THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Appellate Case № 2018-000464
Lower Case No. 2014-CP-10-3019

Jerome Campbell, # 349454, ... Petitioner,

vs.

State of South Carolina, ... Respondent.

BRIEF OF PETITIONER

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Statement of Issue Presented

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective when he failed to object to the trial judge charging mutual combat which undercut the self-defense charge in violation of the principles established in *State v. Taylor,* 356 S.C. 227, 589 S.E.2d 1 (2003)?

Statement of the Case

Procedural History

Jerome Campbell was tried before a jury on January 23-27, 2012 on charges of murder and three counts of assault and battery with intent to kill. The charges arose from an incident that occurred in Charleston, SC on January 9, 2009. He was convicted of all the charges and sentenced to thirty years for murder and ten years on the three assault and battery with intent to kill charges. The judge ran the latter charges concurrent with the murder charge.

A timely Notice of Intent to Appeal was filed with the South Carolina Court of Appeals. The conviction was affirmed on August 7, 2013. A petition for rehearing was denied on October 23, 2013. Mr. Campbell did not appeal further.

Mr. Campbell filed his initial Post Conviction Relief Hearing on May 12, 2014. An Amended Petition was filed on January 12, 2017. A hearing on the Post Conviction Relief hearing was held before the Honorable William H. Seals, Jr. on January 12, 2017. By his Order of January 17, 2018, Judge Seals denied the Petition. Mr. Campbell filed a Motion to Alter or Amend the Judgement on January 31, 2018. This Motion was denied by Order filed March 7, 2018. Mr. Campbell filed his Notice of Appeal on March 12, 2018. This Court granted the Petition for Writ of Certiorari on February 9, 2021 on the single issue of whether trial counsel was ineffective in failing to object to the trial judge charging the law of mutual combat.

Factual History

The events that led to the shooting arose from a marital dispute between Charise Coaxum, the sister of Jerome Campbell, and her husband, Michael Allen. Mr. Allen and his wife resided at the Plantation Apartments. Anthony German and his brother Michael German, the deceased,

resided at Georgetown Apartments. Frank Haigler, the brother of Michael Allen, testified he had been to the Plantation Apartments to try and mediate the differences between Ms. Coaxum and Michael Allen. App. at 306, l 25 to 307, l 5. He testified he stayed at the Plantation apartment for about 45 minutes. App. at 308 ll 3-8.

Mr. Haigler testified he saw Mr. Campbell in front of the apartment of Ms. Coaxum, his sister-in-law, at the Plantation apartment. App. at 303, l 4-6. He later testified Mr. Campbell was not at the Plantation apartment. App. at 308, ll 19-21. After Mr. Haigler left the Plantation apartment, he, with his brother Michael Allen, went to the Georgetown apartment of Anthony and Michael German. At this apartment, Mr. Haigler said he saw Mr. Campbell with a pistol. App. at 304, l 3 to 305, l 7. Mr. Haigler testified that notwithstanding messages from Mr. Campbell for Michael Allen not to return to the Plantation apartment, he, Michael Allen, Anthony German, and Michael German went to the vicinity of the apartment. According to Google Earth, the distance between the two apartment complexes is approximately 4 miles.[1]

Mr. Haigler testified that he told the others to wait at the store while he went to the Plantation apartment of Ms. Coaxum and Mr. Allen. App. at 310, l 24 to 311, l 14. As he approached the apartment, he saw Mr. Campbell. He stated he and Mr. Campbell had a confrontation in which he was struck by Mr. Campbell. He also observed two other men with shotguns. App. at 313, ll 11-15. After being struck, he fled the scene and stated he heard two gun shots, presumably from the shotguns. App. at 316, ll 7-14. After he fled the scene, he heard a car speeding from the Plantation Apartments and heard more gunshots. App. at 317, ll 7-11.

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[1] The South Carolina Supreme Court, in an appeal, has taken judicial notice of distances. "Rand McNally's Road Atlas indicates Gray, Tennessee, is about ten miles from Johnson City, Tennessee." *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004)

No one was able to identify who was driving or who was shooting. As a result of the shooting, a ricochet bullet struck and killed Michael German. Mr. Campbell turned himself in to the police some two hours later. App. at 262, ll 3-6.

Standard of Review

The South Carolina Supreme Court has established the Standard of Review in the appeal of a Post Conviction Relief Hearing. The Court said, "Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839 (2018)(internal citations omitted)

Argument

Question

Did the Post Conviction Relief judge err in failing to find trial counsel ineffective when he failed to object to the trial judge charging mutual combat which undercut the self defense charge in violation of the principles established in *State v. Taylor,* 356 S.C. 227, 589 S.E.2d 1 (2003)?

At the close of the case, a charge conference was held. Based upon the discussion of the parties, the trial judge elected to charge the law of mutual combat. This was apparently first suggested by the State when the solicitor stated "And again, I would just here mention the line of cases involving mutual combat and that's where mutual combat means you both bring guns to a fight, self defense is not a defense available to you and clearly - - - " App. at 665, l 24 to 666, l 2. In ruling on this issue, the trial judge stated "Well, that's part of the instruction and actually, self - - mutual combat is - - There are different parts of mutual combat. Of course, if he voluntarily participated in combat for purposes other than protection, then it's not self-defense, even if during the combat he feared death or serious bodily injury." App. at 666, ll 3-9. Trial counsel then agreed that if the jury finds mutual combat, then they could not find self-defense. App. at 667, ll 20-24. In discussing her jury charge the trial judge again stated she would charge mutual combat. App. at 670, ll 14-18. No objection was ever raised by defense counsel.

The trial judge then charged the law as to mutual combat. The trial judge placed the mutual combat charge in with the self-defense charge right after stating the first element of self-defense as being "without fault in bringing on the difficulty." App. at 759, ll 2-3. Mutual combat would, of course, eliminate the first element. One willingly participating in mutual

combat could not claim they were without fault in bringing on the difficulty. Before going to the second element of self-defense, the trial judge gave the mutual combat charge. She told the jury, "If the defendant voluntarily participated in mutual combat for purposes other than protection, the killing of the victim would not be self-defense." App. 759, ll 11-13.[2]

This charge by the trial judge was contrary to the holding of the South Carolina Supreme Court in *State v. Taylor*, 356 S.C.227, 589 S.E.2d 1 (2003), a case decided some nine years before this trial. Trial counsel admitted he was not familiar with the *Taylor* case. App. at 1077, ll 5-15. As the South Carolina Supreme Court said in *Taylor*, "Although the Court charged self-defense properly in Petitioner's case, that charge was negated by the Court's unwarranted charge on mutual combat. We find that the Court's mutual combat charge acted as a limitation on the Petitioner's ability to claim self-defense, and prejudiced him by transferring the *State's burden* to disprove self-defense onto the Petitioner, forcing him to prove self-defense in violation of *Burkhart Addison, and Wiggins*." *Id.* at 235, 589 S.E.2d at 5 (emphasis in original).

In his ruling, the PCR judge failed to address the *Taylor* opinion. App. at 1091. The failure to address the *Taylor* decision was called to the attention of the PCR judge through a Motion to Alter or Amend the Judgment. App. at 1101. In the Order denying the Rule 59 Motion, the PCR judge again failed to address the case. The closest the PCR judge came to addressing the *Taylor* issue is to say "Here, there is some evidence presented that Applicant engaged in a mutual willingness to fight throughout the day of the incident. Therefore, the trial court's instruction on mutual combat was supported by the evidence presented at trial and any

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[2] How one could participate in mutual combat "for protection" is not explained nor can this writer think of any way it can be done. This statement only added to the confusion as to the charge.

objection would not have been successful." App. at 777 ll 22 to 778 l 1. No facts support this conclusion. The PCR judge does not state facts to support this statement. This statement ignores the importance and significance of the *Taylor* decision. The PCR judge never addressed the burden shifting importance of the *Taylor* decision. Nor did it address the South Carolina Supreme Court's conclusion in *Taylor* that mutual combat seldom, if ever, should be charged with self-defense.

Thus, the PCR judge never ruled on the key issue in this case. As such, this Court is not bond by the ruling of the PCR judge in this matter as there was no ruling by him. In addition, the failure of trial counsel to object to the mutual combat charge is an error of law and should be reviewed de novo in this case. The PCR judge also erred as a matter of law in finding that the facts of this case presented an issue of mutual combat. This is also reviewed by this court de novo.

The same principles established in *Taylor* should apply in this case. Here the concept of "mutual combat" was not clearly established, if at all. While there had been disagreements and arguments between Mr. Campbell and the others, there is no evidence that each armed themselves with the idea or belief they were going to engage in mutual combat at some point during the day. In fact, the record shows that Mr. Campbell had told Mr. Haigler and his brother not to come to his sister's apartment. App. at 338, l 25 to 339, l 6. Nothing in the record suggests Mr. Campbell expected any of the others to come to the apartment of his sister.

Mr. Frank Haigler testified he was trying to resolve a disagreement between his brother Michael Allen and his sister-in-law, who is the sister of Jerome Campbell. App. at 306, l 6 to 308, l 18. Michael Allen and his wife lived at the Plantation Apartments. Mr. Campbell was not

present during the discussions at his sister's Apartment. App. at 308, ll 19-21. Mr. Campbell and Frank Haigler had a confrontation after Mr. Haigler went to the apartment of Anthony and Michael German. This occurred at another apartment complex and after Mr. Haigler had been to the Plantation Apartments to discuss the issues with his brother's wife. Nothing in this confrontation suggested either would arm themselves in mutual combat. App. at 304, l 9 to 305, l 9. After this confrontation, Mr. Haigler and his brothers decided to go to the store near Michael Allen's Plantation apartment and have a beer. App. at 310, l 24 to 311, l 11. Mr. Haigler then went across the street to the apartment of his brother, Michael Allen. He was not armed. App. at 312 ll 2-14. Mr. Haigler testified he did not expect to find anyone at the Plantation apartment. App. at 340, ll 7-8; 342, ll 2-3.

Charise Coaxum, the sister of Mr. Campbell and wife of Michael Allen, testified, concerning the initial contact at the Plantation Apartments, that Mr. Haigler and his brother, along with Anthony German and Michael German, came by the apartment earlier that day. They had made threats against Mr. Campbell. App. at 496, l 8 to 498, l 21. They left when Ms. Sandra Campbell, the mother of Jerome Campbell and Charise Coaxum, threatened to call 911. At that point, Ms. Coaxum left the apartment to spend the night on James Island with her mother. Ms. Coaxum's testimony was confirmed by her mother who arrived at the apartment between seven and eight after receiving a call from her grandchild. App. at 532, l 12 to 535, l 19. In fact, Frank Haigler testified he knew his brother did not have a key to the Plantation Apartment and that his sister in law was going to be in James Island. App. at 340, ll 5-8. This testimony shows there was no mutual combat and no intent on the part of anyone to engage in mutual combat. There was certainly no evidence that Mr. Campbell intended to engage in mutual

combat. Mr. Campbell had done nothing to encourage anyone to return to the Plantation Apartments. There was no request, expressed or implied, by any of the parties to meet and settle their differences. As trial counsel was not familiar with the *Taylor* decision, he made no decision on how to use mutual combat as part of any defense strategy. He even admitted if the jury finds mutual combat, there would be no self-defense. App. at 667, ll 22-24. In this respect, trial counsel erred as a matter of law in failing to object to the mutual combat charge. The mutual combat charge in this case served only to confuse the jury as to the meaning of self-defense and the burden of proof. As there was no trial strategy involved in failing to object to the charge, Mr. Campbell was prejudiced by his trial counsel failing to object to the mutual combat charge. It introduced a principle of law for which no evidence had been introduced. This can only serve to confuse the jury. The charge asked them to look for something that did not exist.

This Court cannot conclude beyond a reasonable doubt that the jury did not base their decision on facts that did not exist simply because the charge suggested those facts did exist. As this Court has found, an improper mutual combat charge is in fact prejudicial to a defendant as lessening the burden on the State, prejudice as required under *Strickland v. Washington*, 466 U.S. 668 (1984) has been established.

No facts in the record support the decision of the PCR judge that trial counsel was not deficient in failing to object to the mutual combat charge. First, there are no facts to support a mutual combat charge. Second, even if there were some facts, the PCR judge did not cite any facts that would justify trial counsel in not objecting to the mutual combat charge.

This Court has recently discussed the *Taylor* case and properly noted, "Although we have a limited number of cases in our jurisprudence on the law of mutual combat, that case law

unequivocally indicates that it is essential there is evidence of a pre-existing ill-will between the parties and that both parties are armed with deadly weapons and have knowledge that the other is armed." *State v. Bowers*, 428 S.C. 21, 34, 832 S.E.2d 623, 630 (Ct. App. 2019), reh'g denied (Sept. 20, 2019), cert. granted (May 22, 2020). While there may be some argument of pre-existing ill-will, the record is completely devoid of any evidence that each knew the other would be armed at the scene of the shooting. Without this critical factor, mutual combat fails as matter of law. "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." *State v. Blurton,* 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). On direct appeal, if an objection to the charge had been raised in this case, this Court would have been required to reverse the conviction.

In *Bowers,* this Court found the mere charge as to mutual combat was prejudicial because it negated self-defense. This Court said, "We find the erroneous charge on mutual combat was prejudicial because the charge effectively negated Appellant's self-defense plea." *Id.* at 37, 832 S.E.2d at 632. Similarly, the South Carolina Supreme Court in *Taylor* said, "Although the Court charged self-defense properly in Petitioner's case, that charge was negated by the Court's unwarranted charge on mutual combat." *Id.* at 235, 589 S.E.2d at 5. The self-defense charge was negated in this case also. In *Taylor*, the South Carolina Supreme Court said as to mutual combat, "This finding, however, fails to recognize that requiring Petitioner to prove he withdrew from the fight removes the burden to disprove self-defense from the State, and improperly places it on the Petitioner." *Id.* at 235, 589 S.E.2d at 5.

In this case, one side denied having a firearm. A gun shot residue test suggested they did have a firearm and fired it. App. at 387, ll 11-23; 588, ll 10-24; 632, ll 8-19. Also, the expert for

the defense testified in his opinion, three close shots were fired first before the more distant shots were fired. The second of the two distant shots seemed fainter, implying the shooter was moving away from the scene. App. at 598, ll 5-19. This testimony would suggest the people at the store fired first. In addition, an automobile parked at the Plantation Apartments had a bullet hole in it. App. at 207, l 21 to 210, l 4; 214, l 22 to 216, l 20. This suggests that a firearm had been fired from across the street of the Plantation Apartments in the vicinity of the store where the brothers were standing. The charge of mutual combat simply made it easier for the jury to decide the contested issues by concluding it was mutual combat due to both sides being armed. The mutual combat charge made such a finding an easy solution for the jury to make. Evidence showed both sides were armed.

This theme of both sides being mutually armed was used by the State in their closing argument. As the State argued, "If they did, and if we all bring guns to the gun fight, none of us get to say self-defense. All right? That's what mutual combat says and it's clear from his actions that he did." App. at 731, ll 12-14. The fact should be noted that this is not a correct statement of the law. Even if both sides are armed, a defendant may invoke self-defense. This argument by the State is based, at least in part, upon the jury charge where the Court stated, "In addition it must be shown that both parties were armed with a deadly weapon." App. at 759, ll 23-24. The ambiguous charge, with the comment by the solicitor, would have easily mislead the jury.

The prejudice to the defendant is that the mutual combat charge, as stated in *Taylor,* requires Mr. Campbell to prove he withdrew from the alleged mutual combat and that lessened the burden of the State to disprove self-defense. As the State in this case argued, if the jury believed both sides were armed it was mutual combat. Giving the jury this out was prejudicial.

As the South Carolina Supreme Court has said, "In deciding the prejudice prong in this PCR action, we examine the following factors, which are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt." *Edmond v. State*, 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000). In making a harmless error analysis on direct appeal, the Court said, "Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012).

1. The record reflects that after about two and a half hours of deliberation, the jury sent a note to the judge that stated, "The jury would like to have the instructions regarding self defense, including mutual combat and the hand of one is the hand of all repeated, please." App. at 773, ll 12-15. After about two more hours of deliberations, the jury then reached a verdict. Based on the facts of this case, this Court cannot conclude that the error was harmless beyond a reasonable doubt. The jury specifically mentioned "mutual combat" in their request to be re-charged.

The reason that mutual combat in misleading and confusing to the jury is that a jury that properly understands the concept of "being without fault in bringing on the difficulty," does not need to be told a person who agrees to meet another for a gun fight, cannot claim to be without fault in bring on the difficulty. The mutual combat charge simply enabled the solicitor to argue, as he did, "If they did, and if we all bring guns to the gun fight, none of us get to say self-defense. All right? That's what mutual combat says and it's clear from his actions that he did." App. at 731, ll 12-14. The issue in this case is not, and usually never is, did both sides bring a

gun to the gunfight. The issue is whether did one side start the gunfight when the other side was not expecting it. Merely being in possession of a firearm does not, and should not, eliminate the right to self-defense.

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the Post Conviction Relief Judge and grant Mr. Campbell a new trial.

March 10, 2021

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