STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable William P. Keesley, Circuit Court Judge

GARY JERRELL MEANS, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

RECEIVED

Jun 30 2020

S.C. SUPREME COURT

APPELLATE CASE NO. 2019-000617

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Did the PCR court err in finding defense counsel was not ineffective for failing to present any factual basis for a claim of self-defense during petitioner's immunity hearing where defense counsel neglected to call any witnesses?

2.

2Did the PCR err in finding defense counsel's deficient performance did not result in prejudice to petitioner where counsel failed to pursue a definitive ruing from the sentencing judge on counsel's request for the judge to exercise his discretionary authority to credit petitioner for time served on home detention?

STATEMENT

On December 20, 2010, petitioner, Gary Means, Jr., called his sister, Shana Lewis, and said "somebody's trying to kill me, I'm in danger, I need you to come get me." The sister immediately left her residence in Spartanburg and drove to where petitioner lived in Aiken. App. 5, ll. 4-11. The next time his sister called, petitioner said the decedent, John Ankeny, was at his door. Petitioner asked the decedent to leave because his sister was coming to get him. App. 220, ll. 2-12. The decedent brought a fruit basket to petitioner and the fruit was beginning to decay and the decaying fruit signaled to petitioner some sort of threat. App. 6, ll. 11-21. Petitioner also felt his life was in danger because the decedent was "acting funny" and had his hand in his crotch and when petitioner asked, the decedent to move it, the decedent refused. App. 220, ll. 17-19. The next time petitioner's sister called him law enforcement answered petitioner's phone and told her there had been a shooting. App. 66, ll. 3-6. Immediately after petitioner shot decedent, he called 911, self-reported the incident, and took himself to the sheriff's department to turn himself in. App. 7, 3-8.

On June 16, 2011, an Aiken County grand jury indicted petitioner for murder. App. 424-25. On January 17, 2013, an immunity hearing was held before the Honorable Doyet A. Early, III. App. 1. Douglas Brannon represented petitioner and David Miller represented the state. App. 1. Counsel Brannon filed a motion under the Castle Doctrine, specifically relying on South Carolina Code § 16-11-440**(c)**.[1] At the hearing counsel Brannon argued petitioner was entitled

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1 South Carolina Code § 16-11-440(c) provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or

to immunity, under the Castle Doctrine, because petitioner, in the throes of an emotional breakdown, perceived the decedent was threatening his life and therefore, defended himself, in his home, using deadly force. App. 7, ll. 16-20. The state argued the defense was taking a psychological defense and trying to fit it into the Castle Doctrine framework when it does not fit. The state also argued the applicable code section to analyze the facts of this case was South Carolina Code § 16-11-440**(a)**,[2] which it argued did not apply here because it was undisputed the decedent was neither unlawfully or forcefully entering or being forcefully ejected by petitioner. App. 11, l. 1-12, l. 13.

The court responded, that there was "no force that [petitioner] [was] having to protect against" and "no evidence of a forced entry or any force within the house or any struggle." App. 13, ll. 23-25. Counsel conceded the only evidence of an attack was that petitioner believed he was under attack even going so far as to say "there [was] no evidence of a struggle." App. 5, ll. 20-25. Counsel planned to call petitioner's sister as a witness, but the record reflects neither

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> another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440

2 South Carolina Code § 16-11-440(a) provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person: (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(a).

petitioner nor any of his family were present in the courtroom during the entirety of the hearing and counsel chose not to present any witness testimony. App. 18, ll. 5-23.

On January 30, 2013, Judge Early signed an order denying immunity finding petitioner presented no evidence to justify granting immunity. The judge found unchallenged evidence established the decedent entered petitioner's home lawfully and no evidence was presented to establish circumstances leading to petitioner shooting decedent. The judge found no support for the proposition that the Act should be applied from the standpoint of petitioner's perception of the event because the clear language of the Act requires evidence of the conduct of the person against whom deadly force is used. Further, the judge found petitioner failed to present any evidence that decedent was in the process of unlawfully or forcefully entering his residence, or that decedent had unlawfully or forcefully entered the residence, or that petitioner was in the process of removing decedent or attempting to do so against decedent's will. The judge found South Carolina Code § 16-11-440(c) inapplicable because there was no evidence of any attack on petitioner by decedent and both parties agreed the physical evidence showed no sign of struggle or confrontation. App. 25-28.

On October 8, 2013, petitioner pled guilty before the Honorable Doyet A. Early, III, to the lesser-included offense of voluntary manslaughter with a recommendation from the state that petitioner's sentence not exceed twenty years' imprisonment. App. 31, ll. 4-9. Petitioner was not sentenced on that day because Dr. Diehl, a clinical psychologist who evaluated petitioner after the incident, could not be there to address the court. App. 31, ll. 10-23. Petitioner told the court he was taking prescription medication for mental health problems, but the medication did not keep him from understanding the court's questions. App. 41, l. 19-42, l.6.

On April 14, 2014, a sentencing hearing was held before Judge Early. App. 47. At sentencing counsel Brannon told the court petitioner had "been a patient of the mental health department" "since he was six." App. 53, ll. 2-5. Counsel added that it was clear petitioner "was not in his right mind at the time of the incident" so he had petitioner evaluated by Dr. Diehl. App. 53, l. 24-54, l.1.

Dr. Diehl evaluated petitioner through clinical interview, testing, and spoke with petitioner's sister. After his evaluation Diehl determined petitioner had a learning disorder, moderate depression, and schizotypal personality disorder. Diehl told the court petitioner reported hearing voices on the day of the incident. Diehl could not diagnose petitioner as schizophrenic because of the limited time he spent with petitioner but Diehl believed petitioner's mental disorder did "contribute to his making the decision" to shoot a "man he considered a very good friend." App. 58-62. Petitioner's sister also testified at sentencing that after speaking with petitioner on the day of the incident she left immediately because petitioner was saying "odd things that were just really bizarre." The sister said petitioner was fearful that people were out to get him. App. 64, l. 11-65, l. 8.

Counsel Brannon asked the court for leniency considering petitioner's mental state and requested petitioner be given credit for time served in jail as well as time spent on home detention. App. 55, ll. 6-12.

Judge Early sentenced petitioner to twenty years' imprisonment stating, "you'll be given credit for the time that they'll – the state law allows." App. 81, 16-18. Counsel asserted South Carolina Code § 24-13-40[3] had recently been amended and the court had discretion to give

3 South Carolina Code § 24-13-40 provides:

petitioner credit for the time he spent on home detention. The judge replied, "I am going to allow whatever the department of corrections deems appropriate and give it to him." App. 36, ll. 3-4.

Thereafter, petitioner filed an application for PCR on March 23, 2015. App. 85. On October 31, 2018, an evidentiary hearing was held before the Honorable William Keesley. App. 102. Tara Shurling represented petitioner and Johnny James, assistant attorney general, represented the state. App. 102.

At the evidentiary hearing, counsel Brannon admitted he failed to call any witnesses during petitioner's immunity hearing. Counsel said the reason he did not call witnesses was that the judge had petitioner' psychological evaluation and all the facts were stipulated to by the state. App. 124, ll. 9-17. Additionally, counsel said that he was concerned about negative facts that might come out if petitioner testified. App. 169, ll. 5-8. However, the only harmful fact counsel could recall was that petitioner and decedent had smoked marijuana that day. App. 191, ll. 10-

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> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40

21. Counsel admitted that his notes reflected petitioner had told him before the immunity hearing that petitioner knew the decedent may have been involved in the recent shooting of a "little girl" and petitioner believed the decedent was going to cause him harm. Further, the decedent was "acting funny, reaching in his pocket." App. 126-27. Counsel agreed these facts would have been a foundation for immunity. App. 137, ll. 1-5.

Later counsel admitted he did not know why he conducted the hearing the way he did and that of seven immunity hearings during his career petitioner's was the only one where he did not call witnesses. App. 137, ll. 8-17. Counsel acknowledged in "retrospect" he wished he had petitioner examined by the court regarding whether he understood his right to testify at the immunity hearing. App. 140, l. 18.

Counsel agreed the time petitioner served on home detention, February 28, 2011 until October 8, 2013, was significant and that he was entitled to that credit if the judge in his discretion had ordered it. App. 149, l. 24-150, l.5; 178, ll. 11-14. Counsel testified that he asked the judge to give petitioner credit for time served on while on home detention and he remembered the judge did not think he had the authority to do so. App. 147, ll. 16-25. Counsel said that he made the judge aware that South Carolina Code § 24-13-40 had been amended and that it was now within the court's discretion to give that credit. App. 149, ll. 2-4. However, the judge ultimately said that he would leave it up to the Department of Corrections to figure out and counsel did not insist or timely file a motion to reconsider petitioner's sentence. App. 149, ll. 17-23. Instead, counsel wrote the judge in April 2015, requesting the court give petitioner credit for that time and never followed up with the judge. App. 151, ll. 7-12.

Petitioner testified that he did not know that he had any right or reason to testify at his immunity hearing and that if he had known it was necessary to present evidence to support his

claim of self-defense he would have testified. App. 221-22. In her brief in support of PCR, PCR counsel argued that at petitioner's immunity hearing counsel Brannon failed to present any evidence that would have gone towards establishing the components of self-defense and instead relied on a recitation of the facts relayed to him by petitioner's sister. App. 355; 364. PCR counsel further argued that if defense counsel had called petitioner as a witness there would have been evidence that petitioner was trying to make the decedent leave and the decedent refused to go. Additionally, petitioner would have testified the decedent reached in his pants after being asked to leave and he refused to take his hand out of his pants. App. 367-68.

On January 15, 2019, Judge Keesley signed an order denying PCR. App. 374-89. The judge found petitioner failed to show a likelihood that a reasonable person under the circumstances would have perceived a threat from the decedent and that the perception of a threat arose from the petitioner's "flawed mental state." It did not meet a reasonable person standard. The judge found that while the PCR testimony of counsel Brannon was "troubling" concerning his failure to make sure the judge knew the specific things that caused petitioner to feel threatened, the record had indications that petitioner denied memory of the event and the court "accepts" that had petitioner testified at the immunity hearing he would have said the same things he did at PCR. App. 385. Thus, the judge found because self-defense based on perception incorporated the reasonable person standard, the PCR hearing failed to produce evidence sufficient to establish that the outcome of the immunity hearing would likely have been different had petitioner testified. App. 385.

Regarding credit for time served on home detention the judge found that though it was deficient performance, it was understandable under these circumstances why counsel did not press the judge any further for a ruling. App. 387. The PCR judge found there was credible

evidence that the sentencing judge indicated at various times he would agree impose the maximum sentence he could approve under the plea agreement, and that there was no proof the sentencing judge would have credited additional time. App. 288

Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. App. 390-411. On March 11, 2019, Judge Keesley signed an order denying petitioner's motion, with the exception that the last sentence of the first full paragraph on page eight of the prior order was deleted.[4]

This petition for a writ of certiorari follows.

4 The deleted sentence is, "Dr. Diehl's report included the applicant's denial of hearing voices instructing him to kill his friend." App. 381.

ARGUMENT

1.

The PCR court erred in finding defense counsel was not ineffective for failing to present any factual basis for a claim of self-defense during petitioner's immunity hearing where defense counsel neglected to call any witnesses.

Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).

There are four elements that must be established to justify the use of deadly force as self-defense. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). The person seeking immunity from prosecution bears the burden of proving these elements by the preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). The elements are of self-defense are:

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

State v. Scott, 424 S.C. 463, 468, 819 S.E.2d 116, 118 (2018).

Only two people, petitioner and decedent, witnessed the shooting. Counsel Brannon admitted at PCR he failed to call petitioner to testify at the immunity hearing. Counsel decided the focus of the hearing would be the threat perceived by the petitioner based on his mental state at the time. Not only did counsel fail to call petitioner or his sister to testify at the immunity

hearing he also conceded during the hearing that there was no evidence of self-defense when he told the court there was no evidence of an attack and no evidence of a struggle in the home. If those facts were true, then counsel had no choice other than to than to call petitioner to testify in order to present evidence of self-defense. Counsel also stated that no one knew what happened inside petitioner's home that day. Petitioner knew what happened and he therefore should have been called to present testimony at his own immunity hearing.

At petitioner's PCR hearing, PCR counsel elicited testimony of evidence not presented at the immunity hearing that indicated petitioner told counsel Brannon the decedent told him he had been involved in killing a girl, the decedent was acting strangely including reaching towards his crotch area, and that petitioner asked the decedent to leave his residence. All of these facts taken in conjunction with testimony from petitioner's sister that petitioner was afraid someone was going to kill him went towards self-defense. By presenting no testimony from petitioner counsel left the court with no other option than to find petitioner was not entitled to immunity because he presented *no evidence* of self-defense. *See State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013). Therefore, counsel was deficient for failing to present evidence of self-defense through testimony of petitioner. If the court had the relevant evidence of self-defense before it, the court likely would have granted petitioner immunity from prosecution. Counsel was therefore ineffective. *Strickland v. Washington*, 466 U.S. 668 (1984).

2.

The PCR erred in finding counsel's deficient performance did not result in prejudice to petitioner where counsel failed to argue effectively that the sentencing judge had discretion to credit petitioner for time served on home detention.

This Court has defined "time served," as it is used in section 24-13-40, as "the time during which a defendant is in pre-trial confinement and charged with the offense for which he is sentenced (so long as he is not serving time for a prior conviction)." *Blakeney v. State*, 339 S.C. 86, 88, 529 S.E.2d 9, 10-11 (2000) (emphasis in original). "Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Leopard*, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct.App.2002). In 2013, South Carolina Code § 24-13-40 was amended adding the language "and may be given for any time spent under monitored house arrest." This amendment gave trial courts the discretion to give credit for time served on home detention.

The PCR court found counsel was deficient for failing to pursue "clarification or specific determination" regarding this issue. Counsel did not timely file a motion to reconsider petitioner's sentence. Instead, a year later, counsel wrote the sentencing judge asking that he correct petitioner's sentencing sheet to reflect credit for time served while on home detention.

However, the PCR court found there was "no proof" the sentencing judge was likely to have credited petitioner for his time served while on home detention. In finding this, the PCR court focuses on the fact that the sentencing judge indicated that he was going to impose the maximum time the state recommended. While that was true, the record reflects the sentencing judge seemed unsure about whether he had the discretion to give petitioner credit for his time served not that he was not inclined to credit him. When the sentencing judge said, "I am going

to allow whatever the department of corrections deems appropriate and give it to him," it appears the judge was willing to give petitioner credit for as much time as allowable under the law including the several months petitioner spent on home detention. Therefore, petitioner was prejudiced by counsel's deficiency in failing to assure he got credit for the time he served while on home detention. *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of June, 2020.