ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Lexington County

R. Lawton McIntosh, Circuit Court Judge

DONALD CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR court err in holding that that plea counsel provided effective assistance where Petitioner presented evidence that plea counsel failed to conduct an adequate investigation and failed to provide competent legal advice prior to the plea proceeding?

STATEMENT

A Lexington County Grand Jury indicted Petitioner for murder during its September 2005 term. App. 267-268. On November 26, 2007, Petitioner pled guilty to voluntary manslaughter. App. 1-22. Richard J. Breibart represented Petitioner during the plea proceedings, and Samuel R. Hubbard, III represented the state. App. 1. The Honorable James W. Johnson, Jr. sentenced Petitioner to imprisonment for twenty years. App. 21 lines 17-20; App. 269. Petitioner did not appeal his conviction or sentence.

On May 22, 2008, Petitioner filed an application for post-conviction relief. App. 23-29. The Honorable R. Lawton McIntosh presided over an evidentiary hearing on February 1, 2011. App. 35. Tara D. Shurling represented Petitioner, and A. West Lee represented the state. App. 35. On August 10, 2011, Judge McIntosh issued his order denying Petitioner relief. App. 247-266.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in holding that that plea counsel provided effective assistance where Petitioner presented evidence that plea counsel failed to conduct an adequate investigation and failed to provide competent legal advice prior to the plea proceeding.

According to the recitation of facts by the prosecutor during the plea proceeding, Petitioner and the victim's daughter lived together in a residence approximately five hundred feet from the victim's residence. App. 12 line 25 App. 13 line 6. The relationship between Petitioner and the victim "started going downhill." App. 13 line 22 – App. 14 line 4. The victim and his wife devised a plan to drive a wedge between Petitioner and the victim's daughter. They purchased a card, which they had signed by a woman suggesting that the woman and Petitioner had been together romantically the week before, and sent it to Petitioner's home. App. 14 line 14 – App. 15 line 5. When Petitioner saw the card, he realized the ruse. Petitioner drove to the victim's home and confronted the victim about the card. App. 15 lines 6-19. The victim ordered Petitioner to leave, which he did, but the victim followed. App. 15 lines 15-22. The victim exclaimed "I told you to get off of my land, you son of a bitch." App. 15 lines 23-24. According to the victim's wife, Petitioner turned around and shot the victim in the chest. App. 16 lines 1-5.

During the PCR proceedings, plea counsel testified that he was retained to represent Petitioner on February 4, 2005, shortly after the incident. App. 54 lines 10-14. Plea counsel testified that he discussed self defense with Petitioner. App. 59 line 20 – App. 60 line 9. Plea counsel also testified that he was aware of numerous documented incidents of prior difficulties between Petitioner and the victim. One of those incidents involved the victim and his wife telling the victim's daughter that Petitioner had been flirting with another woman. App. 69 lines 5-18.

Another incident involved the victim trying to kick in the door of Petitioner's home. App. 70 lines 7-12. The victim's daughter also reported to police that the victim had threatened to harm Petitioner if he saw him in public. App. 71 lines 16-25. Plea counsel also testified that Petitioner made him aware of other undocumented incidents of prior difficulties between Petitioner and the victim. App. 85 lines 7-19. Additionally, plea counsel testified that at the time of the incident, Petitioner believed the victim was armed. App. 125 lines 11-19. Concerning Petitioner's character, plea counsel testified he interviewed only two witnesses. App. 134 lines 16-20. Despite all of the evidence supporting self defense, plea counsel advised Petitioner to accept the plea offer of a negotiated sentence of twenty years in exchange for a guilty plea to voluntary manslaughter.

During the PCR hearing, Petitioner called the victim's daughter to testify. App. 157 lines 18-21. She testified to numerous instances of the victim acting violently toward Petitioner. App. 161 lines 17-22; App. 162 lines 6-11. She recalled an instance in which the victim threatened her stepfather with a rifle or shotgun. App. 168 line 10 – App. 169 line 4. Additionally, she testified that she informed Petitioner of her father's propensity for violence prior to the shooting. App. 162 line 19 – App. 163 line 17. She testified that the victim's reputation in the community was that he was not very peaceful, that she feared her father would harm Petitioner, and she expressed that fear to Petitioner. App. 164 lines 3-10. The victim's daughter testified during the PCR proceedings that she shared this information with plea counsel. App. 165 line 18 – App. 166 line 2. She also told plea counsel that she would be willing to testify on Petitioner's behalf at a trial. App. 166 lines 3-6.

Petitioner testified during the PCR hearing as well. He stated that he told plea counsel from the very beginning that he acted in self defense. App. 182 lines 15-19. Petitioner testified that he armed himself in self defense. App. 188 line 19 – App. 189 line 25. He further testified that as the

victim was following him out the house, the victim was shoving him. App. 192 lines 11-13. Petitioner explained that the victim charged toward him and only then did Petitioner fire the fatal shot. App. 194 lines 10-14. According to Petitioner, plea counsel's explanation of self defense focused on the duty to retreat without any explanation of how the defense related to Petitioner's case. App. 182 line 20 – App. 183 line 1. According to Petitioner, plea counsel did not discuss the circumstances under which he would still have a viable claim of self defense. App. 183 lines 8-16. In general, plea counsel failed to discuss how Petitioner would assert self defense procedurally, that the burden to disprove self defense would be placed upon the prosecution, and that Petitioner would be permitted to introduce evidence of prior difficulties between the parties. App. 183 line 17 – App. 184 line 10. According to Petitioner, plea counsel did not explain that Petitioner would be permitted to present evidence from character witnesses at a trial. App. 197 lines 4-21. Plea counsel did not discuss his odds of getting a self defense verdict. App. 205 lines 4-7. Petitioner testified he agreed to plead guilty because of plea counsel's poor advice and his belief that plea counsel was not prepared for trial. App. 205 line 13 – App. 207 line 7. Petitioner told the PCR judge that if he had understood the elements of self defense and the evidence he would be permitted to present to support his defense, then he would not have pled guilty. App. 198 lines 10-17.

Finally, Petitioner presented a group proffer of eleven individuals who swore they would have testified to Petitioner's good character, reputation, reputation for peacefulness, and reputation for truthfulness had they been called. App. 230 line 10 – App. 231 line 13.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S.

668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688. A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In cases involving guilty pleas, the prejudice prong requires a showing that there is a reasonable probability, but for counsel's errors, Petitioner would have insisted upon a trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Plea counsel provided deficient performance by failing to discuss the elements of self defense with Petitioner, properly investigate the facts supporting his defense, and explain to him the evidence he would be permitted to present to support the defense. When a defendant asserts an affirmative defense, such as self defense, the prosecution must disprove the elements of the defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 544 -45, 500 S.E.2d 489, 492-493 (1998). To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (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, or if the defendant was actually in imminent danger, the

circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order 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 own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978).

Petitioner was not at fault in bringing on the difficulty. An individual who provokes or initiates an assault may not assert self defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id. The evidence presented at the PCR hearing demonstrated that Petitioner was not at fault in bringing on the difficulty. When asked to leave the victim's residence, he did so. It was only after repeated physical aggression by the victim and the final act of charging toward Petitioner that Petitioner wielded his gun. It was the victim who initiated this difficulty by his increasingly violent acts of harassment toward Petitioner and by sending the card to Petitioner's girlfriend to drive a wedge between the two.

Petitioner was in actual imminent danger of losing his life or sustaining serious bodily injury or actually believed he was. In South Carolina, individuals have a right to act on appearances. State v. Starnes, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000). The pertinent fact noted by the Court in Starnes was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the South Carolina Supreme Court held a defendant's statement that it was either

"her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id. Petitioner testified during the PCR hearing that he was in actual danger based upon the victim charging toward him. In the alternative, Petitioner reasonably believed he was in actual danger based upon the victim's conduct of shoving him repeatedly and then charging toward him.

In light of Petitioner's actual danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Alternatively, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief as Petitioner – that he was in imminent danger of losing his life or sustaining serious bodily injury. The undisputed evidence presented at the PCR hearing demonstrated escalating violence on the part of the victim toward Petitioner. In addition, the victim's own daughter testified as to her father's temper and violent nature.

Petitioner had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. In State v. Santiago, 370 S.C. 153, 161, 634 S.E.2d 23, 27-28 (S.C. Ct. App. 2006), this Court held the defendant did not satisfy the fourth element of self defense because the defendant had a duty to retreat and could have done so easily. At the time of the shooting, the defendant stood at the back of the car, and the deceased, who was unarmed, stood at the front. Id. at 161, 634 S.E.2d at 28. This Court held that due to the distance between the two men at the time of the shooting, the defendant could have

retreated rather than shooting or he could have closed his trunk, where the gun was located. Id. Similarly, this Court held a defendant was not entitled to a jury instruction on self defense because the defendant fired the shot after the victim ran from the defendant and was fifty feet away. Lockamy, 369 S.C. at 384, 631 S.E.2d at 558. Petitioner was not required to wait for the victim to attack him before acting. See also Starnes, 340 S.C. at 322, 531 S.E.2d at 913; State v. Nichols, 325 S.C. 111, 117-118, 481 S.E.2d 118, 121-122 (1997); State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)(holding that the defendant did not have to wait for his assailant to "get the drop on him" before acting to protect himself). Petitioner testified at the PCR hearing he had no where to go to get away from the victim when he began charging toward him.

Plea counsel's poor advice that Petitioner's claim of self defense was weak and that he would lose the case if he went to trial constituted deficient performance in light of the undisputed evidence to support Petitioner's claim of self defense. Petitioner testified during the PCR hearing that he pled guilty based upon plea counsel's advice and had he known the law regarding self defense, he would not have done so. Therefore, Petitioner satisfied both prongs of the Strickland standard and is entitled to relief.

CONCLUSION

Petitioner requests this Court grant the writ of certiorari and permit full briefing on the issue.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of February, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

DONALD CARTER,

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STATE OF SOUTH CAROLINA,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald Carter states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 1, 2011. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Donald Carter.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of February, 2012

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Kaelon E. May, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Donald Carter, #325307, at Lee Correctional Institution, this 16th day of February, 2012.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of February, 2012.

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

My Commission Expires: October 2, 2013.