

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 100394

DONNA JEAN REEDY HOCKMAN

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent,

PETITION FOR REHEARING

Bruce D. Albertson
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August 25, 2010

EXHIBIT
No. E

I. STATEMENT OF THE CASE

The Petitioner was indicted on two charges arising from events that occurred on or about July 25, 2008; first-degree murder pursuant to Virginia Code Section 18.2-32, and use of a firearm while committing murder pursuant to Virginia Code Section 18.2-53.1. (RN 1-2 (File #1); Tr. 01/26/09, p. 3, Ins. 8-24).

The case proceeded to a jury trial on January 26, 2009. After closing argument, the jury found the Petitioner guilty of the Indictments. (Tr. 01/30/09, p. 5, ln. 24 through p. 6, ln. 10). The jury sentenced the Petitioner to imprisonment for life on the murder charge, and imprisonment for three years on the remaining charge. (Tr. 01/30/09, p. 36, Ins. 1-16). The Court imposed the sentence recommended by the jury. (Tr. 03/17/09, p.57, Ins. 1-20).

At the conclusion of proceedings in the Court of Appeals of Virginia, the Petitioner filed a Notice of Appeal. On August 11, 2010, the Supreme Court of Virginia denied the Petition for Appeal.

II. ASSIGNMENTS OF ERROR

A) THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE PETITIONER OF THE INDICTMENTS.

B) THE COURT ABUSED ITS DISCRETION IN DENYING COUNSEL FOR PETITIONER'S MOTION TO CONTINUE.

III. FACTS

The Petitioner, Donna Jean Reedy Hockman, met Dustin Stanley in February 2008. (Tr. 01/29/09, p. 10, ln. 24). In April 2008, the relationship, which started out well, began to change over drug-use allegations. (Tr. 01/29/09, p.18, ln. 22 through p. 19, ln. 19). In May 2008, Stanley began to physically abuse the Petitioner. (Tr. 01/29/09, p.23, lns. 2-5). The abuse continued into June 2008. (Tr. 01/29/09, p., ln. 3-25).

Stanley slept over at the Petitioner's residence, the night before the shooting. (Tr. 01/29/09, p. 60, lns. 3-18; 01/26/09, p. 283, lns. 1-11). When he woke that morning he became enraged over some personal items. Stanley grabbed the Petitioner, punched at her, and pushed her to the ground. (Tr. 01/29/09, p. 62, lns. 13-25). Stanley, who had a knife, grabbed her by the neck, drug her to the driveway and stated that he would kill her son and then kill her. (Tr. 01/29/09, p. 63, lns. 16-25).

Stanley then ran towards the house. (Tr. 01/29/09, p. 64, ln. 14). The Petitioner believed he was going to kill her son so she popped the trunk of her car open and grabbed her firearm. (Tr. 01/29/09, p. 64, lns. 15-22). The Petitioner did not remember the shooting, stating that she went black and awoke in the house where her son took the gun from her hands. (Tr. 01/29/09, p. 64, ln. 22 through p. 65, ln. 11). She would later describe to Investigator Hensley of the Rockingham County Sheriff's Office, one of the first responders, that she snapped. (Tr. 01/29/09, p. 65, lns. 17-20). The

Petitioner testified that she fired the gun because she believed Stanley would kill her and then kill her son. (Tr. 01/29/09, p. 75, Ins. 8-10). Stanley's cause of death was five gunshot wounds. (Tr. 01/28/09, p. 335, Ins. 4-10).

Members of the Rockingham County Sheriff's Office responded to the scene. (Tr. 01/26/09, p. 208, Ins. 10-17). Investigator Hensley saw a bruise on Petitioner's face. (Tr. 01/29/09, p. 72, Ins. 17-23; Tr. 01/26/09, p. 237, Ins. 2-11). Furthermore, she made a comment about making a decision in a split second and that she did not plan any of this. (Tr. 01/26/09, p. 235, In. 15 through p. 236, In. 8).

On October 21, 2008, Counsel for Petitioner made a motion for co-counsel to be appointed due to the large amount of discovery in the case. (Tr. 10/21/08, p. 3, In 18 through p. 6, In 4). That motion was granted. (Tr. 10/21/08, p. 9, Ins. 16-23). On January 8, 2009, co-counsel for Petitioner had to withdraw due to a conflict of interest and the Court granted the request. (Tr. 01/8/09, p. 3, Ins. 14-24; p. 16, Ins. 1-2, 20). Counsel noted that co-counsel had to stop work three weeks before that hearing and that he needed more time to properly prepare the defense of Petitioner. (Tr. 01/08/09, p. 13, In. 1, through p. 14, In. 14). Counsel also noted to the Court that laboratory analyses were coming in during the time of the conflict. (Tr. 01/08/09, p. 13, In. 24, through p. 14, In. 2). The Court overruled the motion. (Tr. 01/08/09, p. 16, Ins. 3-20). Counsel made the same motion on the day of trial for the same reasons argued previously

and that motion to continue was again overruled. (Tr. 01/26/09, p. 16, ln. 23 through p. 17, ln. 2; p. 18 lns. 2-14).

IV. ARGUMENT

A) **THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE PETITIONER OF THE INDICTMENTS BECAUSE THE KILLING WAS IN THE DEFENSE OF ANOTHER, WAS WITHOUT MALICE AND WAS NOT "WILLFUL, PREMEDITATED, AND DELIBERATE."**

There was insufficient evidence to convict the Petitioner of the indictments. The Petitioner acted out of the defense of another, her son. "The limitations on the right to defend one's self are equally applicable, with slight modifications, to one's right to defend another. One must reasonably apprehend death or serious bodily harm to another before he or she is privileged to use force in defense of the other person. The amount of force which may be used must be reasonable in relation to the harm threatened." Foster v. Commonwealth, 13 Va. App. 380, 385-386, 412 S.E. 2d 198, 202 (1991).

Neither the Petitioner nor her son was at fault in bringing on the difficulty and she responded with the required amount of force. As such, the shooting of Stanley was justified. The Petitioner is not guilty of any homicide, nor the additional indictment charging use of a firearm in the commission of murder.

Even if this Court determines that there was sufficient evidence to support some level of homicide, the jury could find no more than voluntary manslaughter. "Malice and heat of passion are mutually exclusive; malice excludes passion, and passion presupposes the absence of malice." Barrett v. Commonwealth, 231 Va. 102, 106, 341 S.E.2d 190, 192 (1986).

Stanley through his actions and threats had raised the heat of passion in the Petitioner. The timing of Stanley's violent acts and the shooting are nearly concurrent and there was no time for that heat of passion to reasonably abate. Where heat of passion can not reasonably cool, there is no malice and when there is no malice there is no murder. Furthermore, as the evidence does not support a conviction of murder, there is insufficient evidence to convict the Petitioner of the remaining indictment.

In addition, the evidence presented in the case dictates that a jury find that the killing was not performed in a willful, premeditated and deliberate manner as required to find murder in the first degree. "The test of murder is malice. Every malicious killing is murder either in the first or second degree--the former if deliberate and premeditated, and the latter if not. Furthermore, there is a Prima facie presumption of malice arising from the mere fact of a homicide, but there is no presumption therefrom of deliberation and premeditation. That is merely another way of stating the familiar rule of law that every homicide is Prima facie murder in the second

degree, and that the burden is on the accused to reduce, and on the commonwealth to elevate, the grade of the offense. . . ." Perkins v. Commonwealth, 215 Va. 69, 73, 205 S.E. 2d 385, 387 (1974) citing Bradshaw v. Commonwealth, 174 Va. 391, 398, 401, 4 S.E. 2d 752, 755, 756 (1939).

The facts argued above having to do with heat of passion are factors that dictate that this was not a willful, premeditated, and deliberate act. Therefore, the jury could find the Petitioner guilty of no more than murder in the second degree.

B) THE COURT ERRED IN DENYING COUNSEL FOR PETITIONER'S MOTION TO CONTINUE.

"A trial court's ruling on a motion for a continuance will be reversed on appeal only if it is plainly erroneous and upon a showing of abuse of discretion and resulting prejudice to the movant." Butler v. Commonwealth, 264 Va. 614, 621, 570 S.E.2d 813, 817 (2002), *quoting* Mills v. Mills, 232 Va. 94, 96, 348 S.E.2d 250, 252 (1986).

On January 8, 2009, Co-counsel for Petitioner had to be removed due to a conflict of interest that arose in the case. Counsel noted the reasons he needed a continuance and that he would be unprepared to go to trial. Despite these arguments the Court abused its discretion and

overruled the objection. The conflict that arose was unforeseeable to the parties and the Court and the Petitioner was prejudiced.

WHEREFORE the Petitioner respectfully requests that the Petition for Rehearing be granted for the reasons outlined above.

DONNA JEAN REEDY HOCKMAN

By: B. D. Albertson
Counsel

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CERTIFICATE

I hereby certify that:

1. That a copy of this Petition for Rehearing was served via email on August 25, 2010, contemporaneous with filing to Counsel for Appellee, Christopher L. Miller, Esquire, Deputy Commonwealth's Attorney, 53 Court Square, Suite 210, Harrisonburg, Virginia 22801, at his email address cmiller@rockinghamcountyva.gov; and
2. This Petition contains less than 1750 words and is in compliance with Rule 5:20A; and
3. Counsel for Appellant is appointed.

This 25th day of August, 2010.



Bruce D. Albertson