

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Horry County
Court of Common Pleas

The Honorable Steven H. John, Trial Judge
The Honorable Kristi F. Curtis, PCR Judge

Appellate Case No. 2020-000412

ARMANDO K. CHESTNUT.....Petitioner.

v.

STATE OF SOUTH CAROLINA,.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General
S.C. Bar # 104191

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON PETITION FOR CERTIORARI

Petitioner's Statement of Issue on Petition for Certiorari

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when she waived Petitioner's right to a pretrial immunity hearing pursuant to the Protection of Persons and Property Act where Petitioner was prejudiced since if counsel had not waived the pretrial hearing there is a reasonable probability the trial judge would have granted Petitioner immunity from prosecution and found he lawfully acted in self-defense and the defense of others when he fired the shots that struck the decedent and injured another combatant?

Respondent's Counterstatement of Issue on Petition for Certiorari

Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for electing not to move for a pre-trial hearing to determine if Petitioner was immune from prosecution pursuant to the South Carolina Protections of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.) because Counsel articulated a valid, objectively reasonable strategy for not pursuing such a hearing and Petitioner cannot establish that he would have been granted immunity had such a hearing been held?

STATEMENT OF THE CASE

Armando Chestnut (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections During its August 2012 term, the Horry County Grand Jury indicted Petitioner for murder (2012-GS-26-03115), attempted murder (2012-GS-26-03116), pointing or presenting a firearm (2012-GS-26-03117), and second degree assault and battery by mob resulting in serious bodily injury (2012-GS-26-03118). Petitioner was represented by Barbara W. Pratt, Esquire (hereafter “Counsel”). Bradley C. Richardson and Travis Hyman, Esquires, from the Fifteenth Circuit Solicitor’s Office, represented the State. On July 15-19, 2013, the case proceeded to trial before the Honorable Steven H. John, circuit court judge, and a jury. On July 19, 2013, the jury found Petitioner guilty of the lesser-included offense of voluntary manslaughter (-03115), as indicted for attempted murder (-03116), as indicted for pointing and presenting a firearm (-03117), and of the lesser-included offense of second degree assault and battery (-03118). Judge John sentenced Petitioner to life without possibility of parole as a recidivist offender pursuant to South Carolina Code Annotated Section 17-25-45 based on Petitioner’s prior qualifying convictions.

Petitioner filed a timely notice of appeal and was represented by Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense – Office of Appellate Defense. On appeal, Petitioner raised the following claim, “Whether the court erred by refusing to grant a new trial where it erroneously gave a *Belcher* instruction that the jury could infer malice from the use of a deadly weapon where self-defense was a verdict option, and the judge’s later instruction that ‘if there’s a self-defense, there’s no inference that can be associated with the use of a deadly weapon,’ was hopelessly confusing, and exacerbated rather than cured the prejudice.” The South Carolina Court of Appeals affirmed Applicant’s convictions by

unpublished opinion. *State v. Chestnut*, Op. No. 2016-UP-227 (S.C. Ct. App. filed June 1, 2016).

The remittitur was issued on June 17, 2016.

Petitioner timely filed a PCR application on December 7, 2016, alleging:

1. Ineffective assistance of counsel; and
2. Due Process.

Respondent made its return on October 24, 2017, requesting an evidentiary hearing.

Thereafter, Applicant, through Counsel Daniel A. Selwa, II, amended his application to include the following specific claims for relief:

1. “Trial Counsel Waived Petitioner’s Right to an Immunity Hearing”
 - a. “Trial counsel’s waiver of Petitioner’s right to an immunity hearing pursuant to 16-11-440(c), Trial Transcript 42/12 – 43/10, was ineffective assistance of counsel that resulted in prejudice to Petitioner.”
 - b. “Trial counsel stated that this was a ‘matter of strategy’ and stated, ‘we do not believe that it would add anything to this particular case that we would not be able to ask in a later motion.’ *Id.*”
 - c. “Trial counsel’s advice to petitioner to waive his right to a ‘stand your ground’ hearing was ineffective assistance of counsel. Trial counsel’s statement that it would not add anything that ‘we would not be able to ask in a later motion’ was incorrect and indefensible.”
2. “Trial Counsel Allowed Jurors to Believe Incorrectly that Petitioner had a Duty to Retreat”
 - a. “Trial counsel’s waiver of Petitioner’s rights under S.C. Code Section 16-11-440(c) was ineffective assistance of counsel that resulted in prejudice to Petitioner because the jurors were informed by the Court, and the prosecutor argued in his closing, *that Petitioner had a duty to retreat.*” (emphasis original)
 - b. “Pursuant to the plain language of 16-11-440(c), if Petitioner: 1) was attacked in a place where he had a right to be, then 2) he had the right to stand his ground and meet force with force, including deadly force, if 3) he reasonably believed it was necessary to prevent death or great bodily injury to himself or another person.”
 - c. “There was more than sufficient testimony and evidence presented at the trial from which the jurors could have concluded that Petitioner and Petitioner’s friend Thoros were in a place where they had the right to be and that Petitioner stood his ground and met force with deadly force with the reasonable belief that it was necessary to prevent death or great bodily injury to himself or Thoros.”
 - d. “By waiving Petitioner’s substantial rights under 16-11-440(c), trial

counsel caused the jurors to believe that Petitioner had a duty to retreat pursuant to the older common law definition of self-defense *that had been replaced by 16-11-440(c)*.” (emphasis original)

- e. “There was no valid trial strategy employed by trial counsel that could possibly justify subjecting Petitioner to a duty to retreat, *when he did not have a duty to retreat pursuant to 16-11-440(c)*. Although trial counsel could have corrected this ‘in a later motion,’ she did not.”
3. “Trial Counsel Failed to Object to the Prosecutor’s Argument that Petitioner had a Duty to Retreat”
 - a. Cites to Trial Transcript pp. 891-92.
4. “Trial Counsel Failed to Object to the Court’s Jury Instruction that Petitioner had a Duty to Retreat”
 - a. Cites to Trial Transcript pp. 927-31.

On November 26, 2018, an evidentiary hearing convened before the Honorable Kristi F. Curtis, where Petitioner proceeded forward on the issues raised in his October 24, 2017 amendment. The Court issued an order of dismissal, denying Petitioner’s PCR application and remanding him to the custody of South Carolina Department of Corrections on February 4, 2020. In the order, the Court reached the following findings:

1. Counsel was not ineffective because he waived the immunity hearing. Counsel was not deficient because he reasonably weighed the likelihood of prevailing upon the immunity hearing against the strategic disadvantage of placing the defense case on the record prior to the prosecution presenting its case to the jury, and determined the more favorable course was to waive immunity, wait until after the State presented its case-in-chief, and only then seek to present the case for self-defense. Additionally, even if Counsel had requested a pre-trial determination of immunity under the “stand your ground” statute, the facts would not have established by a preponderance of the evidence that Petitioner was entitled to immunity and, thus, Petitioner was not prejudiced by any deficiency.
2. Counsel was not ineffective for failing to object to the State’s arguments in closing and the trial court’s instructions to the jury that the final element of self-defense was that Petitioner had no other probable way to avoid the danger of death or serious bodily injury than to act as Petitioner did, given the circumstances, because the State was within its rights to argue, and the trial court was correct to instruct the jury that Petitioner was subject to a “duty to retreat”, and no meritorious basis for objection existed, and thus Petitioner cannot show deficiency on the part of Counsel.

Thus, the request for relief was denied. Petitioner appeals from the denial of relief based upon the allegation that Counsel was ineffective when she waived Petitioner’s right to a pretrial

immunity hearing pursuant to the Protection of Persons and Property Act, claiming Petitioner was allegedly prejudiced because if counsel had not waived the pretrial hearing, there is a reasonable probability the trial judge would have granted Petitioner immunity from prosecution and found he lawfully acted in self-defense and the defense of others. This return follows.

STATEMENT OF FACTS

This case involves a series of assaults that occurred on March 6, 2012 at the 3rd Avenue Sports Bar in Myrtle Beach. (App. 127-31). On that date, an altercation arose inside a bar during a pool game over money bet on the game, which led to a fight between a group from Myrtle Beach and a group from Hemingway County. (App. 131-32). Feaster testified that someone wielded a pool stick during the argument. (App. 136-37). The bar owner, John Wayne Feaster Jr., kicked the men out of the bar and the fight continued in the parking lot. (App. 132, 135).

Thoro, Petitioner's friend, was struck with a beer bottle by Damien Canty. (App. 169-70). Feaster stated that three to four men jumped on Thoro, who went "down pretty hard." (App. 169-70). Feaster also stated he remembered everyone fighting and that he saw a gun "go up in the air" and that he "thought" he heard gunshot. (App. 135-36).

Petitioner testified he had his gun on him the entire night, including while inside the bar. (App. 731-32). Petitioner admitted to firing three shots, including shooting Canty in the elbow and shooting a window out of a van. (App. 151, 737-39). Petitioner was seen going to his car prior to the shooting and was thereafter seen with a black handgun that he shot Jamal McFadden with. (App. 52-53, 287, 290-91). The bullet entered his left lower chest, went through the liver, and exited the body, resulting in McFadden's death. (App. 481-82, 488).

Petitioner followed after Canty the altercation then continued inside the bar. Canty was knocked to the floor by Mike Spivey and eventually fell unconscious while he continued to be kicked and stomped on by Petitioner and others. (App. 137-38, 307, 815). Petitioner continued to kick him until the bar owner pushed him off the victim and attempted to strike the victim some more. (App. 138, 307, 815).

Petitioner's girlfriend, Annaleise Testa, testified at trial that Petitioner admitted to him

that he fired his gun. (App. 290-91). Testa stated she did not know who he fired at, but stated Petitioner thought he fired at “the one with dreads” who, at trial, she stated she thought was Jamal McFadden. (App. 290-91).

Existing videos substantiated the allegations and were used at trial to identify the various incidents. (App. 14-162). Petitioner’s weapon was recovered at the time of his arrest after it was dropped from the vehicle. (App. 300-01, 416).

The following day, Petitioner was driving his girlfriend home when a police car pulled behind him. Thereafter, Petitioner threw the gun out the window and, when pulled over, stated he threw it because it’s a crime to carry a gun. (App. 746-48).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the PCR court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCF; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined Petitioner failed to establish counsel was ineffective for electing not to move for a pre-trial hearing to determine if Petitioner was immune from prosecution pursuant to the South Carolina Protections of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.) because Counsel articulated a valid, objectively reasonable strategy for not pursuing such a hearing and Petitioner cannot establish that he would have been granted immunity had such a hearing been held.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective when she elected not to move for a pre-trial hearing. Specifically, Petitioner alleges Counsel was deficient because Counsel admitted she did not consider seeking an immunity hearing prior to trial, indicating the decision not to seek an immunity hearing was not a part of a reasonable trial strategy. Additionally, Petitioner alleges he was prejudiced because if counsel had not waived the pretrial hearing, there is a reasonable probability the trial judge would have granted Petitioner immunity from prosecution and found he lawfully acted in self-defense and the defense of others. However, the PCR court properly rejected this argument, finding Counsel made a valid, objectively reasonable strategic decision to not move for pre-trial immunity and that, even if the hearing was held, Petitioner would not have been entitled to immunity based on the wealth of evidence indicating he did not act in self-defense or defense of others. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the

Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Counsel will not be deemed deficient if he articulates a valid reason for employing certain strategy. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Further, "the United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made." *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689). Thus, courts must be wary of second-guessing counsel's tactics. *Id.*; *Whitehead v. State*, 308 S.C.

119, 122, 417 S.E.2d 529, 531 (1992).

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

The "Protection of Persons and Property Act" ("the Act") provides that "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force[.]" S.C. Code Ann. § 16-11-450. The Act further provides, in part, that:

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 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(C).

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard[.]” *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011)).

Where a defendant seeks relief under section 16-11-440(c), it is not enough for a defendant to establish that he was “not engaged in an unlawful activity” and was in a “place where he has a right to be.” Rather, “[c]onsistent 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” save the duty to retreat. *Id.*, 406 S.C. at 371, 752 S.E.2d at 266. Notwithstanding the Act or other provisions of law, to establish self-defense, the defendant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. *State v. Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). “Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense.” *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) (citing *State v. Long*, 325 S.C. 59, 480 S.E.2d 62 (1997)).

Here, Counsel was not deficient because electing not to move for a pre-trial hearing was a part of a strategic decision that Petitioner consented to. After jury selection, Counsel informed the trial court that she discussed the decision whether to pursue an immunity hearing with Petitioner. Counsel stated they ultimately decided to waive the hearing, because:

First of all, we do not believe that it would add anything to this particular case that we would not be able to ask in a later motion. We also feel it's a matter of strategy, Your Honor, and my client understands that he is giving up the right to have the Court determine whether he's entitled to immunity. But ask I've explained to him, he's not giving up his right to present the idea of self-defense and defense of others to the jury throughout the trial.

(App. 43).

Thereafter, Petitioner was sworn in, the trial judge thoroughly explained the purpose of the pre-trial hearing, confirmed Petitioner discussed the option with Counsel, and confirmed he wished to waive the hearing. (App. 43-46).

Though Counsel second guessed herself at one point during the PCR hearing, she primarily re-affirmed this strategy. Specifically, Counsel stated she was concerned with pursuing an immunity hearing because it would have effectively forced her to present their defense case before drawing a jury, exposing Petitioner and other witnesses to impeachment due to inconsistencies between their testimonies at the hearing and at trial. (App. 1081). Counsel was worried they would probably lose the hearing and that loss would have created a record that neither she nor Petitioner would have wanted that the State could have used against Petitioner later on. (App. 1081, 1090). Counsel also indicated that she wanted to leave the self-defense determination in the jury's hands, not the trial judge's, stating that if the trial judge ruled against them at an immunity hearing, they "would've been in a situation where he had lad the whole – all the testimony out." (App. 1082). Counsel stated she explained the decision to Petitioner thoroughly, thought he understood what the decision consisted of, and that the decision was ultimately made by Petitioner, with Counsel's advice. (App. 1090-91).

Counsel's determination that an immunity hearing would leave Petitioner open to cross-examination that would have been used to impeach him at trial and that she thought the trial judge would likely deny immunity at the hearing which would hurt their self-defense instruction

at trial is a reasonable strategy. Though Counsel stated at the PCR hearing that she may have given Petitioner bad advice, this Court must be wary of second guessing the strategy in hindsight but, rather, evaluate the decision at the time it was made. *Edwards*, 392 S.C. at 456-57, 710 S.E.2d at 64 (quoting *Strickland*, 466 U.S. at 689) (“The United States Supreme Court has cautioned that ‘every effort be made to eliminate the distorting effects of hindsight’ and evaluate counsel’s decisions at the time they were made.”). This Court should accept Counsel’s reasoning behind her decision and conclude a reasonable trial strategy was executed. Thus, because a valid trial strategy was executed, Counsel was not deficient on this ground.

Even if Counsel was deficient, Petitioner was not prejudiced by this deficiency because Petitioner cannot establish that he would have been granted immunity had such a hearing been held. Specifically, the facts would not have established, by preponderance of the evidence, that Petitioner was entitled to immunity. *See State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (citing *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011)) (“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard[.]”).

Trial testimony given showed that Petitioner was not an innocent bystander, but actively participated in the fight, starting with its inception at the pool table. (App. 131-35). The fight was seemingly mutual combat in nature; not an attack and subsequent self-defense reaction. (App. 192). Petitioner went to his car and grabbed his gun without anyone following or actively attempting to fight him at the time. (App. 287, 290-91). Thoro, the person Petitioner claimed he acted in defense of, initiated the fight, both when it started at the pool table and again when it was taken outside. (App. 209, 248, 881-82). Petitioner admitted to firing the fatal shot and evidence presented showed he did so after retreating from others. (App. 290-91, 481-82, 488).

Additionally, no evidence was presented that anyone else used a gun in the fight; instead, with the exception of Petitioner firing, the fight as a whole was an unarmed fistfight. (App. 294-302, 883). Petitioner also actively participated in stomping an unconscious individual to death; an individual who was very clearly no longer presenting an active threat. (App. 137-38, 307, 815-16). Petitioner testified that after Canty ran inside the bar, Petitioner followed inside after him. (App. 815).

Thus, even if an immunity hearing was held, there is no reasonable probability immunity would have been granted because Petitioner could not have established by preponderance of the evidence that he or Thoro were without fault in bringing about the conflicts, that they reasonably feared for their lives, or that they did not have probable means for avoiding the danger. Consequently, even if Counsel acted deficiently, Petitioner was not prejudiced by the alleged deficiency.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
Chelsey F. Marto

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0386

ATTORNEYS FOR RESPONDENT

February 2, 2021