

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jun 19 2020

S.C. SUPREME COURT

Certiorari to Anderson County

Honorable Eugene C. Griffith, Circuit Court Judge

BOBBY JOE ARFLIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001801

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate whether one of the bullets fired by Petitioner in self-defense as the decedent was charging towards him ricocheted off a vehicle before striking the decedent in the buttocks, where Petitioner was prejudiced by counsel's deficient performance because the state argued the location of the entrance wound on the decedent's backside was evidence Petitioner shot the decedent with malice from behind?

STATEMENT OF THE CASE

There was no dispute at trial that Petitioner shot and killed the decedent. There was no dispute that Petitioner shot twice. The only dispute was whether Petitioner acted in self-defense.

On December 11, 2013, after meeting his wife for dinner and visiting his elderly mother, Petitioner drove home. App. 852, l. 2 – 853, l. 12. He lived at the end of Williamson Drive, a dead end country road with no streetlights. App. 853, l. 24 – 854, l. 3. Three generations of Williamsons also lived on Williamson Drive. App. 243, l. 15 – 244, l. 25. There had been disputes in the past between Petitioner, his wife, Shelia, and the Williamsons. App. 862, ll. 2-3. At 8:30 on a December night, it was pitch dark outside. App. 853, ll. 16-25. As Petitioner was travelling down Williamson Drive, he saw a large pickup truck parked on the road in front of a home belonging to the Williamsons. App. 854, ll. 4-10. The truck belonged to Jody Powell. Powell was the boyfriend of Brenda Masters, a Williamson, and was attending a Williamson family party. App. 245, l. 7 – 247, l. 20.

To get to his house, Petitioner, who also drove a large pickup truck, had to pass Powell's vehicle. App. 854, ll. 11-23. Williamson Drive is only sixteen feet wide, significantly narrower than most roads. Rather than bother the Williamsons to ask that someone move the truck, Petitioner tried to go around it. App. 854, ll. 17-25. Both trucks had extended mirrors and Petitioner's mirror clipped Powell's mirror. Petitioner decided to back up to see what, if any, damage had resulted. As he was backing up, Petitioner hit the front corner of Powell's truck. Petitioner's side mirror had been knocked in by the collision and he was unable to see out his rearview mirror because he had a "full sized camper cover" on the back of his truck. App. 855, l. 3 – 856, l. 22.

Petitioner had a pistol in his truck that he carried for protection. App. 857, ll. 6-19. He collected his gun, got out of his truck, and immediately called 911 to report the collision. App. 857, l. 20 – 858, l. 14. He reported hitting the mirror and backing into Powell’s truck when he tried to assess the damage. App. 858, ll. 21-25. While Petitioner was on the phone reporting the accident, several people came outside. Petitioner told them he had hit Powell’s truck. App. 859, ll. 1-13.

Someone went back into the house and told Powell what happened. App. 859, ll. 14-18. Powell came outside while Petitioner was still on the phone with 911. App. 859, ll. 16-22. While Powell and James Madison inspected Powell’s truck, Petitioner heard them say they were going to “kick my ass.” App. 860, l. 6 – 861, l. 11. Because of previous disputes with the Williamsons, Petitioner was afraid. App. 862, ll. 2-6. Petitioner saw Powell rummage through the center console of his truck and hand an object to Madison. App. 862, ll. 18-23.

Petitioner testified, “I was afraid something bad was fixing to happen . . . I could tell that the owner of the pickup truck, Mr. Powell, was agitated, seriously agitated, and he had already come back towards me.” App. 863, ll. 9-13. Brenda Masters, Powell’s girlfriend, came outside and asked Petitioner if he had called police. Petitioner told her he had already reported the accident. App. 863, l. 20 – 864, l. 5. Petitioner tried to explain what happened to Powell, but Powell appeared more and more agitated. App. 864, ll. 9-20. Powell called Petitioner “an SOB” and a “stupid bastard.” App. 864, l. 24 – 865, l. 2. Powell threatened to “whoop” Petitioner’s “ass” and was being “aggressive.” Powell was much younger than Petitioner who “was totally afraid of what could possibly happen.” App. 866, l. 2 – 867, l. 9.

At some point, Powell came in Petitioner’s direction and there was physical contact. Petitioner could not get past Powell. App. 867, l. 23 – 868, l. 10. Powell knocked Petitioner

backwards and punched him in the lower jaw. App. 868, l. 15 – 869, l. 2. At some point, Petitioner told Powell to “stay away from me, boy.” App. 869, l. 24 – 870, l. 2. But Powell approached Petitioner again. App. 870, ll. 5-7. Petitioner told Powell repeatedly that he was not going to fight him. App. 870, ll. 8-12. But, according to Petitioner, Powell hit Petitioner, and Petitioner fired his gun. Petitioner shot twice. It all happened within seconds. App. 870, ll. 17-23; App. 872, l. 4 – 873, l. 11.

Petitioner did not flee the scene. App. 876, ll. 12-13. He stayed by his truck and waited for the police. Upon seeing blue lights, Petitioner closed the door to his truck and laid his gun on top of the hood. App. 876, ll. 14-24. Petitioner complied with law enforcement upon their arrival. He later consented to GSR testing, allowed photographs of his person, and voluntarily provided a blood sample and buccal swab. App. 878, ll. 7-16.

The decedent suffered two gunshot wounds: one to his front right shoulder which exited his left back and another to his buttocks which travelled upward and exited near his armpit. App. 641, l. 24 – 644, l. 8. The pathologist recognized that the gunshot wound to the buttocks had to have occurred while the decedent’s back was to the shooter. App. 648, l. 13 – 650, l. 6.

An Anderson County Grand Jury indicted Petitioner on March 18, 2014 for murder and possession of a weapon during the commission of a violent crime, and on March 17, 2015 for three counts of solicitation to commit kidnapping. A pretrial hearing was held on August 18, 2015 before the Honorable R. Scott Sprouse. App. 1. Petitioner’s case was called to trial on August 24, 2015 before Judge Sprouse, and a jury. App. 111. Assistant Solicitors Catherine Huey and Lauren Price represented the state. App. 111. Druanne White represented Petitioner. App. 111.

On August 27, 2015, the jury found Petitioner guilty as indicted. App. 1009, l. 18 – 1011, l. 10. He was sentenced to thirty years for murder, ten years consecutive for one count of solicitation to commit kidnapping, ten years concurrent for each of the remaining counts of solicitation to commit kidnapping, and five years concurrent for the weapons offense. App. 1015, l. 25 – 1016, l. 13. The aggregate sentence was forty years imprisonment.

The Court of Appeals affirmed Petitioner’s convictions and sentence. App. 1068-1069. On October 9, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 1071-1077. The state filed a return to this application dated January 16, 2018. App. 1078-1085. An evidentiary hearing was held on August 12, 2019 before the Honorable Eugene C. Griffith, Jr. App. 1086. Assistant Attorney General Taylor Smith represented the state, and Rodney Richie represented Petitioner. App. 1086.

Petitioner testified at the hearing that the decedent jumped between Petitioner and Petitioner’s truck preventing Petitioner from getting to his vehicle. App. 1092, ll. 15-23. The decedent then struck Petitioner several times, including an “upper cut” to the chin, which knocked Petitioner to the ground. App. 1092, l. 23 – 1093, l. 12. While Petitioner was on the ground, the decedent continued to move towards Petitioner. Consequently, Petitioner pulled a pistol and shot the decedent twice. App. 1093, ll. 11-15. Petitioner maintained that the decedent was facing him and continuing to progress towards him when he fired. App. 1093, ll. 12-21. However, Petitioner acknowledged there was evidence the decedent was shot in the buttocks and the state argued at trial that Petitioner shot the decedent from behind. App. 1093, ll. 16-18.

Petitioner believed the shot that hit the decedent in the buttocks ricocheted off one of the vehicles before striking the decedent. This explains how the decedent was struck on the backside despite the fact that when Petitioner fired the decedent was facing him and moving towards him.

App. 1093, l. 19 – 1094, l. 10. Petitioner asserted the bullet had to have ricocheted off the decedent’s vehicle because Petitioner’s truck was parked too far away. App. 1094, ll. 8-10. He asked trial counsel on multiple occasions to investigate the possibility that a bullet ricocheted off the decedent’s truck to no avail. He wanted counsel, or someone she designated, to physically inspect the truck and take photographs to prove his theory. App. 1094, ll. 3-10; App. 1095, l. 17 – 1096, l. 8.

Because trial counsel failed to investigate the possibility that the bullet ricocheted off the decedent’s truck, Petitioner did not testify to this fact. Counsel advised Petitioner not to discuss it during his testimony because the jury “was not going to believe it” since, given counsel’s lack of investigation, there was no evidence to support the theory. App. 1096, l. 9 – 1097, l. 2. Petitioner testified during the evidentiary hearing that he believed this evidence would have changed the outcome of his trial. This evidence would have supported his defense and countered the state’s argument that Petitioner shot the decedent from behind. App. 1097, ll. 3-19.

Druanne White, who was retained to represent Petitioner, could not recall whether she and Petitioner discussed the possibility that a bullet ricocheted off the decedent’s vehicle. While she could not remember such a discussion, she did not deny that one occurred. App. 1102, l. 16 – 1103, l. 9. White testified that she physically examined Petitioner’s truck and the decedent’s truck on two separate occasions and photographed the vehicles. App. 1103, ll. 5-9. Investigators with the Anderson County Sheriff’s Office and the Multidisciplinary Accident Investigation Team (MAIT) of the Highway Patrol also examined the vehicles. App. 1107, ll. 1-3. While one projectile struck the decedent’s vehicle and was recovered from inside the cab, White did not “see anything else.” App. 1106, l. 24 – 1107, l. 2.

White further testified that she did not think evidence that the other bullet ricocheted off the truck would have been helpful to Petitioner. According to White, this evidence would not have supported an involuntary manslaughter instruction and would not have strengthened Petitioner's argument that he shot in self-defense. App. 1106, l. 10 – 1108, l. 20.

By order filed October 17, 2019, the PCR judge denied Petitioner relief. App. 1125-1138. The judge found Petitioner failed to present any evidence that one of the bullets Petitioner fired ricocheted off the decedent's truck and then struck the decedent. App. 1132. Rather, the judge concluded Petitioner merely speculated that such a ricochet could have happened. App. 1132. Citing to Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998), the judge asserted, "A defense attorney's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." App. 1132-1133 (internal quotation marks and alternation omitted). The judge ultimately ruled trial counsel was not ineffective since Petitioner "failed to demonstrate that there existed some ricochet evidence for counsel to discover." App. 1133. Moreover, the judge found counsel conducted an adequate and thorough investigation, which included a visual inspection of the decedent's truck, where evidence of a possible ricochet would have been discovered. App. 1134.

Finally, the PCR judge concluded Petitioner failed to prove prejudice from counsel's alleged deficient performance because even if evidence of a ricochet was discovered, it would not have affected the outcome of Petitioner's trial. App. 1135. Since Petitioner admitted he intentionally fired twice at the decedent in self-defense, the judge found it did not matter whether the bullet went directly from the barrel of the gun into the decedent's body or ricocheted off the truck before striking the decedent. App. 1135.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate whether one of the bullets fired by Petitioner in self-defense as the decedent was charging towards him ricocheted off a vehicle before striking the decedent in the buttocks, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate whether one of the bullets fired by Petitioner in self-defense as the decedent was charging towards him ricocheted off a vehicle before striking the decedent in the buttocks, where Petitioner was prejudiced by counsel's deficient performance because the state argued the location of the entrance wound on the decedent's backside was evidence Petitioner shot the decedent with malice from behind.

There was no dispute at trial that Petitioner shot and killed the decedent. There was no dispute that Petitioner shot twice. The only dispute was whether Petitioner acted in self-defense. The state argued the location of the entrance wound on the decedent's buttocks was evidence Petitioner acted with malice and shot the decedent from behind. See App. 961, ll. 9-11. If counsel had conducted a reasonable investigation, she would have discovered evidence that one of the projectiles ricocheted off the decedent's truck, thereby changing its trajectory, before striking the decedent in the buttocks. Counsel's deficient performance prejudiced Petitioner because this evidence would have supported Petitioner's defense and refuted the state's theory of the case. With this evidence, there is a reasonable probability the jury would have acquitted Petitioner of murder.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove 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.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and 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).

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland, 466 U.S. at 691) (alterations in original); See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). “When evaluating the reasonableness of counsel’s conduct, ‘the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.’” Ard, 372 S.C. at 331, 642 S.E.2d at 597 (quoting Strickland v. Washington, 466 U.S. at 690).

Petitioner presented credible evidence that had trial counsel conducted a thorough investigation by examining and photographing the vehicles, she would have discovered evidence that one of the bullets fired by Petitioner ricocheted off the decedent’s truck before striking the decedent in the buttocks. This physical evidence along with Petitioner’s testimony would have refuted the state’s theory that Petitioner shot the decedent from behind as the decedent was running away. Petitioner was prejudiced by counsel’s deficient performance because if counsel had discovered such evidence and presented it to the jury, there is a reasonable probability the jury would have acquitted Petitioner of murder and found he acted in self-defense. Petitioner’s

account of the altercation was compelling and demonstrated that he had no choice but to shoot the decedent to prevent the decedent from attacking him. With a credible explanation as to how the decedent was shot on his backside, the jury would have found the shooting was justified.

Respectfully, this Court should reverse Petitioner's convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. He ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of June, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bobby Joe Arflin states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.
2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on August 12, 2019 before the Honorable Eugene C. Griffith, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Bobby Joe Arflin.

Respectfully Submitted,

s/ Lara M. Caudy _____
Appellate Defender

This 19th day of June, 2020.

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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

This 19th day of June, 2020.

s/ Lara M. Caudy _____
Appellate Defender

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