STATE OF South Carolina
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deidre L. Jefferson, Circuit Court Judge

Case No. 2019-001193

Terrell L. McCoy, #256070 ..... Petitioner,

V.

State of South Carolina ..... Respondent

PRO SE PETITION PURSUANT
TO SC Constitution Article 1 Section 2 & 14

TABLE OF AUTHORITIES

Questions Presented

1. Did the Circuit Court err in finding petitioner's appellate Counsel was not ineffective when appellate Counsel did not raise the issue

of the denial of Petitioner's request for Voluntary Manslaughter charge being given to the jury when Petitioner raised the issue during his trial and preserved the issue for appellate review?

(2) Did the Circuit Court err in finding Petitioner's appellate Counsel was not ineffective when Appellate Counsel did not raise the issue when Petitioner made Contemporaneous Objection to the admission of Brandon Cuttino statements, preserving the issue for Appellate Counsel?

(3) Did the Circuit Court err in finding that newly discovered evidence is not an PCR issue?

ARGUMENTS

[redacted]

1. Did the Circuit Court err in finding Petitioner's appellate Counsel was not ineffective when appellate Counsel did not raise the issue of the denial of Petitioners request for Voluntary Manslaughter charge bein given to the jury when Petitioner raised the issue during his trial and preserved the issue for appellate review?

Petitioner asked the trial court to charge Voluntary Manslaughter. Petitoner based this request on evidence in the record that indicated there was sudden heat of passion in this case. (Appendix page

During Petitioner's trial, state witness Carinda Snowden testified that there was argument between Petitioner, Victm, and Travis Johnson, because everyone was mad at Petitroner for shooting a gun outside. Ms. Snowden testified that during the argument victim approach Petitioner, after numerous time getting between him and Travis Johnson. (Appendix page 159 line 18-23)

During the heated argument, Petitioner told the Victim to get out his face, and then shot him. (Appendix page 162 line 15-

Brandon Cutting testified that everyone had guns in the room, and that he probably had a gun. (Appendix page 252 line 18-25).

Ms. Snowden gave three different description of how the crime occurred, and stated Petitioner shot victim as he bend over to flick cigarette into ashtray. This could not be true.

According to Medical examiner, Amy Shiel, she testified that the victim was shot one to the head, several to the torso, and one to the right hand. Mrs. Shiel stated victim was shot in the forehead. (Appendix III page 500 line 14-16; 22-25, page 501 line 1-3)

Medical examiner testified that the small abrasion on his forehead, and right side of the jaw was the entrance wound. (Appendix III page 501 line 4-7)

During PCR hearing, PCR Counsel ask Appellate Counsel did he recall a Letter to Mr. McCoy, on March 30th 2011, indicating that a voluntary manslaughter -- if the judge refuse to give that, and he requested it that would be an issue on PCR? (Appendix V 943 line 6-25; page 947 line 12-14)

Appellate Counsel stated he was aware that the trial judge did not give an voluntary Manslaughter charge. (Appendix V 942 Line 24-25) Petitioner testified he requested the charge. (Appendix V 980 line 1525; 981 line 1-18)

In Criminal cases, the Appellate Court sits to review errors of law, and is bound by the factual findings of the Circuit Court unless clearly erroneous, State V. Wilson, 345 S.C. 1, 5-6, 545 S.E. 2d 827, 829 (2001). Generally, the trial judge is required to charge only the Correct law of South Carolina. Sheppard V. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004); State V. Brown, 362 S.C. 258, 262 607 S.E.2d 93, 95 (Ct App. 2004). "A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense than the greater." State V. Draft 288 S.C. 30, 32 340 S.E.2d 784, 785 (1986) In determining whether the evidence requires a charge of Voluntary Manslaughter, the trial court views the fact in light most favorable to the defendant. State V. Byrd, 323 S.C. 319, 321 474 S.E. 2d 430, 431 (1996). Boyd V. California, 494 U.S 370, 380 (1990).

Mullaney V. Wilbur 421 U.S 684, 95 S.Ct. ct. 1881 (1975).

The due process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on Sudden Provocation when the issue is properly presented in a homicide case. Yates V. Evatt, 500 U.S. 391, 111 S.Ct 1884, 114 L.Ed. 2d 432 (1999)

In this case, there was evidence presented that proves Petitioner acted upon heat of passion on sudden provocation, therefore, his due process right to have the lesser included offense of murder was violated, and therefore request for a new trial. Petitioner was prejudiced as he was convicted of murder, and Sentence to 40 years in prison. The jury was instructed that malice may be inferred as a deadly weapon. This jury instruction is no longer permitted in South Carolina, as Sanctioned by the S.C Supreme Court. See State V. Belcher 376 S.C. 499, 510-11; At the time of Belcher ruling, Petitioner was convicted, this law has been applied retroactively to all cases. Griffith V. Kentucky 479 U.S. 314, 328, 107 S.Ct 708, 93 L.Ed. 2d 649 (1987). Teague V. Lane 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989).

2. Did the Circuit Court err in finding Petitioner's Appellate Counsel was not ineffective when Appellate Counsel did not raise the issue where Petitioner made Contemporaneous objection to admission of Brandon Cuttino statements, preserving the issue for Appellate review?

During trial, The State admitted Brandon Cuttino's statement over Petitioner's objection. (See Appendix II page 254 through page 261.) Brandon Cuttino admitted making statements to police, but testified he did not write the statement and that officers wrote the statement for him. He testified he signed the statement.

Petitioner made several Contemporaneous objection to the admission of Brandon Cuttino Statement and the trial judge overruled. Appellate Counsel failed to raise this issue. (Appendix ~~II~~ V page 947-948 and 1100). SCRE 613(b) If a witness admits a prior inconsistent statement, he has impeached himself, and further evidence is admissible, See State V. Lynn, 277 S.C. 222, 284 S.E. 2d 786 (1981) and its progeny.

Trial judge abused its discretion by allowing the statements into the record. See United States V. Robertson, 459 F.3d 39, 49 (1st Cir. 2006), Cert. denied, - U.S. 127 S.Ct 1261, 167 L.Ed 2d 90 (2007). The error is

not harmless, as the State Witness Cerenda Snowden, gave three different statements to police, and admitted lying to police. Brandon Cuttano testified, he did not witness Petitioner Kill the victim, and was not present when the victim was Shot. He also testified, that police had ~~already~~ the statement written and that he signed because he was told he could be Charge with accessory. For these reason, Petitioner's was prejudice for the erroneous admission of the statement. Therefore his Conviction should be reverse and new trial warranted.

(3) Did the Circuit Court err in finding that newly discovered evidence is not an PCR issue?

During Summary Judgment hearing, PCR Counsel explained to Judge Hyman that during Petitioner's trial, he was informed that the Subpeona to Jenie Fowler was sent to the wrong J. Fowler, and that there were two officers name Jenie Fowler. (Appendix V. page 906-909; Appendix ~~V~~ IV page 639-640. After Petitioner was convicted, he learned through the freedom of ~~Information~~ Act, that the State, and Ms. Proctor misinformed him of the presence of Dispatcher Jenie Fowler, denying Petitioner's 6th Amendment right to Compulsory process, and due process right to a fair trial.

Presenting a defense that someone other than Ms. Snowden called the police and reported the crime was essential to Petitioner's case. The Dispatcher was in possession of evidence of who actually made the 911 Call, that someone Kick open the door, and Bm was shot. See Appendix IV 852, 855, 856, 857, 858. Petitioner PCR Counsel amended Application, and Petitioner's Amended Application was filed in the Court. (Appendix IV page 810; 843-848). PCR ~~Counsel~~ Judge denied this issue. (Appendix V page 1114) Petitioner filed a SCRCP Rule 59 (e) regarding this Claim (Appendix V page 1107-1108).

The PCR Judge stated in its order that Newly discovered evidence is not a PCR issue. This is not true. This issue was not raised during trial, but after discovered by Petitioner, while his PCR was pending on August 13, 2013. See (Simpson v. Moore, 627 S.E.2d 701, 708 (S.C. 2006); State v. Spann, 513 S.E. 2d 98, 100 (S.C. 1999); Petitioner Submitted an affidavit of after discovered evidence to the clerk of Court; and the attorney general. (Appendix V page 863-864.) See: State v. DeAngelis, 182 S.E. 2d 732 (S.C. 1971);

State V. Augustine, 131 S.C. 21, 126 S.E. 159; State V. Parker, 249 S.C 139, 153 S.E. 2d 183. SC. Code Ann § 17-27-45 (C)

If the Applicant contends that there is evidence of material facts not presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Also See McCoy V. State, 737 S.E.2d 623, 625 (2013); Jamison V. State 765 S.E.2d 123. Based on the 5 prongs "(1) would probably change the result if a new trial is had; (2) had been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.

The Dispatcher, never was present to testify, because the State and Standby Counsel informed Petitioner that the Supeona went to another Jenie Fowler, and that there were two Jenie Fowler. The afterdiscovered evidence, if allowed in PCR Court, or trial Court would show that someone called 911 and reported the crime totally different from what the State presented. Evidence presented at trial, show that crime scene Investigator testified that the door was Kick open upon arrival. The caller was never identified because State suppression of the 911 tape, and not allowing the dispatcher to testify. The dispatcher is in possession, if not destroyed, of evidence and the identity of the 911 caller, and could not been discovered before trial, because the state informed defense that the Subpeona for Jenie fowler went to another J. Fowler. This misinformation should have been corrected by the State. This deny Petitioner due process right to a fair trial. Therefore Petitioner should be granted a new trial.

10/20/20

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Proof of Service

I Certify that I have served the Petitioner Pro Se petition, by depositing a copy of it in the United States mail, postage prepaid, on October 20, 2020, addressed to SC Court of appeals, 1220 Senate Street Columbia SC 29201

dated: 10/20/20

Jerald Smith
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October 20, 2020

SC Court of Appeals
Clerk of Court
1220 Senate Street
Columbia, SC 29201

RE: CASE NO 2019 001193

Dear clerk of Court,

Enclosed please filed Petitioner's Pro Se Petition to be filed in this case. I have also enclosed a proof of service of envelope of service upon you.

Thankyou

Terrell McCoy

cc.
Attorney General

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