

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable R. Ferrell Cothran Jr., Circuit Court Judge

Appellate Case No. 2014-001846

Kenwood Bright, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the post-conviction relief judge properly determine trial counsel was not ineffective in declining to request a jury instruction on the lesser-included offense of voluntary manslaughter where trial counsel testified such an instruction was incompatible with her trial strategy and where such an instruction would not have been proper under the facts of this case?

STATEMENT OF THE CASE

For the purposes of this return, Respondent adopts Petitioner's statement of the case.

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding trial counsel was not ineffective in failing to request a charge on voluntary manslaughter.

Petitioner asserts the post-conviction relief judge erred in finding trial counsel was not ineffective in not requesting a charge on voluntary manslaughter because the co-defendant's testimony "indicated there was an argument ignited by the remark of the victim." (Pet. for Writ of Cert. p. 8). However, the record clearly indicates Applicant's defense strategy was to deny shooting the victim. Because a charge on the lesser-included offense was incompatible with this strategy, trial counsel had no reason to request such a charge. Furthermore, the evidence at trial did not support a voluntary manslaughter charge, and Petitioner would not have been entitled to one even if trial counsel made such a request. Accordingly, Respondent submits the post-conviction relief judge properly found trial counsel was not ineffective in this regard.

A. Standard of Review

In this post-conviction relief action, Petitioner bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Petitioner must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland,

466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the post-conviction relief judge's denial of relief when there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

B. Trial counsel articulated a valid strategic reason for not requesting a voluntary manslaughter charge.

Respondent submits the post-conviction relief judge properly found that "trial counsel articulated a valid trial strategy for not seeking a voluntary manslaughter charge." (App. p. 606). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct

will not be deemed ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Furthermore, the decision to request instructions on lesser-included offenses is a type of strategic decision that is “beyond the realm of serious consideration on a claim of ineffective assistance of counsel.” Abney v. State, 408 S.C. 41, 47, 757 S.E.2d 544, 547 (Ct. App. 2014), cert. denied (Jan. 15, 2015) (quoting Havard v. State, 928 So.2d 771 (Miss. 2006)).

Here, trial counsel testified she had lengthy pre-trial discussions with Petitioner regarding the issues in his case. (App. p. 582, lines 3-18). Based on these discussions, she developed a defense strategy of denying Petitioner was the person who shot the victim. (App. p. 586, lines 1-10). Trial counsel further testified she consulted with Petitioner about whether the jury should be presented with the alternative of a voluntary manslaughter instruction. (App. p. 575, lines 10-21). Based on the defense theory and her discussions with Petitioner, trial counsel made a strategic decision not to request a voluntary manslaughter instruction. (App. p. 576, line 24-p. 577, line 5; p. 591, lines 19-22). Trial counsel further articulated that she did not believe there was any evidence to support the charge even if she asked for it. (App. p. 579, line 21-p. 580, line 6; p. 586, lines 23-587, line 7; p. 592, lines 5-9).

Trial counsel’s testimony¹ clearly demonstrates her trial strategy was to show Petitioner did not shoot the victim. Because Petitioner denied involvement in the shooting, trial counsel had no reason to pursue a strategy of attempting to mitigate the crime to a lesser-included offense. See McCray v. State, 317 S.C. 557, 560, 455 S.E.2d

¹ Respondent notes the post-conviction relief judge found trial counsel’s testimony more credible than Petitioner’s. (App. p. 605). See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (this Court gives great deference to a post-conviction judge’s credibility findings).

686, 688 (1995) (“[C]ounsel had no reason to pursue an entrapment defense because petitioner denied any involvement in the drug incident[.]”) Accordingly, trial counsel’s strategic decision to pursue a defense of denying involvement was reasonable. Furthermore, trial counsel testified she did not believe any evidence in the record supported a theory of voluntary manslaughter.² Thus, trial counsel was not ineffective for asking the jury to find Petitioner was not involved in the shooting rather than to find Petitioner shot the victim under mitigating circumstances. See State v. Walker, 605 S.E.2d 647, 654 (N.C. Ct. App. 2004), overruled on other grounds, 695 S.E.2d 750 (N.C. 2006) (“The record indicates defendants’ counsel were employing an ‘all or nothing’ strategy[.] ... The fact that it failed does not mean that defendants were deprived of effective assistance of counsel.”). In light of her stated trial strategy, based on her thorough investigation, trial counsel articulated a valid reason for not seeking a voluntary manslaughter charge. Abney, 408 S.C. at 46-47, 757 S.E.2d at 547 (declining instruction on lesser-included offense may be reasonable trial strategy). Accordingly, the post-conviction relief judge properly found trial counsel’s performance was not deficient in this regard.

C. Petitioner was not entitled to a voluntary manslaughter charge.

Regardless of the above analysis, Respondent further submits the post-conviction relief judge properly found Petitioner failed to show prejudice from trial counsel’s decision not to request an instruction on the lesser-included offense of voluntary manslaughter. (App. p. 606). Initially, Respondent notes the trial judge indicated he considered charging the lesser-included offense, but did not find it applicable to the facts

² As will be discussed in Part C, infra, trial counsel properly determined the record contains no evidence to support a charge on voluntary manslaughter.

of the case. (App. p. 460, lines 19-23). Thus, Petitioner cannot show “the result of the proceeding would have been different[,]” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625, because the trial judge would not have given the instruction even if trial counsel had chosen to ask for it.

Furthermore, the evidence at trial did not support a charge on voluntary manslaughter. “Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (citing State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)). To be entitled to a charge on voluntary manslaughter, “both heat of passion and sufficient legal provocation must be present at the time of the killing.” Id. (citations omitted). However, “mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon.” State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996).

Here, the State only presented two eyewitnesses to the shooting. Jacobie Samuels testified he saw Petitioner and the victim talking for about five seconds before the shooting. (App. p. 91, lines 8-10). Petitioner was in a car, and the victim was standing on the side of the road. (App. p. 91, lines 11-21). Samuels testified he did not perceive anything out of the ordinary about the conversation between Petitioner and the victim. (App. p. 92, lines 1-13). Victoria Knight testified the tone of the conversation between Petitioner and the victim was not so friendly. (App. p. 248, line 24-p. 249, line 2). She testified Petitioner and the victim were arguing back and forth while the victim stood outside the car. (App. p. 250, lines 3-13).

The only evidence at Petitioner’s trial regarding his interaction with the victim indicates, in the light most favorable to Petitioner, that he was in a verbal argument

immediately prior to the shooting. This is not sufficient to demonstrate adequate legal provocation from the victim. Rogers, 320 S.C. at 525, 466 S.E.2d at 362. Furthermore, there is no evidence of Applicant's mental state to show that he was "overcome by a sudden heat of passion as would produce 'uncontrollable impulse to do violence.'" State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Therefore, trial counsel and the trial judge properly determined Petitioner was not entitled to an instruction on voluntary manslaughter. Because the trial judge would have properly refused to issue such an instruction, the post-conviction relief judge did not err in finding Petitioner failed to demonstrate prejudice from trial counsel's decision in this regard.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: 
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STATE OF SOUTH CAROLINA
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Certiorari to Marlboro County
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

S.C. Supreme Court

KENWOOD BRIGHT,

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:

LaNelle C. DuRant, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 15th day of June, 2015



CAROLINE COLLINS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

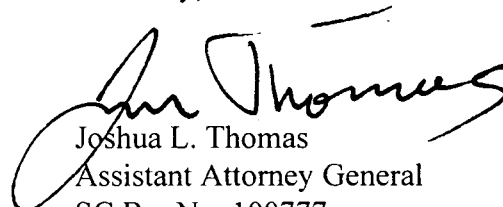
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Kenwood Bright v. State of South Carolina
Lower Court Case No.: 2012-CP-34-0178
Appellate Case No.: 2014-001846

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 opposing counsel today.

Sincerely,


Joshua L. Thomas
Assistant Attorney General
SC Bar No. 100777

JLT/cc
Enclosures

cc: LaNelle C. DuRant, Esquire (2 copies)
Trisha Allen, Victim Services