

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Robin B. Stilwell, Circuit Court Judge

Opinion No. 2013-UP-403 (S.C. Ct. App. filed 10/30/2013)

07-GS-32-01540, 0151, 01542

THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
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Division of Appellate Defense
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JAN 22 2014

SC Court of Appeals

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The Court of Appeals erred in holding that the rule in Belcher¹ was not properly preserved² for appeal because petitioner’s trial was bifurcated via a trial phase and sentencing phase, and since the Belcher issue was raised at the sentencing phase, then this meant that the case was “not yet final,” when the Belcher issue was “preserved” and it is “now pending” properly before this court for appellate review.

CONCLUSION 7

¹ State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

² A Belcher review would require that the issue be “pending on direct review or not yet final where the issue is preserved.”

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 27, 2013

QUESTION PRESENTED

The Court of Appeals erred in holding that the rule in Belcher³ was not properly preserved⁴ for appeal because petitioner's trial was bifurcated via a trial phase and sentencing phase, and since the Belcher issue was raised at the sentencing phase, then this meant that the case was "not yet final," when the Belcher issue was "preserved" and it is "now pending" properly before this court for appellate review.

³ State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

⁴ A Belcher review would require that the issue be "pending on direct review or not yet final where the issue is preserved."

STATEMENT

Petitioner Kerwin Parker was convicted per jury trial of assault and battery with intent to kill and possession of a firearm during the commission of a violent crime per a jury trial held during the September 2009 term of the Lexington County General Sessions Court before Judge Robin B. Stilwell. Petitioner received an aggregate twenty-year prison term at his sentencing hearing held during the October 2009 term of the Lexington County General Sessions Court. Petitioner was represented by Jack Duncan at his trial and sentencing proceedings, and Solicitor Donald V. Myers and Assistant Solicitor Colleen E. Dixon appeared on behalf of the state in the case.

Petitioner appealed his trial court convictions and sentences, and on October 30, 2013, pursuant to an oral argument held in the case on October 7, 2013, the Court of Appeals issued an opinion affirming petitioner's convictions and sentences. See State v. Parker, Unpublished Opinion No. 2013-UP-403 (October 30, 2013). App. p. 1-2. The undersigned counsel represented petitioner on appeal and Assistant Attorney Mark R. Farthing represented the state on appeal.

A petition for rehearing was filed in the case on November 14, 2013. App. p. 3-7. The petition for rehearing was denied by Order of the Court of Appeals on December 27 2013. App. p. 8. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in holding that the rule in Belcher⁵ was not properly preserved⁶ for appeal because petitioner's trial was bifurcated via a trial phase and sentencing phase, and since the Belcher issue was raised at the sentencing phase when the case was "not yet final," then this meant that the Belcher issue was "preserved" and it is "now pending" properly before this court for appellate review.

Petitioner was convicted of possession of a firearm during the commission of a violent crime and assault and battery with intent to kill A. J. Wilson during a shoot-out between petitioner, co-defendant Johnson, A.J. Wilson, Walter Gadsen, and Isaac Wilson (deceased) on the night of November 20, 2006. Co-defendant Johnson was convicted of voluntary manslaughter in relation to Isaac Wilson's death, and aggravated assault against Walter Gadsen and AJ Wilson. The action began when petitioner and co-defendant Johnson arrived at Isaac Wilson's residence. During the commotion that followed, petitioner acted in self defense and in defense of others when A.J. Wilson, Isaac Wilson, and Walter Gadsen, all of whom held guns, and shouted "let's shoot [appellant and codefendant]." R. 691, l. 5 - p. 692, l. 13. Also, petitioner acted in self-defense at one point during the melee when A. J. Wilson fought and held him down while Isaac Wilson pointed a gun at him. R. 732, lines 3-10. In addition, it appeared that all of the men were engaged in mutual combat during the fighting.

The trial judge charged the jury on the law of self defense, defense of others, mutual combat, murder, and voluntary manslaughter. R. 853, l. 13 – p. 854, l. 21; R. 858, l.

⁵ State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

⁶ A Belcher review would require that the issue be "pending on direct review or not yet final where the issue is preserved."

21 – p. 865, l. 2. In addition, the trial judge gave the following instructions on “malice” and “the use of a deadly weapon” to the jury:

In order to prove assault and battery with intent to kill, the State must prove, beyond a reasonable doubt, that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought. The difference between assault and battery with intent to kill and assault and battery of a high and aggravated nature is the presence or absence of malice. Malice, as I have previously defined to you, is ill will or hostility towards another person and the intentional doing of a wrongful act without just cause or excuse with the intent to inflict an injury or under circumstances that the law will infer an evil intent.

R. 719, l. 21-p. 721, l. 15.

Malice is hatred, ill will, or hostility towards another person. [Malice] is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under certain circumstances that the law will implicate an evil intent. Malice aforethought may be expressed or inferred. Express malice is shown when a person speaks words which express hate or ill will. Malice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case.

R. 715, l. 2 – p. 716, l. 5.

The Belcher issue was raised at petitioner’s sentencing proceeding and on direct appeal.

The Court of Appeals affirmed petitioner’s convictions and sentences and decided the Belcher issue as follows:

We affirm pursuant to Rule 220(b), SCACR and the following authorities: State v. Belcher, 385 S.C. 597, 685 S.E. 2d 802 (2009) (providing the Belcher Court’s “ruling is effective in all cases which are pending on direct review or not yet final where the issue is preserved.”

The imposition of the sentence is the final judgment in a case from which an appeal can be taken. State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986). Petitioner’s guilt phase concluded on September 18, 2009. Belcher was decided on October 12, 2009. Petitioner was sentenced on October 21, 2009. Undoubtedly, petitioner’s case was “not yet final” when the Belcher issue was raised at sentencing because this happened before petitioner’s

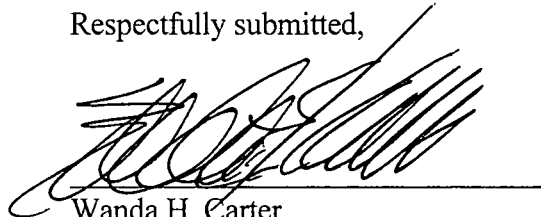
sentences were pronounced and thus before the case was final; and furthermore, the Belcher issue “[was] preserved” at sentencing before petitioner’s sentences were pronounced, and again before the case was final. Hence, per petitioner’s bifurcated proceeding, the Belcher issue was properly raised at sentencing before the case was “not yet final” and “preserved” at sentencing before the sentences were pronounced and the case finality achieved.

The Court of Appeals erred in holding that the Belcher issue was not preserved for appellate review in petitioner’s case.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition for writ of certiorari in the case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of January, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Robin B. Stilwell, Circuit Court Judge

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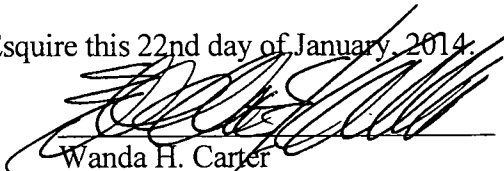
V.

KERWIN PARKER,


PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in his case have been served on Mark R. Farthing, Esquire this 22nd day of January, 2014.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of January, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.