

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SUMTER COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Circuit Court Judge
Case No. 2008-CP-43-1858

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S.C. Supreme Court

ORIGINAL

REGINALD CLEA,..... PETITIONER,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Does evidence support the PCR court's finding that appellate counsel was not ineffective in failing to challenge the trial court's charge on implied malice where (a) Petitioner was tried several years before the decision of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), (b) the issue was not preserved for appellate review, (c) counsel's decision not to raise the issue of the request for additional language that the inference was rebuttable was reasonable under the law at the time, and (d) even if counsel had raised the issue regarding additional language, the outcome would have been no different?

STATEMENT OF THE CASE

Reginald Clea (“Petitioner”) was indicted for two (2) counts of Murder and one (1) count of Possession of a Weapon During Commission of a Crime of Violence (2004-GS-43-0956). Petitioner was represented by John D. Clark, Esquire. Petitioner proceeded to a jury trial before the Honorable Clifton Newman on May 2-5, 2005. (App. pp. 94-857.) Petitioner was acquitted of one (1) count of Murder (Count One, victim John C. Jackson), but he was convicted of the other count of Murder (Count Two, victim James Pollard) and Possession of a Weapon During Commission of a Crime of Violence (Count Three). (App. p. 841, line 20 – p. 842, line 3). Judge Newman imposed a sentence of thirty (30) years for Murder and a concurrent term of five (5) years for Possession of a Weapon During Commission of a Crime of Violence. (App. p. 856, lines 4-16).

A Notice of Appeal was filed and an appeal perfected. Petitioner was represented on direct appeal by Joseph L. Savitz, III (“Counsel”). On appeal, Counsel challenged the trial court’s refusal to instruct the jury on the lesser-included offense of Voluntary Manslaughter. App. pp. 858-865). The South Carolina Court of Appeal affirmed Petitioner’s conviction and sentence. *State v. Clea*, Op. No. 2007-UP-552 (S.C. Ct. App. filed December 14, 2007). (App. pp. 866-874.) The Remittitur was sent on January 2, 2008.

Petitioner filed for post-conviction relief on August 7, 2008. (App. pp. 15-21). Respondent initially moved for summary dismissal based on Petitioner’s failure to set forth a claim cognizable at PCR. (App. pp. 9-14; pp. 22-25.) Petitioner then amended his application. (App. pp. 26-30.) Respondent submitted an Amended Return on March 24, 2009, and the matter was set for an evidentiary hearing. (App. pp. 13-14; pp. 31-34). A hearing was convened on November 4, 2009, in Richland County before the Honorable G. Thomas Cooper, Jr. (App. p. 35-93). Judge Cooper denied and dismissed the application with prejudice. (App. pp. 1-8.)

STANDARD OF REVIEW

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

ARGUMENT

Evidence supports the PCR court's finding that appellate counsel was not ineffective in failing to challenge the trial court's charge on implied malice where (a) Petitioner was tried several years before the decision of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), (b) the issue was not preserved for appellate review, (c) counsel's decision not to raise the issue of the request for additional language that the inference was rebuttable was reasonable under the law at the time, and (d) even if counsel had raised the issue regarding additional language, the outcome would have been no different?

Petitioner argues that appellate counsel's failure to raise the issue of the trial court's jury charge on inferred malice from the use of a weapon constitutes ineffective assistance of appellate counsel. At Petitioner's May 2005 trial, the trial court charged:

...Malice aforethought may be express or implied. These terms, express and inferred or implied, do not mean different kinds of malice but merely the manner in which the malice can be shown to exist. ...

...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. ... *Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.* [Emphasis supplied.]

(App. p. 828, line 22 – p. 829, line 12.) Trial counsel made the following objection:

...The Defendant objects to the Court's charge on inferred malice and use of a deadly weapon. *We believe that's the appropriate charge*, Your Honor, but we believe also when that charge is given the Court should charge that inferred malice can be rebutted by competent evidence. And we would ask the court to recharge the jury, include a charge that inferred malice from the use of a deadly weapon can be rebutted and also if the Court's going to give the jury written jury instructions, that that be added to the written instructions, your Honor.

(App. p. 837, lines 12-22.) Trial counsel added, "the charge as stated impermissibly shifts the burden to the Defendant, unlawfully, unconstitutionally shifts the burden." (See App. 837, line 25 – p.838 line 3.) The trial court denied the request for the additional instruction, finding that the jury had been charged that the State had to prove beyond a reasonable doubt that the

defendant killed with malice aforethought and that the inferred malice charge given was correct. (App. p. 838, lines 4-13.)

On appeal, appellate counsel (hereinafter “Counsel”) raised the following issue:

The trial judge committed reversible error by refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

(App. p. 861.) At PCR hearing, Counsel testified that based on his review of the transcript, he believed this issue to be the strongest issue. (App. p. 43, line 23 – p. 44, line 2; p. 65, line 15- p. 66, line 16.) Counsel fully explained his reasoning for asserting the issue. Counsel stated that he “felt like if it was provocation for self-defense, then it was probably provocation for voluntary manslaughter.” (App. p. 43, lines 5-20.)

Counsel testified that he did not raise the issue of the implied malice charge for several reasons. First, Counsel testified that the portion of the charge allowing a permissive inference of malice from the use of a gun was the charge that was routinely given in South Carolina until the decision of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). (App. p. 46, lines 12-21.) Petitioner was tried on May 2-5, 2005, more than four (4) years before the ruling in Belcher on October 12, 2009. Petitioner’s appellate brief was filed on June 6, 2007, more than two (2) years prior to Belcher. Belcher “represents a clear break from our modern precedent” approving of the jury charge on inference of malice from use of a deadly weapon, expressly overruling some twenty-six (26) cases decided over the course of more than 100 years, ranging in date from 1894 to 2006. 385 S.C. at 612, 685 S.E.2d at 810. The charge given in Petitioner’s case was, at the time of his trial, the sanctioned charge on the law. Counsel stated that even if trial counsel’s objection preserved the issue, at the time of Petitioner’s appeal the charge was not incorrect. (App. p. 51, lines 16-19.) Counsel based his opinion that the issue would not be successful on appeal on authorities valid at the time such as State v. Mattison, 276 S.C. 235, 237-238, 277 S.E.2d 598, 599 - 600 (1981) (overruled by State v. Belcher, supra.) (App. p. 51, line 20 – p. 55,

line 9.) Because the Belcher decision posed a clear break from long-established precedent some two years after Petitioner's trial, Counsel was not unreasonable in failing to raise this issue. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial) (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)).

Counsel also stated, and the PCR court correctly found, that trial counsel's objection to the charge did not adequately preserve the issue for appeal. (App. p. 48, line 11 – p. 49, line 2; p. 56, line 16 – p. 57, line 15; p. 67, lines 21-24.) Noting that trial counsel had stated in his objection that the charge was an appropriate one and only asked for additional language that the inference was rebuttable, Because of the concession that the inference of malice charge was correct, Counsel felt any challenge on that basis would not be preserved under South Carolina's strict issue preservation rules. Counsel will not be deemed ineffective for failing to raise an issue not preserved for appeal. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002).

The Court further found Petitioner's claim that Counsel should have raised the trial court's denial of his request for additional language that the inference of malice may be rebutted was without merit. "[A]ppellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Here, Counsel explained that the charge as given was correct law at the time, charging the suggested language from Mattison regarding the facts and circumstances of the case, and Counsel further felt that the requested charge was not a correct statement of the law at the time of the trial. (App. p. 57, line 22 – p. 58, line 1.) See also State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (best never to use words such as "rebuttable" in any jury charge) (overruled on other grounds by Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991)). Counsel explained that the issue he chose, in his opinion, was more likely to constitute a reversible error. The Court properly found that

Counsel articulated a reasonable for his decision to pursue the issue raised, and Petitioner failed to satisfy his burden of proof to demonstrate otherwise.

The court also properly found that based on the law at the time of the trial and appeal, Petitioner has failed to demonstrate that the outcome of the proceeding would have been different had Counsel asserted that the trial court erred in refusing to charge additional language that the use of a weapon could be rebutted. Moreover, the facts adduced at trial indicated that Petitioner first shot at Charles Jackson (“Jackson”). Petitioner testified that he believed Jackson was about to draw a gun from a box in his truck when he fired. Petitioner was acquitted of the murder of Jackson. However, the evidence at trial was that Petitioner then fired upon James Pollard (“Pollard”). No evidence at trial indicated that Pollard was armed other than Petitioner’s testimony that Pollard reached toward his waist; Petitioner never saw Pollard’s hands before firing. Pollard was shot nine (9) times. The appellate court found that the trial court correctly denied Peitioner’s request for a charge on voluntary manslaughter. Given the evidence, even if the additional charge was appropriate, the outcome of the proceeding would have been no different. Therefore, the PCR court’s Final Order of Dismissal should be upheld.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's Order of Dismissal. However, if this Court grants certiorari, the Respondent asks permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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June 29, 2011

STATE OF SOUTH CAROLINA

SUPREME COURT

Certiorari to Sumter County
The Honorable G. Thomas Cooper, Circuit Court Judge
Case No. 2008-CP-43-1858

REGINALD CLEA,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Lauren Meara, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

James B. Richardson, Jr., Esquire
1229 Lincoln Street
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I further certify that all parties required by Rule to be served have been served.

This 30th day of June, 2011.

Lauren Meara

LAUREN MEARA
Legal Assistant

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