ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

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JUL 2 2014

S.C. Supreme Court

NATHANIEL MCGEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002540

PETITION FOR WRIT OF CERTIORARI

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I N D E X

ISSUES PRESENTED

1.

Whether the decision to seek a lesser-included offense belongs to the client?

2.

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?

STATEMENT

On August 7, 2006, a Charleston County grand jury indicted petitioner for murder. App. 611. On March 2, 2009, petitioner was tried before the Honorable Kristi L. Harrington and a jury. App. 1. Greg Voight and Brian Byrd represented the State. App. 2. James Smiley represented petitioner. App. 2. The jury convicted petitioner. App. 452, ll. 14 – 20. Judge Harrington sentenced petitioner to thirty years' imprisonment. App. 472, ll. 4 – 9.

On appeal, petitioner was represented by Robert M. Dudek. App. 587. Petitioner's appeal was dismissed by the Court of Appeals on January 25, 2012, pursuant to Anders v. California, 386 U.S. 738 (1967). App. 587. State v. McGee, No. 12-UP-047 (S.C. Ct. App. Jan. 25, 2012). A petition for rehearing was denied on March 27, 2012, and the remittitur issued on January 29, 2013. App. 587.

On June 19, 2012, petitioner filed a PCR application. App. 475. On July 23, 2012, a hearing was held before the Honorable Deadra L. Jefferson. App. 524. Jessica L. Means represented petitioner. App. 524. Ashleigh R. Wilson represented the State. App. 524. On October 24, 2012, Judge Jefferson denied petitioner's application. App. 586. This petition follows.

ARGUMENT

1.

The decision to seek a lesser-included offense belongs to the client.

Relevant Facts from the Trial

Petitioner was charged with the murder of Jamie Reid ("Reid"). App. 611. Petitioner admitted shooting Reid, but claimed self-defense. He received a self-defense instruction from the trial court. App. 428, l. 2 – 432, l. 6. Petitioner testified in his own defense. App. 274, ll. 5 – 7. Reid mistakenly believed that petitioner broke into his house and stole his gold chain. App. 276, ll. 10 – 23. Two or three days before the shooting, petitioner was accosted by Reid, several members of Reid's family, and two Jamaicans on dark dirt road. App. 277, l. 2 – 286, l. 6. The Jamaicans bound petitioner and took him into the woods. App. 277, l. 2 – 286, l. 6. Reid and his family arrived in the woods and brandished guns. App. 277, l. 2 – 286, l. 6. Reid's brother punched petitioner in the face. App. 277, l. 2 – 286, l. 6. Reid fired a shot at petitioner. App. 277, l. 2 – 286, l. 6. Reid and his confederates left, but threatened petitioner that they would kill him if he went to the police. App. 284, ll. 7 – 25. Petitioner was scared for his life. App. 285, ll. 1 – 6. He bought a gun the next day for protection. App. 285, l. 19 – 286, l. 6.

A couple of days later, petitioner was at the Dorchester drag way with a friend. App. 286, ll. 19 – 23. Two strippers lured petitioner and a number of other men to Club Fantasy from the drag way. App. 174, l. 15 – 175, l. 19. Petitioner parked behind the club. App. 289, ll. 15 – 18. He began walking to the club to find out the amount of the cover charge. App. 290, ll. 8 – 13. He put his gun in his back pocket. App. 290, ll. 17 – 24.

Before reaching the club, petitioner heard someone call to him from a silver car with tinted windows. App. 291, ll. 6 – 295, l. 1. Petitioner did not recognize the car. App. 291, ll. 9 –

10. When petitioner walked to the car, Reid jumped out and again accused him of stealing his gold chain. App. 293, l. 14 – 295, l. 21. Petitioner denied stealing the chain. App. 295, l. 22 – 296, l. 1. Reid said, "Don't worry I got something for you" and reached into the front of his pants to grab a gun. App. 295, l. 22 – 296, l. 4.

Petitioner saw the gun and "was very scared." App. 297, ll. 16 – 22. He drew his gun from his back pocket and "swung it." App. 297, l. 19 – 298, l. 1. Petitioner testified, "I don't remember pulling the trigger or anything. I just knew the gun went off." App. 297, l. 24 – 298, l. 1. Shots were fired from the silver car, petitioner's friend began firing a gun, and petitioner fled the scene. App. 298, l. 10 – 299, l. 18. He turned himself in to police the next day. App. 301, ll. 1 – 4.

Fred McCoy ("McCoy"), Reid's second cousin, was incarcerated when he appeared at trial to testify for the State. App. 224, l. 1 – 226, l. 1. He was in Reid's car at Club Fantasy. App. 227, ll. 7 – 20. In McCoy's version, petitioner approached the car on his own initiative. App. 228, ll. 13 – 23. Reid told him to get away from the car. App. 228, ll. 19 – 23. Reid got out of the car and began exchanging words with petitioner. App. 229, ll. 9 – 14. According to McCoy, Reid told petitioner "you better use that gun." App. 229, ll. 15 – 22. Petitioner supposedly said, "I'm about to." App. 229, ll. 15 – 22. McCoy claimed they had no guns in the car. App. 231, ll. 6 – 10. McCoy did not see the gunshot. App. 237, ll. 22 – 25.

McCoy admitted telling the police there was a "prior beef" between petitioner and Reid about the alleged break-in. App. 240, l. 24 – 242, l. 16. McCoy fled the scene and eventually gave a statement to police in which he lied about the people present at the club. App. 234, l. 12 – 235, l. 16. The only other witness from the scene to testify was one of the strippers who admitted she did not see the shooting. App. 194, ll. 18 – 22. She did hear petitioner and Reid

arguing. App. 184, ll. 11 – 19. The State's pathologist testified that Reid died from a single gunshot wound to the head. App. to his 7, ll. 11 – 24. He described the wound as "near contact" which he interpreted as meaning that the gun was "very, very close" to the skin when it fired. App. 207, l. 25 – 208, l. 4.

After the State rested its case and before petitioner testified, the trial court inquired about requested jury charges. App. 265, l. 25 – 266, l. 2. Trial counsel told the court, "I think this might get developed a little bit more tomorrow, is whether we request a voluntary or an involuntary based on the testimony tomorrow. And I don't know that we will." App. 266, ll. 3 – 9. The court indicated it would prepare both charges and await the defense's decision. App. 266, ll. 16 – 22. Trial counsel told the judge, "But I may request one after my case is presented, Your Honor." App. 267, ll. 1 – 2.

Before closing arguments, the trial judge asked for the decision on whether to charge lesser included offenses. App. 371, ll. 10 – 12. Trial counsel stated, "The defense is not." App. 371, l. 13. The State also did not request lesser included offenses. App. 371, l. 14. The court did not charge the jury on voluntary or involuntary manslaughter. App. 417, l. 5 – 434, l. 2. Petitioner received his requested self-defense charge. App. 428, l. 2 – 432, l. 6. Neither the defense nor the State objected to the court's charge. App. 434, ll. 7 – 11.

Relevant Facts from the PCR Hearing

At the PCR hearing, trial counsel testified he decided to employ an "all or nothing" strategy when the trial judge asked him for requests to charge. App. 560, l. 11 – 561, l. 3. He explained his reasoning:

> Q. And was it a strategic decision for you to decide at the end of trial not to request a voluntary or involuntary manslaughter charge?

A. Yes, and in retrospect it was and that good of a strategy – yeah, it – we were – I was trying to get Nathaniel to go home because I thought we had presented a strong case. I didn't want to give the jury a middle ground.

Having said that, I think if I had requested a voluntary, I believe there was evidence to show some heat of passion for that. Voluntary could have – the jury certainly could have found voluntary. And again, it was strategically not asking.

Q. But at the time you thought it was best not to request it?

A. Yeah, I wanted Nathaniel to go home. I didn't want him to get convicted of a voluntary, and I thought we were there.

App. 560, l. 11 – 561, l. 3. Petitioner testified regarding this decision:

Q. Did you discuss the jury charges with your attorney?

A. He told me about the self-defense and the murder that I was facing. But other than that he didn't explain anything else. Which I told them at the end of the trial that I wanted to – **I told him to ask for a lesser included offense. But he told me no, that I was going home.** And since he was my representation I took his word for it.

App. 575, l. 21 – 576, l. 2 (emphasis added).

Discussion

The PCR court cited trial counsel's strategic decision as the sole basis for denying petitioner relief on his claim that trial counsel was ineffective for failing to request a voluntary or involuntary manslaughter charge. App. 599-600. The court credited trial counsel's testimony that he considered asking for the charges, but ultimately decided not to give the jury a middle ground to consider. App. 600. The PCR court made no finding that trial counsel consulted with petitioner or had a duty to consult with petitioner. App. 599-600. The PCR court's order assumes that the decision to request lesser included offenses rests solely with trial counsel.

The Court of Appeals recently confronted the issue of whether the decision to seek lesser included offenses belongs to the lawyer or the client. Abney v. State, 408 S.C. 41, 757 S.E.2d 544 (2014), rehearing denied April 24, 2014. Abney is a fractured opinion, but all three judges agreed that the decision belongs to the lawyer. Judge Konduros wrote that the issue was an open question in South Carolina. Id. at 46-47, 757 S.E.2d at 547. She concluded that evidence supported the PCR court's decision that trial counsel made a reasonable strategic decision. Id.

Judge Pieper wrote a concurrence explaining the history of this dilemma and citing the evolution of the ABA guidelines, which originally stated the decision belonged to the client, but then changed in 1993 to state that trial counsel must consult with his client about lesser included defenses. Id. at 47-53, 757 S.E.2d at 547-50. Judge Pieper cited cases from jurisdictions that determined the decision belonged to the client. Id. citing People v. Brocksmith, 642 N.E.2d 1230, 1232 (Ill. 1994). Judge Pieper also cited cases holding that the decision is trial strategy, and therefore belongs to the attorney. Id. citing, e.g., People v. Colville, 20 N.Y.3d 20 (2012); Arko v. People, 183 P.3d 555, 558 (Colo. 2008). Based on the reasoning of these courts, Judge Pieper concluded, "While trial counsel should consult with his client, the final decision on strategy belongs to counsel." Id.

Chief Judge Few dissented, but agreed that the decision of whether to seek a lesser-included offense belonged to the attorney. Id. at 53-57, 757 S.E.2d at 550-52. The Chief Judge dissented because he believed trial counsel in Abney did not understand the elements of the offenses and therefore could not have made a reasonable strategic decision or properly advised his client. Id.

Since, as recognized by the Court of Appeals in Abney that this issue is unsettled in South Carolina, this Court should grant certiorari to consider this issue in this case. Petitioner's

case presents this issue cleanly and without the complication that trial counsel may not have understood the elements of the offenses. Here, it is unquestioned that trial counsel knew exactly what he was doing and took it upon himself to decide to forego lesser included offenses to which petitioner would have been entitled. Petitioner testified that he asked trial counsel to seek the lesser included offenses, but his request was ignored. Petitioner can show prejudice because he did not receive the lesser included offense instructions. This case, where the State's evidence was far from overwhelming, was extremely close and it was likely that the jury would have convicted petitioner of either voluntary or involuntary manslaughter instead of murder.

In Brocksmith, the Illinois Supreme Court likened the decision of whether to seek a lesser included offense to the decision of whether to plead guilty. Brocksmith, 642 N.E.2d at 1232-33. The court concluded the decision belonged to the client. The Brocksmith court cited decisions from four other states adopting this position. Id. citing People v. Frierson, 705 P.2d 396 (Cal. 1985); State v. Boeglin, 731 P.2d 943 (N.M. 1987); In re Trombly, 627 A.2d 855 (Vt. 1993); State v. Ambuehl, 425 N.W.2d 649 (Wis. 1987). The Court should grant certiorari to decide this issue definitively, order further briefing, adopt the reasoning of Brocksmith that the decision is analogous to a plea and belongs to the client, and ultimately grant petitioner a new trial.

2.

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.

The trial court charged the jury that it could infer malice from the use of a deadly weapon. App. 427, ll. 14 – 18. Trial counsel failed to object to any part of the court's charge. App. 434, ll. 7 – 11. Petitioner argued in his PCR application that trial counsel was ineffective for failing to object to this charge pursuant to State v. Belcher, 388 S.C. 597, 685 S.E.2d 802 (2009). App. 513-20. Despite petitioner's argument in his application on this purely legal question, the PCR court held that "the Applicant failed to present any argument or testimony in support of this allegation; therefore, this Court considers this allegation abandoned by the Applicant." App. 601. The PCR court then held that petitioner failed to meet his burden of proving deficient performance or prejudice under Strickland v. Washington, 466 U.S. 668 (1984). App. 601-02.

No evidence supports the PCR court's rulings on this issue because petitioner unquestionably argued this point in his petition. App. 513-20. The PCR court is bound to consider the record, and the record provides all of the evidence necessary to make a decision on this issue. No testimony was required at the PCR hearing on this purely legal issue that only required examination of the trial transcript for the relevant facts.

As for the merits of this issue, trial counsel was ineffective in not objecting to the inferred malice instruction. Had trial counsel objected to the inference of malice charge, petitioner'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. Just as in Belcher, evidence was presented that mitigated the homicide. The defendant in Belcher received a self-defense instruction and so did petitioner. 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). The same issue is present in petitioner's case.

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 petitioner. The Belcher opinion was issued on October 12, 2009—eight months after petitioner was convicted and approximately three years before his conviction was affirmed on appeal.

Petitioner's case therefore falls into a narrow window where the Belcher ruling should apply on PCR. Had trial counsel preserved the objection, petitioner would have received the benefit of

Belcher on direct review. Instead, appellate counsel was constrained to file an Anders brief. Under the facts of this case, with malice as its central question, there is little doubt that Belcher would have required the reversal of petitioner's conviction and a new trial.

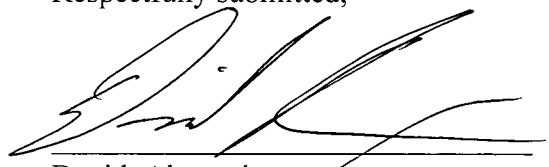
Petitioner's case is unlike other PCR cases where the issue cannot be raised. Belcher was not intended to apply to post-conviction cases where the applicant would not have received its benefit on direct review. For example, had the Court of Appeals affirmed petitioner's conviction before this Court issued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

Analytically, petitioner'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. Petitioner'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 that trial counsel was ineffective, find prejudice in this case where malice or self-defense was the sole issue, and grant petitioner a new trial. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, order further briefing, and ultimately reverse the PCR court and grant petitioner a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of July, 2014.

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NATHANIEL MCGEE,

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RESPONDENT

APPELLATE CASE NO. 2013-002540

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 this 2nd day of July, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of July, 2014.
_____ (L.S.)
Notary Public for South Carolina

My Commission Expires: May 3, 2023