STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

2008-CP-40-0960
Appellate Case No. 2012-~~1618~~ 211386

Jason Moulton.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

I. Probative evidence supports the PCR court's finding Counsel was not ineffective for requesting a jury instruction on the lesser included offense of voluntary manslaughter, where Counsel testified it was her strategic decision to pursue a charge of voluntary manslaughter.

II. Probative evidence supports the PCR court's finding Counsel was not ineffective for failing to request jury instruction on the lesser-included offense of involuntary manslaughter where evidence presented at the trial would not support such a charge.

III. Probative evidence supports the PCR court's finding Counsel was not ineffective for failing to request a jury instruction on transferred intent in the context of self-defense where both the South Carolina Supreme Court and Court of Appeals have refused to recognize such a theory.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was indicted at the December 2003 term of the Richland County Grand Jury for Murder (2003-GS-40-04594). Fielding Pringle, Esquire, represented Petitioner. Petitioner proceeded to trial in front of the Honorable James R. Barber, III. On October 21, 2004, Petitioner was found guilty of voluntary manslaughter and sentenced to thirty years imprisonment.

A timely notice of Appeal was submitted on Petitioner's behalf. The South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Moulton, Op. No. 2007-UP-257 (S.C. Ct. App. filed May 29, 2007).

Thereafter, Petitioner filed a timely application for PCR on February 1, 2008, alleging he was being held in custody unlawfully. Petitioner filed an amended application for PCR on January 12, 2009. Respondent made its Return on January 6, 2009, requesting that an evidentiary hearing be held on Petitioner's application.

On January 14, 2009, an evidentiary hearing on the matter was convened before the Honorable Alison Renee Lee at the Richland County Courthouse. By Order dated March 28, 2012, Judge Lee denied and dismissed Petitioner's application with Prejudice. Petitioner filed a Petition for Writ of Certiorari on December 27, 2012. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney=s performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Probative evidence supports the PCR court's finding Counsel was not ineffective for requesting a jury instruction on the lesser included offense of voluntary manslaughter, where Counsel testified it was her strategic decision to pursue a charge of voluntary manslaughter.

Petitioner asserts the post-conviction relief (PCR) court erred in finding Counsel was not ineffective for requesting a jury charge on the lesser included offense of voluntary manslaughter under the theory of transferred intent. However, this argument is without merit, as the record provides ample evidence to support the PCR court's finding that Counsel was not ineffective in regards to this allegation.

In the instant case, Counsel testified at the PCR hearing that "our defense was sort of a combination of self-defense and voluntary manslaughter." (App. p. 797 line 11-12). Counsel further testified

> I think that had we been able to negotiate the case it would have been voluntary manslaughter based on the facts, and they were never willing to offer that and were only willing to go forward on murder....but my concerns were with this case that there were two shots to this gentleman's back. And my concerns were that him being acquitted of murder was a stretch. And so -- I wanted to give them various alternatives, and that was just my approach to the case and my thinking.

(App. p. 798 lines 6-18). Additionally, the voluntary manslaughter charge was opposed by the State, but Counsel made an argument to the court and "tried to argue why [Counsel] thought it should be applied even if there was no precedent to support it." (App. p. 801 line 9—p.802 line 25). Counsel testified that it was a strategic decision based on the weight of the evidence to request a charge of voluntary manslaughter. (App. p. 820 lines 17-20). Counsel further testified "it was a victory for us" referencing the jury finding Petitioner guilty of voluntary manslaughter.

(App. p. 823 lines 21-22). Therefore, Counsels admitted strategy was to prove voluntary manslaughter and our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). Furthermore, the PCR court found Petitioner is seeking "to second-guess trial counsel's request for a lesser-included offense which was part of trial counsel's stated strategy." (App. p. 875). The court noted both Counsel and Petitioner "testified that the goal was to get the least amount of time possible." (App. p. 875).

II. Probative evidence supports the PCR court's finding Counsel was not ineffective for failing to request jury instruction on the lesser-included offense of involuntary manslaughter where evidence presented at the trial would not support such a charge.

Petitioner asserts the PCR court erred in finding Counsel was not ineffective for failing to request a jury charge on the lesser included offense of involuntary manslaughter. This argument is without merit, as the record provides ample evidence to support the PCR court's finding that Counsel was not ineffective in regards to this allegation.

The law to be charged is determined by the evidence presented at trial. State v. Gourdine, 322 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999). For a defendant to be entitled to a jury instruction on a lesser-included offense, there must be some evidence in the record that would tend to show that the defendant is guilty of the lesser rather than the greater offense. State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003). However, a trial judge does not commit reversible error in refusing to charge the lesser included offense when there is no evidence tending to show that the defendant was guilty only of the lesser offense. State v. Murphy, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986).

Involuntary manslaughter is defined as: "(1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Reese, 359 S.C. 260, 597 S.E.2d 169 (Ct. App. 2004). The South Carolina Supreme Court has held that a charge of involuntary manslaughter is inappropriate in cases where defendant intentionally wielded a weapon but claimed to be aiming at something else. State v. Cooney, 436 S.E.2d 597, 600 (1995). (Holding that trial court did not err in refusing to charge jury on involuntary manslaughter where defendant admitted to firing the gun towards the ground). Further, a charge of involuntary manslaughter is not warranted if the defendant intentionally arms himself and fires his weapon. Douglas v. State, 504 S.E.2d 154, 156 (2003). (Finding no error in the trial court's refusal to charge jury on involuntary manslaughter where defendant admitted to arming himself and firing warning shots into the crowd).

Similar to both Cooney and Douglas, Petitioner admitted to obtaining a gun and using it the night of the shooting. (App. p. 567 lines 19—p. 568 line 3). Petitioner testified he procured the gun in order to "protect myself and my product (crack cocaine)." (App. p. 568 line 9). Further, Petitioner testified "I pulled out my gun, and I just started shooting..." (App. p. 578 line 24). Regardless of who Petitioner intended to shoot, Petitioner freely admitted he intentionally drew his weapon and fired. (App. p. 587 line 24—p. 579 line 12).

Further, at the PCR hearing, Petitioner testified he never discussed with Counsel a jury charge on involuntary manslaughter. (App. p. 829 lines 8-10). Counsel testified "I knew what his (Petitioner) testimony was going to be ahead of time. Even glancing back over it, I'm not sure that you can say it (the killing of victim) was unintentional from his testimony." (App. p.

806 lines 20-24). Counsel further testified Petitioner "felt threatened; he felt afraid, and he responded." (App. p. 808 lines 5-7).

The PCR court correctly found in its Order that "there is no evidence to require a charge for involuntary manslaughter." (App. p. 875). The court further found, "even assuming [Petitioner] did not intentionally fire the gun at [Victim], by pointing the gun and firing, [Petitioner] committed an unlawful act that would naturally tend to cause death or great bodily harm." (App. p. 876). Therefore, there is evidence of probative value to support the PCR court's finding that Counsel was not ineffective for failing to request a jury charge on involuntary manslaughter. Cherry, 300 S.C. at 119, 386 S.E.2d at 625

III. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to request a jury instruction on transferred intent in the context of self-defense where both the South Carolina Supreme Court and Court of Appeals has refused to recognize such a theory.

Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for failing to request a jury instruction on the theory of transferred intent the context of self-defense. However, this argument is without merit, as the record provides ample evidence to support the PCR court's finding that Counsel was not ineffective in regards to this allegation.

In the instant case, the record provides evidence that the jury was charged on the elements of self-defense. (App. p. 732 line 23—p. 726 line 21). Further, the PCR court found the trial court properly charged the jury on the law of self-defense. (App. p. 723). Petitioner alleges Counsel was ineffective for failing to request a jury charge on the theory of transferred intent in the context of self-defense, citing cases from neighboring jurisdictions to support this theory of transferred intent. However, the theory of transferred intent in the context of self-defense has not been adopted by either the South Carolina Supreme Court or South Carolina

Court of Appeals. Notably, the South Carolina Supreme Court had the opportunity to adopt this legal theory. State v. Porter, 269 S.C. 618, 622, 239 S.E.2d. 641 (1977). The court in Porter noted the legal theory of transferred self-defense "is recognized in some jurisdictions to absolve a defendant who injures an innocent third party while attempting to defend himself from bodily harm." Id. However, "we need not now pass on the viability of this theory in South Carolina..." Id.

Further, this Court stated, "[w]e have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Therefore, Counsel cannot be found ineffective for failing to request a jury charge on the theory of transferred intent in the context of self-defense when the courts of South Carolina have failed to adopt such a theory.

However, even if this Court finds Counsels performance deficient for failing to request such a charge, Petitioner cannot show any resulting prejudice as there is overwhelming evidence showing that Petitioner did not act in self-defense. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). During Petitioner's trial, Johnson testified he, Victim, and Sherrema Chitty (Chitty), were all sitting in the living room of Caper's house. (App. p. 209 lines 17-21). Petitioner exited his bedroom and approached Victim. (App. p. 213 lines 6-10). Petitioner asked Victim to return the sweater that Victim was sitting on. (App. p. 213 lines 6-10). Petitioner then began to argue with Victim over a particular seat in the living room. (App. p. 213 lines 14-17). Victim did not argue with Petitioner, but instead followed Johnson out of the house. (App. p. 215 line 8—p. 216 line 23). As the two men exited the house Johnson

testified he heard shots fired and immediately hit the ground. (App. p. 217 lines 18-22). Johnson testified he "got up right after the shots" and "saw the [Petitioner] running." (App. p. 218 lines 11-17). Johnson further testified he saw Petitioner carrying a gun as he was fleeing the scene. (App. p. 219 lines 22-24). Neither Johnson nor Victim had any weapon that night. (App. p. 223 lines 14-16).

Additionally, Chitty testified she had seen Petitioner with a gun prior to the night of the shooting. (App. p. 352 lines 7-16). Chitty testified:

> we was all in the living room talking. That's when he (Petitioner) walked in the house and told Pat (Victim) to get up off his sweater; [Victim] was like 'I'm sorry, man. Here's your sweater.' Then [Petitioner] told [Victim] to get out of his chair. [Victim] told him this was not his chair, and this ain't his chair either because both of them didn't stay there.

(App. p. 347 lines 19-25). After discussing the chair Chitty testified Victim told her he would talk to her later and followed Johnson out of the house. (App. p. 348 line 12-15). Chitty further testified Petitioner followed behind Victim and "pulled out the gun and he (Petitioner) started shooting" at Victim as he was walking away. (App. p. 348 line 14—p. 349 line 14). In addition, Caper's testified she had seen Petitioner with a gun prior to the shooting. (App. p. 273 lines 7-22). Caper's testified "...I didn't pay attention to first shot because it sounded like a book falling on the floor because I had my door shut. Then my niece started screaming, Sherrema (Chitty). He (Petitioner) shot Pat (Victim)..." (App. p. 268 lines 22-25).

Further, Antonio Clemens (Clemens) arrived at Capers house as the shooting took place. Clemens testified "as we pulled—as the two front tires hit the driveway entering up to the house (Capers house), we saw the carport door which led to kitchen inside the house open. And we saw a gentlemen walk out of the door and another gentleman walk out behind him. We saw two shots fired. We could see the flames that night, and we could also hear it." (App. p. 424 lines 7-

14). Clemens further testified he could not identify any of the men exiting the house or the person shooting the gun. (App. p. 425 6-13).

Furthermore, Dale L. Jones, Jr. (Jones), a Sargent with the Richland County Sheriff Office, testified he was a responding officer and arrived at Caper's house shortly after the shooting. (App. p. 186 lines 6-20). Jones further testified there were no weapon located around Victim. (App. p. 191 lines 20-22). Additionally, Kimberly Black, a Forensic Chemist for SLED, testified there was no indication that Victim had handled a gun, fired a gun, or been in close proximity to a gun being fired. (App. p. 497 lines 7-9). As there is evidence of overwhelming guilt, Petitioner cannot show any prejudice resulting from Counsel's alleged deficiency in failing to request a jury charge on a theory of law that is yet to be recognized in South Carolina.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: _____
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May 9, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable Alison Renee Lee, Circuit Court Judge
Case No. 2008-CP-40-0960
Appellate Case No. 2012-1618

JASON MOULTON, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Lauren Meara, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Breen Stevens, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 9th day of May, 2013.

Lauren Meara
LAUREN MEARA
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

May 9, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Jason Moulton v. State of South Carolina**
Appellate Case No. 2012-1618
Lower Court Case No. 2008-CP-40-0960

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

David Spencer
Assistant Deputy Attorney General
SC Bar No. 68571

DS/lm
Enclosure(s)

cc: Breen Stevens, Esquire
Trisha Allen, Victim Services