the applicability of the Protection of Person's and Property Act to the facts of the Defendant's case.

In the year 2006 the South Carolina General Assembly created the Protection of Person's and Property Act in its S.C. Criminal Code as § 16-11-410 thru 450, this Act became effective on June 9, 2006. In its most pertinent sections, the Act grants immunity from all criminal and civil liability to a person who uses deadly force when this same person's actions fall within the articulated parameters of the Act itself. The incident underlying this criminal case occurred May 17, 2008. The Protection of Person's and Property Act § 16-11-410 thru 450 was the standing effective law when the Defendant Rivers used deadly force against the victim Derial McCrea.

At the October 3, 2013 PCR evidentiary hearing held on PCR Application 2010-CP-45-0172, trial counsel LeGrand Carraway was asked under direct examination twice regarding the Protection of Person's and Property Act, which codifies the common law Castle Doctrine, which is better known as South Carolina's "stand your ground law." (see Appx Pg 394, line 23-24 and Pg 396 line 7-9). In reply to these questions trial counsel LeGrand Carraway candidly answered, "I was not familiar with that at the time." (see Appx Pg 396, line 10).

Additionally trial counsel Carraway was pressed with question of did Carraway or did Carraway not know that if a person asserts his actions are caused by South Carolina's "stand your ground law" that this same person would have had an in camera to determine the applicability of the act, prior to going to trial, (See Appx pg. 397, line 4-5). In reply to this question trial counsel Carraway candidly answered, "I don't know anything about that," (See Appx pg. 397, line 6.). This PCR record reflects in disputably that trial counsel Carraway was completely ignorant to the existence of and statutory provisions of §16-11-410 thru 450, The South Carolina "stand your ground" law.

This South Carolina Supreme Court has previously established that when an attorney makes decisions or fail to make decisions because of complete ignorance of relevant available information the performance of said attorney is substandard to Strickland v. Washington's mandates and is ineffective assistance of counsel. (See Wick v. State, 409 S.C. 214, 761 S.E.2d 757 (S.C. 2014)).

In resolving this particular issue of ineffective assistance of counsel the PCR Court determined denial of this issue on two specific grounds: First, at the time of Applicant's trial, a demand for a pre-trial hearing was not within the common standard of practice and therefore counsel was not deficient in this regard because he could not foresee the decision in State v. Duncan, 392 S.C. 404, 409, 709 S.E.2d 662, 664, (2011) which was decided more than two years after applicant's sentence. (See Appx pg. 415 paragraph 4- pg. 416 paragraph 1). Secondly, the PCR Court found that Applicant has failed to show the motion would have been successful and the applicant must show the motion would have been successful in showing he was entitled to protection under §16-11-440(c) by a preponderance of the evidence standard pursuant to State v. Duncan to meet the prejudice

Standard of Strickland v. Washington's mandates. (See Appx pg. 416 paragraph 2 - pg 418 paragraph 1).

Initially, it must be noted by this honorable appellate review court that the PCR court's finding of facts and conclusions of law are confusing and contradicting with regard to this issue. In answering the deficiency prong of Strickland on this issue the PCR court ruled State v. Duncan is inapplicable to the analysis because this case was decided more than two years after Applicant's sentence, yet in answering the prejudice prong of Strickland on the same issue the PCR court wholly applied State v. Duncan in that it ruled Applicant has not made a successful showing he is entitled to the protection of §16-11-440(c) by a preponderance of the evidence as announced by State v. Duncan as being the proper standard of proof at a pre-trial hearing. (See Appx pg 415 paragraph 4 - pg 416 paragraph 1); and Appx pg. 416. paragraph 2 - pg 418 paragraph 1). This PCR court finding are not supported by any evidence of probative value in the record, and actually is contrary to South Carolina Jurisprudence. (See State v Manning, WL 6488708 (2014); S.C. Code of law §16-11-440(c).

The Applicant has met the first prong of Strickland's two prong test of ineffective assistance of counsel as a matter of fact and as a matter of law. Factually, trial counsel Carraway candidly admitted he did not know the existence of §16-11-410 thru 450 South Carolina "stand your ground" law nor did he know the statutory provisions of §16-11-410 thru 450 at all. Trial counsel Carraway did not say he misapprehended the act nor that he failed to appreciate the act as an alternative sustainable defense, neither did Carraway testify he chose a reasonable trial strategy to forego usage of the act. Counsel Carraway testified that he had absolutely no idea that the state of South Carolina had enacted a law which grants a pre-trial hearing to determine total criminal and

Civil immunity to a person who uses deadly force if said person's asserts his actions trigger the statutory provisions of the Protection of Persons and Property act.

This is an incredible revelation by trial counsel Carraway when taking into consideration that Carraway's trial theory, cross-examination tactics, closing arguments and PCR testimony vehemently stresses that Applicant Rivers' actions were justified non criminal use of deadly force to protect himself and the life of Erica Mc Bride from the attacks of Derrial Mc Crea, and that Carraway whole heartedly believe Rivers depicting of what occurred. (See Appx pg 35, Line 2-line 4; Appx pg 36 line 3-line 10; Appx pg 36 line 25-pg 37 line 1; Appx pg 48 line 25; Appx pg 64 line 18-24; Appx pg 77 line 11-pg 79 line 4; Appx pg 105 line 20-25; Appx pg 107 line 2-pg 108 line 20; Appx pg 111 Line 12-line 18; Appx pg 150 line 9; Appx pg 156 line 14; Appx pg 197 line 14-pg 198 line 23; Appx pg 204 line 13-line 22; Appx pg 232 line 19-pg 233 line 4; Appx pg 251 line 4-pg 253 line 14; Appx pg 256 line 20-pg 257 line 6; Appx pg 281 line 9-line 10; Appx pg 281 line 20-line 25; Appx pg 296 line 24-pg 297 line 2; Appx pg 297 line 18-line 20; Appx pg 298 line 2-line 7; Appx pg 298 line 20-pg 299 line 8; Appx pg 299 line 10-line 16; Appx pg 300 line-line 4; Appx pg 300 line 11-line 25; Appx pg 301 line 13-line 21; Appx pg 302 line 7-line 10; Appx pg 302 line 13-line 18; Appx pg 307 line 16-line 25; Appx pg 308 line 20-line 25; Appx pg 310 line 3-line 8; Appx pg 311 line 6-line 10; Appx pg 312 line 18-line 19; Appx pg 312 line 24-pg 313 line 11; Appx pg 314 line 6-lines 8; Appx pg 314 line 22-pg 315 line 3; Appx 350 line 25-pg 351 line 1).

To know the existence of the protection of persons and property act or it's statutory is the epitome of the deficiency of assistance of counsel on counsel Carraway's part pursuant to Strickland's first prong, and is indefensible under any theory of attorney conduct.

The PCR court's grounds of dismissal of this issue in determining that "a demand for a pre-trial hearing was not deficient in this regard because he could not foresee the decision is State v. Duncan, which was decided more than two years after Applicant's sentence is contrary factually and legally to South Carolina jurisprudence. The common standard of practice in South Carolina is that should a defendant seek immunity under the Protection of Person's and Property act said defendant must motion for the immunity prior to trial and if done, the trial court will make a review of the defendant's motion under the act and issue a judicial ruling on the motion which is appealable should it result in a denial. This established common standard of practice in South Carolina is evident to have been put into action since as early as the year 2006. To illustrate this point the Applicant offers the following body of South Carolina case law which demonstrates the common standard of practice in action:

State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (S.C. App. 2008, reversed 394 S.C. 491; 716 S.E.2d 97. (S.C. 2011).

Dickey's incident occurred April 29, 2004. Dickey was indicted for murder and tried before a jury in September 2006. The defense counsel for Dickey argued before the trial court, on the record, that the trial should apply the Protection of Person's and Property act to this case. Thereafter trial court heard opposing argument from the state on this same issue. After hearing from both parties on the issue, the trial court ruled on the issue, stating "I think it was clearly the intent of the legislature, that the act does not apply to pending criminal prosecution. For that reason that is the courts ruling." The issue was timely raised on the record and ruled upon by the trial court and is, therefore,

presented for review. This court must take note Dickey argued for a pre-trial hearing and received a pre-trial hearing for immunity in the year 2006.

State v. Bolin, 381 S.C. 557; 673 S.E.2d 885 (S.C. App 2009).

Bolin's incident occurred February 18, 2006. Bolin was indicted by the York County Grand Jury on charges of Murder, assault and battery with intent to kill, discharging a weapon into an occupied vehicle, unlawful possession of a pistol, and possession of a weapon during commission of a violent offense. At trial Bolin asserted his immunity under the act §16-11-410 thru 460. The motion was denied and the case proceeded to trial. The Court of Appeals found the Protection of Person's and Property act does not apply retroactively to Bolin's case, additionally the court of appeals found that the counsel withdrew this ground of appeal at oral argument and proceeded only with the jury charge issue. This court must take note Bolin argued for a pre-trial review and received a pre-trial review for immunity in the year 2006.

State v. Rocquemore 2010 WL 10080069

David Rocquemore's case came about 2010. Rocquemore's trial attorney argued before the trial court, on the record, that the trial court should apply the Protection of Person's and property act to this case. The trial court Denied the motion. Rocquemore appealed. The Court of Appeals found the act does not apply retroactively to Rocquemore's case. This court must take note Rocquemore argued for and received a pre-trial review and received a pre-trial review for immunity in the year 2008.

State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (S.C. 2011).

Duncan was indicted for murder in 2009 by the Greenville County Grand Jury. Prior to trial, Duncan moved to dismiss the indictment, arguing he was entitled to immunity under the protection of Person's and Property act. At a hearing on

Duncan's motion, the state introduced numerous pieces of evidence, including witness statements and testimony, photographs and video of the crime scene, cell tapes, and the victim's autopsy report. After considering the evidence, the circuit court dismissed the indictment finding Duncan is immune, under the Protection of Person's and Property Act, from prosecution. This court must note Duncan argued for a pre-trial review and received a pre-trial review for immunity in the year 2009.

Significance of these cases and the point the appellant illustrates with these cases is that all four (4) cases were decided prior to the ruling of Duncan's initial ruling on May 9, 2011 and its subsequent rehearing on June 8, 2011, and still yet each case followed the common standard of practice in South Carolina. The trial counsels of Dickey, Botin, Rocquencourt, and even Duncan himself all adhered to the established common standard of practice in South Carolina when a defendant asserts immunity under the Protection of Person's and Property Act which is (a) defendant must motion for immunity prior to trial, (b) the trial court will make a review of the defendant's motion under the Act and issue a judicial ruling, and (c) the ruling is appealable should the defendant be denied immunity. The PCR court's reasoning that Duncan created this common standard of practice of how to proceed under the Protection of Person's and Property Act is legally erroneous and is factually refuted by the above mentioned case law. Although Duncan may have refined the required steps in evaluating the analysis and breadth of the scope of evidentiary material to be considered by the trial judge in assessing the defendant's assertions under the Act, Duncan in no way created the common standard of practice of how to proceed under the Protection of Person's and Property Act which is at issue on this appeal. The existence or non existence of the Duncan ruling is of no consequence in resolving Appellate Rivers' claim, it is wholly irrelevant. It was irrelevant in the resolution of even Duncan

himself, because at the trial stage of Duncan's case in the year 2009 he and his attorney and the sitting trial judge Edward W. Miller did not have the benefit of the ruling of State v. Duncan, 709 S.E.2d 662 (S.C. 2011) to guide their actions in asserting and resolving the Protection of Person's and Property act yet they following the common standard of practice at a very minimal of motioning for immunity, having a judicial ruling upon the merits of the immunity assertions and then the aggrieved party appealing said judicial ruling. This support Appellant's position that this trial counsel Carraway is ineffective and should have been at the very minimum, knowledgeable about the established common standard of practice in South Carolina when a defendant asserts immunity under the Protection of Person's and Property Act same as Dickey's, Bolin's, Rocquemore's, and Duncan trial lawyers were at the time of their trials pre-Duncan, (see S.C. Code of law §16-11-410 thro 450; State v. Dickey, 380 S.C. 384; 669 S.E.2d 917, reversed 394 S.C. 491, 716 S.E.2d 97 (S.C. 2010); State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (S.C. App 2009); State v. Rocquemore, 2010 WL 10080069; State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (S.C. 2011)). This also shows that the PCR court's conclusions are unsupported by law, fact and neither supported by any evidence of probative value in the record before this honorable court.

The PCR Court's determination that the Applicant did not meet his burden of proving the deficiency prong of his ineffective assistance of counsel claim at the PCR ~~confidential~~ hearing under Strickland is not supported by any evidence of probative value in the record and therefore the PCR court's denial must be reversed by this honorable appellate court. (See Simuel v. State, 701 S.E.2d 738, 739 (2010); "On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. However, if there is no evidence to support the PCR court's ruling the appellate court will reverse."; (see also Lounds v. State, 670 S.E.2d 646 (S.C. 2008) and Pauling v. State, 565 S.E.2d 769).

Turning to the prejudice prong of Strickland test, the Applicant has met the second prong of Strickland's two prong test of ineffective assistance of counsel as a matter of fact and as a matter of law.

The PCR Courts determined that State v. Duncan controls, and that Applicant has not made a successful showing he is entitled to the protection of §16-11-410(c) by a preponderance of the evidence as introduced by Duncan as being the proper standard of proof at a pre-trial hearing therefore prejudice is not established under Strickland. (See Appx pg 415 paragraph 4 - pg 416 paragraph 1; and Appx pg 416 paragraph 2 - pg 418 paragraph 1). This is the entirety of the PCR court's scope of examination and evaluation of the prejudicial prong of Strickland's standard. These finding of facts and conclusions of law by the PCR court is erroneous and warrant reversal.

The central and critical point of the determination of the prejudice prong of this case is: what harm did the Applicant suffer as a result of counsel's deficiency in failing to make himself aware of the existence of the Protection of Person's and Property Act?

The PCR court found the only harm is the Applicant was unable to have a pre-trial hearing conducted upon immunity under the Act, but that this is of no consequence because the Applicant cannot establish by his PCR testimony nor the trial testimony of the various witnesses nor by the police statements that he is entitled to immunity under §16-11-410 thru 450, the Protection of Person's and Property Act, South Carolina's version of "stand your ground" law. The methodology the PCR court uses to resolve the prejudice prong of this issued has been admonished by this South Carolina Supreme Court as an inappropriate and flawed approach by the lower trial courts that will not be sustained on appellate review, but will be reversed and remanded. (See State v. Manning,

2014 WL 6488708 S.C. App (2014).

In Manning the S.C. Court of Appeal issued a ruling that mandates that a review of Immunity must take into consideration a determination of all the defendant's evidence and must not be restricted to attorney arguments and police statements but must encompass the taking of testimony or consider any other evidence.

In State v. Douglas, 2014 WL 7273646, the S.C. Court of Appeals broadened the parameters of the allowable evidence a defendant may present at the immunity hearing to include previous history of violent conduct of Decedent, testimony from various witnesses concerning the decedent previous history of violent conduct, testimony from law enforcement of decedent previous history of violent conduct, testimony and evidence of decedent alcohol and drug intoxication, testimony and evidence of crime scene reconstruction expert, testimony and evidence of forensic ballistic and blood spatter, and autopsy and gun shot residue (see Id.). The methodology the PCR court uses to resolve the prejudice prong of Strickland is erroneous as a matter of law and is not supported by the record. The PCR court's methodology deprives the Applicant of the safeguards proscribed by Manning and Douglas and must be reversed.

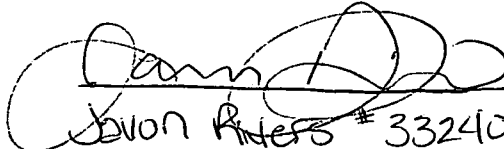
The prejudice prong of Strickland is satisfied in that counsel Carraway's deficient performance deprived the Applicant of the pre-trial in camera hearing, and any review at all, of his assertion of immunity under the Protection of Person's and Property Act. Further the same evidence that counsel Carraway argued to the trial court to receive a jury charge of "self defense" and "defense of others" is the same evidence which at the very least, proves a prima facie showing that an assertion under the 816-11-410 thru 450 immunity would be meritorious.

and fruitful if the Applicant has been given opportunity to a full evidentiary hearing as prescribed by Manning and Douglas. Make no mistake, Applicant did receive a jury instruction to "self defense" and "defense of Others" at his trial and this provides threshold evidence that his assertion to immunity under the act is a non-frivolous legal and factual claim. (see. Appx pg 335 line 19 - pg 339 line 19).

The PCR Court's determination that the Applicant did not meet his burden of proving the prejudice prong of his ineffective assistance of counsel claim at the PCR evidentiary hearing under Strickland is not supported by any evidence of probative value in the record and therefore the PCR Court's denial must be reversed by this honorable appellate court. (see Simuel v. State 201 S.E.2d 738, 739 (2010). "On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. However, if there is no evidence to support the PCR court's ruling the appellate court will reverse". See also Lounds v. State, 607 S.E.2d 646. (S.C. 2008) and Pauling v. State, 565 S.E.2d. 769).

Wherefore the Applicant requests this Court vacate the PCR Court's denial and urges this court to issue an order Reversing and Remanding these convictions and sentences for a new trial.

2/5/15
Dated


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The State Of South Carolina

In the Supreme court.

Certiorari to Williamsburg County


Court of Common Pleas.

R. Knox McManon, Circuit Court Judge


Case #10.# 2013.-002647

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of Certiorari and a Certificate of Service have been served on Donald J. Zelenka, Esquire. at Rembert Dennis Building 1000 Assembly Street, Room 519, Columbia, SC. 29201, and The South Carolina Commission of Indigent Defense. Division of Appellate Defense. P.O. Box 11589. Columbia, SC. 29211-1589.


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Sworn to before me this
5th Day of February, 2015


Susan H. Dye
Notary Public for South Carolina

My Commission Expires

My Commission Expires
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