

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

RECEIVED

JUL 24 2019

JOHN M. CURETON,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002020

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to properly argue that Petitioner was entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-440?

STATEMENT

In August of 2016¹, Greenville County Grand Jury indicted Petitioner, John Mark Cureton, III, for murder, possession of a weapon during the commission of a violent crime and attempted murder, indictments #2014-GS-23-2373, 2374. On December 12, 2016, Petitioner proceeded to jury trial before the Honorable Edward W. Miller. Thomas J. Quinn represented Petitioner at trial. Elizabeth C. Major prosecuted the case. After the judge denied Petitioner's motion for immunity pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-440, the jury selected and the State presented four witnesses, Petitioner entered guilty pleas to voluntary manslaughter and assault and battery first degree. Judge Miller sentenced Petitioner to fifteen (15) years for voluntary manslaughter and a concurrent ten (10) years for assault and battery first degree. A timely notice of intent to appeal was filed but the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by SCACR Rule 203(d)(1)(B)(iv).

On November 8, 2017, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on May 9, 2018. On October 22, 2018, an evidentiary hearing was held before the Honorable Alex Kinlaw, Jr. R. Mills Ariail, Jr. represented Petitioner at the PCR hearing. DeShawn H. Mitchell represented the State. In a written order signed November 5, 2018, Judge Kinlaw denied relief and dismissed the application. A timely notice of intent to appeal was served on November 12, 2018. This petition for writ of certiorari follows.

¹ It appears that the indictment was filed with the clerk of court in 2014, but not presented to the grand jury until 2016.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to properly argue that Petitioner was entitled to immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §16-11-440.

Prior to trial counsel for Petitioner told the judge, “Your Honor, I think the next motion would be mine. It would be a stand-your-ground issue.” (App. p. 35, lines 14-15). The judge heard testimony from Petitioner and from Investigator Fortner with the Greenville County Sheriff’s Office. After the two witnesses testified, trial counsel argued:

I think that Investigator Fortner helps my argument. What you've got, based on the testimony, is a crowd of 30 people in a very small space between two trailers, at least, some of which are on Mr. Brooks' [sic] property, and to the extent they were so concerned that a warning shot is fired, which disperses the crowd. And then 10 of them regather and come back to the base of the steps of the back porch of the trailer, face off against the owner of the trailer and his brother.

At that point, it is pretty clear that they want them to be gone from the warning shot. Whether the Court would count that as ejection under the law, I leave up to the Court. But, clearly, they are trespassers not on their own property. They have, clearly, come with the intention of causing violence.

Mr. Cureton has testified that he believed that he, his brother, and the people inside were in danger of serious bodily injury or death. It would appear from the facts described by Investigator Fortner that that fear is reasonable. And, therefore, he had the right to defend himself and his family. So I would ask the Court to find that stand your ground is appropriate in this case and he has immunity from prosecution.

(App. p. 84, line 22 -p. 85, lines 1-20). Trial counsel failed to cite any case law or even the statute to support the motion. While generally asserting self-defense, trial counsel failed to specifically address the elements of self-defense. The judge denied the motion stating, “I would point out that Investigator Fortner’s testimony about the size of the crowd is based on his interview with the defendant. I’m going to find that the Defendant has failed to meet his burden of proof with respect to the invocation of the act and require the case to go to trial.”

In the PCR application Petitioner alleged, “That trial counsel was ineffective for failure to investigate, or invoke or present “Protection of Person and Property Act, Castle Doctrine 16-11-410 of the SC Code of Laws.” (App. p. 198). During the PCR hearing Petitioner testified that counsel failed to properly argue that Petitioner was entitled to immunity from prosecution pursuant to the Protection of Person and Property Act, S.C. Code §16-11-440. (App. p. 223, lines 1-20).

In the order of dismissal there is a section titled, “Failure to Properly Argue Immunity Statute.” (App. p. 272). In the body of the order, however, the PCR judge wrote, “Here Applicant argues plea counsel was ineffective for failing to argue he was entitled to immunity. This Court finds this allegation to be without merit.” (App. p. 273). The allegation is not that counsel failed to argue that Petitioner was entitled to immunity. Counsel moved for immunity but he failed to argue specific parts of the statute applicable to Petitioner and failed to argue the specific elements of self-defense. Counsel was ineffective for not properly arguing that Petitioner was entitled to immunity pursuant to the statute.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable

probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

On February 3, 2014, Petitioner was living with his brother and sister in law and their children. (App. p. 37, lines 10-22). During the immunity hearing Petitioner testified that a fight broke out next door during a party. (App. p. 39, lines 6-17). When Petitioner’s brother asked the people next door if everybody was alright, an altercation took place between the brother and the people next door. (App. p. 39, line 25 – p. 40, lines 1-25). Petitioner testified that the deceased and others came on the porch of the house he shared with his brother. (App. p. 40, lines 8-22). Petitioner testified, “They was arguing with my brother. And I told them, Ain’t nobody going to mess with my brother. Because we had kids in the house. And they – I mean, they wouldn’t comply. And they kept trying to get – I mean barge their way past me, you know.” (App. p. 41, lines 12-16). Petitioner testified that some of the people got past him and went inside the house. (App. p. 42, lines 20-25). When the people went in the house, Petitioner, still on the back porch, fired a warning shot in the air and the people from next door left. (App. p. 42, line 12 – p. 43, lines 1-18). The people from next door, however returned. (App. p. 43, line 19 – p. 44, lines 1-25). Petitioner testified, “Yeah. They was trying – yeah. They was trying to get in the trailer again. So that’s why we – my brother – well, he had put his shoes on by then. So he came outside and I came behind him. And as soon as he came out on the front porch, they ran up on him. And I shot one shot.” (App. p. 46, lines 17-22). Petitioner testified that the deceased was starting to pull out a gun when he shot. (App. p. 45, lines 18-24). Javario Brooks was fatally shot and Dominic Sitton was shot in the arm.

S.C. Code §16-11-440 provides:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

Counsel failed to argue at the immunity hearing that, pursuant to S.C. Code §16-11-440 (A), Petitioner was presumed to have a reasonable fear of imminent peril or death or great bodily injury to himself or his brother and brother's family because the people against whom deadly force was used were in the process of unlawfully and forcefully entering the porch and trailer. Additionally, counsel failed to argue that Petitioner proved the elements of self-defense, save the duty to retreat, by a preponderance of the evidence.

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). In Curry the South Carolina Supreme Court wrote, “Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat.” 406 S.C. at 371, 752 S.E.2d at 266.

A person is justified in using deadly force in self-defense when:

(1) The defendant was without fault in bringing on the difficulty; (2) The defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief; and (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

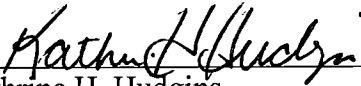
State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (quoting State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)). Counsel failed to argue that Petitioner met the elements of self-defense and as a result, the trial judge did not make specific rulings as to the elements of self-defense. Counsel's performance was deficient.

As to the specific elements of self-defense, Petitioner was without fault in bringing on the difficulty. Petitioner actually believed that he and his family were in danger. The reasonableness of Petitioner's fear should be presumed pursuant to S.C. Code §16-11-440 (A). Because Petitioner was in the curtilage of his home when he used deadly force, he had no duty to retreat, and was free to stand his ground and meet force with force. See State v. Scott, 424 S.C. 463, 474-75, 819 S.E.2d 116, 121 (2018) ("Because Scott was in the curtilage of his home when he used deadly force against Niles, he already had no duty to retreat, and was free to stand his ground and meet force with force, pursuant to the Castle Doctrine as we explained in *Grantham*, 224 S.C. [41] at 45, 77 S.E.2d [291] at 293.").

Petitioner was prejudiced by counsel's failure to properly argue that Petitioner was entitled to immunity. There is a reasonable probability that if counsel had properly argued the self-defense claim and the presumption provided in S.C. Code §16-11-440 (A), the judge would have granted Petitioner immunity from prosecution. Petitioner is entitled to relief.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

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V.

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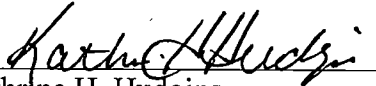
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Mark Cureton states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Alex Kinlaw, which was held on October 22, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for John Mark Cureton.

Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of July, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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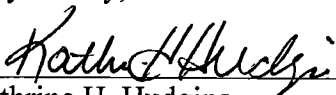
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CERTIFICATE OF SERVICE

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 Taylor Z. Smith, 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 John Mark Cureton, #312745, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 24th day of July, 2019.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

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



(L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019