

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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MAR 25 2013

SC Court of Appeals

MORRIS ANTONIO SULLIVAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2010-151951

BRIEF OF PETITIONER

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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¹ 334 S.C. 256, 513 S.E.2d 104 (1999)

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ISSUE PRESENTED

Trial counsel erred in failing to request a jury charge per State v. Burriss² explaining that arming oneself in self-defense can be considered a lawful activity that would support an involuntary conviction because the facts of this case warranted such a charge.

² 334 S.C. 256, 513 S.E.2d 104 (1999)

STATEMENT

Petitioner Morris Antonio Sullivan was convicted per jury trial of voluntary manslaughter, possession of a weapon during the commission of a violent crime, and possession of a pistol of one under age 21 during the January 2006 term of the Greenville County Courthouse before the Honorable D. Garrison Hill, Judge. Petitioner was sentenced to imprisonment for an aggregate period of eighteen years. App. 1 – 492. Petitioner appealed, but his convictions and sentences were affirmed and the appeal was dismissed. See State v. Sullivan, Op. No. 2008-UP-478 (S.C. Ct. App. filed August 11, 2008).

On January 28, 2009, petitioner filed a post conviction relief application with the Greenville County Office of the Clerk of Court. App. 494-503. The respondent filed a return dated April 17, 2009, requesting that a hearing be held in the case. App. 504-507

A hearing was convened on November 12, 2009, at the Greenville County Courthouse before the Honorable G. Edward Welmaker, Judge. App. 509-537. On December 18, 2009, Judge Welmaker issued an order of dismissal denying petitioner's allegations of ineffective assistance of counsel in the case. App. 539-545.

Petitioner appealed Judge Welmaker's order of dismissal and filed a petition for writ of certiorari dated October 7, 2010. The respondent filed its return on February 21, 2011. Per this Court's order dated December 21, 2012, granting petitioner's petition for writ of certiorari in the case, this brief of petitioner follows. .

ARGUMENT

Trial counsel erred in failing to request a jury charge per State v. Burris³ explaining that arming oneself in self-defense can be considered a lawful activity that would support an involuntary manslaughter conviction because the facts of this case warranted such a charge.

An altercation between Jervis Powers and petitioner occurred at petitioner's home at noon on January 16, 1998, during which time Powers was shot and killed.

Eyewitnesses Octavious Barksdale, Ronica Butler, Ronnie Cook and Cedrick Evans were present at petitioner's house and described the misunderstanding between Powers and petitioner which led to the shooting. Butler, Cook, Barksdale, and Evans testified that the incident began when Powers questioned petitioner about whether he (petitioner) fired gunshots into his (Powers') home earlier on that day. Petitioner denied doing this. Thereafter, petitioner and Powers began arguing and moved down the hallway and into a room. At some point while in the room, petitioner armed himself with a gun and began backing out of the room and down the hall away from Powers. However, Powers continued to advance toward petitioner as petitioner backed away. Petitioner fired a warning shot onto the floor, but Powers continued to advance and told him to use the weapon. Ultimately, petitioner fired two more low shots in Powers' direction. One shot hit Powers' leg and the other shot hit him in the chest as he fell down. App. 169, l. 16 – p. 181, l. 21; App. 186, l. 87 – p. 205, l. 6; App. 210, l. 3 – p. 234, l. 8; App. 135, l. 12 – p. 150, l. 5.

³ 334 S.C. 256, 513 S.E.2d 104 (1999)

At the close of all testimony, the trial judge entertained requests to charge. The trial judge charged the jury on the law of self-defense, voluntary manslaughter, and involuntary manslaughter, but omitted a Burriss charge explaining how self defense would impact the offense of involuntary manslaughter. App. 336, l. 14 – p. 349, l. 3; App. 380, l. 11 – p. 390, l. 17. The charge follows:

To prove involuntary manslaughter the State must prove beyond a reasonable doubt that the defendant unintentionally killed the victim without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or the defendant unintentionally killed the victim without malice while engaged in a lawful activity with the reckless disregard for the safety of others....

Now, ladies and gentlemen, as I told you, Mr. Sullivan has raised various defenses to these indictments, and I'm going to go over these defenses with you now. The first defense he has raised is self-defense, and self-defense under the law is a complete defense.....and I will now charge you on the law of self-defense.....

Tr. 439, line 20 – p. 442, line 11.

Petitioner indicated clearly in his statement given to police that the shooting was unintentional and that he lawfully armed himself in self-defense in response to Powers' confrontation and behavior. In the statement, petitioner stated that Powers entered his house asking if he shot into his (Powers) house. Petitioner denied doing this, but Powers argued with him insisting that he did this. Petitioner stated that they went to the bedroom where they both grabbed for a gun, but that he (petitioner) got possession of the gun and asked Powers to leave, but that Powers would not leave and kept talking, so he fired gunshots.” App. 315, lines 1-20.

In State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1991), the Court held that a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he

were entitled to arm himself in self-defense at the time of the shooting, because this would make said act (arming oneself) lawful within the meaning of the definition of involuntary manslaughter. Thus, arming oneself in self-defense can be translated into acting lawfully even if he is in unlawful possession of a weapon. In Burriess, the court held that the defendant lawfully armed himself in self-defense and was entitled to do so when he was pushed to the ground by the victim and another man during an attack against him, and where he drew a gun, fired into the ground to stop their advance toward him, and the result was that one aggressor was killed by gunfire as the two continued their advancement. Here, petitioner experienced a similar incident where the deceased, who entered his house with accusations, continued to advance and close in on him despite his low fired gunshots as he backed away from the deceased as he (deceased) continued advancing until hit with gunfire. Note that the ruling in Burriess has been upheld in its progeny as well.

Compare State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), where the court held that the defendant armed himself in self-defense and was entitled to do so when confronted by a jealous girlfriend who held a long brown strand of hair and a pointed .22 rifle while screaming and suggesting infidelity, which in turn moved him (defendant) to grab the gun that fired shortly after a struggle and killed the girlfriend. Compare also, State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003), where the defendant lawfully armed himself in self-defense and was entitled to do so when he tried to break up a fight between three women and fired his gun when the boyfriend of one of the women charged keep advancing toward him (defendant).. See also State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (2010). In Brayboy, the Court held that the defendant lawfully armed himself

in self-defense and was entitled to do so when he managed to retrieve the gun after his girlfriend with whom he was arguing dropped the gun she had in her possession and where the gun fired as he swung it up after his girlfriend “got in his face.”

Here, the trial judge charged the jury on the law of voluntary manslaughter, involuntary manslaughter, self-defense; defense of habitation, and the defense of necessity, but failed to highlight the how self-defense and involuntary manslaughter were disconnected. Per Burriss, an instruction explaining how self defense would impact the offense of involuntary manslaughter should have been requested and charged in this case. In other words, the jury needed to know that arming himself in self-defense was a consideration to be made in conjunction with the issue of lawful and unlawful activity within the definition of involuntary manslaughter. For example, the judge should have specifically explained that one can be found guilty of involuntary manslaughter when one unintentionally kills another while recklessly engaged in a lawful activity and that possession of a firearm while acting in self defense as such an action can be considered a lawful activity. Additionally, the judge should have charged that one can be found guilty of involuntary manslaughter when one unintentionally kills another while engaged in an unlawful activity such as unlawful possession of a weapon if one armed himself in self-defense. Had the Burriss charge been requested and given, or had counsel objected to the judge’s failure to give a Burriss charge in the case, then a reasonable probability exists that the jury might have found petitioner guilty of involuntary manslaughter rather than issuing a verdict of guilty on the offense of voluntary manslaughter.

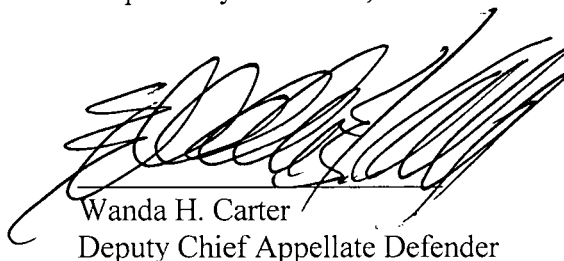
Thus, trial counsel’s error in failing to request upon a specific Burriss charge prior to the jury charge, and in failing to object to the trial judge’s error in not giving a

specific Burris charge to the jury were both acts of omission which resulted in deficient legal representation of petitioner at trial. This violated petitioner's right to effective assistance of counsel at trial as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, §14 of the South Carolina State Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court reverse petitioner's conviction and remand the case to the trial court for a new trial

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 25th day of March, 2013

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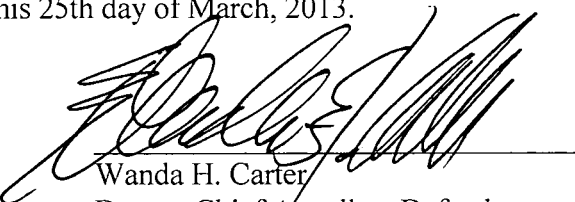
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

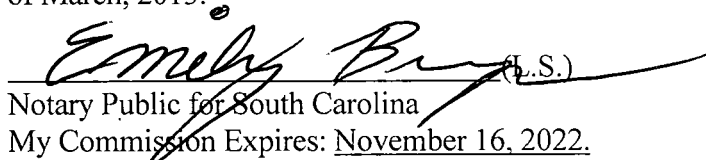
I certify that a true copy of the brief of petitioner, in this case has been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Morris Antonio Sullivan, #256260, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 25th day of March, 2013.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of March, 2013.



Notary Public for South Carolina

My Commission Expires: November 16, 2022.