STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lee County
Jocelyn Newman, Circuit Court Judge for Post-Conviction Relief
George C. James, Circuit Court Judge for Criminal Trial

THE STATE,

RESPONDENT,

V.

ERNEST TONEY,

PETITIONER.

Brief of Petitioner Pursuant to *White v. State*

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STATEMENT OF THE CASE

On September 29, 2011, Petitioner was indicted by the Lee County Grand Jury. App. 771. On December 10, 2012, Petitioner proceeded to trial before the Honorable George C. James and a jury. App. 1. For trial, Petitioner was represented by Shaun C. Kent and Ray E. Chandler, hereinafter referred to collectively and individually as Trial Counsel. The State was represented by Paul M. Fata.

Petitioner was convicted of Murder. The trial court sentenced Petitioner to forty years in prison. App. 736, ll. 11-16.

After his conviction, Petitioner wanted to appeal his conviction and sentence. App. 764, ll. 17-19. Petitioner spoke to trial counsel about the appeal on several occasions. App. 764, ll.15-17. Petitioner asked Trial Counsel to file a direct appeal. App. 764, ll. 13-22. For nearly twenty-seven months after the direct appeal, Petitioner awaited a decision from the appellate court. App. 740.

On March 13, 2015, Mr. Kent wrote Petitioner a letter with an Application for Post-Conviction Relief and indicating that he had scheduled a telephone conference. App. 750. Prior to this letter, Petitioner believed that a direct appeal had been filed. App. 740-748.

On May 8, 2015, Petitioner filed an Application for Post-Conviction Relief. App, 738-749. In the Application, Petitioner alleged the following allegations of ineffective assistance of counsel:

> Counsel failed to investigate, develop, and present all available, relevant and admissible evidence.
>
> Counsel failed to present expert witnesses i.e. handwriting-expert to expose a fraudulent signature on a fraudulent statement.
>
> Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution. As a result of counsels failure to make all appropriate objections, applicants sentence is unreliable.
>
> Counsel instructs applicant to list all grounds in which he would be entitled to post-conviction relief, which counsel did not timely file appeal, left applicant without a transcript to fully review all his grounds for relief.

App. 746-749; App. 752; App. 768.

On July 9, 2015, the State filed a "Return and Motion to Dismiss All Claims but *White v. State*. App. 751-755.

A PCR hearing was convened on July 26, 2016 before the Honorable Jocelyn Newman. App. 757. For this hearing, Petitioner was represented by Lance Boozer and the State was represented by Julie A. Coleman.

On August 25, 2016, the PCR Court found that Petitioner did not knowingly and intelligently waive his right to a direct appeal. App. 767-769.

This appeal follows.

ARGUMENT

When the Trial Court *sua sponte* raised the issue of whether the jury should be instructed on the "stand his ground" provision of the protection of persons and property act, did the Trial Court err in only instructing the jury on the common law duty to retreat?

Relevant Facts

Gregory Rogers, hereinafter Decedent, and Petitioner had a tense relationship. App. 459, l. 16. Petitioner had been carrying on a long-term and open affair with Decedent's wife, Lorie Rogers. App. 435, ll. 9-16. Decedent had known about the affair for many years or prior to his death. App. 437, ll. 1-16. The affair produced a daughter who was four years old when Decedent died. Despite the long term affair, Lorie and Decedent still lived together in the house with Petitioner's daughter.

Decedent had a reputation as a mean drunk who did no shy away from a fight. App. 456, ll. 1-10; App. 457, l.10—458, l. 4; App. 469, ll. 2-6. On September 12, 2010, Decedent was drunk and, true to his character, something ignited his temper. App. 371, ll. 23-25. App. 423, ll. 12-13.

At approximately 3:00 to 3:30 p.m. that afternoon, Decedent came home angry. App. 423, ll. 12-13. He retrieved his .30-30 rifle. App. 424, l. 2—425, l. 17. Descendent then left the house fuming. After he left home, Lorie Rogers called Petitioner and warned him that Decedent had a gun and to stay away from him. App. 467, ll. 22-25.

Lorie Rogers would later claim that Decedent returned home with the rifle after "approximately seven minutes." App. 425, l. 19. However, approximately an hour after Decedent left his house with the .30-30 rifle, Decedent was on security camera video thirty-five minutes away from home; purchasing .30-30 ammunition from the Wal-Mart in Sumter. App. 519, l. 18—520, l. 9.

After leaving Wal-Mart in Sumter, Decedent drove back toward his home in Lee County. At approximately 6:00 p.m., it was reported that Decedent was laying on the side of the road three tenths of a mile from his home. App. 254, ll. 9-17; App. 424, l.18—425, l. 2.

At trial, the State introduced the following statement that investigators attributed to Petitioner:

> I left home yesterday around 2:00 p.m…I called Lorie Rogers to talk about a date. I went up to park on the paved road and took a piss. [Decedent] pulled up in front of me and jumped out. He said, Mother Fucker, what are you doing here get out of her, and I said this is a public highway, Mother Fucker, stay here until I get back [Decedent] said as he got in his truck. I called Lorie back. Lorie said [Decedent] had a gun. I told Lorie I'm not worried about no gun. When I looked up [Decedent] was pulling up. [Decedent] jumped out of his car with a long gun. I was standing on the outside of my truck. I got my 8 millimeter rifle from behind the seat. I shot it one time. [Decedent] fell to the ground. I jumped in my truck and went to my mother's house.

App. 504, l. 5—505, l. 1.

When law enforcement arrived on the scene, they found Decedent had been killed by a single gunshot wound. However, they were unable to locate Decedent's .30-30 rifle.

After the shooting law enforcement thoroughly searched Decedent's home for the .30-30 rifle. App. 559, l. 25—560, l.4. Included in that search the officer's searched under the beds of Decedent's home. App. 561, ll. 10-12. The only weapon found was a pistol with obliterated serial numbers. App. 560, ll. 5-9.

Two days after the search, a member of Decedent's family contacted law enforcement and claimed to have found the .30-30 rifle under the bed that was previously searched by law enforcement. App. 560, l. 20—561, l. 6. Law enforcement was unable to get a "straight answer" as to how the .30-30 appeared two days after the search. App. 562, l. 15—563, l. 1.

At trial, Petitioner argued that the shooting was in self-defense.

At the close of the State's case, Judge James indicated that is planned to instruct the jury on the law of self-defense. The Judge James then *sua sponte* raised the issue of whether the jury should be instructed on the "stand his ground" section of the Protection of Person's and Property Act. Judge James stated the following:

> All right, that brings to bear what I've always wondered about this new statute we have. If someone is in a place where they have a legal right to be and then it says including one's own business, which I don't know why you got to include something if it says if they're in a place where they have a legal right to be, there is no duty to retreat. I don't understand -- we all call that the Castle Doctrine which typically is tied to one's house, but that's what the statute says. Of course, that's more of an immunity statute than it is a self-defense statute but. How about the duty to retreat? You've got a situation where evidently Mr. Toney probably knew, circumstantially, where Mr. Rogers lived. And he says in a threatening way, you stay right here, I'll be right back and then he leaves in that vehicle. Did not Mr. Toney have the time and the means to truck on out of there?

App. 641, 2-19.

The State argued that it was not a defense it was an immunity and that Petitioner failed to raised r. App. 643, l. 21—App. 644, l. 6. Trial Counsel responded that he had not raised the immunity pre-trial because he did not want to give away his strategy by having a pre-trial immunity hearing. App. 645, ll. 11-16.

In ruling on the issue, the trial court stated the following:

> We'll be helped out in the coming years about some development of that case law,[1] but we'll go forward with the self-defense issue. More than likely, Mr. Fata, I'm gonna charge it as -- if I were a fact finder, to me the most debatable part of the self-defense would be why didn't Mr. Toney just leave. But as a matter of law, I don't think I cannot charge it.

App. 645, ll. 17-24. The Trial Court did not charged the stand your ground provision.

[1] Petitioner's trial took place in December 2012.

For the sake of justice and judicial economy, this Court should find that the *sua sponte* ruling not to charge the "stand is ground" language is sufficient to preserve the issue for appellate review.

The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal. *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005). This Court has given the following rational for this ruling:

> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve--intentionally or by chance--in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). When a trial court *sua sponte* rules on an issue, the rational for the error preservation rule are met.

Judge James *sua sponte* raised the issue of whether it would be appropriate to instruct the jury on the "stand his ground" law. App. 641, 2-19. Judge James had every opportunity to consider all the facts and law. There was no "ace card up [defendant's] sleeve." *See id.* Therefore, the rational for error preservation rule was met even though the issue was first raised by the trial court.

Although the Court of Appeals has previously held that a *sua sponte* ruling from a judge is not sufficient to preserve an issue for appellate review,[2] this Court should decline to adopt this onerous interpretation of the error preservation rule. This interpretation does not serve any legitimate purpose, and is not consistent with the administration of justice. *See id.* Moreover in criminal cases, it also leads to unnecessary waste of judicial resources, requiring the courts to re-examine the issue in a post-conviction relief action. *Cf. State v. Johnston*, 333 S.C. 459, 462, 510

[2] *See State v. Taylor*, 399 S.C. 51, 64, 731 S.E.2d 596, 603 (Ct. App. 2012) ("The balance of the argument on the issue at the post-trial motion hearing was raised by the trial court, which is also insufficient to preserve the issue for our review.").

S.E.2d 423, 425 (1999) (Departing from the error preservation rule when requiring the defendant to file a PCR could result in the defendant's incarceration beyond the maximum release date).

Therefore, Petitioner respectfully requests that this Court find that a *sua sponte* ruling by the trial court is sufficient to preserve an issue for appellate review.

The South Carolina Constitution requires the Trial Court instruct the jury on the law regardless of whether it was requested by the parties.

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. Ann. Art. V, § 21 (emphasis added). The law charged must be "current and correct." *See State v. Robinson*, 306 S.C. 399, 401, 412 S.E.2d 411, 413 (1991). The South Carolina Constitution places this duty on the Judge, and this duty is not discretionary. *Cf. S.C. Dep't of Highways & Pub. Transp. v. Dickinson*, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986) ("Ordinarily, the use of the word 'shall' in a statute means that the action referred to is mandatory."). Since this mandatory duty is place on the trial judge, it is error for a trial judge not to charge on the "current and correct" law even in absence of a request to do so by trial counsel.

After Judge James *sua sponte* raised the issue, Trial Counsel did not specifically request the charge to be given and the State objected to the charge being given. App. 643, l. 21—App. 645, l. 16. However, Petitioner had a constitutional right to the charge being given. *See* S.C. Const. Ann. Art. V, § 21. Petitioner was denied his right to a fair trial when the jury was not given an instruction on the "current and correct" law involving his right to "stand his ground." *See Robinson, supra*.

At the time of Petitioner's trial the "stand his ground" language contained in S.C. Code § 16-11-440(C) was necessary for a "current and correct" charge on the law in Petitioner's case.

Since June 9, 2006, the law in South Carolina has stated the following:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes

> it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). There is nothing in the plain language of S.C. Code Ann. § 16-11-440(C) which limits this section as only applicable when a defendant seeks pre-trial immunity. The legislature outlined the purpose of the Act by stating:

> The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.

S.C. Code § 16-11-420(E) (*emphasis added*).

In the present case, whether Petitioner had a duty to retreat was crucial. App. 641, ll. 2-19. The State argued that Petitioner had a duty to retreat throughout its closing argument. App. 661, ll. 2-6; App. 663, ll. 17-19; App. 668, ll. 20-24. Moreover, at sentencing, Judge James stated:

> In my mind it's debatable, academically debatable that self-defense was available as a defense. The most compelling argument against it either as a matter of law of from the jury's eyes as a matter of fact is that he did have an opportunity, a golden opportunity to retreat.

App. 733, l. 23—734, l. 4. Instructing the jury that Petitioner had a duty to retreat was not the "current and correct" law. *See Robinson, supra*.

CONCLUSION

Petitioner respectfully requests that this court reverse his conviction and vacate his sentence.

Respectfully submitted,

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