STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge

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S.C. SUPREME COURT

Case No. 2012-CP-22-0635

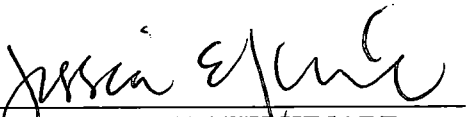
Vladimir Walt Pantovich, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable George C. James, Jr.'s order dated January 8, 2017 and filed January 2, 2017 granting post-conviction relief to the Respondent. The State received notice of entry of the order on January 17, 2017. A copy of the order on appeal is attached to this notice.

By: 

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February 10, 2017

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PROOF OF SERVICE

I, Jessica Elizabeth Kinard, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Tristan M. Shaffer, Esq.
Shaffer Law Firm
225 Columbia Ave.
Chapin, SC 29036

I further certify that all parties required by Rule to be served have been served this 16th day of February, 2017.

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STATE OF SOUTH CAROLINA) COUNTY OF GEORGETOWN)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Vladimir W. Pantovich, #326633,)) Applicant,)) v.)) State of South Carolina,)) Respondent.))	Case No. 2012-CP-22-635

ORDER GRANTING POST-CONVICTION RELIEF

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 22, 2012. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In April 2006, the Georgetown County Grand Jury indicted Applicant for murder (2006-GS-22-126). Stuart M. Axelrod, Esquire ("trial counsel"), represented Applicant. On February 4, 2008, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. On February 8, 2008, the jury found Applicant guilty of the lesser included offense of voluntary manslaughter. Judge Culbertson sentenced Applicant to fourteen (14) years imprisonment.

Applicant filed a timely notice of appeal. Joseph L. Savitz, III, Esquire ("appellate counsel"), of the Office of Appellate Defense, filed an Anders[1] brief. The South Carolina Court of Appeals dismissed Applicant's appeal on June 8, 2011. State v. Pantovich, Op. No. 2011-UP-275 (S.C. Ct. App. filed June 8, 2011). The direct appeal remittitur was returned to the circuit court on June 28, 2011.

[1] Anders v. California, 386 U.S. 738 (1967).

On June 22, 2012, Applicant filed the PCR application that gave rise to this action. Respondent made a timely Return on or about September 25, 2012. The Court convened an evidentiary hearing into the matter on March 21, 2014, at the Georgetown County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Although other issues were raised in the PCR application at the PCR hearing, Applicant amended his PCR Application and proceeded on only an allegation of ineffective assistance of appellate counsel for failure to file a merits brief challenging the trial judge's refusal to issue certain jury charges. One of those jury charges was a good character charge based on State v. Green, 278 SC 239, 240, 294 SE2d 335, 335 (1982).

Applicant's trial counsel, Stuart M. Axelrod, Esquire, testified at the first PCR hearing. The Court had before it a copy of the trial transcript, the records of the Georgetown County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and exhibits introduced at the hearing. Counsel for Applicant and Respondent also submitted memoranda in support of their respective positions.

On June 16, 2014, the Court dismissed Applicant's PCR finding that Applicant failed to overcome the presumption of regularity attached to the Court of Appeal's review of the appellate Counsel's Anders brief. Applicant appealed this order.

On August 19, 2015, the Supreme Court reversed and remanded Applicant's case. Pantovich v. State, 2015-MO-052 (filed August 19, 2015). The Supreme Court found there was not a "rebuttable presumption that the Court of Appeals reviewed every potential appellate issue and determined them to be without merit when conducting an Anders review" on Applicant's case. See id. The Supreme Court remanded the case for a determination based on Strickland v.

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Remittitur was sent on September 14, 2015.

At the request of Applicant and the consent of Respondent and the Honorable William Seals acting as chief administrative judge for the Fifteenth Judicial Circuit, this Court agreed to hear this matter on remand.

On May 2, 2016, the Court convened a hearing on this matter at the Richland County Courthouse.[2] The Court had before it a copy of the trial transcript, the records of the Georgetown County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return. In addition, the first PCR hearing transcript was made part of the record.

For the May 2, 2016 hearing, the State was represented by Jessica E. Kinard, Esquire who argued that Appellate Counsel did not have a duty to raise every possible issue on appeal. In a case such as this where, the State alleged, there was overwhelming evidence of guilt, it argued that Petitioner cannot show that the error was harmful or prejudicial. The State also argued that a good character instruction has no relevance to the analysis of self-defense.

Petitioner argued that Appellate Counsel was ineffective because there was no strategic reason not brief the good character jury charge issue and that, had Appellate Counsel raised this issue, the conviction would likely have been reversed by the Court of Appeals.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to S.C. Code § 17-27-80, the Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court makes the following findings:

[2] For ease of scheduling, all parties consented to a change of venue for this hearing.

The Test for Determining Ineffective Assistance of Appellate Counsel

In determining if Appellate Counsel was ineffective for failing to raise the good character charge in a merits brief, this Court must apply the Strickland test. Pantovich v. State, 2015-MO-052 (August 19, 2015). "For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient, and 2) he was prejudiced by counsel's deficient performance." Bennett v. State, 383 S.C. 303, 307-08, 680 S.E.2d 273, 275 (2009) (citing Strickland). An allegation of ineffective assistance of appellate counsel requires an applicant show appellate counsel failed to raise a viable issue on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990)). The applicant must also prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (other citations omitted).

Application of Strickland to the Present Case

Trial counsel requested a good character charge, but the trial judge denied the request, stating that he thought the charge given covered everything. (Tr. 536, l. 25 – 538 l. 6). Appellate Counsel did not brief the good character charge issue and instead submitted an Anders brief. The issue in this case is whether Appellate Counsel's failure to raise and argue the issue was deficient and, if it was deficient, whether there is a reasonable probability that but for this error, the Applicant's conviction would have been reversed and the matter remanded for a new trial.

For the reasons argued by the Applicant, a good character charge should have been given. It is well-settled that a criminal defendant may introduce evidence of his good character. Applicant's trial counsel did so through multiple witnesses. (Tr. 481, ll. 21-25; 483, ll. 17-23; 494, l. 23 – 496, l. 5; 498, ll. 9-11; 500, l. 14 – 502, l. 2; 507, l. 16 – 508, l. 1; 511, ll. 4-7).

When requested and when there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant. See, e.g., State v. Green, 278 SC 239, 240, 294 S.E.2d 335, 335 (1982); State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007) (reversing the trial court for failure to give a good character evidence charge); State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000) (cert. denied) (reversing drug conviction after the trial court's refusal to charge good character evidence despite the defendant's admission that he attempted to purchase cocaine.); State v. Lyles, 210 S.C. 87, 92, 41 S.E.2d 625, 627 (1947) (finding that the trial court erred in not giving a good character evidence charge but finding that the issue was not preserved).

The State argues that since this was a case of "imperfect self-defense," a good character charge was not warranted. Our Supreme Court has addressed the doctrine of imperfect self-defense in two recent cases, State v. Sams, 410 SC 303, 764 S.E.2nd 511 (2014) and State v. Scott, 414 SC 482, 779 S.E.2d 529 (2015). As noted in Sams, "[u]nder the 'imperfect self-defense' doctrine, the crime is reduced from murder to voluntary manslaughter where a defendant had a genuine but unreasonable fear of imminent peril ... and ... although acting in self-defense, was not himself or herself free from blame, as where he or she was the aggressor or used excessive force, although without murderous intent." 40 C.J.S. Homicide §110 (2006), quoted in Sams, 410 SC at 315. However, the Sams Court and the Scott Court observed that the doctrine of imperfect self-defense has not been adopted in South Carolina. Since the doctrine is not recognized in South Carolina, this court respectfully rejects any argument that the instant case was a case of imperfect self-defense; since the doctrine is not recognized, the court must

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also reject the State's argument that the Applicant's good character was therefore not relevant to the jury's consideration of self-defense.

The defense presented by the Applicant was that he acted in self-defense. The Court first notes that self-defense can be a defense to voluntary manslaughter, according to our Supreme Court. See State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993). In Hill, the defendant was charged with murder. The murder charge and the lesser offense of voluntary manslaughter were submitted to the jury. The trial judge refused the defendant's request to charge self-defense. The defendant was acquitted of murder but convicted of voluntary manslaughter. The defendant appealed the denial of the self-defense charge and the Supreme Court reversed and remanded for a new trial, holding self-defense should have been charged.

In the instant case, evidence of the Applicant's character and reputation for peacefulness and non-violence was admitted into evidence. Absent a jury instruction on good character, it is reasonable to conclude that the jury was not aware that it could consider the Applicant's good character in determining whether the State had disproven that the Applicant acted in self-defense. The trial transcript clearly reflects that the jury was debating the issue of self-defense when it asked the trial judge during deliberations whether there was "any duty to leave the premises if the residence is both the residence of the victim and the defendant." (Tr. 587, l. 20). Of course, this narrow question from the jury does not mean that the jury was not also reviewing the other factors of self-defense, such as whether Applicant was without fault in bringing on the difficulty. There is a reasonable probability that Applicant would have prevailed on appeal if the good character charge issue had been raised by appellate counsel, as there is ample room for an appellate court to have concluded that a good character charge would have had an impact upon the jury's consideration of the elements of self-defense. In this case for example, there is a

reasonable probability that a good character charge would have impacted the jury's consideration of whether the defendant was without fault in bringing on the difficulty between him and the victim. See discussion in State v. Lee-Grigg, *supra*, 374 S.C. at 417-418.

The State contends that "good character" cannot factor into a self-defense analysis, as evidence of good character cannot rehabilitate a defendant's conduct when there is no question that the defendant killed the victim. For this proposition, the State cites State v. Starnes, 388 S.C. 590, 698 S.E. 2d 604 (2010). In that case, the Supreme Court affirmed the defendant's capital murder conviction, rejecting the defendant's argument that the trial court erred in refusing to charge the jury on voluntary manslaughter. In its discussion on the interplay between self-defense and voluntary manslaughter when the primary charge is murder, the Court reaffirmed that evidence that a defendant killed a victim in the heat of passion—even heat of passion arising from fear— mitigates murder to voluntary manslaughter but does not justify it. The State maintains that under the facts of the instant case, even if a good character charge had been given, there is a high probability that the jury would still have found Applicant guilty of voluntary manslaughter, and that, therefore, there is not a reasonable probability that Applicant would have prevailed on appeal. For the reasons stated above, I respectfully disagree.

CONCLUSION

This court concludes that the Applicant has met his burden of proving (1) that appellate counsel's failure to brief the good character charge issue constituted deficient performance and (2) that, but for this deficient performance, the result of the appeal would have been different, as there is a reasonable probability that the Court of Appeals or Supreme Court would have reversed the conviction and remanded for a new trial, because a good character charge may have caused the jury to conclude the State had not disproven self-defense beyond a reasonable doubt.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is granted; and

2. The case is remanded to the Georgetown County Court of General Sessions for a new trial.

AND IT IS SO ORDERED this 8 **day of** January **, 2017.**

GEORGE C. JAMES, JR.
Presiding Judge