STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

G. Edward Welmaker, Circuit Court Judge

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JUN 12 2014

S.C. Supreme Court

HASHIN ALLIE ONEIL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-02126

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether the court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974)?

2.

Whether the PCR court erred by finding trial counsel was not ineffective for failing to object to the jury charge on the four lesser included offenses of attempted murder since Petitioner testified that he wanted a verdict of simply guilty or not guilty on attempted murder, which was a legitimate strategy that trial counsel should have employed since it likely would have resulted in Petitioner being acquitted of all charges?

STATEMENT

A York County Grand Jury indicted Petitioner at the April 12, 2012 term of General Sessions for attempted murder and possession of a firearm during the commission of a violent crime. App. 697-698. His case was called to trial on April 16, 2012 before the Honorable John C. Hayes, and a jury. Assistant Solicitors Lisa Collins and Christopher Epting represented the state, and Robert A. Muckenfuss and Elizabeth Timmermans represented Petitioner. App. 1.

At the conclusion of the trial on April 18, 2012, the jury acquitted Petitioner of attempted murder and the weapons offense, but found Petitioner guilty of the lesser included offense of first degree assault and battery. App. 615, l. 24 – 616, l. 10. He was sentenced by Judge Hayes to ten years imprisonment. App. 622, ll. 3-8. Petitioner did not appeal.

On October 8, 2012, Petitioner filed an application for post-conviction relief (PCR) seeking, *inter alia*, a belated direct appeal because his attorney failed to file a notice of appeal. App. 659-665. The state filed a return to this application dated April 25, 2013. App. 666-670. The matter proceeded to an evidentiary hearing on August 16, 2013 before the Honorable G. Edward Welmaker. App. 671. Assistant Attorney General J. Rutledge Johnson represented the state, and Charles T. Brooks, III represented Petitioner. App. 671. By order dated September 23, 2013, Judge Welmaker granted Petitioner a belated direct appeal. App. 696. However, Judge Welmaker denied Petitioner's remaining PCR allegations. App. 696.

This petition for writ of certiorari follows.

ARGUMENT

1.

The court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974).

Judge Welmaker correctly granted Petitioner a belated direct appeal. The PCR court found Petitioner "did not knowingly and voluntarily waive his right to a direct appeal." App. 695. Petitioner testified that he wanted a direct appeal, but "no appeal was ever filed." App. 675, ll. 17-25. Trial counsel acknowledged that he did not file a notice of appeal. App. 682, ll. 23-25. He testified that after the verdict he spoke with Petitioner in the holding cell at the courthouse and advised Petitioner "it would be better not to appeal the case" because he "he didn't feel like any result would have been better than what we got." Trial counsel maintained that Petitioner "didn't say anything after that" and never told trial counsel whether or not he wanted to appeal the verdict. App. 683, l. 1 – 684, l. 14.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). This case meets that standard. The PCR judge's ruling is supported by Petitioner's testimony that he wanted to appeal his conviction and sentence. Trial counsel admitted that he did not file an appeal. Therefore, this evidence supports the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35.

2.

<u>The PCR court erred by finding trial counsel was not ineffective for failing to object to the jury charge on the four lesser included offenses of attempted murder since Petitioner testified that he wanted a verdict of simply guilty or not guilty on attempted murder, which was a legitimate strategy that trial counsel should have employed since it likely would have resulted in Petitioner being acquitted of all charges.</u>

Jury Instructions

There was little discussion on the record about the jury instructions. The judge commented shortly before closing arguments that a discussion about the charges was held in chambers. <u>See</u> App. 545, l. 25 – 547, l. 19. The trial judge ultimately charged the jury with attempted murder and the lesser included offenses of assault and battery of a high and aggravated nature (ABHAN), assault and battery in the first degree, assault and battery in the second degree, and assault and battery in the third degree. <u>See</u> App. 597, l. 18 – 604, l. 17.

PCR Hearing

Petitioner testified at the PCR hearing that his trial counsel should have objected to the court instructing the jury on the four lesser included offenses of attempted murder. Petitioner testified that if the court had not instructed the jury on the lesser included offenses then he "would have only been faced with a guilty or not guilty of attempted murder." He explained that based on the evidence presented at trial, whether he was guilty or not guilty of attempted murder should have been the only issue the jury should have considered. App. 676, l. 1 – 677, l. 6.

Petitioner also testified, "I feel like these lesser-included offenses should not have been included into my trial because I wasn't informed of the existence of these included offenses, and my constitutional rights - - I feel like my constitutional rights were violated because I have an

entitlement to be tried only on the charges approved by the grand jury. And I also have a 6th amendment right to be informed of the nature and cause of the accusations against me. And I also have a constitutional right to due process. So if I'm not aware of these four additional charges, how it is possible for me to prepare a defense for these additional charges when I was never informed of the existence of these four additional charges?" App. 677, l. 10 – 678, l. 1.

Petitioner explained that he thought trial counsel's failure to object to the court charging the jury on the lesser included offenses changed the outcome of his trial because "a material variance was created between these four additional charges and the allegations in the indictment." Petitioner also testified that his trial counsel's failure to object "undermined the confidence of the outcome of [his] trial." App. 678, l. 17 – 689, l. 5.

Trial counsel, Robert Muckenfuss, testified that he did not object to the trial court charging the jury on the lesser included offenses. He said, "To give a little background of how that came about, at the end of the trial, Judge Hayes asked us to come back into chambers to discuss the jury instructions. It was at that point that Judge Hayes discussed the lesser-included offenses with counsel. And he indicated that he would instruct the jury on the lesser included offense[s]. At that point, after the discussion with the judge in chambers, we met with Mr. O'Neil [Petitioner]. There were two other counsel with me trying the case with me. And we met with Mr. O'Neil and discussed the lesser-included offense[s] with him. And at that point, it was my belief it was appropriate for the case and it was good for Mr. O'Neil, so I did not object to the lesser-included offenses." App. 681, l. 21 – 682, l. 10.

On cross-examination by the attorney general, Muckenfuss testified, "[I]t's my belief it would have been ineffective not to have lesser-included offenses because of the risk of him being

convicted of attempted murder. And again, the State was seeking life without parole,[1] so he had a significant risk of life without parole if he was convicted of attempted murder. Our goal was to avoid that. That was our objective. So I believe it was a good thing to have the lesser-included offenses instructed." App. 686, l. 22 – 687, l. 4.

At the end of the testimony, the PCR judge said, "I fail to see how the attorney violated his duty under the Strickland[2] standard for not objecting to the lesser-included offenses when the statute clearly shows that the judge certainly has - - judges are required to charge those laws that are applicable to the evidence that the judge sees fit." App. 690, ll. 19-25.

Order of Dismissal and Grant of Appeal Pursuant to White v. State

In the order of dismissal, the PCR judge summarized Petitioner and trial counsel's testimony regarding the issue of whether trial counsel was ineffective for failing to object to the trial court charging the jury on the lesser included offenses of attempted murder. The court noted that Petitioner testified he thought the jury should not have been instructed on the lesser included offenses and that he "wanted a verdict of simply guilty or not guilty on the Attempted Murder charge." The PCR court also stated that trial counsel "testified he fully discussed the jury instructions with the State and the trial judge in chambers and understood the trial judge would instruct the jury concerning Assault and Battery, 1st degree as a lesser included offense of Attempted Murder." App. 694-695.

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[1] Before trial, the state served both trial counsel and Petitioner with a notice of intention to seek life without parole based on Petitioner's prior conviction out of North Carolina. See App. 31, l. 23 – 32, l. 12.

[2] Strickland v. Washington, 466 U.S. 668, 686 (1984)

However, after granting Petitioner a belated direct appeal, the PCR court simply ruled, "The Court also finds Applicant's other allegations are without merit. Applicant has failed to meet his burden of proof as to other PCR issues." App. 696.

Discussion

Trial counsel should have objected to the jury charge on the four lesser included offenses of attempted murder and his failure to do so amounted to ineffective assistance of counsel. Petitioner testified that he wanted a verdict of simply guilty or not guilty on the attempted murder charge. This was a valid trial strategy that should have been employed by trial counsel as Petitioner requested. If trial counsel would have objected to the trial court instructing the jury on the lesser included offenses, there is a reasonable probability the trial judge would not have charged the lesser included offenses and a reasonable probability the jury would have acquitted Petitioner of attempted murder since they did, in fact, find him not guilty of attempted murder.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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 686; see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625. A

reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In Abney v. State, the Court of Appeals noted "other states ha[ve] determined whether failing to ask for a jury charge on a lesser included offense is a valid trial strategy. Alabama, Georgia, and Utah all found refusing to ask for a charge on a lesser included offense could be a reasonable trial strategy." 408 S.C. 41, ___, 757 S.E.2d 544, 547 (Ct. App. 2014) (citing Harbin v. State, 14 So.3d 898, 909 (Ala. Crim. App. 2008), Ojemuyiwa v. State, 285 Ga.App. 617, 647 S.E.2d 598, 605 (2007), and Harvard v. State, 928 So.2d 771, 791 (Miss.2006)). The Court of Appeals therefore held the defense attorney in Abney was not ineffective for failing to request the lesser included offense of strong armed robbery since the defense attorney "was able to articulate a valid reason for employing his strategy" not to request the lesser included offense. The Court of Appeals noted that the defense attorney "testified during a break in the trial, he and Abney felt they were winning the case and he would be found not guilty of armed robbery." 408 S.C. at ___, 757 S.E.2d at 547.

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel should have employed the trial strategy used in Abney and objected to the court charging the jury with the lesser included offenses because it was apparent at the end of the state's case in chief that the state had failed to prove "intent to kill" or the other elements of attempted murder. See S.C. Code Ann. § 16-3-29; see also App. 598, ll. 8-10. As trial counsel testified during the PCR hearing, he had been successful during the trial in keeping "out some significant evidence in the case that was damaging to Mr. O'Neil's [Petitioner's] case" and as a result it was extremely unlikely that the state could have proved intent to kill and thereby attempted murder. See App. 683, ll. 21-23. Objecting to the

trial court charging lesser included offenses is not an uncommon strategy as some defendants prefer an "all or nothing" approach and are afraid of a compromised verdict.

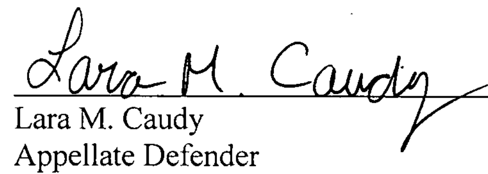
Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to object allowed the jury to consider four lesser included offenses that the jury should not have been permitted to consider. If trial counsel would have objected to the trial court instructing the jury on the lesser included offenses, there is a reasonable probability the trial judge would not have charged the lesser included offenses and a reasonable probability the jury would have acquitted Petitioner of attempted murder since they did, in fact, find him not guilty of attempted murder.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari, permit full briefing on the issues presented, and consider Petitioner's belated direct appeal.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of June, 2014.

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HASHIN ALLIE ONEIL,

PETITIONER,

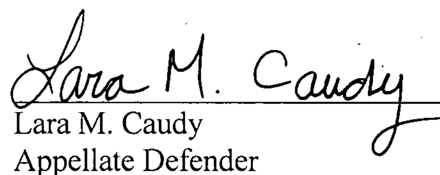
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of June, 2014.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of June, 2014.

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