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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Colleton County
Court of Common Pleas
The Honorable William H. Seals Jr., Post-Conviction Relief Judge
The Honorable D. Craig Brown, Trial Judge

S.C. SUPREME COURT

Appellate Case No. 2020-000560

SINCERE J. OWENS, #342813,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES PRESENTED

- I. Did the PCR court err in not finding trial counsel deficient for failing to request an involuntary manslaughter jury charge and such deficiency substantially prejudiced the Petitioner?
- II. Did the PCR court err in not finding trial counsel deficient for failing to object to a jury charge on voluntary manslaughter and that the deficiency substantially prejudiced the Petitioner?
- III. Did the PCR court err in failing to rule and/or denying the Petitioner's Motion to Amend his application pursuant to Rule 59(e) and 15(b) SCRCP?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

- I. Did the PCR court properly find trial counsel was not constitutionally ineffective for not requesting an involuntary manslaughter jury instruction?
- II. Did the PCR court properly find trial counsel was not constitutionally ineffective for not objecting to a jury instruction on voluntary manslaughter?

STATEMENT OF THE CASE

Sincere J. Owens (Petitioner) is presently confined in the South Carolina Department of Corrections. In June 2009, the Colleton County Grand Jury indicted Petitioner for murder (2009-GS-15-0305) and possession of a weapon during the commission of a violent crime (2009-GS-15-0306). David S. Matthews, Esquire, of the Fourteenth Circuit Public Defender's Office represented Petitioner at trial. Deputy Solicitor Sean P. Thornton prosecuted the case. On September 13, 2010, Petitioner proceeded to a jury trial before the Honorable D. Craig Brown. The jury found Petitioner not guilty of murder, but guilty of the lesser-included offense of voluntary manslaughter and guilty of possession of a weapon during a violent crime. On September 15, 2010, Judge Brown sentenced Petitioner to imprisonment for twenty-seven years for voluntary manslaughter and five years for possession of a weapon during a violent crime, to be served consecutively.

Petitioner filed a motion to reconsider the sentence. A hearing on the motion first convened on May 29, 2012, before Judge Brown, who recused himself from the matter. A subsequent hearing was held on November 13, 2012, before the Honorable Perry M. Buckner, III. At the November 2012 hearing, David L. Michel, Esquire, represented Petitioner. Judge Buckner found no legal reason to disturb the discretion of the trial judge and denied the motion for reconsideration.

Petitioner filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal and granted counsel's motion to be relieved on November 5, 2014. State v. Owens, Op. No. 2014-UP-374 (Ct. App. 2014). The remittitur returned to the circuit court on November 21, 2014.

Petitioner timely filed his application for post-conviction relief on June 19, 2015. In his application, Petitioner alleged, among other things, ineffective assistance of counsel for "[n]ot objecting to voluntary manslaughter charge being given to jury." Respondent filed its Return to

the application on October 26, 2018. An evidentiary hearing was held April 1, 2019, before the Honorable William H. Seals, Jr. Judge Seals denied Petitioner's application by written order filed October 18, 2019. Petitioner then filed a Motion to Alter or Amend the Judgment on October 18, 2019, under Rule 59(e) of the South Carolina Rules of Civil Procedure. Respondent emailed its Return to Petitioner's Motion to Alter or Amend on January 10, 2020. Petitioner supplemented his Motion to Alter or Amend on January 13, 2020. In Petitioner's Supplemental Motion, Petitioner moved to amend his PCR application to conform to the evidence presented at the PCR hearing under Rule 15(b) to address the issues concerning both the voluntary and involuntary manslaughter jury charges.

The PCR court filed a Form 4 order denying Petitioner's Motion to Alter or Amend on March 16, 2020. (App. 154-156).

SUMMARY OF THE FACTS

On April 22, 2009, Sincere Owens shot and killed Keith Williams. Sincere Owens fired three shots at the victim, striking Williams directly in the upper buttocks. (App. p. 25). Owens fired the shots somewhere in between Annie Glover's residence and the victim's residence both of which are on Francis Street in the City of Walterboro, South Carolina. The last shot was fired very close to the victim's home. Petitioner and the decedent, Keith Williams, each had a child with Shante Glover. (App. p. 13, l. 1-14, l. 6). Shante Glover's grandmother, Annie Glover, provided afternoon childcare for Shante's children, one fathered by Owens and the other by Williams. The grandmother lived only a few houses from William's residence.

Earlier in the day Williams was at Shante's workplace (Subway Restaurant), he was upset and talking disrespectfully to Shante. Williams was apparently upset about the fact that she and Owens were back together as a couple. Williams was still upset when he left Shante's workplace. Because of this, Shante thought it would be better for her not to go near William's residence and asked Owens to pick up her kids from Annie Glover's residence instead of her, to avoid any further confrontation with Williams. (App. p. 16, l. 14-23). Owens took Shante's SUV and went to Francis Street to get the kids from Annie Glover's house. Shante kept a pistol in the glove box of the SUV. (App. p. 17, l. 23-p.18, l. 1).

Mark McCune was the only witness, other than Petitioner, to directly witness the events. According to McCune, Williams just got home from work, checked his mailbox and Williams verbally confronted Owens by saying, "What did you say? What you say?" (App. p. 6, l. 16-p.8, l. 14). McCune saw Owens with a gun. (App. p. 8, l. 15-16). McCune then testified at the jury trial when being questioned by the State as follows:

Q: All right. Who had the gun?

A: Sincere.

A: Okay. And he wasn't trying to shoot him or nothing, you know. He pulls the gun and he was like, "Man, I should—" and then he stopped. He didn't finish his statement. He was like – and Keith was like, "Oh, so you got a gun? You got a gun?" and he started walking off and Sincere fired three times at the ground, you know, trying to scare him. And he ran and he must be got hit in the back." (App. p. 8, l. 17-23)

Q: All right. So your testimony, now, is that this was an accidental shooting? That he just shot at the ground to try to scare him?

A: Yeah, the first shot was at the ground, and then, you now, he just kind of like aimed, like he was shooting, but he was still shooting at the ground. He was still shooting—not towards like trying to shoot him, but he was shooting at the ground." (App. p. 9, l. 10-17).

McCune further testified to the following:

Q: So did he shoot at Keith Williams or did he shoot at the ground?

A: He was shooting towards him, but he was shooting at the ground.

Q: But that's not what you told the detective, is it?

A: That's what I told her. He was shooting at him, shooting at him.

(App. p. 96, l. 18-24).

The State introduced Owen's written statement and published it to the jury. The published statement read as follows:

I pulled up to my child's grandmother's house to pick up my baby and they told me the kids were still at daycare. So I started walking back to my baby mother's truck when somebody said, "Look." He was walking from his house on Francis Street towards the truck, reaching. Then he pulled out a black gun and started- and told me to run. I was shooting and ran. I didn't know where I was at. I didn't know what he could have did to me. I just ran and shot. Showtime was the one with the gun." (App. p. 26, l. 1-10).

None of the persons who were on scene directly after the shooting testified that they saw a gun on or near the victim. Richard Sheffield and Joseph Campbell, emergency service operators, both testified that they did not see a gun near the victim and would have noticed if there was one. (App. p. 68, 75). Kevee Rowes and Charlene Rowes, both arrived

immediately after the shooting, testified that neither of them saw a gun on or near the victim as well. (App. p. 80, 88).

Dr. Batalis (the forensic pathologist) testified that the gunshot wound on the victim was not consistent with that of a ricochet. Dr. Batalis testified that when bullets ricochet before hitting the body, the wounds tend to be irregular in shape and when a bullet hits a body without ricocheting the wound tends to be circular and punched. After examining the wound on the victim, Dr. Batalis determined the wound was not the result of a ricocheting bullet. (App. p. 107).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR Court properly found trial counsel was not constitutionally ineffective for not requesting an involuntary manslaughter jury instruction.¹

Petitioner argues trial counsel was constitutionally ineffective for failing to request a jury instruction on the lesser-included offense of involuntary manslaughter. However, The PCR court properly found trial counsel was not constitutionally ineffective for failing to request the jury instruction where no evidence in the record existed to support the request. Petitioner committed an offense naturally tending to cause death or great bodily harm by brandishing a weapon at the victim. Further, Petitioner was not doing a lawful act with “reckless disregard for the safety of others” where the uncontradicted evidence presented at trial showed Petitioner fired the weapon intentionally. This Court should deny certiorari where trial counsel was not constitutionally ineffective for failing to request a jury instruction when there was no evidence in the record to support such a request.

a. The PCR court properly found trial counsel was not constitutionally ineffective for not requesting a jury instruction on involuntary manslaughter.

¹ Respondent does not believe this issue is properly before the Court. No motion to supplement the application was made during the hearing, and the PCR court denied both of Petitioner’s motions in its Form 4 order. (App. p. 155). Petitioner argues that the Court failed to rule on its Rule 15(b) motion. The PCR court denied Petitioner’s motion in its Form 4 order dated March 6, 2020. (App. p. 155). Petitioner made his motion to supplement as part of his Rule 59(e) motion. The decision to grant or deny a Rule 59(e) motion is within the sound discretion of the trial court and is subject to an abuse of discretion standard. Pollard, 314 S.C. at 402, 444 S.E.2d at 536 (stating the decision to grant or deny a motion under Rule 59(e), SCRPC, lies within the sound discretion of the trial court); Taylor, 369 S.C. at 551, 633 S.E.2d at 503 (“An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support.”); Branch Banking & Tr. Co. v. Hunt, (S.C. Ct. App. Dec. 18, 2019). Here, the PCR court was well within its discretion in denying Petitioner’s motion and its decision should not be disturbed by this Court.

Without waiving its procedural objection, and out of an abundance of caution, Respondent addresses the merits of Petitioner's allegation the PCR court erred in not finding trial counsel deficient for failing to request an involuntary manslaughter jury charge and such deficiency substantially prejudiced the Petitioner.

During the PCR hearing, trial counsel testified that he "should have" requested a charge on involuntary manslaughter based upon the facts adduced by the State at trial. However, despite trial counsel's hindsight assertion, the facts at trial did not support such a charge. (App. p. 98, l. 1-9). Trial counsel testified that the State elicited testimony from McCune (the eyewitness) at trial, "that he wasn't trying to hit him; that he was firing at the ground." (App. 97, l. 9-23). However, trial counsel seemed to forget the rest of McCune's testimony at trial where McCune admitted he had consistently told law enforcement Petitioner was shooting at the victim in his previous statements. (App. p. 10, l. 18-24). Moreover, neither Petitioner nor anyone else has ever contended Petitioner did not purposely and intentionally fire the gun.

Involuntary manslaughter is, "the unintentional killing of another without malice, but while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the doing of a lawful act with a reckless disregard for the safety of others." State v. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015). Involuntary manslaughter mandates a showing of criminal negligence, defined as "the reckless disregard of the safety of others." S.C. Code Ann. § 16- 3-60 (2015). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman. 373 S.C. 527,571, 647 S.E.2d 144, 167 (2007).

The facts do not support a charge based on the first type of involuntary manslaughter: an unlawful act not amounting to a felony and not naturally tending to cause death or serious bodily

harm. State v. Rivera, 389 S.C. 399, 403, 699 S.E.2d 157, 159 (2010). It is undisputed Petitioner intentionally discharged his firearm, an act this Court has deemed naturally tends to cause death or great bodily harm. Id. at 160.

The facts of Petitioner's case also do not meet the elements for the second type of involuntary manslaughter in order warrant a jury instruction. Petitioner was not doing a lawful act with a reckless disregard for the safety of others. As noted above, to merit an instruction on involuntary manslaughter the handling of the weapon must have been reckless. There was no evidence at trial that Petitioner unintentionally fired the weapon; to the contrary, all evidence shows that he intentionally fired the weapon. Petitioner's own statement was that he just ran and shot the gun. (App. p. 26). Further, McCune testified that Petitioner was shooting at the victim. (App. p. 10). Petitioner reached into his own vehicle for the weapon, ran towards the victim, and fired three shots in his direction. (Tr. p. 149). There was no evidence presented suggesting a struggle over the weapon or any reckless handling of the weapon by Petitioner. Petitioner intentionally fired the weapon in the direction of the victim, striking him in the upper buttock, and killed him.

Therefore, Petitioner has failed to establish there was any evidence to warrant a jury instruction on involuntary manslaughter. The PCR court properly found trial counsel was not constitutionally ineffective for not requesting a jury instruction on involuntary manslaughter where no evidence in the record supported the request. Therefore, Petitioner cannot establish deficiency, and this Court should deny Certiorari.

Further, Petitioner was not prejudiced by the alleged deficiency. Even if the instruction had been given, it is not likely that it would have changed the outcome of the trial. McCune's testimony at trial that Petitioner was shooting at the ground was not credible, as he was impeached by his

previous statements to law enforcement and internal contradictions in his own testimony. (App. p. 10). Petitioner's own statement does not say that he was running away from the victim or that he was just trying to scare him with his shots. (App. p. 26). Dr. Batalis also testified that his forensic autopsy concluded that the fatal wound was a direct hit and was not caused by a ricochet of the bullet. (App. p. 107). The idea that the shooting of the victim was unintentional is not credible, and there is no reasonable probability the jury would have found for Petitioner on an involuntary manslaughter charge. Therefore, Petitioner has failed to establish prejudice from the alleged deficiency, and this Court should deny Certiorari.

II. The PCR Court properly found trial counsel was not constitutionally ineffective because he did not object to the voluntary manslaughter jury instruction.

Petitioner argues the PCR court erred in not finding trial counsel ineffective because trial counsel was allegedly deficient for failing to object to a jury charge on voluntary manslaughter and the deficiency substantially prejudiced the Petitioner. However, the PCR court properly found that trial counsel was not constitutionally ineffective for failing to object to the voluntary manslaughter charge because there was evidence in the record to support the trial court giving the instruction. Therefore, the PCR court correctly denied relief, and this Court should deny certiorari.

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Niles, 412 S.C. 515, 522, 772 S.E.2d 877 (2015). To receive a voluntary manslaughter charge, "there must be evidence of sufficient legal provocation and sudden heat of passion." Id. In State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996), this Court, in defining the elements of voluntary manslaughter stated:

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, it must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and

produce what, according to human experience, may be called an uncontrollable impulse to do violence.

There was significant evidence presented at trial, when considered together, that supported a jury instruction for voluntary manslaughter. First, Petitioner's own statement supports both a sudden heat of passion and sufficient legal provocation. Petitioner's statement included the following:

He was walking from his house on Francis Street towards the truck, reaching. Then he pulled out a black gun and started- and told me to run. I was shooting and ran. I didn't know where I was at. I didn't know what he could have did to me. I just ran and shot.

In this statement, the jury could have found that Petitioner was legally provoked by the victim walking towards him and pulling a weapon, which is a threatening action. "An overt, threatening act or a physical encounter may constitute sufficient legal provocation." State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). Petitioner's statement also indicates he was overcome with the sudden heat of passion because immediately after the provocation, he pulled his weapon and beginning to shoot at the victim. Petitioner had previous issues with the victim regarding his relationship with the mother of their children. Both Petitioner and the victim had children with the same woman, Shante Glover, and issues arose of this situation. (Tr. p. 120). Shante Glover testified that she had an argument with the victim after Petitioner dropped her off at work, and the victim told her she better have someone come pick up her kids. (Tr. p. 119). Petitioner knew of this prior bad blood due to ongoing issues surrounding the mother of his and victim's children when he went and ultimately confronted the victim. The victim approaching him and reaching for what Petitioner presumed to be a weapon caused him to the uncontrollable

violence that followed. Finally, McCune's previous statements also support that Petitioner was shooting at the victim. (App. p. 10).

Therefore, the PCR Court properly found that trial counsel was not constitutionally ineffective for failing to object to the voluntary manslaughter charge, as trial counsel did not have a basis to do so.

Further, Petitioner was not prejudiced by any alleged deficiency. Trial counsel arguably was able to obtain a jury instruction on a lesser-included offense that prevented Petitioner from being convicted of murder. There is evidence in the record to support the instruction. The jury clearly did not find Petitioner was acting in self-defense, and the ability to consider appropriately voluntary manslaughter feasibly kept Petitioner from being found guilty of murder. Substantial evidence existed in the record to support a jury finding Petitioner guilty of murder. Significantly, Petitioner does not say in his statement which way he ran when he began shooting at the victim, which would be an important factor in sudden heat of passion for implying criminal intent. The physical evidence shows that shell casings were found from the corner of Ms. Glover's lot, all the way up to right in front of where the victim was found, showing that Petitioner was running *toward* the victim rather than away from him (Tr. p. 149, l. 1-25). Further, as testified to by Dr. Batalis, the victim was shot in his upper left buttock and the injury was not consistent with a ricochet. (Tr. p. 107). This evidence, when considered with Petitioner's own statement, suggests that Petitioner, despite claiming he was afraid he was going to be shot, proceeded to run *towards* the victim while firing. The evidence also shows that Petitioner was not in fact shooting at the ground, but that he was actually shooting with the intent to hit the victim. Had the jury not had the lesser-included offense to consider, it is reasonably likely they would have

found Petitioner guilty of murder. Trial counsel strategically arguing voluntary manslaughter was valid considering the evidence did not support a finding of any other lesser-included offense. Therefore, Petitioner can establish not prejudice from the alleged deficiency, and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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