

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

VAUGHN HILLIARD,

RECEIVED

JUN 24 2019

PETITIONER

S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002207

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel failed to request a lesser-included charge of voluntary manslaughter during a murder trial, where the evidence, including Petitioner's testimony, would have justified such a charge, where the PCR court found it was a strategic decision not to request the charge, and where Petitioner received a forty year sentence?

STATEMENT

Petitioner was indicted by a Charleston County grand jury for murder on March 10, 2014. App. 584 – 585. He proceeded to trial before the Honorable Kristi L. Harrington and a jury on June 8, 2015. App. 1. Culver Kidd and Richard Waring served as the solicitors, and Megan Ehrlich and Michael Loignon represented Petitioner. After a three day trial, the jury found Petitioner guilty as indicted. App. 484 ll. 16 – 23. Judge Harrington sentenced him to forty years' imprisonment. App. 494 ll. 13 – 16.

Petitioner's direct appeal was dismissed pursuant to Anders v. California.¹ State v. Hilliard, Op. No. 2017-UP-048 (S.C. Ct. App. filed January 26, 2017). He soon thereafter filed an application for post-conviction relief, on or about July 21, 2017. App. 497. It contained allegations of ineffective assistance of counsel, including claims that counsel failed to request an immunity hearing, failed to request a lesser-included charge, and failure to move for a mistrial when a hearsay objection was overruled. App. 505.

An evidentiary hearing took place before the Honorable Deadra L. Jefferson on July 25, 2018. App. 514. Rodney Davis represented Petitioner, and Megan Jameson appeared on behalf of the state. Petitioner and trial counsel Ehrlich testified at the hearing. Petitioner proceeded on three claims, including failure to properly argue his fragility during closing argument, failure to request voluntary manslaughter, and failure to explain the possibility of a plea under North Carolina v. Alford.² The PCR court denied relief at the hearing, and the resulting Order of Dismissal was filed on November 15, 2018. App. 571 – 583. Regarding the failure to request a

¹ 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

² 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

lesser-included offense allegation, the PCR court found “trial counsel made a valid strategic decision not to request a Voluntary Manslaughter instruction in accordance with the Applicant’s desires.” App. 579.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel failed to request a lesser-included charge of voluntary manslaughter during a murder trial, where the evidence, including Petitioner's testimony, would have justified such a charge, where the PCR court found it was a strategic decision not to request the charge, and where Petitioner received a forty year sentence.

Relevant facts

Petitioner was fifty-seven years old at the time of his trial. App. 360 ll. 17 – 21. Prior to the events giving rise to his arrest, he was a stevedore. App. 365 ll. 6 – 24. He was injured on the job and hurt his knees, back, wrist, and teeth. Id. Additionally, he suffered from diabetes and hypertension. App. 365 l. 25 – App. 366 l. 1. At the time of his arrest, he walked with a cane; at trial, he was confined to a wheelchair. App. 366 ll. 2 – 8.

On September 7, 2013, Petitioner began his daily outdoor exercises. App. 370 ll. 3 – 24. While walking in his yard, he noticed a beer can that had been thrown over the fence onto his property. Id. Because Petitioner was unable to rake and clean the yard himself, he contracted with someone do to it. Id. As a result, he knew it was recently littered on to his property. Id. He did not, however, see who had thrown it into his yard. App. 370 l. 25 – App. 371 l. 2.

When Petitioner wondered about the freshly deposited beer can aloud, a man from the neighboring property denied having done it. App. 371 ll. 3 – 22. The man threatened to come over to Petitioner's yard and "kick [his] ass," even going so far as to inquire where the nearest access point was. Id. This man was both younger and larger than Petitioner. App. 527 ll. 9 – 14. The two walked, each on their respective sides of a chain-link fence, towards the gate. App. 371

l. 21 – App. 372 l. 9. Petitioner, without equivocation, testified that he was not going to the gate to fight. App. 372 ll. 10 – 11. While Petitioner was unlocking the gate, the man reached through the gap and punched Petitioner. App. 372 l. 12 – App. 373 l. 16. The state conceded that this man either pushed or punched Petitioner. App. 526 ll. 12 – 22. Petitioner fell backwards onto the ground. Id.

Petitioner picked himself up off the ground using his cane and retrieved a rifle. App. 374 l. 1 – App. 375 l. 12. When the man started moving in Petitioner’s direction, Petitioner fired his rifle once. App. 376 ll. 2 – 25. The bullet entered the man’s torso, and he died two days later. App. 261 ll. 20 – 22. The cause of death was gunshot wound to the abdomen. App. 262 ll. 4 – 8.

On the second day of trial, the assistant solicitor remarked that “a voluntary charge would be appropriate.” App. 347 ll. 5 – 7. In response, counsel indicated she was “pondering that” and wanted to see how the rest of the trial went. App. 347 ll. 8 – 12. The charge conference the following day illuminates trial counsel’s failure to request any lesser included offenses:

Court: All right. Are you requesting any lesser included [offenses]?

Counsel: I don’t know.

Court: I need to know. It’s not like I’ve been riding y’all hard. So you’ve had plenty of breaks and ...

Counsel: I mean **I think it’s probably appropriate** but I don’t know that anybody really testified about my guy being enraged.

Solicitor: I think if you want it you get it; it’s just up to [you] whether you want it or not.

Counsel: No.

App. 402 ll. 4 – 15. (emphasis added). After the two members of Petitioner’s trial counsel team spoke off the record, counsel Ehrlich declined the charge. App. 403 ll. 1 – 24.

At the evidentiary hearing, Petitioner testified that counsel was appointed to his case. App. 521 ll. 9 – 13. He met with his attorneys six times while in jail. App. 521 l. 17 – App. 522 l. 5. He did not recall having a discussion with his attorneys about lesser included offenses. App. 527 ll. 15 – 23. Other than a plea offer to voluntary manslaughter, no lesser included offenses were discussed with Petitioner prior to or during trial. App. 528 ll. 2 – 15.

Notably, Petitioner answered in the affirmative when asked whether he would have wanted the jury to consider a third possible result, voluntary manslaughter. App. 528 ll. 16 – 20. Trial counsel, on the other hand, suggested that a meeting occurred between Petitioner and herself regarding the manslaughter charge. App. 541 l. 10 – App. 543 l. 1. During cross-examination, counsel remarked that Petitioner had left the decision of whether to request a manslaughter charge up to her. App. 547 ll. 3 – 23. Had he been convicted of manslaughter, Petitioner could have been sentenced to between two and thirty years, as noted by counsel. App. 548 ll. 12 – 24. However, he was denied effective assistance of counsel when that charge was not requested by his attorney at trial.

Discussion

“ ‘Murder’ is the killing of any person with malice aforethought, either express or implied.” S.C. Code Ann. § 16-3-10. The mandatory minimum for a murder conviction is thirty years; Petitioner received forty. S.C. Code Ann. § 16-3-20. Manslaughter, on the other hand is “the unlawful killing of another without malice, express or implied,” and carries a sentence of between two and thirty years. S.C. Code Ann. § 16-3-50. Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon a sufficient legal provocation. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000).

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or

shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996) (internal citations omitted). Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. State v. Walker, 324 S.C. 257, 478 S.E.2d 280 (1996). Both heat of passion and sufficient legal provocation must be present at the time of the killing. State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984). “[F]ear can constitute a basis for voluntary manslaughter.” State v. Wiggins, 330 S.C. 538, 549, 550 S.E.2d 489, 495 (1998).

The law to be charged must be determined from the evidence presented at trial. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). In determining whether the evidence requires a charge on voluntary manslaughter, this Court must review the facts in the light most favorable to the defendant. State v. Byrd, supra. To warrant a court’s eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993).

Viewing the evidence in the light most favorable to Petitioner, and as admitted by the solicitor, Petitioner was entitled to a charge on voluntary manslaughter. The decedent punched him so hard that he fell to the ground and was continuing to threaten Petitioner. Petitioner was so overcome by a sudden heat of passion that he retrieved his rifle and then fired a shot.

Because Petitioner was entitled to the charge, the question becomes whether counsel was ineffective for failing to request it. Counsel testified that she pursued a self-defense charge. This Court, however, has reiterated that “evidence of self-defense and voluntary manslaughter may

coexist and that a charge on self-defense and voluntary manslaughter may be warranted.” State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988).

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components.” Walker v. State, 407 S.C. 400, 404, 756 S.E.2d 144, 146 (2014) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). “The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice.” Id. at 404–05, 756 S.E.2d at 146. “To satisfy the first prong, a defendant must show counsel's performance ‘fell below an objective standard of reasonableness.’ ” Id. at 405, 756 S.E.2d at 146 (quoting Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001)).

Pursuant to Strickland, *supra*, this Court applies the following two-pronged test when considering a claim of ineffective assistance of counsel: (1) the applicant must show his counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's error, there is a reasonable probability the result at trial would have been different. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

In PCR proceedings, the applicant has the burden of establishing his entitlement to relief. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where allegations of ineffective assistance of counsel are made, the question becomes, whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Id.

Counsel’s decision fell below an objectively reasonable standard. Petitioner was prejudiced by the decision not to pursue the charge on the lesser included offense of voluntary

manslaughter, because he would have been convicted of voluntary manslaughter instead of murder if the jury had received the instruction.

As noted by PCR counsel in closing remarks at the evidentiary hearing, this strategic decision could not have been a valid one:

[T]he decision was left to her [to request a lesser included charge] and she did not. We would argue that it should have been requested.

And given that the jury had the option of not guilty because now ... it is less clear so there is not a binary choice between guilty or not guilty. It makes it a much more nuance[d] and complex decision for them. It could have hung them up or certainly they could have believed that while he was guilty of some offense it was not malice aforethought homicide.

App. 552 ll. 3 – 18. In response, the state argued that counsel made a strategic decision “to go straight up, to not give the jury an opportunity to split the baby and go for the acquittal.” App. 559 l. 17 – App. 560 l. 560. Especially in light of his testimony, evidence existed to charge the jury on voluntary manslaughter. A sentence of between two and thirty years is more ideal than a minimum of thirty. Given that the solicitor admitted a voluntary manslaughter charge would have been proper, counsel was ineffective for failing to pursue it.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charge against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read 'Taylor D Gilliam', written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of June, 2019.

STATE OF SOUTH CAROLINA

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V.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vaughn Hilliard states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Deadra L. Jefferson, which was held on July 25, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Vaughn Hilliard.

Respectfully Submitted,



Taylor D Gilliam

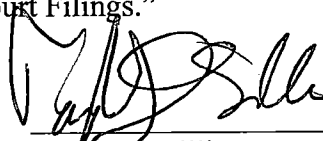
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of June, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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Appellate Defender

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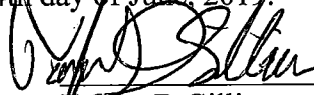
V.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Vaughn Hilliard, #364310, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 24th day of June, 2019.



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of June, 2019.

Marcy Allegio (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027