STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

LITTLE JOHNNY LEE MACKEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212877

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding that plea counsel provided effective assistance of counsel where plea counsel failed to conduct a reasonable investigation because plea counsel failed to conduct any analysis as to whether the Castle Doctrine as codified in the Protection of Persons and Property Act provided immunity to Petitioner from prosecution for murder?

STATEMENT

Indictments

On July 28, 2009, Petitioner Little Johnny Lee Mackey was indicted by the Anderson County Grand Jury for: (1) one count of murder in violation of S.C. CODE ANN. § 16-3-10; and (2) one count of possession of a weapon while committing the crime of murder in violation of § 16-23-490. App. 93-94.

Guilty Plea and Sentence

On February 8, 2011, Petitioner appeared before the Honorable J. Cordell Maddox, Jr. where he pled guilty to murder. App. 6-7. Petitioner was represented by Jennifer Johnson, and the State was represented by Assistant Solicitor Jennings Byford. App. 1-18.

The State presented its version of the facts, followed by Petitioner's counsel's presentation. App. 7-13. The incident occurred on May 16, 2009. App. 7, ll. 17. A few weeks before the incident, Petitioner's brother and the decedent had gotten into a verbal altercation witnessed by Petitioner. Shortly after that, Petitioner's brother's common-law wife was shot on May 15, 2009. Petitioner believed that the decedent had been involved in the shooting of his brother's common law wife the previous evening, even though a different individual was subsequently charged in that offense. App. 10, ll. 6-25; 11, ll. 1-11.

The day of incident, Petitioner and his brother visited his brother's wife at the hospital and then returned to the brother's house to clean up the blood from the shooting. App. 10, ll.18-22.

While Petitioner and his brother were at the house, the decedent approached the home in a vehicle, pulling past the house a little bit and then backing up in the street in front of the house and pulled into the driveway. Although it was subsequently discovered that the

decedent was unarmed, Petitioner assumed the decedent was armed and was at the house to stir up trouble. App. 8, l.4; 11, ll. 5-11.

Following the shooting, Petitioner called 911 shortly after and gave a statement that he had shot the decedent in self-defense. App. 8, ll. 14-16.

At the plea hearing, plea counsel requested the Trial Court to consider a sentence of thirty years. App. 12, ll. 19-20. The State made no recommendations as to the sentence. App. 4, ll. 7-8.

The Trial Court accepted the plea and sentenced Petitioner to forty-five years. App. 17, ll. 17-19, 25.

Petitioner did not file a direct appeal of his guilty plea.

PCR Application and Evidentiary Hearing

On May 5, 2011, Petitioner filed his application requesting post-conviction relief (PCR). App. 20-35. The State filed its return on January 13, 2012. App. 36-40. Petitioner filed an Amendment to his PCR application on May 7, 2012. App. 41-44.

An evidentiary hearing was held before the Honorable Alexander S. Macaulay on June 5, 2012. App. 45-76. Petitioner was represented by Rodney Richey, and the State was represented by Assistant Attorney General Kaelon E. May. App. 45. Petitioner and trial counsel testified at the evidentiary hearing.

Petitioner's counsel asserted that one of the grounds for the PCR application was plea counsel's failure to adequately investigate the case. App. 48, ll. 2-3. Petitioner testified that he had spoken with his plea counsel a couple of times and that she met with him twice. He did not know if she had done any investigation into his case. App. 50, ll. 5-25; 51, ll. 1-23.

Petitioner's plea counsel told him that he could accept a sentence of anywhere between thirty years to life or go to trial. Petitioner felt that he did not have any options. App. 53, ll. 4-7. Petitioner further testified that he was not offered any plea deals, that he asked his counsel about the possibility of any plea deals, and that his counsel told him that there would be no plea deals. App. 9, ll. 17-25; 10, ll. 1-6. Petitioner asked his plea counsel if she could try to get an offer from the State but she informed him that the only options he had was the thirty years to life or go to trial. App. 10, ll. 10-14.

Plea counsel testified that she only analyzed Petitioner's case under the traditional rules of self-defense and did not conduct any investigation as to whether the Castle Doctrine as set forth in S.C. CODE ANN. § 16-11-410 et al applied. App. 22, ll. 2-10. Plea counsel believed that if she had raised the issue of the Castle Doctrine to the solicitor, she could have perhaps received a better plea deal for Petitioner. App. 66, ll. 11-25; 67, ll. 1-3.

Order of Dismissal

On August 16, 2012, Judge Macaulay ruled in his Order of Dismissal that Petitioner had not established any constitutional violations or deprivations that would require the court to grant Petitioner's PCR application and denied Petitioner's claim. App. 87-88. The PCR court dismissed Petitioner's allegation that plea counsel was ineffective for failure to investigate his case because "Applicant could not point to any specific matters counsel failed to discover which would have caused him to proceed with a jury trial instead of pleading guilty," and "offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Applicant." App. 83.

This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective assistance of counsel because plea counsel failed to conduct a reasonable investigation where plea counsel failed to conduct any analysis as to whether the Castle Doctrine as codified in the Protection of Persons and Property Act provided immunity to Petitioner from prosecution for murder.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

Where a defendant challenges a guilty plea, the defendant must show that there is a reasonably probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

The United States Supreme Court has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. This includes a duty to investigate possible defenses even in a case where the defendant ultimately pleads guilty. Cobbs v. State, 305 S.C. 299, 302 408 S.E.2d 223, 225 (1991) (provides that failure to

investigate possible defenses constitutes ineffective assistance of counsel). "Because a guilty plea is valid only if it represents a knowing and voluntary choice among alternatives, . . . a client's expressed intention to plead guilty does not relieve counsel of their duty to investigate possible defenses and to advise the defendant so that he can make an informed decision." Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996).

In this case, Petitioner's plea counsel admitted that she never analyzed whether the Castle Doctrine as codified in the Protection of Persons and Property Act (the "Act") could be used as a defense. App. 66, ll. 4-10. The Act provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
> >
> > (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> . . .
>
> (D) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime as defined in Section 16-1-60.

S.C. CODE ANN. § 16-11-440.

The Act further provides that "[a] person who uses deadly force as permitted by the provision 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." § 16-11-450(A).

The Act augments common law self-defense principles by establishing a presumption of "reasonable fear of imminent peril of death or great bodily injury" in the person who uses deadly force against an unlawful intruder. § 16–11–440(A). "This presumption is crucial because at common law, any self-defense claim requires the person using deadly force to demonstrate that he 'actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger' and that a 'reasonable prudent man of ordinary firmness and courage would have entertained the same belief.'" Fielder v. Stevenson, No. 2:12-cv-00412, 2013 WL 594764, at *5 (D.S.C. Feb. 14, 2013) (quoting State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

"In sum, the Act eliminates the duty to retreat from a threat when a person is in his own home. Additionally, while the Act does not eliminate the requirement that the person using deadly force against an intruder demonstrate a reasonable fear of injury or death, it does provide a rebuttable presumption of that state of mind." Id. at *5.

Petitioner's plea counsel conceded that she only analyzed Petitioner's case under the traditional rules of self-defense and not under the terms of the Act. Plea counsel did not undertake any investigation as to whether the decedent was in the process of unlawfully and forcefully attempting to enter into the dwelling or residence of which Petitioner was an invited guest which would have entitled Petitioner to the presumption that he had a reasonable fear or imminent peril of death or great bodily injury when he used deadly force which would have then entitled Petitioner to immunity from prosecution.

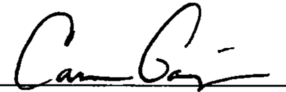
Petitioner was prejudiced by plea counsel's failure to investigate whether the Act applied to the facts of the Petitioner's case. Had he been aware that he might have been entitled to immunity from criminal prosecution under the Act, the Petitioner would have likely had his plea counsel seek a determination pre-trial as to whether the Act applied prior to pleading guilty. Petitioner was never given the choice to make this decision because he was unaware of this additional defense.

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill, 474 U.S. at 56. Without a complete investigation by counsel, Petitioner could not have made a knowing and voluntary plea because he did not know the available alternatives.

CONCLUSION

For the reasons set forth herein, the PCR court erred in denying Petitioner's Application for Post-Conviction Relief. This Court should grant Petitioner's writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
ALEXANDER S. MACAULAY, CIRCUIT COURT JUDGE

LITTLE JOHNNY LEE MACKEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Little Johnny Lee Mackey states:

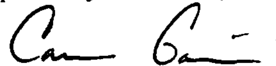
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 5, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Little Johnny Lee Mackey.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of April, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Alexander S. Macaulay, Circuit Court Judge

LITTLE JOHNNY LEE MACKEY,

PETITIONER,

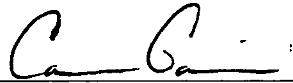
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Little Johnny Lee Mackey, #294652, at Perry Correctional Institution this 12th day of April, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of April, 2013.

_______________________________(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.