ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Kershaw County

James R. Barber, III, Circuit Court Judge

Opinion No. 2015-UP-071 (S.C. Ct. App. Filed 2/11/2015)

09-CP-28-01346

MICHAEL A. HOUGH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2015-000813

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 19, 2015.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by finding there was no evidence to support the PCR court's finding that plea counsel was ineffective for failing to advise Petitioner he could receive an involuntary manslaughter jury instruction where there was evidence the decedent grabbed the gun from Petitioner and the two struggled over it before the firearm accidently discharged?

2.

Whether the Court of Appeals erred by finding there was no evidence to support the PCR court's finding that plea counsel was ineffective for advising Petitioner he simply was not entitled to an involuntary manslaughter instruction if he went to trial given his version of what occurred in this case?

STATEMENT OF THE CASE

Procedural History

A Kershaw County Grand Jury indicted Petitioner at the October 2008 term of General Sessions for the offense of murder. App. 177-178. His case was called to trial on June 22, 2009 before the Honorable J. Ernest Kinard, Jr. and a jury. App. 1. The trial was ultimately continued before the jury was sworn after a juror found Petitioner's prior record on the internet and shared it with other members of the jury. App. 66, l. 12 – 72, l. 22. On July 28, 2009, Petitioner pled guilty to the lesser included offense of voluntary manslaughter before the Honorable G. Thomas Cooper, Jr. App. 86. Assistant Solicitors John Meadors and Jason Anders appeared on behalf of the state, and Cornelius ("Neil") Riley represented Petitioner. App. 1. Petitioner was sentenced by Judge Cooper to twenty-three years imprisonment. App. 106, ll. 12-16. He did not appeal.

On November 20, 2009, Petitioner filed an application for post-conviction relief (PCR). App. 108-116. The state filed a return to this application dated March 19, 2010. App. 117-121. The matter proceeded to an evidentiary hearing on June 7, 2011 before the Honorable James R. Barber, III. App. 122. Assistant Attorney General Brian T. Petrano represented the state, and Jeremy A. Thompson represented Petitioner. App. 122. By order dated July 19, 2011, Judge Barber granted Petitioner relief finding plea counsel was ineffective for failing to advise Petitioner that if he proceeded to trial he could have received a jury instruction on the lesser included offense of involuntary manslaughter. App. 167-175.

On September 27, 2011, the state filed a petition for writ of certiorari with this Court. Petitioner filed a return to the petition for writ of certiorari on March 8, 2012. The case was ultimately transferred to the Court of Appeals pursuant to Rule 243(l), SCACR. The Court of Appeals granted certiorari by order dated November 14, 2013.

On February 18, 2014, the state filed its Brief of Petitioner and on May 21, 2014, Petitioner filed his Brief of Respondent. After oral arguments were held, the Court of Appeals reversed the PCR court's order granting Petitioner relief in an opinion dated February 11, 2015.

On February 25, 2015, Petitioner filed a petition for rehearing. The Court of Appeals denied the petition for rehearing by order dated March 19, 2015.

This petition for writ of certiorari follows.

The Aborted Trial

Petitioner's case was called to trial during the week of June 22, 2009. Before the jury was sworn, Petitioner moved *pro se* to relieve plea counsel. He told Judge Kinard that plea counsel had met with him for less than three hours total in the fourteen months counsel had represented him. Petitioner said he wanted counsel to be relieved because "he failed to represent me in a way that I feel comfortable to go on with this trial." App. 3, ll. 12-17.

Petitioner's motion was denied after plea counsel said he was prepared to go forward. App. 10, l. 16 – 11, l. 18. As noted above, the trial was ultimately continued after a juror obtained Petitioner's prior record and shared it with the other jurors. App. 66, l. 12 – 73, l. 18.

The Guilty Plea

During the guilty plea proceeding, Assistant Solicitor Anders told Judge Cooper the facts of the case as the state believed them to be. He said that on April 17, 2008, Billy Humphries drove Francis Horton to Rodney Baskins' mobile home to purchase drugs. According to Anders, when Horton was walking down the rear steps of the mobile home, Petitioner approached him and "put the gun to his face and told him to give up what he got, what he had . . . [A]t that point the victim [Horton] grabbed the gun from his head and got it down by his chest. There was a slight **struggle** that ensued after that . . . at which time the defendant [Petitioner] shot Francis Horton in the right

side of the chest." App. 92, l. 10 – 93, l. 6 (emphasis added). Horton died as a result of the gunshot wound to the chest. App. 94, ll. 11-17.

When asked by Judge Cooper if that is what happened, Petitioner said, "All I can say is . . . **there was a struggle and the gun just went off.**" App. 94, ll. 18-23 (emphasis added). When asked if the gun was in his hand, Petitioner said, "Well, I mean, both of us had it. He [Horton] had his hands over the gun and all. **He was just shaking me back and forth and the gun went off.**" App. 95, ll. 2-5 (emphasis added).

Judge Cooper found a factual basis for the plea. App. 96, ll. 2-8. During mitigation, plea counsel told the court that Horton had a plastic bag containing .27 grams of crack cocaine and a crack pipe on his person when he died. The autopsy revealed that Horton had a blood alcohol level of .061 and cocaine in his system. App. 101, ll. 5-18. Moreover, plea counsel revealed that gunshot residue was found on Horton's left palm "which confirms the fact that **there was a struggle** during the confrontation between Mr. Hough [Petitioner] and Mr. Horton." App. 101, ll. 19-25 (emphasis added).

Judge Cooper ultimately sentenced Petitioner to twenty-three years imprisonment pursuant to a negotiated plea agreement. App. 106, ll. 12-16.

PCR Hearing

During the PCR hearing, Petitioner testified that he sat in the county jail for three months before his community supervision was revoked due to his pending charge. During that three month period, plea counsel never came to see him at the jail. Petitioner was sentenced to one year imprisonment for the community supervision violation and transferred to the Department of Corrections where he was housed at Lieber Correctional Institution. App. 128, l. 12 – 129, l. 3. Petitioner said he had no contact with counsel while he was at Lieber. App. 129, ll. 11-13. He was

finally transferred back to the Kershaw County Detention Center on April 1, 2009. App. 129, ll. 4-6. Even after he was moved back to Kershaw, counsel only met with Petitioner for less than three hours total. App. 129, l. 23 – 131, l. 8.

Petitioner testified that he first told plea counsel he was over at his sister-in-law's house at the time of the incident and that she could verify his alibi. He said he lied to counsel because "he's a lawyer that's [always trying] to get you to plead. He coerces you to plead all the time. That's all his clients - - he all the time is trying to coerce you to plead." App. 131, l. 24 – 132, l. 9. Petitioner testified that he eventually told plea counsel "what really happened."

Petitioner said that around 6:00 pm he went over to the home of two unnamed men who convinced Petitioner to come with them while they stole property from Rodney Baskins, a known drug dealer. The plan was to wait for Baskins to leave his home and then to go in and "steal his money and drugs." App. 133, ll. 8-11. Petitioner agreed to go with them. App. 132, l. 22 - 133, l. 14.

They walked by Baskins' house and saw there were people at the home, so they left and planned to come back when the home was unoccupied. App. 133, l. 20 – 134, l. 2. The three men, including Petitioner, waited about seventy-five to one hundred yards away in "an old abandoned store yard." App. 134, ll. 1-2. While they were waiting, the two men gave Petitioner "a hit of crack." App. 134, ll. 2-3. Petitioner then decided to "just go rob him [Baskins] straight up." App. 134, ll. 4-5.

However, *Petitioner changed his mind and decided that instead of attempting to rob Baskins, he would attempt to sell the gun.* App. 134, ll. The two men Petitioner was with had wanted to sell this .22 revolver earlier in the week. App. 134, ll. 14-15. Abandoning his attempt

to rob anyone, including Baskins, Petitioner took the weapon with him and walked towards Baskins' home. App. 134. l. 15; App. 144, ll. 7-10.

Before he reached the home, Petitioner encountered Francis Horton, the decedent, and offered to sell him the gun. App. 135, ll. 9-11. Petitioner testified that Horton asked to examine the gun, but Petitioner refused. App. 133-135. Horton then grabbed the pistol and a struggle ensued. Petitioner testified, "**The next thing I know Mr. Horton done grabbed this pistol. He grabbed my hand and he sidestepped me, and Mr. Horton started slinging me, slinging me, and the gun just went off.**" App. 135, ll. 8-17 (emphasis added). Petitioner confirmed the gun went off as they "were fighting" over the gun Petitioner had proposed selling to Horton.

Petitioner repeated that he did not intentionally point the gun at Horton and fire at him, but rather the gun went off during the struggle over the weapon. Petitioner did not plan on robbing anyone that night, he did not intentionally point the gun Horton, and he confirmed the gun went off during the struggle. App. 144, ll. 11-17.

Petitioner testified at the PCR hearing that plea counsel did not discuss with him the fact that his testimony could entitle him to a jury instruction on involuntary manslaughter. Petitioner said *he brought up involuntary manslaughter*, but plea counsel told him, "I didn't fit that criteria . . . because of my previous charges." App. 140, ll. 8-17.

Petitioner testified that he "had no other choice" but to plead guilty to voluntary manslaughter because based on the advice of his counsel he understood that voluntary manslaughter was the best result he could receive at trial. App. 140, ll. 18-23.

After he returned to prison and conducted independent research, Petitioner discovered that evidence of a struggle over a gun *can lead* to an instruction on involuntary manslaughter. App. 140, l. 24 – 141, l. 9. Petitioner testified that had he known the correct law, he would not

have pled guilty to voluntary manslaughter, but instead would have gone to trial. App. 141, l. 12 – 142, l. 8. Petitioner, therefore, requested a new trial so that he could testify on his own behalf and argue he should only be convicted of involuntary manslaughter. App. 141, ll. 15-22.

During his testimony, plea counsel admitted he advised Petitioner that the best he could do was to plead guilty to voluntary manslaughter. Plea counsel testified that Petitioner told him he went there to rob Rodney Baskins. Counsel maintained that Petitioner never told him he attempted to sell Horton a gun before the struggle occurred. Plea counsel said he did not think he could convince a judge to charge the jury on involuntary manslaughter under the facts as he understood them. App. 154, l. 11 – 156, l. 14.

Order Granting Relief

In the order granting PCR, the court noted the definition of involuntary manslaughter is "(1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." App. 171.

Noting that Petitioner testified "he offered to sell the gun to the victim in this case, that the victim grabbed the gun from him, and that a struggle ensued in which the victim was shot and killed," the court found Petitioner's conduct meets the test for involuntary manslaughter under the first definition. App. 172. Petitioner "was not allowed to be in possession of a firearm and would not have been allowed to legally sell the gun to the victim." App. 172-173. The court held "since the unlawful sale of a firearm is not an activity that naturally tends to cause death or greatly bodily harm, [Petitioner] . . . would have been entitled to a charge on involuntary manslaughter through his testimony." App. 172-173.

The PCR court noted the evidence was disputed about whether Petitioner told plea counsel "the full version of events" prior to his guilty plea. Assuming plea counsel was correct that Petitioner had never told him about the sale of the gun, the PCR court found that "counsel's deficient performance was the reason for the lack of forthrightness" from Petitioner. App. 173. This is a credibility finding against plea counsel from the PCR court that observed both Petitioner and counsel.

The PCR court noted the dispute between plea counsel and Petitioner prior to the aborted trial and the fact that plea counsel had spent only three to four hours meeting with Petitioner. App. 173. The court found that if Petitioner "did hold back information from defense counsel, it was defense counsel's ineffective assistance that caused the difficulties." App. 173. Again, a credibility finding that was made against plea counsel.

The court concluded that plea counsel did not advise Petitioner he could receive an instruction on involuntary manslaughter and that Petitioner would have been entitled to such a charge if he had gone to trial. App. 173. Therefore, the court ruled plea counsel's performance fell below prevailing professional norms. App. 174. The court found Petitioner was prejudiced because, but for the improper advice, the case would have gone to trial, not ended in a guilty plea. App. 174.

Court of Appeals' Opinion

The Court of Appeals found that because armed robbery and possession of a handgun by a convicted felon are both felony offenses, Petitioner would not have been entitled to a jury instruction on involuntary manslaughter and, therefore, the PCR court erred as a matter of law when it found Petitioner's case met the first definition of involuntary manslaughter. The Court held, "Under either version of the facts presented to the PCR court, it appears Hough [Petitioner]

would not have been entitled to the requested charge as he was a convicted felon in possession of a pistol."

ARGUMENT

1.

The Court of Appeals erred by finding there was no evidence to support the PCR court's finding that plea counsel was ineffective for failing to advise Petitioner that he could receive an involuntary manslaughter jury instruction where there was evidence the decedent grabbed the gun from Petitioner and the two struggled over it before the firearm accidently discharged.

The proper standard of review of a post-conviction relief evidentiary ruling is whether there is "any evidence of probative value" to sustain the PCR court's finding. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). A PCR applicant must prove that counsel's performance was deficient, and that he was prejudiced by that deficiency to obtain relief. See Hill v. Lockhart, 474 U.S. 52 (1985).

The PCR court correctly found plea counsel ineffective where Petitioner told his counsel that the gun accidentally went off during a struggle, and plea counsel informed Petitioner that voluntary manslaughter would be the best he could do given these facts. Plea counsel was incorrect as a matter of law that involuntary manslaughter was not a verdict option if Petitioner went to trial. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999); State v. Slater, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007); State v. Cabrera-Pena, 361 S.C. 372, 383, 605 S.E.2d 522, 527 (2004).

"In determining whether the evidence requires a charge on a lesser included offense, **the court views the facts in the light most favorable to the defendant**." Brayboy, 387 S.C. at 179 691 S.E.2d at 485 (citing State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)) (emphasis added). "Importantly, our courts have long emphasized that to warrant a court's

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." Brayboy, 387 S.C. at 180, 691 S.E.2d at 485 (citing State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)).

"Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112 (2003) (*citing* State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999)); See also State v. Battle, 408 S.C. 109, 116, 757 S.E.2d 737, 740 (Ct. App. 2014) (citing State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008)). The factual scenario relayed to plea counsel by Petitioner before the plea easily satisfies the first definition of involuntary manslaughter.

"Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge." Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008). The fact that a struggle between Petitioner and Horton occurred immediately before the gun went off is not in dispute in this case. Plea counsel knew, in his own words, that a "significant struggle" had occurred between Petitioner and Horton before he advised Petitioner to plead guilty. App. 103, ll. 8-12. Therefore, the PCR court was correct in holding that Petitioner's conduct meets involuntary manslaughter's first definition and that plea counsel's advice to Petitioner was incorrect as a matter of law. App. 172. Additionally, the court was correct in concluding that because plea counsel's advice was incorrect counsel's performance unquestionably "fell below prevailing professional norms." App. 172; See Pelzer v. State, 381 S.C. 217, 672 S.E.2d 790 (Ct. App. 2009).

The PCR judge heard plea counsel's testimony, and he observed his demeanor. As seen above, the PCR judge made credibility findings against plea counsel that he was entitled to make and which this Court should treat with great deference. The PCR court cited plea counsel's lack of time he spent with Petitioner trying to apply the correct defense or lesser-included offense to the full version of the facts.

Respondent argued that since plea counsel maintained Petitioner told him he was attempting to rob Horton at the time the gun discharged, that the judge was incorrect in ruling plea counsel gave deficient and ineffective legal advice. Brief of Petitioner at 9. However, this argument ignores the fact that the PCR court found "defense counsel's deficient performance was the reason for the lack of forthrightness" from Petitioner. App. 173. Again, that was a credibility finding against plea counsel from the PCR court that observed both Petitioner and defense counsel.

Further, the PCR court cited the dispute between plea counsel and Petitioner prior to the aborted trial and the fact that plea counsel had spent approximately three to four hours meeting with Petitioner. App. 173. The court found that if Petitioner "did hold back information from defense counsel, it was defense counsel's ineffective assistance that caused the difficulties." App. 173. Another credibility finding that was made against plea counsel.

The prejudice in this case is clear. Petitioner testified at the PCR hearing that had he received the proper advice, he would have never have pled guilty to voluntary manslaughter, and instead would have gone to trial. See Hill v. Lockhart, 474 U.S. 52 (1985). The PCR court was correct in finding Petitioner credible on this issue. App. 174. The PCR court was also correct in finding that proper advice about the possible results at trial, instead of the improper advice which was given, would have resulted in Petitioner going to trial, not pleading guilty to voluntary

manslaughter – the best trial counsel told him was possible. App. 174. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

Since there is evidence to support the PCR court's ruling, it should have been affirmed by the Court of Appeals.

2.

The Court of Appeals erred by finding there was no evidence to support the PCR court's finding that plea counsel was ineffective for advising Petitioner he simply was not entitled to an involuntary manslaughter instruction if he went to trial given his version of what occurred in this case.

The PCR court was correct in holding that plea counsel was ineffective for failing to advise Petitioner that involuntary manslaughter applied to his case considering the version of events as told by Petitioner at the PCR hearing. Because of Petitioner's prior conviction for armed robbery he was not lawfully allowed to possess a firearm and would not have been allowed to legally sell the gun to Horton. However, that obviously does not end the inquiry, and an issue involved is whether Petitioner's actions constituted activity "not naturally tending to cause death or great bodily harm." Crosby, 355 S.C. at 51-52, 584 S.E.2d at 112.

The PCR court was correct that the unlawful sale of a firearm is not an activity that naturally tends to cause death or great bodily harm. The average unlawful sale of a firearm is not a dangerous activity. It happens regularly with no one being injured. It is simply an interaction between two people in which money or some other form of payment is exchanged for a firearm. It is a peaceful encounter where each participating party receives the benefit of the bargain.

As seen, Petitioner testified that the two unnamed men intended to steal money and drugs from Baskins when no one was home. That plan ultimately fell through and instead Petitioner approached Horton and attempted to sell him a gun. Horton wanted to inspect the gun, and Petitioner refused to allow him to do so. Horton then grabbed the gun and a struggle ensued over the gun. The gun accidently discharged. This is a classic involuntary manslaughter situation. See

Crosby, 355 S.C. at 51-52, 584 S.E.2d at 112; see also Light, 378 S.C. 641, 664 S.E.2d 465; Brayboy, 387 S.C. 174, 691 S.E.2d 482; Burriss, 334 S.C. 256, 513 S.E.2d 104.

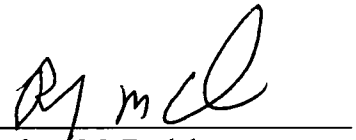
Consequently, the PCR court's conclusion that the unlawful sale of a firearm is not an activity that naturally tends to cause death or great bodily harm was correct and plea counsel was ineffective for failing to advise Petitioner that involuntary manslaughter applied to his case. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

Since there was and is evidence to support the PCR court's ruling it should have affirmed by the Court of Appeals.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issues presented.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR PETITIONER

This 1st day of June, 2015

STATE OF SOUTH CAROLINA
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MICHAEL A. HOUGH,

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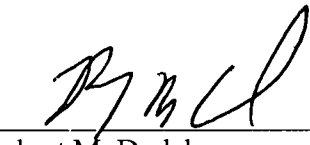
PETITIONER

CERTIFICATE OF SERVICE

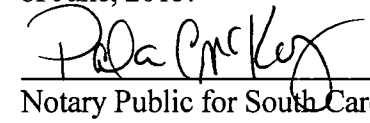
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Daniel F. Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the South Carolina Court of Appeals this 1st day of June, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 1st day
of June, 2015.



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