STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Edgar W. Dickson, Circuit Court Judge

TRAVIS MCLAUGHLIN, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2015-000543

PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR judge err by finding trial counsel provided effective representation in Petitioner's murder case where counsel did not hire a private investigator to conduct an independent assessment of the evidence collected at the crime scene, since Petitioner pled guilty only because counsel incorrectly stated Petitioner had no defense at trial where self-defense and involuntary manslaughter were viable verdicts?

STATEMENT OF THE FACTS

On May 13, 2010, the Marion County Grand Jury indicted Petitioner for murder and possession of a weapon during commission of a violent crime. App. 95. On December 2, 2011, Petitioner pled guilty to voluntary manslaughter before the Honorable William H. Seals, Jr. App. 1 – 2. Fitzlee H. McEachin represented the State. Henry M. Anderson, Jr. represented Petitioner. App. 1.

Judge Seals sentenced Petitioner to twenty-five years' imprisonment. App. 22. Petitioner did not appeal his guilty plea or sentence. App. 82.

On April 4, 2012, Petitioner filed a PCR application. App. 24. On February 4, 2013, Respondent filed its return requesting an evidentiary hearing. App. 32. On September 6, 2013, PCR counsel Joshua Bailey filed an amended PCR application raising the issue presented in this certiorari petition. App. 29. A PCR hearing was held on October 8, 2014, before the Honorable Edgar W. Dickson. App. 37. Croom Hunter represented the State. App. 37.

On December 10, 2014, Judge Dickson issued an order of dismissal. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge err by finding trial counsel provided effective representation in Petitioner's murder case where counsel did not hire a private investigator to conduct an independent assessment of the evidence collected at the crime scene, since Petitioner pled guilty only because counsel incorrectly stated Petitioner had no defense at trial where self-defense and involuntary manslaughter were viable verdicts.

Guilty Plea

According to the solicitor, on December 7, 2009, Petitioner and Joe Harps, the decedent, "had been hanging out together during the day." App. 4, lines 6 – 9. That evening, Harps and Petitioner returned to Harps's apartment. While at the apartment, the two men argued, a struggle ensued, and Harps was shot in the head. App. 4, lines 9 – 23. The gunshot "caused immediate death." App. 4, line 23. Petitioner was arrested the following day and gave a statement to law enforcement which indicated that he and Harps tussled over the gun. App. 5, lines 1 – 3.

PCR Hearing

Don Girndt testified as an expert in crime scene analysis and evidence collection. App. 44. Girndt explained that based upon his review of the evidence in Petitioner's case, there was a struggle between Harps and Petitioner. App. 48, lines 5 – 8. Harps "had a laceration on his right index finger," which "would be consistent with trying to remove the gun from somebody's hand if they were the . . . ones who were holding the gun." App. 48, lines 9 – 16. In addition to the lacerations, Harps had "a number of bruises on his right arm and the back of his right hand . . . probably consistent with fighting over a gun." App. 48, lines 17 – 19.

Girndt also described how the two bullet projectiles recovered from the scene supports a struggle between Petitioner and Harps. According to Girndt, one projectile was "found under the

body in an undamaged condition, and another was found in the kitchen cabinet." App. 48, lines 20 – 23. Neither bullet projectile hit Harps. App. 48, lines 23 – 24. Because Harps was hit one time, the undamaged projectiles "would be wild shots . . . consistent with maybe struggling over a gun and the gun going off." App. 48, line 23 – App. 49, line 2.

Girndt explained that Harps' body was on the floor when he was shot as evidenced by the "shored-up wound." App. 49, lines 3 – 6. The "bullet went in one side of his head and didn't have enough energy to go out the other side due to the head being on the floor," which is consistent with a struggle. App. 49, lines 6 – 10. Further, there was no indication that Harps' hands were bagged to be tested for gunshot residue. App. 50, lines 8 – 13.

Petitioner testified that he and Harps had been together hanging out and drinking all day the day Harps was shot. App. 56, lines 21 – 25. When he drove Harps home, they got into an argument. App. 57, lines 5 – 7. Harps pulled his gun on Petitioner, who "grabbed the gun and tried to wrestle the gun away from [Harps]." App. 57, lines 7 – 13.

Counsel informed Petitioner that the State did not make a plea offer and Petitioner would have to "plead to a mandatory 30 years." App. 57, lines 17 – 20. Petitioner responded that he would rather go to trial. App. 57, lines 20 – 21. Counsel returned to the county jail to inform Petitioner that the State reconsidered extending a plea offer and would allow Petitioner to plead guilty to voluntary manslaughter, with exposure from two to thirty years. App. 57, lines 22 – 25. Counsel told Petitioner that he could not win self-defense, **had no argument for involuntary manslaughter**, and would be found guilty at trial. App. 58, lines 1 – 4. Petitioner "had no other alternative but to accept this plea or go to trial and lose." App. 58, lines 4 – 5.

Petitioner indicated that counsel did not discuss with him the possibility of obtaining an expert, such as Girndt. App. 59, line 25 – App. 60, line 3. Petitioner testified that if he had the

benefit of the forensic evidence that was the subject of Girndt's expert PCR testimony supporting Petitioner's account of a struggle for the gun, he would not have pled guilty and would have insisted on going to trial. App. 60, lines 9 – 14.

Trial counsel did not think there was a need to bring in an expert. App. 70, lines 16 – 18. Counsel prepared a trial notebook and had researched blood splatter. App. 71, lines 15 – 17. Counsel spoke to law enforcement about the case and tried to contact witnesses Petitioner asked him to contact. App. 75, lines 6 – 8. However, counsel admitted that he never hired an investigator to work on the case. Nor did he hire an expert to conduct an independent analysis of the scene of the shooting. App. 75, lines 6 – 8.

Further, counsel admitted that he started preparing for Petitioner's murder trial only two weeks prior to the guilty plea. App. 75, lines 15 – 21. According to counsel, "absent of a death penalty case, you can get anything ready in two weeks." App. 76, lines 8 – 9.

Order of Dismissal

The PCR judge issued an order of dismissal. App. 93. The judge found that counsel "thoroughly prepared and investigated" Petitioner's case. App. 88. The judge also wrote that Petitioner "ha[d] not shown a reasonable probability that the added testimony would have been enough to change the outcome if the case went to trial." App. 89.

The PCR judge also addressed Petitioner's claim that counsel did not discuss the charge of involuntary manslaughter and a possible self-defense. App. 89. According to the PCR judge,

> "Applicant claims he would not have pled guilty if he had been aware of the possible charge of involuntary manslaughter as well as the possible claim for self-defense. However, as the above referenced case law explains, the 'essence of an involuntary manslaughter charge is the involuntary nature of the killing.' Douglas, 332 S.C. at 74. Applicant testified during his PCR hearing that the victim flinched as he began to back away, at which point Applicant pulled the trigger, shooting and killing the victim. While

> this may have all occurred during the heat of passion, the shot that killed the victim was intentional. Therefore, even assuming plea counsel failed to inform the Applicant of the charge of involuntary manslaughter as well as a possible defense, it is highly unlikely the results would have changed Applicant's decision to plea, because the Applicant could not have succeeded on getting his charges reduced to involuntary manslaughter."

App. 90.

The judge found that Petitioner's guilty plea was not coerced and he "failed to present any valid reasons why he should be allowed to depart from his valid plea of guilty."

Discussion

The PCR judge erred by finding trial counsel provided effective representation in Petitioner's murder case. Counsel did not hire a private investigator to conduct an independent assessment of the evidence collected at the crime scene. Petitioner pled guilty only because counsel stated Petitioner had no defense at trial.

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, 584 S.E.2d 110 (2003) (citing State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999)). South Carolina case law has established that evidence that a gun was fired during a struggle is sufficient for a jury charge on involuntary manslaughter. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (finding that there was sufficient evidence to warrant both self-defense and involuntary manslaughter jury charges where defendant took a loaded gun from the decedent, who was threatening him with it, and the gun fired almost immediately after defendant took possession of it); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (finding that defendant was entitled to a jury charge on the law of

involuntary manslaughter where defendant gave an initial statement to police that he closed his eyes and pulled the trigger while being attacked by the victim, but later added that he did not know he had pulled the trigger); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010) (finding that defendant was entitled to a jury charge on involuntary manslaughter where there was evidence that the decedent pulled out a gun, defendant struggled with the victim to obtain the gun, and the gun discharged right after the defendant obtained possession).

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). In the context of a guilty plea, a court will conduct a two-prong test when determining whether defense counsel's assistance was ineffective. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Hill, 474 U.S. at 58 – 59. Whether counsel was "deficient" turns on whether the guilty plea was entered voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). See Hill, 474 U.S. at 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Second, the applicant must show that he was prejudiced by counsel's deficient performance during the guilty plea process. Hill, 474 U.S. at 59. Specifically, the applicant must show that there is a reasonable probability that "but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997). When a court is evaluating

guilty plea issues, "it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007); Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

Criminal defense attorneys have a duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and evidence that can refute any aggravating evidence presented by the State. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 359 (2008) (citing Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 2537 (2003)); Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 634 (Ct. App. 2014). This duty requires, at a minimum, interviewing potential witnesses and making an independent investigation of the facts and circumstances of the defendant's case. Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2008), this Court reversed the defendant's murder conviction because trial counsel was ineffective. In that case, defense counsel failed to hire an independent expert witness on gunshot residue analysis to evaluate the State's gunshot residue reports. Id. at 330, 642 S.E.2d at 596. The State relied on the gunshot residue evidence, specifically, the fact that no residue was found on the victim. Id. at 334, 642 S.E.2d at 598. Because the defendant argued that the gun accidentally fired when he grabbed it out of the victim's hand, the lack of gunshot residue on the victim was critical to the State's case. Id. Defense counsel failed to "adequately evaluate and challenge" the State's gunshot residue evidence and, therefore, was unable to refute it. Id. According to this Court, "the State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlight[ed] both the deficiency of counsel and the resulting prejudice."[1] Id. at 334-35, 642 S.E.2d at 598.

[1]On retrial, Ard was convicted of involuntary manslaughter. John Monk, Inmate goes from Death Row to freedom, The Post and Courier, July 31, 2012, www.postandcourier.com/article/20120731/120739886/inmate-goes-from-death-row-to-freedom.

Here, Petitioner pled guilty to voluntary manslaughter only because defense counsel advised him he had no defense at trial. Defense counsel opined that he did not think Petitioner could argue self-defense or receive the lesser charge of involuntary manslaughter at trial. However, counsel admitted that he failed to hire an investigator to work on the case. Counsel failed to hire an expert to conduct an independent analysis of the State's evidence.

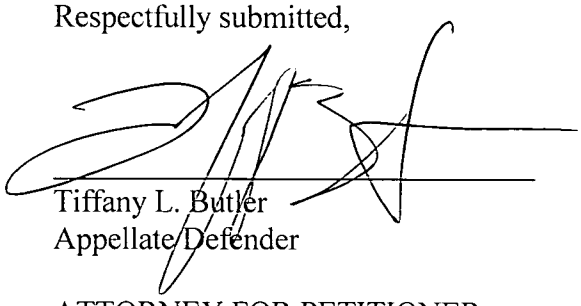
While Petitioner explained to defense counsel that he and the decedent engaged in a struggle before the gun fired, the expert testimony during the PCR hearing confirmed that the evidence at the scene, including the decedent's body, was consistent with a struggle having occurred. In fact, the decedent's gunshot wound was consistent with being shot while in a struggle on the floor. Further, the PCR judge found the expert's testimony credible. Yet, Petitioner could not avail himself of this expert testimony because counsel made no attempt to consult with an expert. Girndt's expert PCR testimony supported charging involuntary manslaughter. See Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) ("Evidence of a struggle between a defendant and a Victim over a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury."); see also State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993) ("The law to be charged to the jury is determined by the evidence presented at trial.").

Because of defense counsel's ineffective representation, Petitioner could not fully understand the defenses that were available to him. Consequently, he could not intelligently evaluate the alternate courses of action in his murder case. Had Petitioner had access to the crime scene expert's opinion and testimony that the evidence at the scene of the shooting supports a struggle between Petitioner and Harps before the gun shot, not murder, Petitioner would not have pled guilty to voluntary manslaughter and would have insisted on going to trial.

CONCLUSION

For the grounds argued above, Petitioner Travis McLaughlin respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Edgar W. Dickson, Circuit Court Judge

TRAVIS MCLAUGHLIN, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2015-000543

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 have been served on J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Travis McLaughlin #291562 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of August, 2015.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.