

The State of South Carolina
In The Supreme Court

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MAY 20 2015

SC SUPREME COURT

Appeal from Williamsburg County
Court of Common Pleas

R. Knox McMahon Circuit Court Judge

Case# 2013-002647

Javon Rivers Sr.

Petitioner

v

State of South Carolina

Respondent

Pro-se

Reply for Writ of Certiorari

Argument

I. The PCR Court's findings are not supported by probative evidence gleaned from the PCR record.

The trial counsel in the Case candidly admitted at the PCR evidentiary hearing that he did not know the Protection of Person's and Property Act existed in South Carolina law. This is a factual point established in the record of this case. Trial counsel did not know nor did he make himself aware of applicable laws available to construct a complete defense for his client against the indictment of murder, specifically the protection of person's and property act. The trial counsel is clearly deficient under the first prong of Strickland, because Strickland requires trial counsel to perform under the professional norms of the standard legal profession and the norms of the standard legal professions dictates that trial counsel must be abreast of the current body of law which encompasses the offenses the client is facing. Trial counsel failed in this regard. Trial counsel Carraway did not research and preparing appropriately under Strickland's standard to discover the Protection of Person's and Property Act and to argue it's protection on Rivers' behalf. Over and over and over again trial counsel Carraway testified Rivers stood his ground and he was justified in doing so. (See Appx Pg. 402 line 2. ("His (Rivers) stand your ground was when he came back"). also Appx pg 404 line 24- pg. 405 line 5. ("I'm going to tell you that shows what kind of character he has. A guy swung at him swing with a knife and all he did was step out of the way, or whatever, he didn't do anything. But as the guy got closer and really was about to really, you know, get right up on him or whatever. That's the only time he responded. He didn't respond until then.")) Although Carraway passionately decied that Rivers' actions were not criminal

at all by him taking the life of Derial, Counsel Carraway failed to advance the full spectrum of legal defenses available in South Carolina's Jurisprudence to anchor his impassioned oratory. The Counsel Carraway failed to advance the Protection of Person's and Property Act because he did not know this Act, and the accompanying body of law in line with the Act, existed in South Carolina. The trial counsel is ineffective. (*Strickland v. Washington*, 466 U.S. 668; 101 S.Ct. 2052).

The Respondent's return, pg 7 paragraph 1, misstates the petitioner's allegation. The petitioner alleges that trial counsel Carraway is 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. This is the correct recitation of the Petitioner's allegation. Interestingly, the Respondent does not address counsel Carraway's concession that he had absolutely no idea South Carolina had a "Stand your ground" law enacted by the Protection of Person's and Property Act. This honorable court should take notice of Respondent's silence on this factual point.

For clarity purpose, the crux of petitioner's allegation is that at all relevant times of petitioner's criminal proceedings the trial counsel Carraway had the ability, through a motion in limine, to request a review of the applicability of the protection of person's and property Act to the facts of Rivers Case. The established practice of a motion in limine is to address the issue the party is concerned with to the trial judge before commencing of the trial in order to obtain a preliminary ruling on the matter from the trial court. (See Rule 104.

S.C.R.E. State v. Cheatham 349 S.C. 101. 561 S.E.2d 618 (2002) (discussing Cheatham's pretrial motion in limine requesting veil v. Biggers review of identification concerns.); State v. Smith. 337. S.C. 27. 522 S.E. 2d 598. (discussing Smith's pretrial motion in limine requesting the trial court to rule his prior domestic violence convictions inadmissible.) State v. Hill 331 S.C. 94. 501 S.E.2d 122 (1998) (discussing Hill's pretrial motion in limine requesting the trial court to clear the courtroom and the hallways of uniformed officers because their presence has prejudicial effect on the jury and the trial.); State v. Floyd 295 S.C. 518: 369 S.E.2d 842. (discussing Floyd's motion in limine requesting the trial court limit the scope of the prosecutor's cross-examination of two of Floyd's witnesses); State v. Miller. 359 S.C. 589. 598 S.E.2d 297 (discussing Miller's motion in limine requesting the trial court conduct a suppression hearing pursuant to State v. Moore. 343 S.C. 282. 540 S.E.2d 445. (2000) based on the unduly suggestive show up identification of his co-defendant.); State v. Moses. 390 S.C. 502. 702 S.E.2d 395 (discussing Moses' motion in limine requesting trial court review Brady v. Maryland violations, the voluntariness of Moses' statement, and the irregularity of his grand jury proceedings.)

The petitioner asserts the above Rule 104 and the aforementioned case laws as support that counsel Carraway had the method to request a review of the Protection of Persons and Property Act. via a motion in limine, had Carraway made him self knowledgeable with §16-11-410. et. al. The above mentioned case laws illustrates to this court that a motion in limine is used in this state for various issues by South Carolinian attorneys to the trial judge before commencing of the trial in order to obtain a preliminary ruling on the matter from the trial court. The petitioner referenced State v. Dickey. 394 S.C. 491. 716 S.E.2d 41 (S.C. 2010) and state v. Rowenmore. 2010 WL 10040069. in his

initial Petition for writ of Certiorari to demonstrate that Dickey's attorney and Zocquevone's attorney requested a review of their respective clients' case under the Protection of Person's and Property Act via a pre-trial motion in limine.

The Respondents is conflating what a South Carolina trial lawyer must do to initiate a request for a pre-trial evidentiary review of the applicability of §16-11-410. et al. with how and when the defendant's triggering request must be determined by the trial court. Nothing within the analytical framework of *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (S.C. 2011) prevented a South Carolina lawyer from requesting a review of the applicability of the Protection of Person's and Property Act through a motion in limine or any other mechanism available in the South Carolina Rules of Court. The *Duncan* ruling simply does not state and such restraint nor created any new method to request a review separate and apart from existing South Carolina Rules of Court mechanisms. The *Duncan* Court answered two specific questions on issue of first impression: (1) immunity under Protection of Person's and Property Act was to be determined pre-trial; and (2) defendant was required to prove entitlement to immunity by preponderance of the evidence standard. The Court specifically stated in *Duncan*, "whether immunity under the Act should be determined prior to trial is an issue of first impression in this state." (*State v. Duncan*, 709 S.E.2d 662). The petitioner is not challenging the pre-trial procedure of *Duncan*, the pre-trial procedure articulated the new mandate that the immunity finding must be determined pre-trial by the trial judge and the new mandate that said determination must be by the preponderance of the evidence standard. The *Duncan* ruling did not establish a new method to request a review separate and apart from the methods a South Carolina lawyer routinely uses to obtain a ruling from the trial judge on an issue concerning said lawyer.

The Petitioner asserts, and the South Carolina body of criminal caselaw supports, that any attorney in this state had the available means to request but not in line or otherwise to a trial court for the review of the applicability of the Protection of Person's and Property Act to the facts of their clients case prior to Duncan. The request for a review at the time of Petitioner's trial is the core of Petitioner's assertion whether the request is resolved by the trial judge prior to trial, during trial, or after trial is of no consequence... as long as the trial judge addressed the request. The trial judge could have chose to address the applicability of the protection of persons and property Act to Rivers' case facts prior to trial, during trial or after trial because Duncan was not ruled upon at the time of Rivers' trial, and therefore the trial court had no procedure on when to determine immunity and by what standard to evaluate the evidence in reaching said determination. The trial judge did not pass any determination at any time concerning the applicability of § 16-11-410 et. al. to Petitioner's case because counsel Caraway failed to request a review because he had no idea South Carolina enacted a "Stand your Ground" law in enacting the Protection of Persons and Property Act. This is ineffective assistance of counsel under Strickland's prongs.

The PCR Court's determination that Applicant did not meet his burden of proving the deficiency 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 is controlled by errors of law, therefore the PCR court's denial must be reversed. (See. Simuel v. State, 701 S.5.2d 738, 739 (2010)).

II


The portion of the Respondent's Return on Page 9 which states "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 (Appx. pg 59 line 12 - pg 60 line 1; pg 96. line 7-21.)", is a falsity and it mischaracterizes what the record reflects truly. The appx pg 59 line 12 - pg 60 line 9 is the state prosecutor Barr questioning witness Ms. Morant specifically on what Morant observed during the "initial confrontation" between Mr Rivers and Derial. (see. Appx pg 96 line 7-8.). The Respondent is using smoke screens and mirrors to shroud this court's appreciation of the facts of this case is assessing the prejudice incurred upon petitioner through ineffective assistance of counsel. The Respondent knows, and the record is clear and corroborated that Derial brandished a knife weapon during the second confrontation he brought to Petitioner Rivers, and it is during this second confrontation that Rivers' and Ericas' imminent death or great bodily harm were jeopardized by Derial slashing and stabbing with the knife. The Petitioner did not act at all during the first confrontation. The Petitioner responded with lethal force during the second confrontation to and to defend Ericas.

The Petitioner did not testify at trial in his defense. Although the petitioner did not testify, the evidence developed during the trial moved the trial court to rule that a "self-defense" and a "defense of others" jury instructions were legally mandated to be charged to the jury deciding Petitioner's case. The one undeniable historical procedural event of this case is that Petitioner Rivers did in fact receive a self-defense jury instruction and a defense of others jury instruction. Every legal analysis of this case's deficiencies and prejudice evaluation must take into consideration this

historical fact while making final determinations of applicable laws and legal principles to this case. The Respondent appears to discard this historical fact in the arguments it presses in its Return. And all of the Respondent's argument that "for Petitioner to have actually been entitled to immunity, the underlying circumstances of the case must still have supported a finding of self-defense or defense of others" pursuant to state v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) are dispelled because the trial court Judge George C. James determined as a matter of law that the evidence developed during the trial is substantial evidence of self-defense and defense of others such that the defenses of self-defense and defense of others must be charged to the jury as jury instructions. Petitioner Rivers has demonstrated a prima facie threshold showing that a request for a review of his case under the Protection of Person's and Property Act was warranted to have been made by counsel Carraway by motion in limine had Carraway known and appreciated the legal framework of §16-11-410, et.al. There is a reasonable probability the circuit trial Judge George C. James would have found by preponderance of the evidence standard that immunity was warranted or at least further reception of evidence and testimony is required to offer Petitioner Rivers due process in resolving the request. Additionally, Judge James ruling would have been appealable by either party and would have been pending as South Carolina's body of law has evolved on these circumstance and therefore would be ripe for appeal. (Strickland v. Washington, 416 U.S. 668, 104 S.Ct. 2052).

WHEREFORE Petitioner prays this Court REVERSE the PCR Court's denial and GRANT PCR relief in this case.

5/22/15
Date


Jason Rivers Sr. #332402
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4460 Broad River Road
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Sworn to and Subscribed before me

this 22 of May 2015


Notary Public of South Carolina

My Commission Expires April 14, 2024

The State of South Carolina

In The Supreme Court

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SC SUPREME COURT

Appeal From Williamsburg County

Court of Common Pleas

R. Knox Mc Mahon, Circuit Court Judge

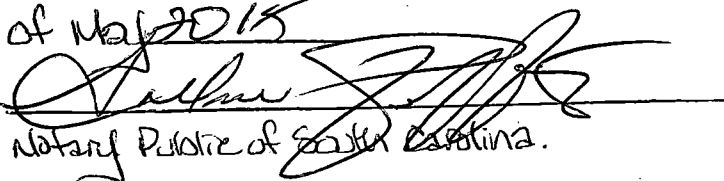
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CERTIFICATE OF SERVICE

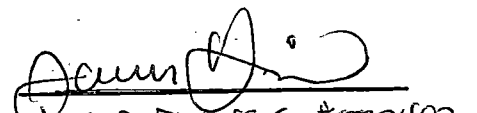
I certify that a true copy of the ~~Defendant~~ for writ of certiorari and a certificate of service have been served on Daniel Gourley; office of the Attorney General; P.O. Box 11549, Columbia, SC 29211, and the South Carolina Commission of Indigent Defense, Div. of Appellate Defense P.O. Box 11589, Columbia, SC 29211-1589.

Served to before me this 22nd

of May 2015


Notary Public of South Carolina.

My commission expires NOV 14 2024


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