ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Marlboro County

Brooks P. Goldsmith, Circuit Court Judge

CLARENCE KENDALL COOK,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000366

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter?

STATEMENT OF THE CASE

In July of 2010, the Marlboro County Grand Jury indicted Cook for murder, indictment #2010-GS-34-0466. In February of 2011, the Marlboro County Grand Jury indicted Cook for unlawful possession of a pistol and possession of a weapon during the commission of a violent crime, indictments #2011-GS-34-91, 92. On April 18, 2011, Cook proceeded to jury trial before the Honorable J. Michael Baxley. Attorneys Myesha Brown and Rosalind Sellers represented Cook at trial. Attorneys Mary-Thomas Johnson-Lee and Shipp Daniel prosecuted the case on behalf of the State. At the close of the State's case the State withdrew the unlawful possession of a pistol charge. The jury returned with a verdict of guilty of the lesser included charge of voluntary manslaughter and guilty of the remaining weapon charge. Judge Baxley sentenced Cook to twenty years for voluntary manslaughter and five years consecutive for the weapon charge. The direct appeal was not perfected.

On February 16, 2012, Cook filed an application for post conviction relief. On May 18, 2012, the State filed a return. On January 11, 2013, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. Attorney Mary P. Miles represented Cook at the PCR hearing. Attorney Tyson A. Johnson was present on behalf of the State. In a written order signed January 30, 2013, Judge Goldsmith denied relief and dismissed the application. On February 20, 2013, Cook filed a timely notice of intent to appeal. On December 20, 2013, Cook filed a petition for writ of certiorari. In the petition for writ of certiorari Cook asserted that the PCR judge erred in finding that Cook was not entitled to a direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The State filed a return on April 7, 2014. On November 20, 2014, this Court grant the petition for writ

of certiorari and directed the parties to brief the issue included in the petition for writ of certiorari. This brief pursuant to White v. State follows.

STATEMENT OF FACTS

On June 10, 2010, a confrontation took place between Appellant Cook and the decedent, Charles "Snook" Hayes at the Marlboro Court Apartments. Appellant admitted shooting Hayes but told police that he feared for his life when Hayes approached him. (App. pp. 401-410). At trial appellant asserted self defense. (App. pp. 83-88; 589-602). The decedent's fiancé, Kim Brown, testified about heated text messages between the decedent and appellant two hours prior to the shooting. (App. p. 117, line 15 – p. 118, 119, lines 1-25). Terrance Bridges, the decedent's nephew, witnessed the shooting. Bridges testified:

> Words were said. At this point I'm really not sure from the point of what they said first. But, all I know is my Uncle had got up. He had walked to the sidewalk. Clarence then came towards my Uncle. And from there on they were just talking real softly. From that point you could hardly tell it was an argument. And then he stepped back, he pulled out a gun and shot him. My Uncle had fell, and that is when he walked over him, and he did some kind of gesture, and he shot him again. And then he ran off.

(App. p. 186, line 21 – p. 187, lines 1-5).

Marquis Short testified that after the shooting he saw Kim Brown remove a black gun from the decedent's pocket. (App. p. 495, lines 13 – 24). Chasity Carter, Appellant Cook's fiancé, testified that the decedent had previously accused Cook of being a snitch. (App. pp. 521 – 525). Prior to the shooting Cook had testified as a State's witness in a trial in North Carolina. (App. pp. 436-439).

The judge properly instructed the jury on the law of self defense. (App. pp. 577-581). The judge however, over appellant's objection (App. pp. 558-563), instructed the jury on the law of the lesser included offense of voluntary manslaughter. (App. pp. 575-576). Appellant renewed the objection to charging the jury with voluntary manslaughter. (App. p.

626, lines 7-8). The jury returned with a verdict of guilty of the lesser included offense of voluntary manslaughter. (App. p. 634, lines 4-7). Following the verdict, appellant again objected to the voluntary charge. (App. p. 640, lines 6-24). The judge again overruled the objection. (App. p. 641, lines 11-22).

ARGUMENT

The trial judge erred in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter.

"Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). Both heat of passion and sufficient legal provocation must be present at the time of the killing. Id. The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence. See id." State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000). In State v. Starnes, 388 S.C. 590, 596-97, 698 S.E.2d 604, 608 (2010), the South Carolina Supreme court wrote:

> We have consistently held that both heat of passion and sufficient legal provocation must be present at the time of the killing. Wharton, 381 S.C. at 215, 672 S.E.2d at 788. A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion. See id. (holding the State's request for a voluntary manslaughter charge was not warranted where there was no evidence of sufficient legal provocation, although the defendant may have been acting under heat of passion). Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked. See State v. Pittman, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion). Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation.

In Starnes, 388 S.C. 590, 598-99, 698 S.E.2d 604, 609 (2010), the Court also wrote:

> We also have held that fear resulting from an attack can constitute a basis for voluntary manslaughter. See State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) ("[F]ear can constitute a basis for voluntary manslaughter."). Yet the presence of fear does not end the inquiry

> regarding the propriety of a voluntary manslaughter instruction. We have consistently held that sudden heat of passion upon sufficient legal provocation is defined as an act or event that "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Pittman, 373 S.C. at 572, 647 S.E.2d at 167. While the act or event "need not dethrone the reason entirely, or shut out knowledge and volition," it must cause a person to lose control. *Id.*
>
> We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence. Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence. (Emphasis in original).

In the present case the judge erred in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence that appellant was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Based on the facts of this case, appellant either shot in self defense or he acted with malice. This factual determination was to be made by the jury. Instead, finding the appellant guilty of voluntary manslaughter, the jury found that while appellant did not act with malice, he did not shoot in self defense. The error in charging the jury with voluntary manslaughter requires reversal.

In ruling that he was required to charge the jury with voluntary manslaughter, the judge cited State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011), and State v. Starnes, 388 S.C. 590, 598-99, 698 S.E.2d 604, 609 (2010). (App. p. 558, line 6 – p. 559, 560, lines 1-17). The judge stated:

> The facts based on the decision that the court has heard is: Number one. The defendant was in fear of ---_ based upon threats allegedly made by the victim. Again, this is taken in the light most favorable to the defendant at this juncture, that when the victim was approached, the defendant --- the victim either had his hand in his back pocket, or reached his hand into or toward his back pocket, which gave the defendant the belief that he was in danger. There is a testimony that a weapon was later removed from the victim. Again, this is disputed. But this is taking the facts in the light most favorable to the defendant. All of these may go to voluntary manslaughter, and certainly they go to self defense as well.

(App. p. 559, lines 11-23). The judge then discussed the second shot and states:

> That would have incapacity [sic] the victim, and the second shot was fired while the victim was down on the sidewalk, on the ground. For that reason the court finds that the second shot, which is at issue here and in evidence, is clearly a fact for which a voluntary manslaughter charge must be given. And while that occurred in the sudden heat of passion, upon sufficient legal provocation, and whether the defendant has lost his reason is for the jury to determine. But the court finds it appropriate to charge the lesser included offense to the jury.

(App. p. 560, lines 7-17).

> Appellant objected to the voluntary charge stating:
>
> It is our position that they have not presented any evidence in the record at this time to suggest that Mr. Cook at any point lost control, or that he was at possession in his mind that he was out of control at any point. No one testified to that. In fact, it was clear from the state's witnesses that Mr. Cook came down the stairs, and just pulled the gun. So, it has nothing to do with control, or the way he was acting, or where he was to be at the time the shots were fired. And he made it very clear that he was in fact afraid. And that is in evidence on this record. Not loss of control. No one mentioned that.

(App. p. 561, lines 8-18). Appellant also cited Starnes for the proposition that fear alone does not manifest an uncontrollable impulse to do violence. (App. p. 561, lines 19-24). Appellant argued that the State failed to present evidence of heat of passion required for voluntary manslaughter. (App. p. 562, lines 4-8).

The State requested a charge on the lesser included offense of voluntary manslaughter. (App. p. 558, lines 11-12). In support of giving the charge the State argued, "Just to point out for the record that in defendant's video taped statement, he says something to the effect of, before I knew it, I fired a bullet. Which certainly goes to sudden heat of passion by his own statement, which is in the record. (App. p. 562, lines 11-15). The judge commented, "All right. And on that same point the court is aware that the defendant was asked in his statement why did he shoot the second shot. And his response to that which may indicate to this jury a temporary loss of reason. The jury may determine there is not a loss of reason. Nevertheless the court finds that there is [sic] sufficient facts here for which the charge should go forward." (App. p. 562, lines 16-22). The trial judge erred. The statement attributed to appellant, "before I knew it, I fired a bullet" does not constitute evidence that appellant was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear.

Appellant's fear of the decedent, based on prior difficulties and the text messages, does not rise to the level of heat of passion required in order to charge voluntary manslaughter. In Starnes, the Court found no error in the trial judge refusing to charge voluntary manslaughter although Starnes testified that prior to the shooting one of the decedents came up behind him in the restroom of a bar, grabbed his throat, put a metal object to the back of his head, and began yelling about money which Starnes allegedly stole from him. Starnes also testified that later the decedent remarked to one of the bar's employees that she "better call the police because he was going to take [Starnes] up on Platt Springs Road and blow his F'in brains out." Additionally Starnes testified that before he fired the fatal shot, the decedent pointed a gun at him. Starnes testified that he

was scared and frightened. The Court held, "While this testimony is evidence that Appellant was in fear, there is no evidence Appellant [Starnes] was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. The only evidence in the record is that Appellant deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." State v. Starnes, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010).

As in Starnes, while there is testimony that Appellant in the present case was in fear, there is no evidence that Appellant was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. In State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011), the South Carolina Supreme wrote:

> In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). "To warrant the court in eliminating the offense of manslaughter it should clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." Pittman, 373 S.C. at 572, 647 S.E.2d at 168.

In the present case, taking into consideration the previous relations as well as the surrounding circumstances prior to and at the time of the shooting, there is no evidence tending to reduce the crime from murder to manslaughter.

In State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000), the South Carolina Supreme Court found that the trial judge erred in charging voluntary manslaughter because there was no evidence of sufficient legal provocation. In Cooley the Court wrote:

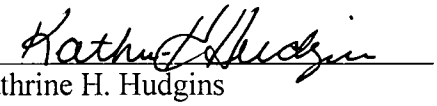
> Since the jury heard no evidence of legal provocation, Defendant's voluntary manslaughter conviction suggests that the jury may have compromised between murder and involuntary manslaughter or accident in reaching their verdict. As such, it is fair to assume that at least one member of the jury may have believed the State's position that Defendant murdered Victim by shooting her with a shotgun in the face at close range. However, due to the error in granting the solicitor's request for a voluntary manslaughter charge, Defendant will not have to face a jury of his peers on the charge of murder again. This is a cautionary tale for solicitors as to the pitfalls of requesting a potential "compromise" charge which is unsupported by the evidence.

State v. Cooley, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000). The trial judge in the present case erred in granting the State's request for a voluntary manslaughter charge.

CONCLUSION

Based on the above argument, the convictions should be reversed.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of March, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of March, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of March, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.