

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
Court of Common Pleas
The Honorable James R. Barber, III, Circuit Court Judge

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S.C. Supreme Court

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

2009-CP-28-01346

MICHAEL A. HOUGH,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Court of Appeals properly conclude Plea Counsel was not ineffective for failing to advise Petitioner of the possibility of an involuntary manslaughter jury charge, where there was evidence the victim grabbed the gun?**

- II. Did the Court of Appeals properly conclude Plea Counsel was not ineffective for advising Petitioner that he was not entitled to an involuntary manslaughter instruction he if he went to trial given his version of what occurred in his case?**

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Kershaw County Clerk of Court's order of commitment. The Kershaw County Grand Jury indicted the Petitioner at the October 8, 2008 term of the General Sessions for Murder (2008-GS-28-847). The State noticed the Petitioner that they were seeking Life Without Parole. (App. p. 96). On July 28, 2009, Petitioner pled guilty to the lesser-included offense of voluntary manslaughter. Prior to the plea the Petitioner began a trial (App. p. 1-85). He was sentenced by the Honorable G. Thomas Cooper, Jr., to confinement for twenty-three years.

Petitioner then brought this action seeking post-conviction relief filed November 20, 2009. Respondent made its return on or about March 22, 2010. An evidentiary hearing was convened before the Honorable James R. Barber, III, on June 7, 2011, at which Petitioner alleged ineffective assistance of counsel. A timely notice of intent to appeal was filed on July 27, 2011. Respondent filed a Petition for Writ of Certiorari on September 26, 2011. Petitioner filed a Return to Petition for Writ of Certiorari on March 8, 2012. By Order filed November 14, 2013, the South Carolina Court of Appeals granted Writ of Certiorari. Respondent filed his brief on February 18, 2014. Petitioner filed its brief on May 21, 2014. Oral Argument at the Court of Appeals was held on December 8, 2014. In a 3-0 decision, the Court of Appeals reversed the lower court's order granting Petitioner's application. On July 18, 2014, Petitioner filed his Petition for Writ of Certiorari June 1, 2015. This Return to Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

The Petitioner approached the victim, put a gun toward his face and demanded money. (App. p. 92). The victim fought back and there was a struggle for the gun. (App p. 93). The victim was shot in the chest and the Petitioner fled the scene. (App. p. 93). The Petitioner admits he was high on crack, and that this was not an armed robbery but that he was (although high on crack) merely brandishing the weapon to the victim in an attempt to offer it for sale. (App. p. 134-135). The Petitioner acknowledged that he, as a convicted felon, was not lawfully in possession of the firearm. (App. p. 145). The Petitioner explained that he did not stay and help the victim, reasoning that he fled the scene because he was scared when the gun went off. (App. p. 145).

The facts in this case are not in significant dispute. According to the Petitioner, on April 17, 2008, he and two other individuals planned to rob the home of Rodney Baskins, a known drug dealer. They went by the house but saw that there were people at the home, so they left and planned to come back when the home was unoccupied. When they returned, they saw that there were people still in the home. The Petitioner told the others that he would just go up to the home and rob Baskins. However, on his way up to the home, the Petitioner claims he thought better of his plan and decided he was going to sell his gun. Before he reached the home, the Petitioner encountered Francis "Puddin'" Horton, the victim in this case, and offered to sell him the gun. The Petitioner claimed that the victim asked to examine the gun, but the Petitioner refused. The victim then grabbed the gun and a struggle ensued. During the struggle, the victim was fatally shot.¹ The Petitioner testified that he did not know who pulled the trigger and that he did not mean to shoot the victim.

¹ Although the State's witnesses would have disagreed with the Respondent as to how the incident began, the State informed the plea court that a struggle over the gun did occur. See Guilty Plea Tr. p. 8, lines 2-6.

At the time of the incident, the Petitioner was on community supervision. Following the Petitioner's arrest, his community supervision was revoked and he was placed back into SCDC custody. For the bulk of the Petitioner's service of this sentence, he was housed at Lieber Correctional Institution in Ridgeville, South Carolina. The Respondent was released from SCDC custody on April 1, 2009, and was returned to the Kershaw County Detention Center, where he remained until his plea. Although the Petitioner was scheduled to proceed to trial the week of June 22, 2009, defense counsel had only met with the Petitioner for a total of three to four hours on a few occasions prior to that date. At the outset of that trial, the Petitioner attempted to have defense counsel relieved, but the motion was denied. The trial was ultimately continued after a juror obtained Petitioner's criminal record and shared it with the other jurors.

Prior to the aborted trial, Petitioner told defense counsel that he was not present at Baskins' home the night of the shooting and that he had nothing to do with the death of the victim. Following the aborted trial, Petitioner sent defense counsel a letter detailing his involvement in the death of the victim. Defense counsel sent a letter back to the Petitioner stating

Please remember that, as you've told me, [1] you went to Rodney's house with a gun; [2] you had the gun out and it went off in a struggle; and [3] a man died. If the prosecution can prove those three things, as I believe they can, the jury will have no choice but to convict you of at least voluntary manslaughter, which the State has offered.

Letter to Petitioner dated July 17, 2009.² Defense counsel testified before this Court that while he did not recall Petitioner telling him about the attempted sale of the firearm, the letter to the Petitioner effectively summarized his advice to the Petitioner about accepting a plea deal. The Petitioner testified that defense counsel never advised him that evidence of a struggle over the

² This letter was admitted as an exhibit during the hearing.

gun could be used to argue for the lesser-included offense of involuntary manslaughter at trial. The Petitioner further testified that had he known that the jury could have been instructed on the crime of involuntary manslaughter, he would have proceeded to trial.

STANDARD OF REVIEW

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will not be upheld when they are not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

CERTIORARI

Petitioner argues that the Court of Appeals erred in finding that Petitioner would not have been entitled to an involuntary manslaughter charge under either version as he was a convicted felon in possession of a pistol. Petitioner argues that he would have been entitled to an involuntary manslaughter charge because there was evidence that a struggle occurred prior to the gun going off and killing the victim. Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008) (“evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge.”) Petitioner further argues that Plea Counsel was ineffective for advising Petitioner that an involuntary manslaughter charge would not be applicable to his case considering Petitioner’s new version of events as told at the PCR Hearing. Respondent disagrees with this argument and submits the Court of Appeals properly relied upon the well-reasoned and time tested opinions of State v. Reese³ and State v. Cabrera-Pena⁴ in reversing the PCR court’s decision granting Petitioner’s application. Pursuant to Rule 242(b), SCACR, there are no “special and important reasons” for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, the Court of Appeals decision was straightforward exercise of applying existing precedent to the particular facts and circumstances of Petitioner’s case

³ 370 S.C. 31, 36, 633 S.E.2d 898, 901 (2006) overruled on other ground by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (reversing this court’s holding that Reese was entitled to an involuntary manslaughter instruction; “Reese was pointing or presenting a firearm, a felony, which would preclude an involuntary manslaughter charge.”)

⁴ 361 S.C. 372, 381, 605 S.E.2d 522, 526 (2004) (Cabrera-Pena’s conduct does not fit within the first definition of involuntary manslaughter because he was engaged in unlawful, felonious[,] and harmful conduct.”)

ARGUMENT

I. The Court of Appeals properly concluded Plea Counsel was not ineffective for failing to advise Petitioner of the possibility of an involuntary manslaughter jury charge, where there was evidence the victim grabbed the gun.

In the instant case, Petitioner argues Plea Counsel was ineffective for advising him that the lesser included offense of Involuntary Manslaughter was not possible given the factual context relayed to him by Petitioner. However, this allegation is without merit as no probative evidence exists to support this allegation.

The PCR Court found counsel was deficient because he advised Petitioner that at best could receive a voluntary manslaughter, despite the fact that the Petitioner had informed him that there was a struggle over the gun. (App. p. 172). The PCR court found that evidence of a struggle over the gun is sufficient for a charge of involuntary manslaughter charge. (App. p. 172)

Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008). However,

Involuntary manslaughter is either 1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or 2) the killing of another without malice and unintentionally but while engaged in the doing of a lawful act with a reckless disregard of the safety of others.

State v. Sams, 410 S.C. 303, 764 S.E.2d 511, 514 (2014). (emphasis added).

It is a felony offense for a person who has been convicted of a crime of violence or a violent crime that is classified as a felony offense, to possess or acquire handguns within this state. S.C. Code Ann. § 16-23-30(B) (Supp. 2015); S.C. Code Ann. § 16-23-50(A)(1) (Supp. 2014); § 16-23-500 (Supp. 2015). Armed robbery is considered a violent crime and is a felony offense. S.C. Code Ann. § 16-1-60 (Supp. 2015); S.C. Code Ann. § 16-11-330(A) (2003).

In State v. Tucker, 324 S.C. 155, 478 S.E.2d. 260 (1996), this Court found that “because Appellate was engaged in committing burglary, kidnapping and armed robbery at the time of the shooting occurred (all felonies), he was not entitled to have (charge of involuntary manslaughter). Tucker, 324 S.C. at 170, 478 S.E.2d. at 268; See also State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (holding that defendant was “pointing or presenting a firearm, a felony, which would preclude an involuntary manslaughter charge”).

In State v. Young, 319 S.C. 33, 459 S.E.2d. 84 (1999), Young asserted the trial court should have charged the jury on the elements of involuntary manslaughter. Young, 319 S.C. at 39, 459 S.E.2d. at 87. According to Young’s version of facts, his Co-Defendant, Bell, grabbed the Victim’s necklace from around his neck. Id. When the Victim came towards Bell, Young aimed the gun at Victim’s head. Subsequently, Bell asked Victim for his money. Id. After an argument, Victim tossed his wallet towards Bell and “kinda swung” at Young and the gun just went off. Id. Bell then took the gun and shot the Victim in the head. Id. This Court held, “Young was engaged in the commission of an armed robbery, a felony under § 16-1-10, at the time of the shooting. As such, he was not entitled to an involuntary manslaughter charge.” Young, 319 S.C. at 40, 459 S.E.2d at 88.

In the instant case, Counsel explained that Petitioner never mentioned to him the story about selling the gun to the Victim (App. p. 156 line 4). Counsel testified Petitioner had instead, written him a letter admitting to pulling out a gun, intending to rob the Victim, the Victim fought back, and the gun went off (App. p. 155 line 22—p. 156 line 1). Counsel further stated the State was prepared to call two co-defendants to testify that Petitioner intended to rob the Victim. (App. p. 154 lines 22-25; p. 154 lines 11-14). Counsel properly concluded that there was no realistic chance to get a judge to charge the jury on involuntary manslaughter due to the fact that

Petitioner admitted to committing an attempted armed robbery. Counsel's advice under those facts – an attempted armed robbery gone bad – was correct because involuntary manslaughter would not apply. State v. Young, 319 S.C. 33, 459 S.E.2d. 84 (1999). Furthermore, Counsel explained that he could have had a problem putting the Petitioner on the stand and eliciting testimony from him because of potential perjury due to the Petitioner's shifting and inconsistent version of events [including first claiming an alibi]. (App. p. 152, 156-157). Lucas v. State, 572 S.E.2d 274 (2002).

Therefore, the PCR court erred in finding Counsel was ineffective for advising Respondent that he would not be entitled to an involuntary manslaughter charge due to the fact that he admitted to attempting to rob the Victim at gun point.

II. No probative evidence exists to support the PCR court's finding that Counsel was ineffective for advising his client that Involuntary Manslaughter would not apply considering the new version of events as told during the PCR hearing.

In the instant case, Petitioner argues Counsel was ineffective for advising him that the lesser included offense of Involuntary Manslaughter was not possible given the factual context stated during the PCR hearing. However, this allegation is without merit as no probative evidence exists to support this allegation.

Assuming there was a trial and Petitioner took the stand and explained his new version of events as he had at the PCR hearing, involuntary manslaughter would still not be a valid jury charge. The PCR court erred in finding otherwise. A PCR court should be reversed if the decision is controlled by an error of law. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Petitioner admitted to being high on crack cocaine and illegally in possession of the firearm when he approached the victim to present the gun for potential sale. (App. p. 134-135, 145).

Involuntary manslaughter is either 1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act *not amounting to a felony* and not naturally tending to cause death or great bodily harm, or 2) the killing of another without malice and unintentionally but while engaged in the doing of a *lawful act* with a reckless disregard of the safety of others.

State v. Sams, 410 S.C. 303, 764 S.E.2d 511, 514 (2014). (emphasis added).

Under S.C. Code Ann. § 16-23-410, it is unlawful for any person to present or point at another person a loaded or unloaded firearm. Any person who violates the provisions of this section is guilty of a *felony*. (emphasis added). Additionally, it is a felony offense for a person who has been convicted of a crime of violence or a violent crime that is classified as a felony offense, to possess or acquire handguns within this state. S.C. Code Ann. § 16-23-30(B) (Supp. 2015); S.C. Code Ann. § 16-23-50(A)(1) (Supp. 2014); § 16-23-500 (Supp. 2015). Armed robbery is considered a violent crime and is a felony offense. S.C. Code Ann. § 16-1-60 (Supp. 2015); S.C. Code Ann. § 16-11-330(A) (2003).

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant. *See Knoten*, 347 S.C. at 302, 555 S.E.2d at 394.

In the instant case, Petitioner testified that he has one prior conviction for armed robbery.⁵ (App. p. 98 line 14-16; p. 145 line 4-7). Petitioner testified he is not lawfully allowed to carry a firearm. (App. p. 145 line 10-11). Petitioner testified he approached Victim with the

⁵ During the guilty plea, the Solicitor stated Respondent had an additional conviction for Assault and Battery of a high and aggravated nature in 2007. (App. p. 98 line 19-22).

pistol and stated the weapon was for sale. (App. p. 135 lines 9-11). Petitioner stated, Victim took the gun from Petitioner and a struggle ensued. (App. p. 135 lines 11-15). Petitioner stated Victim started to sling him around and “the gun just went off.” (App. p. 135 lines 11-15). Petitioner’s act of possessing and/or attempting to sell a firearm amounts to a felony. See S.C. Code Ann. § 16-23-410; See S.C. Code Ann. § 16-23-30; See S.C. Code Ann. § 16-23-50. Because Respondent shot Victim during the commission of a felony – both possessing and selling an illegal handgun – Counsel’s advice that involuntary manslaughter charge would not be applicable given the factual context was correct. See State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526 (2004) (Cabrera-Pena’s conduct does not fit within the first definition of involuntary manslaughter because he was engaged in unlawful, felonious[,] and harmful conduct.”)

Furthermore, there is no evidence whatsoever that the Petitioner was engaged in self-defense when he was “struggling” over the weapon with the victim. Being high on crack cocaine and brandishing an illegal gun in an attempt to sell it is not a lawful activity. Petitioner admits he was engaged in an unlawful activity. (App. p. 160, line 23). The ultimate issue would be whether; (1) being high on crack cocaine, (2) while in possession of an unlawful handgun, (3) approaching a stranger and, (4) brandishing the gun accompanied with an unsolicited offer to sell the gun is an activity “not naturally tending to cause death or great bodily harm.” Brandishing an illegal weapon while high on crack cocaine can cause bodily harm. See State v. Rivera, 389 S.C. 399 (2010) (reversing the Court of Appeals and finding that involuntary manslaughter did not apply because brandishing of a weapon was unlawful conduct naturally tending to cause death or great bodily harm). The victim’s death was a direct consequence of Petitioner being high on cocaine while handling a loaded illegal weapon. “There can be no doubt of the general rule of

law that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which naturally or necessarily flow from it..." State v. Williams, 189 S.C. 19, 199 S.E. 906, 908 (1938).

On a final note, the PCR court relied on case law that is inapplicable to the facts at hand. There is no evidence whatsoever that the Petitioner was engaged in self-defense when he was "struggling" over the weapon with the victim. The PCR court based its conclusions of law that involuntary manslaughter applies whenever there is a "struggle" over the weapon on the following cases: State v. Rivera, 389 S.C. 399 (2010); Tisdale v. State, 378 S.C. 122 (2008); Casey v. State, 305 S.C. 445 (1991). (App. p. 171). Because there is no evidence of self-defense as to Petitioner, the above cases are inapplicable as each involves a struggle intertwined with self-defense issues.

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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By: 

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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:

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This 21st day of July, 2015


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LEGAL ASSISTANT