STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Honorable Grace Gilchrist Knie, Circuit Court Judge

MAURICE ROBERTS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2022-000652

RETURN TO PETITION
FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Roberts was indicted by the Richland County grand jury for murder, first-degree burglary, attempted armed robbery, and two counts of attempted murder. The jury convicted Petitioner as charged following trial on February 24-28, 2014. The Honorable Doyet Early, III, the presiding judge, sentenced Petitioner to concurrent terms of forty-five years' imprisonment for murder, forty-five years' imprisonment for first degree burglary, thirty years' imprisonment for both counts of attempted murder, and twenty years' imprisonment for attempted armed robbery.

Petitioner appealed. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission filed a brief on Applicant's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction on July 13, 2016. State v. Roberts, Op. No. 2016-UP-358 (S.C. Ct. App 2016). The remittitur was returned to the circuit court on August 11, 2016.

Petitioner filed an application for post-conviction relief (PCR) on July 26, 2017. The State made its return on May 14, 2018. A hearing was held at the Richland County Courthouse on March 28, 2022, before the Honorable Grace Gilchrist Knie. By order dated April 25, 2022, Judge Knie denied relief.

Petitioner appealed the denial of relief. The return to the petition for writ of certiorari follows.

STATEMENT OF FACTS

Petitioner's friend, Jwaun Duckett, and all three of Petitioner's codefendants: Demetrice James, Vincent Nelson, Jr., and Deshawn McClary, testified against Petitioner. Testimony conflicted on the exact membership of the group, but Petitioner and his codefendants were alleged to be members of a rap group named "600." App. p. 403; pp. 410-11; pp. 663-64. Duckett testified Petitioner, James, Nelson, and McClary were present when Petitioner discussed committing a robbery. Duckett declined to participate. App. pp. 408-12.

Petitioner was planning to rob the Davis household, which included two sons: Trenton and Troy Scott, who would be caught in a hand to hand fight with the armed robbers. Trenton explained the Davis household had a recording studio, hair salon, and athletic room on the first floor of the house, with the living quarters upstairs. Brandon Jones, the murder victim, was a cousin who recorded at the house. The Davis household was a place youth would hang out and the family members helped friends that were having a hard time by providing food and clothes or maybe paying them for cleaning around the house. Trenton's mother took codefendant Nelson under her wing and the family helped him out. They treated him like family. App. pp. 324-27.

Joshua Williams testified he spent a lot of time at the Davis's and saw Nelson there on occasion. Nelson came over around 10 p.m. He testified Nelson's demeanor seemed odd, and when Nelson answered his phone, Nelson said, "I'm inside." Then Williams, Nelson, and Brandon (the murder victim) went outside to smoke. While outside, Williams saw three men in a sort of formation headed to the house. One of them giggled, then made a sudden turn and pointed a gun at Williams and told him to get on the ground. Williams was then hit with a pistol. App. pp. 231-40. The

gunman went in the house and Williams heard glass breaking. Meanwhile, two individuals were beating on Victim. Williams then heard Nelson yelling "let's go, let's go." Williams heard someone say "600, don't do it" before he heard gunshots. App. pp. 242-43.

Both Trenton and Troy Scott identified Petitioner as one of two men who broke into the house and engaged in a fight with them. Trenton recounted the burglary, testifying that prior to the burglary, Nelson was acting "out of character"—he was pacing back and forth, and he received a number of phone calls, which was odd since Nelson did not normally have a cell phone. App. p. 331, lines 2–16. Nelson pressured Jones to go outside to smoke a cigarette, and Jones eventually gave in. App. pp. 331-32.

Trenton came down stairs to what he called the "orange" room when he ran into Petitioner, who pointed a gun at him. Petitioner hit Trenton with a gun, but Trenton got up, hit Petitioner, and Petitioner fell through a glass table and dropped his gun. The second robber, later identified as Demetrice James, picked up the gun and passed it to Petitioner. Trenton did not know James, but recognized him from the neighborhood. Trenton then fought with James and Petitioner passed the gun to James. When Trenton's brother, Troy, joined the fight, they pushed James and Petitioner out of the room, into an exterior room, and they tried to push the door shut as the gun poked out. Then Trenton and Troy opened the door to the exterior room and rushed James and Petitioner, who both fled out of the house. However, codefendant James fired the gun as he departed and shot Trenton in the arm. App. pp. 332-41. Trenton picked both James and Petitioner out of photo lineups. App. pp. 347-49.

Troy testified how they treated Nelson like family. He likewise noticed Nelson acted nervous that night and wanted a smoke. Troy heard glass breaking and went into the basement room to see Trenton and Petitioner fighting. He testified similarly as Trenton, although when he first ran into the room, James had the gun at that point in time. Troy confirmed Trenton was shot, but they managed to eject Petitioner and James from the house. Troy then heard five or six more shots outside the house. When he went outside, he discovered Brandon (Victim), laying on the ground. They called for help. App. pp. 448-53. Troy also picked Petitioner and James out of photographic lineups. App. pp. 459-60.

Codefendant Nelson testified he told the group about studio equipment in Davis's house. Petitioner gave him Petitioner's phone. The plan was for Nelson to visit the Davis's house and call once he was inside. App. pp. 521-30. When things did not go as planned, Nelson ran away and heard shots fired as he fled. He later met Petitioner and McClary back at Petitioner's house. Petitioner went upstairs and used bleach on the clothes Petitioner wore during the burglary. App. pp. 543-548.

Chandler Davis, father to the two Scott brothers, found Victim and called EMS. App. pp. 252-55. Cari Pearson dated Troy. She testified similarly that Nelson acted strange. She told this to law enforcement, and she pulled up Nelson's Facebook page for them, Nelson's Facebook page talked about robbing people. App. pp. 468-77.

Codefendant James testified he agreed to go with Petitioner and McClary to meet Nelson at the studio. James admitted becoming involved in an altercation inside the house because Petitioner was a "dear friend." James testified Petitioner had a gun, dropped the gun during fighting, and James

picked it up. James testified his arm was caught in the door and the gun went off while they were trying to leave the house. James testified as he ran away, he saw Petitioner standing over the victim and fire a shot. He heard more shots as he ran away. App. pp. 489-97.

Codefendant McClary testified he remained outside during the failed robbery. He heard a gunshot a couple of minutes after Petitioner and James entered the house. Then Petitioner and James ran out of the house. Petitioner had the gun at this point. McClary saw Petitioner standing over Victim, shooting. App. pp. 672-77. McClary admitted he has a "600" tattoo on his arm and counsel argued McClary's nickname was 600 and he was the shooter. App. p. 219; p. 663.

Petitioner's statement to law enforcement admitted he was at his house with Nelson, McClary, and James, when Nelson discussed doing a lick at a house with a studio. Nelson left five minutes before everyone else with Petitioner's phone. Petitioner confirmed, "The plan was that [Nelson] would get inside and then call us to let us know when to come." App. pp. 740-41. Petitioner claimed McClary went with James in the house. He admitted though to helping his codefendants when they were "tussling" with someone in front of the house. He claimed during the tussle, he was hit in the eye. App. p. 741. Trenton previously testified he hit Petitioner in the face during the scuffle inside the house. App. p. 334. Petitioner claimed McClary shot Victim. Petitioner also claimed he accidently bleached his clothes while washing the dishes. App. p. 741.

Investigator McDonald, who took Petitioner's statement, confirmed law enforcement found bleached clothes at Petitioner's residence. He also confirmed Petitioner had a black eye. App. pp. 744-45.

STANDARD OF REVIEW

On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold the findings if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40.

The applicant bears the burden of proving the allegations in the PCR application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). For a claim of ineffective assistance of counsel, the applicant 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. 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." Id. at 117-18, 386

S.E.2d at 625.

ARGUMENT

I.

Counsel's cross-examination, calling out the investigation for its reliance on co-defendants of questionable character, was reasonable trial strategy.

Petitioner complains that counsel was ineffective for eliciting testimony from the lead investigator that the lead investigator found the three codefendants were credible "in this particular instance." The reality is counsel engaged in a cross-examination that mocked the investigators for relying on the three unsavory codefendants and obfuscated, for a moment, the other strong evidence of Petitioner's guilt, the identifications by both of the brothers and particularly Petitioner's admission that he was present for the planning of the robbery and was present at the location of the robbery. Counsel's cross-examination does not represent deficient performance, nor was Petitioner prejudiced.

The prosecutor went through the steps with Deputy Smith that he took during the investigation and asked Deputy Smith, "And from the credible evidence, [who was] the shooter?" Deputy Smith responded it was the Petitioner. Tr. p. 810, lines 1-2. On cross-examination, counsel questioned Deputy Smith as follows:

> Q: Well, you testified that the credible evidence points to Maurice as shooting outside?
>
> A: Yes.
>
> Q: And that's – those fellows right there, Deshawn McClary, Demetrice James, and Vincent Nelson ---

A: I believe they all indicate that.

Q: **Okay, and so they're credible to you?**

A: In this particular instance they are, yes, sir.

Q: Okay. Fair enough.

A: They all defined their involvement. Demetrice James ---

Court: All right. Hold, hold on one second. Let's – listen, fellows, ladies. This jury determines the credibility of the witnesses. Not the witnesses. So, that is y'all's sole responsibility to determine who's telling the truth. Not this witness. So, move on to another area.

Sutherland: Yes, indeed. Thank you, Your Honor.

Tr. p. 810, line 16 – p. 811, line 6.

Petitioner alleges counsel was ineffective by attempting to elicit testimony from the deputy about the credibility of the codefendants. The PCR court noted "and so they're credible to you" was clearly a rhetorical question calculated to undermine the prosecution by focusing on the prosecution's dependence on co-defendants the jury might find unsavory in character. Counsel, in hindsight, testified he should have objected rather than "mock" the deputy. But Counsel also agreed he got the best of both worlds by getting to mock the deputy and get a curative instruction that the jury determines the credibility of a witness and not another witness. App. p. 1020. However, there was unquestionable value in focusing the jury's attention on law enforcement's reliance on these codefendants. As Petitioner correctly points out, the codefendants in this case showed especially bad character: (1) McClary was previously convicted of strong-arm robbery and along with facing the charges from the present case, he had unrelated charges for armed robbery, kidnapping, and criminal sexual conduct in the third degree (App. 685-87); (2) James minimized his conduct, claiming he was

simply in the wrong place at the wrong time. He was adjudicated delinquent for carrying a weapon on school grounds, and in addition to the charges from the present case, he was also facing unrelated charges for kidnapping, armed robbery, first degree criminal sexual misconduct, and marijuana charges. (App. pp. 508-10); (3) of course Nelson was the one who betrayed the trust and goodwill of the Davis family that took him in. He already pled to several charges, including voluntary manslaughter as a lesser offense of the murder charge. His sentence was deferred until after he testified in this trial. Petitioner, in his petition, summarizes Nelson's shortcomings at trial well: "Nelson was a reticent witness who consulted his attorney during his testimony and did not answer a number of questions posed to him by the solicitor." Pet. for W.C. at 4 (citing App. pp. 524-527).

Counsel's cross-examination underscored law enforcement's reliance on the three codefendants who a jury might see as individuals of low character. This distracts from other evidence, including Petitioner's confession admitting to being a participant in the robber and the identification of Petitioner by both brothers. Not surprisingly, Counsel rendered this same criticism during closing argument, telling the jury "they have very little credibility" because "everybody is self-interested." App. p. 882. The cross-examination tactic was reasonable.

In order to prove a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. "[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." Strickland at 689. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S., at 690.

"Under Strickland, counsel's representation must be only objectively reasonable, not flawless or to the highest degree of skill." Dows v. Woods, 211 F.3d 480, 487 (9th Cir. 2000). "Moreover, counsel's tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must similarly meet only objectively reasonable standards." Id.; Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.") (citation and internal quotation marks omitted).

"Courts generally entrust cross-examination techniques, like other matters of trial strategy to the professional discretion of counsel." Henderson v. Norris, 118 F.3d 1283, 1287 (8th Cir. 1997). "The cross-examination of a witness is a delicate task; what works for one lawyer may not be successful for another." Id. The Eighth Circuit observed "there are few, if any, cross-examinations that could not be improved upon." Id. (citation and quotation marks omitted).

The PCR Court found Counsel's cross-examination "an effective display of advocacy for his client and does not find his performance in this regard deficient. It was well done, and was a reasonable approach to the prosecution's question about the 'credible evidence.'" App. p. 1054. Probative evidence supports the PCR court's finding as counsel's cross may be seen as a stinging criticism of the prosecution rather than the investigator bolstering witnesses as Petitioner insists. Even counsel's hindsight observation is more accurately described as a question of decorum when he suggests he should not have mocked the deputy.

Further, the jury heard the trial judge explain that credibility is for the jury, not a witness to

determine. Petitioner complains this admonishment was not a true curative instruction as it was not directed at the jury. However, the jury heard it and would later hear the trial court explain that the jury must determine the credibility of witnesses during the trial court's charge to the jury. App. pp. 897-98. Moreover, the admonishment was clearly for the jury's consumption when the trial court stated, "So, that is y'all's sole responsibility to determine who's telling the truth. Not this witness." An appropriate curative instruction is generally considered to cure any error. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). Because counsel's strategy on cross-examination was reasonable and because Petitioner was not prejudiced due to the on-point curative instruction, probative evidence supports the denial of relief.

II.

Because prior to 2015, reasonable minds could differ as to whether attempted murder was a specific or general intent crime, and the trial was in 2014, counsel was not deficient for failing to object to the general intent instruction for attempted murder.

Petitioner alleges counsel was ineffective for failing to object to a jury instruction that only a general intent was required for attempted murder. This trial occurred in 2014. In 2015, the Court of Appeals determined that a specific intent to commit murder was required to prove attempted murder. State v. King, 412 S.C. 403, 410-12, 772 S.E.2d 189, 193 (Ct. App. 2005). Subsequently, the Supreme Court affirmed as modified the Court of Appeals' opinion. State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). However, the opinion was not unanimous as to whether attempted murder was a specific intent crime. Justice Kittredge noted:

> The majority and I agree that the statutory language creates an ambiguity – "with intent to kill" speaks to a specific intent crime while "malice aforethought, either expressed or implied" points to a general intent crime. I would resort to legislative history to resolve the tension between the two phrases.

Id. at 72, 810 S.E.2d at 31 (Kittredge, J., concurring). Justice Kittredge favorably cited State v. Foust, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996), which held the then-existing offense of assault and battery with intent to kill (ABWIK) required only a general intent. Justice Kittredge found section 16-3-29 was the "verbatim" codification of the common law offense of ABWIK, and then queried, "If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?" Id. at 73, 810 S.E.2d at 32. Justice Kittredge concluded he would find the legislature intended for the offense to be a general intent crime. Id. at 74, 810 S.E.2d at 32.

In Foust, the Supreme Court noted ABWIK requires both the intent to kill and malice, but concluded the intent to kill is only a general intent. When the 2010 statute was passed, it mirrored ABWIK in requiring an intent to kill and malice "express or implied," mirroring the language of the common law offense of ABWIK. Given the verbatim language of ABWIK found in the attempted murder statute, a reasonable attorney could conclude that attempted murder was a general intent crime – just like Justice Kittredge did in his concurring opinion in King.

Petitioner challenges the applicability of the clairvoyance doctrine, arguing the attempted murder statute was passed in 2010, so King was not an actual change in the law. This argument misses a central tenet of Strickland that requires eliminating the distorting effects of hindsight in analyzing counsel's conduct. Counsel's testimony suggests that he saw the level of intent for attempted murder to be the same as the common law offenses of assault with intent to kill and assault and battery with intent to kill. App. p. 1002, lines 2-7. This is consistent with Justice Kittredge's view of the 2010 law years after the trial as evidenced by Justice Kittredge's dissent. Regardless of whether King "changed" the law, the question as to whether attempted murder was a general intent crime or a specific intent crime was an open question, unsettled until after Petitioner's 2014 trial. Until King, reasonable minds could differ.

However, the State disagrees that a clarification of the law is not a change in the law. Until the King cases, the statutory language, which Justice Kittredge noted was ambiguous, had not been interpreted by a reviewing court. Clairvoyance is still required to anticipate the outcome of King. In keeping with this, both the Fourth Circuit and our own State court understands Strickland does not require counsel to be clairvoyant and anticipate changes in the law. Harden v. State, 360 S.C. 405,

409, 602 S.E.2d 48, 50 (2004). The Supreme Court found the lower court erred in granting relief on the basis that defense counsel should have objected to an instruction contrary to State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), five years before Daniels was issued. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). The Supreme Court held "that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se." Id. In reaching this result, the Supreme Court declared the following:

> This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Id.; see Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) (holding "the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."). The intent required for attempted murder was a novel question of law until the King cases were issued.

In the present case, Justice Kittredge's disagreement on the intent element is proof that in 2014, counsel could believe only a general intent was necessary to prove attempted murder. Justice Kittredge's opinion is consistent with the State's argument referenced in the Court of Appeals' opinion. Reasonable minds back in 2014 certainly could disagree on what the statute required – the

issue was not finally settled until 2017. Whether viewed as a change in law or a clarification of law, counsel was not required to anticipate the holding of King. Therefore, counsel's failure to object to the general intent language does not fall below professional norms because pulling away the distorting effects of hindsight, counsel's judgment, like Justice Kittredge's, was reasonable. Further, in light of the overwhelming evidence of guilt, including that his codefendant fired the shots constituting the charge while they were engaged in a violent home invasion and burglary, Petitioner was not prejudiced by the alleged error. Therefore, probative evidence supports the PCR court's ruling.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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