STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY

Roger L. Couch, Judge

Kenneth D. Smith, Petitioner,

v.

State of South Carolina, Respondent.

Appellate C/A 2015-000696

Petitioner's Pro Se Brief

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STATEMENT OF THE CASE

On October 24, 2008, petitioner was indicted by a Spartanburg County Grand Jury for murder. App. 1. 506. On July 17, 2009, petitioner was indicted for Breach of Peace OF A High and Aggravated Nature (BPHAN). App. 510. On September 8, 2009, petitioner was tried before the Honorable J. Derham Cole and a jury. App. 1. Derrick B. Bulsa and Danny Fulmer represented the State. App. 1. Richard Whelchel represented petitioner. App. 1. The jury convicted petitioner on both charges. App. 417, 1. 21-418, 1.9. Judge Cole sentenced petitioner to life imprisonment for murder and ten years imprisonment for BPHAN. App. 421, 1. 21-422. 1. 10. On March 14, 2012, the Court of Appeals dismissed petitioner's appeal. App. 498. State v. Smith, Op. No. 2012-up-178 (S.C. Ct. App. Mar. 14, 2012).

On January 30, 2013, petitioner filed a PCR Application. A hearing was held on Sept. 18, 2014, before Hon. Roger Couch. Christopher Bough represented petitioner and Suzanne White the State. On March 27, 2015, Couch denied petitioner's application. This Pro Se Brief follows:

I. Was It Error To Charge The Jury That It May Infer Malice From The Use Of A Deadly Weapon?

The PCR Court failed to apprehend that Belcher not only applies to cases where self-defense is charged, but also where voluntary manslaughter is charged. 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. Evidence that reduces murder to voluntary manslaughter is evidence of mitigation of a homicide as contemplated by Belcher.

The testimony presented at trial revealed conflicting versions of the event. The jury was instructed that malice may be inferred by the use of a deadly weapon and convicted Smith of murder and Breach of Peace of a High and Aggravated Nature (BPHAN) App. 1. 21-422, 1. 10.

The trial court charged the jury in part, as follows:

-you are also permitted to infer malice from proof of the intentional use of a deadly weapon.

-Simply stated, you are permitted to infer the existence of malice from proof of any one or more of the circumstances that I have just described as well as from any other evidence received during the trial of the case.

The law does not reduce from murder to manslaughter.

Where a jury is asked to consider a lesser included offense of murder

or a defense. Smith asserts the permissive inference charge violates the common law and the constitutional prohibition against charging juries on the facts. This appeal should be decided solely under the common law. The modern day usage of this jury charge has strayed from this Court's original jurisprudence.

The critical observation is that the charge was not proper where the evidence in the case reduced, mitigated, excused or justify the killing.

The law of course speaks in terms of "permissive inferences", not "presumptions". This transition resulted from the Unites States Supreme Court's pronouncement that the Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant, as in the case at bar. See, Sandstrom v. Montana, 442 U.S. 510, 524 (1979)(holding that burden-shifting presumptions or conclusive presumptions deprive a defendant of the due process of law and are therefore unconstitutional; Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975)(holding that the Due Process Clause forbids a State from placing the burden on the accused to prove his actions reduced the crime from murder to manslaughter.

Under this Court's policy-making role in the common law, the Court held that the use of a deadly weapon implied malice instruction has no place in a murder prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing. This charge is confusing and prejudicial in light of the evidence. A jury charge is place for purposeful ambiguity. Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is entirely conceivable that the only evidence of malice was Smith's use of a handgun.

In the Belcher case, this Court's decision represents a clear break from their modern precedent. The ruling is effective in this case and for all cases which are pending on direct review or not yet final. Griffin v. Kentucky, 479 U.S. 314, 328 (1987)(holding that a new rule for the conduct of criminal prosecution's is to be applied retroactively to all cases pending on direct review or not yet final; Harris v. State, 543 S.E.2d 716, 717-18 (Ga. 2001) reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule to all cases in the pipeline as in this case at bar and cases which were pending on direct review or not yet final. Petitioner's Due Process rights were violated based upon the erroneous jury charge which shifted the burden of proof. See, PCR Transcript.

II. The Petitioner Submits That After The Close Of The Evidence And Arguments By The Counsels, The Judge Charged The Jury On The Inference Of Malice, In Relevant Part As Follows:

Court: Malice may be inferred, through no expressed intent to kill is proven by direct evidence in the case "where the facts and corcumstances which have been proven by the evidence in this case" satisfy you beyond a reasonable doubt that malice was present in the mind of the killer at the time that any killing took place. Tr.p. 400 L. 5-19.

This portion of the judge's charge that "where the facts and circumstances which have been proven by the (State's) evidence in this case" amounted to a charge on the facts in violation of S.C. Const. art. V § 21. A trial judge may not become a participant in the verdict of the jury by indicating an opinion of any stage of the trial on issuable facts. Johns v. Elbert, 34 S.E.2d 796 (1945). A comment which could have been considered by a reasonable jury that the judge felt that the state had met its burden of proving defendant's guilt of charged offense, coupled with the judge's denial of defendants request for clarifying instruction, constitutes reversible error. See, State v. Smith, 342 S.E.2d 600 (S.C. 1986).

If an instruction relieves the state of the necessity of proving every element of the crime beyond a reasonable doubt, it is constitutionally deficient, may not be treated as harmless error, and will always invalidate the conviction. Sullivan v. Lousiana, 113 S.Ct. 2078, 2081 (1993). In reliance on Sullivan, Petitioner submit that his counsel's failure to object to the judge's factual jury charge, and failure to request a clarifying instruction from the judge was ineffective assistance of counsel that was prejudicial and entitled him to reversal of his conviction insofar as the judge's factual jury charge relieved the state of its burden of proving the "malice element" to convict him of murder. The Due Process Clause requires the state to prove beyond a reasonable doubt every element of crime for which a defendant is charged. In re Winship, 90 S.Ct. 1068, 1073.

Petitioner was denied effective assistance of trial counsel for failure to object to the judge's instruction on the facts which reduced the state's burden of proof. See Trial transcript & PCR.

III. Was The PCR Court's Decision An Unreasonable Determination Of The Facts In Light Of The Evidence Presented In That Trial Counsel Was Ineffective For Failing To Object To A Jury Charge That Malice Could Be Inferred From The Use Of A Deadly Weapon?

At the charge conference, Judge Cole asked the parties for their requested instructions. App. 366, 11. 8-9. The solicitor not trial counsel, asked Judge Cole whether he intended to charge any lesser included offenses. App. 366, 11. 10-11. The solicitor told Judge Cole he "was anticipating the defense

of an inferred malice charge was error.

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, barely a month after petitioner was convicted and approximately three years before his convictions were affirmed on appeal.

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

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 trial counsel ineffective, find prejudice in this case where malice was the sole issue, and grant petitioner a new trial. See Strickland v. Washington, 466 U.S. 668.

IV. Was Petitioner Denied The Right To Effective Assistance Of Trial Counsel By Counsel's Failure To Object To The Judge's Improper Comments On The Facts, When The PCR Judge Went Contrary To The U.S. Supreme Court Precedent And Applied A Legal Context Which Was Objectively Unreasonable.

In applicant's case, it was the state's contention that while he and his friend, John Sainvil, was involved in a fight with the victim, Jerry De La Rosa, and two of his brothers about a defective gun, the applicant shot and killed the victim. The victim's brother Santos Reiz, initially sold the defective gun to applicant's friend Sainvil who wanted his money back.

During the state's direct examination of the victim's brother, Santos Reiz, the following direct examination by the Court took place:

Solicitor: How did they come to be in possession...?

Court: Excuse me just a second. When you refer-- when you refer to somebody as him or her

Reiz: I don't know this name.

Court: You need to tell us who that is, because we don't know.

Reiz: I never knew the name.

Court: Do you see that person in the courtroom?

Reiz: Yes.

Court: Can you identify that person for us?

Reiz: Yeah. That's the guy who killed my brother.

Court: That one over there. Now you realize there are several people over there at the defense table. Which one are you refering?

Reiz: Him with the black-with the white shirt.

Court: The white shirt and pen in his hand?

Reiz: Yes. Yes.

Court: Seated next to Mr. Whelchel (Applicant's Counsel)

Reiz: Yeah, right there in the middle.

Court: The Lawyer?

Reiz: Yes.

Court: Okay. Thank you. He identified the defendant.

Solicitor: Yes, sir.

It would be judicially noted here that, prior to the judge's direct examination of Santo Ruiz, this witness had never made any previous out-of-court identification of the applicant. Tr.p. 147, L. 15-21.

Moreover, during cross-examination of Reiz, the Court again intervened in the examination of the witness, as follows:

Court: Excuse me just a minute, now. Again when you say both, you have to identify who you're talking about.

Reiz: Mr. Smith. And I never knew the names.

Court: Can we find out? Sir will you tell us your name, please?

Sainvil: Sainvil.

Court: John Sainvil. Okay, his name is John and his name is Mr. Smith and Mr. Sainvil. Okay.

Ruiz: John right?

Court: John Sainvil.

Ruiz: John Okay.

Court: Kenneth Smith. John Sainvil in the blue shirt and Kenneth Smith in the white shirt, Okay.

Tr. p. 131, L. 23--p. 137, L. 14.

The applicant submits that it can be forcefully argued that, in this particular instance, the judge did not only improperly engage in direct and cross-examination of a material witness, but he did also solicited factual testimony that assisted the state in identifying the applicant as the person who killed the victim. Tr. p. 115, L. 14-15. Under the provisions of the South Carolina Constitution, a judge shall not charge the jury in respect to matters of fact, but shall direct the law. S.C. Const., art. V, §21.

The real object of this Clause of the Constitution is to leave the decision of all questions of fact to the jury, exclusively, uninfluenced by any expression or opinion by the judge. State v. Coggins, 42 S.E.2d 240 (1967). A trial judge must refrain from all comments which tends to indicate his opinion as to weight or sufficiency of the evidence, credibility of witnesses, the guilt of the accused as to controverted facts. State v. Smith, 342 S.E.2d 600 (S.C. 1986).

The applicant contends that he was deprived of a fundamental right to a fair trial by the judge's prejudicial direct and cross examinations of Santos Ruiz, a State material witness, on issuable facts that usurped the province of the jury and that was of such magnitude as to effect the outcome of the trial based primarily on the court's solicitation of Ruiz's identification of the applicant as the person who killed his brother. Tr. p. 115, L. 14-16. A trial judge may not, expressly or by implication, intimate any opinion as to the facts and effect of testimony in a case. State v. Dawkins, 232 S.E.2d 223 (S.C. 1977). The U.S. Supreme Court has held that, although most constitutional errors have been held amenable to harmless error analysis, some errors will always invalidate a conviction such as a trial "by an unfair and bias judge". See, Arizona v. Fulminante, 111 S.Ct. 1246, 1265 (1991), citing Chapman v. California, 386 U.S. 18, 23 n.8.

VI. Was Petitioner Denied The Right To Effective Assistance By Counsel

By Counsel's Failure To Object To The Judge's Instruction On The Facts Of His "Breach Of Peace Of High And Aggravated Nature" Charge That Lessened The State's Burden Of Proof?

The applicant submits that in his case he was charged with the offense of "breach of the peace of a high and aggravated nature" pursuant to S.C. Code, §22-5-150, which states, in relevant part, the following:

> The magistrate may cause to be arrested (a) all affayers, disturbes and brakes of the peace, (b) all who go armed, offensively, to the terror of the people, (c) such as utter menacing or threatening speeches and (d) otherwise dangerous and disorderly person. Person arrested for any such offenses shall be examined by the magistrate before whom they are brought any may be tried before him. "if found guilty" they may be required to find sureties of peace and and be punished within the limits prescribed in §22-3-560 or, when the offense is of a "high and aggravated nature", they may be committed or bound over for trial before the court of general sessions.

In defining a "breach of the peace of high and aggravated nature", the S.C. Supreme Court has held an "assault with a pistol is one of a high and aggravated nature. See, State v. Wharton, 211 S.E.2d 237 (S.C. 1975).

By comparison, in applicant's case, the judge charged the jury on his "breach of the peace of a high and aggravated nature" offense as follows:

> Court: The second indictment charge the defendant with "breach of the peace of a high and aggravated nature. And that's also a statutory offense. The statute setting forth that particular crime is contained in section 22-5-150 of the Code of laws.
>
> This section of the law provides that any person engaging in any unlawful and justifiable affray, riot or other disturbance, or any person who goes armed offensively to the terror of the people, or any person who engages in menacing or threatening species or otherwise engages in any dangerous and disorderly conduct in a public "is guilty of breach of the peace (of a high and aggravated nature)".

Tr. p. 405, line 14-25.

The applicant submits that, unlike the judge's instruction to the jury that anyone who engages in any dangerous and disorderly conduct in a public place "is guilty of breach of the peace (of an high and aggravated nature)", the statute speaks in terms of permissive language that "if found guilty" rather than "is guilty of". Thus, the applicant contends that the judge's instruction in this particular instance had the effect of conveying to jury the judge's opinion of the facts. A trial judge must be careful to avoid expressing, or intermating any opinion as to the facts, and if he does

so whether intentionally or unintentionally, a new trial must be granted. State v. Thorne, 116 S.E.2d 954 (S.C. 1960).

The applicant contends that his counsel's failure to object to the trial judge's factual jury charge and failure to request a curative instruction was ineffective assistance of counsel that prejudices his right to a fair trial.

VI. Was Petitioner Denied The Right To Effective Assistance Of Counsel By Counsel's Failure To Object To The Judge's Instruction On The Facts Of His "Breach Of The Peace Of High And Aggravated Nature" Charge That Lessened The State's Burden Of Proof.

Accordingly, at the conclusion of the presentation of the evidence and arguments by counsels, the judge instructed the jury on the element of malice of the applicant's murder offense, in relevant part, as follows:

Court: You are permitted to infer malice from proof of an intentional use of a deadly weapon. You are also permitted to infer malice from the intentionally commission of an act or acts which are inherently dangerous to human life. Tr. p. 401 L. 6-10.

Simply stated, you are permitted to infer the existence of malice from proof of "any one" or more of the circumstances that I have just described, as well as from other evidence received during the trial of the case. But you are in no way required to do so. Tr. p. 402, L. 5-9.

The applicant contends that the above portion of the judge's jury instruction regarding the inference of malice was constitutionally infirm because it allowed the jury to base its conviction in part on an inference or presumption of malice rather than on evidence introduced by the state with respect to this critical element (malice) of his murder defense.

The applicant's contention is grounded in a line of Supreme Court cases dating back to In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 358 (1970); which held that "due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". The Supreme Court has applied the holding in Winship to potentionally coercive jury instruction in a number of cases, most notably Sandstrom v. Montana, 442 U.S. 501, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979); Francis v. Franklin, 470 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); and Yates v. Evatt, -U.S.-111 S.Ct. 1985, 1990, 114 L.Ed.2d 432 (1991).

As the Court noted in Sandstrom "the threshold inquiry in ascertaining the constitutional analysis applicable to an erroneous presumption malice charge requires careful attention to words actually spoken to jury. 442 U.S. at 514-99 S.Ct. at 2454. In applicant's case, the jury was instructed that "it was permittar to infer malice from applicant's "intentional use of a deadly weapon,

and from the intentional commission of an act or acts which are inherently dangerous to human life". The permission charges were qualified by the court with instructions that " the jury could infer malice from either one of the inferences instructions by the court". Tr. p. 402, L. 5-7.

The applicant accordingly contends that the judge's "qualifying jury instruction regarding malice permitted the jury to infer malice and base its verdict, independent of other evidence or lack thereof, upon an inference or presumption of malice rather than upon evidence introduced by the state with respect to the criminal element of intent for his murder conviction. See, Yates v. Evatt, -U.S.-111 S.Ct.1884 (1991)(holding unconstitutional a presumption and burden-shifting jury charge that "malice is implied or presumed from the willful, deliberate, and intentional doing of an unlawful act" and "from the use of a deadly weapon".); See also State v. Elmore, 308 S.E.2d 781 (1983)(giving mandatory presumption of malice charge, rather than charge creating permissive inference, is reversible error in murder prosecution.

While the court did include the correct jury instruction in conjunction with the incorrect jury instruction on the state's burden of proof on the malice element, it failed to withdraw the incorrect malice instruction. In addressing such conflicting jury instructions, our Supreme Court has held that when an incorrect charge is given, the court must withdraw it, and that "merely superimposing a correct statement of the law over an erroneous jury charge only foster confusion and prejudice". State v. Robinson, 412 S.E.2d 411 (S.C. 1991). Likewise, the U.S. Supreme Court has held that when one portion of a jury charge contains an erroneous presumption, the jury charge does not comport with due process. Franklin, 471 U.S. at §22-24, 105 S.Ct. at 1975.

Furthermore, while an erroneous malice instruction is subject to a harmless error analysis, such an analysis is inapplicable to the applicant's murder case where there was evidence of, and jury charge on, a manslaughter offense. Our Supreme Court has held that in prosecution for murder, a defendant is deprived of affective assistance of trial counsel where defense counsel fails to object to a mandatory presumption of malice charge to jury; although such charge is subject to harmless error analysis, such an analysis is inappropriate where there is evidence from which the jury could find the defendant guilty of a lesser-included offense of voluntary manslaughter since a charge creating a mandatory presumption precludes manslaughter. See Carter v. State, 392 S.E.2d 104 (S.C. 1990).

Finally, as there was evidence in the case from which the jury could have found applicant guilty of manslaughter, and as failure, the judge charged the jury on this offense, the applicant contends that his counsel's failure to object to the judge's mandatory presumption jury charge on the malice element

asking for voluntary manslaughter". App. 366, 11. 12-15. Upon prompting from the trial judge, trial counsel stated he "would have no objection to your Honor charging voluntary whatsoever ". App. 11, 19-20. Judge Cole asked, "well, are you requesting an instruction on voluntary manslaughter? App. 11. 21-22. App. 366, 11. 21-22. Trial counsel answered affirmatively. App. 366. 1. 23. Trial counsel did not request any other instructions. App. 366, 11. 24-25. Based upon the evidence that was presented the solicitor conceded that the charge for voluntary manslaughter should be given. App. 367, 11.2-4.

During his charge, the trial judge told the jury they could infer malice from the use of a deadly weapon. App. 401, 11. 6-10. The trial judge charged the jury on voluntary manslaughter. App. 403, 1. 11-405, 1.3. Trial counsel did not make any objections to the court's charge. App. 413, 11. 3-4. At the PCR hearing, petitioner alleged trial counsel was ineffective for failing to object to the inference of malice charge based on the State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

The PCR court committed an error of law in ruling that trial counsel was not ineffective for failing to object to the inference of malice from a deadly weapon charge. App. 502-03. The PCR court used petitioner's claim that trial counsel was ineffective for failing to request a self-defense charge as the basis for rejecting petitioner's Belcher claim. App. 502-03. The PCR court wrote, "Seeing as the applicant raised the self-defense solely at the PCR hearing and not at trial, this court finds that the jury charge was not improper. App. 503.

The PCR court failed to apprehend that Belcher not only applies to cases where self-defense is charged, but also where voluntary manslaughter is charged. 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. Evidence that reduces murder to manslaughter is evidence of mitigation of a homicide as contemplated by Belcher.

In this case, the trial court's charged the jury on presumptions of malice and that malice my be inferred from the use of a deadly weapon. Just as in Belcher, evidence was presented that mitigated the homicide. The defendant in Belcher received a self-defense instruction. Petitioner received an instruction on voluntary manslaughter. 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 his murder offense was ineffective assistance of counsel that deprived him of the right to a fair trial. Riley, Supra.

CONCLUSION

WHEREFORE, for the foregoing reason, the applicant pray the Honorable Court grant him relief to reverse his convictions for a new trial.

Respectfully submitted,

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This 30, Day of Dcember, 20 15,

at Pelzer, South Carolina.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
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CERTIFICATE OF SERVICE

I certify that a true copy of my Pro Se Brief has been served on the South Carolina Supreme Court by placing a copy in the United States mail at the Perry correctional mailroom, addressed as follows:

S.C. Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

I Kenneth D. Smith, certify and verify under the penalty of perjury that the foregoing is true and correct. 28 U.S.C.A. §1746

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