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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the South Carolina Supreme Court

Appeal from Lexington County
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2022-000254

The State of South Carolina, ...Respondent,

v.

Michael Young, ... Petitioner.

AUSTIN PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether trial counsel rendered ineffective assistance of counsel when he failed to advise his client that he would have been entitled to a voluntary manslaughter jury instruction had he proceeded to trial. Counsel's investigation into Petitioner's case was substandard and the PCR court's order of dismissal commits an error of law in finding Petitioner's counsel provided effective assistance of counsel.

STATEMENT OF THE CASE

Michael James Young, Jr. (SCDC #345614) was indicted by the Lexington County Grand jury during its October 2007 term for murder (2007-GS-32-2948), assault and battery with intent to kill (2007-GS-32-2949), and possession of a firearm during the commission of a violent crime (2007-GS-32-2950). Petitioner was represented by John D. Delgado on all charges. On April 11, 2011, Petitioner pleaded guilty before the Honorable Thomas A. Russo to murder and assault and battery with intent to kill. Judge Russo sentenced Petitioner to prison for 50 years for murder and 20 years for assault and battery with intent to kill. The sentences were ordered to be run concurrently.

Petitioner then timely filed a notice of appeal. By written order dated February 10, 2012, the South Carolina Court of Appeals dismissed the appeal for failing to show cause why his appeal should have been allowed to proceed as required by Rule 203(d)(1)(B)(iv), SCACR.

Petitioner then timely filed an application for post-conviction relief on November 21, 2012. The state filed its return on March 3, 2014. Petitioner filed an amendment to his application for post-conviction relief on November 1, 2018. An evidentiary hearing was held on November 9, 2018 at the Lexington County courthouse before the Honorable Walton J. McLeod, IV. Petitioner was represented by Robert W. Mills. The state was represented by Kelly Oppenheimer of the South Carolina Attorney General's Office. An order of dismissal was filed December 5, 2018.

Counsel for Petitioner then filed a Motion to Alter Judgment Pursuant to SCRCP 59(e) on December 20, 2018. No appeal was filed.

Petitioner filed a subsequent application for post-conviction relief on June 15, 2020.[1] On February 4, 2022, a Consent Order Granting *Austin* Appeal was filed in the Lexington County Court of Common Pleas, signed by the Honorable William P. Keesely, Circuit Judge.

This appeal timely follows.

Relevant Facts

Shaunna Bell, Petitioner's ex-wife worked at the Columbiana Mall, in Richland County, at a computer kiosk. App. 17, 27. She and Petitioner had married the previous year, at age 21, but divorced about a month prior to this incident. App. 27. Their relationship was full of issues that young couples faced, and both conceded their separation was caused by marrying too young. App. 23. Although their marriage was over, Petitioner attempted to contact her on several occasions after their separation. App. 28, 29. He admitted his anger often got the better of him in their relationship. App. 22.

On June 4, 2007, because of prior instances of stalking, Ms. Bell obtained an Order of Protection from Petitioner. App. 28. He was to refrain from all contact with

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[1] Undersigned counsel had initially filed a Motion to Allow Appeal of Denial of Post-Conviction Order of Dismissal Pursuant to *Austin v. State*, 505 S.C. 453, 409 S.E.2d 395 (1991) on January 27, 2020. The Supreme Court, on January 29, 2020, issued an order dismissing the appeal without prejudice to allow Petitioner to seek Austin relief by filing a PCR application in the circuit court.

her and was no longer allowed to show up at her place of business. Petitioner was arrested the next day for violating the order. App. 29. Following the arrest, a police officer recommended to Ms. Bell that she ask her father to come inside the mall to pick her up and bring her home as an added method of protecting her from Petitioner. App. 29.

The incident occurred on June 13, 2007. App. 14. On that day, around 6:00pm, Ms. Bell was getting off work. App. 29. Petitioner sent one of his friends inside the mall, while he remained in the parking lot, to see if she was working that day. Once he figured out she was working, he went inside and attempted to speak to her. Ms. Bell informed him that he was not supposed to be there and that she did not want to talk to him. Mr. Bell arrived shortly after to pick her up and take her home. Mr. Bell saw that Petitioner was inside talking to Ms. Bell. He told her it was time for them to leave. App. 30. Petitioner followed them outside, into the parking lot and toward Mr. Bell's car.

Mr. Bell instructed Ms. Bell to get in the car. While doing so, Mr. Bell and Petitioner got into a heated argument outside the car. Ms. Bell was on the phone with her mother at the time and had no idea what the two were talking about. App. 30. After the argument, a scuffle between the two ensued. App. 18, 30. After the scuffle, and enraged by the argument, Petitioner pulled out a .38 caliber pistol and shot Mr. Bell three times. He then proceeded to the passenger side of the car and shot Ms. Bell twice. App. 18, 30. Immediately, Petitioner and his friends left the scene.

App. 30-31. The next day, Petitioner contacted the authorities who gave him a time and a place to turn himself in. App. 31.

Petitioner pleaded guilty to the murder of Mr. Bell and the attempted murder of his ex-wife, Ms. Bell on April 11, 2011. App. 16. In a letter to the judge, Petitioner admitted his anger got the better of him. App. 22. He admitted to having a lot of respect for Mr. Bell and called him "a good man." App. 24. He stated that all he wanted was to have a family with Ms. Bell and to be accepted by the Bell family. He admitted what he did was wrong, and that Mr. Bell was just trying to look out for his daughter in what was "a very volatile, emotional relationship." App. 24.

> "To the family, I want them to know that I'm sincerely sorry. I would do anything to take it back. I hope that one day they can forgive me as a person. I know they'll never forgive the act, but I hope they forgive me a person. I hope they have peace and I hope me doing this today is one step towards that peace for them."

App. 26.

Petitioner stated that he knew he had to pay for his actions but asked for the forgiveness of the family. App. 26.

ARGUMENTS

I. Trial counsel rendered ineffective assistance of counsel when he failed to advise his client that he would have been entitled to a voluntary manslaughter jury instruction had he proceeded to trial. Counsel's investigation into Petitioner's case was substandard and the PCR court's order of dismissal commits an error of law in finding Petitioner's counsel provided effective assistance of counsel.

The Sixth Amendment guarantees every criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 688, 683 (1984). To prevail on an ineffective assistance of counsel claim, defendant must prove: (1)

counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different. *Id* at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In this instance, trial counsel should have, consistent with the evidence, informed Petitioner that, had he proceeded to trial, he was entitled to voluntary manslaughter charge and by failing to do so rendered ineffective assistance of counsel.

In South Carolina, the Supreme Court has defined voluntary manslaughter as the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Pittman*, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007).

> "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, 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 call an uncontrollable impulse to do violence."

Id at 575.

The heat of passion and sufficient legal provocation must exist at the time of the killing. *Id.* at 572. In determining whether an act which caused death was impelled by heat of passion or by malice, 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. *State v. Norris*, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969). In *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000), the Court found that a period of three

to five minutes as a sufficient cooling off period for heat of passion. Legal provocation must exist simultaneously with the heat of passion element. Words are not enough to constitute legal provocation. *Id.* When death is caused by the use of a deadly weapon, words must be accompanied by the appearance of an assault or by some overt threatening act which could have produced the heat of passion. *State v. Locklair*, 341 S.C. 352, 361, 535 S.E.2d, 420, 424 (2000). The Supreme Court has also held that fear, if it creates an uncontrollable impulse to do violence, is enough to warrant legal provocation. *State v. Oates*, S.E.2d 911, 923 (S.C. App 2017).

The law to be charged must be determined from the evidence presented at trial. *State v. Cole*, 338 S.C. at 101, 525 S.E.2d at 512. In determining whether the evidence in a murder charge requires a charge of voluntary manslaughter, the circuit court views facts in a light most favorable to the defendant. *State v. Niles*, 400 S.C. 527, 533, 735 S.E.2d 240, 244 (2012). To warrant a court's eliminating the offense of voluntary manslaughter, it should be very clear that there is no evidence whatsoever tending to reduce the crime from murder to voluntary manslaughter. *State v. Cole*, 338 S.C. at 101, 525 S.E.2d at 513.

In this case, plea counsel provided ineffective assistance of counsel when he failed to advise Petitioner that he would have been entitled to a voluntary manslaughter charge if he went to trial, and by subsequently failing to investigate facts that would have brought that charge to light.

At the PCR hearing, former plea counsel testified to having met with Petitioner approximately 25-30 times during the course of the proceedings. App. 122. During

their meetings, both he and Petitioner admitted to having multiple discussions about the incident, potential jail time, and whether Petitioner had any viable defenses. App. 88, 124. The defenses of voluntary manslaughter and self-defense were brought up and summarily dismissed as possibilities by trial counsel. According to counsel, self-defense would not have worked because Petitioner was unlawfully present with a weapon at the mall and Petitioner would have had to have been without fault in bringing on the incident. App. 124, 136.

Petitioner and counsel also discussed a voluntary manslaughter charge. PCR 49. Counsel dismissed this idea during their discussions due to lack of legal provocation. Although Petitioner informed his counsel that a scuffle did ensue between him and Mr. Bell, counsel indicated a jury would likely not believe Petitioner was entitled to a voluntary manslaughter charge. App. 123, 139.

Two elements must be present in order to obtain a voluntary manslaughter jury instruction during trial. First, the killing must have occurred in a sudden heat of passion, and second there must have been some form of legal provocation. *State v. Pittman*, 373 S.C. at 572, 647 S.E.2d at 167. The South Carolina Supreme Court has held that when analyzing voluntary manslaughter, specifically the heat of passion element, all facts surrounding the incident are relevant. *State v. Norris*, 253 S.C. at 35, 168 S.E.2d at 566. Heat of passion is defined as a feeling that occurs that "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 call an uncontrollable impulse to do violence". *Id* at 575. In *State v. Pittman*, a

twelve-year-old child shot his grandparents. The Court held that it could not ignore the fact that he had been beaten by his grandparents with a paddle on the night of the incident. *State v. Pittman*, 373 S.C. at 575, 647 S.E.2d at 170. Heat of passion must be supported by an insufficient period to cool down. *Id.* In *State v. Cole*, the Court held that the three to five minute that occurred in between the altercation between the defendant and the victim, in which time the defendant went and grabbed the eventually murder weapon, gave him enough time to cool his mind and therefore would not raise the requisite facts to support a voluntary manslaughter charge. *State v. Cole*, 338 S.C. at 102, 525 S.E.2d at 513.

In the present case, had Petitioner exercised his Constitutional right to a trial, there would have been sufficient evidence to support a jury charge for voluntary manslaughter. The record shows that Petitioner was in an emotionally vulnerable state, as evidenced by his tumultuous relationship with his former wife. On the date of the incident, Petitioner conceded he was psychologically stressed and that he just wanted to have a conversation with his ex-wife. He had also been intoxicated. App. 83-84. Mr. Bell, a protective father, got involved and a scuffle between the two ensued. App. 33. When Mr. Bell would not allow Petitioner to speak with his ex-wife, he became enraged and following the scuffle, he shot Mr. Bell. Additionally, Mr. Bell apparently had cocaine in his system. App. 14, ll. 4-7. Both heat of passion and legal provocation existed at the time the shooting took place. When Mr. Bell interfered and a scuffle pursued, tempers flared, and Petitioner was highly emotional. Additionally, there was not an adequate cooling off period. In contrast to the facts in *Cole, supra,*

here Petitioner had no time to cool off and collect his thoughts. His thoughts and feelings were a direct result from the events that had just taken place. This clouded his judgment and did not allow him time to process what was about to happen.

At the PCR hearing, plea counsel indicated he did not believe a judge would have given the jury a charge on voluntary manslaughter:

> A: Michael was in a state of mind where Ms. Shawna Bell, his wife, was the source of all his discontent. And Mr. Bell, her father, Mr. Robert Bell, added to that because, according to Michael, he was interfering in their marriage.
>
> The facts, as related that day, came out during the discovery process. And my review of it with Michael was Michael was probably at the rear of Mr. Bell's car. Mr. Bell was in the position of standing with his back to an open door.
>
> As Michael said in his statement to the City of Columbia police officers, they asked him, why did he shoot him? And Michael said nothing to do with self-defense, nothing to do with words that Bell had used to him.
>
> Michael said that he had either disrespected him or that he had-- well, let me just-- the police officer asked him: What reason did you shoot him? Answer: Because he hurt me emotionally. That isn't going to it for a voluntary manslaughter plea, if that came out.
>
> There was no indication of sufficient leave of provocation. Michael was present with that gun, very probably improperly and unlawfully. Self-defense as not going to be something we could have raised. I did not see that voluntary manslaughter was a reasonable alternative; that possibly even a judge would not allow us to argue to a jury. So then we're left with guilty or not guilty on a charge of murder.

App. 123, l. 8- 124, l. 12.

Plea counsel erred in leading his client to believe he would not be entitled to a jury instruction on voluntary manslaughter. Given Petitioner's intense emotional state, the physical provocation, and the lack of cooling off time, a judge would have

given the jury a charge on voluntary manslaughter. Here, plea counsel appears to have substituted his own belief that perhaps the jury would not have convicted Petitioner of voluntary manslaughter, but would have convicted Petitioner of murder, but that is a different claim than whether Petitioner was entitled to the instruction.

The order of dismissal erred when it found "there was nothing to indicate Mr. Bell did anything to evoke the "sudden heat of passion" in Applicant." Order, p. 20. There clearly was an event between the two men as they were standing outside of the car and there was insufficient time for Petitioner to have cooled down before he shot Mr. Bell. "This Court gives deference to the PCR judge's findings of fact, and 'will uphold the findings of the PCR court when there is any evidence of probative value to support them.'" *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) (quoting *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008)). "However, we review questions of law *de novo*, and 'will reverse the decision of the PCR court when it is controlled by an error of law.'" *Id.* (quoting *Goins v. State*, 397 S.C. 568, 573, 726 S.E. 2d 1, 3 (2012)).

The testimonial evidence presented at the PCR hearing was sufficient to support the jury instruction for voluntary manslaughter and Petitioner was prejudiced by his lawyer's substandard performance. This Court has long recognized that trial counsel's erroneous advice to a criminal defendant is prejudicial and entitles a defendant to relief. *See Robinson v. State*, 422 S.C. 78, 810 S.E.2d 32 (2018) (trial counsel's advice that defendant should plead guilty to avoid life sentence under inapplicable statute constituted ineffective assistance of counsel); *Alexander v. State*,

303 S.C. 539, 402 S.E.2d 484 (1991) (trial counsel's erroneous advice as to potential sentencing prejudiced defendant who was entitled to relief). But for plea counsel's substandard performance in encouraging him to plead guilty, Petitioner would have gone to trial. Petitioner testified had he known how voluntary manslaughter would have applied to the facts of his case, he would not have pleaded guilty but would have gone to trial. App. 90, ll. 8-22. *Hill v. Lockhart*, 474 U.S. 52 (1985); *Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009). Plea counsel rendered ineffective assistance of counsel and this Court should grant Petitioner's petition for a writ of certiorari.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

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April 15, 2022.