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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

MICHAEL ANTHONY ROGERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002116

Appeal from Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 2021-UP-247

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Michael Anthony Rogers respectfully petitions the Court for a rehearing of its Opinion No. 2021-UP-247 issued on June 30, 2021 based upon the following points overlooked or misapprehended by the Court:

Regarding the introduction of the 911 recording, counsel testified as to its contents, the benefits and drawbacks to introducing it, and whether he found it helpful:

> In a way and in a way not. Some of the problems, as I was looking at my notes on the 9-1-1 tape, is Tonya, who's doing most of the talking that you heard, that's the female voice that you heard, Tonya Lowery, who we used to testify, she made it sound like he got mad because Mr. Ryan made a pass at her and they fought as opposed to, you know, he told him to leave and he wouldn't leave, you know, and

> that kind of thing. So, you know, I'm a little bit - - I was a little bit leery of that scenario that he just got mad and fought him and killed him.
>
> It was helpful in the sense that you do hear the concern and the panic in Mr. Rogers' voice, you know, his concern about, you know, they were saying he's losing him or dying. I know we had conversations. They were aware that the ambulance was outside and wouldn't come in, and I know Mr. Rogers periodically asked me, you know, like "Why didn't they come in?" And I was trying to explain to him that they were waiting for the police because these reports that the attacker was still on the scene and the knife - - they didn't know where the knife was, and the ambulance people will not come in until it's been secured by the officers. So, yeah, the ambulance apparently arrived and was sitting out there for a while before the officers arrived.
>
> So it's good and it's also bad, and I just felt we could do as good with their testimony, they're going to have to testify anyway, to testify about what led up to the fight or what led up to the scuffle and then what they did afterwards.

App. 566 l. 8 – 567 l. 11.

The next question and answer from counsel at the evidentiary hearing secured testimony that this was a strategic decision to omit the evidence, as correctly noted by this Court: "Trial counsel testified that he did not introduce the recording because he believed statements from Petitioner's girlfriend in the recording made it sound as if Petitioner fought and killed Victim because Victim made a romantic pass at Petitioner's girlfriend." Rogers v. State, Op. No. 2021-UP-247 (S.C. Ct. App. filed June 30, 2021).

However, this conclusion overlooks the benefits this evidence would have provided beyond what is listed in counsel's above remarks and understates the contents of the recording. While it is true that the exhibit includes references to Mrs. Lowery's beliefs as to what started the fight, her admission that she did not observe the fight notwithstanding, the call also includes multiple references to Petitioner's attempts to save the decedent's life. Lowery advised the 911 operator that Petitioner was "trying to help him." 9-1-1 Call Audio at 1:48. Petitioner could be heard pleading with the decedent to wake up. Audio at 4:57. Lowery plainly stated that

Petitioner was not trying to hurt the man, rather he was trying to help him and save him. Audio at 5:10 – 5:33. She outright declared that Petitioner was trying to "keep him alive." Audio at 6:07. Lowery told the 911 operator that Petitioner was not armed and that it was safe for EMS to come into the house. Audio 6:42; 7:28.

As noted in the Brief of Petitioner, this evidence would have shed a different light on Petitioner. During closing argument, the state contended that after stabbing the decedent, Petitioner went to the bathroom, washed his hands, washed the knife, and threw it underneath the dryer. App. 454 ll. 8 – 23. Counsel was asked about this during the evidentiary hearing and admitted he did not object. App. 564 ll. 4 – 23. Had the 911 call been entered, it would have prevented the solicitor from painting Petitioner in such a negative light or at least given counsel a means of rebuking the state's mischaracterization of the evidence.

In addition to refuting the state's arguments, the evidence would have bolstered Petitioner's credibility. Petitioner told the jury that he attempted to save the decedent's life. App. 386 ll. 1 – 11. He denied placing the knife anywhere intentionally and indicated that the last time he saw it, it was on the bathroom sink. App. 391 l. 3 – 392 l. 13. Further, and perhaps more importantly, the 911 recording would have proven that Petitioner began life-saving efforts for his friend upon realization that he was accidentally stabbed. This contemporaneous record does admittedly contain references to Lowery's opinions as to how the fight started, but it also entails additional information that would have benefitted Petitioner at trial.

Counsel's strategy as evidenced in his opening statement was to explain why the fight started, namely that the decedent placed his hands on Lowery. App. 161 l. 8 – 163 l. 15. Petitioner asked that the decedent leave, but his demands were rebuffed. The 911 call would

have served as meaningful evidence to show that Petitioner did not intend to injure his friend and acted quickly to administer aid.

The South Carolina Supreme Court has held "where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward. Edwards v. State 392 S.C. 449, 459, 710 S.C.2d 60, 66 (2011) (citing Jackson v. State, 329 S.C. 345, 350-51, 495 S.E.2d 768, 770-71 (1998); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). This recording would have aided other evidence introduced at trial, most notably the testimony presented by Petitioner and Lowery that the stabbing was an accident and completely unintentional.

In Vail v. State, this Court reversed the PCR court's denial of relief and held that trial counsel's deficient failure to object to hearsay testimony constituted ineffective assistance. 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013). Following a discussion of whether counsel's decision not to object in that case was part of a reasonable trial strategy, this Court noted: "Portions of the hearsay testimony exceeded the purpose of trial counsel's stated trial strategies." Id. at 89, 738 S.E.2d at 510. Similarly, counsel was correct in his analysis that Lowery stated in the 911 call that the decedent made a pass at her and it was her opinion that the two men fought as a result. However, the decision not to introduce this recording did not prevent that from becoming part of the state's theory of the case. As seen in the state's opening statement:

> During the course of the evening, the … defendant became angry towards the victim 'cause he felt like he had done something to his girlfriend that he shouldn't have, he touched her in some way so in his anger he attacked the victim, he attacked John; it begins a fist fight, it escalated shortly thereafter into a knife fight.

App. 160 ll. 15 – 20.

The added benefit in the 911 call recording was to show the jury that Petitioner did not intentionally injure his friend. If he had acted with malice, it is unlikely that Petitioner would have then begun to save his friend's life.

Petitioner was also entitled to relief on the jury instruction issue. This Court cited to State v. Rye, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007) for the elements necessary to show the defense of habitation. In Rye, the South Carolina Supreme Court reversed Rye's murder conviction based on the trial court's incorrect jury charge regarding habitation. Id. Rye cited State v. Bradley, 126 S.C. 528, 533, 120 S.E.2d, 242 (1923) for the underlying test for habitation as well as four scenarios involving the law of habitation:

> (1) When the occupant is the slayer and stands upon habitation apart from self-defense; (2) When the occupant is the slayer, stands upon the right of self-defense, but claims immunity from his duty to retreat; (3) When the occupant is the slain and the homicide occurred while he sought to protect his habitation; (4) When the occupant is the slain and the homicide occurred while he was attempting to eject a trespasser but was outside of his habitation.

Bradley at 233-37; 120 S.E. at 242-243.

This Court held that "[a]lthough the evidence shows Petitioner asked Victim to leave his home, Petitioner admitted at trial that he was not attempting to eject Victim from his home during the fight between the pair." Rogers v. State, Op. No. 2021-UP-247 (S.C. Ct. App. filed June 30, 2021).

Petitioner asked the decedent to leave three times. App. 13 ll. 7 – 24. As a result, trial counsel researched a habitation charge. App. 561 ll. 15 – 24. His reason for not proceeding with a request for habitation language illustrated a misunderstanding of the law wherein he did not "really view this as [Petitioner] defending his home," but rather Petitioner was defending himself. App. 561 ll. 15 – 24.

Counsel for Petitioner proved at the PCR evidentiary hearing that State v. Bryant, 391 S.C. 225, 705 S.E.2d 465, 470 (Ct. App. 2010) provided favorable language and would have supported his defense of Petitioner at trial. App. 562 l. 2 – 563 l. 22.

For practical purposes, there was no difference between Petitioner's repeated requests for the decedent to leave the home and his admission that he was not attempting to eject the man from his home during the fight. App. 227 ll. 23 – 25. Lowery's testimony shows how Petitioner met the elements for habitation:

> It wasn't long after [Jackie Lance] left [Petitioner] asked John to leave. **He told him to leave, he told him three times** and … I told him, I said, [h]e can't go, she took his truck, and I'm tryin' - - I wanted like, John, you sit here and, Mike, you sit here and then John swung and then he hit [Petitioner] in the face and … they were fightin'.

App. 227 l. 22 – 228 l. 7. (emphasis added).

This exchange was reiterated on cross-examination with trial counsel questioning Lowery:

> Q: After she left [Petitioner] told John to leave?
>
> A: Yes.
>
> Q: Wanted him out, I mean he said he wanted him outta the house?
>
> A: Yes.
>
> Q: You told [Petitioner] he can't go right now because his truck or that Jackie's gone with his truck, is that correct?
>
> A: Yes.
>
> Q: Mike told you, or said, Well he can still get outta the house and leave, is that correct?
>
> A: He just said, he kept tellin' John he wanted him out of his house. He told him like three times, I mean, right after each other and then that's like I say, that's when John swung, I mean, it was just, there wasn't no reaction,

> there was no time to call nobody, I mean, it was just, it just happened. I mean, they started fightin' again.

Q: What I'm tryin' to get at is even after you told [Petitioner] that he couldn't leave because his truck was gone [Petitioner] still told John that I want you outta the house?

A: Yes.

App. 250 l. 12 – 251 l. 6.

This exchange corroborated Petitioner's testimony that he told John to leave. App. 378 ll. 17 – 22. Additionally, Petitioner testified at trial that he never "changed his mind and [told] him that he could stay for a while." App. 395 ll. 5 – 8.

The admission this Court referenced occurred during cross-examination. Although Petitioner testified that he did not try to eject John, this statement did not undo his previous testimony:

Q: - - - it was your home but you weren't trying to eject John at this time, were ya, - - -

A: I was tryin' to eje - - I didn't try to eject John, I told him to leave before he attacked me. I did not try to eject him. If I wanted - - if I'da tried to eject him, I woulda accomplished just that and got him outta my home.

App. 417 ll. 7 – 12.

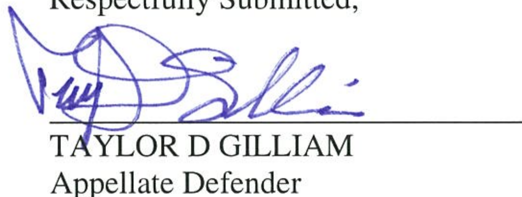
Petitioner's actions in repeatedly requesting that John leave his home were reasonable under the circumstances. This conversation occurred after the two had already fought at least once. App. 404 ll. 21 – 25. Petitioner is not required to use the legal terms of art, nor does his statement that he was not trying to eject John physically negate or dilute in any way his prior testimony. He was entitled to the defense of habitation based on the testimony he provided at the trial level.

Similarly, Petitioner was entitled to a jury charge on involuntary manslaughter, and counsel was ineffective for failing to request it. "Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge." Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 212 (2008). This case is distinguishable from State v. Sams wherein the defendant was convicted of voluntary manslaughter after choking a victim. 410 S.C. 303, 764 S.E.2d 511 (2014).

Petitioner testified pretrial that he did not remember stabbing the decedent and that his actions were unintentional. Tr. 47, ll. 19 – 24. His testimony at trial mirrors the language from Tisdale. Tr. 382 l. 14 – 382 l. 22. Petitioner's actions were unintentional and he was not acting with malice. He was lawfully defending himself from an attack from his friend who was armed with a knife. App. 380 l. 2 – 382 l. 22. In Sams, the death was caused by strangulation. By comparison, the decedent in the matter *sub judice* died following a struggle with a weapon which supports an involuntary manslaughter charge under Tisdale.

Petitioner respectfully requests that this Court reverse its decision and remand for a new trial.

Respectfully Submitted,



TAYLOR D GILLIAM
Appellate Defender

This 15th day of July, 2021.

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V.

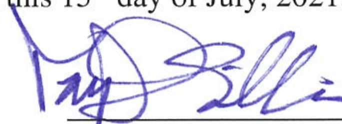
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002116

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William H. Ray, Esquire, at the Rembert Dennis Building, at the primary e-mail address listed in the Attorney Information System (AIS); and Michael Anthony Rogers, #348110, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 15th day of July, 2021.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT