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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

RAPHAEL L. PONTOO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-001217

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err finding trial counsel was not ineffective for failure to request the trial court include the element “in the absence of mitigating circumstances” in its charge for failure to stop for a blue light resulting in death where there was mitigating evidence presented to the jury and where the Court of Appeals found the issue was not preserved for appellate review?

STATEMENT

In May 2014, a Lexington County grand jury indicted petitioner for failure to stop for a blue light resulting in death and armed robbery with a deadly weapon. App. 637-641. Petitioner's case was called to trial on January 26, 2015, before the Honorable Thomas A. Russo. David Mauldin represented petitioner and assistant solicitors Robby McNair and Shawn Graham represented the state. App. 1. Judge Russo sentenced petitioner to consecutive terms of ten years imprisonment on the charge of armed robbery and twenty years imprisonment on the charge of failure to stop for a blue light involving death. App. 471.

Petitioner filed an application for post-conviction relief on December 11, 2018. App. 474. The state filed a return, partial motion to dismiss and motion for more definite statement dated March 22, 2019. App. 480-492. Petitioner filed an amended application for post-conviction relief on June 7, 2021. App. 493-495. An order of continuance and order denying the substitution of counsel signed by the Honorable Judge Brooks P. Goldsmith IV and dated July 13, 2019, was issued. App. 496-500. Petitioner filed a second amended application for post-conviction relief on June 16, 2021. App. 501-503.

An evidentiary hearing was held before the Honorable Courtney Clyburn Pope on July 2, 2021, via Webex Videoconference. Ola Johnson represented petitioner. Lillian L. Meadows, assistant attorney general, represented the state. App. 504.

An order of dismissal signed by Judge Courtney Clyburn Pope and dated September 22, 2021, was issued. App. 582-636. The court held that petitioner failed to establish any constitutional violations or deprivations that would require the court to grant his application for post-conviction relief and denied relief on all allegations and dismissed his PCR action with prejudice. App. 634-635. Specifically, the court found trial counsel was not ineffective for

failure to request the court include the element “in the absence of mitigating circumstances” in its charge on failure to stop for a blue light resulting in death. App. 626. The court reasoned, that although the mitigating language constituted an element of the alleged offense the language was immaterial in the context of a duress defense. App. 628.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred finding trial counsel was not ineffective for failure to request the trial court include the element “in the absence of mitigating circumstances” in its charge for failure to stop for a blue light resulting in death where there was mitigating evidence presented to the jury and where the Court of Appeals found the issue was not preserved for appellate review.

Trial

At trial the state alleged that on January 24, 2014, petitioner held Jonathan Ruple at gunpoint and stole a firearm from him and proceeded to drive away in a vehicle with four other men. Ruple called 911 and reported the tag number of the vehicle. A state trooper stopped the vehicle petitioner was in and began ordering the individuals out one by one until only petitioner and Alexander Clemmons were left in the car. Petitioner drove away from the stop and eventually ran the car into a ditch. Clemmons died as a result of the accident.

Petitioner testified at trial that he was out at a bar in West Columbia playing pool with his friends. App. 365, ll. 1-15; 368, ll. 12-21. He said when they left the bar one of his friends had a gun that he did not have earlier in the evening. App. 370, ll. 2-11. Petitioner testified they were stopped by a state trooper and three of his friends got out of the car, but Clemmons told to him, “it was his birthday and he wasn’t going to jail,” and he grabbed a gun, put it to petitioner’s head, and demanded he drive. App. 371, l. 16-372, l. 3. Petitioner, afraid for his life, drove away from the traffic stop. Petitioner said that Clemmons yanked the wheel and that is the last thing he remembered. App. 372, l. 5-373, l. 8.

During jury instructions the court charged the jury on failure to stop for a blue light as follows.

In order to prove this crime, the state must prove beyond a reasonable doubt that the defendant was driving the motor vehicle

on a road, street or highway of this state; that the defendant was signaled to stop by a law enforcement vehicle by means of a siren and/or flashing light, and that the defendant did not stop. An official signal requiring a motorist to stop may be a siren or flashing lights, but both are not required. An attempt to increase speed of a vehicle or in some other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light may be considered as evidence of failure to stop for a blue light. However, it is merely an evidentiary fact to be taken into consideration by you along with the other evidence in this case and is to be given whatever weight that you think it should receive. If you find that the state has proved beyond a reasonable doubt that the defendant failed to stop for a blue light and his actions resulted in the death of another, that would satisfy the elements of the offense of failing to stop for a blue light resulting in death.

App. 452-53. Defense counsel made no objection to the jury instructions. App. 458, l. 5.

PCR hearing

Counsel Mauldin admitted that he should have objected to the court's jury instruction on failure to stop for a blue light resulting in death because it did not include, "in the absence of mitigating circumstances." Mauldin testified that he asked for the affirmative defense of duress to be charged but failed to object to the jury charge. App. 541, ll. 15-25.

Discussion

Trial counsel's request and the court's decision to instruct the jury on the affirmative defense of duress charge did not cure trial counsel's failure to object to the court's erroneous jury instruction on failure to stop for a blue light resulting in death.

S.C. Code Ann. § 56-5-750(A) provides that

In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a

failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

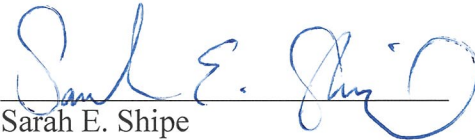
To establish a claim of ineffective assistance of counsel, petitioner must show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that, but for counsel's error, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (S.C.1992).

The court erred finding that trial counsel was not deficient for failure to object to the court's instruction. Counsel admitted he should have objected to the court's erroneous instruction. There was mitigating evidence presented through petitioner's testimony that he was held at gunpoint and instructed to drive by Clemmons. There was no strategic reason given for counsel's failure to object, counsel contended, at the PCR hearing, that the affirmative defense of duress constituted the mitigative circumstances.

The PCR court erred finding petitioner was not prejudiced by trial counsel's failure to object to the court's instruction. On direct appeal, the Court of Appeals found petitioner's argument, that the trial court failed to charge the "current and correct law for the offense of Failure to Stop for a Blue Light—specifically, that an element, 'in the absence of mitigating circumstances,' was omitted from the jury instruction—[was] not preserved" for appellate review because it was not raised to the lower court. Supp. App. 80. The absence of that language where there was mitigating evidence presented "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.



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ATTORNEY FOR PETITIONER

This 11th day of April, 2022.