

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

RECEIVED

OCT 29 2013

S.C. Supreme Court

LOUIS GAINNEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000535

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

In violation of Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel failed to object to the trial judge's instruction to the jury which permitted the jury to infer malice from the use of a deadly weapon in order to convict him of assault and battery with intent to kill.

STATEMENT

On October 18, 2007, a Richland County Grand Jury indicted Petitioner for assault and battery with intent to kill. App. 577 – 578. Petitioner was tried before the Honorable L. Casey Manning and a jury during a three-day trial beginning on September 1, 2009. Heather Weiss and Joanna McDuffie represented the state. James D. Cooper, III and Ernest Deon O’Neil represented Petitioner. App. 1. The jury found Petitioner guilty as charged, rejecting the lesser-included offense of assault and battery of a high and aggravated nature. App. 395, lines 13 – 19. Pursuant to the recidivist statute, Judge Manning sentenced Petitioner to life imprisonment without the possibility of parole. App. 406, lines 6 – 11; App. 579. Petitioner filed a timely notice of appeal, which was perfected by Kathrine Hudgins. Ms. Hudgins filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 410 – 419. On February 1, 2012, the South Carolina Court of Appeals dismissed Petitioner’s appeal in an unpublished opinion. App. 420 – 421; State v. Gainey, 2012 – UP – 057 (S.C. Ct. App. filed Feb. 1, 2012).

On July 6, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 422 – 460. The matter proceeded to an evidentiary hearing on January 15, 2012 before the Honorable G. Thomas Cooper. David Belding represented Petitioner, and Robert Corney represented the state. App. 469. On March 8, 2013 Judge Cooper denied Petitioner relief from his conviction and sentence. App. 562 – 576.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

In violation of Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel failed to object to the trial judge's instruction to the jury which permitted the jury to infer malice from the use of a deadly weapon in order to convict him of assault and battery with intent to kill.

Relevant facts

Facts produced during the trial

During opening statements, the prosecutor explained that Petitioner had been charged with assault and battery with intent to kill (ABWIK), which required the state to prove that Petitioner acted with malice. App. 73, lines 14 – 20. The prosecutor informed the jurors that “malice may be implied from the use of a deadly weapon,” and the jury would have to determine “what is a deadly weapon.” App. 74, lines 3 – 8.

On March 31, 2007, Detra Montgomery, Petitioner's girlfriend, and Petitioner got into an argument. App. 95, lines 17 – 21. Montgomery walked to a neighbor's apartment. App. 96, lines 1 – 2. Later, Petitioner joined her at the neighbor's; however, the two continued to argue. Petitioner wanted Montgomery to return home as it was one o'clock in the morning, but Montgomery refused. App. 183, lines 2 – 14. Petitioner then grabbed Montgomery and removed her from the neighbor's porch. App. 183, lines 15 – 16. Petitioner dragged her around the side of the apartment building. App. 104, lines 11 – 14. Montgomery believed Petitioner was punching her, but claimed she realized Petitioner was stabbing her when she heard a popping sound. App. 107, lines 1 – 14. Montgomery fought back. App. 107, lines 21 – 24. Montgomery testified that she was not sure what Petitioner used to stab her, but she thought she remembered a screwdriver. App. 109, lines 4 – 6.

Petitioner testified that he and Montgomery's struggled on the ground. He admitted to hitting Montgomery, but he did not remember stabbing Montgomery. App. 302, lines 5 – 13. Additionally Petitioner denied having a screwdriver during the altercation with Montgomery. App. 317, lines 7 – 10.

Based upon the evidence presented, the trial judge agreed to charge the jury concerning the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) in addition to ABWIK. App. 339, lines 8 – 12.

During his closing argument, Petitioner admitted he was guilty of ABHAN, but denied he was guilty of ABWIK. App. 349, lines 2 – 5. When discussing the circumstances of aggravation applicable to ABHAN, Petitioner explained that the use of a deadly weapon was a circumstance of aggravation which would permit a finding of ABHAN. App. 350, lines 12 – 15. In fact, Petitioner admitted that the prosecution had presented evidence of the use of a deadly weapon. App. 350, lines 15 – 16. Importantly, Petitioner explained that the jury was not required to infer anything in order to find him guilty of ABHAN. App. 351, lines 3 – 8.

In contrast, the prosecutor argued that Petitioner was guilty of the greater offense - ABWIK - based upon the use of a deadly weapon. The prosecutor reminded the jury that Petitioner had admitted there was evidence he had used a deadly weapon. The prosecutor explained that Petitioner's use of a deadly weapon took the incident "to the next level." App. 358, lines 9 – 19.

In his jury instructions, the trial judge explained that malice was a required element of ABWIK. App. 373, lines 8 – 9. Further, the trial judge explained that implied malice occurred "when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to common experience there was a plain and

strong likelihood that death would follow the contemplated act.” App. 374, lines 10 – 15.

Specifically, the judge instructed the jury:

the law says that if one intentionally shoots or stabs another with a deadly weapon, the implication of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary or he fact to be taken into consideration by you, the jury, along with other evidence in the case and you may give it such weight as you determine it should receive.

App. 374, lines 16 – 24. Additionally, the trial judge instructed the jury concerning the elements of ABHAN, which included the use of a deadly weapon as an example of a circumstance of aggravation. App. 377, lines 20 – 24.

Petitioner’s trial counsel took no exception to the judge’s instructions. App. 382, lines 14 – 18. While deliberating, the jury asked a question concerning the definition of malice. App. 385, lines 16 – 19; app. 408. While the judge and the attorneys were discussing how to answer the jury’s question regarding malice, the jury requested further instruction on the laws of assault and battery. App. 388, line 25 – App. 389, line 1; App. 409. In response to the jury’s questions, the judge instructed the jury again regarding ABWIK and ABHAN. He also instructed the jury concerning the inference of malice from the use of a deadly weapon. App. 390, lines 7 – App. 393, line 14. Shortly thereafter, the jury returned with its verdict finding Petitioner guilty of ABWIK. App. 395, lines 13 – 19.

Direct appeal

On direct appeal, Petitioner raised the following issue: “[d]id the trial judge err in charging the jury that malice may be inferred from the use of a deadly weapon where there was evidence presented that would reduce the charge from assault and battery with intent to kill to assault and battery of a high and aggravated nature?” App. 413. In his brief, Petitioner explained that the South Carolina Supreme Court decided State v. Belcher, 385 S.C. 597, 685

S.E.2d 802 (2009) on October 12, 2009, which was just over a month after Petitioner's trial. App. 415. In Belcher, the Court held that a jury instruction permitting an inference of malice from the use of a deadly weapon was not permissible where evidence was presented that would reduce, mitigate, excuse, or justify an ABWIK caused by the use of a deadly weapon. Petitioner argued that the trial judge's instruction to the contrary was in error. App. 415-416. The Court of Appeals dismissed Petitioner's appeal. App. 420 – 421.

Facts produced during the PCR hearing

Petitioner denied stabbing Montgomery with a screwdriver. However, Petitioner admitted hitting Montgomery with a fingernail file a couple of times during their scuffle. App. 491, lines 16 – App. 492, line 24. After the first hit, the fingernail file bent. Petitioner drop the file and ran. App. 493, lines 6 – 15.

Trial counsel's trial strategy was based upon his belief that the jury would believe that Petitioner had assaulted Montgomery. Therefore, trial counsel decided the best course of action would be to ask the jury to convict Petitioner of ABHAN rather than ABWIK in order to save Petitioner from a sentence of life without parole. App. 539, lines 4 – 22. Trial counsel reiterated that his trial strategy was to tell the jury that Petitioner was guilty of an assault, but not assault with intent to kill. App. 540, lines 16 – 24; App. 555, lines 8-21. As explained by the Assistant Attorney General, "the majority of the trial defense was ... mitigating [Petitioner's] actions for the most part." App. 545, lines 14 – 23; see also, App. 556, line 25 – App. 557, line 10.

Trial counsel was familiar with Belcher, supra. However, trial counsel had no knowledge at the time of Petitioner's trial that the ruling was imminent. App. 534, line 12 – App. 535, line 5. Paradoxically, the Assistant Attorney General explained that the Supreme

Court's decision in Belcher only applied in situations where there was some evidence to mitigate the actions of the defendant. App. 547, line 7 – App. 548, line 6.

Order denying PCR

Judge Cooper found Petitioner's claim that trial counsel was ineffective for failing to object to the trial judge's jury instruction on the permissible inference of malice from the use of a deadly weapon "to be erroneous and improperly raised in the current action." App. 574. The PCR Judge held the charge given at Petitioner's trial to be "the sanctioned charge on the law." Additionally, the court held that because the Belcher decision posed a clear break from long-established precedent and was not decided until after Petitioner's trial, trial counsel was not objectively unreasonable in failing to object to the charge. App. 575. Finally, the PCR Judge relied upon the Supreme Court's opinion in Belcher that the ruling would not apply to convictions challenged on PCR. App. 575.

Discussion

Trial counsel's failure to object to the jury instruction regarding inferred malice from the use of a deadly weapon resulted in ineffective assistance of counsel based on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Had counsel objected to the jury instruction, then Petitioner would have been granted a new trial upon review by the Court of Appeals in light of the intervening Belcher decision. In Belcher, 385 S.C. at 600, 685 S.E.2d at 803-804, our Supreme Court overruled settled law and held "that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Belcher, 385 S.C. at 600, 685 S.E.2d at 803.

The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. The Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id.

Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state's constitutional prohibition against charging juries on the facts. Belcher, 385 S.C. at 602, 685 S.E.2d at 804.

After an extensive review of the state's jurisprudence in this area, our Supreme Court discovered that when the permissive inference charge first developed in the late nineteenth century it was subject to "some qualification," specifically "the recognition that some facts will not permit the inference of malice from the use of a deadly weapon." Belcher, 385 S.C. at 604, 685 S.E.2d at 806. The Supreme Court stated, "We are persuaded . . . that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified." Belcher, 385 S.C. at 605, 685 S.E.2d at 806. The Court recognized that it later "began a slow, and at first almost imperceptible, retreat" from above established law and that "by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that 'malice is presumed from the use of a deadly weapon.'" Belcher, 385 S.C. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflect the "proper application of the charge," the Supreme Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that

would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity.” Belcher, 385 S.C. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher’s trial and it was “conceivable that the only evidence of malice was Belcher’s use of a handgun,” our Supreme Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Belcher, 385 S.C. at 612, 685 S.E.2d at 810.

In effect, the Belcher ruling “return[ed] to the rationale” of prior South Carolina jurisprudence on the matter dating back to the late nineteenth century, and overturned existing case law to the contrary that occurred in the intervening century. Id. Because the rule in Belcher marked a “clear break from our modern precedent,” the Supreme Court applied its effect to “all cases which [were] pending on direct review or not yet final where the issue [was] preserved.” Id. (citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708 (1987)(“hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final”)).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel’s performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115; 386 S.E.2d 624 (1989) (internal citations omitted). “The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. The

defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that “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, 466 U.S. at 692.

Due to the timing of Petitioner’s direct appeal, the Belcher opinion should apply to Petitioner’s current PCR case. Simply stated, by applying the Belcher decision retroactively to all cases pending direct appeal where an objection was made, the Court acknowledged effective assistance of counsel is provided by objecting to the inferred malice jury instruction when evidence reducing, mitigating, excusing, or justifying the offense was present. By denying application of its holding to cases pending collateral review when the opinion was filed, the Belcher Court limited its reach to conduct that arose in cases which were not yet final at the time. As a result, despite the fact that Belcher did not serve to grant Petitioner a new trial on direct appeal, the Belcher decision nonetheless applied to trial counsel’s performance.

In the present case, trial counsel never objected to the inferred malice jury instruction. Had counsel done so, Petitioner would have received relief at the direct appeal phase of his case. Therefore, trial counsel’s performance was constitutionally deficient.

Finally, Petitioner was clearly prejudiced by trial counsel’s deficient performance, as it is likely that the result of Petitioner’s case would have been different if counsel objected to the jury instruction. As indicated above, Petitioner would have received the relief of a new trial on his direct appeal if counsel preserved the issue by timely objecting to the jury instruction. Therefore, Petitioner was prejudiced by counsel’s failure to object.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR court, reverse his conviction, and remand for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
G. THOMAS COOPER, CIRCUIT COURT JUDGE

LOUIS GAINNEY,

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STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Louis Gainey states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing which was held on January 15, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Louis Gainey.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of October, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
G. Thomas Cooper, Circuit Court Judge

LOUIS GAINEY,

PETITIONER,

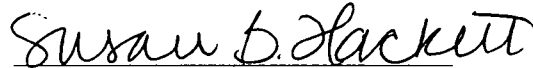
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

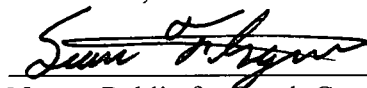
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Esquire and Louis Gainey, #185519, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 29th day of October, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of October, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.