STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Georgetown County
Hon. Paul M. Burch, Circuit Court Judge
Appellate Case Tracking No. 2018-001793

Dominic A. Leggette, Petitioner,

v.

State of South Carolina, Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE

I. The Post-Conviction Relief Court did not err in finding Petitioner failed to meet his burden of establishing counsel was ineffective in failing to object to the voluntary manslaughter charge when the evidence at trial supported the charge. Additionally, the issue is not preserved for review.

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted at the November 2008 term of the Georgetown County Grand Jury for murder (2008-GS-22-00944), assault and battery with intent to kill (2008-GS-22-00945). Ronald W. Hazzard, Esq., represented Petitioner, and Scott R. Hixson, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On March 29, 2010, Petitioner proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Petitioner guilty of the lesser-included offenses of voluntary manslaughter and assault and battery of a high and aggravated nature on April 1, 2010. Judge Culbertson sentenced Petitioner to imprisonment for concurrent terms of 30 years for manslaughter, and 10 years for ABHAN.

Petitioner filed a timely notice of appeal and a direct appeal was perfected. By unpublished opinion decided March 28, 2012, the South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Leggette, Op. No. 2012-UP-203 (S.C. Ct. App. filed March 28, 2012). Petitioner petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated May 7, 2014. The Remittitur was issued on May 15, 2014.

Petitioner filed an application for post-conviction relief (PCR) on May 21, 2015. Respondent made its return on or about February 23, 2016. The Court convened an evidentiary hearing into the matter on Monday, May 9, 2016. Petitioner was present at the hearing and represented by Steven W. Fowler, Esq. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf at the evidentiary hearing. Petitioner's trial counsel, Ronald W. Hazzard, Esq. ("Counsel") also testified.

The PCR court filed an Order of Dismissal on September 24, 2018, concluding Petitioner failed to prove deficient performance on the part of trial counsel or any prejudice therefrom. Petitioner served his Petition for Writ of Certiorari on March 13, 2019. After a return by the State, this Court granted the Petition for Writ of Certiorari. Petitioner served and filed his Brief of Petitioner on October 15, 2021. This Brief of Respondent follows.

Factual Background

At trial, the State presented several witnesses. Al Ingram, one of the victims in this case, testified he was at a nightclub with Antonio Tisdale, the deceased victim. The two left the nightclub which was near the scene of the shooting, but returned a short time later. (App.204) According to Ingram, when they returned several people were exchanging words with Petitioner. Ingram explained Petitioner was from a different part of town and people from Ingram's neighborhood typically do not get along with people from Petitioner's neighborhood. (App.204-205). According to Ingram, when he walked up, someone stated: "There go Al right there. There go Al right there." At that point Petitioner walked off from the scene. (App.205; 208). He later explained someone said "Al, there goes Dominic [Petitioner]." When questioned more about it, Ingram indicated his guys were trying to get him to fight Petitioner. (App.229; 236).

Ingram acknowledged about a year prior to this incident he was involved in a fight with Petitioner but only because Petitioner was helping others that he had a dispute with at the time. He stated no weapons were involved in the prior dispute and everyone went home when it was over. However, Ingram did admit fighting Petitioner because of his involvement in the group. (App.206). He also acknowledged being adjudicated delinquent on a possession of a weapon charge three years before the incident. (App.225).

Petitioner walked away from the group and headed towards the Super Chic convenience store. According to Ingram, he and Tisdale headed in the same direction a couple minutes later to purchase cigarettes. Ingram testified at the time of the incident, Petitioner was walking 10 to 15 feet in front of them when he turned and shot. (App.208-209).

In further discussing some of the prior difficulties with Petitioner and his associates, Ingram explained that the altercation involved around eight people allied with him against 4-5 associated with Petitioner. (App.234). He explained Petitioner and his group usually lost the fights to Ingram and his allies. (App.237).

The State also presented the testimony of Leron Gardner, who went to the bar with Petitioner on the night of the shooting. He testified they arrived at the bar "a bunch of people just rushed up on us out of nowhere out of the blue." (App. 276). He acknowledged being scared and said that Petitioner "took off running and he left." Gardner then testified: "Billy and Al [the victims] went running after him." (App. 276).

Another of the State's witnesses, Craig Jackson, testified he was hanging out at the bar on the night in question. He said that he heard someone say: "That's Dominic right there." At that time Petitioner headed toward the Super Chic convenience store. Jackson indicated the victims walked off and he started looking because "I'm thinking that they were going to fight, it was going to be a fight or something like that, you know." (App.305). He indicated the victims were walking four to five feet behind Petitioner as they headed off. (App. 307).

At trial, Petitioner testified. He explained the prior difficulty he had with Ingram, one of the victims. He indicated in 2006-2007 Ingram and several of his friends started "to Holler at" Petitioner's girlfriend and Petitioner took exception. The next day he let one of Ingram's friends know that he did not like the way Ingram approached him and his girlfriend. (App.332-333).

Two nights later, Ingram's friend approached Petitioner at the back of a night club and told him Ingram wanted to fight. They ended up in a fight in which ten to twelve individuals allied with Ingram fought with four people on Petitioner's side. As he testified, they "got jumped." (App.334). He indicated there were more confrontations with Ingram between 2006 and 2008 when the shooting occurred. (App. 335). He indicated: "we had a couple of confrontations, a couple, a couple of lynchings had went on, jumpings that went on throughout the neighborhood." (App. 335). He testified fights occurred very often in Andrews because the groups saw each other often. (App. 335).

On Saturday August 9, the Saturday before the shooting occurred on Wednesday, Petitioner was again at the night club. He saw his cousin's girlfriend out dancing and confronted her that she needed to be home taking care of her child. (App.336-337). Ingram overheard the conversation and confronted Petitioner. (App.338). The confrontation resulted in a physical altercation with Ingram. (App.339). On Monday before the shooting, Ingram was hanging out at some apartments with his cousins and friends. Ingram drove by and got out of his car to again confront Petitioner. (App. 339).

On the night of the shooting, Petitioner received a phone call from his girlfriend to bring her his phone charger up at the bar. Petitioner believed something was going to happen but took her the charger. (App. 342). When he got to the bar, he saw people from the other side of town, but kept moving to try and avoid a confrontation. (App. 344).

Once he got to his girlfriend and gave her the charger, he was confronted by several individuals. He explained: "as a result of that confrontation I was, I was scared because it was more than one person. It was about – I saw it was one here, one here, one here and a couple of people behind them." Petitioner explained: "So, I already, I already knew I was going to get

jumped . . . ." (App. 345). After the individuals formed a semi-circle around Petitioner, the victims drove up and one of the people flagged them down telling them Petitioner was there. (App.346).

Petitioner walked off but heard someone coming behind him. He then heard someone say: "What's up now? What's up now?" He turned and the people were about three feet behind him. He indicated he was scared and "didn't know what to do." (App.347). He saw Ingram reaching for his waistband, and because he knew about the gun charge and knew him to carry a gun, pulled his gun and shot two or three times. (App.346-347). Petitioner fled the scene and was not apprehended until almost a month later by the U.S. Marshals. (App. 348; 352).

ARGUMENT

I. The Post-Conviction Relief Court did not err in finding Petitioner failed to meet his burden of establishing counsel was ineffective in failing to object to the voluntary manslaughter charge when the evidence at trial supported the charge. Additionally, the issue is not preserved for review..

The PCR Court correctly found counsel was not ineffective for failing to object to Petitioner's conviction for voluntary manslaughter. Petitioner has raised the issue as a failure to object to the charge, which is not properly preserved for review on appeal. Even if preserved, counsel was not ineffective for failing to object because there is ample testimony to support the charge of voluntary manslaughter.

Standard of Review

The Court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the appellate court affords great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and the Court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

Preservation

Initially, it is highly questionable whether the issue as raised by Petitioner in his Petition for Writ of Certiorari is preserved for review on appeal. At the PCR hearing, Petitioner maintained counsel was ineffective for failing to object to his conviction for voluntary manslaughter because he was only indicted for murder. Essentially, his argument was that he did not recognize voluntary manslaughter as a lesser included offense. This is also the issue caption in the PCR court's Order of Dismissal: "Failure to Object to Conviction for Voluntary

Manslaughter." The PCR Court also noted: "Applicant attested that murder and voluntary manslaughter are different things, and took issue with being convicted of voluntary manslaughter when he was indicted for murder." (App.660). Additionally, the PCR Court explained: "Applicant offered no reason why voluntary manslaughter should not have been charged, and appears to not recognize it as a lesser-included offense of murder." (App.660). However, on appeal, Petitioner has solely challenged the sufficiency of the evidence to support a charge of voluntary manslaughter—a different issue than raised at the hearing. As a result, it is not properly preserved for review. See, e.g., State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Merits

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to

receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

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 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. Strickland, 466 U.S. at 696-97.

In the instant case, Petitioner now claims counsel was ineffective for failing to object to the voluntary manslaughter charge at trial because the evidence failed to support a finding that he shot the victim in the heat of passion upon sufficient legal provocation. However, there was ample evidence supporting a charge for voluntary manslaughter so counsel was not deficient in failing to object to the charge.

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

"It has long been the law in this State that 'to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatever tending to reduce the crime from murder to manslaughter.'" Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (quoting State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969)). "If there is **any evidence** from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) (emphasis added).

Voluntary manslaughter is a lesser-included offense of murder. See State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." Id. (quoting State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)). In order for a killing to constitute voluntary

manslaughter, both heat of passion and sufficient legal provocation must exist at the time of the killing, and the heat of passion must result from the legal provocation. Starnes, 388 S.C. at 596-597, 698 S.E.2d at 608. Sudden heat of passion resulting from sufficient legal provocation in the context of voluntary manslaughter "need not dethrone reason entirely, or shut out knowledge and volition[.]" State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011). The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). "In determining whether the act which caused death was impelled by heat of passion . . . , all the surrounding circumstances and conditions are to be taken into consideration, **including previous relations** and conditions connected with the tragedy, as well as those existing at the time of the killing." Norris, 253 S.C. at 35, 168 S.E.2d at 566 (emphasis added).

During trial, the testimony of numerous witnesses established Petitioner acted in the heat of passion based upon a sufficient legal provocation to support a charge for voluntary manslaughter. The testimony established an ongoing feud between rival groups with Petitioner on one side and the victims, most notably Ingram, on the other. There was evidence of numerous prior physical confrontations between Petitioner and Ingram, including in the days leading right up to the shooting.

Prior to the shooting, Petitioner is at a bar and is confronted with numerous individuals. A State's witness testified they were basically ambushed by about ten individuals. Petitioner indicated a group of men formed a semi-circle in front of him and were going to jump him. See

State v. Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2007) (recognizing "an overt, threatening act or physical encounter may constitute sufficient legal provocation"). Several witnesses testified that when Ingram arrived someone pointed out Petitioner and that was when Petitioner left. Those same witnesses indicated they believed a fight was going to occur and Ingram himself indicated he believed the people were pointing out Petitioner to encourage him to fight. As this Court has found, "fear resulting from an attack can constitute a basis for voluntary manslaughter." Starnes, 388 S.C. at 598, 698 S.E.2d at 609. "[A] person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion." Id.

Petitioner fled the scene after being confronted by multiple individuals. See Starnes, 388 S.C. at 599, 698 S.E.2d at 609 ("Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter – it will not justify it."); State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) ("[F]ear can constitute a basis for voluntary manslaughter."); see generally State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) ("The question of criminal intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." (citation omitted)). Shortly thereafter, he is followed by people coming from the direction of those he is trying to escape. When he turns, they are within a close distance and he fires the fatal and wounding shots.

Most significantly, Petitioner testified: "In that course of time I was already scared. **I didn't know what to do.**" (App. 347)(emphasis added). His resulting behavior was not the exercise of rational thought, but an uncontrollable reaction based on his fear and likelihood of attack.

Petitioner acted in the heat of passion based on the sufficient legal provocation resulting from the need to escape an escalating dangerous situation in which he was going to be jumped and hearing people following closely behind him. Ingram, with whom he had prior physical altercations with including leading up to the shooting, had been alerted to Petitioner's presence and was being encouraged to go after Petitioner to fight. Upon turning around, Petitioner sees the victims, is already scared from the situation, and reacts without cool reflection because he "didn't know what to do." See Starnes, 388 S.C. at 599, 698 S.E.2d at 609 ("A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it.").

While the testimony at trial could have supported a conviction for murder, or an acquittal based on self-defense, the testimony does not eliminate the possible conclusion that Petitioner acted in the heat of passion based on a sufficient legal provocation. Being followed by someone with whom you have had prior physical altercations immediately after almost being jumped by a group of his friends who were then encouraging him to go and fight resulted in Petitioner's uncontrollable impulse to do violence that resulted from the sufficient legal provocation. See State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951) ("[T]o warrant

the Court in eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter."). As a result, counsel was not deficient in failing to object to the voluntary manslaughter charge given because it was properly presented to the jury based on the evidence in the record.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision of the PCR Court should be affirmed.

Respectfully submitted,

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