

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No. 2014-000381

Fred R. Rutland,.....Petitioner,

v.

State of South Carolina,.....Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

1. Is there any probative evidence in the record to support the PCR Judge's finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to utilize a purported prior inconsistent statement where the allegation was based solely upon speculative ambiguity between a witness's prior statement to police and trial testimony?
2. Is there any probative evidence in the record to support the PCR Judge's finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to preserve a request to charge defense of another for appellate review where the charge was unsupported by the evidence presented at trial.

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case.

STATEMENT OF THE FACTS

At the time of his murder, Mr. Jimmy Peele (the victim) was separated from his wife, Sally Peele, who had left him for Petitioner. App.p.201-03. That morning, shortly after 9:00 a.m., Petitioner and Mrs. Peele went to a local pawn shop. App.p.201. There, Mrs. Peele purchased a 12-gauge shotgun (one that her husband had previously pawned) (**State's Exhibit 19**) and a .25 caliber semi-automatic pistol (**State's Exhibit 12**), as well as ammunition for both weapons. Id. These purchases were made on Petitioner's behalf, because he did not have South Carolina identification. App.p.203. The two left the store in a van shortly thereafter, and went to the victim's residence. Mr. Bruce Sharpe, a friend of the victim, testified that he and the victim were preparing to smoke a joint shortly after 10:30 a.m., when they were interrupted by Mrs. Peele. App.p.248. She came into the house and pointed the .25 caliber semi-automatic pistol at the victim. Id. The victim turned around and said, "Go ahead shoot me, bitch." Id. Mrs. Peele backed out of the doorway and out of the house, where the victim followed her. App.p.250.

As soon as the victim walked outside, Petitioner exited the van with a shotgun. App.p.251. Petitioner pointed it at the victim, and fired a round off into the air. App.p.252-53. Following this incident, the victim called 911. App.p.212. Petitioner and Mrs. Peele then went to the house of Robin Hunt (Mrs. Hunt), a woman who had been driving them around that morning. App.p.323. Mrs. Hunt testified that shortly after arriving at her house, Mrs. Peele telephoned a person who she addressed as "Jimmy" – the same name as the victim's – and told him to meet her at the Bow-Wow Boutique in approximately forty-five minutes. App.p.482-483.

Petitioner and Mrs. Peele then went to the Bow-Wow Boutique, where they ostensibly inquired about whether or not Kim Kestner (Mrs. Kestner), a store employee, would sell her car to them. App.p.100. Mrs. Kestner and her husband were the only people present when Petitioner and Mrs. Peele arrived. Id. After the Kestners agreed to sell the vehicle, Mr. Kestner went outside to look for the title. Id.

Shortly after Mr. Kestner went outside, the victim entered the store. App.p.128. Mrs. Peele was making a telephone call in the middle section of the store, and Mrs. Kestner was grooming a dog. App.p.127. Petitioner was standing in the doorway leading to the front of the building. App.p.102-02. From this vantage point, Petitioner could clearly see the victim before he entered the building. Id.

Rather than leave,¹ Petitioner reached behind his back for a gun as soon as the victim entered the store. App.p.401; 463-64. The victim, who did not have anything in his hand at that time, made the same motion. App.p.133-34. At that point, Mrs. Peele screamed, "Oh my God," and Petitioner shot the victim four times. App.p.141; 161.

Sgt. Chris Garner, of the Lexington County Sheriff's Department, arrived shortly thereafter and was the first responder on the scene. App.p.88-89. He saw the victim's car and the van Petitioner had been driving parked on either side of the store. App.p.89-90. He also saw Mr. Kestner standing near the store. App.p.90. Mr. Kestner told him that the person who had been shot was in the building. Id. Inside, Sgt. Garner found the .25 caliber semi-automatic pistol that Petitioner used to murder the victim (**State's Exhibit 12**). App.p.91. He also found a 9 mm pistol laying on the floor some distance away from the victim (**State's Exhibit 13**). Id. As soon as Sgt. Garner entered the

¹ While Petitioner testified that there were no exits other than past the victim, it appears that Mrs. Kestner stated in her testimony that there was an exit through the apartment in the store. App.p.124.

building, Petitioner told him, "I shot him, I'm sorry, please help him." Id. Ballistics testing on the .25 caliber pistol (**State's Exhibit 12**) would later reveal that it was, indeed, the weapon used to kill the victim. App.p.160-61. Also, the safety on the 9mm pistol (**State's Exhibit 13**) was on at the time of the shooting. App.p.87-91;97-98. Petitioner was arrested. Id. He later gave several statements which were introduced against him at trial. App.p.175-95;215-16. One of these statements, which he refused to reduce to writing, was to the effect that he and Mrs. Peele had discussed plans to murder her husband or have him "taken care of" by someone else. However, Mrs. Peele had persuaded him not to do so. Id. App.p.213-14. This conversation took place approximately a month before the murder. Id.

The prosecution also presented testimony from Mr. David Jones, who had been Petitioner's cellmate following his arrest. App.p.486-497. Mr. Jones testified that he discussed Petitioner's murder of the victim over the course of five or six days. App.p.489. Petitioner initially told Mr. Jones only that he had killed a man. App.p.490. Eventually, he also shared that the victim "wasn't worth a damn," and that he "had offered to do it a month earlier." Id. Mr. Jones testified that Petitioner showed absolutely no remorse when discussing the murder. App.p.491. To the contrary, he described Petitioner as cocky, arrogant and boastful about what he had done, specifically: "[h]e had killed [the victim] and he was going to run off with [his] wife." Id. With respect to the facts of the murder, Petitioner told Mr. Jones that he and Mrs. Peele had purchased the .25 caliber pistol on the morning of the murder and had gone to the Bow-Wow Boutique because they "knew [the victim] would be there." App.p.491.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

There is ample probative evidence in the record to support the PCR Judge's finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to utilize a purported prior inconsistent statement where the allegation was based solely upon speculative ambiguity between a witness's prior statement to police and trial testimony.

At the PCR hearing, Petitioner argued counsel was ineffective in failing to utilize State witness, Kimberly Kestner's, purported prior inconsistent statements during his cross-examination of the witness. Petitioner presented Mrs. Kestner's September 4, 1992 statement in support of the allegation. See Applicant's Exhibit 1. App.p.821.

Counsel testified to his course of conduct on the matter. In addition, Assistant Solicitor Riddle testified to his involvement in prosecuting Applicant's case. He noted that Mrs. Kestner testified in manner consistent with his pre-trial interview with the witness; but noted possible ambiguity on whether Mrs. Kestner's trial testimony comported with her prior statements on the matter. App.pp.769-96. He was adamant that Assistant Solicitor McMahon² disclosed all discovery material in a timely and ethical manner. App.p.798. Riddle disputed Petitioner's interpretation of the Mrs. Kestner's statement in stating, "No, ma'am, the conclusion that I take is that -- you're drawing, is that [the victim] walks in with gun in his hand then [Petitioner] pulls the gun and defends himself and I don't think that's what this statement said." App.p.802, ln. 6-10.

In denying Petitioner's application for post-conviction relief, the PCR judge found "[Petitioner] has not carried his burden of establishing prejudice in that he failed to present Kestner's testimony at the PCR hearing... [w]ithout presenting Kestner's

² The Honorable R. Knox McMahon.

testimony, [Petitioner] leaves this Court to speculate as to the impact the proposed impeachment of Kestner would have had at [Petitioner]'s trial." App.p.839.

Effective Assistance of Counsel

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). An applicant's mere speculation of what a witness's testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995).

Discussion

Ample probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove Strickland's prejudice prong where the allegation was solely reliant upon speculative ambiguity between Mrs. Kestner's statement to police, **Applicant's Exhibit 1**, and her trial testimony. At trial, Mrs. Kestner testified that a partial partition blocked her view of the victim's hands when he entered the business.

App.pp.131-33. She noted that Petitioner first reached to the back of his pants to grab an object which triggered the victim to follow suit. App.p.134. Upon hearing shots, she ducked for cover. App.p.134. Emergency dispatch instructed her to tell Petitioner to put down his pistol. App.p.150. Mrs. Kestner definitively realized the victim was also armed *after* he was murdered. App.p.150.

Any ambiguity³ between Mrs. Kestner's trial testimony and statement to police is subject to a number of interpretations, one of which may very well be that Mrs. Kestner lied on the witness stand as part of a nefarious plot to frame Petitioner. Respondent would suggest, however, a more plausible interpretation is that after witnessing a traumatic event from a poor vantage point, Mrs. Kestner allowed her mind to fill in the blanks and *assumed* the victim was also armed, only to later acknowledge while under oath that she had never actually seen a weapon *in his hands*. In any event, such possibilities are mere speculation – Respondent can no more explain or rationalize the ambiguity between Mrs. Kestner's statement to police and trial testimony than Petitioner can. The difference, however, is that Petitioner had the burden of filling in any such gap at the PCR evidentiary hearing and failed to do so. Accordingly, the PCR Court appropriately refused to engage in a speculative guessing game when Petitioner could have just as easily subpoenaed Mrs. Kestner and had her settle any confusion.

Alternatively, any possible deficiency here constituted harmless error in light of the overwhelming evidence of guilt, and Petitioner's trial testimony. Petitioner testified

³ Respondent notes that it is not entirely clear that Mrs. Kestner was referring to the victim arming himself in her statement to police, as it simply states: "There was a guy in the boutique with [Mrs. Peele]. [The victim] came in. **He reached behind him and pulled a gun.** I heard 2 [sic] and [the victim] fell." **See Applicant's Exhibit. 1** (Emphasis added). The indefinite pronoun "he" here could be interpreted to mean either the victim *or* Petitioner.

he reached for the pistol soon after the victim entered the building. App.pp.461-62. In pertinent part:

McMahon: You've already got your pistol out don't you, Mr. Rutland?
Petitioner: Yes.

McMahon: You cannot see a weapon in his hand at all. Can you? Right now.
Petitioner: I can't see his hand either.

App.p.464, ln. 22—p.465, ln. 2. By Petitioner's own account, he was the aggressor and brandished his pistol prior to having to the opportunity to observe whether the victim was in fact armed for the occasion. Furthermore, Petitioner's trial testimony undercut the materiality and relevance of Mrs. Kestner's value to the defense case and the State's case. He testified at trial that he and Mrs. Peele moved to the other side of the room to confront the victim while Mrs. Kestner remained at her station and continued to groom the Chow puppy throughout the fatal incident. App.p.400, ln 1-3; p.402, ln. 9—p.403, ln. 8. In pertinent part:

Counsel: And where was [Mrs. Kestner] at this time?
Petitioner: She was -- well, this is her table but it was **way back in here**. She was back in here⁴.

App.p.403, ln.12-14 (emphasis added).

Thus both Petitioner and Mrs. Kestner undermine the importance of her testimony by explaining that she was at a poor vantage point. The bottom line is that Mrs. Kestner's credibility was not a serious issue in this case. The fact that she did not see a weapon does not even conclusively refute Petitioner's version of events. Mrs. Kestner never testified that the victim was unarmed at the time of the shooting, or that he could not have had a weapon. In fact, she acknowledges that he made the same "reaching

⁴ In reference to State's Exhibit 1. App.p.396.

motion” that Petitioner did prior to the shooting – testimony from which a jury could easily infer he was also reaching for a weapon. App. p. 133, l. 25 – p. 134, l. 1. Particularly when she also testified that she did not see Petitioner with a gun until *after* the murder occurred. App. p. 136, l. 3-5.

Accordingly, Petitioner failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

II.

The PCR Judge correctly found that Petitioner failed to meet his burden to prove counsel was ineffective for failing to preserve a request to charge defense of another for appellate review where the charge was unsupported by the evidence presented at trial.

At the PCR hearing, Petitioner argued counsel was ineffective for failing to properly preserve the Trial Judge's rejection of the request to charge defense of another for appellate review. In denying Petitioner's application for post-conviction relief, the PCR Judge rejected the efficacy of Petitioner's argument and found a defense of another charge was inappropriate in Petitioner's case. App.p.842.

Effective Assistance of Counsel

"This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist at the time of trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Failure to request particular instructions is not ineffectiveness where those given by the court are adequate." Campbell v. U.S., 364 F.3d 727, 733 (6th Cir. 2004). And instructions need not be requested that are inconsistent with the trial theory. Butcher v. Marquest, 758 F.2d 373, 376-77 (9th Cir. 1985). "A defendant is entitled to a defense of another charge only where there is evidence he was lawfully defendant another person, i.e., the other person would have had the right to take the decedent's life in self-defense." Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1980).

The law to be charged is determined by the evidence presented at trial. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). In determining whether a defendant was

prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the proper instruction in a way that violates the Constitution. Todd v. State, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003). In order to establish self-defense, a defendant must establish the following elements:

1) the defendant must be without fault in bringing on the difficulty; 2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; 3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; if the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life, and; 4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance.

Goodson, 312 S.C. at 280, 44- S.E.2d at 372. The principle difference between defense of another and self-defense is that, in addition, the defendant must also establish that the person he assisted would have been entitled to use the same degree of force in his or her own defense. State v. Francis, 152 S.C. 17, 149 S.E.2d 348 (1929).

Discussion

The PCR Judge correctly assessed that Petitioner's case did not support an instruction on defense of another. Clearly, the State's evidence tended to prove that Petitioner murdered the victim; he killed Mr. Peele with malice aforethought, as the result of a preconceived plan. This evidence obviously would not support a jury instruction since the State's evidence reasonably tended to prove that Petitioner and Mrs. Peele were at fault in bringing on the difficulty; that Mrs. Peele lured her husband to the boutique,

where Petitioner was lying in wait; and, that Petitioner shot the victim before he had a chance to defend himself.

Likewise, the evidence presented by Petitioner did not support a charge on defense of another, separate and distinct from the self-defense charge that was given. His evidence reasonably tended to show that on September 4, 1992, he wanted to help Mrs. Peele leave her husband and Lexington County. However, neither one of them owned a car and both were in need of transportation. When they arrived at the boutique to purchase a vehicle from Mrs. Kestner, Petitioner carried a .25 caliber pistol into the store because the victim had purportedly threatened his life several hours earlier.

Petitioner first observed the victim outside of the boutique. He immediately walked into the middle section of the store and warned Mrs. Peele that her husband was there. Petitioner testified that Mrs. Peele approached, directed his attention first towards Mrs. Peele, loaded his pistol, and pointed it at her stomach. Mrs. Peele exhibited her imminent fear by walking closer to her husband. Petitioner noted that as soon as he saw the victim, he engaged in brinkmanship and pointed his pistol in the victim's direction. According to Petitioner, Mr. Peele redirected his aim towards him after Petitioner pleaded with him to stand down. Mrs. Peele initially attempted to step between the two men, but abruptly stopped when Petitioner shot the victim under the mistaken belief that he had pulled the trigger on his weapon. After shooting the victim in his side, Petitioner fired three shots under the same mistaken belief.

Petitioner testified that he carried the weapon into the boutique because of Mr. Peele's purported threats on his life. He initially intervened on Mrs. Peele's behalf when

the victim accosted her. However, he did not shoot the victim until he thought his own life was in danger. Compare Hewitt, 205 S.C. 207, 31 S.E.2d at 257 (1944) (The Court found that in Hewitt there were two incidents, separated by fifteen minutes; on the first occasion, the defendant was acting in defense of his wife and not himself; but in the second incident, he was acting only in self-defense). Unlike the situation before this Court in Hewitt, there was only one incident here, and Petitioner did not shoot until after the victim allegedly tried to shoot him. Id. Thus, under the unique circumstances presented in this case, the decision to charge on self-defense was sufficient and there was no error. See State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992).

Alternatively, Mrs. Peele would not have had the right to kill her husband in self-defense at the time of the shooting, since she could not meet all four of the elements to establish self-defense. See Goodson, 312 S.C. at 280, 440 S.E.2d at 372. First, her husband was pointing his weapon at Petitioner when the shooting occurred. Obviously, Mrs. Peele was no longer in either actual or apparent immediate danger of losing her life or sustaining bodily injury, thus obviating her right to use lethal force. The mere fact that the victim had previously pointed his gun at her would not give her the right to use lethal force against him once she was no longer facing an imminent threat. See State v. Bodie, 33 S.C. 117, 11 S.E. 624 (1890). Second, the only evidence presented at trial was that Mrs. Peele was at fault in bringing on the difficulty because she initiated the original encounter at the marital home. She admitted that she had drawn the .25 caliber pistol on her unarmed husband; the spark that initiated the conflict. Thus, her undisputed fault in

bringing on the subsequent difficulty at the boutique precluded the right to then use lethal force against the victim. See State v. Strickland, 147 S.C. 514, 145 S.E. 404 (1928). Finally, Mrs. Peele's aggressive posture in approaching the victim after he drew on her negated the plausibility that she experienced imminent fear of death or great bodily injury. Thus, the PCR Judge correctly found that as a matter of law the charge here was unsupported by evidence presented at Petitioner's trial.

Respondent would also point out, however, that even if Petitioner was entitled to a charge on defense of others as a matter of law, counsel's failure to request it *in no way* would have resulted in prejudice. To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous *and prejudicial* to the defendant. See State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). Petitioner's current claim of defense of others shares all of the factual problems and discrepancies he ran into when asserting self-defense. Respondent submits the jury's decision to convict was not the result of its confusion over some obscure legal technicality, but rather a firm belief that Petitioner's version of events was not believable. Petitioner's argument that counsel's failure to properly preserve the matter for appellate review is therefore without merit.

Accordingly, there is ample probative evidence in support of the PCR Judge's ruling that Petitioner failed to meet his burden under Strickland to show ineffective assistance of counsel. See Frasier v. State, 351 S.C. 285, 389, 570 S.E.2d 172, 174 (2002) "The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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By: 
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October 22, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No. 2014-000381

FRED R. RUTLAND,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

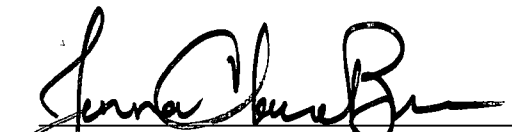
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
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This 22nd day of October, 2015


JENNA CLAIRE BROWN
LEGAL ASSISTANT