

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-002116

MICHAEL ANTHONY ROGERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION OF CERTIORARI

ALAN WILSON
Attorney General

JORDAN A. COX
Assistant Attorney General
SC Bar No. 103157

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734 – 3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE ISSUES

- I. Did the post-conviction relief court properly deny relief for ineffective assistance of counsel where trial counsel strategically chose not to offer a 9-1-1 audio recording into evidence?

- II. Did the post-conviction relief court properly deny relief for ineffective assistance of counsel where trial counsel did not request a jury charge on involuntary manslaughter?

- III. Did the post-conviction relief court properly deny relief for ineffective assistance of counsel where trial counsel did not request a jury charge on habitation defense?

STATEMENT OF THE CASE

On November 12, 2010, Petitioner Michael A. Rogers (“Petitioner”) was at his home around midnight. (App. p. 160). Mr. John Ryan (“Victim”) was also at the home, along with two other women. (App. p. 160). After both men had been drinking alcohol throughout the night, a fight broke out between them. (App. p. 160-161). The scuffle escalated and Victim was stabbed in the chest with a knife by Petitioner. (App. p. 160). Victim later died from his injuries. (App. p. 160).

During its March 2011 term, the Spartanburg Grand Jury indicted Petitioner for murder (2011-GS-42-1933). (App. p. 597). Petitioner was represented at trial by Clay T. Allen, Esquire (“trial counsel”). (App. p. 1). Assistant Solicitor Danny Fulmer appeared on behalf of the State of South Carolina. (App. p. 1). On September 2, 2011, Petitioner moved to dismiss the charge under S.C. Code § 16-11-450, claiming that he was immune from prosecution and a hearing was conducted in Spartanburg County, South Carolina. (App. p. 1). During a pre-trial hearing, the Honorable J. Derham Cole presided and denied Petitioner’s motion to dismiss. (App. p. 153). On October 4, 2011, Petitioner’s case was called trial before Judge Cole. (App. p. 119). Following the three-day trial, a jury found Petitioner guilty of voluntary manslaughter. (App. p. 484). Judge Cole sentenced Petitioner to twenty-one (21) years imprisonment. (App. p. 489).

Petitioner appealed his conviction and Judge Cole’s sentence on October 19, 2011. The South Carolina Court of Appeals affirmed Petitioner’s conviction for voluntary manslaughter and his sentence. State v. Rogers, Op. No. 2014-UP-332 (S.C. Ct. App. Filed September 17, 2014). The South Carolina Supreme Court denied certiorari on January 23, 2015.

On September 16, 2015, Petitioner filed an application for post-conviction relief, alleging ineffective assistance of trial and appellate counsel.¹ (App. p. 492). Specifically, Petitioner alleged his trial counsel provided ineffective assistance for:

- c. “Counsel failed to request instruction on lesser included offense of involuntary manslaughter”
- e. “Counsel failed to request defense of habitation”
- g. “Counsel failed to produce evidence of 911 call which was in favor of [Petitioner].”

Respondent made its return on July 1, 2016, requesting an evidentiary hearing. (App. p. 504). An evidentiary hearing was conducted on February 1, 2017, before the Honorable Edward W. Miller in Spartanburg County, South Carolina. (App. p. 511). Petitioner was represented by Susannah C. Ross, Esquire. Caitlin B. Hastings, Esquire, appeared on behalf of Respondent. Petitioner testified on his own behalf. (App. p. 512). Trial counsel testified on behalf of Respondent. (App. p. 512).

At the hearing, Petitioner testified that his attorney never allowed him to listen to a 9-1-1 recording from the incident. (App. p. 518). Petitioner testified that the only time he ever reviewed any discovery was after losing his direct appeal. (App. p. 541). Petitioner testified that he believed his trial counsel failed to request additional charges, even though there was what he believed to be evidence to support the charges. (App. p. 530). Petitioner testified that he was the first one to push the victim, but the victim was wrong and in the Petitioner’s home. (App. p. 540).

Trial counsel testified that he met with Petitioner at least six (6) times between May and October of 2011. (App. p. 544-545). Trial counsel testified that he does not remember giving Petitioner a copy of his discovery, because he normally discourages it if the client is incarcerated. (App. p. 545). Trial counsel testified as to his discussions with Petitioner on all possible defenses,

¹ Petitioner included nine (9) allegations of ineffective assistance against his trial counsel and three (3) allegations of ineffective assistance against his appellate counsel within his application for PCR. All were denied, but only the stated allegations are being presented in the petition for writ of certiorari.

based on Petitioner's version of the facts. (App. p. 546). Trial counsel testified that he presented evidence of Petitioner's right to defend himself and his home during the stand your ground hearing, but Judge Cole decided not to include jury charges requested by the defense. (App. p. 549). Trial counsel testified that he discussed the involuntary charge with Petitioner, but that based upon his review of the case, Trial counsel did not feel it was appropriate. (App. p. 550). Trial counsel further testified that he did not request a habitation defense, since it was apparent from the evidence that Petitioner was defending himself and not his home. (App. p. 561). Trial counsel successfully requested a self-defense charge. (App. p. 560).

Trial counsel testified that he did not introduce the 9-1-1 audio recording at trial for strategic reasons. (App. p. 567). Trial counsel testified that he was leery of the recording, since he believed it could imply a scenario "that he just got mad and fought him and killed him." (App. p. 566). Trial counsel testified that he believed the defense would do just as well relying on witness testimony. (App. p. 567).

By written order submitted on March 29, 2017, Judge Miller denied Petitioner's allegations and dismissed the application for post-conviction relief, with prejudice. (App. p. 584). On April 2, 2017, Petitioner filed a Motion to Alter or Amend the Judgment of Judge Miller, requesting the court to change its ruling of dismissal. (App. p. 585). Respondent filed its Return on April 27th, 2017. (App. p. 594). The Motion to Alter or Amend the Judgment was denied on October 6, 2017. (App. p. 596).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989).

In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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 (1984); Butler, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at

117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1991); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Abney v. State, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014) (quoting Strickland).

ARGUMENT

I. Because trial counsel articulated a valid strategic reason for not offering a 9-1-1 audio recording into evidence, the post-conviction relief court properly denied relief for ineffective assistance of counsel.

Petitioner alleges trial counsel was constitutionally ineffective for failing to introduce a 9-1-1 audio recording at trial. However, the post-conviction relief court properly denied Petitioner relief, as trial counsel testified at an evidentiary hearing that he did not believe the tape was especially helpful to Petitioner's case. This Court should deny certiorari.

Trial counsel testified that he has practiced almost exclusively criminal law since being admitted to the South Carolina Bar in 1979. During this time, Trial counsel testified that he has represented defendants in several murder trials. The PCR court found Trial counsel's testimony to be credible.

It is clear from the record and testimony at the evidentiary hearing that Trial Counsel made a reasonable strategic decision to not introduce the 9-1-1 recording at trial. At the evidentiary hearing, Trial Counsel specifically addressed the tape:

Q: Mr. Allen, briefly, why didn't you introduce the 9-1-1 tape at trial or pretrial? Did you find it helpful?

A: In a way and in a way not. Some of the problems, as I was looking at my notes on the 9-1-1 tape, is Tonya, who's doing most of the talking that you heard, that's the female voice that you heard, Tonya Lowery, who we used to testify, she made it sound like **[Petitioner] got mad because [Victim] made a pass at her and they fought** as opposed to, you know, and that kind of thing. So, you know, I'm a little bit – **I was a little bit leery of that scenario that [Petitioner] just got mad and fought him and killed him.**

It was helpful in the sense that you do hear the concern and the panic in Mr. Rogers' voice, you know, his concern about, you know, they were saying he's losing him or dying...

...So it's good and it's also bad and **I just felt we could do as good with their testimony, they're going to have to testify anyway, to testify about what**

led up to the fight or what led up to the scuffle and then what they did afterwards.

Q: So you waited. It was a strategic decision on your part to leave it out?

A: **Right.**

At trial, Petitioner's girlfriend testified as to the events surrounding the fight involving Petitioner and Victim. During this testimony, the witness stated multiple times as to the accidental nature of the stabbing and her phone conversation with 9-1-1 officials. Trial Counsel reasonably relied on this live testimony in order to put forth a defense case. Trial Counsel reasonably believed the caller's testimony was just as useful as introducing the audio recording, but also believed that introducing the call would have been risky for Petitioner's defense.

Trial counsel articulated a valid strategic reason for not introducing the audio recording at trial. He testified to his specific analysis of the tape and how it related to the testimony presented at trial. Therefore, the PCR court properly denied Petitioner relief.

II. Because trial counsel articulated a valid strategic reason for not requesting a jury charge on involuntary manslaughter, the post-conviction relief court properly denied relief for ineffective assistance of counsel.

Petitioner alleges Trial Counsel was constitutionally ineffective for failing to request a specific jury charge on involuntary manslaughter. However, the post-conviction relief court properly denied relief, as Trial Counsel was able to articulate a valid strategic reason for not requesting the charge.

During the evidentiary hearing, Trial Counsel testified why he felt an involuntary manslaughter charge was inappropriate:

A: No. I explained to [Petitioner] that during one of our – or during our in-chambers conference, because I believe the testimony was pretty much complete or something to that effect, that I acknowledge that those – **no evidence of recklessness and extreme negligence**, and that I explained to [Petitioner] that we

weren't going to be getting a charge on – or that **I didn't think that a charge on involuntary manslaughter was appropriate in this case.**

Further, Trial Counsel testified that the evidence did not support that the killing was merely an accident:

Q: ...So the record showed testimony that there was an accident.

A: Yes. But a lot of times – I guess what I'm trying to make is a lot of time, people use the word "accident" in the colloquial sense. **It was clear that [Petitioner] was defending himself**, it was clear that he was trying to take – that he took the knife – or his testimony is that he took the knife from [Victim] and that struggle continued."

App. p. 557.

Trial Counsel investigated Petitioner's case thoroughly and developed a strategic defense for trial. Counsel moved for a pretrial dismissal of the case during a stand your ground hearing, which fit Trial Counsel's defense strategy that Petitioner was defending himself against an attacker. Based upon his investigation of the facts and relevant law, Trial Counsel articulated a valid strategic reason as to why an involuntary manslaughter charge was inappropriate for Petitioner's case.

Petitioner has also failed to show he was prejudiced by Trial Counsel's decision to request a jury charge on involuntary manslaughter. 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 improper instruction in a way that violates the Constitution. Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). It is clear from the record of this case that the evidence did not support a charge on involuntary manslaughter, because the evidence showed a lack of accident. Petitioner was not entitled to a jury charge on involuntary manslaughter as it was clear

he was attempting to defend himself and forcefully remove the victim, not that an accidental stabbing occurred.

Based upon the testimony and record of this case, the PCR court properly denied relief for ineffective assistance of counsel. This Court should deny certiorari.

III. Because trial counsel articulated a valid strategic reason for not requesting a jury charge on habitation defense, the post-conviction relief court properly denied relief for ineffective assistance of counsel.

Petitioner alleges Trial Counsel was constitutionally ineffective for failing to request a specific jury charge on habitation defense. However, the post-conviction relief court properly denied relief, as Trial Counsel was able to articulate a valid strategic reason for not requesting the charge.

The defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). One defending himself from imminent attack on his own premises is entitled to a charge on defense of habitation. State v. Griggs, 218 S.C. 86, 61 S.E.2d 653 (1950). A defendant must establish that a trespass has occurred and that his chosen means of ejection were reasonable under the circumstances. State v. Bradley, 126 S.C. 528, 533, 120 S.E.2d 240, 242 (1923). Even if a defendant believed himself in imminent danger, his belief **must be reasonable under the circumstances** to be entitled to a charge on defense of habitation. (emphasis added) State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987).

During the evidentiary hearing, Trial Counsel testified why he felt a habitation defense charge was inappropriate:

Q: Now, as far as the common law defense of habitation, on – it looks like on page 313, too, you didn't request an instruction on the defense of habitation at the trial or the hearing prior.

A: No, I did not. I had looked at some charges and I had pulled a charge, it's in my research file, on defense of habitation. It was a short statement talking about

defending one's home, basically. **But I didn't really view this as he's defending his home. He was really defending himself.**

App. p. 561.

Trial Counsel testified that he did not believe the defense of habitation was appropriate for Petitioner's case. Trial Counsel researched the law applicable to the facts of Petitioner's case and submitted several requested jury charges to Judge Cole. Trial Counsel made a strategic decision to not request a jury charge on defense of habitation and based his decision in exercise of reasonable, professional judgment. Therefore, the PCR court properly denied relief and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

JORDAN A. COX
S.C. Bar No. 103157
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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Court of Common Pleas

S.C. SUPREME COURT

Honorable Edward W. Miller, Circuit Court Judge

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Michael Anthony Rogers, Petitioner,

v.

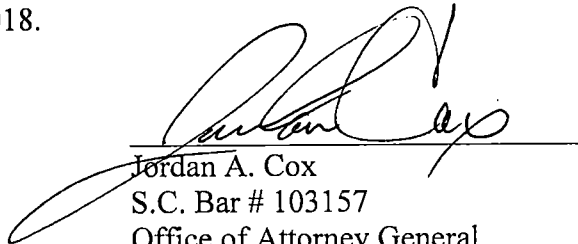
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in interagency mail and in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia South Carolina 29211-1589

This 23rd day of August, 2018.



Jordan A. Cox
S.C. Bar # 103157
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT



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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

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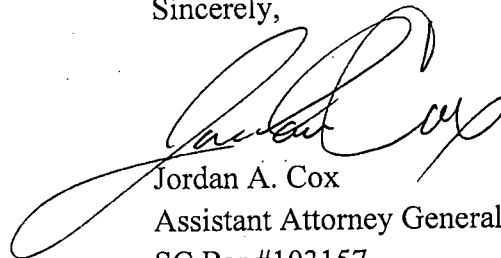
The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Michael Anthony Rogers, #348110 v. State of South Carolina
Appellate Case No.: 2017-002116
Lower Court Case: 2015-CP-42-3862

Dear Mr. Shearouse:

Enclosed for filing please find an original and six copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,



Jordan A. Cox
Assistant Attorney General
SC Bar #103157

JAC/lm
Enclosures

cc: Taylor D. Gilliam, Esquire
Trisha Allen, Director - Victim Advocacy Division