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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

Honorable R. Keith Kelly, Circuit Court Judge

MICHAEL DURAN WATSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000486

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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INDEX

ISSUES PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for not sufficiently presenting Petitioner Watson's self-defense theory to the jury because trial counsel failed to bring out during Petitioner's testimony that someone from the group of young men involved in surrounding Petitioner's car prior to the trial incident had shot at Petitioner in a prior incident several days earlier which was prejudicial to Petitioner because there was a reasonable probability that the jury would have found him not guilty since they did find him guilty of the lesser included voluntary manslaughter?

2. Did the PCR court err in failing to find trial counsel ineffective for not objecting to the references by several witnesses during trial that Petitioner Watson was using a sawed-off shotgun when the solicitor had admitted during a pretrial motion that he did not believe that he could present evidence of a sawed-off shotgun because that would likely be prejudicial because possession of a sawed-off shotgun was a crime?

STATEMENT

On August 5, 2007, Petitioner Watson went to the Saluda Terrace Apartments to take money to a friend, Candace, who lived there. She was not at home so he turned around the loop and saw a group of guys. It was dark so he could not see who they were. App. 465, ll. 14 -App. 466, ll. 9.

Andrew Chandler was with a group of five young men which included his brother, Warren, at Saluda Terrace Apartments the same night of August 5, 2007. They had driven there to hang out and smoke marijuana. They saw a car coming down the hill towards them, and recognized that it was Petitioner Watson. App. 143, ll. 14 – App. 144, ll. 13.

Watson stopped his car at the group to ask them if they had seen Candace. When he did, according to Watson, two of the group rushed towards his car. He heard one of them say; "Shoot now." Watson picked up the shotgun he had with him and shot through the passenger window. App. 464, ll. 20 – 25; App. 466, ll.10 – App. 468, ll. 23.

Andrew Chandler was shot in the face and was killed. App. 143, ll. 14 – 17; App. 145, ll. 2 – 12. Petitioner Watson left and took the gun to a friend's house. Then Watson went home and waited for the police. He did not know anyone had been killed until he arrived at home. App. 472, ll. 2 – App. 473, ll. 25; App. 145, ll. 2 – 12.

The police went to Watson's home and he turned himself in. Watson gave a statement to Commander Charles Holloway of the Saluda Police Department admitting that he shot but said it was self-defense. App. 475, ll. 1 – 23; App. 145, ll. 13 – App. 146, ll. 2; App. 94, ll. 1 – 25.

On October 17, 2007, the Saluda County Grand Jury indicted Watson on the charges of murder, possession of a weapon during the commission of a violent crime, and pointing and presenting a firearm. App. 718 – App. 728.

On July 26-29, 2010, Petitioner Watson proceeded to trial before the Honorable William P. Keesley and a jury. Watson was represented by Paul Andrew Anderson, and the state was represented by H. Franklin Young, III. App. 1.

In a pretrial hearing, trial counsel moved to suppress the testimony of two witnesses, Jarrod Coleman and Tobias Daniels, that Watson pointed a shotgun at them approximately one week before the trial incident. The solicitor responded that the state was going to offer this as evidence that Watson was in possession of a short shotgun the week prior to the trial incident. App. 71, ll. 22 – App. 73, ll. 5. However, the solicitor then stated:

> I don't believe I can present evidence of a sawed-off shotgun because I believe that would be likely prejudicial as the possession of that is a crime. Indeed that same shotgun, however, was used in this case.

App. 73, ll. 6 – 10.

The judge granted the motion to exclude the evidence about pointing the weapon at those juveniles. App. 76, ll. 25 – App. 77, ll. 6.

During the trial, Jarrod Coleman testified that he saw Watson in possession of a short shotgun on July 30, 2007. There was no objection by trial counsel. App. 282, ll. 10 – App. 283, ll. 25.

Two other witnesses testified that they saw Watson with a sawed-off shotgun at the Saluda Terrace Apartments during the trial incident. Raymond Dale Kirkland testified that he saw Watson in a black Toyota pull out a sawed-off shotgun and shoot and the decedent fell. There was no objection by trial counsel. App. 226, ll. 1 – 23. Corddaryl Ouzts testified that he was at Saluda Terrace Apartments on August 5, 2007 when the decedent was shot. App. 155, ll. 9 – App. 156, ll. 24. He said in response to the state's questioning that he saw Watson shoot a

sawed-off shotgun as Watson was driving through the parking lot at the apartments. There was no objection by trial counsel. App. 164, ll. 4 – 17.

During his testimony at trial, Petitioner Watson told of an incident at the ballpark about two weeks before the August 5 trial incident. He was in the car with his cousins, Marvin and Reggie Martin. As they started to leave, someone threw a rock at their car. When they got out of the car, Warren Chandler pulled a gun. This scared Watson so he began riding around with a shotgun in his car for safety reasons. App. 462, ll. 25 – App. 465, ll. 13. When Watson saw the group of boys at Saluda Terrace Apartments on August 5, 2007 start to approach his car, he became "really" scared because he believed that someone was going to shoot. App. 465, ll. 1 - App. 469, ll. 9.

Warren Chandler testified for the state concerning the shooting of his brother. App. 183, ll. 18 – App. 195, ll. 21. On cross-examination, trial counsel asked Chandler if he had discharged a gun at the ballpark in that incident with Watson. Chandler initially responded yes. When asked if it was in the direction of Watson and his friends, Chandler said: "I mean, at the time of the ballpark, I was found guilty, but I didn't do anything." He denied having a gun. App. 197, ll. 1 – 25.

On redirect, when the state asked Chandler if he were found guilty of shooting a firearm in the air in the city limits, Chandler responded yes. App. 201, ll. 1 – 12.

The jury found Petitioner Watson guilty of the lesser included charge of voluntary manslaughter, possession of a firearm during the commission of a violent crime, and pointing and presenting a firearm. App. 593, ll. 20 – App. 594, ll. 16. The judge sentenced Watson to thirty years on the voluntary manslaughter, and five years each on the two gun charges to run concurrent. App. 603, ll. 4 – 19.

Watson's trial counsel filed a notice of appeal. The appeal was perfected by the Division of Appellate Defense in the Commission on Indigent Defense. The South Carolina Court of Appeals affirmed Watson's convictions and sentences on June 26, 2013. State v. Watson, Op. No. 2013-UP-276 (Ct. App. filed June 26, 2013).

On July 8, 2014, Petitioner Watson filed an application for post-conviction relief (PCR). The state filed a return on May 1, 2015. On October 13, 2016, PCR counsel filed an amended PCR application. An evidentiary hearing was held on November 8, 2016 before the Honorable R. Keith Kelly. Petitioner Watson was represented by Kristy G. Goldberg, and the state was represented by Johanna C. Valenzuela. App. 633.

At the beginning of the hearing, the state named the allegations of ineffective assistance of counsel Watson claimed. Among these allegations were that trial counsel was ineffective for failing to object when witnesses testified that Watson was in possession of a sawed-off shotgun. Among the allegations was that trial counsel was ineffective for failing to sufficiently argue and present testimony providing a basis for the self-defense argument. App. 636, ll. 16 – 20; App. 637, ll. 7 – 9.

Petitioner Watson testified at the PCR hearing that he never denied shooting the decedent as he always said that it was self-defense. He testified that the other men were going to shoot him. He told the jury how he acted in self-defense. App. 640, ll. 1 – App. 641, ll. 25. He explained about the incident at the ball park with the same group of guys including the two Chandler brothers a week or so before the August 5, 2007 incident. After that group threw a rock at the car Watson was in, Watson and the others in the car got out. Then Warren Chandler pulled out a gun and shot towards Watson and the others. App. 643, ll. 1 – App. 644, ll. 25.

At trial Chandler admitted that he had been arrested for discharging a firearm in the city limits, and he pled guilty to that charge. When Watson testified at trial, he said that his trial counsel did not bring out that Chandler fired a gun at Watson before the August 5 incident. Watson said that he was never asked to go into detail about the incident. It was more like Chandler just shot. It never came out that he shot at Watson. App. 645, ll. 1 – 25. Watson said he was not asked the right questions so the jury never knew that he had been shot at by these same boys the week before the trial incident. App. 646, ll. 1 – 5.

Petitioner Watson stated that he was very concerned when witnesses testified that he had a sawed-off shotgun. He said that "paints a very evil picture." Watson believed that was "inherently prejudicial." App. 646, ll. 6 – 15.

Trial counsel testified at the PCR hearing and admitted that he did not elicit from Watson that Chandler actually shot the gun at Watson at the ballpark incident. Trial counsel did not know the reason he did not do so because he also admitted that that fact could be an important fact for self-defense. App. 666, ll. 4 – App. 667, ll. 3. Trial counsel said that he thought the self-defense theory was weak because no one saw Chandler with a gun. App. 656, ll. 3 – 9.

Trial counsel testified that he did not know why he did not object when the solicitor elicited from the witness Jarrod Coleman that Watson had a "short" shotgun because that went along with the sawed-off shotgun issue. The trial judge had ruled concerning the testimony of the two boys, Coleman and Tobias, that they could say they saw Watson with a gun but could not say that he pointed the gun at them. App. 657, ll. 1 – App. 658, ll. 21.

Trial counsel also admitted that he did not object when other witnesses mentioned a sawed-off shotgun that Watson had. Counsel did not consider asking the court to limit that testimony. Trial counsel admitted that it would have been "smarter" to limit any mention of a

sawed-off shotgun because he agreed that it had a negative connotation and would be prejudicial. App. 658, ll. 22 – App. 659, ll. 18.

The PCR judge found that trial counsel presented evidence of self-defense through other witnesses who said someone in the group of boys said "shoot now" when Watson stopped his car. And the victim's pocket was turned inside out as though he pulled something out where his hands looked like a gun had been in it and removed. The judge also found that the jurors heard from Watson about the prior incident. App. 710 - App. 711.

The PCR judge issued an order on March 7, 2018 denying Petitioner Watson's PCR application, and dismissing it with prejudice. App. 700 – App. 715.

The PCR judge found that Watson's claim of ineffective assistance of counsel on this issue was "without merit." The judge wrote that trial counsel "thoroughly and ably presented the theory of self-defense." App. 710. The judge also found that Watson could not demonstrate prejudice where the state presented "overwhelming evidence of Watson's guilt." The judge cited Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008) to support his ruling. App. 712.

The judge found on the issue that counsel was ineffective for failing to object to references to a sawed-off shotgun by witnesses to be without merit. The judge wrote that although "trial counsel did not object when sawed-off was used in reference to Watson's weapon," counsel "vigorously cross-examined each witness about the event." App. 706. The judge wrote that "counsel's performance was reasonable under professional standards and was not deficient." Therefore, the judge wrote, Watson could not show he was prejudiced by counsel's performance. App. 707.

PCR counsel filed a notice of appeal. This petition follows.

ARGUMENT

I.

The PCR court erred in failing to find trial counsel ineffective for not sufficiently presenting Petitioner Watson's self-defense theory to the jury because trial counsel failed to bring out during Petitioner's testimony that someone from the group of young men involved in surrounding Petitioner's car prior to the trial incident had shot at Petitioner in a prior incident several days earlier which was prejudicial to Petitioner because there was a reasonable probability that the jury would have found him not guilty since they did find him guilty of the lesser included voluntary manslaughter.

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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant 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. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that to satisfy the prejudice prong of an ineffective assistance of counsel claim, an applicant must demonstrate there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. The court also held that the PCR court should also consider the strength of the state's case in light of all of the evidence presented as well as considering the impact of trial counsel's error.

The Supreme Court then found in Smalls that for the evidence to be overwhelming such that it precludes a finding or prejudice with regard to an ineffective assistance of counsel claim, the evidence must include something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of a "reasonable probability the factfinder would have had a reasonable doubt" cannot possibly be met.

Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008) which was the case the PCR judge relied on in finding that there was overwhelming evidence of Watson's guilt was abrogated by State v. Smalls, *supra.*

Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). In Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994), the Supreme Court held that petitioner received ineffective assistance of counsel when trial counsel failed to introduce evidence that would reasonably have changed the result of the case. The defendant was on trial for receiving stolen goods. The defendant bailed her son and boyfriend out of jail, when they received charges not related to the burglary of the stolen goods the defendant had pawned, with money she obtained by pawning stolen goods which she claimed she did not know were stolen. She was then arrested for the burglary related to the stolen goods. Trial counsel was

found ineffective for not introducing the evidence that the boyfriend and son were in jail on charges not related to the burglary of the goods defendant was charged with selling. The case was reversed.

In State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) the South Carolina Supreme Court listed the elements of self-defense as: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant was actually in imminent danger of death or serious bodily injury, or the defendant actually believed he was in imminent danger of death or bodily injury; (3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or 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; (4) and the defendant had no other probable means of avoiding danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

The PCR court erred in not finding trial counsel ineffective for not presenting the evidence that Warren Chandler shot at Watson during the ballpark incident. The jury obviously had doubts as they found Watson guilty of the lesser included offense of voluntary manslaughter. Chandler had already testified that he pled guilty to discharging a firearm in the city. His credibility was in doubt when he denied having a weapon. Trial counsel should have asked Watson if Chandler shot at him or at least asked the proper question to allow Watson to say Chandler shot at him prior to the trial incident. That information would have enhanced Watson's credibility that he was in danger as well as believed he was in danger. That would have created a reasonable probability that the jury would have found self-defense.

ARGUMENT

II.

The PCR court erred in failing to find trial counsel ineffective for not objecting to the references by several witnesses during trial that Petitioner Watson was using a sawed-off shotgun when the solicitor had admitted during a pretrial motion that he did not believe that he could present evidence of a sawed-off shotgun because that would likely be prejudicial because possession of a sawed-off shotgun was a crime.

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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

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A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

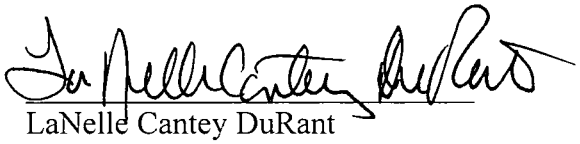
In Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), the Supreme Court held that defense counsel's failure to object to inadmissible hearsay by the clinical psychologist and minor's caseworker was deficient performance and supported claim of ineffective assistance of counsel. The Court also held that defense counsel was ineffective for failing to object to impermissible bolstering by the psychologist and detective. The Court found that the defendant showed that he was prejudiced by trial counsel's ineffectiveness because there was a reasonable probability that the outcome would have been different but for trial counsel's deficiencies.

South Carolina Code Section 16-23-230 provides that it is unlawful for a person to possess a sawed-off shotgun.

The PCR court erred in not finding trial counsel ineffective for not objecting to the references by witnesses that Watson was in possession of a sawed-off shotgun. Trial counsel knew the solicitor stated that a reference to a sawed-off shotgun would be prejudicial as it was a crime. Counsel still did not object. Therefore, the issue was not preserved for appellate review which had a reasonable probability to change the outcome of Watson's case. The reference was to Watson committing a crime or prior bad act both of which were more prejudicial than probative pursuant to Rule 403, SCRE.

CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences reversed, and the case remanded for a new trial.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of August, 2018.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Kelly Oppenheimer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael Duran Watson, #342010, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 31st day of August, 2018.

LaNelle Cantey DuRant
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 31st day of August, 2018.

ATTORNEY FOR PETITIONER

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.