THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
May 16 2024
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2024-000078
Lower Case № 2020-CP-07-01099

Aaron Scott Young, Sr. #288580,..... Petitioner,

vs.

State of South Carolina ..... Respondent

PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

Procedural History

On October 30, 2014, the grand jury for Beaufort County indicted Aaron Young, Sr. for murder and attempted murder in indictment №s 2020-GS-07-02173 and 2014-GS-07-01941. He was tried before Judge Thomas W. Cooper and a jury on August 10-12, 2015. The jury convicted Mr. Young of murder and attempted murder. Judge Cooper sentenced him to 30 years for the murder and 20 years for attempted murder.

Mr. Young appealed his convictions. On June 26, 2019, the South Carolina Court of Appeals affirmed Mr. Young's conviction for murder. After a timely petition for rehearing the South Carolina Supreme Court on March 12, 2020 denied his Petition for Writ of Certiorari.

On May 14, 2020, Mr. Young filed his initial application for Post Conviction Relief. An Amended Application for Post Conviction Relief was filed on March 16, 2023. A hearing was held in this matter on March 16, 2023, before Judge Robert J. Bonds. Judge Bonds denied the applicant's request for relief and denied a Rule 59 Motion. The Notice of Appeal was filed on January 18, 2024.

Factual History

On the afternoon of September 1, 2012, Tyrone Robinson came to the residence of Aaron Young, Sr., pointed a pistol at Mr. Young and then started shooting at him. App. at 724, l 18 to 726, l 18; App. 582, l 1 to 583, l 8. After the shooting, Mr. Young, with his son, left the residence of Mr. Young to obtain a pistol to go after Mr. Robinson. The testimony of Jontu Singleton established that while Mr. Young and his son pursued Mr. Robinson, they never found him. 587, l 11 to 588, l 12. Mr. Singleton stated that the three of them then went to Allen Road,

did not find Mr. Robinson and returned back to Mr. Young's house. App. at 588, l 22 to 589, l 8. At no time while Mr. Singleton was with them was the firearm retrieved by Mr. Young ever operable. App. 589, l 14-17. Neither Mr. Young nor his son ever fired at Mr. Robinson. App. at App. at 743, ll 15-21. Mr. Young admitted looking for Mr. Robinson down Oak View Road in Hilton Head. App. at 727, ll 18-24. After going down Oak View Road, Mr. Young and his son returned to Mr. Young's residence, App. at 727, l 25 to 728, l 6. From his home he then went to Allen Road. On Allen Road they saw Mr. Robinson's car parked in a yard. They did not see Mr. Robinson. When they saw the car, Mr. Young's son shot up the automobile. They then left to go back home. App. at 728, l 19 to 729, l 2. At the scene where Mr. Robinson's car was shot up, was the only place where shell casings were found. App. at 618, ll 2-18. The record contains no evidence of any shooting on another road.

After they left Allen Road, they heard three gun shots. App. at 729, ll 3-20. One of the last three gun shots, killed the minor child. The testimony established that Mr. Young's son was firing a 9 mm. The shot that killed the minor child was a .38. App. at 618 l 15 to 619, l 2; App. at 656, ll 18-20. The evidence established that the firearm used by the Youngs did not kill the minor child.

Standard of Review

As to Question I, the standard of review is de novo as the issue is one of law and does not involve factual issues. As to Questions II, III and IV, the standard of review is whether there are any facts at the post conviction relief hearing to support the findings of the Post Conviction Relief Judge. "Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839 (2018)(internal citations omitted)

Argument

Question I

Did the Post Conviction Relief judge err in failing to hold that the application of *State v. Young,* 429 S.C. 155, 818 S.E.2d 516 (2020) to this case on appeal violated the ex post facto provisions of Article I, § 4 of the Constitution of the State of South Carolina and Article I, § 10, cl. 1 of the Constitution of the United States of America when the South Carolina Supreme Court held in the *Young* case that they were extending the law of mutual combat to apply to an innocent third party?

Prior to the decision of this Court in *State v. Young,* 429 S.C. 155, 818 S.E.2d 516 (2020), no Court in South Carolina had ever applied the mutual combat situation to the death of a third party not involved in the mutual combat. This Court had in 1918 applied the mutual combat situation to a person who had not stabbed anyone but participated in the mutual combat with two individuals who did in fact stab someone. The defendant in that case was aiding and abetting the two people who had actually stabbed the deceased. *State v. Brown,* 108 S.C. 490, 195 S.E. 61

(1918). In the case, Davis Freize was stabbed by the defendants Brown and Humphries. The dispute arose over a strike at Judson Mill in Greenville, SC. Apparently a knife fight broke out between the strikers and the non-strikers. The defendants Brown, Huggins, and Humphries were nonstrikers. David Freize, who was a striker, was killed in the fight. Brown, Huggins and Humphries were convicted of manslaughter, which would have been in keeping with the doctrine of mutual combat applicable at the time of the fight.

As all the defendants that appealed the case were on the same side, the case is more properly analyzed as being part of the aiding and abetting doctrine. All three entered into mutual combat even though the deceased was only killed by Brown and Humphries. Under the charge, the jury believed that the three were acting in mutual combat and the three were convicted of manslaughter. The case did not involve the death of a person not engaging in mutual combat or aiding and abetting a mutual combat. In the case, the doctrine of mutual combat was used in its traditional role to reduce murder to manslaughter. The state did not use the doctrine as an offensive weapon to prove murder.

When this Court decided *Young*, this Court, for the first time, extended the doctrine to include an innocent third party. In addition to extending the doctrine of mutual combat, this Court used the doctrine, not in its traditional role of reducing murder to manslaughter, but to elevate the crime to murder. This Court said, "Today, we extend our jurisprudence and hold that each participant who willingly engages in mutual combat may be held accountable for the death or injury of an innocent bystander resulting from that confrontation." *Id.* at166, 818 S.E.2d at 522. In *Young,* this Court not only extended the doctrine, but used the doctrine to sustain a murder conviction. In discussing the impact of mutual combat, this Court has historically stated,

"Even in cases of mutual combat, if one begins the fight with a mortal weapon, it is murder; for in all such cases the combat must have been begun on equal terms to reduce the offence to manslaughter." *State v. Hammond,* 36 S.C.L. 91, 102 (S.C. App. L. 1850). This Court has also held, "In cases of mutual combat, to mitigate a homicide to manslaughter, it is necessary that the occasion should be unpremeditated, and that at the commencement of the contest, the parties should be upon equal terms." *State v. McCants*, 28 S.C.L. 384, 385-386 (1843).

The use of mutual combat to sustain a murder conviction is an application of the doctrine of mutual combat that had never been applied in South Carolina. Simply put, this Court took the doctrine of mutual combat to places it had never before been applied. This extension of the doctrine of mutual combat violated the *ex post facto* provisions of Article I, § 4 of the Constitution of the State of South Carolina and Article I, § 10, cl. 1 of the Constitution of the United States of America. The indictment in this case shows how the new meaning of "mutual combat" was used to secure the conviction of Mr. Young. The indictment provides, "Aaron Scott Young, Sr. did wilfully, unlawfully and with malice aforethought engage in mutual combat with Tyrone Robinson and did thereby cause the victim [ ] to be shot and killed . . . ." App. at 886. Prior to this case, no reported case in South Carolina had ever permitted the state to use mutual combat as a basis to establish malice. The irony is that mutual combat is normally used by the defense to eliminate malice.

This principle of extending the case law to be in violation of the *ex post facto* provision of the state and federal constitutions was recognized in *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984). In *Horne,* the defendant was convicted of murder of the killing of a viable fetus. Prior to *Horne*, no court had ever held that the murder statute applied to a viable fetus. The court

noted that it had previously held a defendant liable in a civil action for the wrongful death of a viable fetus. The court then stated, "It would be grossly inconsistent for us to construe a viable fetus as a 'person' for purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.* at 447, 319 S.E.2d at 704. In reversing the conviction the court said, "However, at the time of the stabbing, no South Carolina decision had held that killing of a viable human being *in utero* could constitute a criminal homicide. The criminal law whether declared by the courts or enacted by the legislature cannot be applied retroactively. " *Id.* In this case, at the time of the shooting, no South Carolina decision had held that killing of an innocent third party would apply to all participants in a mutual combat. Thus, the application of the extension of the law to Aaron Young, Sr. violates the *ex post facto* provisions of both state and federal constitutions.

As the *Young* decision violates the ex *post facto* provisions of the state and federal constitutions, this issue can be brought in a post conviction relief action under S.C. Code § 17-27-20. This section permits an action to be brought if the "conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State." Mr. Young has alleged a violation of the state and federal constitutions. To not provide him a remedy would violate the Constitution of the State of South Carolina which provides, "every person shall have speedy remedy therein for wrongs sustained." Art. I, § 9 Constitution of the State of South Carolina. Mr. Young is entitled to a remedy for the wrong sustained.

This Court in *Young* relied upon cases from other states to support its position. This Court cannot rely upon the interpretation of other states to avoid the application of the ex post facto provisions of our constitutions. As the United States Supreme Court has said, "It would be

a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." *Bouie v. City of Columbia*, 378 U.S. 347, 359–60 (1964). The prohibition of the use of out of state cases as to statutes would also apply to the interpretation of the common law by this Court.

This Court extended the application of the mutual combat doctrine to include an innocent third person and permitted the state to use the doctrine not to reduce murder to manslaughter, but to sustain a murder conviction. As such, this Court has given the doctrine a new meaning in violation of the *ex post facto* provisions of of Article I, § 4 of the Constitution of the State of South Carolina and Article I, § 10, cl. 1 of the Constitution of the United States of America. Thus, this Court should grant the Petition for Writ of Certiorari and reverse the murder conviction of Aaron Young, Sr.

Question II

Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective in failing to object to a hearsay statement of Tyrone Robinson that he had been shot at by Aaron Young, Jr. as the statement did not qualify as an excited utterance?

At the trial, Charlese Mitchell testified she had heard about ten shots fired in rapid succession. App. at 524, ll 4-6. After she walked outside, she noticed a truck driven by Aaron Young, Sr., her cousin, drive by. App. at 524, l 11 to 525, l 5. After the truck passed her house another cousin of hers, Tyrone Robinson stopped by her house. App. at 529, ll 6-21. She described Mr. Robinson as "He is hyper, like he was on cloud nine. He was really amped up - -" App. at 530, ll 16-17. When she started to say what Tyrone Robinson told her, trial counsel made a timely hearsay objection. When the trial judge ruled the statement qualified as an excited

utterance, trial counsel made no further objection. App. at 530, l 23 to 531, l 8. Trial counsel made no argument that the comment did not qualify as an excited utterance. An objection should have been raised.

While Mr. Robinson was described as "amped up," his first statement was the product of cool reflection. Ms. Mitchell stated he first asked to see his cousin, Patrick Young. App. at 531, ll 12-15. Only after making an inquiry about his cousin does Ms. Mitchell state, "He then applied [sic] to me that those MF was out there shooting at him." App. at 531, ll 15-16. He never identified who was shooting at him.

Trial counsel erred in failing to object to this comment which was admitted as an excited utterance. This Court has said, "A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court." *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). Had a proper objection been raised, the statement would not have been admitted. In considering the totality of circumstances, the trial court would have been required to consider that Mr. Robinson had previously shot at Mr. Young at Mr. Young's residence. He was not a reliable source for making any accusation against Mr. Young and his son. Secondly, the event was over. The statement was not made while the stress of the event was happening.

In determining whether an alleged excited utterance should be admitted, this Court has said, "In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances." *State v. McHoney*, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001).

In determining the totality of the circumstances, the Kentucky Supreme Court has listed eight factors for the court to consider. They stated the eight factors as:

> (I) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.
> *Jarvis v. Commonwealth* 960 S.W.2d 466, 470 (Ky. 1998)

In this case, the alleged excited utterance would not be admissible considering these eight factors. Both the opportunity and the likelihood of fabrication are great. Mr. Robinson had previously shot at Mr. Young. There was obvious animosity between the two men. Because of Mr. Robinson's actions earlier that day, he had an inducement to fabricate - he had shot at Mr. Young. There were no visible results to which the excited utterance related. While the utterance was not made in response to a question, it was not an immediate utterance upon seeing the witness. He asked about a third person first. To minimize his involvement in the previous shooting, he obviously would have an interest in making a self-serving declaration. Finally, one need look no further than Rule 802(2) of the South Carolina Rules of Evidence which requires that the person be under the stress of the excitement. In this case, the alleged excitement could be from his being involved in shooting at Mr. Young. The shooting at Mr. Young is reason to be "amped." Whether a person is under the excitement of the alleged incident or a recent previous event is a question for the trial judge to determine. In this case, no trial judge would determine as a matter of law that Mr. Robinson was under the influence of being shot at, if he was in fact being shot at. For these reasons, trial counsel was ineffective in failing to object to the statement attributed to Tyrone Robinson.

Question III

Did the Post Conviction Relief Judge err in failing to hold trial counsel was ineffective when he failed to object to the 911 call in which hearsay statements of other witnesses were given on the tape as the alleged crime was being reported?

A 911 call is not admissible simply because it is a 911 call. A 911 call can be, and often is, inadmissible as a violation of the Sixth Amendment under *Crawford v. Washington*, 541 U.S. 36 (2004). As the United States Supreme Court later said:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006)

The four 911 calls were introduced at the trial on a single disk. App. at 514, l 18 to 515, 20. No objection was made to the introduction of the calls. An objection should have been made to some of the calls. Trial Counsel admitted he did not conduct any research as to the 911 call and whether it violated the *Crawford* decision. App. at 1141 ll 6-22. He further admitted the 911 call was prejudicial to Mr. Young, as, "[T]hat tends to show that it was a running gun battle which was the state's theory all along." App. at 1142, ll 7-9. The 911 call violated *Crawford* and should have been excluded.

This 911 call begins with the statement "We have a lady on the line who has some information about where the shots were fired just now." 911 call. The call was between a caller and dispatch with the caller simply repeating what was allegedly told to her. The caller, repeating what was allegedly told to her said, "and the two were shooting at each other." 911 call. Later in

the call, another woman gets on the line. The assumption is this woman is the one who first relayed the facts to the called. The dispatcher did not ask this woman to repeat what was previously said. The woman was not a victim of any crime. At the time of the call, the woman is simply reporting a crime that she had observed. Nothing in the call suggests the crime was on going. Under these circumstances the call was no different from a person walking in off the street to report what they observed concerning a crime. Thus, the call is testimonial in nature and an objection should have been made.

As stated by the Court in *Crawford,* "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England." *Crawford* at 52. As long as the person doing the questioning is a government actor, it matters not whether the person is a police officer or a 911 operator. They both are trying to achieve the same result - a statement from the caller as to the events surrounding the crime that they observed. In a similar situation, the New York court held:

> Viewed from the perspective of an "objective witness," it is not unreasonable to believe that such a witness reporting a crime to the police would expect that she or he would be called, if necessary, to testify at trial, and that all pre-trial information which she or he had given to the police, including a statement within a 911 call, would be available for use at trial. The very act of reporting a crime, that is making a formal statement to government officers, would lead an objective witness to understand that she or he has become involved in an official police investigation and that her or his formal statement could be used for prosecution, including trial.
> *People v. Dobbin,* 6 Misc. 3d 892, 897, 791 N.Y.S.2d 897, 901 (Sup. Ct. 2004)

The same reason would apply in this case. The caller made the call to report what she knew about the crime. The caller would not have been surprised to ask to be present at the trial

and present their testimony. The 911 call was testimonial and would have been excluded under *Crawford* had a timely objection been made.

In addition to trial counsel stating the testimony was prejudicial to Mr. Young, the facts of the case also show this. The state sought to prove the attempted murder charge by the use of the 911 call and the statement by Tyrone Robinson. The 911 call gave the testimony of Tyrone Robinson credibility. When Mr. Robinson said he was being shot at, he well might have meant that his car was being shot at. Mr. Young never denied shooting up the car of Mr. Robinson. The jury could have easily rejected the testimony of Tyrone Robinson as being not reliable. The one piece of testimony then became the basis for the attempted murder charge. The state exploited the 911 call in its closing argument. App. at 787, l 18 to 788, l 11. As this testimony should have been excluded, Mr. Young was prejudiced by the failure to object. The 911 calls were used to help established both attempted murder and the mutual combat.

Question IV

Did the Post Conviction Relief Judge err in holding that trial counsel was not ineffective for the failure to object to the general intent charge as to attempted murder when trial counsel admitted he researched the issue and did not object to the implied malice alleged in the indictment?

This case was tried on August 10-12, 2015, well before the decision of this Court on October 25, 2017, in *State v. King,* 422 S.C. 47, 810 S.E.2d 18 (2017) The case, however, was tried shortly after the decision of the South Carolina Court of Appeals on April 22, 2015, *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017).

At the Post Conviction Relief hearing, trial counsel testified he researched the issue of the mens rea required to prove attempted murder. He was asked about his research on the mens rea required in attempted murder. He testified as follows:

> Q. (By Mr. Wise): Did you find any cases about the mens rea required as to attempted murder?
> A. (By Mr. Ferguson): Well, I can't recall specifically sitting here. I do know that there was an issue with implied malice versus expressed malice, you know. And I recall, you know, having concerns about some of Mr. Young's statements about how he wanted to kill Mr. Robinson. And so I was concerned about both expressed and potentially implied malice. I don't recall the specific research, but certainly it was something we looked into a good deal, yes sir.
> App. at 1135, l 17 to 1136, l 5.

By this testimony, defense counsel acknowledged that the mens rea required for attempted murder was an important issue in this case. In his testimony he recognized the important difference between expressed and implied malice. With this knowledge and concern, any reasonably competent defender of those accused of a crime, should have been aware of the opinion by the South Carolina Court of Appeals decision in *King*, decided less than four months before this trial.

Even if this Court does not hold trial counsel to have been ineffective in not citing to the Court of Appeals decision in *King,* other decisions should have put trial counsel on notice that attempted murder is a specific intent crime. In 2000, this Court said, "Attempted murder would require the specific intent to kill and conduct towards that end." *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). In 2001, the South Carolina Court of Appeals, citing *Sutton*, stated, "Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime." *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001). Finally, the court of appeals reaffirmed the

position as to specific intent as to attempt crimes when it stated, "A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery." *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007). In 2011, this court again reaffirmed the position that an attempt to commit a crime requires specific intent, The Court said, "To prove attempt, the State must prove that the defendant had the specific intent to commit the underlying offense, along with some overt act, beyond mere preparation, in furtherance of the intent." *State v. Reid*, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011). In 2012, this court said, "Accordingly, '[t]o prove attempt, the State must prove that the defendant had the specific intent to commit the underlying offense, along with some overt act, beyond mere preparation in furtherance of the intent.'" *State v. Green*, 397 S.C. 268, 283, 724 S.E.2d 664, 671 (2012)(internal citations omitted). Since 1973 an ALR has existed discussing attempted murder and the requirement that there be a specific intent. Jeffrey F. Ghent, Annotation, *What constitutes attempted murder*, 54 A.L.R.3d 612 (Originally published in 1973).

The citations above show that a reasonably competent lawyer, who has recognized the importance of the required mens rea in an attempted murder case, would easily have found that a specific intent is required. In this case, trial counsel, even though admitting he had researched the issue of the mens rea required for attempted murder, apparently found none of the cases cited. Counsel was ineffective in his research and in his representation of Mr. Young. As the United States Supreme Court has said, "Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Tollett v. Henderson*, 411 U.S. 258, 268 (1973). The United States Supreme Court has cautioned courts from viewing a case from hindsight. As the court

said, "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). In finding trial counsel ineffective, the cases cited in this Petition shows that a finding that counsel was ineffective is not being made in hindsight, but based upon the law available at the time of the trial.

As the case law of South Carolina at the time of this trial clearly established that any attempted crime required a finding of specific intent, trial counsel was ineffective in his representation of Aaron Young, Sr. As a result a new trial should be ordered.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and order a new trial for Aaron Young, Sr.

May 15, 2024

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