

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County
Perry M. Buckner, Circuit Court Judge

RECEIVED

DEC 27 2013

S.C. Supreme Court

JOSE ANGEL HERRERA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001119

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

1.

Whether trial counsel was ineffective for failing to object to a jury charge that malice could be inferred from the use of a deadly weapon where, if the issue had been preserved, petitioner would have received the benefit of State v. Belcher, 388 S.C. 597, 685 S.E.2d 802 (2009) on direct appeal?

2.

Whether trial counsel was ineffective in failing to obtain an involuntary manslaughter charge and preserve the request for a charge for appellate review?

STATEMENT

On October 25, 2007, petitioner was indicted by a Beaufort County grand jury for murder and a related weapons charge. App. 448-51. On March 16, 2009, petitioner was tried before the Honorable G. Thomas Cooper, Jr. and a jury. App. 1. Duffy Stone and Angie Tanner represented the State. App. 1. Lauren Carroway and Gene Hood represented petitioner. App. 1. Petitioner was convicted on both counts. App. 381, ll. 10 – 20. Judge Cooper sentenced petitioner to life imprisonment. App. 392, l. 21 – 393, l. 6. On June 11, 2011, the Court of Appeals affirmed his convictions. State v. Herrera, Op. No. 2011-UP-354 (Ct. App. June 30, 2011).

On December 11, 2014, petitioner filed a PCR application. App. 396. On April 2, 2013, a hearing was held before the Honorable Perry M. Buckner. App. 411. Ashleigh Wilson represented the State. App. 411. Dudley B. Ruffalo represented petitioner. App. 411. On May 2, 2013, Judge Buckner dismissed petitioner's PCR application. App. 439. This petition follows.

ARGUMENT

1.

Trial counsel was ineffective for failing to object to a jury charge that malice could be inferred from the use of a deadly weapon where, if the issue had been preserved, petitioner would have received the benefit of State v. Belcher, 388 S.C. 597, 685 S.E.2d 802 (2009) on direct appeal.

Relevant Facts

The central question in the trial of Jose Herrera (“Herrera”) was whether he acted with malice when his wife died from a gunshot wound. The solicitor began his closing argument by rhetorically asking the jury, “Malice. What is malice?” App. 353, ll. 7 – 11. He then told the jury, “The determination you have before you is whether or not when Jose Herrera shot and killed his wife there was malice.” App. 353, ll. 12 – 14. Immediately following telling the jury their task, the solicitor told them they could infer malice from the use of a deadly weapon:

Now, there’s a number of ways in South Carolina that you can determine that. Number one, use of a deadly weapon. Did Jose Herrera use a pistol when he shot and killed Katherine Herrera in the back of her head? You may use that to determine his malice.

App. 353, ll. 15 – 19.

Defense counsel admitted the shooting in closing argument, but argued that it was not done with malice. App. 361, l. 23-362, l. 8. Herrera’s attorney told the jury in closing several times that he never intended to pull the trigger of the gun that killed his wife. App. 362, ll. 4 – 8. App. 362 616 – 23. App. 363, ll. 1 – 3. App. 364, ll. 4 – 5.

The evidence at trial showed that Herrera called 911 to report that his wife had been shot in the head. App. 305, ll. 16 – 21. Herrera’s wife was found dead in their bathroom. App. 306, ll. 9 – 19. Herrera gave several versions of the evening’s events to Officer Bob Bromage. Herrera first

told Officer Bromage that he found his wife in the bathroom and noticed a gunshot wound. App. 307, ll. 4 – 9. App. 389, ll. 7 – 16. App. 312, ll. 9 – 10. App. 313, ll. 7 – 20.

Herrera later told Officer Bromage that his wife was upset because Herrera was going to leave and she grabbed his pistol and pointed it at her head. App. 319, ll. 19 – 25. When Herrera reached to get the pistol, the gun fired. App. 319, ll. 19 – 25. Herrera further described the shooting as accidental, stating that when he reached for the gun, his hand must have hit the trigger. App. 320, l. 4 – 321, l. 15.

Subsequently, Herrera gave a recorded statement to Officer Bromage. App. 324, l. 21 – 326, l. 5. In this interview, Herrera again denied intentionally shooting his wife. App. 328, ll. 2 – 25. Herrera had the gun and his wife pushed him. App. 328, l. 19 – 329, l. 9. Herrera tripped. App. 329, ll. 10 – 14. He was unsure whether he tripped over a cat or over his wife’s feet. App. 329, ll. 13 – 15. He ultimately admitted firing the pistol. App. 331, l. 25 – 332, l. 3. However, Herrera repeatedly and adamantly denied intentionally firing the gun and professed that he loved his wife. App. 331, l. 21 – 332, l. 10.

The trial judge conducted a lengthy charge conference. App. 341, l. 1 – 350, l. 10. At no point did defense counsel object to the trial court charging the jury that they could infer malice from the use of a deadly weapon. App. 350, ll. 9 – 10. The trial court charged the jury: “The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise.” App. 373, ll. 21 – 22. The trial court further charged: “If you find evidence supports a presumption of malice, that presumption would be rebuttable and is always for the jury to determine from all of the evidence whether or not malice has been proved beyond a reasonable doubt.” App. 374, ll. 4 – 7. Trial counsel did not object to these instructions after the court completed its charge.

App. 379, ll. 2 – 24. Herrera received an instruction on voluntary manslaughter. App. 374, l. 8 – 375, l. 23.

Discussion

Had trial counsel objected to the inference of malice charge, Herrera’s conviction would have been reversed on direct appeal. See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Belcher held that instructing the jury that malice may be inferred from use of a deadly weapon is error “where evidence is presented that would reduce, mitigate, excuse or justify the homicide.” Id. at 600, 685 S.E.2d at 803-04. In Belcher, the jury was instructed that “malice may be inferred by the use of a deadly weapon.” Id. at 601, 685 S.E.2d at 804. This court held that the evidence in Belcher “presented a jury question on self-defense.” Id. at 601, 685 S.E.2d at 804.

In this case, the trial court’s charge on the inference of malice was functionally equivalent to the charge given in Belcher. The trial judge charged the jury on presumptions of malice and that malice may be inferred from the use of a deadly weapon. App. 374, ll. 4 – 7. App. 379, ll. 2 – 24. Just as in Belcher, evidence was presented that mitigated the homicide. The defendant in Belcher received a self-defense instruction. Herrera received an instruction on voluntary manslaughter. App. 374, l. 8 – 375, l. 23. The Belcher Court concluded the error was not harmless beyond a reasonable doubt because the prejudice from the charge went to the heart of the case: whether the killing was in self-defense or done with malice. Id. at 611-12, 685 S.E.2d at 809-10. See also State v. Stanko, 402 S.C. 252, 263-64, 741 S.E.2d 708, 713-14 (2013) (holding that where defendant presented evidence of abnormal brain function the giving of an inferred malice charge was error). In this case, the solicitor and the defense argued to the jury that the question of malice was the determining factor for the jury to decide.

This Court held in Belcher that its ruling would be effective “for all cases which are pending on direct review or not yet final where the issue is preserved.” Belcher at 612, 685 S.E.2d at 810. This court also stated that the Belcher ruling would “not apply to convictions challenged on post-conviction relief.” Id. at 613, 685 S.E.2d at 810. While certainly this case is a PCR case, the timing of this case means that Belcher’s proscription against application of its ruling in PCR cases does not apply to Herrera. The Belcher opinion was issued on October 12, 2009—seven months after Herrera was convicted and approximately two years before his conviction was affirmed on appeal.

Herrera’s case therefore falls into a narrow window where the Belcher ruling should apply on PCR. Had trial counsel preserved the objection, Herrera would have received the benefit of Belcher on direct review. Under the facts of this case, with malice as its central question, there is little doubt that Belcher would have required the reversal of Herrera’s conviction and a new trial.

Herrera’s case is unlike other PCR cases where the issue cannot be raised. Belcher was not intended to apply to post-conviction cases where the applicant would not have received its benefit on direct review. For example, had the Court of Appeals affirmed Herrera’s conviction before this Court issued the Belcher decision, it is without question that Herrera could not raise a Belcher ineffective assistance claim. His conviction would have been final on direct review.

Analytically, Herrera’s case should be treated no differently than any other ineffective assistance of counsel claim regarding Belcher. At any point after 2009, if a trial judge gave an erroneous inference of malice charge and defense counsel failed to object, such failure would unquestionably constitute ineffective assistance of counsel. Herrera’s case is the same. Drawing the line against post-conviction relief where a defendant would have received the benefit of Belcher but for his attorney’s failure to object was not the Court’s intention. Furthermore, any decision in petitioner’s favor would not open a “floodgate” of PCR claims because any defendant whose

conviction was final on direct review before the Belcher decision would still be barred from relief. Therefore, this Court should hold trial counsel ineffective, find prejudice in this case where malice was the sole issue, and grant petitioner a new trial. See Strickland v. Washington, 466 U.S. 668 (1984).

2.

Trial counsel was ineffective in failing to obtain an involuntary manslaughter charge and preserve the request for a charge for appellate review.

But for trial counsel's ineffective assistance, Herrera would have received an involuntary manslaughter charge. The Court of Appeals held that trial counsel limited her argument "to Herrera's third version of events to determine what the jury should be charged." Herrera at 3. On appeal, Herrera argued that the second version of his story—that his wife was holding the gun at her head, he reached for it, and it fired—constituted the "any evidence" required to charge involuntary manslaughter. Id. The Court of Appeals held that "because Herrera never argued either his first or second version of events as a basis for the requested jury charges, the judge never ruled on these grounds." Id. "We find that it was incumbent upon Herrera to make the legal arguments that the first and second versions of his statement should have been considered to preserve the issue for appellate review." Id. at 3-4. The Court of Appeals held the issue was unpreserved. Id. at 4.

The PCR court failed to apprehend the Court of Appeals' ruling. It found that trial counsel was not ineffective because she requested an involuntary manslaughter charge. App. 444-45. This ruling constitutes a legal error. The Court of Appeals held that trial counsel failed to provide the court with the proper legal argument that would have entitled Herrera to an involuntary manslaughter charge. The PCR court's interpretation of the Court of Appeals' ruling is without any support and cannot be upheld on appeal.

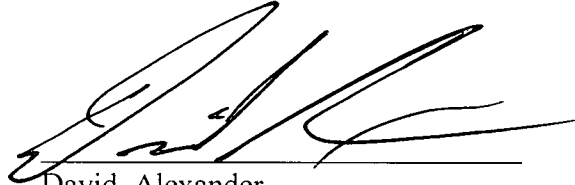
The failure to preserve an issue for appeal constitutes ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475-76, 746 S.E.2d 41, 46-47 (2013). In McHam, trial counsel failed to make a contemporaneous objection after losing a motion in limine. Id. Appellate counsel filed an Anders brief. Id. The State attempted to argue that no prejudice existed because of the Anders review. Id. This Court rejected that argument, stating that under the Anders procedure, the court reviews the entire record “for any *preserved* issues with potential merit.” Id. (emphasis in original). The McHam Court held that trial counsel’s performance was deficient. Id. Just as in McHam, trial counsel’s failure to preserve this issue for appeal constitutes deficient performance.

Herrera also can show prejudice. The trial court must charge the lesser-included offense of involuntary manslaughter unless there is “no evidence whatsoever” of that lesser included offense or accident. State v. Mekler, 379, S.C. 12, 664 S.E.2d 477 (2008). Under Herrera’s second version of events, he was struggling for the gun when it fired, which entitled him to a jury instruction on involuntary manslaughter pursuant to State v. Light, 378, S.C. 641, 664 S.E.2d 465 (2008). In Light there was also evidence the defendant struggled over a gun when it “went off” accidentally. The Supreme Court held the defendant was entitled to an involuntary manslaughter instruction given these facts since the jury could have found the gun fired accidentally, but the defendant failed to exercise due care. Similarly, here, the jury could have found that Herrera failed to exercise due care during a struggle over a gun and convicted him of involuntary manslaughter. For these reasons, the Court should hold trial counsel ineffective for failing to make the proper argument at trial and preserving the issue for appeal. Since petitioner suffered prejudice, his case should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition with the ultimate relief of reversing petitioner's convictions and granting him a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Perry M. Buckner, Circuit Court Judge

JOSE ANGEL HERRERA,

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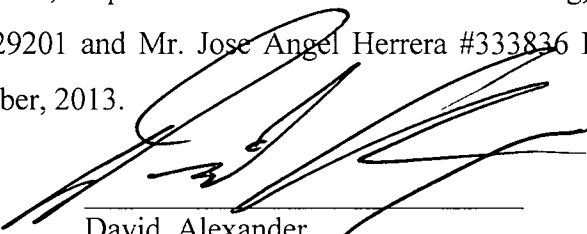
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001119

CERTIFICATE OF SERVICE

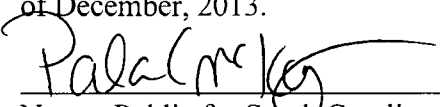
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Jose Angel Herrera #333836 Lieber Correctional Institution this 27th day of December, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of December, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .