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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO HORRY COUNTY
Court of General Sessions

The Honorable Steven H. John, Trial Judge
The Honorable Kristi F. Curtis, PCR Judge

Appellate Case No. 2019-000863

Keith Sheldon Levan.....Petitioner,

v.

STATE OF SOUTH CAROLINA,.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General
S.C. Bar # 104191

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

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?

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly find Petitioner failed to establish constitutionally ineffective assistance of counsel for failing to present a self-defense argument where the trial judge partially instructed the jury on the doctrine of mutual combat and Counsel failed to request an instruction that one can invoke self-defense after the combatant withdraws from the initial combat?

STATEMENT OF THE CASE

Keith Sheldon Levan (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its April 2016 term, the Horry County Grand Jury indicted Petitioner for murder (2016-GS-26-01806). Petitioner was represented by Lawrence R. Filiberto, Esquire (hereafter “Counsel”). Assistant Solicitors Scott R. Hixson, Esquire, and Thomas G. Terrell, III, Esquire, from the Fifteenth Circuit Solicitor’s Office, represented the State. On February 13, 2017 the case proceeded to trial before the Honorable Steven H. John. On February 15, 2017 the jury found Petitioner guilty of the crimes charged. Judge John sentenced Petitioner to forty years’ imprisonment.

At trial, the State raised the possibility of self-defense during its opening argument twice, nodding at the possibility of a self-defense argument, though asking the jury to find the killing was not in self-defense. (App. 72-75). Though Counsel did not mention self-defense specifically, he did request the jury to keep an open mind, use its common sense, and apply the law as the trial judge provided it. (App. 75-76). Judge John confirmed he would not infer malice based on use of the weapon and instructed the jury on self-defense. (App. 326). Petitioner testified at trial after Counsel informed him that without his testimony they could not assert a self-defense charge or make an argument to support a manslaughter finding to the jury, took time to calm Applicant’s apprehensions over testifying, and dedicated a conservative fifty to sixty hours of trial testimony preparation with Petitioner. (App. 461, 471-72). In closing, the State refuted the self-defense argument element by element. (App. 356-57). Counsel argued Petitioner used deadly force against the victim only after the victim struck Petitioner with his vehicle and Petitioner was placed in fear of his life, and finished by walking through the elements of self-defense. (App.

379-82). In reply, the State emphasized that Petitioner told the police that he wanted to confront the victim and scare him by shooting at the vehicle or otherwise scaring him. (App. 262, 344, 366-67).

Petitioner timely filed a notice of appeal, which was withdrawn on July 19, 2017 by and through appellate counsel T. Kirk Truslow, Esquire. The appeal was dismissed by the South Carolina Court of Appeals on September 13, 2017. The Remittitur was issued October 17, 2017.

Petitioner timely filed a PCR application on October 24, 2017, alleging “counsel failed to adequately convey plea offer to Applicant” and “[f]ail[ed] to investigate and adequately prepare for trial”. Respondent made its Return on February 5, 2018. The evidentiary hearing occurred on November 30, 2018, before the Honorable Kristi F. Curtis. T. Kirk Truslow, Esquire was the Petitioner’s attorney. Johnny Ellis James, Jr., Esquire of the South Carolina Attorney General’s Office represented Respondent.

At the PCR hearing, Petitioner conceded that he and Trial Counsel had discussed the possibility of a self-defense strategy at trial, but it was never made clear to Petitioner that this strategy would actually be used. (App. 421). Counsel testified that he successfully secured charges on self-defense and voluntary manslaughter, though he indicated he thought it would ultimately be a mitigation case. (App. 453-54). Counsel testified he told Petitioner that it was his right to or to not testify, but stated his testimony would be necessary to make self-defense and voluntary manslaughter arguments. (App. 458-59). Thus, Petitioner testified at trial, contending he was compelled to do so. (App. 458-59). The PCR court denied relief, finding a self-defense argument was utilized by Counsel and Petitioner voluntarily testified at trial, after Counsel prepared him to testify and explained the strengths and weaknesses of the self-defense argument. (App. 500).

The Court issued an Order of Dismissal, denying Petitioner's Post-Conviction Relief Application and remanding him to the custody of South Carolina Department of Corrections on May 7, 2019. Thus, the request for relief was denied. Petitioner appeals from the denial of relief based upon the allegation that Counsel was ineffective for failing to present a self-defense argument where the trial judge partially instructed the jury on the doctrine of mutual combat and Counsel failed to request an instruction that one can invoke self-defense after the combatant withdraws from the initial combat.

STATEMENT OF FACTS

A triangular relationship existed between the Petitioner, the victim, and Petitioner's common law wife, which led to animosity between the victim and Petitioner. (App. 330-335). This eventually led to the incident on February 21, 2015, where the Petitioner went to confront the victim and the victim became hostile upon emergence of Petitioner on the scene. (App. 275-294). Petitioner attempted to flee from the victim but eventually culminated to Petitioner open firing on the victim with an AR-15 he came armed with. (App. 275-294). Consequently, the victim was killed by Petitioner. (App. 220-235). Petitioner, expressing regret, confessed to his common-law wife shortly thereafter. (App. 220-235).

Myrtle Beach Police Department received a report regarding a running vehicle on the sitting on the median of a retail parking lot near the interchange of highways 17 and 501 shortly thereafter. (App. 80-81). Responding officers found the victim slumped over the steering wheel, deceased, with "what appeared to be brain matter coming out the right side of the head[.]" (App. 83). Law enforcement determined that the accident was caused by an assault, not a motor vehicle collision, after discovering four bullets in the vehicle's rear, four flat tires on the vehicle, and empty casings across the street and near the roadway. (App. 84-85, 121-25). The autopsy showed the Petitioner died from a gunshot to the back of the head. (App. 92).

Later that day, Petitioner confessed to the killing at the Myrtle Beach Police Department and was promptly taken into custody shortly thereafter. (App. 127-135). Petitioner's vehicle contained spent casings and the murder weapon and additional ammunition was recovered from a wooded area the Petitioner notified Law Enforcement of in a written statement. (App. 148-54, 172-73, 238-45).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the post-conviction relief court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCPP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish constitutionally ineffective assistance of counsel for failing to present a self-defense argument where the trial judge partially instructed the jury on the doctrine of mutual combat and Counsel failed to request an instruction that one can invoke self-defense after the combatant withdraws from the initial combat.

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief because Counsel was constitutionally ineffective in failing to present a self-defense argument after the 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. Petitioner argues this establishes that Counsel was constitutionally ineffective and this ineffectiveness warrants remanding the matter back to the court of general sessions for resentencing. However, the PCR court properly rejected this argument, finding that Counsel “effectively and adequately advanced a theory of self-defense on Applicant’s behalf a trial.” (Appx. 500). These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

Ineffective Assistance of Counsel, Generally

There is probative evidence to support the lower court’s findings of effective assistance of counsel. To prove ineffective assistance of counsel, 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, 686 (1984). The *Strickland* analysis is a two-pronged test, of which the applicant shoulders the burden of proof in meeting both prongs.

First, the applicant must prove defense counsel’s performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency,

the applicant must prove by the preponderance of the evidence¹ that counsels actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant” and the scope limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690).

Second, counsel’s deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 295. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

Self-Defense

Whether failure to assert a defense constitutes ineffective assistance of counsel ultimately hinges on if failure to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a “reasonably substantial investigation” into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d 1243, 1252(1984)). That said, if there are several lines of defense, counsel may still be effective even if every single

¹ As per Rule 71.1(e) SCRCP

line is not explored. *Id.* “[W]hen counsels assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.” *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, “[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Here, there is probative evidence to support the PCR Court’s determination that Counsel was not ineffective in developing a self-defense argument at trial. Though Counsel did not specifically mention self-defense in his opening, he told the jury to keep an open mind, use common sense, and apply the law as described. During the charge conference, Counsel asked for both voluntarily manslaughter and self-defense charges, both of which the court granted. Additionally, the Court did not charge inference of malice from Petitioner’s possession of a deadly weapon, because of the self-defense charge as well as other mitigating factors. *See State v. Belcher*, 385 S.C. 597, 612 (2009).

Further, Counsel called Petitioner to testify at trial, partially to support a self-defense argument. Petitioner stated that for months leading up to the incident, he became concerned about his safety and well-being because of conversations he was aware of between the victim and his common law wife. (App. 276-77). He testified he lost sleep, checked the doors and locks, and took other safety precautions for about two years leading up to the incident out of fear of the victim. (App. 277). He took the matter to the police, who told him he did not have enough evidence for them to take action. (App. 277). Counsel also introduced a photograph of victim

holding a firearm, which was sent to Petitioner's wife with an accompanying note that caused his wife to cry. (App. 278-80).

Petitioner testified on February 21, 2015 (the night of the incident), the Petitioner was awoken in the middle of the night because of his emotionally-distraught wife who began crying after receiving a message from the victim. (App. 281-82). The message terrified Petitioner, who had received many similar messages from the victim and testified the messages' contents were getting increasingly worse. (App. 283). Ultimately, he decided to confront the victim regarding the messages received and tell him to stop messaging the family and to stop "terrorizing [him] and [his] son." (App. 284). Additionally, he decided to arm himself out of fear of confronting the victim and pre-existing knowledge regarding victim's habit to carry a firearm. (App. 285).

Once both men were at the scene, Petitioner testified that victim was furious at him and started making violent gestures and yelling obscenities and threatened to kill him. (App. 289). After this, Petitioner became scared and drove around the building they were parked outside of. (App. 289-290). The victim followed Petitioner, while Petitioner headed to the police department. (App. 290). The victim continued followed Petitioner and ultimately cut him off while yelling at him with the windows down, saying he was dead and began pointing at him with an unidentified object, which Petitioner thought was a firearm. (App. 291). Petitioner put his car in the line of fire, hopped out of the car, and grabbed his gun, which got stuck in the seatbelt and attempted to shoot at the victim's tires. (App. 291-92). Petitioner was hit with victim's car and sustained injuries as a result. (App. 292). Petitioner got off the ground after being struck, retrieved his rifle, which fired and struck the victim's car. (App. 293). Petitioner stated he did not know the victim was fatally injured until hours later. (App. 293-94). This testimony was

presented in the Petitioner's defense, substantiating Counsel's argument for the self-defense argument and the lesser included defense of voluntary manslaughter.

When closing, though Counsel acknowledged confrontation was a poor idea, he stated Petitioner only went after victim to get him to leave his family alone. Counsel closed with walking through the facts within a self-defense context. The Court instructed the jury on self-defense. (App. 378-79).

At the PCR hearing, Petitioner stated that he and Counsel discussed using a self-defense argument prior to trial, even though Petitioner did not know it would ultimately be used. Counsel testified that the case was ultimately a mitigation case, but he did successfully secure a self-defense charge. Further, Counsel testified that he advised Petitioner that he must testify to assert a self-defense claim for any chance of establishing this offense to occur.

Given the facts laid out above, there is no indication of ineffective assistance of counsel in asserting a self-defense argument at trial. Counsel incorporated the defense at all stages of the proceeding and maintained self-defense as a central theme at trial. Petitioner was aware of the self-defense argument prior to trial and knew, if this argument was made, he would have to testify at trial. Further, any additional focus placed on the mitigation argument, that otherwise took away from time that theoretically could have been spent fleshing out the self-defense argument was tactical by nature, presumably because Counsel believed self-defense was not a strong argument in this case. This was made clear in his testimony that he thought the case would ultimately be a mitigation case; not a self-defense case. (App. 453-54). Thus, there was probative evidence in this case to support the lower court's finding that the self-defense claim was adequately presented at trial.

Mutual Combat

Further, there is no indication of ineffective assistance of counsel in failing to ensure a complete explanation of mutual combat was provided to the jury. To constitute mutual combat, there must be “mutual intent and willingness to fight . . . [that] may be manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.” *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495. Unless he later withdraws or attempts, in good faith, to decline further conflict and makes this known to the adversary, he cannot make a valid self-defense claim. *Id.* at 451.

Here, mutual combat is relevant in this case. The record makes clear that Petitioner went to the scene to confront the victim and once the victim saw the person at the scene was Petitioner, he immediately became angry, hostile, and ready to fight. Both sides intended to confront one another, if not become violent towards the other party.

There was no indication that Petitioner withdrew from the fight and communicated this intent to withdraw with the victim. Conversely, even though Petitioner drove away from the victim a number of times, he never fully left the scene and, after driving around the parking lot, grabbed his firearm and began to aim and then shoot at the victim’s car. Thus, there is no indication that a withdrawal instruction would have been relevant, given the circumstances.

Further, Counsel testified at the PCR hearing that he had considered requesting a full instruction to the jury on mutual combat, but decided against it, stating that he decided against making the argument because it would have been a “challenging attempt with the court” because “[h]is testimony was actually pretty challenged”, testifying that he struggled answering the questions and, consequently, Counsel had to lead him “aggressively”. (App. 462). Thus, not objecting to the jury instruction was a tactical decision chosen by Counsel because of his belief

that objecting to the instruction would not have benefited his client. Petitioner's testimony was weak and Counsel, understanding this, did not think a full instruction would have made a difference. Thus, failure to object did not fall below the standard of competence required of attorneys and, thus, Counsel did not act ineffectively.

Additionally, Petitioner was not prejudiced by Counsel's inaction. Evidence was overwhelming that Petitioner grabbed his firearm and met the victim at the parking lot with the intent to confront him. Petitioner's testimony was flawed and challenged. Specifically, Petitioner intentionally created the conflict and, when the victim became angry, he grabbed the gun and shot him. Based upon these facts, it is reasonable to conclude that regardless of whether or not Counsel asked and was granted a full instruction on mutual combat, the results of the proceeding would have remained unchanged. Petitioner would be found guilty of murder regardless of whether the jury was given a complete instruction or not. Thus, Petitioner was not prejudiced by Counsel's alleged deficient performance and, thus, Petitioner fails to pass the second prong of the *Strickland* test as well.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: Chelsey F. Marto
Chelsey F. Marto

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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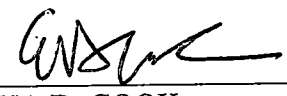
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by courier two (2) copies addressed to:

Adam Sinclair Ruffin, Esquire
S.C Commission on Indigent Defense
Post Office Box 11433
Columbia, SC 29211-1433

This 27th day of February, 2020.



EVA D. COOK
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

February 27, 2020

RECEIVED

FEB 27 2020

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Keith Sheldon Levan, #371451 v. State of South Carolina
Appellate Case No. 2019-000863
Lower Court Case No. 2017-CP-26-7016

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Chelsey F. Marto
Assistant Attorney General
S.C. Bar No. 104191

CFM/ec
Enclosures

cc: Adam S. Ruffin, Esquire