

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Berkeley County

S.C. Supreme Court

Deadra L. Jefferson, Circuit Court Judge

JERMAINE T. MCKELVEY

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001743

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the trial judge's jury charge on assault and battery with the intent to kill (ABWIK) when he instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon" which was error pursuant to State v. Belcher¹ because evidence was presented which would reduce the ABWIK to assault and battery of a high and aggravated nature (ABHAN) as evidenced by the judge instructing the jury on ABHAN as a lesser-included offense?

¹ State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

STATEMENT

In February of 2009, the Berkeley County Grand Jury indicted McKelvey for assault and battery with intent to kill [ABIK] and possession of a firearm during the commission of a violent crime, indictments #09-GS-08-305, 305. In April of 2009, the Berkeley County Grand Jury indicted McKelvey for armed robbery, indictment #09-GS-08-504. In December of 2009, the Berkeley County Grand Jury indicted McKelvey for possession of cocaine base, indictment #09-GS-08-2447. On April 12, 2010, McKelvey proceeded to jury trial on all four charges before the Honorable R. Markley Dennis, Jr., and a jury. McKelvey was represented by Chad Shelton and David Schwacke. The state was represented by Dorie Bigante and Ann Williams. App. 1. The jury returned verdicts of guilty on all charges. Judge Dennis sentenced McKelvey to twenty-seven years on the armed robbery; twenty years on the ABWIK; to one year on the possession of crack cocaine; and five years on the possession of a firearm during the commission of a violent crime. The judge emphasized that the sentence for the possession of a firearm should be served first day for day, and the other sentences, which would run concurrent to each other, would be consecutive to the gun charge. App. 440, ll. 6 – App. 441, ll. 18. A timely notice of intent to appeal was filed on April 16, 2010. An appeal was perfected by the Office of Appellate Defense in the form of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina court of Appeals affirmed McKelvey's convictions and sentences. State v. McKelvey, 2012-UP-169 (Ct. App. filed March 7, 2012).

On April 23, 2012, McKelvey filed an application for post-conviction relief (PCR). He filed two amended PCR applications on May 28, 2013 and May 9, 2014. The state filed a return on June 28, 2013. An evidentiary hearing was held on May 19, 2014 before the Honorable Deadra L. Jefferson. McKelvey was represented by Dennis J. Rhoad and Sally Rhoad. The state was

represented by Ashleigh R. Wilson. App. 492. On July 17, 2014, Judge Jefferson issued an order denying McKelvey's PCR application and dismissing it with prejudice. App. 696 – App. 739. McKelvey's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to the trial judge's jury charge on assault and battery with the intent to kill (ABWIK) when he instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon" which was error pursuant to State v. Belcher² because evidence was presented which would reduce the ABWIK to assault and battery of a high and aggravated nature (ABHAN) as evidenced by the judge instructing the jury on ABHAN as a lesser-included offense.

On November 26 -27, 2008, Bernard Phoenix was at the Pleasure Club in Moncks Corner. McKelvey, whom Phoenix knew, was at the club as well. Phoenix's testimony was that McKelvey told Phoenix to give him his money, but Phoenix thought McKelvey was kidding. McKelvey kept following Phoenix and hitting him, not saying anything. Finally, an altercation began and they ended up outside the Club. Phoenix was hit on the head. He saw a gun in McKelvey's hand and then McKelvey shot. The owner came out and helped Phoenix walk to the club. The next thing Phoenix remembered was the helicopter taking him to Roper Hospital. He told the police that McKelvey shot him. App. 94, ll. 8 – App. 106, ll. 21.

Officer Tony Edwards was on patrol when he heard another officer on the radio say he heard a shot behind the Berkeley Middle School. Officer Edwards went to the Pleasure Club which was at the location of the shot. He saw McKelvey and another man heading towards their car and saw a man lying on the porch of the club. He stopped McKelvey, who was the passenger, and the driver as they were leaving. McKelvey had no guns on his person. App. 115, ll. 8 – App. 118, ll. 22.

² State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

Officer Edwards then checked on Bernard Phoenix as he lay on the porch. There was a small puddle of blood around him, but he answered Officer Edwards. Officer Edwards called EMS. The he found a bullet jacket or fragment near Phoenix. Officer Edwards testified:

I looked at it and I picked it up. It was the jacket of a bullet that evidently had passed through Mr. Phoenix and wound up in the wall.

App. 119, ll. 7 – App. 120, ll. 23.

McKelvey and his friend, Dash, were in the patrol car having been arrested for disorderly conduct. The officer searched the car and found a gun under the passenger seat. There was blood on the bottom slide of the loaded gun. It was a Russian made Makarov. App. 122, ll. 17 – App. 125, ll. 24. Officer Edwards performed a gunshot residue (GSR) test on McKelvey who said: “Oh, y’all must have thought I shot somebody.” App. 134, ll 1 – App. 135, ll 12.

Michele Moritzky was the EMS person who responded. She testified that she was called to the scene of a gunshot wound. The man was lying in a pool of blood and she decided to send him via helicopter to MUSC as the trauma center in the area. On cross examination when asked why she said it was a gunshot, she responded that ‘that’s what we were dispatched to.’ She admitted that there was no gun powder on the victim. There was an entrance type wound and exit. App. 251, ll. 9 – App. 259, ll. 12.

Cynthia Fuda was the nurse in the surgical trauma intensive care unit at MUSC. She provided care to Bernard Phoenix who was critical as he had a gunshot to the head. However, the shot did not penetrate the skull so not his brain. Dr. Minshall was the trauma surgeon who treated Phoenix. However, he was out of the country on a mission trip at the time of this trial. App. 318, ll. 1 - App. 327, ll. 13.

On cross examination, Fuda admitted that some of her testimony was based on Phoenix’s patient records. The emergency room nurses got reports from EMS as to what happened, and this

was one of the reports Fuda relied on. She did not know the history. In creating her history of the case, she relied on what other people said from several sources. App. 327, ll. 14- App. 331, ll. 15.

Suzanne Cromer, a SLED firearms examiner, tested the pistol which was a nine-millimeter with .380 auto ammunition. She also tested the bullet fragment found at the scene. It was too damaged to determine its caliber. She could not tell if it had been fired from the gun recovered. App. 279, ll. 16 – App. 287, ll. 25.

The State argued that malice could be inferred from a deadly weapon in closing arguing:

What is malice? Malice is an ill will, hatred, extreme indifference for human life. Well, how do you know if someone's acting maliciously? We tell that from the circumstances and the surroundings that are happening. **Having a deadly weapon, having a gun in an inference of malice.** Shooting someone in the head is an inference of malice. You know, it's a hostility toward a person without any justification to do so. And the judge is going to tell you about how malice can be inferred. Again, use your common sense.

App. 369, ll. 9-21. [emphasis supplied.]

At the close of the State's case the judge held a jury charge conference and indicated that he would charge the jury with the law on the lesser included offense of ABHAN. The State objected to the lesser included offense. The judge said ABHAN did not involve malice and a fight was not malice. In this case, there was an altercation. The judge said he had refused to charge ABHAN several time, but in this case, there was no question that there was evidence of ABHAN. App. 347, ll 5 – App. 349, ll. 20.

The judge charged the jury with the law of the lesser included offense of ABHAN. App. 399, ll. 7 – App. 400, ll.18.

When instructing the jury on the law of ABWIK, the judge told the jury that malice aforethought was an element of ABWIK. The judge told the judge that malice could be express or

inferred. App. 396, ll. 13 – App. 397, ll.4. The judge told the jury, “Malice may be inferred, as I told you. Inferred malice may be shown from conduct showing a total disregard for human life. **Inferred malice may also arise when the deed is done with a deadly weapon.**” The judge then defined deadly weapon. App.397, ll.15-App. 398, ll. 2. [emphasis added.]

The jury convicted McKelvey as indicted. App. 431, ll. 1 -21.

At his PCR hearing, McKelvey denied shooting Phoenix. His trial attorney was “highly ineffective.” His attorney did not object when the judge charged the jury that malice can be inferred from the use of a firearm during the incident. This was ineffective assistance of counsel. He did not object to witnesses qualified as experts who testified that the victim was shot. He should not have allowed the bullet fragment to be admitted. App. 590, ll. 1- App.598, ll. 24.

Suzanne Cromer, the firearms examiner with SLED, testified at the PCR hearing that she examined the pistol, the magazine, the bullet fragment. She found that the bullet fragment was unsuitable for identification. So, it could have been fired from McKelvey’s pistol or any other firearm. There was no blood on the bullet fragment. No cartridge case was given to her to examine and this gun should produce a cartridge when the bullet is expelled. App. 570, ll. 1 – 573, ll. 6.

Michele Moritzky, the paramedic who responded to the scene, testified at the PCR hearing that the dispatcher told her it was a gunshot wound. The victim had a penetrating type wound to his head. However, she had no training in the diagnosis of gunshots but only treated them. App. 583, ll. 1 – App. 584, ll. 15.

Cynthia Fuda, who was the treating nurse at MUSC in the surgical trauma intensive care unit, treated Phoenix when he was brought in. She had training in treating gunshot wounds, but had no training in determining whether a wound was a gunshot or some other kind of wound. She said that would fall under diagnosis, and nurses did not diagnose. She called it a gunshot wound because

that was his admitting diagnosis. She was told it was a gunshot. The admitting doctor had been told by others, probably EMS or the police, that it was a gunshot wound. App. 577, ll. 1 – App. 581, ll. 25.

Trial counsel testified that McKelvey always maintained that he did not shoot Phoenix. Counsel admitted that he did not call any witnesses nor present any evidence that McKelvey did not shoot Phoenix. Counsel did not offer any medical testimony on McKelvey's behalf. App. 498, ll. 1 – App. 501, ll. 4.

Counsel was familiar with the case of State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) which was the law in effect at the time of McKelvey's trial. Counsel admitted that he knew that Belcher held that it was not proper for a judge to instruct a jury that they could imply malice when a weapon was involved. However, counsel did not object when the judge gave that instruction to the jury. Counsel admitted that the gunshot wound was a main theory of the case, and that the solicitor argued it to the jury. The PCR judge at that point said that Belcher was only applicable in murder cases. App. 520, ll. 24 – App. 521, ll. 7. PCR counsel presented her with a copy of the case after which the court acknowledged that it applied to ABWIK as well. App. 519, ll. 15 – App. 521, ll. 25.

Trial counsel responded to the PCR counsel:

Q: Do you believe had you properly objected to that instruction given the testimony about the gunshot wound and how important that was that that would have made a difference?

A: I just---I don't know. It could have, yes. I missed it just to be honest with you.

App. 522, ll. 1 – 11.

McKelvey's PCR attorney argued to the court that the strongest legal argument in McKelvey's PCR was that the jury charge on malice being inferred from a weapon was improper,

and trial counsel did not object. Therefore, the error was not preserved for appellate review on direct appeal. PCR counsel argued that the jury charge in addition to the fact that no evidence was presented to “bolster the theory that Mr. Phoenix did not suffer from a gunshot wound” was ineffective assistance of counsel. App. 622, ll. 14 – App. 623, ll. 17.

The PCR judge ruled that the malice instruction by the trial court was proper and counsel had no basis to object. The judge wrote that McKelvey did not claim self-defense as Belcher did and no evidence was presented at trial that would reduce, mitigate, excuse or justify the applicant shooting the victim. The order provided that the only issue presented to the jury was whether McKelvey was the assailant and committed the ABWIK. The PCR judge then held:

This Court also notes that even if this jury instruction were improper, pursuant to Belcher, the applicant still would not be entitled to post-conviction relief. In Belcher, the court explicitly held: “our ruling, however, will not apply to convictions challenged on post-conviction relief.

App. 718.

To preserve an issue for review, there must be a contemporaneous objection that is ruled upon by the trial court, and the objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005).

In State v. Belcher, *supra*, decided in October of 2009, prior to the April 2010 trial date in the present case, the South Carolina Supreme Court wrote, “Under our policy-making role in the common law, we hold that the “use of a deadly weapon” implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).”

Pursuant to Belcher, the trial judge committed reversible error in instructing the jury that malice could be inferred from the use of a deadly weapon, and defense counsel did not object. App. 411, ll. 1 – App. 412, ll. 3. Evidence was presented that would reduce the ABWIK to ABHAN. The judge charged the jury with the law of ABHAN. App. 399, ll. 7 – App. 400, ll. 15.

Where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant 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 v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Supreme Court ruled in State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), that the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given, and the trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence.

The Supreme Court wrote in State v. Belcher, *supra*:

Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved.Our ruling, however, will not apply to convictions challenged on post-conviction relief. *See generally* Teague v. Lane, 489 U.S. 288 (1989).

The PCR judge misapprehended the law in Belcher. Teague as cited is a retroactivity case. Certainly this Court did not intend that this applied to cases tried after Belcher was published.

In Teague v. Lane, 489 U.S. 288 (1989), the United States Supreme Court held that new constitutional rules of criminal procedure do not apply to cases which have become final before the new rules are announced. A new rule may apply if the Supreme Court held that it was retroactive.

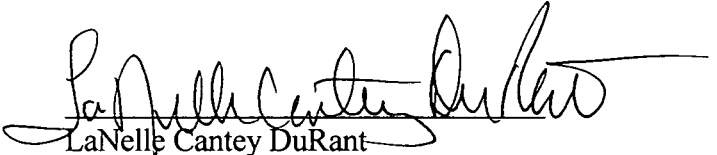
Applying this rule in Teague to Belcher, the result is that because this Court expressly held that the rule applied retroactively to cases pending on direct review, direct appeals were implicated. Teague would not foreclose prospective ineffective assistance of counsel challenges after the Belcher ruling.

The PCR court erred in failing to find trial counsel ineffective for not objecting to the jury instruction on malice being inferred from a weapon. The trial judge obviously believed there was evidence to reduce the ABWIK to ABHAN since he charged the jury on the lesser included charge of ABHAN. The trial judge specifically stated that there was an altercation, and ABHAN applied to this case. There was no medical evidence presented of the medical diagnosis that the victim, Phoenix, suffered a gunshot. No one testified who diagnosed the wound as a gunshot. Without the malice instruction from Belcher, there was a reasonable probability that the jury would have found McKelvey guilty of ABHAN.

CONCLUSION

Based on the above, certiorari should be granted, and his case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of March, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County
Deadra L. Jefferson, Circuit Court Judge

JERMAINE T. MCKELVEY

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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jermaine T. McKelvey, #280590, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 16th day of March, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of March, 2015.

Maic Hundert (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.