STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

JONATHAN M. CAMPBELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001428

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did trial counsel's deficient performance – failing to object to the trial judge's instruction to the jury that malice may be inferred from the use of a deadly weapon in order to convict him of murder – prejudice Petitioner?

STATEMENT

During its January 2006 term, the Greenville County grand jury indicted Petitioner for murder (2006-GS-23-328) and possession of a weapon during the commission of a violent crime (2006-GS-23-329). App. 618-619; App. 621-622. The state, represented by William J. Weston and Jonathan M. Gregory, called the case for trial before the Honorable Edward W. Miller on January 12-14, 2010. John P. Abdalla represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 473, line 21 – App. 474, line 1. Judge Miller sentenced Petitioner to forty-five years' imprisonment for murder, and to five years' imprisonment for the weapon charge. App. 482, lines 1-2; App. 620; App. 623. Petitioner filed a timely notice of appeal, which was perfected. Joseph L. Savitz, III represented Petitioner on appeal. App. 484-493. On April 18, 2012, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Campbell, 2012-UP-236 (S.C. Ct. App. filed April 18, 2012); App. 522 – 523. Remittitur was issued on May 4, 2012. App. 524.

On December 5, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 525-533. An evidentiary hearing was conducted on April 22, 2014 before the Honorable D. Garrison Hill. Caroline M. Horlbeck represented Petitioner, and Karen C. Ratigan represented the state. App. 539. In an order filed June 5, 2014, Judge Hill denied Petitioner relief from his convictions and sentences. App. 608-617. Neither the state nor Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel's deficient performance – failing to object to the trial judge's instruction to the jury that malice may be inferred from the use of a deadly weapon in order to convict him of murder – prejudiced Petitioner.

Relevant facts

The trial

In his opening statement, the solicitor informed the jury that this case was "about a murder committed in a drug fueled rage." App. 50, lines 23-24. According to the state's evidence, Petitioner and his co-defendant, Carl Southerland, met with the Jermaine Proctor ("the deceased") during the early morning hours of June 19, 2006 for a drug deal. App. 221, lines 3-22. Southerland[1] claimed that he, Petitioner, and the deceased were going to burglarize a business and provide the stolen goods to the deceased in exchange for crack. App. 220, line 20 – App. 221, line 2. However, the deceased gave Petitioner and Southerland several crack rocks to smoke so they "could get [their] courage up to do what [they] needed to do." App. 222, lines 15-23. The trio scouted several locations for the burglary, but were not satisfied with any of the sites. App. 221, line 22 – App. 224, line 13.

When Petitioner and Southerland informed the deceased they were not going to burglarize an electronics store near Cleveland Park, an argument ensued. App. 224, line 14 – App. 225, line 7; App. 225, lines 20-25. Southerland believed the deceased was going to hit Petitioner so he held the deceased by his shoulders. App. 225, lines 12-15; App. 226, lines 3-7. Southerland claimed

[1] Southerland testified for the state in compliance with his plea agreement. At the time of trial, he had pleaded guilty to voluntary manslaughter, but had not been sentenced. All other charges were dismissed. App. 266, line 13 – App. 267, line 12.

Petitioner stabbed the deceased multiple times in the chest using a knife[2] he kept in the back of his pants. Then, according to Southerland, Petitioner climbed on top of the deceased, placed his feet against the steering column and dash, and continued to stab the deceased. App. 226, lines 8-25; App. 227, lines 5-11. Southerland described Petitioner as "going crazy" during the stabbing. App. 227, lines 12-13.

After the stabbing, Southerland and Petitioner placed the deceased in the backseat and started driving away. App. 230, line 23 – App. 231, line 1. The two then drove to Alabama where they were stopped after a police chase. App. 241, lines 14-21; App. 242, lines 6-24.[3] Southerland and Petitioner were arrested and returned to South Carolina. App. 243, lines 2-4. While in Alabama, Southerland gave a statement to police in which he claimed the deceased pulled a gun on them. App. 243, lines 17-22; App. 257, lines 21-25. However, at trial, Southerland admitted that did not happen. App. 243, lines 23-24.

Petitioner's testimony was very similar to Southerland's testimony regarding the events leading up to the death of the deceased, including the agreement among the trio to burglarize a business in exchange for drugs and scoping out sites. App. 310, lines 8-22; App. 311, lines 4-22; App. 312, line 1 – App. 316, line 24. Petitioner noted that Southerland took a hammer with him to assist in the burglary. App. 311, lines 17-20. When Southerland and Petitioner informed the deceased they were unwilling to burglarize the business near Cleveland Park, the group agreed to

---

[2] Southerland identified a knife (State's #11) as looking like the one used by Petitioner to stab the deceased. App. 228, lines 13-25; App. 184, lines 5-9. A crime scene technician collected State's #11, the "steak knife," from the interior of the vehicle. App. 149, line 25 – App. 150, line 11. No testing on the knife was conducted to look for fingerprints or DNA. App. 151, line 5 – App. 152, line 15; App. 154, lines 12-17; App. 177, line 19 – App. 178, line 17; App. 180, lines 7 – 14; App. 180, line 20 – App. 181, line 6.

[3] The police chase, subsequent crash of the automobile, and apprehension of Petitioner and Southerland were caught on video by a camera in one of the police cars. The video was admitted into evidence at the trial. App. 127, line 7 – App. 128, line 8.

meet at another time for another burglary. App. 317, line 8 – App. 318, line 20; App. 376, lines 11-14; App. 377, lines 3-5; App. 379, lines 15-18; App. 380, lines 13-15. When Petitioner reached for the door handle to exit the automobile, he was struck on the back of his head with a hammer. Although Petitioner initially believed the deceased had struck him with the hammer, he later learned Southerland actually struck him. App. 319, lines 23-24; App. 320, lines 1-6; App. 380, lines 16-19; App. 381, lines 2-8; App. 381, line 22 – App. 382, line 6; App. 382, lines 15-19. Petitioner turned his head toward the deceased and saw the deceased leaning toward him. Instinctively, Petitioner grabbed the deceased, who bit Petitioner's thumb. Petitioner was mad at the deceased because he believed the deceased had hit him and was biting his thumb. App. 319, line 22 – App. 320, line 22; App. 383, lines 2-25; App. 384, lines 4-11; App. 386, lines 12-20; App. 387, lines 4-8. While Petitioner and the deceased were struggling, Southerland got out of the back seat, opened the driver's door, and stabbed the deceased. Southerland continued stabbing until the deceased stopped moving. App. 322, line 1 – App. 328, line 7; App. 384, line 12 – App. 386, lines 25; App. 388, line 8 – App. 390, lines 13.

Thereafter, Southerland got into the driver's seat and drove away with Petitioner and the deceased remaining in the automobile. App. 329, lines 8-11. Southerland leveled multiple threats at Petitioner concerning what would happen if he tried to leave or speak of the incident to anyone. Using tattoos on his body as proof, Southerland explained his membership in the Aryan Nation and his worship of Satan. Using a hammer and a screwdriver, Southerland threatened harm to Petitioner and his family to force Petitioner to accompany him on his escape. App. 331, line 20 – App. 343, line 15; App. 346, lines 15-22; App. 350, lines 9-21.

The solicitor's closing argument ridiculed what he called Petitioner's "cocamamy story." App. 445, lines 9-11. Repeatedly, the solicitor noted that Petitioner testified that he was mad at the

deceased because he believed the deceased had hit him with a hammer. App. 450, line 17 – App. 451, line 5.

During the charge conference, trial counsel requested the jury be instructed as to voluntary manslaughter. App. 413, lines 21-23; App. 414, lines 1-5. After the solicitor objected on the basis of lack of evidence concerning sufficient legal provocation, trial counsel argued the evidence in the record supported the charge because Petitioner testified he believed the deceased hit him in the head with a hammer, which would satisfy the sufficient legal provocation element of the offense. App. 415, lines 15-23. After taking a break, the judge agreed to charge the jury concerning voluntary manslaughter. App. 421, line 7.

At the conclusion of the trial, the judge instructed the jury regarding the elements of murder. Concerning malice, he instructed: "And malice aforethought may be either express or inferred. And these terms express 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." App. 460, lines 3-8. Further, he charged that "[i]nferred malice may also arise when the deed is done with a deadly weapon. And a deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. And whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case." App. 460, lines 14-19. Immediately thereafter, the judge instructed the jury regarding the elements of voluntary manslaughter. App. 460, line 20 – App. 461, line 15.

Trial counsel did not object to the charge permitting the jury to infer malice from the use of a deadly weapon despite this Court's opinion in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) being issued three months before Petitioner's trial.

The PCR hearing

During the PCR hearing, trial counsel admitted the trial judge charged the jury that the law permits an inference of malice when a deadly weapon is used. According to trial counsel, judges "generally charge that." Tr. 548, lines 11-15. Trial counsel described it as "a typical malice charge." Tr. 548, line 25 – Tr. 549, line 2. Trial counsel further admitted that he did not object to the instruction during the trial. Tr. 549, lines 3-4. Although trial counsel explained that he does not "like inferences," he testified that he "gave up on challenging those." Tr. 549, lines 5-9.

Petitioner testified that trial counsel failed to object to the judge's instruction to the jury that they may infer malice from the use of a weapon despite the fact that the judge instructed the jury on the lesser-included offense of voluntary manslaughter. App. 582, lines 17-24; App. 589, lines 15-19. Petitioner testified the inference "precluded manslaughter" because possession of a weapon was necessary for the stabbing and would require the jury find him guilty of murder. App. 582, line 25 – App. 583, line 7.

The order denying relief

The PCR judge found trial counsel was deficient in failing to object to the charge "[a]s this case was tried after the South Carolina Supreme Court issued State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)." App. 615. However, the PCR judge found Petitioner "failed to meet his burden of proving he was prejudiced by trial counsel's lack of objection to the presumption of malice charge." App. 615. The PCR judge found Petitioner could not prove prejudice "because of the overwhelming evidence of [Petitioner]'s guilt." App. 615. While discussing this claim for relief, the PCR judge indicated it also found the jury charge "did not contribute to the verdict." The PCR judge noted the jury asked questions about reasonable doubt and accomplice liability, which "indicate[d] they were focusing upon [Petitioner]'s responsibility as a principal and not whether

malice existed." App. 616-617. Thus, the PCR court denied Petitioner relief from his convictions and sentences.

Discussion

Trial counsel's failure to object to the jury instruction regarding inferred malice from the use of a deadly weapon resulted in ineffective assistance of counsel based on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Had counsel objected to the jury instruction, then Petitioner would have been granted a new trial upon review by the Court of Appeals. In Belcher, 385 S.C. at 600, 685 S.E.2d at 803-804, this Court overruled prior law and held "that a jury charge instructing 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 the homicide."

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Belcher, 385 S.C. at 600, 685 S.E.2d at 803. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. This Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id. Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state's constitutional prohibition against charging juries on the facts. Belcher, 385 S.C. at 602, 685 S.E.2d at 804.

After an extensive review of the South Carolina's jurisprudence in this area, this Court discovered that when the permissive inference charge first developed in the late nineteenth

century it was subject to "some qualification," specifically "the recognition that some facts will not permit the inference of malice from the use of a deadly weapon." Belcher, 385 S.C. at 604, 685 S.E.2d at 806. This Court stated, "We are persuaded . . . that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified." Belcher, 385 S.C. at 605, 685 S.E.2d at 806. This Court recognized that it later "began a slow, and at first almost imperceptible, retreat" from above established law and that "by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that 'malice is presumed from the use of a deadly weapon.'" Belcher, 385 S.C. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflect the "proper application of the charge," this Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," this Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Belcher, 385 S.C. at 612, 685 S.E.2d at 810.

In effect, the Belcher ruling "return[ed] to the rationale" of prior South Carolina jurisprudence on the matter dating back to the late nineteenth century, and overturned existing case law to the contrary that occurred in the intervening century. Id. Because the rule in Belcher marked a "clear break from our modern precedent," this Court applied its effect to "all cases which [were] pending on direct review or not yet final where the issue [was] preserved." Id. (citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708 (1987)("hold[ing] that a new rule for the conduct of

criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final")).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR 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, 466 U.S. at 692.

The PCR judge held trial counsel rendered deficient performance by failing to object to the instruction which permitted the jury to infer malice from the use of a weapon where there was evidence presented to reduce the offense to voluntary manslaughter. The state did not challenge this ruling; therefore, it is the law of the case. See Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)(explaining that "[u]nder the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court"); Atlantic Coast Builders and

Contractors v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)(stating that "an unappealed ruling, right or wrong, is the law of the case). Ample evidence in the record supported this holding, including the judge's instruction to the jury concerning voluntary manslaughter, evidence that Petitioner was mad at the deceased when the stabbing occurred, evidence that Petitioner was acting "crazy," evidence that Petitioner was in a "drug-fueled rage," evidence that Petitioner believed the deceased had hit him with a hammer in the head just moments before the stabbing, evidence that the deceased was biting[4] Petitioner's finger at the time of the stabbing, and evidence that Petitioner and the deceased were struggling immediately before the stabbing.

As in Belcher, the erroneous instruction that malice may be inferred from the use of a deadly weapon cannot be considered harmless here. The erroneous inference of malice from the use of a deadly weapon jury instruction was reversible error because it was not harmless beyond a reasonable doubt. See Rose v. Clark 478 U.S. 570 (1986). The evidence in the record supported the jury instruction for voluntary manslaughter, which mitigated the offense. As Petitioner testified at his PCR hearing, when the jury was instructed that it could infer malice from the use of a deadly weapon, its consideration of voluntary manslaughter was precluded because the use of a deadly weapon – a knife – was undisputed. The evidence against Petitioner was not overwhelming. The jury heard testimony from Southerland, who testified pursuant to a plea agreement and in exchange for a reduced charge and sentence, that Petitioner, while acting crazy, stabbed the deceased. On the other hand, Petitioner testified that Southerland stabbed the deceased while Petitioner and the

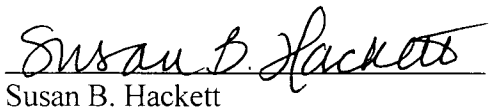
[4] See State v. Cleland, 148 S.C. 86, 145 S.E. 628, 629 (1928), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (quoting jury instructions illustrating voluntary manslaughter as follows: "[i]f he should meet another on the street and that one should pull his nose, or spit in his face, and on the spur of the moment he should slay him, he would be guilty, not of murder, but of manslaughter").

deceased struggled. The evidence presented supported both and was contingent upon the jury's credibility determinations.

CONCLUSION

Petitioner respectfully requests this Court order full briefing on the issue presented.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

JONATHAN M. CAMPBELL,

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 Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Jonathan M. Campbell #236007, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 21st day of January, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of January, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.