

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Daniel D. Hall, Circuit Court Judge

FRANKLIN DOVER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000537

PETITION FOR WRIT OF CERTIORARI

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Whether the PCR court erred finding defense counsel was not deficient for failure to object to the trial court's instruction that the jury could infer malice from the use of a deadly weapon and in finding petitioner was not prejudiced by this failure where *State v. Burdette*,¹ was decided two days after petitioner was sentenced to life for murder?

¹ 427 S.C. 490, 832 S.E.2d 575 (2019).

STATEMENT

On September 4, 2014, a Cherokee County grand jury indicted petitioner for murder. App. 599-600. On July 15-17, 2019, petitioner was tried before the Honorable R. Keith Kelly and a jury.² App. 1. Michael Morin represented petitioner and Kimberly Leskanic, deputy solicitor, represented the state. App. 1. The jury found petitioner guilty of murder, and Judge Kelly sentenced petitioner to life imprisonment. App. 469, ll. 2-7; 475, ll. 12-15; 601.

Appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing the trial court abused its discretion by refusing to direct a verdict. The South Carolina Court of Appeals dismissed the appeal by unpublished opinion.

Thereafter, petitioner filed an application for post-conviction relief (PCR). App. 482-534. On August 8, 2022, an evidentiary hearing was held before the Honorable Daniel D. Hall. App. 553-78. Rodney Richey represented petitioner and Chelsey Marto represented the state. App. 553.

On March 13, 2023, Judge Hall signed an order denying PCR. App. 579-98. The court found counsel was not deficient for failure to object to the trial court instructing the jury it could infer malice from use of a deadly weapon because *State v. Burdette* was not decided until after petitioner's trial. App. 591. The court stated the jury instruction was proper at the time and counsel could not have anticipated this change in the law. App. 591. The court further found no prejudice was established because any alleged error in the instruction was harmless for three reasons. App. 592. First, there was no prejudice because petitioner's case did "not present a concern of possible jury confusion because there [was] no evidence that [petitioner] was entitled to a lesser-included offense instruction or that a relevant defense, such as self-defense or defense

² Petitioner was tried jointly with his co-defendant, Rajshun Foster, who was represented at trial by Tracy Racine. App. 1; 13, ll. 23-25; App. 54, ll. 14-15.

of other was applicable.” App. 592. Second, there was no prejudice because the trial court’s alternative definitions of malice supported the conclusion that the killing was malicious. App. 592. Third, there was no prejudice because the evidence of malice in the case was overwhelming.

This petition follows.

ARGUMENT

The PCR court erred finding defense counsel was not deficient for failure to object to the trial court's instruction that the jury could infer malice from the use of a deadly weapon and in finding petitioner was not prejudiced by this failure where *State v. Burdette* was decided two days after petitioner was sentenced to life for murder.

Relevant facts

At trial, the state alleged that in June 2014, petitioner “laid in wait” for Timothy Blair to return to his apartment and shot him in the chest, killing him. App. 49, ll. 5-14. Petitioner was tried with his co-defendant, Rajshun Foster, who the state claimed was driving the getaway vehicle. App. 51, l. 20-52, l. 23. The state presented evidence, which is discussed below, that petitioner was seen at the apartment complex looking for decedent a few days before and was seen there on the day of the shooting. However, the state did not produce any direct evidence of petitioner's guilt during trial.

The decedent's girlfriend, Terrica Bonner, testified at trial. App. 93-127. Terrica and decedent were living together at the apartment complex at the time of his murder. App. 93, ll. 12-21. She testified that a few days before decedent was killed Rajshun Foster and petitioner came to her apartment looking for decedent, but he was not there. App. 98, ll. 14. Terrica stated they were looking for decedent and “[i]t wasn't no friendly visit.” App. 98, ll. 19-25; 119, l. 25-120, l. 2. However, Terrica admitted when she first spoke to police about this visit, she did not include petitioner as one of the men who showed up looking for petitioner. She initially said it was Rajshun and three unknown men. App. 112, ll. 1-13. Terrica also clarified that during Rajshun's visit to her apartment a few days before decedent was killed he told her, “he had something for [decedent].” App. 98, ll. 21-23; 117, ll. 3-11.

On the day decedent was killed Terrica saw Rajshun at the apartment complex, with three other individuals as she was leaving the complex heading to her mother's home. She did not see petitioner. App. 101, l. 7-103, l. 19. Not long after Terrica arrived at her mother's home, she got a call that decedent had been killed. App. 104, ll. 2-5.

A resident of the apartment complex, Bernice Dowdle, testified that Rajshun was asking about decedent before the day he was killed. App. 129, l. 15-130, l. 12. Bernice testified usually decedent and Rajshun were together because they were friends. App. 130, ll. 20-24. On the day of the shooting, Bernice saw decedent and spoke to him. She told decedent Rajshun had been looking for him. App. 131, ll. 7-19. After Bernice spoke with decedent and he walked away she heard a "big bam," and she saw decedent laying behind the back door of Terrica's apartment. She did not see anyone leaving the area. However, Bernice testified she did see Rajshun after the shooting in the parking lot with Antron Bonner. App. 132, ll. 5-17.

Rajshun Foster's girlfriend, Jasmine Hudson testified that she and Rajshun were going to the apartment complex to visit her friend that lived there on the day decedent was killed. App. 145, l. 22-147, l. 7. On the way there she and Rajshun ran into petitioner, and he also went to the apartment complex. App. 147, l. 10-148, l. 18. Jasmine claimed she saw a gun in the passenger side of the car petitioner was driving. She described the gun as "beige" and "big." App. 150, l. 11-20; 152, ll. 20-24. Jasmine and Rajshun drove to the apartment complex and some time later petitioner got there. While there, Jasmine went to her friend's apartment and Rajshun and petitioner stayed outside by the cars. App. 156, l. 22-157, l. 25. Jasmine never heard a gunshot but found out later there had been a shooting. She says she left the apartment complex separately from Rajshun that day. App. 158, l. 3-159, l. 25.

A resident of the apartment complex, Sharie Studyvance, testified that on the day he was

killed she saw decedent outside talking to Rajshun and petitioner. App. 176, l. 24-178, l. 12. She claimed the Rajshun and decedent were arguing and petitioner was standing over beside his car with the door open.³ App. 180, ll. 6-25. Sharie testified that petitioner said to the decedent “I’ll get you one way or the other.” App. 179, ll. 16-21; 181, ll. 14-19. Sharie said she saw petitioner with a gun and described the gun as a “black and brown” “long gun.” App. 179, ll. 16-17; 181, ll. 2-7. Sharie left to go to the store and was later told decedent had been killed. App. 181, ll. 21-25.

Antron Bonner⁴ testified that he rode to the apartment complex with petitioner and Rajshun on the day of the incident. App. 317, l. 10-318, l. 14. He claimed petitioner had his rifle and “doctor’s gloves” with them in the car on the way to the complex. App. 318, l. 23-319, l. 14. Another individual Antron called “T” brought a small pistol. App. 318, l. 24-319, l. 18. On the way to the apartment complex, petitioner and T got out of the car with their guns. App. 321, l. 22-322, ll. 25. Rajshun and Antron proceeded to the apartment complex where Rajshun met with and spoke to decedent. App. 323, ll. 9-21. It is unclear from Antron’s testimony, but it appears that decedent eventually walked off. App. 324. Then Rajshun bought some marijuana, and they heard what Antron said sounded like an explosion. App. 325, ll. 22-24. They left the complex and picked up petitioner and T. App. 326, ll. 9-25. Antron claimed Rajshun asked petitioner where he shot him and petitioner answered he shot him in the chest. Then they dropped petitioner and T off at a woman’s house. App. 327, ll. 1-25. Antron admitted on cross-

³ Another resident of the apartment complex Nakisha Love testified she heard arguing and saw petitioner and Rajshun on the day of the incident but did not see decedent get shot. App. 198-99. Resident Kiara Douglas testified decedent told her he argued with petitioner and Rajshun but she did not see either man on the day of the shooting. App. 208-209.

⁴ Antron Bonner is the cousin of Terrica Bonner, decedent’s girlfriend. App. 115, ll. 1-8.

examination he never told police about this conversation in any of his earlier statements. App. 347, ll. 12-23; 350, ll. 2-16.

Antron testified that he was charged with decedent's murder but had been offered to plead guilty to "misprison of a felony." App. 329, l. 23-330, l. 3. He denied knowing about a plan to kill decedent. App. 330, ll. 5-15. Antron admitted he did not go to police about what happened but asserted that when he was asked by police he cooperated and gave a statement. App. 330, ll. 12-18.

Petitioner's girlfriend, Mary Davis testified that she saw petitioner late in the afternoon on the day of the incident. App. 363, l. 20-25. She said that he arrived at her house with T. Mary testified that petitioner changed clothes and put the clothes in a box for a friend to come and pick up. App. 364, ll. 13-25; 365, l. 14-366, l. 13; 374, l. 16-375, l. 13. Mary denies having seen petitioner with a gun that day or having seen Rajshun. App. 381, l. 1-8.

During the jury charge, the trial court instructed the jury as follows:

Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished and resulting wounds or injuries may be considered in determining intent.

The use of a deadly weapon gives rise to a permissive inference of malice. You twelve may draw an inference of malice from proof of the use of a deadly weapon if you conclude such an inference is proper after considering all the facts and circumstances in evidence.

You are free to accept or reject the permissive inferences, depending on your view of the evidence.

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise.

If the facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would be simply an evidentiary fact to be taken into consideration by you, along with all other evidence, and give it such weight as you determine it should receive.

A deadly weapon is an article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument or object has been used as a deadly weapon depends on the facts and circumstances of each case.

App. 458, l. 20-459, l. 18 (emphasis added).

At his evidentiary hearing petitioner testified that the trial court instructed the jury that it could infer malice from the use of a deadly weapon and defense counsel failed to object to the improper instruction. App. 557, ll. 7-21. He testified that he believed the decision in *State v. Burdette*, which came out on July 31, 2019, should have applied to his case where he filed his direct appeal on July 26, 2019. App. 559, l. 19-558, l. 9. Petitioner contended that defense counsel was ineffective for failure to object to and preserve the issue for appellate review. App. 558, ll. 10-15.

Defense counsel agreed the court's instruction regarding malice is no longer proper but stated that at the time of trial the law supported the charge. App. 570, ll. 4-16; 576, ll. 17-22.

Discussion

The burden of proof is on the applicant in PCR proceedings to prove the allegations in their application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where allegations of ineffective assistance of counsel are made, the question becomes, "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984).

First, the applicant must show that counsel's performance was deficient. *Id.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.*

The court wrongly found defense counsel was not deficient for failure to object to the trial court instructing the jury it could infer malice from use of a deadly weapon because *State v. Burdette* was not decided until after petitioner's trial. In *Burdette* this Court held, regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. *State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) (emphasis added).

In its order denying PCR the court stated the jury instruction was proper at the time and counsel could not have anticipated this change in the law. However, this situation did not require counsel to anticipate a change in the law where this issue was being considered on appeal at the time of petitioner's trial. Petitioner was tried July 15, 2019. This Court granted certiorari in *Burdette* the prior year, on March 7, 2018. Oral argument was held in *Burdette* in February 2019. Counsel's failure to object to the court's instruction was not reasonable where this issue had already been considered by the Court of Appeals and was under review by the Supreme Court.

Second, the applicant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the individual of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984).

Petitioner was prejudiced by counsel's failure to object to the court's jury instructions. The court erred finding petitioner's case did "not present a concern of possible jury confusion because there [was] no evidence that [petitioner] was entitled to a lesser-included offense instruction or that a relevant defense, such as self-defense or defense of other was applicable." While it is true there was no evidence presented that petitioner committed this crime in self-defense or that a lesser included instruction was applicable, as stated above the *Burdette* Court


held that regardless of the evidence presented at trial the trial court should not instruct the jury that it can infer the existence of malice when a deadly weapon was used.

The PCR court erred finding there was no prejudice because of the trial court's alternative definitions of malice supported the conclusion that the killing was malicious. Regardless of the rest of the instruction being proper the court's instruction to the jury that it could infer malice from the use of a deadly weapon prejudiced petitioner in this case. The state's case was largely circumstantial where there were no witness that saw petitioner shoot decedent or saw petitioner fleeing the shooting. However, multiple witnesses testified that they saw a gun in petitioner's car or in his hands on the day of the shooting and the court's instruction that the jury could infer malice from the use of a deadly weapon was certainly prejudicial in the state's case against petitioner.

The court erred finding there was no prejudice because the evidence of malice in the case was overwhelming. The evidence of malice in this case was far from overwhelming. The state's only evidence of malice was testimony that another resident heard petitioner say, "I'll get you one way or the other." The only direct evidence of petitioner's guilt was the incredible testimony of Antron Bonner whose testimony was largely self-serving as he admittedly had been offered a deal in exchange for his testimony against petitioner.

CONCLUSION

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



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ATTORNEY FOR PETITIONER

This 20th day of November, 2023.