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May 22, 2020

RECEIVED
MAY 27 2020
S.C. SUPREME COURT

Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Willie Marvin Williams, #167077 v. State of South Carolina,
Case No. 2016-CP-23-7610

Dear Hon. Shearouse:

I am enclosing herewith for filing the original Notice of Appeal together with the original Certificate of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

C. Rauch Wise

CRW/slt
Enclosure

cc Hon. Robin B. Stilwell
Clerk of Court, Greenville
William Walter Wilkins, III, Thirteenth Circuit Solicitor
Taylor Zane Smith
SC Court Administration

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAY 27 2020
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Hon. Deadra L. Jefferson, Trial Court Judge
Hon. Robin B. Stilwell, Post-Conviction Relief Judge

Case № 2016-CP-23-7610

Willie Marvin Williams, #167044 . . . . Respondent-Appellant,

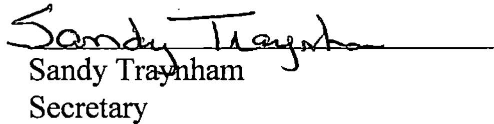
vs.

The State of South Carolina . . . . Appellant-Respondent.

CERTIFICATE OF SERVICE

I hereby Certify that I am the Secretary for C. Rauch Wise, Attorney for the Respondent-Appellant in the above entitled case. That on May 22, 2020, I did deposit in the United States Mail with proper postage affixed thereto, a copy of the Notice of Intent to Appeal in the above case addressed to Taylor Z. Smith, Rembert C. Dennis Building, P.O. Box 11549, Columbia, SC 29211-1549; Paul B. Wichensimer, Clerk, Greenville County Courthouse, 305 E. North Street, Ste. 232, Greenville, SC 29601; Honorable Robin B. Stilwell, 305 E. North St., Greenville, SC 29601; Walt Wilkins, Solicitor Thirteenth Judicial Circuit, 305 E. North Street, Greenville, SC 29601.

May 22, 2020



Sandy Traynham
Secretary

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Hon. Deadra L. Jefferson, Trial Court Judge
Hon. Robin B. Stilwell, Post-Conviction Relief Judge

Case № 2016-CP-23-7610

Willie Marvin Williams, #167044 .... Respondent-Appellant,

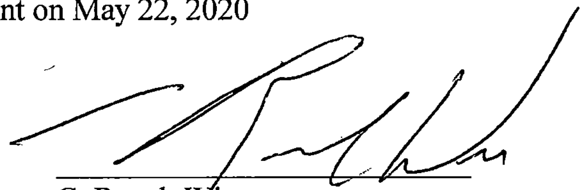
vs.

The State of South Carolina .... Appellant-Respondent.

NOTICE OF INTENT TO APPEAL

Willie Williams appeals the Order of the Honorable Robin B. Stilwell, dated March 31, 2020, reconsidering in part the Order granting post-conviction relief filed on April 7, 2020. This Notice of Appeal is filed pursuant to SC Court Rule 203(c). Respondent-Appellant received a copy of the Notice of Appeal from Appellant-Respondent on May 22, 2020

May 22nd, 2020



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TRANSMISSION VERIFICATION REPORT

TIME : 05/22/2020 13:36
SER.# : B3W213997

DATE,TIME	05/22 13:34
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT

Willie Marvin Williams, #167044,) Case No. 2016-CP-23-7610

Applicant,)

v.) **ORDER GRANTING APPLICATION**

State of South Carolina,)

Respondent.)

FILED 2020 APR -2 PM 2:22

This matter comes before this Court by way of an application for post-conviction relief filed on December 28, 2016, by Willie Marvin Williams (Applicant). The State (Respondent) filed its return on October 5, 2017, in which it moved to dismiss some of the grounds raised by Applicant and moved for a more definite statement. On May 9, 2019, Applicant, through counsel, filed an amended application for post-conviction relief.[1] An evidentiary hearing in the matter was held before the undersigned on December 18, 2019, at the Greenville County Courthouse. Applicant was present and represented by C. Rauch Wise, Esquire, and Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf, and Respondent called W. Townes Jones, IV, Esquire, and Richard H. Warder, Esquire, as witnesses. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court grants the application.

[1] Applicant's PCR counsel filed a second application for post-conviction, which was assigned a case number of 2019-CP-23-2687. The two cases were merged, with this case surviving. Williams v. State, No. 16-CP-23-7610 (Greenville, S.C., Ct. Common Pleas, September 3, 2019).

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. During its April of 2013 term, the Greenville County Grand Jury indicted Applicant for murder (2013-GS-23-3238), possession of a weapon during the commission of a violent crime (2013-GS-23-3238), attempted murder (2013-GS-23-3239), and unlawful conduct towards a child (2013-GS-23-3240). Jones and Warder represented Applicant, and Assistant Solicitor Judith M. Munson of the Thirteenth Circuit Solicitor's Office prosecuted the case. On May 13, 2013, through May 16, 2013, Applicant proceeded to a jury trial with the Honorable Deadra L. Jefferson, presiding. The jury convicted Applicant as indicted. Judge Jefferson sentenced Applicant to concurrent terms of imprisonment of life for murder, five years for possession of a weapon during the commission of a violent crime, thirty years for attempted murder, and ten years for unlawful conduct towards a child.

Jones filed a timely notice of appeal. Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense perfected Applicant's appeal, arguing the trial court erred (1) in excluding a statement made by the victim's boyfriend and (2) denying Applicant's request to instruct the jury on involuntary manslaughter. State v. Williams, Op. No. 2016-UP-215 (S.C. Ct. App. filed May 18, 2016) (per curiam). The South Carolina Court of Appeals affirmed in an unpublished opinion, finding the trial court did not abuse its discretion in admitting the boyfriend's statement and the request to instruct the jury on involuntary manslaughter was not preserved for appellate review. The Remittitur was issued on June 3, 2016.

CURRENT PROCEEDING

On December 28, 2016, Applicant filed an application for post-conviction relief, in which he alleged that he was being held in custody unlawfully based on the following grounds:

1. "Due process and constitutional violations"
    a. "The State used perjured testimony and falsified evidence to support its case"
    b. "During closing arguments the solicitor re-introduced known false testimony to the jury"
    c. "The solicitor made improper closing arguments by making a false and misleading statement to the court."
    d. "The solicitor's prosecutorial and courtroom misconduct, and use of false testimony and falsified evidence induced a cumulative effect upon the jury and affected the judgment of the jury."
    e. "The State was so fundamentally unfair that the applicant was deprived of due process of law which resulted in an unfair trial."
2. "'Fraud upon the Court' and constitutional violations"
    a. "The State knowingly presented perjured testimony and false statements to the trial court, which constituted fraud upon the court."
    b. "The State provided a witness that presented fabricated and perjurious testimony to the court that resulted in intrinsic fraud."
    c. "The solicitor knew that the testimony was false and perjurious, but re-introduced it again to the jury during closing arguments that resulted in extrinsic fraud."
    d. "During opening statements, the solicitor made a false statement."
    e. "The applicant was prevented from fully preserving and exhibiting facts to the court because of the perjurious testimony from the State's witness, which was knowingly presented by the State."
    f. "Because the State fabricated an exhibit and submitted it into evidence, the solicitor and State investigator conspired together and presented perjured testimony."
3. "Trial court lacked subject matter jurisdiction"
    a. "No legal indictments charging the applicant with the alleged offences"
    b. Judge Letitia Verdin is a resident judge of Greenville County and therefore does not have jurisdiction in a circuit court in which she resides.
    c. "The Chief Justice of the South Carolina Supreme Court did not set the term April 23, 2013 term of the court of general sessions and did not assign Judge Verdin to hold the grand jury session."
4. "<u>Brady</u> violation and constitutional violation"
    a. "The State failed to disclose evidence that was favorable to the appellant."
    b. "The State failed to disclose the forensic result of the swabs of the suspected blood that was taken and identified."

At the start of the evidentiary hearing before the undersigned on December 18, 2019, Respondent requested that Applicant specify for the record the grounds upon which he would

victim's boyfriend, outside the victim's home. He testified Wilson's testimony at trial was that he never went outside the victim's home when the victim was murdered, but noted the parties stipulated at trial that Wilson's fingerprint was found outside the victim's home, referring to what was admitted at trial as Exhibit 59. He testified the victim's son's testimony was inconsistent with everyone else's testimony, and believed this supported his contention that he was prejudiced at trial. He testified victim's home had a garage door, front door, and a patio door that led to the rear of her home, and that Wilson could have used that door to exit the victim's home, although he testified this was never mentioned of the back door at trial. He testified the inconsistencies in the State's case at trial indicated to him that the State did not have a solid case against him because there were factual disputes.

Jones testified as a witness at the PCR hearing. He testified he has been practicing law since 1981 and has experience clerking for a trial court, working as an assistant solicitor, and as the elected Solicitor for the Eighth Judicial Circuit, and working in private practice. He testified approximately 85% of his legal experience has been in the field of criminal law. He testified he hired an investigator to assist him in preparation for trial and that he and Applicant selected Warder as co-counsel after Applicant's bond hearing. He testified he and Warder both wanted to be conversant in the case and prepared the facts and evidence equally. He testified he knew the trial court would instruct the jury on accident but believed the instruction was supported by the evidence presented at trial. He testified the bulk of testimony at trial was that the shootings were accidental and that the victim and Wilson were shot during Applicant's struggle with Wilson. He testified it was unclear from Applicant's testimony whether he ever gained control of the gun.

On cross-examination, Jones testified the manslaughter victim would have been the victim, Applicant's wife, and that there was no evidence that she had engaged in any provocation. He

move forward. Applicant specified that he would be moving forward only upon the grounds articulated in the amended application for post-conviction relief, which are as follows:

1. Trial counsel was constitutionally ineffective for:
   a. Failing to preserve for appellate review the trial court's failure to instruct the jury on involuntary manslaughter;
   b. Failing to object to the jury instruction that the provocation in voluntary manslaughter must come from the victim;
   c. Failing to object to the jury instruction on mutual combat when no evidence was presented at trial that would have supposed such an instruction;
   d. Failing to object to the jury instruction that specific intent is not required in an attempted murder case;
   e. Failing to object to the State's request in closing arguments that the jury find Applicant guilty "[o]n behalf of the people of Greenville County . . . ;"
   f. Failing to object when the trial court failed to instruct the jury on criminal intent as it relates to murder or involuntary manslaughter; and
   g. Failing to request a jury instruction on transferred intent as it relates for self-defense.

This Court finds that all allegations other than these have been waived by Applicant and they will not be addressed in this order.[2]

Testimony at PCR Hearing

Applicant testified on his own behalf at the PCR hearing. He testified the jury indicated it was struggling to understand the difference between murder and manslaughter by sending a note to the trial court requesting further instruction. He testified he fought with Anthony Wilson, the

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[2] Applicant testified about his concerns about a print from Wilson found on the trunk of a vehicle parked at the victim's home, the existence of which and connection to Wilson the parties stipulated during trial. Tran. 172. Respondent noted in closing argument that the issue had not been raised as a claim in the pleadings or during the PCR hearing, and Applicant stated in closing that he was not alleging that his attorneys were constitutionally ineffective regarding their treatment of Wilson's print at trial; rather, he was bringing up the print to rebut any argument from Respondent that there was overwhelming evidence of Applicant's guilt and to support his argument that he was prejudiced by the other errors he alleges his attorneys made during his trial. Therefore, this Court will not address the print as a stand-alone claim for post-conviction relief.

testified the victim's actions could have been interpreted as a provocation. He referred to the 911 call in which the operators asked the victim to look out the window to see who was beating on her front door. He testified the victim could have done something that attracted Applicant's attention at the time, although he did not think that this would have constituted provocation. He testified the defense did not argue at trial that the victim had provoked Applicant. When asked about the jury's question about manslaughter and provocation, he testified he thinks juries ask for supplemental instructions because they have a lot of unfamiliar information to take in during deliberations and they want to be clear. He testified it did not appear that the jury clearly was asking about provocation and noted the trial court charged the jury that provocation must come from the victim.

He testified he was familiar with the concept of transferred intent but not as much with the concept of transferred self-defense. He testified he did not request a jury instruction on transferred intent. He testified he has dealt with the concept of imperfect self-defense before. He testified he knew the first element of self-defense, and based upon his previous experience as a solicitor, he would never have argued that someone who goes to another's house in the early morning hours while armed with a handgun was entitled to a jury instruction on self-defense.

He testified the parties stipulated at trial that a bloody fingerprint found on the car outside the victim's home belonged to Wilson, and further testified that this fact would have supported Applicant's defense. He testified he did not know of any testimony at trial that Wilson ever left the victim's home after being shot.

Upon being given a copy by Applicant of State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003), to review, Jones testified he was not familiar with the case. He testified no one objected to the jury instruction on mutual combat, but said he could not remember details about it.

He testified he did not remember if he had done any legal research of the mental requirement needed for attempted murder. He testified he did not think it objectionable that the State referred in its closing argument to Greenville County. He agreed with Applicant that the State should not argue outside the record, but did not believe the comment was objectionable. He noted that the crime occurred in Greenville County.

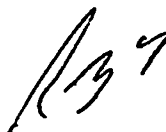
Warder also testified as a witness at the PCR hearing. He testified that, for the most part, he has no specific recollections about why he did or did not make specific objections or arguments during Applicant's trial. He testified he could not remember whether the defense requested jury instructions in involuntary or voluntary manslaughter. He testified he would have objected during trial to anything he found objectionable at the time and would have raised any issue he felt needed to be addressed. He testified he does not know if he is aware of Taylor. He testified he did not think there was any evidence of extreme recklessness, as required in a charge of involuntary manslaughter, on the part of Applicant at the time of trial. He testified he, Jones, and Applicant discussed all facts of the case but cannot remember what they decided to do about jury instructions. He testified it was not clear to him before trial began whether Applicant would testify that the gun discharged while he and Wilson were struggling outside the victim's home. He testified he does not have any recollection of the specific research he did in the case in preparation for trial. He testified he did not find the State's comment during its closing argument about the people of Greenville County objectionable at the time of trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which

allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.



The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Applicant's attorneys were constitutionally ineffective for failing to preserve for appellate review the trial court's failure to instruct the jury on involuntary manslaughter.

Applicant argues that his defense attorneys were constitutionally ineffective for failing to preserve for appellate review their objection to the trial court's not instructing the jury on involuntary manslaughter. During the charge conference, Jones asked the trial court to charge the jury on involuntary manslaughter. Tran. 581. The trial court questioned whether the instruction would be warranted. Tran. 582. Later, the court informed the parties that it would not instruct the jury on involuntary manslaughter as the record was "void of any evidence supporting that instruction." Tran. 600-01. When asked if the defense took any exception to the court's decisions

regarding jury instructions, Jones did not take any exception as to the involuntary manslaughter issue. Tran. 603. After the court charged the jury, excluding an instruction on involuntary manslaughter, Jones informed the court that it did not have any issues other than those it had already stated. Tran. 651. The Court of Appeals affirmed the convictions, finding Applicant's attorneys had not preserved the issue of the instruction on involuntary manslaughter for appellate review.

When an issue was unpreserved for appellate review, a PCR court must examine whether the applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether the applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through the same lens that would be applied on appeal . . . ") (citation omitted); see also McHam v. State, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court erred in finding counsel was not deficient in failing to preserve an issue for appellate review but agreeing with the PCR court that McHam failed to establish prejudice because the Fourth Amendment claim failed on the merits), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). When an appellate court is reviewing a trial court's jury instructions for error, it must consider the instructions as a whole "in light of the evidence and issues presented at trial." Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (citation omitted).

Involuntary manslaughter is "the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others." Sullivan v. State, 407 S.C.

241, 244, 754 S.E.2d 885, 887 (S.C. Ct. App. 2014) (citation omitted). "Involuntary manslaughter requires a showing of criminal negligence, which 'is defined as the reckless disregard of the safety of others.'" State v. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (citing S.C. Code Ann. § 16-3-60 (2003)). In Scott, the South Carolina Supreme Court affirmed the Court of Appeals' opinion in upholding the trial court's decision not to instruct the jury on involuntary manslaughter because the evidence did not support the instruction. Id. at 484, 779 S.E.2d at 530 (citation omitted). Scott's explanation for the victim's death was that the victim pulled an object out of her pocket while they were engaged in a confrontation, that he performed a martial arts move on her that caused her elbow to be pushed up, and that the move caused her to stab herself in the throat. Id. at 485, 779 S.E.2d at 530. The Court found Scott did not present any evidence that he acted with reckless disregard for the safety of others. Id. at 488, 779 S.E.2d at 532.

In this case, Applicant testified at trial that he performed a self-defense move when Wilson approached him outside the victim's home. According to Applicant, the gun discharged during that maneuver, and the fired bullet went through a window on the victim's house and struck her between her eyes. Applicant did not testify that he had his hands on the gun or that he and Wilson were struggling for control of the weapon when it discharged. Rather, his testimony was that the gun discharged in Wilson's hand when Applicant performed his self-defense move. Like the defendant in Scott, Applicant was not entitled to an instruction on involuntary manslaughter because his defensive move caused the weapon's bearer to use it to cause harm; in this case, according to Applicant's testimony, his move caused Wilson to fire the fatal shot at the victim. Additionally, Applicant's testimony would not support the instruction because he never claimed to have or to struggle for control of Wilson's gun. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008). Jones's testimony at the PCR hearing was that it was not clear from Applicant's

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testimony that he was claiming to have had control of the gun rather than Wilson having had control. Warder testified that he did not believe at the time of trial that Applicant's testimony provided evidence of recklessness as would be required to warrant a jury instruction on involuntary manslaughter.

To the extent that Applicant's argument amounts to an argument that he was entitled to an instruction on imperfect self-defense, meaning that the jury could have determined that he acted recklessly while acting in self-defense, this Court rejects that argument as well. South Carolina does not recognize the doctrine of imperfect self-defense. State v. Sams, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014) (citing State v. Finley, 277 S.C. 548, 290 S.E.2d 808 (1982)).

This Court finds, even if the jury instruction on involuntary manslaughter were somehow warranted at trial, Applicant has not shown his conviction would have been reversed on appeal because any purported error was harmless. Applicant's explanation of the events at the victim's home was not credible in light of the evidence. The evidence at trial showed that the victim had sought an order of protection and that Applicant had recently been served with court papers indicating that he and the victim were due in the Family Court for a hearing a week after her death, that the victim had barricaded her front door with furniture out of fear of Applicant, that Applicant had attempted to call the victim multiple times on the night of her death, that Applicant abandoned his date at a nightclub in a hurried fashion at around 3:45 a.m. on the night of the murder, that he arrived at the victim's home at around 4:45 a.m. on the morning of the murder, that the victim told the 911 operator shortly before being shot through the eyes that she believed Applicant to be attempting to gain entry to her home, that Wilson identified Applicant as the shooter, and that the victim's young son identified Applicant as the shooter.

This Court finds Applicant was not entitled to a jury instruction on involuntary manslaughter and would not have prevailed on the issue, even if it had been preserved for appellate review. The instruction was not warranted based on the evidence at trial. This allegation is denied and dismissed with prejudice.

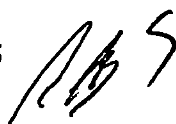
Applicant's attorneys were constitutionally ineffective for failing to object to the jury instruction that the provocation in voluntary manslaughter must come from the victim.

Applicant argues that his defense attorneys were constitutionally ineffective for failing to object to the trial court's jury instruction, while charging the jury on voluntary manslaughter as the lesser-included offense of murder, that "[t]he provocation needed for voluntary manslaughter must come from some act of or related to the victim." Tran. 657. Applicant maintains that the instruction was not properly given as provocation may have come from Wilson, whom Applicant alleges was approaching Applicant with a gun in a threatening manner, such that the jury may have convicted Applicant of the voluntary manslaughter of the victim rather than of her murder.

In State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 788-89 (2009), the South Carolina Supreme Court vacated the portion of the Court of Appeals' decision that addressed the question of whether the doctrine of transferred intent was applicable in voluntary manslaughter cases. The Supreme Court found the Court of Appeals had improperly relied upon State v. Childers, 373 S.C. 267, 645 S.E.2d 233 (2007), in which a plurality of the Supreme Court held that transferred intent does not apply to voluntary manslaughter, because Childers was not a majority opinion, the applicability of the doctrine remains unsettled in South Carolina, and the issue was not properly before the Wharton court as there was no evidence that a thirty party had given Wharton sufficient legal provocation. Id. Even without the statement from Childers that transferred intent is not recognized, authority at the time of Applicant's trial would have reasonably given notice to defense attorneys that provocation must come from the victim in a case of voluntary manslaughter. Harris

v. State, 354 S.C. 382, 387, 581 S.E.2d 154, 156 (2003) ("Sufficient provocation necessary to justify a manslaughter charge must come from the victim and not be transferred from a third-party to the victim.") (emphasis in original) (citations omitted); State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (S.C. Ct. App. 1992) ("The provocation of the deceased must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection.") (citation omitted), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

This Court finds neither Jones nor Warder exhibited deficient performance by failing to object to the trial court's jury instruction that provocation must come from the victim or in requesting that the court instruct the jury on the doctrine of transferred intent in the context of voluntary manslaughter. Our appellate courts have not answered the question of whether the doctrine is recognized in South Carolina, and there is therefore no legal authority in this State regarding the doctrine. In recognizing the uncertainty surrounding a legal issue that was unsettled at the time of Applicant's trial and is unsettled now, this Court finds the attorneys were not ineffective. Cf. State v. Starnes, 388 S.C. 590, 597-98, 598 S.E.2d 604, 608 (2010) (recognizing that "[t]rial courts often struggle with the difficult interplay between murder and the lesser-included offense of voluntary manslaughter . . . " and affirming the trial court's refusal to give a jury instruction on voluntary manslaughter). Jones and Warder should not be held to the standard of a clairvoyant, seeing the answer to the question on transferred intent when the question remains unanswered to this day. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

This Court finds Applicant has failed to demonstrate that there is a reasonable likelihood the outcome of trial court have been different had Jones and Warder objected to the trial court's instruction that provocation in voluntary manslaughter must come from the victim. Applicant's explanation as to Wilson's approaching him in a threatening manner with a weapon outside victim's home was not credible. As previously noted in this order, the evidence at trial showed that victim had sought an order of protection and that Applicant had recently been served with court papers indicating that he and the victim were due in the Family Court for a hearing a week after her death; that the victim had barricaded her front door with furniture out of fear of Applicant; that Applicant had attempted to call the victim multiple times on the night of her death; that Applicant abandoned his date at a nightclub in a hurried fashion at around 3:45 a.m. on the night of the murder; that he arrived at the victim's home at around 4:45 a.m. on the morning of the murder; that the victim told the 911 operator shortly before being shot through the eyes that she believed Applicant to be attempting to gain entry to her home; that Wilson identified Applicant as the shooter, and; that the victim's young son identified Applicant as the shooter. In light of all of this, Applicant has failed to show a reasonable likelihood that the jury's decision to find Applicant guilty of the victim's murder rather than convicting him of the lesser-included offense of voluntary manslaughter would have been different had the trial court given the provocation instruction Applicant believes he should have received.

This Court finds Applicant has failed to show his attorneys were constitutionally ineffective for failing to object to the jury instruction or in failing to request an instruction based on the doctrine of transferred intent in the context of voluntary manslaughter as he has shown no deficiency in their performance in this regard nor any resulting prejudice. This allegation is therefore denied and dismissed with prejudice.

Applicant's attorneys were constitutionally ineffective for failing to object to the jury instruction on mutual combat when no evidence was presented at trial that would have supposed such an instruction.

Applicant argues that his attorneys were constitutionally ineffective for failing to object to the trial court's jury instruction on mutual combat because there was no evidence at trial that supported the instruction and because the charge violates established law. The trial court instructed the jury, without objection from the defense, that:

> If the Defendant voluntarily participated in mutual combat for purposes other than protection, the killing of the victim would not be self-defense. This is true if even during the combat the Defendant feared death or serious bodily injury. However, if before the killing is committed, the Defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes the fact known to the victim, he would be without fault in bringing on the difficulty. For mutual combat, there must be a mutual intent and willingness to fight. This intent may be shown by the acts and conduct of the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon.

Tran. 644-45.

The law of South Carolina is clear that mutual combat should generally not be charged in connection with self-defense. *State v. Taylor,* 356 S.C. 227, 589 S.E.2d 1 (2003). In *Taylor* the Court found that:

> Although the court charged self-defense properly in Petitioner's case, that charge was negated by the court's unwarranted charge on mutual combat. We find that the court's mutual combat charge acted as a limitation on the Petitioner's ability to claim self-defense, and prejudiced him by transferring the State's burden to disprove self-defense onto the Petitioner, forcing him to prove self-defense. *Id.* at 235.

The same is true in the case at bar. The mutual combat charge had the impact of negating the self-defense charge, and Mr. Williams was in fact prejudiced thereby.

Further, both trial counsel testified at the Post Conviction Relief hearing they were not familiar with the holding in *Taylor*. This case was tried on May 13-14, 2013. *Taylor* had been the law of our state for over 10 years. A reasonable criminal defense attorney should have been

knowledgeable concerning the application of *Taylor*. In addition, even if trial counsel were not familiar with *Taylor*, the evidence in this case does not support mutual combat. Giving due deference to the credibility issues, the evidence does not indicate that Mr. Wilson and Mr. Williams intended to engage in mutual combat. The evidence did not support mutual combat, and trial counsel should have objected to such a charge. Under this charge, the jury was unable to fairly consider the Defendant's claim of self-defense.

The Applicant has, therefore, met his burden of proof with respect to the Mutual Combat charge.

Applicant's attorneys were constitutionally ineffective for failing to object to the jury instruction that specific intent is not required in an attempted murder case.

Applicant argues that his attorneys were constitutionally ineffective for failing to object to the trial court's jury instruction that specific intent is not an element of attempted murder. While instructing the jury on the elements of attempted murder, the trial court charged the jury as follows:

> I instruct you that a specific intent to kill is not an element of attempted murder. But here must be a general intent to commit serious bodily injury. Intent means intending the result which, actually, occurs, not accidentally or involuntarily.

Tran. 642.

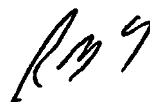
Neither of Applicant's attorneys objected to the instruction.

The South Carolina Court of Appeals held in State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (S.C. Ct. App. 2015), that the specific intent to commit murder is an element of attempted murder. The South Carolina Supreme Court later affirmed that holding. State v. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017). In its discussion of the Court of Appeals' treatment of the issue, the Supreme Court agreed with the State that the Court of Appeals partly based its conclusion on dicta from State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), acknowledging that South Carolina has been afflicted with "conflicting case law regarding levels of criminal intent . . . ," and

noted the "ambiguity" created by the language in the attempted murder statute. King at 55-62, 810 S.E.2d at 22-26. A concurring opinion in King further emphasized the ambiguity of the attempted murder statute, stating that the question of whether attempted murder is a specific intent crime "is easily stated . . . but not easily answered." Id. at 71, 810 S.E.2d at 31 (Kittredge, J., concurring).[3]

This Court finds that, due to the ambiguity of the language in the attempted murder statute, Applicant's defense attorneys were not acting outside the reasonable bounds of prevailing professional norms by not objecting to the jury instruction. At the PCR hearing, neither Jones nor Warder could remember their understanding of specific intent and attempted murder at the time of Applicant's trial; however, the difficulty in knowing the level of intent required in attempted murder cases before King is apparent from our appellate courts' decisions. The Court of Appeals' decision in King, which was published almost two years after the conclusion of Applicant's trial, recognized that the language of the attempted murder statute was ambiguous, and that it was necessary for the Court to resort to statutory interpretation and legislative history in order to determine whether specific intent was an element of attempted murder. Id. at 408-09, 772 S.E.2d at 191-91. The Supreme Court's decision in King, which was published almost four years after Applicant's trial, also makes it clear that the issue was confusing due to the interplay of common law offenses and statutory enactments. King clarified that the specific intent to kill is an element of attempted murder after the decision would have been of any guidance to Jones or Warder, and they should not be held to the standard of a clairvoyant. See Thornes, at 309-10, 426 S.E.2d at 765-66 (explaining that the Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

[3] The majority in King acknowledged and agreed with Justice Kittredge on this point. Id. at 62, 810 S.E.2d at 25-26.

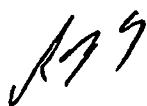
 

This Court finds Applicant has failed to show there is a reasonable likelihood the jury's verdict as to Applicant's attempted murder of Wilson would have been different had Jones or Warder objected to the trial court's instruction regarding specific intent. Wilson testified at trial that Applicant entered the room belonging to the victim's children, in which Wilson was waiting with the children after Applicant entered the victim's home, and that the room was somewhat illuminated from the closet light. Tran. 294. Wilson testified Applicant shot at him three times and that he was struck by one of the bullets. Tran. 295. Wilson's testimony indicated the bullets may have mostly missed him due to his tripping over the children's video game console on the floor. Tran. 295. The shooter was close enough to Wilson that Wilson's face and clothing suffered powder burns and he smelled gunpowder. Tran. 295-96. Additionally, the jury heard testimony from Wilson and the victim's son regarding Applicant's killing of the victim, which included the son's testimony that Applicant trained his gun on him and fired, thwarted by a malfunction in the gun's firing mechanism or a depletion of ammunition.

This Court finds Applicant has failed to demonstrate his attorneys were constitutionally ineffective for failing to object to the trial court's specific intent instruction because he has failed to show any deficiency in his attorney's performance and resulting prejudice. This allegation is denied and dismissed with prejudice.

Applicant's attorneys were constitutionally ineffective for failing to object to the State's request in closing arguments that the jury find Applicant guilty "[o]n behalf of the people of Greenville County . . . ".

Applicant argues his attorneys were constitutionally ineffective because they did not object when the State asked the jury to find Applicant guilty "[o]n behalf of the people of Greenville County . . . " because the comment encouraged the jury to convict on a basis other than the evidence admitted at trial and lessened the State's burden of proof.

The State ended its argument by explaining to the jury that Applicant enjoyed the presumption of innocence and was clad in "a robe of righteousness" that could only be removed if the jury removed the robe from Applicant after considering the evidence against him. Finally, the State said:

> And after careful deliberation and without hesitation, you will remove that robe from him. And you'll come back in here and tell him that he's guilty. On behalf of the people of Greenville County, please, find him guilty.

Tran. 630.

Neither Jones nor Warder objected to the reference to the people of Greenville County, and both testified at the PCR hearing that they did not find the comment objectionable.

The South Carolina Court of Appeals considered whether comments made by the State during closing argument denied a defendant the right to a fair trial in State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (S.C. Ct. App. 2001). Id., overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In Hamilton, the State argued the defendant took the stand and admitted his guilt after going through a jury trial when he could have pleaded guilty at the start of the week and also said, "[L]adies and gentlemen, you put me here as a representative of your system of justice, a representative of your community, and I wouldn't bring in to you a borderline case." Id. at 359-60, 543 S.E.2d at 594-95. The Court found the comments "highly inappropriate and constitutionally impermissible." Id. at 362, 543 S.E.2d at 596. It evaluated the comments by giving the test that the State's closing:

> Must be carefully tailored so it does not appeal to the personal biases of the jurors. Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. Moreover, the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right.

Id. (citations omitted).

The Court of Appeals went on to find that, though the comments were not permissible, they did not so infect the trial with unfairness that Hamilton's due process rights were violated. Id. at 365, 543 S.E.2d at 596. The South Carolina Supreme Court recently affirmed that this is the proper test for judging whether a defendant's due process rights were violated by comments made by the State during closing argument. Fortune v. State, Op. No. 27932 (S.C. Sup. Ct. filed Dec. 4, 2019) (Shearouse Adv. Sh. No. 47 at 6, 9) (citations omitted) (finding the State's closing argument was improper when the State commented that the solicitor's job is to tell the truth but the job of defense attorneys is to "manipulate the truth" and "do whatever they have to – without regard for the truth – to get a not guilty verdict.").

The State's reference to the people of Greenville County in this case was not impermissible. In contrast with Hamilton, the solicitor did not make derogatory references during Applicant's trial to Applicant's right to a trial before the jury, did not identify himself as a representative of the jury's members by virtue of his position as a solicitor, and did not personally vouch for the strengths of the State's case against Applicant. The State's comment in closing was no more objectionable than the solicitor's informing the jury at the beginning of jury qualification that she worked as an assistant solicitor for the Thirteenth Circuit Solicitor's Office or Warder's note that he and Jones were appearing before the jury on behalf of Applicant. Tran. 10-12. The jury was aware that the purpose of the trial concerned allegations that Applicant had committed crimes within the jurisdiction of Greenville County from the trial court's reading to them of the indictments. Tran. 8-10. The trial court also informed the jury pool that its members were pulled from Greenville County, which was part of the Thirteenth Judicial Circuit. Tran. 8. The State's comment did not ask the jury to inject arbitrary factors in its deliberations, particularly when the

State's references to the presumption of innocence and its burden of proving Applicant's guilt beyond a reasonable doubt are taken into consideration.

This Court finds Applicant has failed to demonstrate his attorneys were constitutionally ineffective for failing to object to the State's reference to the people of Greenville during closing argument because he has failed to show any deficiency in his attorney's performance and resulting prejudice. This allegation is denied and dismissed with prejudice.

Applicant's attorneys were constitutionally ineffective for failing to object when the trial court failed to instruct the jury on criminal intent as it relates to murder or involuntary manslaughter.

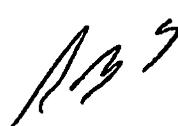
Applicant argues that his attorneys were constitutionally ineffective for failing to object to the trial court's failure to instruct the jury on criminal intent as it relates to murder or involuntary manslaughter.

When giving its charges to the jury, the trial court instructed the jury as follows:

> The Defendant is charged with murder. The State must prove beyond a reasonable doubt that the Defendant killed another person with malice aforethought. Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury, or under the circumstances the law an evil intent.
>
> Malice aforethought does not require that malice exist for any particular time before the act is committed. But malice must exist in the mind of the Defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Tran. 638-39.

The trial court then went on to explain that malice aforethought may be expressed or inferred and distinguished the difference, and then went on to instruct the jury that it was to consider whether Applicant was guilty of voluntary manslaughter if it found the State had not proven Applicant guilty of murder beyond a reasonable doubt. Tran. 638-39. The trial court began its instruction on voluntary manslaughter by charging the jury that:

> The State must prove beyond a reasonable doubt that the Defendant took the life of another in the sudden heat of passion based on sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter.

Tran. 639.

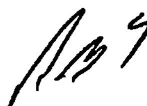
The court then went on to give explanations of both the sudden heat of passion and legal provocation required by voluntary manslaughter, as well as whether a reasonable person would have had sufficient time to cool off before the killing. Tran. 639-40.

This Court finds Applicant has failed to show his attorneys should have objected to the instructions on the *mens rea* of either voluntary manslaughter or murder due to inadequacy. Jones testified he believed the trial court adequately covered the law on these issues. Applicant presented no evidence that there was anything inadequate about these jury charges or that the outcome of his conviction for murder would have been different had his attorneys objected to these instructions on the ground of inadequacy.

This Court finds Applicant has failed to demonstrate his attorneys were constitutionally ineffective for failing to object to the trial court's jury instructions on criminal intent in regards to voluntary manslaughter and murder because he has failed to show any deficiency in his attorneys' performance and resulting prejudice. This allegation is denied and dismissed with prejudice.

Applicant's attorneys were constitutionally ineffective for failing to request a jury instruction on transferred intent as it relates for self-defense.

Applicant argues his attorneys were constitutionally ineffective for failing to request a jury instruction on the theory of "transferred self-defense". The South Carolina Supreme Court has noted that the theory of transferred self-defense is recognized in some jurisdictions outside of South Carolina, and that it "absolve[s] a defendant who injures an innocent third party while attempting to defend himself from bodily harm." State v. Porter, 269 S.C. 618, 622, 239 S.E.2d 641, 643 (1977).



This Court finds Applicant has failed to establish his attorneys' performance was deficient according to the prevailing professional norms because he has not shown that they should have requested a jury instruction on transferred self-defense. When asked to recognize the theory in Porter, the Supreme Court declined to decide whether the theory is viable in the courts of South Carolina. Id. Our appellate courts have not recognized the theory since. Jones and Warder were acting reasonably under the prevailing professional norms when they did not request a jury instruction, the viability of which the Supreme Court declined to address almost four decades before Applicant's trial. Furthermore, the Supreme Court has explained that it "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes at 309-10, 426 S.E.2d at 765-66 (citing Robinson, 308 S.C. 74, 417 S.E.2d 88 (1992) (holding that counsel was not constitutionally ineffective in failing to make use of a defense that would not receive acceptance for years afterwards). It is not a requirement of constitutional effectiveness that a defense attorney be the trailblazer in the courts' acceptance of a new legal theory, and Jones and Warder were not ineffective for not raising the issue with the trial court.

This Court finds Applicant has failed to demonstrate any prejudice from his attorneys' not requesting the instruction. In light of the testimony from Applicant's date at trial about Applicant's post-killing behavior on the night of the murder, Wilson's testimony about Applicant's arrival at the victim's home and his shooting at him, and the victim's son's testimony about Applicant's attack on the victim and Wilson, as well as the testimony about Applicant's flight from police after the killing and his suicide attempt in stabbing himself in the chest, it is unlikely that the jury would have reached a different conclusion even had it received a jury instruction about transferred self-defense because the evidence did not tend to support Applicant's version of events at the victim's home.

This Court finds Applicant has failed to show Jones and Warder were constitutionally ineffective for failing to request that the trial court instruct the jury on the legal theory of transferred self-defense as he has not shown any deficiency in their performances with respect to this allegation and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has established constitutional violations or deprivations that requires this Court to grant his application for post-conviction relief. Therefore, this application is granted.

This Court notes the parties must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief is granted;
2. The conviction of Willie M. Williams is overturned and a new trial granted; and
3. Custody shall be remanded to the Greenville County Detention Center pending issuance of any appropriate bond.

AND IT IS SO ORDERED this 31 day of March, 2020.

ROBIN B. STILWELL

Greenville, South Carolina

Copy mailed to Attorney General / R. Wise on 4/2/2020

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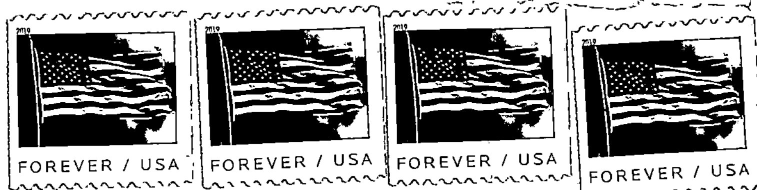

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MAY 27 2020
S.C. SUPREME COURT

Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211