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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Colleton County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2025-000508

MAURIO DAETREL RIVERS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

SUPPLEMENTAL APPENDIX

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Proposed Supplemental Order Granting Post-Conviction Relief. 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
Maurio D. Rivers, #232669	)	2016-CP-15-0647
Applicant	)	Proposed
v.	)	**Supplemental Order Granting**
State of South Carolina	)	**Post-Conviction Relief**
Respondent.	)	
	)	

This matter comes before the PCR Court on remand from the Court of Appeals, pursuant to Fishburne v. State, 427 S.C.505, 832 S.E.2d 584 (2019), to address whether trial counsel was ineffective in failing to object to the example given by the trial judge to the jury of accomplice liability because, under the facts of this case, the example constituted an improper comment on the facts. After reviewing the trial transcript, the PCR application and return, the transcript from the PCR hearing, and the appellate court documents, this Court finds that the example given by the trial judge, based on the narrow and specific facts of this case, constituted an improper comment on the facts. Trial counsel was deficient in failing to object to the example and the Applicant was prejudiced by the deficient performance.

Procedural History

Applicant is presently serving a thirty (30) year sentence for attempted murder. In August of 2011, the Colleton County Grand Jury indicted Applicant for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime, indictments #2011-GS-15-00549, 00550, 00551. (App. pp. 230-231). On December 12, 2012, Applicant proceeded to jury trial before the Honorable Diane S. Goodstein. John D. Bryan represented Applicant at trial. Steven Knight prosecuted the case. The jury found Applicant not guilty of one

count of attempted murder and not guilty of the weapon charge. The jury found Applicant guilty of one count of attempted murder. Judge Goodstein sentenced Applicant to thirty (30) years. (App. p. 232).

A timely notice of intent to appeal was filed and the direct appeal perfected. The first issue raised on direct appeal was whether the trial court erred in failing to grant Appellant's motion for a directed verdict on the charge of attempted murder where: (1) there was no evidence that Appellant fired any gunshots; (2) the State failed to present any evidence of a common scheme or plan between Appellant and his passenger, the person who fired the gunshots, to commit any criminal act; and (3) the State failed to establish that Appellant had the requisite specific intent to kill as required by S.C. CODE ANN. § 16-3-29. The second issue raised on direct appeal was whether the trial court erred in failing to instruct the jury that they could not convict Appellant of attempted murder unless they found that Appellant had a specific intent to kill. A three-judge panel of the South Carolina Court of Appeals heard argument in the case on November 5, 2014, and on December 3, 2014, affirmed the conviction in an unpublished opinion. State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App. Filed December 3, 2014). (App. pp. 269-270). Applicant filed a petition for rehearing and filed a motion to relieve counsel and proceed *pro se*. The Court of Appeals granted the motion to relieve counsel and on April 16, 2015, denied the petition for rehearing. Applicant then filed a petition for writ of certiorari with the South Carolina Supreme Court that was denied on November 19, 2015.

On June 1, 2016, Applicant filed an application for post-conviction relief [PCR]. (App. pp. 271-284). The State filed a return on April 17, 2017. (App. pp. 285 - 290). On November 15, 2017, Applicant filed a motion to relieve PCR counsel and a motion to amend the PCR application. (App. pp. 291-298). An evidentiary hearing was held on April 1, 2019, and April 3, 2019, before

this Court. Leslie T. Sarji represented Applicant at the PCR hearing. Benjamin Limbaugh represented the State. In a written order signed December 21, 2019, this Court denied relief and dismissed the application. (App. pp. 411-420). On January 10, 2020, Applicant filed a motion to alter or amend pursuant to Rule 59(e) SCRCP. (App. pp. 421-424). On January 23, 2020, PCR counsel filed a motion to alter or amend. (Supplemental Appendix pp. 1-2). The State filed a return on July 21, 2020. (Supplemental Appendix pp. 3-6). This Court denied the motion to alter or amend on July 23, 2020. (App. pp. 425-426). A timely notice of intent to appeal was filed on August 7, 2020.

On February 22, 2021, the petition for writ of certiorari was filed with the South Carolina Supreme Court. The return was filed on June 10, 2021. The reply brief was filed on Jume 21, 2021. On June 29, 2021, pursuant to Rule 243(1), SCACR, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On November 28, 2023, the South Carolina Court of Appeals denied the petition for writ of certiorari as to questions one and three but granted the petition for writ of certiorari as to question two and ordered briefing as provided by Rule 243(j), SCACR.

The brief of petitioner was filed on December 14, 2023. On June 17, 2024, the State filed a motion to strike and require filing of amended appendix and brief of petitioner. On June 27, 2024, applicant/petitioner filed a return in opposition to the motion to strike and require filing of amended appendix and brief of petitioner. On July 10, 2024, the State filed a reply to the return in opposition to the motion to strike and require filing of amended appendix and brief of petitioner. On August 26, 2024, the Court of Appeals denied the motion to strike but required the filing of a supplemental appendix to include PCR counsel's motion to alter or amend and the State's return. The brief of respondent was filed on October 25, 2024. On November 7, 2024, applicant/petitioner

filed a reply brief. On February 5, 2025, the Court of Appeals remanded to this Court for a ruling on the issue of whether trial counsel was ineffective for failing to object to the trial court's accomplice liability charge, which petitioner/applicant contends constitutes an improper comment on the facts of the case.

Summary of Evidence

The jury found applicant/petitioner guilty of the attempted murder of Lieutenant Joseph Burnette with the Dorchester County Sheriff's Office. On July 12, 2011, at 7:00 PM Deputy Justin Eaches with the Dorchester County Sheriff's Office attempted to stop a black car on Interstate 95 for failure to use a turn signal. (App. p. 63, lines 10 – p. 64, lines 1-2). The deputy testified that he saw two black males in the car and he identified Petitioner as the driver. (App. p. 64, lines 13-25). A chase ensued and the deputy asked for assistance from Lt. Burnette. (App. p. 67, line 3 – p. 68, lines 1-9). Lt. Burnette took over the pursuit of the car because of the condition of Deputy Eaches' patrol car and the high rate of speed of the chase. (App. p. 68, lines 1-6). Lt. Burnette testified that he heard gunshots after the car exited the interstate onto Highway 61. (App. p. 87, lines 15-16). Lt. Burnette testified that these first set of shots were fired by the passenger. (App. p. 85, lines 4-7). Lt. Burnette confirmed that the passenger, Bronson Shelley, stuck his head out of the sunroof, looked at the officer and shot at him. (App. p. 92, line. 19 – p. 93, lines 1. 7; p. 96, line 22 – p. 97, lines 1-7).

The black car was eventually struck by Lt. Burnette's patrol vehicle. (App. p. 84, lines 13-15). According to Lt. Burnette, as the black car was traveling backwards out of control before flipping over, he heard a second set of what he later determined to be gunshots. (App. p. 97, line 8 – p. 98, lines 1-20). Lt. Burnette testified that while there were two different sets of shootings, he only saw one person, the passenger and co-defendant, Bronson Shelley, shoot during the first set. (App. p. 97, lines. 4-15). Lt. Burnette did not testify as to who was shooting the second time. According to Lt.

Burnette, both the driver and passenger fled from the vehicle after it wrecked. (App. p. 85, lines. 19-24. Lt. Burnette released his K-9 and Petitioner was apprehended[1]. (App. p. 85, line 12 – p. 86, lines 1- 11). Deputy Eaches assisted in the apprehension of the passenger, Bronson Shelley. Shelley had a holster in his pocket when he was apprehended. (App. p. 73, lines 4 – 17).

There were three guns recovered from the wreck scene. One gun, a .38 special, was found on the ground after the car was rolled upright. (App. p. 105, line 21 – p. 106, lines 1-18, p. 107, line 19 – p. 108, lines 1-4). Another gun, a Bursa Firestone .380, was found lying in plain view while the car was still upside down. (App. p. 109, lines 1-4; p. 133, lines). This gun was found with the slide back indicating all bullets had been fired from the weapon. (App. p. 109, lines 1-20; p. 133, lines 11-16). A third gun, a Colt .45, was found inside the glove box of the black car. (App. p. 111, line 11 – p. 112, lines 1-3).

Five shell casings were recovered on Highway 61. (App. p. 116, line 11- p. 117, lines 1-4). These casings matched the Bursa Firestone .380. (App. p. 145, lines 11-12). Bullet fragments were collected at the scene of the wreck. (App. p. 116, lines 19-23; p. 117, lines 6-11). One of the fragments was fired by the .38 special. (App. p. 146, lines 2-3). There were four holes in the windshield of the black car where shots had been fired outward. (Tr. p. 124, line 1 – p. 127, line 1; p. 129, lines 11-12).

Petitioner was charged with the attempted murder of both Lt. Burnette and Deputy Eaches and charged with possession of a weapon during the commission of a violent offense. The jury found Petitioner not guilty of the attempted murder of Deputy Eaches and not guilty of the weapon charge. The indictment for the attempted murder of Lt. Burnette reads, “That in Colleton County, South

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[1] Petitioner testified at the PCR hearing that he filed a federal civil suit against the officers for allowing the dog to continue to bite him in the groin. (App. p. 333, line 23 – p. 334, lines 1-4). Petitioner testified that he received a settlement of ten thousand dollars ($10,000). (App. p. 326, lines 15-25).

Carolina, on or about July 12, 2011, the defendant, Maurio Daetrel Rivers, with malice aforethought accompanied by a present ability to complete the act and the intent to kill, either express or implied, did attempt to kill the victim, Deputy J. Burnette with the Dorchester County Sheriff's Office, while on Augusta Highway, by shooting at the victim; in violation of S.C. Code of Laws Section 16-03-0029 of the South Carolina Code of Laws (1976), as amended." (App. p. 231). The indictment does not contain accomplice liability language.

In his closing argument the prosecutor discussed the principle of "the hand of one is the hand of all." (App. p. 169, line 20 - p. 170, lines 1-17). The prosecutor gave the examples of a get away driver and a look out as examples of the hand of one is the hand of all. (App. p. 169, line 25 – p. 170, lines 1-11). The prosecutor emphasized the high speed chase and fleeing from the car to show intent. (App. p. 170, line 18 – p. 171, lines 1-8). The prosecutor also argued that the second round of shots came from inside the car on the driver's side. (App. p. 172, lines 6-11).

Defense counsel argued that mere presence is not sufficient for accomplice liability. (App. p. 173, line 25 – p. 174, lines 1-13). Defense counsel also argued that it was impractical to believe that Petitioner, the driver, fired the second round of shots at the same time as he was trying to regain control of the car as it spun out of control and flipped over. (App. p. 176, line 13 – p. 177, lines 1-5). The jury found Petitioner not guilty of the weapon charge.

During the instruction on accomplice liability/hand of one is the hand of all the trial judge gave the following example:

> For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one – only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted together in concert to commit a burglary.

(App. p. 193, line 25 – p. 124, lines 1-8).

Allegation of Ineffective Assistance of Counsel

In the PCR application Petitioner alleged that trial counsel was ineffective for failing to object to the example given by the trial judge. (App. pp. 283-284). In the amended application Petitioner also alleged that trial counsel was ineffective in failing to object to the example given. (App. p. 295). During the PCR hearing Petitioner testified, "And the jury basically inferred from another – she gave an example of a burglary and a getaway driver as the example of the hand of one is the hand of all in her jury instruction." (App. p. 328, lines 12-15). Petitioner testified that trial counsel did not object to the example and then testified, "And I think that was pretty much what prejudiced me the most because it made the jury think that they only thing I had to do to be guilty of attempting to harm the officers was trying to get away driving. And I think that was the most prejudicial thing in the instruction was that." (App. p. 328, lines 17-22). Trial counsel did not recall objecting to the example. (App. p. 369, lines 9-14). When asked about the burglary/getaway driver example trial counsel testified that he believed the jury would have made the distinction. (App. p. 378, line 25 – p. 379, lines 1-2).

The initial order of dismissal addressed comments made by the prosecutor in closing rather than the example given by the trial judge to the jury in the instruction on accomplice liability. The initial order states, "Applicant alleges counsel was deficient for failing to object to the Solicitor giving an illustration of a burglary and a getaway car as an example of accomplice liability." (App. p. 417). Additionally, the order reads:

> Applicant testified that counsel should have objected to the example being used by the Solicitor. Counsel testified he did not object to the example and did not feel the need to do so. This Court finds that counsel is given latitude in remarks made during

> closing argument and that the court corrected any potential error by charging on the law of accomplice liability. This Court also finds that even if counsel did err in failing to object, the error would have been harmless and would not have prejudiced Applicant. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

(App. p. 418).

Findings of Fact and Conclusions of Law

On remand this Court reviewed the trial transcript, the PCR application and return, the transcript from the PCR hearing, and the appellate court documents. After a careful review based on the Strickland standard set forth below, this Court finds applicant/petitioner carried his burden of proof in establishing both deficient performance and resulting prejudice.

Ineffective Assistance of Counsel

Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Deficient Performance

Trial counsel was deficient in failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example constituted an improper comment on the facts. The getaway driver example in the accomplice liability charge was an improper charge on the facts because evidence at trial showed that applicant/petitioner was the driver and the passenger shot at the police. The trial judge gave the following example in her charge:

> For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one – only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted together in concert to commit a burglary.

(App. p. 193, line 25 – p. 124, lines 1-8).

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. See also Pantovich v. State, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) ("The modern trend, however, has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."); State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (stating "the trial court shall not provide a limiting instruction or otherwise comment to the jury on" suicide-attempt evidence because such a charge may be an improper charge on the facts).

In State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019), the South Carolina Supreme Court wrote:

> We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven. See, e.g., State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980) (holding it was improper for the trial judge to charge the jury that the defendant's flight may be considered as evidence of guilt); State v. Hughey, 339

> S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use).

In State v. Brown, 443 S.C. 196, 199–200, 904 S.E.2d 448, 450 (2024), the Court, citing State v. Burdette, 427 S.C. 490, 832 S.E.2d 575, (2019), and finding that the trial court erred in giving an inferred malice charge, the Court discussed other cases that involved the an improper comment on the facts writing:

> See id. [Burdette] (holding the trial court may not instruct the jury that it may infer existence of malice when a deadly weapon was used regardless of the evidence presented); State v. Stewart, 433 S.C. 382, 391, 858 S.E.2d 808, 813 (2021) (disapproving an inference charge about knowledge or possession of drugs when the drugs are found on property under the defendant's control); State v. Smith, 430 S.C. 226, 230, 845 S.E.2d 495, 496 (2020) (confirming that trial courts may not give any implied malice charge when there has been evidence presented that the defendant acted in self-defense); Pantovich v. State, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) (finding improper a charge that "good character" evidence may create reasonable doubt as to the commission of the crime charged); State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (precluding the trial court from providing a limiting instruction or otherwise commenting to the jury on suicide-attempt evidence); State v. Stukes, 416 S.C. 493, 499–500, 787 S.E.2d 480, 483 (2016) (invalidating a charge that the victim's testimony in a criminal sexual conduct case need not be corroborated); State v. Cheeks, 401 S.C. 322, 328–29, 737 S.E.2d 480, 484 (2013) (concluding, in a drug trafficking case, that the trial court may not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use); State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 330,

> 680 S.E.2d 5, 10 (2009); State v. Grant, 275 S.C. 404, 407–08, 272 S.E.2d 169, 171 (1980) (concluding it was improper for the trial judge to charge the jury that the defendant's flight may be considered as evidence of guilt).

Unlike like the finding in Brown that the charge was harmless, as will be discussed below, the improper comment on the facts in the present case would not have been harmless on direct appeal and trial counsel's failure to object resulted in prejudice requiring reversal.

Like the examples above, the getaway driver example given in the instruction in this case was improper. Under the facts of this case, where the evidence shows that Petitioner was the driver and the passenger shot at the police, the getaway driver example given by the trial judge became an improper charge on the facts. Trial counsel was deficient in failing to object.

Prejudice

Petitioner was prejudiced by the deficient performance because the charge additionally diluted the State's burden of proof by omitting the requirement that in order for the jury to find Petitioner guilty of attempted murder, the State had to prove that the passenger and Petitioner had an agreement, a pre-arranged plan to attempt to murder the police officer. Based on the example included in this charge, the jury could have found liability based solely on Petitioner driving the car and failing to stop for police. In finding Petitioner not guilty of the weapon charge, the jury appears to have rejected the State's argument that Petitioner was the shooter of the second round of shots. The jury's verdict reflects that the jury found Petitioner guilty based on accomplice liability, "the hand of one is the hand of all."

In State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276–77 (2017), the South Carolina Supreme Court wrote:

> " 'Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.' "State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (alteration in original) (quoting State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." Id. at 262, 647 S.E.2d at 705. "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].' " Id. (alteration in original) (quoting State v. Hill, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977)).

The getaway driver example diluted the State's burden of presenting evidence of a pre-arranged common design or purpose between Petitioner and the co-defendant for some illegal purpose of which the attempt to murder the police officers was incidental or a natural or probable consequence.[2] This case is different from most other cases dealing with the hand of one hand of all accomplice liability charge where the parties pre-arrange to meet for some illegal act, usually a burglary or a robbery, and in the process someone is shot or killed. Petitioner was the driver of the car that failed to stop for a minor traffic violation. The co-defendant was a passenger in Petitioner's car who shot at police. There was no evidence of a pre-arranged plan. Even if the driver, with control of the car, and the passenger could have developed a plan to flee from the police, the shooting is not incidental or a natural or probable consequence of any assumed plan to evade law enforcement.

There is a reasonable probability that, but for trial counsel's failure to object to the improper example in the jury instruction, the result of the proceeding would have been different. Viewing

[2] There is mention of a stolen car during the PCR hearing but this was not discussed at trial. (App. p. 304, lines 8-9; p. 355, lines 3-8).

the charge as a whole in light of the evidence presented, the charge was an improper charge on the facts that diluted that State's burden of proof. Trial counsel was deficient in failing to object to the improper charge. Applicant/petitioner proved both deficiency and prejudice.

Conclusion

This Court finds that Applicant/petitioner established a constitutional violation that requires this Court to grant the application for post-conviction relief. The application is granted, the conviction reversed and the case remanded for a new trial.

This Court notes the parties must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief is granted;
2. The conviction is reversed and the case remanded for a new trial.

AND IT IS SO ORDERED THIS ____ day of _____________, 2025

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WILLIAM H. SEALS, JR.

____________________, South Carolina