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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-000366

Clarence Kendall Cook,.....Petitioner,

v.

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

PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, and hereby respectfully petitions this Court to rehear this matter.

I.

Respondent submits this Court erred in the first instance in granting Petitioner's request for a White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), review of direct appeal issues. The post-conviction relief judge found Petitioner failed to meet his burden of proving he did not knowingly and voluntarily waive his right to a direct appeal. (App. p. 816). This Court applies a highly deferential standard to review finding of the post-conviction relief judge. This Court must affirm the denial of post-conviction relief when there is any probative evidence to support the findings of the post-conviction relief judge.

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 v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)). Substantial evidence in the record demonstrates Petitioner waived his right to a direct appeal. Trial counsel testified extensively Petitioner was aware of the procedure for requesting an appeal from her, but never asked her to file an appeal. (App. p. 770, lines 2-6; p. 770, lines 9-15; p. 771, lines 23-25; p. 772, lines 13-16; p. 773, line 1; p. 773, lines 2-15; p. 786, lines 24-p. 789, line 17).¹ Trial counsel's testimony overwhelmingly indicates she advised Petitioner of the right to appeal. She explained to him that he could appeal the conviction. She explained an appeal must be filed within ten days. She discussed potential appellate issues with Petitioner. She had petitioner sign a document indicating he was aware of the deadline to appeal.² Therefore, the probative evidence overwhelmingly indicates Petitioner was aware of the right to an appeal, and waived that right by failing to request an appeal. Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) ("Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." (citing 92 C.J.S. Waiver, p. 1063 (1955))). As this Court overlooked this substantial evidence supporting the post-conviction relief judge's finding, rehearing is appropriate in this case.

¹ This Court may have been persuaded by Petitioner's testimony at the hearing that he immediately requested an appeal, (App. p. 703, lines 19-p.704, line 12; p. 717, lines 11-18), as that was the *only* evidence contrary to the post-conviction relief judge's finding. However, the post-conviction relief judge found Petitioner's testimony not to be credible. (App. p. 817). As the post-conviction relief judge was in a better position to judge the credibility of the witnesses, (see Simuel v. State, 390 S.C. 267, 271 n.2, 701 S.E.2d 738, 740 n.2 (giving great deference to post-conviction relief judge's credibility finding)), this Court abandoned its stated standard of review in giving credence to Petitioner's self-serving testimony.

² This document was introduced at the PCR hearing, but is not included in the record. See reference at App. p. 787, lines 18-19.

II.

Respondent further submits this Court erred in holding there was no evidence petitioner was acting in the sudden heat of passion. Again, this Court must defer to the trial judge's decision to charge the lesser included offense of voluntary manslaughter where there is *any* evidence to support the charge. State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010).³ "If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). The "sudden heat of passion" that mitigates a murder to a voluntary manslaughter, "while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001) (citations omitted). Here, the record contains evidence that, viewed in the light most favorable to Petitioner, could indicate he was acting in a heat of passion. The victim had a long history of threatening behavior toward Petitioner. Petitioner and the victim had exchanged threatening text messages hours before the shooting. Petitioner's witnesses indicated he was "fussing" with the victim at the time of the shooting. Four witnesses testified Petitioner walked over to the victim, after he fell to the ground, and fired a second shot. Petitioner also gave a statement indicating he fired the shots "before [he] knew it." (from Petitioner's videotaped statement, admitted at trial.)

³ Contrary to the Court's assertion, it is not this Court's duty to weigh the evidence to determine whether Petitioner was acting in a sudden heat of passion. Instead, this Court must determine whether there is *any* evidence in that respect.

The trial judge properly ruled a reasonable juror could interpret this evidence to indicate Petitioner was acting under a sudden heat of passion. Petitioner's own statement, that "before [he] knew it, [he] fired a bullet,"⁴ could be interpreted to mean he was not in control of himself when he shot the victim, and thus acting under an uncontrollable impulse to do violence. The fact Petitioner approached the incapacitated victim and shot him again could be interpreted to mean he was incapable of cool reflection during the shooting.

The Court's comparison of this case to State v. Niles, 412 S.C. 515, 772 S.E.2d 877 (2015), simply because both Petitioner and Niles both fired two shots, is myopic. In Niles, the defendant fired two shots in response to allegedly being fired upon during a drug robbery. 412 S.C. at 523, 772 S.E.2d at 881. The number of shots fired by Niles was not a factor in the Court determining he was not entitled to a voluntary manslaughter charge. Id. ("Thus, the scheme to rob the victim, coupled with Niles's decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act in a sudden heat of passion.").

Instead, this case is apposite to State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993), despite the Court's efforts to distinguish it because of the lack of a physical altercation. There, Lowry and the decedent were engaged in a verbal altercation prior to the shooting. 315 S.C. at 398, 434 S.E.2d at 273. During the altercation, the decedent raised his arms above his head and Lowry shot him in the chest. Id. "After the decedent

⁴ The Court's assertion that this statement could be heard in any shooting cases "[d]ue to the short, swift motion of firing a gun" is misplaced. This statement indicates Petitioner fired the shot without intent. Were this a true self-defense case, Petitioner would have fired the shot with the intent to protect himself. This Court also takes the position Petitioner either fired the shot in self-defense or with malice, thereby foreclosing the availability of voluntary manslaughter. The jury determined Petitioner did not act in self-defense, and this Court should not second guess that determination or prevent Petitioner from receiving that jury charge.

fell, Lowry cursed him and shot him again, this time in the head.” Id. Based on those facts, this Court held the trial judge erred in not instructing the jury on voluntary manslaughter because the jury could have discerned there was sufficient heat of passion to find Lowery guilty of the lesser-included offense. Id. at 399, 434 S.E.2d at 274 (citing State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988)). By distinguishing this case because of the lack of a physical altercation, the Court now seems to say a physical altercation is a prerequisite to acting in a sudden heat of passion.⁵ While the nature of the altercation may be relevant to establish whether there was sufficient provocation,⁶ it has no bearing on the defendant’s state of mind. Whether Petitioner was overcome by a sudden heat of passion should not be dependent on the actions of the victim, especially in a case such as this one where Petitioner conceded the victim’s actions constituted sufficient provocation.⁷

Furthermore, the Court determines this case is distinguishable from Lowry because some witnesses testified the argument between Petitioner and the victim was not heated. However, inconsistencies in the testimony about the nature of the altercation do not eliminate the possibility Petitioner was acting under a sudden heat of passion. See State v. Grubbs, 353 S.C. 374, 382, 577 S.E.2d 493, 497 (Ct. App. 2003) (“We likewise find Grubbs's inconsistent statements do not negate her right to a charge of voluntary

⁵ Respondent notes that the only physical altercation in Lowry was “bumping chests,” and contends that this behavior is not in the nature of a physical altercation, but may have been incidental to a heated argument in which the participants were in close physical proximity.

⁶ “Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. Rather, when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault-by some overt, threatening act-which could have produced the heat of passion.” Lowry, 315 S.C. at 399, 434 S.E.2d at 274 (internal citations omitted). Respondent reiterates that the minimal physical encounter present in Lowry was found to be enough to necessitate the voluntary manslaughter charge.

⁷ Interestingly, this Court has previously held a defendant in a verbal argument may be acting under a sudden heat of passion. State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (“Appellant was in a heated argument with Victim and Sister.”).

manslaughter where one of her statements asserted facts entitling her to the charge.”). Therefore, the trial judge properly submitted the voluntary manslaughter charge to the jury in spite of the other contradictory evidence relied upon by this Court.

This Court, instead of reviewing the record for evidence to support the trial judge’s decision, took its own view of the facts to determine Petitioner was not guilty of voluntary manslaughter.⁸ However, there was *some* evidence of a sudden heat of passion. As this Court may have overlooked this evidence, rehearing is appropriate in this case.

III.

Respondent further requests this Court grant rehearing and oral argument in this case. This Court took the unusual step of issuing an opinion without giving the parties the opportunity to present oral arguments on the issue before this or any Court. Respondent submits this case is *not* one where “oral argument would not aid the Court in resolving the issues.” Rule 215, SCACR. Rather, Respondent submits that rehearing would provide the first true opportunity for this Court to hear both sides of the matter.

In the alternative, should the Court deem rehearing unnecessary, Respondent requests this Court depublish its opinion. Pursuant to Rule 220(b)(1)(B), SCACR, this Court may issue a memorandum opinion when it unanimously decides the evidence to support a jury verdict is insufficient. Respondent respectfully submits this Court’s decision should be depublished because it is based upon a factually specific finding by this Court that certain facts did not amount to a sudden heat of passion. As the

⁸ Interestingly, this Court has recently chastised the intermediate appellate court for similar actions. See Bass v. S.C. Dept. of Soc. Servs., Op. No. 27593 (S.C. Sup. Ct. filed Dec. 2, 2015) (Shearouse Adv. Sh. No. 47 at 12) (“Rather than examining the record to discern whether there was any evidence put forward at trial to support the jury verdict, the court of appeals seems to have searched the record for evidence to corroborate DSS’s theory of the case[.]”).

determination of whether facts give rise to a heat of passion should be determined on a case by case basis, the publication of this opinion creates dangerous precedent implying a heat of passion can never exist absent a physical altercation. Thus, should the Court decline to rehear this matter, the opinion should be depublished.

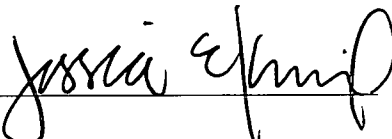
CONCLUSION

Because of the great significance of the position in this published decision, we ask the Court to grant oral argument so it may be further discussed with the Court. Furthermore, for all of the foregoing reasons, the State requests this Court grant the petition for rehearing and affirm Petitioner's conviction and sentence. In the alternative, the State requests this Court depublish its opinion in this matter.

Respectfully submitted,

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BY: 

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ATTORNEYS FOR RESPONDENT

December 22, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

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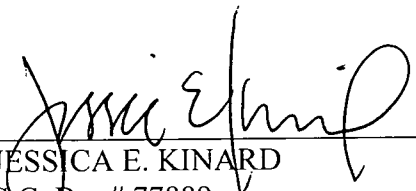
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Jessica E. Kinard, certify that I have today served the within **Petition for Rehearing** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 22nd day of December, 2015.



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ALAN WILSON
ATTORNEY GENERAL

December 22, 2015

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

Re: Clarence Kendall Cook v. State of South Carolina
Appellate Case No: 2013-000366
Lower Case No: 2012-CP-34-0041

Dear Mr. Shearouse:

Attached is the original and six (6) copies of the **Petition for Rehearing** of Respondent in the above referenced case for filing in your office.

Sincerely,

Jessica E. Kinard
Assistant Attorney General
SC Bar #77889

JEK/jacc

cc: Kathrine H. Hudgins, Esquire
Trisha Allen, Victim Services