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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2013-002540

NATHANIEL MCGEE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Whether counsel was ineffective for failing to request a voluntary manslaughter jury instruction when trial counsel articulated a valid strategic basis for his decisions not to seek the lesser included offense?

II. Whether counsel was ineffective for failing to object to the malice jury instruction given at trial when this issue is not preserved for appellate review, the Petitioner's trial took place prior to this Court's ruling in Belcher, and trial counsel is not required to be clairvoyant or to anticipate changes in the law that did not exist at the time of trial?

STATEMENT OF THE CASE

For purposes of this Return, the Respondent adopts the Petitioner's Statement.

ARGUMENT

The Petitioner asserts the post-conviction relief court erred by finding the Petitioner failed to carry his burden of proving trial counsel provided ineffective assistance of counsel. The Respondent submits probative evidence exists to support the post-conviction relief court's findings. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant 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 v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

I. There is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to request a voluntary manslaughter instruction at trial when counsel articulated a valid strategic basis for his decision to forgo requesting the lesser included offense instruction and the Court of Appeals' clear holding in Abney is dispositive on this issue.

The Petitioner asserts counsel was ineffective for failing to request a jury instruction on the lesser included offense of voluntary manslaughter. The Respondent submits counsel articulated a valid strategic basis for his decision to forgo requesting the lesser included offense and discussed his strategic decision with the Petitioner. This Court should affirm the lower court's ruling.

The Petitioner was convicted of murder. The defense theory at trial was that the Petitioner acted in self-defense. At the conclusion of the State's case, the court inquired as to whether the parties had any requests for jury instructions. Counsel for the Petitioner told the court that he was not requesting a jury instruction on voluntary or involuntary manslaughter at the time, but that it was possible he would request such jury instructions after the next day's testimony. (App. 265:7-267:3). The following day, the Court inquired again as to whether the parties were requesting instructions on any lesser included offenses. Counsel for the Petitioner stated the defense was not asking for a charge on a lesser included offense. (App. 371:10-14).

At the post-conviction relief hearing, counsel for the Applicant provided credible testimony that he discussed requesting a voluntary manslaughter jury instruction with the

Petitioner and ultimately did not request a voluntary or involuntary manslaughter jury instruction. (App. 535:12-23). Counsel testified further he made a strategic decision not to request a jury instruction on the lesser included offense. Counsel testified he thought they had a good case at the time and he did not want to give the jury any middle ground since the jury could have found the Petitioner guilty of voluntary manslaughter. (App. 560:11-561:3).

The Respondent submits there is probative evidence to support the lower court's finding that counsel articulated a valid strategic basis for his decision to forgo requesting a jury instruction on the lesser included offense of voluntary manslaughter. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland v. Washington, 466 U.S. 668, 691 (1984). Therefore, judicial scrutiny of counsel's performance must be highly deferential. Strickland at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Counsel stated his strategy was to obtain an acquittal for the Petitioner, by not giving the jury a middle ground. The Respondent submits counsel's strategic decision to take an "all or nothing" approach and forgo requesting a jury instruction for voluntary manslaughter was valid. This Court should not second guess counsel's actions when he articulated a valid reason for employing such strategy.

The Petitioner claims the lower court's ruling is improper because it assumes the decision to request a lesser included offense rests solely with trial counsel. The Respondent submits an assumption by the lower court that the decision to request a lesser included offense is a strategic decision that rests with trial counsel is proper in light of the Court of Appeals' recent ruling in Abney v. State. 408 S.C. 41, 757 S.E.2d 544 (Ct. App 2014), reh'g denied (Apr. 24, 2014). In Abney, the Court found trial counsel was not ineffective for failing to request an instruction on the lesser included offense when he articulated a valid strategic basis for forgoing such request. Id. at 47, 757 S.E.2d at 547. Like in Abney, counsel for the Petitioner articulated a valid basis for his decision not to request an instruction on the lesser included offense.

The Petitioner also claims this Court should grant certiorari because the issue of whether or not trial counsel can strategically decide to forgo a request for the lesser included offense is still unsettled after Abney. The Respondent submits the Court of Appeals left nothing unsettled with regard to this issue in Abney.[1] In Abney, the judges writing for the majority, the concurrence, and the dissent all agreed that the decision to not request a jury charge on a lesser included offense can be a valid trial strategy. Judge Kondurus writing for the majority held "Abney does not prove trial counsel failed to meet an objectively reasonable standard. Trial counsel was able to articulate a valid reason for employing his strategy." Id. at 47, 757 S.E.2d at 547. Judge Pieper in his concurrence agreed "The reasoning that the decision to request a lesser included offense is a matter of strategy requiring the legal expertise of trial counsel is compelling. While trial counsel should consult with his client, the final decision on strategy belongs to counsel." Id. at 51, 757 S.E.2d at 549 (citations omitted). Judge Few in his dissent also agreed "with the majority that the decision not to request a jury charge on a lesser-included

[1] The Respondent notes the Court of Appeals' ruling in Abney is currently under review by this Court following the filing of a Petition for Writ of Certiorari by Abney.

offense can be a valid trial strategy." Id. at 52, 757 S.E.2d at 550. The Respondent submits the Court's finding in Abney is clear- the decision to not request a jury charge on a lesser-included offense can be a valid trial strategy. This Court should adopt the Court's reasoning in Abney and find there is evidence to support the lower court's denial of post-conviction relief.

II. The issue of whether counsel was ineffective for failing to object to the malice instruction given at trial is not preserved for appellate review and trial counsel was not ineffective for failing to object to the malice instruction when the Petitioner's trial took place prior to this Court's ruling in Belcher and trial counsel is not required to be clairvoyant or to anticipate changes in the law that did not exist at the time of trial.

The Petitioner asserts counsel was ineffective for failing to object to the malice instruction given to the jury during the Petitioner's trial. The Petitioner asserts the malice instruction given was improper pursuant to this Court's ruling in State v. Belcher, 3885 S.C. 597, 685 S.E.2d 802 (2009). As an initial matter, the Respondent submits this issue is not properly preserved for appellate review. It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727.

The Petitioner argues the lower court erred in ruling "the Applicant failed to present any argument or testimony in support of this allegation; therefore, this Court considers this allegation abandoned by the Applicant." The Respondent submits this finding by the lower court in the Order of Dismissal is not sufficient to preserve this issue for appellate review. This Court's ruling in Marlar v. State is dispositive on this issue. 375 S.C. 407, 653 S.E.2d 266 (2007). In Marlar, this Court held the PCR court's generic finding that the Applicant failed to present any

evidence regarding an allegation[2] does not set forth specific findings of fact and conclusions of law as required by S.C. Code § 17-27-80. Id. at 409, 653 S.E.2d at 266-67. The Court held further that since counsel failed to make a Rule 59(e) motion asking the Court to make specific findings of fact and conclusions of law, the issue was not preserved for appeal. Id. at 410, 653 S.E.2d at 267; see also Smith v. State, 404 S.C. 493, 745 S.E.2d 378 (2012) ("Where a PCR court fails to make specific findings and reasons for those findings, the issue is not preserved for appellate review if the petitioner failed to make a Rule 59(e) motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations.").

Like in Marlar, the lower court in this case ruled that the Applicant failed to present any argument or testimony in support of this issue and denied and dismissed the claim. Also like in Marlar, the Applicant failed to file a motion to alter or amend pursuant to Rule 59(e) to obtain a specific finding from the lower court on this issue. The Respondent submits it is clear from the record that the lower court did not rule on counsel's failure to object to the malice jury instruction. This issue is not preserved for appellate review, therefore, this Court should not address the merits of this claim.

However, if this Court is inclined to review this issue on appeal, the Respondent submits the Petitioner's jury trial was pre-Belcher and the malice instruction given during the Petitioner's trial was proper at the time. The Respondent also submits the Applicant failed to carry his burden of proving counsel was not ineffective for failing to object to the malice instruction given at trial.

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[2] In Marlar, the PCR judge's order found: "As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed. 375 S.C. at 409, 653 S.E.2d at 266.

The Petitioner was convicted of shooting and killing Jamie Reid (victim) in the parking lot of a strip club. At trial, the Petitioner claimed self-defense. The jury was instructed on malice as follows:

> "The defendant is charged with murder. The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought. Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse, and with the intent to inflict an injury, or under circumstances that the law will infer an evil intent. Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant just before, and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent in the act. Malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is either by direct evidence, or by inference from the facts and circumstances, which are proved. Express malice is shown when a person speaks words, which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind, would be express malice. Malice may be inferred from conduct showing a total disregard for human life. **Inferred malice may also arise when the deed is done with a deadly weapon.**" (App. 426:4-427:15) (emphasis added).

In State v. Belcher, this Court held that a "jury charge instruction that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify homicide." 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009). This Court held further "the permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder." Id. at 612, 685 S.E.2d at 810 (2009).

While the malice instruction given in the Petitioner's case was later held to be improper by this Court in Belcher, the Respondent submits that at the time of the Petitioner's trial the instruction was not improper or objectionable. The Petitioner proceeded to trial on March 2, 2009. Belcher was decided by this Court on October 12, 2009. Counsel's performance was

proper because at the time of the Petitioner's trial- seven months prior to Belcher- the malice instruction given to the jury was proper and there was no basis to challenge the instruction.

A finding by this Court that counsel was ineffective for failing to object to a malice instruction that was later declared improper by Belcher would be equivalent to this Court requiring trial counsel to act and make objections based on anticipated changes in the law. This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

In support of his argument that counsel should have objected to the malice instruction, the Petitioner asserts if counsel had objected to the instruction he would have had the benefit of Belcher being applied retroactively while his case was pending on direct appeal. The Petitioner asserts further that this case falls within a narrow window of cases where this Court's ruling in Belcher should be applied retroactively on post-conviction relief. The Respondent submits this Court clearly outlined which cases would have the benefit of retroactivity and this case does not meet the requirements necessary for Belcher to be applied retroactively.

In Belcher, this Court held that its decision in the case was a clear break from modern precedent and would be effective in "all cases which are pending on direct review or not yet final where the issue is preserved." Id. at 612, 685 S.E.2d at 810. This Court went on to hold that its ruling in Belcher "will not apply to convictions challenged on post-conviction relief." Id. at 612-13, 685 S.E.2d at 810. Belcher does not apply retroactively to this case because trial counsel did not object to the instruction to preserve the issue for appellate review. At the time of trial, the malice instruction had not been found improper by this Court. In State v. Tapp, this Court held our preservation rules require that objections to the admissibility of evidence be specific, but

they most certainly do not require clairvoyance. 398 S.C. 376, 385-86, 728 S.E.2d 468, 473 (2012).

Belcher also does not apply retroactively to this case because this appeal stems from the Petitioner's challenge of his conviction on post-conviction relief. It is true that had counsel objected to the malice instruction given during the Petitioner's trial, Belcher would likely have applied retroactively to this case on direct appeal. However, this argument by Petitioner cannot be used to circumvent this Court's clear mandate that it ruling in Belcher "**will not apply to convictions challenged on post-conviction relief.**" Id. (emphasis added). The Respondent submits this issue is not preserved for appellate review and the Petitioner failed to carry his burden of proving counsel was ineffective for failing to object to the malice jury instruction given at trial.

CONCLUSION

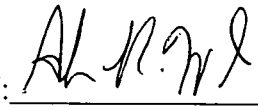
For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: 

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ATTORNEYS FOR RESPONDENT

November 20, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

NATHANIEL MCGEE Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari To The SC Supreme Court has been served upon the respondent's attorney David Alexander, this 20th day of November 2014.

Anne R. Henley
Legal Assistant

SWORN to before me this
20th day of November, 2014.

(L.S.)
Notary Public for South Carolina.
My Commission Expires: 3/6/23

ALAN WILSON
ATTORNEY GENERAL

November 20, 2014

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Nathaniel McGee v. State of South Carolina**
Appellate Case No. 2013-002540
Lower Court Case No. 2012-CP-10-3986

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return to Petition for Writ of Certiorari.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: David Alexander, Esquire