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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Appellate Case No. 2020-000560

Sincere J. Owens,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITIONER'S REPLY TO THE STATE'S RETURN

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PETITIONER'S REPLY TO THE STATE'S RETURN

The Petitioner, Sincere J. Owens, sets forth his Reply to the State's Return to his Petition for a Writ of Certiorari as follows:

I. TRIAL COUNSEL'S FAILURE TO REQUEST A JURY CHARGE ON INVOLUNTARY MANSLAUGHTER:

The State (Respondent) asks this Court to indulge in retroactively weighing the credibility of trial witness Mark McCune, a witness who did not testify at the Petitioner's PCR Hearing. The State in its Return concedes that McCune testified that Owens was firing a gun at the ground trying to "scare" the decedent and not trying to shoot the decedent. See, State's Return at pp. 6-7. The State relies on the cross-examination of McCune trying to impeach McCune on possible contradictory statements McCune made to investigators years prior and not under oath.

The State's theory as to why involuntary manslaughter was not an appropriate jury charge is misplaced. The State ignores the "any evidence" standard to request a jury charge. Wigington v. State, 413 S.C. 578, 776 S.E.2d 407 (S.C. Ct. App. 2015)("If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction."). "A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence presented at trial." Id. at 586, 411. "The law to be charged to the jury is determined by the evidence at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993); See also, State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

The standard the State proposes in its Return would allow a trial judge to impermissibly weigh a witnesses testimony when considering a jury charge. The State argues to this Court that

even if a jury instruction was given on involuntary manslaughter, "it is not likely that it would have changed the outcome of the trial," because the State argues that a portion of McCune's testimony was not credible in the State's view. See, State's Return at p. 11. The PCR Court did not weigh McCune's testimony, nor could it have legally. See, Goss v. State, 425 S.C. 101, 820 S.E.2d 373 (2018). Trial Counsel admitted to the PCR Court that he "should have" requested a jury instruction on involuntary manslaughter. (App. at pp. 97-98). The PCR Court made no specific findings as to the credibility of trial counsel.

The State contends in its Return that:

> "[t]he 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 . . .."

See, State's Return at p. 12. The State simply ignores the "any evidence" standard and has fallen into the oubliette of having persons other than a jury to weigh the credibility of the evidence presented at trial. The law clearly established in Wigington v. State, *supra,* prevents a trial judge, trial counsel, a PCR judge in retrospect, the State or even, respectfully, this Court from invading a jury's province to determine the credibility of a witness or the probative value, force and effect of testimony in evidence at a jury trial.

Our State Constitution prohibits judges from weighing the credibility of the evidence presented at trial. S.C. Const. art. V, Section 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.") See also, State v. Hartley, 307 S.C. 239, 414 S.E.2d 182 (S.C. App. 1991); State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244 (1942). Under the mandate of Wigington v. State, *supra* and as admitted by trial counsel, the jury "should have" been instructed, if requested

by trial counsel, on the law of involuntary manslaughter based upon the evidence presented by the State at the Petitioner's jury trial. The evidence presented at the PCR hearing was that trial counsel admitted he "should have" requested the involuntary manslaughter charge at trial. In the determining whether the evidence requires a particular jury charge in a criminal case, this Court is required to, "view the facts in a light most favorable to the defendant." State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996); See also, State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994).

Without any analysis or instruction, the PCR Court simply sent an email to the Attorney General stating "all" PCRs heard that term of court are "denied." Therefore, the PCR Court erred as a matter of law, erred as a matter of fact, and such clear error by trial counsel prejudiced the Petitioner.

I. TRIAL COUNSEL'S FAILURE TO OBJECT TO A JURY CHARGE ON VOLUNTARY MANSLAUGHTER:

If the State believes that there is no evidence of involuntary manslaughter, then the Petitioner's conviction for voluntary manslaughter must be vacated due to his trial counsel's failure to object to such a charge that was not warranted by the evidence presented at trial. The case of State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) is not only instructive, but controlling here. Assuming involuntary manslaughter does not apply to the facts of this case, which the Petitioner does not concede, this would be a case of murder or nothing.[1]

Likewise, the case of State v. Niles, 412 S.C. 515, 522, 772 S.E.2d 877 (2015) settles the

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[1] On a special verdict form, the trial jury found the Petitioner "not guilty" of murder.

distinction between acting in sudden heat of passion and acting in self-defense.[2] This Court in Niles, 412 S.C. at 523, held that since Niles' "own testimony was that he shot at the men to scare them away, appears to support a charge of self defense, not heat of passion." McCune's trial testimony received into evidence (and introduced at the PCR hearing) was that Petitioner was trying to "scare" the decedent by firing into the ground. The reasoning in both Wharton and Niles squarely delineate why a jury charge on voluntary manslaughter is legally inappropriate in this case.

WHEREFORE, the Petitioner prays that this Honorable Court grant his Petition and reverse the PRC Court's denial of his PCR and grant the Petitioner a new trial based upon counsel errors and the resulting prejudice to the Petitioner.

Respectfully Submitted,

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[2] The law of Self-Defense was charged by the trial judge in the trial of this case.