STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO WILLIAMSBURG COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

2012-CP-45-0172
Appellate Case No. 2013-002647

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S.C. Supreme Court

Javon Rivers.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Is the PCR Court's finding—that Petitioner was unable to meet his burden and show that Counsel was ineffective in failing to assert immunity from prosecution under the Protection of Persons and Property Act—supported by any probative evidence?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. The Petitioner was indicted at the December 2008 term of the Williamsburg County Grand Jury for Murder and Possession of a Weapon during the Commission of a Violent Crime (2008-GS-45-0275). Petitioner was represented by LeGrand Carraway, Esquire. Petitioner proceeded to a jury trial before the Honorable George C. James, Jr., where he was convicted as indicted. On March 12, 2009, Judge James sentenced Petitioner to thirty years imprisonment for Murder and a consecutive five years imprisonment for the Possession of a Weapon during the Commission of a Violent Crime.

Petitioner appealed his convictions, and following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Rivers, 2012-UP-199 (Ct. App. filed March 21, 2012). The Remittitur was sent on April 6, 2012.

Petitioner filed an application for PCR on March 27, 2012 (2010-CP-45-0172). The State made its Return on or about September 10, 2012, and the matter was scheduled for an evidentiary hearing before the Honorable R. Knox McMahon on October 3, 2013. Petitioner was present and represented by Charles T. Brooks, Esquire. In a written order signed November 26, 2013, Judge McMahon denied and dismissed Petitioner's application with prejudice. Petitioner appealed Judge McMahon's order of dismissal.

This Return to the Petition of Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Appellate courts give great deference to the PCR Court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

The PCR Court's finding—that Petitioner was unable to meet his burden and show that Counsel was ineffective in failing to assert immunity from prosecution under the Protection of Persons and Property Act—is supported by probative evidence.

Petitioner alleges that Counsel was ineffective in failing to assert immunity pursuant to the Protection of Persons and Property Act, S.C. Code § 16-11-440(C) (Section 440(C)) (hereinafter "Act"). Specifically, Petitioner argues that Counsel should have motioned the court for a pretrial hearing to determine whether Petitioner qualified for immunity under the Act. Respondent respectfully submits that Petitioner's argument has been adequately addressed in the PCR Court's Order of Dismissal, which is supported by ample probative evidence in the record. Perhaps most critically, the PCR Court properly concluded that Petitioner failed to establish, by even a preponderance of the evidence, that he was in fact entitled to immunity under Section 440(C). See App. p. 417.

Petitioner argues that the PCR Court erred in finding that the pre-trial hearing procedure was not clearly established at the time of Petitioner's trial in March 2009. In support of his argument Petitioner cites to State v. Dickey, 394 S.C. 491, 716 S.E.2d 91 (S.C. 2011)[1]; State v. Bolin, 381 S.C.557, 673 S.E.2d 885 (S.C. App 2009)[2]; State v. Rocuquemore, 2010 WL 10080069[3]; and State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (S.C. 2011). Petitioner argues

[1] In Dickey, defense counsel made a pre-trial motion to dismiss the charges under the Act. This Court addressed the issue of whether the Act applied retroactively. At no point in time did the Court in Dickey address the procedures of how to assert immunity under the Act. Notably, this case was no decided until September 2011, several years after Petitioner's trial.

[2] In Bolin, defense counsel made a motion for a directed verdict at the close of the State's case based on Section 16-1-440(C) of the South Carolina Code. At no point in time did Bolin's counsel make a motion for a pretrial hearing as asserted by Petitioner. Bolin, 381 S.C. at 886, 673 S.E.2d at 550 (2009).

[3] Initially, Respondent submits Rocuquemore is an unpublished opinion and has no precedential value. Regardless, the court in Rocuquemore only addresses the issue of whether the Act applied retroactively.

that these cases were decided prior to Duncan and therefore the common practice to request a pretrial hearing would have been established prior to Duncan.

Despite Petitioner's assertion to the contrary, such a procedure was not clearly established. In State v. Duncan, 392 S.C. 404, 409, 709 S.E.2d 662, 664 (2011), decided more than two years after Applicant was sentenced, the South Carolina Supreme Court found that:

> Whether immunity under the Act should be determined *prior to trial* is an issue of first impression in this state. Further, the Act does not explicitly provide a procedure for determining immunity.

[Emphasis supplied.] In the decision, for the first time, the Court found that the legislature intended through the Act to shield a defendant from trial and not simply to create an affirmative defense. Therefore, at the time of Petitioner's trial, a demand for a pre-trial hearing was not within the common standard of practice. As a result, the PCR Court properly found Petitioner's counsel could not be held to be deficient for failing to request a pretrial hearing. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial) (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)).

Moreover, even if Counsel had requested a pre-trial hearing, Petitioner has failed to show the motion would have been successful. State v. Duncan also announced the proper standard of proof at a pre-trial hearing: "when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." 392 S.C. at 411, 709 S.E.2d 665. The only potentially applicable portion of the Act in Applicant's case would be S.C. Code §16-11-440(C). The primary difference between §16-11-440(C) and self-defense is that §16-11-440(C) does away with the duty to retreat, allowing a person attacked in a place where he has a right to be (other

than his dwelling, residence, occupied vehicle, or place of business) to "meet force with force." Assuming Petitioner was in a place where he had a right to be (other than his dwelling, residence, occupied vehicle or place of business) and not acting unlawfully, Section 440(C) may very well have eliminated his obligation to retreat prior to using deadly force in self-defense. S.C. Code§ 16-11-440(C). However, for Petitioner to have actually been entitled to immunity, the underlying circumstances of the case must still have supported a finding of self-defense[4] or defense of others.[5] See State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) (in determining a defendant's entitlement to Section 440(C)'s immunity, "a valid case of self-defense must exist, and the trial court must ... consider ... all elements of self-defense, save the duty to retreat"). Even if Petitioner had no duty to retreat, the PCR Court found substantial evidence in the record tending to disprove the remaining elements of self-defense. Petitioner's claim of fear of imminent death or great bodily injury was refuted by evidence that the victim was not armed with a knife. (App. p. 59 l. 12—p. 60 line 9; p. 96, l. 7-21). The reasonableness of Petitioner's alleged fear was refuted by evidence that the "other" Petitioner claimed he was defending was not in fear for her life or even near the victim at the time of the shooting. (App. p. 146, l. 21 – p. 147 l. 1; p. 148, l. 17-21; p. 149, l. 1-10). Additionally, there was evidence refuting Petitioner's assertion that he was without fault in bringing on the difficulty, as several

[4] A person is justified in using deadly force in self-defense when: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Davis,282 S.C. 45, 46, 317 S.E.2d 425, 453 (1984).

[5] Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Starnes, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2000).

witnesses testified that the victim was leaving the area, (App. p. 150, l. 2-6; p. 114, l. 14-17) and Erica was not near the victim. (App. p. 149, l. 1-10).

The substantial direct and circumstantial evidence refuting Petitioner's claim of self-defense provides ample support for the PCR Court's findings.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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May 8, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County
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JAVON RIVERS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

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

Javon Rivers, #332402
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

This 8th day of May, 2015

Caroline Collins

CAROLINE COLLINS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

May 8, 2015

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

RE: **Javon Rivers v. State of South Carolina**
Lower Court Case No.: 2012-CP-45-0172
Appellate Case No.: 2013-002647

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-referenced case. By copy of this letter we are serving Petitioner.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/cc
Enclosures

cc: Javon Rivers, #332402 (2 copies)