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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Saluda County

Honorable R. Keith Kelly, Circuit Court Judge

MICHAEL DURAN WATSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-000486

BRIEF OF PETITIONER

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2.

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the references by several witnesses during trial that Petitioner Watson was using a sawed-off shotgun when the solicitor had admitted during a pretrial motion that he did not believe that he could present evidence of a sawed-off shotgun because that would likely be prejudicial because possession of a sawed-off shotgun was a crime?

STATEMENT

In October 2007, a Saluda County grand jury indicted petitioner Michael Duran Watson for murder, pointing and presenting a firearm, and a weapons charge. App. 718-28. On July 26, petitioner was tried before the Honorable William P. Keesley and a jury. App. 1. H. Franklin Young, III represented the State and Paul Andrew Anderson represented petitioner. App. 1. The jury acquitted petitioner of murder, but convicted him of the lesser included offense of voluntary manslaughter. App. 593, l. 20 – 25. The jury convicted petitioner on both weapons charges. App. 594, l. 1 – 16. Judge Keesley sentenced petitioner to thirty years' imprisonment for manslaughter and five-year concurrent sentences on the weapons charges. App. 603, l. 4 – 16. The Court of Appeals affirmed petitioner's convictions in an unpublished opinion. App. 716 - 17.

On July 8, 2014, petitioner filed a PCR application. App. 614. On November 8, 2016, the honorable R. Keith Kelly held a hearing. App. 633. Kristy G. Goldberg represented petitioner and Johanna C. Valenzuela represented the State. App. 633. On March 7, 2018, Judge Kelly signed the Order of Dismissal. App. 700-15. Petitioner, then represented by former Appellate Defender LaNelle Durant, filed a petition for certiorari which this Court granted. This brief of petitioner follows.

STANDARD OF REVIEW

The appellate court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

ARGUMENT

1.

The PCR court erred in failing to find trial counsel ineffective for not sufficiently presenting Petitioner Watson's self-defense theory to the jury because trial counsel failed to bring out during Petitioner's testimony that someone from the group of young men involved in surrounding Petitioner's car prior to the trial incident had shot at Petitioner in a prior incident several days earlier which was prejudicial to Petitioner because there was a reasonable probability that the jury would have found him not guilty since they did find him guilty of the lesser included voluntary manslaughter.

Petitioner told the police when he was arrested that he acted in self-defense. App. 461, l. 12 – 18. He testified in his own defense at trial. App. 454, l. 13 – 21. About two weeks before the shooting in this case, petitioner was at a park. App. 463, l. 3 – 11. When petitioner was in a car with his cousins about to leave, someone threw a rock at the car. App. 463, l. 22 – App. 464, l. 8. They got out of the car and Warren Chandler, the brother of the decedent, pulled a gun. App. 464, l. 4 – 8. Petitioner told the jury this incident made him afraid and he began riding round with a shotgun. App. 464, l. 18 – 25.

What the jury did not hear during the trial was that during this incident, Warren Chandler pulled out a gun and shot towards petitioner. App. 644, l. 12 – App. 645, l. 2. During the trial, Warren Chandler admitted that he was found guilty to discharging a firearm. App. 190, l. 17 – 22. On cross-examination, Warren Chandler denied firing the gun at petitioner. App. 197, l. 11 – 21. He also denied having a gun, stating, "I didn't have no gun, but I was found guilty." App. 197, l. 20 – 21.

Petitioner testified that trial counsel failed to ask him on direct-examination the questions needed to tell the jury the crucial information that Warren Chandler shot at him. App. 645, l. 11 – 646, l. 5. As petitioner put it, the jury just knew "they shot a gun." App. 646, l. 3 – 5. Trial counsel testified at PCR that his memory was "that somebody shot at them." App. 665, l. 6 – 18. When asked why he did not ask petitioner about Warren Chandler shooting at him, trial counsel responded, "I don't know." App. 666, l. 18 – App. 667, l. 3.

After the incident at the ballpark, on August 5, 2007, petitioner went to the Saluda Terrace Apartments to take money to a friend, Candace, who lived there. App. 465, l. 14 – 22. Petitioner did not see her car so he turned around the loop and saw a group of guys. App. 466, l. 4 – 9. It was dark and he did not know who they were. App. 466, l. 5 - 9. He continued past them, but looped back, stopped his car, and rolled down the window if they knew where Candace was. App. 466, l. 16 – 24. Before he could ask anything, two men rushed the car and he heard Octavious Thompson say, "Shoot now." App. 466, l. 16 – App. 467, l. 1. Petitioner picked up his shotgun and fired through the window. App. 467, l. 2 – 4.

The decedent, Andrew Chandler, was one of the group of five young men which included his brother, Warren, at Saluda Terrace Apartments that night. App. 183, l. 17 – App. 184, l. 9. They had driven there to hang out and smoke marijuana. App. 184, l. 11 – 23. One of the men left the lights on in his car and when they went up to turn them off, they heard music, saw a car come down and the driver "reach under the seat." App. 186, l. 2 – 21. According to Warren Chandler, the car blocked them in and Octavious Thompson said, "If you're going to shoot me, then shoot me." App. 186, l. 22 – App. 187, l. 8. It got quiet and then "A shot went off." App. 187, l. 6 – 10. Andrew Chandler was shot in the face and was killed. App. 143, l. 14 – App. 145, l. 12.

Petitioner left and took the gun to a friend's house. Then petitioner went home and waited for the police. He did not know anyone had been killed until he arrived at home. App. 472, l. 2 – App. 145, l. 12. The police went to petitioner's home and he turned himself in. Petitioner gave a statement to Commander Charles Holloway of the Saluda Police Department admitting that he shot but said it was self-defense. App. 475, l. 1 – 23; App. 145, l. 13 – App. 146, l. 2; App. 94, l. 1 – 25.

The PCR judge found that trial counsel presented evidence of self-defense through other witnesses who said someone in the group of boys said "shoot now" when petitioner stopped his car. The victim's pocket was turned inside out as though he pulled something out where his hands looked like a gun had been in it and removed. The judge also found that the jurors heard from petitioner about the prior incident. App. 710-11. The court also made an adverse credibility finding as to petitioner's testimony and a favorable credibility finding as to trial counsel. App. 702.

The PCR judge found that petitioner's claim of ineffective assistance of counsel on this issue was "without merit." The judge wrote that trial counsel "thoroughly and ably presented the theory of self-defense." App. 710. The judge also found that petitioner could not demonstrate prejudice where the state presented "overwhelming evidence of Watson's guilt." The judge cited Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008) to support his ruling. App. 712.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure

of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id.

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that to satisfy the prejudice prong of an ineffective assistance of counsel claim, an applicant must demonstrate there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. The court also held that the PCR court should also consider the strength of the state's case in light of all of the evidence presented as well as considering the specific impact of trial counsel's error.

The Supreme Court then found in Smalls that for the evidence to be overwhelming such that it precludes a finding or prejudice with regard to an ineffective assistance of counsel claim, the evidence must include something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of a "reasonable probability the factfinder would have had a reasonable doubt" cannot possibly be met. Smalls abrogated Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), which was the case the PCR judge relied on in finding that there was overwhelming evidence of Watson's guilt. Smalls at 181 n.2, 810 S.E.2d at 839 n.2.

In State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) the South Carolina Supreme Court listed the elements of self-defense as: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant was actually in imminent danger of death or serious bodily injury, or the defendant actually believed he was in imminent danger of death or bodily injury; (3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; (4) and the

defendant had no other probable means of avoiding danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

The PCR court erred in not finding trial counsel ineffective for not presenting the evidence that Warren Chandler shot at petitioner during the ballpark incident. Trial counsel had no explanation for why he did not elicit this information from petitioner. Trial counsel's testimony at the PCR hearing indicated that he knew Warren Chandler shot at petitioner. Therefore his failure to ask the proper questions was a matter of negligence, not strategy.

Petitioner was prejudiced by this failure. Petitioner had the right to act on appearances and to consider prior difficulties when he acted in self-defense. See State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). He did not have to wait for the five men, one of whom said "Shoot now," to get the drop on him before defending himself. See State v. Rash, 182 S.C. 42, 188 S.E.2d 435 (1936).

Had the jury heard about the seriousness of the prior altercation, it made petitioner's testimony more credible and his actions more reasonable. Petitioner's testimony about the gunshot was corroborated by Warren Chandler's conviction. Because petitioner testified, the self-defense issue was one of credibility and the PCR court's finding of overwhelming evidence of guilt fails, especially in light of Smalls. The jury obviously had doubts as they found petitioner guilty of the lesser included offense of voluntary manslaughter. The PCR court erred and this Court should reverse petitioner's conviction to allow a jury to hear the full story that was prevented by trial counsel's failure.

2.

The PCR court erred in failing to find trial counsel ineffective for not objecting to the references by several witnesses during trial that Petitioner Watson was using a sawed-off shotgun when the solicitor had admitted during a pretrial motion that he did not believe that he could present evidence of a sawed-off shotgun because that would likely be prejudicial because possession of a sawed-off shotgun was a crime.

In a pretrial hearing, trial counsel moved to suppress the testimony of two witnesses, Jarrod Coleman and Tobias Daniels, that petitioner pointed a shotgun at them approximately one week before the trial incident. The solicitor responded that the State was going to offer this as evidence that petitioner was in possession of a short shotgun the week prior to the trial incident. App. 71, l. 22 – App. 73, l. 5. However, the solicitor admitted:

> I don't believe I can present evidence of a sawed-off shotgun because I believe that would be likely prejudicial as the possession of that is a crime. Indeed that same shotgun, however, was used in this case.

App. 73, l. 6 – 10. The judge granted the motion to exclude the evidence about pointing the weapon. App. 76, l. 25 – App. 77, l. 6.

During the trial, Jarrod Coleman testified that he saw petitioner in possession of a short shotgun on July 30, 2007. There was no objection by trial counsel. App. 282, l. 10 – App. 283, l. 25. Two other witnesses testified that they saw petitioner with a sawed-off shotgun at the Saluda Terrace Apartments during the trial incident. Raymond Dale Kirkland testified that he saw petitioner in a black Toyota pull out a sawed-off shotgun and shoot and the decedent fell. There was no objection by trial counsel. App. 226, l. 1 – 23. Corddaryl Ouzts testified that in response to the State's questioning that he saw petitioner shoot a sawed-off shotgun as he was driving

through the parking lot at the apartments. There was no objection by trial counsel. App. 164, l. 4 – 17.

Petitioner testified at the PCR hearing that he was very concerned when witnesses testified that he had a sawed-off shotgun. App. 646, l. 6 – 15. He said that "paints a very evil picture." App. 646, l. 6 – 15. It was "inherently prejudicial." App. 646, l. 6 – 15.

Trial counsel testified that he did not know why he did not object when the solicitor elicited from the witness Jarrod Coleman that petitioner had a "short" shotgun because that went along with the sawed-off shotgun issue. The trial judge had ruled concerning the testimony of the two men, Coleman and Tobias, that they could say they saw petitioner with a gun but could not say that he pointed the gun at them. App. 657, l. 1 – App. 658, l. 21.

Trial counsel also admitted that he did not object when other witnesses mentioned a sawed-off shotgun that petitioner had. Counsel did not consider asking the court to limit that testimony. Trial counsel admitted that it would have been "smarter" to limit any mention of a sawed-off shotgun because he agreed that it had a negative connotation and would be prejudicial. App. 658, l. 22 – App. 659, l. 18.

The judge found on the issue that counsel was ineffective for failing to object to references to a sawed-off shotgun by witnesses to be without merit. The judge wrote that although "trial counsel did not object when sawed-off was used in reference to Watson's weapon," counsel "vigorously cross-examined each witness about the event." App. 706. The judge wrote that "counsel's performance was reasonable under professional standards and was not deficient." Therefore, the judge wrote, Petitioner could not show he was prejudiced by counsel's performance. App. 707.

In Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), the Supreme Court held that defense counsel's failure to object to inadmissible hearsay by the clinical psychologist and minor's caseworker was deficient performance and supported claim of ineffective assistance of counsel. The Court also held that defense counsel was ineffective for failing to object to impermissible bolstering by the psychologist and detective. The Court found that the defendant showed that he was prejudiced by trial counsel's ineffectiveness because there was a reasonable probability that the outcome would have been different but for trial counsel's deficiencies.

South Carolina Code Section 16-23-230 provides that it is unlawful for a person to possess a sawed-off shotgun. The PCR court erred in not finding trial counsel ineffective for not objecting to the references by witnesses that petitioner was in possession of a sawed-off shotgun. Trial counsel knew the solicitor stated that a reference to a sawed-off shotgun would be prejudicial as it was a crime. Counsel still did not object. Therefore, the issue was not preserved for appellate review which had a reasonable probability to change the outcome of petitioner's case. The reference was to petitioner committing a crime or prior bad act both of which were more prejudicial than probative pursuant to Rule 403, SCRE.

CONCLUSION

For the foregoing reasons, petitioner's convictions should be reversed and this case remanded for a new trial.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of August, 2021.