ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marlboro County

Brooks P. Goldsmith, Circuit Court Judge

RECEIVED
JUN - 3 2015
S.C. Supreme Court

CLARENCE KENDALL COOK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000366

REPLY BRIEF OF PETITIONER PURSUANT TO WHITE V. STATE

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

ARGUMENT IN REPLY

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. 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

State v. Cole, 338 S.C. 97, 525 S.E.2d 511, (2000) 3, 5

State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000) 5, 6

State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993) 3

State v. Niles, No. 2012-213592, 2015 WL 1325887, (S.C. Mar. 25, 2015) (petition for rehearing pending) 4, 5

ARGUMENT IN REPLY

> 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.

Cook reasonably believed that he was in imminent danger of losing his life or sustaining serious bodily injury. That reasonable fear required for self defense, however, does not rise to the level of an uncontrollable impulse to do violence required for voluntary manslaughter. While the decedent's actions prior to the shooting gave rise to self defense, the actions do not rise to the level as to create the sudden heat of passion required for voluntary manslaughter.

The State's reliance State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993), is misplaced. In State v. Cole, 338 S.C. 97, 525 S.E.2d 511, (2000) this Court found no error in the trial judge's refusal to charge voluntary manslaughter where there was no evidence of sudden heat of passion or sufficient legal provocation. This Court distinguished Lowry writing:

> In State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993) , this Court found the trial judge should have charged voluntary manslaughter where the defendant shot the decedent after the decedent taunted the defendant then moved toward him in a menacing fashion with his arms outstretched as if to grab him. Id. at 398, 434 S.E.2d at 273. The Court found a jury could reasonably conclude that when taken together, the menacing words and the actions constituted a legal provocation sufficient to produce sudden heat of passion. Id. at 399, 434 S.E.2d at 274.

State v. Cole, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000). In the present case there is no evidence of sudden heat of passion. Unlike the decedent's actions in Lowry, the decedent's actions in the present case of moving toward Cook with his hand in his pocket are not sufficient to produce sudden heat of passion. Evidence of prior threats by the

decedent and the prior confrontational text messages go to self defense but still do not elevate the decedent's actions sufficient to produce sudden heat of passion.

At trial the State argued, in support of giving the instruction on the lesser included charge of voluntary manslaughter, "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."[1] (App. p. 562, lines 11-15). This statement, "before I knew it, I fired a bullet," attributed to Cook by the State, does not constitute evidence that Cook was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. During the trial the investigator admitted that Cook told her he was in fear for his life when the decedent approached him. (App. p. 401. line 23 – p. 402, line 1). The investigator also admitted that Cook told her that he reached for his gun only after he thought the decedent reached for his gun. (App. p. 408, lines 18-20). These statements support a charge on self defense, not heat of passion.

Recently, this Court in State v. Niles, No. 2012-213592, 2015 WL 1325887, (S.C. Mar. 25, 2015) (petition for rehearing pending) found the trial court properly refused to instruct the jury with the lesser included charge of voluntary manslaughter because there was no evidence the defendant acted with a sudden a heat of passion upon sufficient legal provocation. This Court wrote:

> Niles's own testimony does not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do*

[1] It is unclear when or if Cook made this alleged statement. Cook's videotaped statement to the police was admitted in evidence without objection as State's Exhibit #1 and played for the jury but not transcribed. (App. p. 367, lines 1-12; pp. 376-377). Petitioner has moved to supplement the Appendix to include State's Exhibit #1 and moved to transport the tape to the Court.

> *violence.* Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of Hammond rather than of perpetrating violence upon the victim See Cole, 338 S.C. at 102, 525 S.E.2d at 513 ("[T]here was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self[-]defense, not heat of passion."). As in Cole, the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense.
>
> In State v. Childers, we explained:
>
> > Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever. If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court.... Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury.

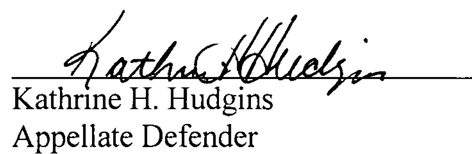
State v. Niles, No. 2012-213592, 2015 WL 1325887, at *3-4 (S.C. Mar. 25, 2015).

The evidence in the present case supports a charge on self defense. The evidence does not support a charge on voluntary manslaughter because there is no evidence Cook was overtaken by a sudden heat of passion such that he had an uncontrollable impulse to do violence. As in State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000), because the jury heard no evidence to support sudden heat of passion, the voluntary manslaughter conviction suggests that the jury compromised between murder and self defense in reaching their verdict. The State's request for a voluntary manslaughter charge was unsupported by the evidence and resulted in a compromise verdict. The convictions must be reversed.

CONCLUSION

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

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 3rd day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marlboro County

Brooks P. Goldsmith, Circuit Court Judge

CLARENCE KENDALL COOK,

PETITIONER,

V.

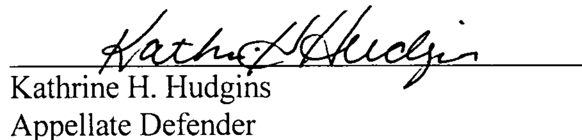
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000366

CERTIFICATE OF SERVICE

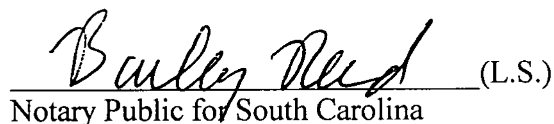
The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Clarence Cook #345807 at Broad River Correctional Insitution, this 3rd day of June, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 3rd day of June, 2015.



_______________(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .