

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

JUL 18 2018

**CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge**

S.C. SUPREME COURT

**Appellate Case № 2018-000464
Lower Case No. 2014-CP-10-3019**

Jerome Campbell, # 349454, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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Statement of Issues Presented

Question I: Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective when he failed to object to the trial judge charging mutual combat which undercut his self defense charge in violation of the principles established in State v. Taylor 356 S.C. 227, 589 S.E.2d 1 (2003)?

Question II: Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective in failing to properly object to the failure of the trial judge to charge the law as to the defense of others?

Question III: Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective for his failing to object to the trial judge charging the hand of one is the hand of all and the law of aiding and abetting when the facts did not support the charge?

Statement of the Case

Procedural History

Jerome Campbell was tried before a jury on January 23-27, 2012 on charges of murder and three counts of assault and battery with intent to kill. The charges arose from an incident that occurred in Charleston, SC on January 9, 2009. He was convicted of all the charges and sentenced to thirty years for murder and ten years on the three assault and battery with intent to kill charges. The latter charges ran concurrent with the murder charge.

A timely Notice of Intent to Appeal was filed before the South Carolina Court of Appeals. The conviction was affirmed on August 7, 2013. A petition for rehearing was denied on October 23, 2013. No further appeal was taken.

Mr. Campbell filed his initial Post Conviction Relief Hearing on May 12, 2014. An Amended Petition was filed on January 12, 2017. A hearing on the Post Conviction Relief hearing was held before the Honorable William H. Seals, Jr. on January 12, 2017. By his order of January 17, 2018 Judge Seals denied the Petition. Mr. Campbell filed a Motion to Alter or Amend the Judgement on January 31, 2018. This was denied by Order filed March 7, 2018. Mr. Campbell filed his Notice of Appeal on March 12, 2018.

Factual History

The events that led to the shooting arose from a marital disputed between Charise Coaxum, the sister of Jerome Campbell, and her husband, Michael Allen. Mr. Allen and his wife resided at the Plantation Apartments. Anthony German and his brother Michael German, the deceased, resided at Georgetown Apartments. Frank Haigler, the brother of Michael Allen, testified he had been to the Plantation Apartment to try and mediate the differences between

Ms. Coaxum and Michael Allen. App. at 306, l 25 to 307, l 5. He testified he stayed at the Plantation apartment for about 45 minutes. App. at 308 ll 3-8.

Mr. Haigler testified he saw Mr. Campbell in front of the apartment of Ms. Coaxum, his sister-in-law, at Plantation apartments. App. at 303, l 4-6. He later testified Mr. Campbell was not at the Plantation apartments. App. at 308, ll 19-21. After Mr. Haigler left the Plantation apartment, he, with his brother Michael Allen, went to the Georgetown apartment of Anthony and Michael German. At this apartment Mr. Haigler said he saw Mr. Campbell with a pistol. App. at 304, l 3 to 305, l 7. Mr. Haigler testified that notwithstanding messages from Mr. Campbell for Michael Allen not to return to the Plantation apartment, he, Michael Allen, Anthony German, and Michael German went to the vicinity of the apartment.

He testified that he told the others to wait at the store while he went to the Plantation apartment. App. at 310, l 24 to 311, l 14. As he approached the apartment, he saw Mr. Campbell. He stated he and Mr. Campbell had a confrontation in which he was struck by Mr. Campbell. He also observed two other men with shotguns. App. at 313, ll 11-15. After being struck he fled the scene and stated he heard two gun shots. App. at 316, ll 7-14. After he fled the scene he heard a car speeding from the Plantation apartments and heard more gunshots. App. at 317, ll 7-11. No one was able to identify who was driving or who was shooting. As a result of the shooting, a ricochet bullet struck and killed Michael German. Mr. Campbell turned himself in to the police some two hours later. App. at 262, ll 3-6.

Argument

Question I

Did the Post Conviction Relief judge err in failing to find trial counsel ineffective when he failed to object to the trial judge charging mutual combat which undercut his self defense charge in violation of the principles established in State v. Taylor 356 S.C. 227, 589 S.E.2d 1 (2003)?

At the close of the case, a charge conference was held. Based upon the discussion of the parties, the trial judge elected to charge the law of mutual combat. This was apparently first suggested by the state when the solicitor stated “And again, I would just here mention the line of cases involving mutual combat and that’s where mutual combat means you both bring guns to a fight, self defense is not a defense available to you and clearly - - -” App. at 665, l 24 to 666, l 2. In ruling on this issue, the trial judge stated “Well, that’s part of the instruction and actually, self - - mutual combat is - - There are different parts of mutual combat. Of course, if he voluntarily participated in combat for purposes other than protection, then it’s not self defense, even if during the combat he feared death or serious bodily injury.” App. at 666, ll 3-9. Trial counsel then agreed that if the jury finds mutual combat, then they could not find self defense. App. at 667, ll 20-24. In discussing her jury charge the trial judge again stated she would charge mutual combat. App. at 670, ll 14-18. No objection was raised by defense counsel at that point.

The trial judge then charged mutual combat. The trial judge placed the mutual combat charge in the with the self defense charge right after stating the first element of self defense as being “without fault in bringing on the difficulty”. App. at 759, ll 2-3. Before going to the second element of self-defense, the trial judge then gave the mutual combat charge. She told the

jury “If the defendant voluntarily participated in mutual combat for purposes other than protection, the killing of the victim would not be self defense.” App. 759, ll 11-13.

This charge by the trial judge was contrary to the holding of this Court in *State v. Taylor*, 356 S.C.227, 589 S.C.2nd 1 (2003), a case decided some nine years before this trial. Trial counsel admitted he was not familiar with the *Taylor* case. App. at 1077, ll 5-15. As this Court said in *Taylor*, “Although the court charged self-defense properly in Petitioner’s case, that charge was negated by the court’s unwarranted charge on mutual combat. We find that the court’s mutual combat charge acted as a limitation on the Petitioner’s ability to claim self-defense, and prejudiced him by transferring the *State’s burden* to disprove self-defense onto the Petitioner, forcing him to prove self-defense in violation of *Burkhart Addison, and Wiggins.*” *Id.* at 235, 589 S.E.2d at 5 (emphasis in original).

In his ruling, the PCR judge failed to address the *Taylor* opinion. App. at 1091. The failure to address the *Taylor* decision was called to the attention of the PCR judge through a Motion to Alter or Amend the Judgment. App. at 1101. In the Order denying the Rule 59 Motion, the PCR judge again failed to address the case. The closest the PCR judge came to addressing the *Taylor* issue is to say “Here, there is some evidence presented that Applicant engaged in a mutual willingness to fight throughout the day of the incident. Therefore, the trial court’s instruction on mutual combat was supported by the evidence presented at trial and any objection would not have been successful.” App. at 777 ll 22 to 778 l 1. This statement ignores the importance and significance of the *Taylor* decision. The PCR judge never addressed the burden shifting importance of the *Taylor* decision. Nor did it address this Court’s conclusion in *Taylor* that mutual combat seldom, if ever, should be charged with self-defense.

The same principles established in *Taylor* should apply in this case. Here the concept of “mutual combat” was not clearly established, if at all. While there had been disagreements and arguments between Mr. Campbell and the others, there is no evidence that each armed themselves with the idea or belief they were going to engage in mutual combat. In fact the record shows that Mr. Campbell had not told Mr. Haigler and his brother not to come to his sister’s apartment. App. at 338, l 25 to 339, l 6.

Mr. Frank Haigler testified he was trying to resolve a disagreement between his brother Michael Allen and his sister-in-law, who is the sister of Jerome Campbell. App. at 306, l 6 to 308, l 18. Michael Allen and his wife lived at the Plantation Apartments. Mr. Campbell was not present during the discussions at his brother’s Apartment. App. at 308, ll 19-21. Mr. Campbell and Frank Haigler had a confrontation after Mr. Haigler went to the apartment of Anthony and Michael German. This occurred after Mr. Haigler had been to the Plantation Apartment to discuss the issues with his brother’s wife. Nothing in this confrontation suggested either would arm themselves in mutual combat. App. at 304, l 9 to 305, l 9. After this confrontation, Mr. Haigler and his brothers decided to go to the store near Michael Allen’s apartment and have a beer. App. at 310, l 24 to 311, l 11. Mr. Haigler then went across the street to the apartment of his brother, Michael Allen. He was not armed. App. at 312 ll 2-14. Mr. Haigler testified he did not expect to find anyone at the Plantation apartment. App. at 340, ll 7-8.

Charise Coaxum, the sister of Mr. Campbell and wife of Michael Allen, testified, concerning the initial contact at Plantation apartments, that Mr. Haigler and his brother, along with Anthony German and Michael German came by the apartment earlier that day. They had made threats against Mr. Campbell. App. at 496, l 8 to 498, l 21. They left when Ms. Sandra

Campbell, the mother of Jerome Campbell and Charise Coaxum, threatened to call 911. At that point Ms. Coaxum left the apartment to spend the night on James Island with her mother. Ms. Coaxum's testimony was confirmed by her mother who arrived at the apartment between seven and eight after receiving a call from her grandchild. App. at 532, l 12 to 535, l 19. This testimony shows there was no mutual combat and no intent on the part of anyone to engage in mutual combat. There was certainly no evidence that Mr. Campbell intended to engage in mutual combat. Mr. Campbell had done nothing to encourage anyone to return to the Plantation apartments. There was no request by any of the parties to meet and settle their differences.

As trial counsel was not familiar with the *Taylor* decision there could be no decision on his part to use mutual combat as part of any defense strategy. He even admitted if the jury finds mutual combat, there would be no self defense. App. at 667, ll 22-24. The mutual combat charge in this case served only to confuse the jury as to the meaning of self defense and the burden of proof. As there was no trial strategy involved in failing to object to the charge, Mr. Campbell was prejudiced by his trial counsel failing to object to the mutual combat charge. As this Court has found an improper mutual combat charge is in fact prejudicial to a defendant as lessening the burden on the State, prejudice as required under *Strickland v. Washington*, 466 U.S. 668 (1984) has been established.

Question II

Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective in failing to properly object to the failure of the trial judge to charge the law as to the defense of others?

In the charge conference, the judge stated:

However, I do not think that it would be appropriate for me to instruct defense of others because there is no testimony that he shot a weapon to defend someone else and that's what defense of others is about. It's about you having the ability or the legal right to basically stand in the shoes of someone else and to exercise their right to defend themselves. And so I don't think that - - And actually, to some extent it's - - it's cumulative because it's basically the same instruction. App. at 669, ll 15-22.

Trial counsel did not object to the decision of the trial judge not to charge defense of others at the time the trial judge made the statement. Nor did he raise an objection after the jury charge in which the trial court failed to charge defense of others.

The problem with the approach taken by the trial court is, as she acknowledged, no one knows the identity of the shooter, as no one could identify who was in fact in the car. As the trial court noted, "Mr. Campbell may not have shot the gun, but he certainly was part of the conclusive effort to make sure the gun was shot." App. at 660, ll 22-24. She further stated to the State, "if you're going to hold him culpable for the acts of the people in the car and say he conspired and he aided and abetted them in doing what they did, you cannot then deprive him of a defense as well that would be available" App. at 663, ll 16-23. If the car is being shot at by a third party, each occupant of the car would have the right of self defense and simultaneously in defense of others have the right to fire a weapon to protect them. The trial judge found that Campbell was part of the "conclusive effort to make sure the gun was shot." App. at 660, ll 23-24. She also found that this "conclusive effort" gave him the right to self defense, which would, as a matter of law, also give him the right fire a weapon to defend others in the car.

The issue of who fired first, whether the group in front of the convenience stores fired weapons and whether more than one weapon was fired, is in dispute. John Roberts,

the expert for the state, testified Michael German, the deceased, had gunshot residue on hands and opined it was possible for him to have fired a gun. App. at 401, ll 20-21. He also presented the theory that the readings could have come from a bullet striking the wall and vaporizing a portion of the lead bullet when it struck the wall. App. at 390, l 20 to 392, l 5. The expert for Mr. Campbell, Chris Robinson, opined that vaporizing a lead bullet by hitting a brick wall was not possible. App. at 584, l 22 to 585, l 17; 586, l 5-12. Mr. Robinson further testified that based upon his reading of the GSR tests, the readings from both Michael Allen and Michael German showed that one or both fired a firearm. App. at 587, l 2-21. He further opined that from the sounds heard on the recording of the convenience store more than one weapon was fired. App. at 598, l 14-19. He also concluded that the smoke seen in the store video came from a firearm fired directly underneath the camera. App. at 596, l 15-24.

Under the facts of this case, the State presented the case to the jury under a “hand of one is the hand of all” theory as well as “aiding and abetting.” Under this same theory, if one had the right of self defense then so did the other and the other also had the right of defense of others. The State will argue that Mr. Campbell was not without fault in bring on the difficulty. First, that is a jury question to be decided by a properly charged jury. When a question of a jury charge is raised, the evidence must be viewed in the light most favorable to the defendant. *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001). Under the facts, the evidence can be reasonably interpreted to mean that after Mr. Campbell’s initial encounter with Mr. Haigler, Mr. Campbell fled the scene and was withdrawing from the initial difficulty. “One’s right to self-defense is restored after withdrawal from

the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act.” *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999).

As the evidence is susceptible of the fact that the fleeing automobile was fired upon first, then any occupant of the automobile, in returning the fire, would have had the right of self defense or the defense of others. The jury should have been properly instructed on the law of defense of others.

Question III

Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective for his failing to object to the trial judge charging the hand of one is the hand of all and the law of aiding and abetting when the facts did not support the charge?

The State never produced any witness who was able to identify who fired the fatal shot from the automobile. The indictment did not allege Mr. Campbell aided and abetted anyone. The indictment alleged Mr. Campbell himself fired the fatal shot. App. at 805 (indictment). The trial counsel at the PCR hearing testified that the state never knew who fired the fatal shot. App. at 1084 ll 7-12. The Post Conviction Relief judge also credited the theory of trial counsel that the record contained no evidence of a conspiracy between Mr. Campbell and the other occupants of the automobile.

In *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387 (2014) the South Carolina Court of Appeals held that trial counsel was ineffective in failing to object to the charge of aiding and abetting. The Court noted that an alternative theory, like a lesser included charge, may be charged only when the evidence would support such a charge. The

question here, put another way, is if the only charge against Mr. Campbell had been the charge of aiding and abetting, would the trial judge have been required to direct a verdict in favor of Mr. Campbell? If so, then the “aiding and abetting” and “hand of one is the hand of all” charges should not have been given.

The trial judge charged “Where two or more are acting with a common plan or intent are present at the commission of the crime, it does not matter who actually commits the crime, all are guilty. The hand of one is the hand of all.” App. at 775, 1 18 to 776, 1 2. As to aiding and abetting the trial court said “Intent is also a necessary element for there must have been a common scheme or plan or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act.” App. at 776, 11 8-11.

In this case the trial judge treated the two concepts as virtually identical. The trial judge instructed that the State must prove an intent on the part of the two or more people to actually commit the crime.¹ Under this charge the State is required to prove that another person shot the deceased and Mr. Campbell, with malicious intent, intended for that person to fire the shot and committed some overt act to further this intent. “From the context of his last remarks, it is perfectly clear that the circuit judge meant the parties who

¹ As a general rule the “hand of one is the hand of all” theory involves a crime where the parties intent to commit one crime and during that crime a shooting occurs. As this Court has said, “There can be no doubt of the general rule of law that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which naturally or necessarily flow from it, and that if he combines and confederates with others to accomplish an illegal purpose he is liable criminaliter for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though what was done was not intended as a part of the original design or common plan.” *State v. Williams*, 189 S.C. 19, 199 S.E. 906, 908 (1938)

did not fire the shot would be guilty if they were there with the malicious intent of aiding in the shooting; not any other enterprise. We think the charge was in accord with defendants' view of the law. If they wished it stated with more particularity, a request to that effect should have been submitted.” *State v. White*, 67 S.C. 320, ___, 45 S.E. 210, 211 (1903). No substantial circumstantial evidence in this record establishes such a malicious intent to aid and abet a shooting in this case.

Under the facts of this case, Mr. Campbell was fleeing the scene. No testimony established an agreement between Mr. Campbell and another to inflict any injury upon the individuals at the store. The evidence establishes they were fleeing. No evidence of an expressed or implied agreement was presented. Based upon the firing of a shotgun seconds before, a jury could not reasonably concluded there was an agreement to shoot and kill anyone as they left the scene. There was no testimony Mr. Campbell ordered or encouraged anyone else to fire a gun. Had the parties had the intent to inflict serious bodily injury or kill someone, Mr. Haigler would have either been killed or seriously injured. If an occupant of the car on their own decided to fire a revolver in the direction of the store that would not be a basis for finding Mr. Campbell aided and abetted in the crime.

This Court has not defined what is substantial circumstantial evidence. Under *Jackson v. Virginia*, 443 U.S. 307 (1979) it has to mean more than a scintilla of evidence. As one court has said “Substantial evidence, in a case depending upon circumstantial evidence, simply means that the proof must go beyond presenting the jury a choice so evenly balanced that a finding of guilt must rest, not on testimony, but on conjecture.”

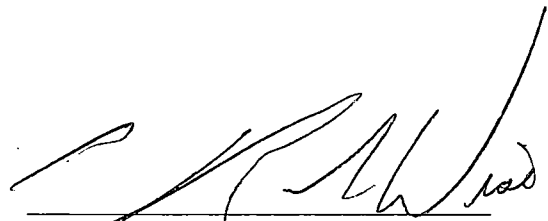
Holloway v. State, 11 Ark. App. 69, 71, 666 S.W.2d 410, 411 (1984). In this case, for the jury to conclude that Mr. Campbell aided and abetted another person would simply be conjecture. The person could have just as likely fired the firearm on his own as with the encouragement of Mr. Campbell. To satisfy its burden, the State is required to prove more than it is slightly more likely Mr. Campbell aided and abetted. That would satisfy a preponderance of the evidence standard in a civil case, but it would fall short of the standard required by *Jackson*.

As no substantial circumstantial evidence exists in this case to justify the charges of “aiding and abetting” and the “hand of one is the hand of all,” Mr. Campbell was prejudiced by having this charge given to the jury. Trial counsel was ineffective and Mr. Campbell is entitled to a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari for Jerome Campbell, reverse the ruling of the Post Conviction Relief Judge and grant Mr. Campbell a new trial.

July 16, 2018



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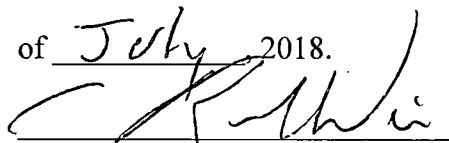
AFFIDAVIT OF SERVICE

Personally appeared before me Sandy Traynham, who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Applicant in the above entitled case. That on July 16, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to Megan Harrigan Jameson, SC Attorney General Office, P.O. Box 11549, Columbia, SC 29211.

Sworn to and Subscribed

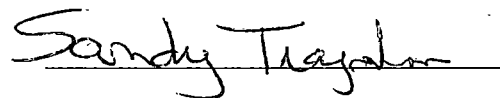
before me this 16th day

of July 2018.



Notary Public for South Carolina

My Commission Expires: 12/7/2019



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July 16, 2018

Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 113300
Columbia, SC 29211

Re: Jerome Campbell #349454 vs. State of South Carolina, Case No. 2018-000464

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Petition Writ of Certiorari and the original unbound and one bounded copy of the Appendix together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,


C. Rauch Wise

CRW/slt
cc Megan Harrigan Jameson