STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge

KEITH SHELDON LEVAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000863

AMENDED PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR judge err in finding that counsel was not ineffective for failing to adequately present self-defense where the trial judge partially instructed the jury on the doctrine of mutual combat and counsel failed to request an instruction that if a combatant withdraws from the initial combat, he may still invoke self-defense?

STATEMENT

Petitioner was indicted in April 2016 by the Horry County grand jury for murder. App. 512. On February 13, 2017, Petitioner was called to trial before the Honorable Steven H. John and a jury. App. 1. Petitioner was represented by Lawrence R. Filiberto. App. 1. The state was represented by Scott R. Hixson and Thomas G. Terrell, III. App. 1.

On February 21, 2015 law enforcement responded to the parking lot of a Home Depot in Myrtle Beach and found a vehicle that had crashed into a median with its engine still running. App. 77, l. 16 – 78, l. 25. The driver of the vehicle, Barry Selmon, was slumped over in the driver's seat and had been shot one time in the back of the head.[1] App. 82, l. 20 – 85, l. 7; app. 92, ll. 7 – 22.

After Selmon was discovered deceased in the Home Depot parking lot, Petitioner and his wife Penny arrived at the Myrtle Beach Police Department to report being harassed by Selmon. App. 128, l. 18 – 130, l. 16. During that meeting, Petitioner informed the police officers that he shot Selmon in self-defense. App. 507 – 508. Petitioner was placed under arrest. App. 135, ll. 11 – 13.

Petitioner testified in his own defense at trial. Petitioner had grown increasingly concerned for his and his wife's safety as a result of Selmon's actions towards them. App. 277, ll. 3 – 20. Petitioner testified that he reported his concerns regarding Selmon to law enforcement. App. 277, l. 15 – 278, l. 5. Petitioner's trial counsel also introduced a photograph of Selmon holding a "large [and] intimidating firearm." Selmon had sent the photograph to Penny about four months prior to the shooting. App. 278, l. 6 – 280, l. 10.

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1 William Stair with the Myrtle Beach Police Department located a total of nine impact marks from bullets on the rear of Selmon's vehicle. App. 117, ll. 16 – 22.

As a result of Selmon's actions towards Penny, Petitioner asked Penny to stop communicating with Selmon. App. 280, ll. 12 – 15. In the early morning hours on the day of the shooting, Petitioner was awakened to Penny crying and emotionally distraught. App. 281, ll. 12 – 23. Selmon had asked Penny to meet him in the Walmart parking lot. App. 283, ll. 7 – 14. Petitioner decided that he would go to the Walmart parking lot to confront Selmon to tell him to leave Penny alone and to stop terrorizing his family. App. 284, ll. 17 – 24. Petitioner carried a rifle with him when he went to meet Selmon because he was fearful, and he knew that Selmon carried a gun. App. 285, ll. 1 – 25.

After Petitioner arrived at the Walmart,[2] he began having second thoughts about confronting Selmon and he attempted to leave. App. 287, ll. 9 – 17. Before Petitioner could leave though, Selmon pulled up next to him. App. 287, l. 19 – 288, l. 22. Petitioner began to drive away from Selmon and drove around the parking lot in the visibility of Walmart's surveillance cameras.[3] App. 287, l. 25 – 288, l. 2. Selmon caught up to Petitioner a second time and pulled up directly next to him. App. 288, ll. 20 – 25. Selmon rolled down his passenger side window and realized that the person in the other car was Petitioner and not Penny. When Selmon realized that Penny was not in the car, Petitioner recalled: "[Selmon] was furious and started making violent gestures and yelling out obscenities and threatened to kill me." App. 288, l. 22 – 289, l. 17.

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2 The Walmart was directly adjacent to the Home Depot where Selmon was found deceased. There was also a Costco directly adjacent to the Home Depot. H. H. Gregg and Home Goods were both directly across the street from the Home Depot which was in between Costco and Walmart. The only surveillance video introduced at trial came from the Costco. App. 138, l. 21 – 141, l. 10; app. 158, l. 13 – 160, l. 15.

3 Petitioner's trial counsel testified at the PCR hearing that he only went to the Home Goods store to obtain the surveillance footage. Trial counsel did not attempt to obtain surveillance footage from Walmart which Petitioner testified would have corroborated his version of events. App. 423, l. 10 – 427, l. 22; app. 456, l. 4 – 457, l. 7.

Petitioner attempted to flee from Selmon after Selmon threatened to kill him. App. 289, ll. 19 – 24. As Petitioner was driving away from Selmon, he stopped his car behind the Home Goods store that was across the street from the Home Depot and tried to hide and dial 911. App. 290, ll. 12 – 25. Selmon caught up to Petitioner's car again and cut Petitioner off with his vehicle. App. 291, ll. 1 – 6. Petitioner recalled: "Selmon, who had pulled his vehicle in front of mine, rolled his window down, yelling that I'm a dead son-of-a-bitch and pointed – and started pointing it at me like that . . . with something in his hand." App. 291, ll. 8 – 12. Believing that Selmon had a firearm, Petitioner jumped out of the car so that he could flee. App. 291, ll. 16 – 22. However, when Petitioner got out of the car, Selmon backed his vehicle up, struck Petitioner and ran over his right foot. Petitioner then fired his rifle into the back of Selmon's vehicle in an attempt to save himself from being run over. App. 291, l. 21 – 293, l. 12.

After the shooting, Petitioner left the scene. Several hours later, he found out that Selmon was dead and voluntarily went to the police department to explain to them what happened. App. 293, l. 18 – 294, l. 13. Petitioner was found guilty of murder. The judge sentenced him to forty years imprisonment. App. 387, ll. 8 – 12; app. 324, ll. 7 – 9.

Petitioner withdrew his direct appeal and filed his PCR application on October 24, 2017. The state filed its Return on February 5, 2018. App. 399 – 412. Petitioner filed an amended PCR application through his attorney, T. Kirk Truslow, on August 3, 2018. App. 413.

An evidentiary hearing was held on November 30, 2018 before the Honorable Kristi F. Curtis. Petitioner was represented by Kirk Truslow and the state was represented by Johnny E. James, Jr. App. 417. Petitioner and his trial counsel, Filiberto, testified at the hearing. App. 418. The PCR judge denied Petitioner's application for relief.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that counsel was not ineffective for failing to adequately present self-defense because the trial judge partially instructed the jury on the doctrine of mutual combat and counsel failed to request an instruction that if a combatant withdraws from the initial combat, he may still invoke self-defense.

Relevant Facts

The trial judge granted defense counsel's requests to charge self-defense and voluntary manslaughter. App. 318, l. 17 – 327, l. 7. The trial judge also instructed the jury on the doctrine of mutual combat. This instruction appeared immediately after his explanation of the first element of self-defense – that the defendant must be without fault in bringing on the difficulty. App. 379, l. 14 – 380, l. 5. The judge instructed the jury:

> If the Defendant voluntar[ily] participated in mutual combat for the purposes other than protection, the killing of the victim would not be self-defense. For mutual combat, there has to be a mutual intent of both parties and a willingness to fight of both parties. This intent may be shown by the acts and conduct of the parties and the circumstances surrounding the combat.

App. 379, l. 14 – 380, l. 5.

At the PCR hearing, trial counsel was asked why he failed to request a jury instruction that an aggressor who withdraws from the combat can still claim self-defense pursuant to "State v. Graham and Duncan."[4] Trial counsel admitted that he was aware of such a charge but did not

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4 While PCR counsel did not give specific citations to these cases, it appears from the context that he was referring to State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973) and State v. Duncan, 86 S.C. 370, 68 S.E. 684 (1910). Graham held that a mutual combat instruction was warranted where the defendant and decedent had prior disputes with one another, including making threats to each other, and then essentially engaged in a "duel" in the street in front of a barber shop where both knew the other was armed and both fired shots at each other. Graham, 260 S.C. at 451, 196 S.E.2d at 496. Duncan was also a self-defense case that centered on the

request it. He reasoned: "I think that based on [Petitioner's] testimony it would've been a challenging attempt with the Court." App. 461, l. 25 – 462, l. 16. However, counsel admitted that Petitioner's testimony at trial was that he was trying to get away from Selmon when the shooting happened. Counsel acknowledged that he failed to request the self-defense charge that an initial aggressor can withdraw and still claim self-defense. App. 480, l. 11 – 481, l. 2.

Discussion

The PCR judge erred in finding that counsel was not ineffective for failing to adequately present a claim of self-defense. In order to prove ineffective assistance of counsel, Petitioner must show that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it 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. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

Mutual combat should not have been charged to the jury in this case because there was no evidence that Selmon went to the Walmart parking lot looking for a fight; nor was there evidence

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issue of whether or not the defendant was without fault in bringing on the difficulty. Duncan, 86 S.C. 370, 68 S.E. at 686.

that Selmon knew Petitioner was armed. Selmon was intending only to meet Petitioner's wife, Penny, at the Walmart.[5] Mutual combat was therefore inapplicable to the facts of this case and should not have been charged. See State v. Bowers, 428 S.C. 21, 32, 832 S.E.2d 623, 629 (Ct. App. 2019) (noting that in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003), this Court required that mutual combat arise out of a pre-existing dispute between the parties, that each party be armed, and that each party know the other is armed). However, mutual combat was charged, and trial counsel did not object to it.

Counsel's failure to object to the mutual combat instruction was deficient performance because the doctrine was irrelevant to Petitioner's case.[6] Furthermore, because mutual combat was instructed, the burden of disproving self-defense was removed from the state and instead the burden was shifted to Petitioner to prove that he withdrew from the combat. This Court observed in State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003):

> The mutual combat doctrine is triggered when both parties contribute to the resulting fight. Self-defense, on the other hand, is available only when the defendant is without fault in bringing on the difficulty. Despite this fundamental difference between the doctrines of mutual conflict and self-defense, the Court of Appeals found that charging mutual combat to the jury did not destroy Petitioner's self-defense theory because Petitioner still could have proven that he withdrew from the fight in good faith. This finding, however, fails to recognize that requiring Petitioner to prove he withdrew from the fight removes the burden to disprove self-defense from the State, and improperly places it on the Petitioner.

Id. (internal citations and emphasis omitted).

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5 The state's theory at trial was essentially that Petitioner's wife was cheating on him with Selmon in order to get back at Petitioner for having allegedly cheated on her.

6 While the specific argument that mutual combat should not have been instructed was not raised at the PCR hearing, it provides context to the argument that trial counsel was ineffective for failing to request a full and complete instruction on the doctrine of mutual combat, specifically, withdrawal.

Given the fact that the trial judge did partially instruct the jury on the doctrine of mutual combat, trial counsel should have, at a minimum, requested that the judge give the full and complete instruction on mutual combat. While it was a correct statement of law that self-defense is not available to one who engages in mutual combat, that was not a complete statement of the law. In order to accurately explain the doctrine of mutual combat, the jury instruction should have also stated that although the plea of self-defense is not available to a person engaged in mutual combat, if he "withdraws and endeavors in good faith to decline further conflict, and either by word or act, makes that fact known to his adversary," the plea of self-defense is still available to him. State v. Graham, 260 S.C. 449, 451, 196 S.E. 495, 496 (1973); see also State v. Taylor, 356 S.C. 227, 232, 589 S.E.2d 1, 3 (2003) (noting that self-defense is unavailable to a person engaged in mutual combat *unless* the person withdraws from the combat prior to the killing).

Trial counsel was ineffective in failing to request a full and complete instruction on the doctrine of mutual combat where the judge instructed the jury that this doctrine negated a plea of self-defense. Petitioner's defense at trial was clearly that of self-defense. Even though Petitioner armed himself and went to confront Selmon, he changed his mind about confronting Selmon after he got to the Walmart. App. 287, ll. 9 – 17. Petitioner was attempting to leave the scene when he was accosted by Selmon who was so angry when he realized that Penny had not come to meet him that he began threatening to kill Petitioner. App. 288, l. 22 – 289, l. 17. Petitioner was trying to get away from Selmon, clearly conveying his intent to withdraw from any conflict. However, Selmon blocked Petitioner with his vehicle and then ran over Petitioner when he tried to flee. App. 291, l. 21 – 293, l. 12.

At the PCR hearing, trial counsel was asked about his view of Petitioner's self-defense claim:

> The challenge I think was that [Petitioner] created the confrontation. I tried to make the argument – ultimately, when it was gonna [sic] go to trial, I tried to make the argument that he discontinued the confrontation and then a subsequent confrontation occurred between Mr. Selmon and [Petitioner].

App. 452, l. 23 – 453, l. 4. Counsel's candid admission regarding the challenge of arguing self-defense when Petitioner armed himself in order to confront Selmon was very important. Counsel knew that the most difficult aspect of Petitioner's defense was going to be the first element of self-defense, i.e. that the defendant be without fault in bringing on the difficulty. The "without fault" element was instructed right before the jury was instructed that self-defense was not available to a person who was engaged in mutual combat. App. 379, l. 14 – 380, l. 5. Therefore, it was essential that trial counsel ensure the jury was also correctly instructed that a combatant who withdraws from the conflict may regain the right to act in self-defense. As counsel freely admitted at the PCR hearing, this was exactly the argument he sought to make on Petitioner's behalf to the jury. However, his argument was completely negated by the trial court's erroneous and incomplete charge on mutual combat.

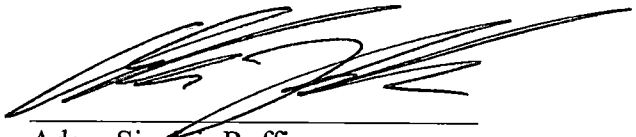
Petitioner was forced to act in self-defense based on Selmon's actions. Even after Petitioner was blocked in by Selmon's vehicle, he continued to try to flee from Selmon by jumping out of his vehicle to get out of Selmon's line of fire. Instead of allowing Petitioner to retreat, Selmon attacked Petitioner by ramming Petitioner with his car.

Counsel was ineffective because he failed to request a jury instruction that a plea of self-defense was still available to an aggressor who withdraws from the conflict prior to the killing. Furthermore, Petitioner was prejudiced by counsel's failure because the jury was only instructed

that self-defense was unavailable to a mutual combatant. The jury should have also been charged that self-defense was available when a combatant withdraws. The trial judge's instruction on mutual combat was an erroneous and incomplete statement of the law which virtually guaranteed that the jury would misapply the law of self-defense in Petitioner's case. Therefore, the PCR judge erred in finding that trial counsel was not ineffective for failing to ensure the critical "withdrawal" element of mutual combat was instructed given the very strong evidence of withdrawal in this case. See State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of December, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Amended Petition for Writ of Certiorari in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Amended Petition for Writ of Certiorari has been served on Keith Sheldon Levan, #371451, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 27th day of December, 2019.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of December, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.