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**Nov 13 2024**

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Hampton County

Honorable Roger M. Young, Circuit Court Judge

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DANIEL LEE FLUDD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000375

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PETITION FOR WRIT OF CERTIORARI

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### **ISSUE PRESENTED**

Whether the PCR court erred by ruling petitioner was not prejudiced by defense counsel's failure to object to the improper jury instruction that malice could be inferred from the use of a deadly weapon reasoning that when the jury found petitioner guilty of voluntary manslaughter it determined malice was not involved in the killing since the jury was not instructed that malice was not an element of voluntary manslaughter and the jury's rejection of self-defense could also have been based on an erroneous determination that malice was involved since a deadly weapon was used by petitioner?

## STATEMENT

### **Procedural history**

Petitioner was indicted at the August 17, 2017 term of the Hampton County grand jury for the offense of the murder of Bobby Atkins on March 22, 2017. Petitioner was also indicted for possession of a weapon during the commission of a violent crime in that same incident. App. 643-646.

Petitioner's case was called to trial on December 3, 2018, before the Honorable Perry M. Buckner and a jury. Ian Deysach represented petitioner, and Tameaka Legette was the assistant solicitor. App. 1.

On December 5, 2018, the jury found petitioner guilty of the lesser-included offense of voluntary manslaughter and guilty of possession of a weapon during the commission of a violent crime. App. 552, l. 16 – 553, l. 3. Judge Buckner sentenced petitioner to twenty years' imprisonment for voluntary manslaughter, and he imposed a five-year concurrent term of imprisonment for possession of a weapon during the commission of a violent crime. App. 565, l. 17 – 566, l. 5,

Petitioner's convictions were affirmed on direct appeal in State v. Daniel Lee Fludd, 2021-UP-165 (filed May 12, 2021). App. 568-569. The Court of Appeals found that the issue of the judge's error in charging that malice could be implied from the use of a deadly weapon was not preserved for appellate review. App. 569.

Thereafter, petitioner filed an application for post-conviction relief on May 20, 2022. App. 570-576. The state then filed a return to this application for post-conviction relief and a motion for a more definite statement. App. 578-589,

Thereafter, petitioner filed an amended application dated November 10, 2023 through PCR counsel Chelsey Marto. App. 590-593.

An evidentiary hearing was convened on November 27, 2023, before the Honorable Roger Young. Chelsey Marto represented petitioner. Danielle Dixon was the assistant attorney general. App. 596.

An order of dismissal was filed on February 26, 2024. App. 627-641. As to the failure of trial counsel to object to the jury instruction that malice can be inferred from the use of a deadly weapon, the PCR court found that while the jury instruction was improper, petitioner could not prove prejudice. The PCR reasoned that since the jury convicted of voluntary manslaughter and not murder, the jury determined the state did not prove malice aforethought. App. 639.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred by ruling petitioner was not prejudiced by defense counsel's failure to object to the improper jury instruction that malice could be inferred from the use of a deadly weapon reasoning that when the jury found petitioner guilty of voluntary manslaughter it determined malice was not involved in the killing since the jury was not instructed that malice was not an element of voluntary manslaughter and the jury's rejection of self-defense could also have been based on an erroneous determination that malice was involved since a deadly weapon was used by petitioner.

### **Relevant facts**

The decedent and petitioner had their fatal fight because the decedent refused to give petitioner his necklace back after petitioner let him borrow it. Zaneh Garvin testified she was twenty-four-years-old, and that she was a graduate of Estill High School. She knew the decedent, Bobby Atkins, by his nickname of "Champ." App. 286, ll. 2-22.

Garvin dated Champ for about four months. App. 287, ll. 2-3. Champ was addicted to drugs. App. 287, ll. 17-19. Garvin admitted she was a prostitute since she sold herself for drugs, and she gave some of her prostitution money to Champ so he could buy drugs. App. 287, ll. 10-16.

Garvin testified that on the night of the fatal incident, she and Champ started out at Bummy's house. Petitioner was there. Drinking and drugs use were prominent at the event. The decedent was using crack cocaine, and Garvin was there to sell herself as a prostitute. She did not make any money that night at Bummy's house to give to the decedent. App. 344, l. 4 – 345, l. 22.

However, Garvin acknowledged that at one point, petitioner gave the decedent his necklace. The decedent then put petitioner's necklace around his neck. App. 346, l. 1 -347, l. 2.

Garvin remembered that they then walked to the home of one Mr. Brooks. Petitioner did not go with them. App. 347, ll. 3-13. They then proceeded to the home of Travis Fields who was a drug dealer. The decedent was trying to trade petitioner's necklace for drugs at this time. App. 348, l. 20 – 349, l. 23.

Garvin testified that at some point that evening, petitioner asked for his necklace back and the decedent refused to give it back. App. 351, ll. 1-9. A fight ultimately developed over the necklace in which the decedent grabbed a shovel, and he swung the shovel at petitioner. The shovel broke at that time. Garvin admitted no knife was involved until after the shovel was broken. App. 354, ll. 2-18. Garvin claimed after the decedent swung the shovel and broke it that petitioner pulled out a knife and fatally stabbed the decedent. App. 360, ll. 12-21.

The pathologist later testified that the decedent's injuries were likely caused by "a knife with one blunt edge and one sharp edge." She said it was unlikely that a shovel caused the decedent's wounds. App.458, l. 6 - 459, l. 16. This opinion of the pathologist was not in agreement with petitioner's statement to the police that he stabbed the decedent in self-defense with the remains of the broken shovel. See State's Exhibit 101, App. 647-699, items 132-471.

The judge instructed the jury on the offenses of murder, voluntary manslaughter, and the defense of self-defense. App. 526, l. 8 -539, l. 12.

The judge also charged that "malice may also be inferred, or may arise, when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or sustain bodily harm. Whether an instrument has been used as a deadly

weapon depends on the facts and circumstances of each case, based on the evidence.” App. 533, l. 24 – 534, l. 4.

As will be seen infra, the state conceded at PCR that the implied malice instruction involving the use of a deadly weapon was improper in this case since it was self-defense case. See State v. Belcher, 385 S.C. 595, 685 S.E.2d 802 (2009). Further, while petitioner’s case was pending on appeal, our Supreme Court held in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), that regardless of the evidence presented at trial, the trial court should never instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. Thus, if the implied malice jury instruction error was preserved on direct appeal petitioner would have obtained a new trial unless the appellate court found the error harmless.

As stated, appellate counsel raised the improper implied malice instruction from the use of a deadly weapon on direct appeal. The Court of Appeals found the issue was not preserved for appellate review because defense counsel did not object to the instruction. App. 568-569.

This failure to object to the implied malice instruction issue was raised in post-conviction relief in the lower court, and it is now properly before this Court. Petitioner testified at PCR that he understood the jury instruction that malice could be inferred from the use of a deadly weapon was an incorrect instruction on the law at the time since he had raised self-defense at trial. Appellate counsel raised that issue and the Court of Appeals found it was not preserved for appellate review. Petitioner testified his attorney should have objected to this instruction. App. 606, l. 6 – 607, l. 7.

Defense counsel testified at PCR that he did not recall the judge charging that malice could be inferred from the use of a deadly weapon. App. 618, ll. 14-17. However, defense counsel admitted that since that jury instruction was given, he should have objected to it.

However, defense counsel rationalized that “the jury didn’t find malice, so it wasn’t like they got that instruction and then they found that there was malice. So I guess even though that instruction was given and it wasn’t right, it didn’t end up being, I don’t know, something that the jury decided.” App. 618, l. 18 -619, l. 1.

At the conclusion of the PCR hearing, PCR counsel argued that State v. Belcher clearly applied in this case and that defense counsel had no reason not to object to this impermissible jury instruction. App. 622, l. 20 – 623, l. 9.

The assistant attorney general then argued that there was no prejudice from the failure to object to the malice being inferred from the use of a deadly weapon instruction because petitioner was found not guilty of murder. She reasoned the jury did not find malice in this case because it convicted petitioner of voluntary manslaughter and not murder. App. 625, ll. 13-20.

In the order of dismissal, the PCR judge wrote that the jury instruction on malice being inferred from the use of a deadly weapon was not a proper jury charge. App. 639. The PCR court also ruled:

However, this Court finds Applicant cannot prove prejudice from counsel’s failure to object to this charge. The jury convicted Applicant of voluntary manslaughter, which does not include malice aforethought. Thus, the jury found the State did not prove malice aforethought beyond a reasonable doubt. Because the jury—in convicting Applicant of voluntary manslaughter but acquitting him of murder—determined the State did not prove malice aforethought, it is not reasonably likely the outcome would have been different had the Court not given this inferred malice charge. Thus, Applicant did not prove prejudice, and this claim is denied.

App. 639.

## Discussion

In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which was the controlling law at the time of petitioner's 2018 trial, the Supreme Court held that the jury instruction that malice could be inferred from the use of a deadly weapon was improper in a murder case where there was any evidence that would reduce, mitigate, or justify the killing.

In petitioner's case, the jury was properly instructed on voluntary manslaughter, which reduced murder to a lesser-included offense, so long as there was evidence of a killing in a heat of passion upon a sufficient legal provocation. See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) (voluntary manslaughter instruction was mandated where there was evidence the killing occurred in a heat of passion upon a sufficient legal provocation).

Further, petitioner's jury was instructed on self-defense, which was a complete defense the state had the burden of disproving beyond a reasonable doubt once it was properly raised by petitioner. See State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002).

It was uncontested in this case that the jury instruction that malice could be inferred from the use of a deadly weapon was an improper jury charge. The error of the PCR court here was in finding that petitioner was not prejudiced by the improper implied malice instruction because the jury found petitioner guilty of voluntary manslaughter and not murder. However, the jury in this case was not instructed that the crime of voluntary manslaughter was a killing "*without malice.*" Therein lies the fallacy in the harmless error logic since the jury was never instructed that voluntary manslaughter was the killing of another human being without malice. The jury was instructed that "the state must prove beyond a reasonable doubt that defendant killed another person with malice aforethought" to be guilty of murder. App. 532, l. 22 – 533, l. 23. The jury was also instructed that malice could be inferred "when the deed is done with a deadly weapon."

Both the broken shovel handle and a knife were deadly weapons within the meaning of this jury instruction. App. 533, l. 24 – 534, l. 4. See State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (Whether a fist can be a deadly weapon was a question of fact for the jury).

When the jury was instructed on voluntary manslaughter, it was not instructed that the crime of voluntary manslaughter was the killing of another human being without malice. App. 534, l. 14 – 536, l. 2. The lack of malice was never mentioned in the instruction on voluntary manslaughter. App. 534, l. 14 – 536, l. 2. If the jury had been instructed that voluntary manslaughter did not contain the element of malice, the lack of prejudice rationale would certainly be more appealing or compelling.

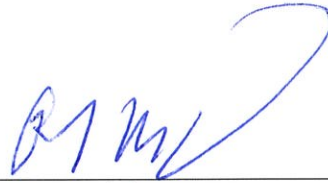
Further, though, the jury could have convicted petitioner of voluntary manslaughter by reasoning that the killing included malice but precluded it from acquitting petitioner by reason of self-defense since a defendant had to be without fault in bringing on the difficulty. App. 526, l. 8 – 529, l. 14. If petitioner was acting with malice aforethought, it would be reasonable for the jury to conclude that malice aforethought was a mental state that precluded it from acquitting petitioner by reason of self-defense.

The PCR court erred, given the jury instruction in petitioner's case, by concluding petitioner did not suffer prejudice from the improper jury instruction that malice could be inferred from the use of a deadly weapon since petitioner's jury was not instructed that voluntary manslaughter was the killing of another human being *without malice*.

The order of the PCR court should therefore be reversed.

**CONCLUSION**

By reason of the foregoing arguments, the PCR court's denial of relief should be reversed, and petitioner's case remanded to the Hampton County Court of General Sessions for a new trial.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of November, 2024.