

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County

S.C. Supreme Court

Deadra L. Jefferson, Circuit Court Judge

ROGER RAYNARD PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002162

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on the lesser included offense of voluntary manslaughter where there was evidence Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation?

2.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to call Petitioner's mother, Virginia Johnson, as a witness at trial where Johnson witnessed the events leading up to the shooting and her testimony supported Petitioner's defense of self-defense and would have further supported a voluntary manslaughter jury instruction?

STATEMENT

A Charleston County Grand Jury indicted Petitioner at the March 5, 2007 term of General Sessions for the offense of murder. App. 920-921. His case was called to trial on February 25, 2008 before the Honorable R. Marley Dennis, Jr., and a jury. App. 1. Assistant Solicitor Jennifer Shealy represented the state, and Andrew Grimes represented Petitioner. App. 1. On February 27, 2008, the jury found Petitioner guilty. App. 733, ll. 5-14. He was sentenced by Judge Dennis to life without parole. App. 749, ll. 17-18.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Parker, Op. No. 2010-UP-378 (S.C. Ct. App. Filed August 2, 2010); App. 791-792. This Court denied the petition for writ of certiorari by order dated January 11, 2012. App. 835.

On November 14, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 837-849. The state filed a return to this application dated July 5, 2013. App. 850-855. The matter proceeded to an evidentiary hearing on May 19, 2014 before the Honorable Deadra L. Jefferson. App. 856. Assistant Attorney General Ashleigh Wilson represented the state, and Christopher L. Murphy represented Petitioner. App. 856. By order filed September 18, 2014, Judge Jefferson denied Petitioner relief. App. 904-919.

This petition for writ of certiorari follows.

ARGUMENT

1.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on the lesser included offense of voluntary manslaughter where there was evidence Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation.

Facts at Trial

Demetria Grant was the sister of the decedent, Carlise ("Carlos") Grant. Demetria lived in the Ashley Shores apartment complex in North Charleston with her two young children and her fifteen year old cousin, Emmanuel Johnson. App. 122, l. 11 – 124, l. 16. Appellant and his parents lived next door to Demetria and Emmanuel. App. 468, ll. 5-11. Each apartment had a small concrete stoop in front of the unit. App. 126, l. 9 – 127, l. 3.

Emmanuel and Appellant's father, Roger Johnson, had an ongoing dispute and it appeared the two families did not get along. On April 18, 2006, the dispute continued when Roger thought the teenaged Emmanuel was disrespecting him and Emmanuel accused Roger of paying "some people to jump [him]" because Roger thought Emmanuel's brother had broken into his apartment. App. 477, ll. 5-20; App. 171, ll. 5-6.

Demetria testified that her mother, Cassandra Ward, was over at her apartment that afternoon. She remembered that Roger and Emmanuel "said some little words" to each other and that Roger eventually came out of his apartment with a baseball bat and was swinging it in Emmanuel's direction. App. 128, ll. 1-14. Emmanuel grabbed a chair from the stoop in response. App. 129, l. 22; App. 130, ll. 1-14. Demetria said her mother got in between Emmanuel and Roger

and broke up the argument. App. 128, l. 14 – 129, l. 18. Once things settled down, everyone went back inside their respective apartments. App. 129, ll. 22-25; App. 130, ll. 15-19.

Demetria testified that later that afternoon, the decedent stopped by the apartment complex after he got off of work and knocked on Roger's door to talk about the tension. Roger supposedly invited the decedent inside. App. 131, l. 3-24. Demetria claimed she did not hear any loud voices or "angry tones" while the decedent and Roger were inside talking. Eventually, the decedent, Roger, his wife, and Petitioner came outside. App. 134, l. 15 – 135, l. 11. Demetria claimed that Roger "started acting totally different" when the group came outside. She said he was "huffing and carrying on" and grabbed his baseball bat and struck the decedent with the bat. App. 135, l. 24 – 136, l. 4.

Demetria testified that after Roger hit the decedent, the decedent started "going towards" Roger, but her mother and Roger's wife got in between the men. She claimed it was then that Petitioner "pulled the gun" and shot the decedent. App. 139, ll. 4-23. Demetria said that she hurriedly got her children inside the house and that when she came back outside she saw the decedent on the ground and Petitioner "running down the street shooting the gun in the air." App. 140, l. 24 – 141, l. 8.

On cross-examination, Demetria admitted that the decedent "used to have a temper." App. 146, ll. 12-13. She also acknowledged she told the police in her written statement that before the decedent knocked on Roger's door he said he was going to "resolve this today." However, she denied ever telling the police that fact. App. 146, l. 23 – 150, l. 18.

Demetria's mother, Cassandra Ward, also testified about the dispute between Roger Johnson and Emmanuel. Ward remembered that when Roger came outside with a baseball bat, Emmanuel grabbed a chair in response. Ward got in between the two and told Roger, "This is a child and I'm

not going to allow you to hit this child.” App. 166, l. 2 – 167, l. 11. After Ward separated the two, they each went inside their own apartments.

Ward testified that some time later, the decedent came over and “went straight to Mr. [Roger] Johnson’s house.” She claimed the decedent “was very calm” and “wasn’t upset or nothing.” App. 167, l. 16 – 168, l. 25. Roger let the decedent in the house, but Ward did not hear any conversation while they were inside. App. 169, ll. 1-17. Eventually, the decedent, Roger, and his wife came outside. Ward remembered Roger’s wife asking the decedent, “How would you feel if somebody had broken in your house and you’re afraid for yourself?” This was regarding the accusation that Emmanuel’s brother had broken into their apartment. App. 169, l. 18 – 170, l. 11.

Ward testified that while they were outside, Petitioner came over. She claimed that when Petitioner arrived, Roger’s attitude changed. She explained that Roger got upset when the decedent told him “he doesn’t want to hear that because what happened with my other nephew [Emmanuel’s brother] shouldn’t be held against Emmanuel.” App. 171, ll. 13-23. Ward claimed that Roger then hit the decedent with the baseball bat and Petitioner shot him. App. 172, ll. 8-18; App. 176, ll. 9-16. She said the decedent ran after he was shot in the shoulder and Petitioner ran after him shooting his gun. Ward maintained that when her son fell to the ground, “I watched him [Petitioner] stand over my child and he shot him in his head.” App. 179, l. 5 – 181, l. 20. She also claimed that after Petitioner shot the decedent, “he ran down the street, shooting up in to the air.” App. 182, ll. 19-22.

Detective Keith Elmore testified Petitioner was arrested in Charleston as the result of an anonymous tip on January 17, 2007. App. 253, l. 4 – 254, l. 13. Both parties stipulated to this fact. App. 411, ll. 13-16.

Dr. Kim Collins, the pathologist who performed the autopsy, testified that the decedent had a wound on his arm consistent with him being struck by a baseball bat. App. 387, ll. 9-22; App.

398, l. 22 – 399, l. 23. The decedent also had gunshot wounds to the shoulder and head. The wound to the head was fatal. App. 381, l. 12 – 382, l. 4.

Petitioner called Emmanuel Johnson to testify during his case in chief. Emmanuel admitted that he was not very respectful to Roger Johnson that afternoon and that the two had argued. Later on, the decedent arrived at the apartment complex. Emmanuel testified that when he heard the decedent outside, he came outside to see what was going on. He remembered the decedent knocked on Roger Johnson's door and Roger invited him inside. Eventually, the decedent, Roger, and Petitioner came out of the apartment. App. 478, l. 10 – 479, l. 13.

Once outside, Roger and the decedent continued to argue and Roger struck the decedent in the back with a baseball bat. App. 467, l. 4 – 468, l. 11; App. 469, l. 18 – 470, l. 19. Emmanuel testified that after he was struck, the decedent turned around with his two fists raised and told Petitioner, "If I have to come back over here it is not going to be pretty." App. 470, l. 20 – 471, l. 3; App. 479, ll. 21-25; App. 480, ll. 4-7. He claimed that this is when Petitioner started shooting. App. 470, l. 20 – 471, l. 6. According to Emmanuel, the decedent was shot in the shoulder and then started running. He maintained that Petitioner ran after the decedent and continued to shoot until the decedent fell to the ground. The decedent was ultimately shot in the head, but Emmanuel did not know whether he was struck in the head while he was running or while he was on the ground. App. 471, l. 9 – 473, l. 9.

William Greene, who lived a few apartments down, likewise testified that it was the decedent that day who was making threats, not Petitioner. He said it was the decedent who "got this all heated up." App. 497, ll. 8-13. Greene explained that the decedent was upset, talking loud, and waving his hands around. App. 498, l. 13 – 499, l. 9. He remembered that as he and Petitioner were walking away from the verbal dispute, a physical altercation began. Roger swung a baseball bat at

the decedent and Emmanuel began swinging “a little small kiddie rocking chair.” This is when Petitioner “went into the middle of it” because “[h]is father was being attacked by three people, one with a chair.” App. 499, l. 10 – 500, l. 19; App. 502, ll. 14-16.

Greene testified that after Petitioner separated the group from his father, “he went to walk away” when the decedent said to him, “If you ever put your hands on him again, I’m going to light this bitch up. In fact, I’d like to light this bitch up right now.” Greene said, “That’s when it got out of hand.” App. 502, l. 18 – 503, l. 9. He explained that the decedent repeated the threat a second time and while doing so it looked “[l]ike he was reaching for something.” After he saw the decedent reach for something, Greene “hit the ground.” He testified he “hit the ground” because “if somebody had said that to you, that means that somebody was getting ready to do something, some damage, to someone. I went for cover.” App. 504, ll. 3-19. Greene did not see Petitioner with a gun and did not see the shooting. He maintained that Petitioner never made any threats to the decedent. App. 504, l. 20 – 505, l. 8.

Roger Johnson, Petitioner’s father, testified that about ten minutes after the initial dispute he had with Emmanuel, the decedent came to his door and he invited him inside. He explained that the decedent was “acting calm” at first, but eventually “[h]e just went off.” App. 544, l. 15 – 546, l. 7. The decedent was in Roger’s face and was “acting crazy.” The two argued for about ten to fifteen minutes until Petitioner came home and told the decedent “to get out of his mom and daddy’s house, that he can’t be cursing his mom and daddy in their home.” App. 546, l. 16 – 548, l. 1. Roger testified that the decedent continued to yell at him and told Roger “he would close my house down.” App. 548, ll. 2-9. Roger took this as a threat. App. 549, ll. 5-12. The decedent also told Roger “he would light my ass up.” App. 55, ll. 2-3. Roger said he took this to mean “that he was definitely going to do some damage to me, that he was going to do some physical harm.” App. 550, ll. 6-10.

After the decedent said this, Petitioner “pulled him out of the house and told him that he can’t be disrespecting his daddy and mom in their house, that he would have to get out.” App. 550, ll. 11-1.

Roger remembered that when he, the decedent, and Petitioner got outside, Ward, Demetria, and Emmanuel were all standing there. The decedent continued to make threats towards Petitioner and his father and said “he would lay our ass down, that he would light our ass up . . .” App. 551, ll. 7-14. While the decedent was making these threats, Emmanuel grabbed the “little rocking chair.” App. 553, ll. 4-14. Roger admitted that he had a baseball bat for protection. 554, ll. 19-23. Eventually, Petitioner “push[ed]” his mother into their apartment to protect her. Roger said it was then when the decedent, Demetria, Emmanuel, and Ward “started coming towards [him]” and he swung his bat. App. 556, ll. 14-25. Roger recalled that as the group was coming towards him, he was trying to get into his apartment, but Petitioner “was coming out the door when [he] was trying to get in.” Roger eventually made it into his apartment and fell on the floor. He heard gunshots, but did not see the shooting. App. 556, l. 23 – 559, l. 13.

Petitioner testified that he was at his father’s apartment where he lived when his father got into an argument with Emmanuel. After the argument ended, Petitioner went to hang out with some guys in the parking lot in the middle of the apartment complex. While he was “chatting,” William Greene opened up the back door of his apartment and called Petitioner over. App. 600, l. 22 – 601, l. 23. Petitioner said that when he got to Greene’s apartment, Greene said he was on the telephone with the decedent. App. 601, l. 24 – 602, l. 2. Greene put the telephone on speakerphone and Petitioner heard the decedent say he was on his way to Roger Johnson’s apartment “to act fucking stupid.” App. 602, ll. 8-22; App. 606, ll. 2-7. Petitioner testified that the decedent was “very irate about what was going on” with Emmanuel and that he felt his father was in danger. App. 602, ll. 10-11; App. 606, ll. 10-13.

When Petitioner got to his father's house, the decedent and his father were standing in his father's living room. Petitioner remembered that the decedent was in his father's face and "was commenting about how he would [light] the motherfucker up, how he would shut our household down." App. 608, l. 15 – 609, l. 18. After the decedent continued to make threats, Petitioner told him, "I can't have you disrespecting my mother and father" and pulled him out of the apartment by the arm. App. 610, l. 24 – 612, l. 8.

Petitioner testified that when they got outside, Demetria, her mother, and Emmanuel were all "carrying on" and Emmanuel picked up a wooden chair. The decedent continued to make threats. Petitioner remembered that his mother came outside and he went over and told her to go inside the apartment because he did not know what the decedent was capable of doing. App. 612, l. 9 – 613, l. 24. As he was "push[ing]" his mother in the house, his father was also trying to get inside the apartment. This is when Petitioner saw the decedent reach under his shirt. Petitioner thought the decedent was reaching for a weapon because of all the threats he had made. He testified that once he saw the decedent reach under his shirt, he pulled out a gun and started shooting. He continued to shoot until he saw the decedent run between two cars. Petitioner denied ever shooting the decedent while he was on the ground. App. 614, l. 10 – 615, l. 20.

PCR Hearing

During the PCR hearing, Appellant testified that he discussed requesting a voluntary manslaughter instruction with trial counsel during his trial. He said trial counsel told him he thought the judge would charge voluntary manslaughter if they requested the charge, but that trial counsel did not want to request it because their "number one strategy" was self-defense. App. 879, l. 22 – 881, l. 1. However, Appellant testified that he would have preferred a voluntary manslaughter

conviction instead of a murder conviction, but the jury did not have the option of convicting him of voluntary manslaughter because trial counsel refused to request the charge. App. 881, ll. 4-14.

Andrew Grimes, Petitioner's trial counsel, testified that he debated requesting a voluntary manslaughter instruction, but ultimately decided against it. He said he believed the judge would have charged the lesser offense because there was sufficient evidence to support the charge. App. 883, ll. 16-23. He also admitted that he thought if the court charged voluntary manslaughter then Petitioner likely would have been convicted of the lesser charge instead of murder and "probably" sentenced to the maximum thirty year sentence. App. 883, l. 20 – 884, l. 5. Grimes explained that he knew Petitioner did not want to serve a "substantial period of time" and he "believed [a] charge of voluntary manslaughter would guarantee that." App. 884, ll. 6-9.

Moreover, Grimes testified that he did not think the state could prove malice aforethought, which was required for a murder conviction, and that "there were some issues with the self-defense." As a result, Grimes said he thought the jury would compromise by finding Petitioner guilty of voluntary manslaughter if he requested the instruction, therefore, he decided to go with an "all or nothing" approach. App. 890, l. 10 – 891, l. 4.

Order of Dismissal

The PCR court found trial counsel "articulated a valid strategic basis for failing to request a jury instruction on the lesser included offense" of voluntary manslaughter. App. 914. The court noted trial counsel's testimony that "he felt the State would have trouble proving the malice element of murder" and therefore he thought the best strategy was to go "all or nothing" and not give the jury the option of voluntary manslaughter. App. 915. The court found the strategy employed by trial counsel was valid and did not result in any failure by counsel to meet an objectionably reasonable standard of performance. App. 916.

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on the lesser included offense of voluntary manslaughter where there was evidence Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation. Petitioner was prejudiced because trial counsel's failure to request the lesser charge deprived him of the chance to avoid being convicted of murder. See Abney v. State, 408 S.C. 41, 56, 757 S.E.2d 544, 552 (Ct. App. 2014) (Few, C.J., dissenting).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"The trial court is required to charge a jury on a lesser included offense "if there is *any evidence* from which it could be inferred the lesser, rather than the greater, offense was committed." Abney, 408 S.C. at 45-46, 757 S.E.2d at 546 (citing State v. Gourdine, 322 S.C. 396, 398, 472

S.E.2d 241, 241 (1996)) (internal quotation marks omitted) (emphasis added). “However, the trial court should refuse to charge on a lesser included offense when there is no evidence that the defendant committed the lesser rather than the greater offense.” Abney, 408 S.C. at 46, 757 S.E.2d at 546 (citing State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994)).

“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.” State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009) (citing Pittman, 373 S.C. at 572, 647 S.E.2d at 168) (emphasis added). In determining whether the evidence requires a charge of voluntary manslaughter, the trial court views the facts in a light most favorable to the defendant. State v. Hernandez, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010) (citing State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)).

“Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” Wharton, 381 S.C. at 214, 672 S.E.2d at 788 (citing State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007)). “The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, 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.” Wharton, 381 S.C. at 214, 672 S.E.2d at 788 (citing Pittman, 373 S.C. at 572, 647 S.E.2d at 167).

“Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000) (citing State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951)). Rather, when death is caused by the use of a deadly weapon, the opprobrious words must be

accompanied by the appearance of an assault—by some overt, threatening act—which could have produced the heat of passion. Locklair, 341 S.C. at 360, 535 S.E.2d at 424 (citing State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993)).

“This Court has held in several cases that it is proper to charge voluntary manslaughter where the defendant and the victim had been in a heated argument prior to the murder.” Locklair, 341 S.C. at 360, 535 S.E.2d at 424 (citing State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998) (holding that evidence tended to show defendant acted in sudden heat of passion where defendant was in a heated argument with victim and feared for his life because victim threatened him), State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993) (holding that a voluntary manslaughter charge was necessary where the defendant and the victim were in a heated argument and victim was about to initiate a physical encounter when shooting occurred), and State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983) (holding voluntary manslaughter charge was proper where a witness testified that defendant and victim had been fighting)).

Trial counsel was ineffective for failing to request a jury instruction on voluntary manslaughter where there was evidence Petitioner and the decedent had engaged in a heated argument immediately before the shooting and Petitioner testified the decedent had continually threatened him and his father and appeared to be reaching under his shirt for a weapon as he was coming towards Petitioner. App. 613, l. 3 – 614, l. 25; See Lowry, 315 S.C. at 398-400, 434 S.E.2d at 273-274. Moreover, Emmanuel Johnson testified that the decedent was coming towards Petitioner with his two fists raised and said, “If I have to come back over here it is not going to be pretty” immediately before Petitioner shot him. App. 470, l. 20 – 471, l. 3; App. 479, ll. 21-25; App. 480, ll. 4-7. William Greene also testified that the decedent had made threats towards Petitioner and was reaching for something when Petitioner fired. App. 504, l. 20 – 505, l. 8.

Based on this evidence, trial counsel's failure to request a charge on the lesser included offense of voluntary manslaughter constituted deficient performance. Additionally, his "all or nothing" strategy was unreasonable because it deprived Petitioner of the chance to avoid being convicted of murder. See Abney v. State, 408 S.C. 41, 56, 757 S.E.2d 544, 552 (Ct. App. 2014) (Few, C.J., dissenting). With only self-defense and murder on the table, the scales were tipped greatly in favor of the jury convicting Petitioner of murder. However, if trial counsel would have requested a voluntary manslaughter instruction, there is a high probability the jury would have convicted Petitioner of voluntary manslaughter. Therefore, trial counsel's strategy in this case was unreasonable.

Petitioner was prejudiced by trial counsel's deficient performance because there is a reasonable probability Petitioner would have been convicted of voluntary manslaughter if trial counsel had requested the charge. See Abney, 408 S.C. at 57, 757 S.E.2d at 552 (citing McHam v. State, 404 S.C. 465, 474-475, 746 S.E.2d 41, 46 (Few, C.J., dissenting) ("The standard for prejudice is not whether Abney *would* have been convicted of the lesser offense, but whether there is a reasonable probability he would.")). Even though the jury was not convinced Petitioner had acted in self-defense, the jury could have discerned, consistent with the evidence, that there was sufficient legal provocation and heat of passion to find Petitioner guilty of voluntary manslaughter. See Lowry, 315 S.C. at 400, 434 S.E.2d at 274 (citing State v. Gilliam, 296 S.C. 395, 397, 373 S.E.2d 596, 597 (1988)). The chance of the jury acquitting Petitioner based on self-defense was miniscule, but there is a high probability the jury would have convicted Petitioner of voluntary manslaughter if trial counsel had requested the charge.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional

errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to call Petitioner's mother, Virginia Johnson, as a witness at trial where Johnson witnessed the events leading up to the shooting and her testimony supported Petitioner's defense of self-defense and would have further supported a voluntary manslaughter jury instruction.

PCR Hearing

Petitioner testified at the PCR hearing that he thought trial counsel should have called his mother as a witness to testify at his trial because his mother was home during the altercation and could have been a fact witness about what occurred between the decedent, Petitioner, and his father. He thought her testimony would have been helpful to his defense. App. 876, ll. 10-24.

Andrew Grimes, Petitioner's trial counsel, testified that he met with Petitioner's mother before trial, but chose not to call her as a witness because "she was upstairs when it happened and didn't see the incident." Grimes explained further, "I think she saw some preliminary stuff to the incident when Mr. Grant [the decedent] came over and was making a scene. And given that we had his father and Mr. Green as witnesses I wasn't sure how much his mother would add to the facts of the case." App. 884, l. 20 – 885, l. 11.

Petitioner's mother, Virginia Johnson, testified at the PCR hearing that her family and the decedent's family were neighbors and had a long standing dispute. She said the decedent's family let their pit bulls run loose and would play loud music. She remembered the dispute escalated when Emmanuel began disrespecting her husband. She said on the afternoon of April 18, 2006, Emmanuel kept "talking real nasty to [her husband]," but this argument broke up and everyone went inside. App. 894, ll. 1-24.

Mrs. Johnson said later that evening, she was upstairs when she heard her husband, Roger Johnson, arguing. When she came downstairs, the decedent “was telling [her] husband what he was going to do to him. He was arguing with him and he was all in his face . . .” Mrs. Johnson explained that the decedent was talking very loud and said “[h]e was going to mess him [Roger Johnson] up.” App. 892, l. 12 – 893, l. 12. The decedent was also “saying he was going to come back and he was telling him [Roger Johnson] when he come back he was going to hurt him.” App. 893, ll. 22-25.

Mrs. Johnson recalled that her son, Petitioner, eventually came over and “was trying to calm things down,” but the decedent “just kept saying they were going to get us, they were going to get us.” App. 895, ll. 8-24. Johnson said she interpreted this as a physical threat and was scared. App. 895, l. 25 – 896, l. 1. She testified that it was then that the decedent began reaching for something. She said, “*He had something* but nobody could know what he had. *He had something.*” App. 896, ll. 2-5 (emphasis added). She remembered hearing gunshots, but did not see who fired the shots because she ran. App. 896, ll. 6-14.

Order of Dismissal

The PCR court found “[t]rial “counsel provided credible testimony that he discussed with [Petitioner] calling [his] mother, Virginia Johnson, as a witness at trial.” App. 913. The court further noted trial counsel’s testimony that “he ultimately decided not to call Mrs. Johnson because she was not present when the shooting took place and he did not think her testimony would add to the fact of the case or [Petitioner’s] testimony.” App. 913.

The court also found that after listening to Mrs. Johnson’s testimony during the PCR hearing, “her testimony would not have added anything to [Petitioner’s] version of the facts,” especially because she “did not witness the final interaction between [Petitioner] and the victim.”

App. 914. Moreover, the court found that Petitioner suffered no prejudice from trial counsel's failure to call Mrs. Johnson as a witness because Petitioner took the stand to testify to his version of events and "any testimony from Mrs. Johnson would likely have been cumulative to [Petitioner's] trial testimony." App. 914.

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to call Petitioner's mother, Virginia Johnson, as a witness at trial where Johnson witnessed the events leading up to the shooting. Petitioner was prejudiced because Johnson's testimony supported Petitioner's defense of self-defense and would have further supported a voluntary manslaughter jury instruction.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

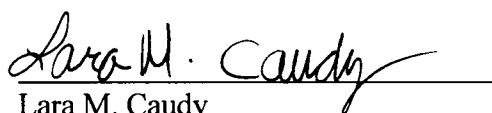
Trial counsel was ineffective for failing to call Virginia Johnson as a witness at Petitioner's trial. Counsel's belief that Mrs. Johnson's testimony would not "add to the facts of the case" was unreasonable. App. 885, ll. 7-11. Johnson's testimony would have corroborated Petitioner's testimony and his father's testimony that the men were engaged in a heated argument and that the decedent was making threats towards both Roger Johnson and Petitioner. Her testimony would have also corroborated Petitioner and Greene's testimony that the decedent was reaching for something underneath his clothing before he was shot.

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because there is a reasonable probability that Virginia Johnson's testimony would have affected the outcome of Petitioner's trial because it supported his defense of self-defense. Her testimony would have also supported the giving of a voluntary manslaughter instruction if counsel had requested one.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR court and grant him a new trial based upon the ineffective assistance of trial counsel in failing to request a jury instruction on voluntary manslaughter and failing to call Virginia Johnson to testify as a witness at trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Deadra L. Jefferson, Circuit Court Judge

ROGER RAYNARD PARKER,

PETITIONER,

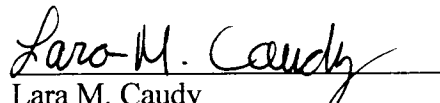
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

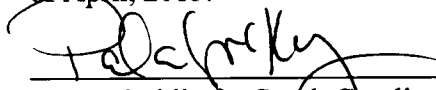
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R. Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of April, 2015.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of April, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.