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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Diane Schafer Goodstein, Circuit Court Judge

TOMMY MCKNIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000821

PETITION FOR WRIT OF CERTIORARI

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Defense counsels provided ineffective assistance of counsel when counsels failed to object on the record to the trial court's charge on inferred malice, thus preserving it for appellate review, where this Court's decision in *State v. Belcher*[1] prohibiting such instructions was issued while Petitioner's case on direct appeal and where defense counsels testified at the PCR hearing that they had extensively argued against the charge at sidebar during the trial.

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[1] 385 S.C. 597, 685 S.E.2d 802 (2009).

STATEMENT

Trial and Direct Appeal

Petitioner was indicted by the Kershaw County Grand Jury for murder on June 11, 2008. On March 16-19, 2009, Petitioner stood trial before the Honorable J. Ernst Kinard Jr. and a jury. App. 1 - 493. Cornelius J. Riley and Jarson D. Kirincich represented Petitioner. Deputy Solicitor John P. Meadors and Assistant Solicitor Ronald W. Moak represented the State.

The jury found Petitioner guilty and Judge Kinard sentenced Petitioner to thirty years of imprisonment. App. 486, ll. 3-12. Petitioner filed a timely notice of appeal. On January 27, 2011, Chief Appellate Public Defender Robert M. Dudek filed a Final Brief of Appellant pursuant to *Anders v. California*, 386, U.S. 738, 87 S.Ct. 1396 (1967). App. 494 - 503. On June 6, 2012, the South Carolina Court of Appeals dismissed Petitioner's appeal in an unpublished decision. *State v. McNight*, 2012-UP-341 (Filed June 6, 2012); App. 505 - 506.

PCR Application

On November 19, 2012, Petitioner filed an application for post-conviction relief. App. 507 - 514. On January 25, 2013, the State filed a Return. App. 515 - 520. Petitioner was represented by Tara D. Shurling, who filed an amended application on June 3, 2013. App. 521 - 524. Petitioner filed a second amended application on June 14, 2013. App. 527 - 528.

On August 5-6, 2013, an evidentiary hearing was held by the Honorable Diane S. Goodstein. The State was represented by Assistant Attorney General Megan Jameson. App. 529 - 770. The PCR court denied Petitioner's application in a written order issued on March 7, 2016. App. 800 - 899.

This petition follows.

ARGUMENT

Defense counsels provided ineffective assistance of counsel when counsels failed to object on the record to the trial court's charge on inferred malice, thus preserving it for appellate review, where this Court's decision in *State v. Belcher*[2] prohibiting such instructions was issued while Petitioner's case on direct appeal and where defense counsels testified at the PCR hearing that they had extensively argued against the charge at sidebar during the trial.

Relevant Facts

Petitioner's murder charge arises out of a fight that occurred at a residence on Campbell Street in Aiken. App. 202, l. 4 - 205, l. 22. On the night of the fatal incident, Petitioner, who lived nearby, was riding his bicycle past the Campbell street house and stopped because there was a group of people relaxing on the front porch and around the yard. *Id.*

Decedent Isaac Williams was sitting on front porch drinking a beer. Williams had his dog with him. From the sidewalk, Petitioner asked Williams what kind of dog that was. App. 143, l. 5 - 145, l. 21. Williams apparently believed Petitioner was insulting his dog. *Id.* Williams then threw his beer bottle at Petitioner, striking him on his head and causing him to fall over onto the sidewalk. *Id.*

Williams, who did not live at the Campbell street house, then yelled at Petitioner to leave. *Id.* Petitioner refused to leave and began to drink a beer that he had brought with him. *Id.* Williams then left the front porch, walked through the front yard and confronted Petitioner on the sidewalk. *Id.* He again demanded that Petitioner leave and Petitioner again refused.

A brief fight ensued during which Petitioner retreated into the street as he and Williams, who was much larger and younger than Petitioner, exchanged punches. App. 181, l. 6 - 186, l. 24. Williams' friends on the front porch soon headed towards the two fighters. *Id.*; App. 353, l.

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

2 - 356, l. 24. As Williams' friends closed in on Petitioner, he pulled out a knife and stabbed Williams in the stomach. App. 202, l. 4 - 205, l. 22.

Petitioner carried the knife for personal protection as he had been recently robbed. App. 364, l. 6 - 365, l. 20. Petitioner ran to his house after the fight. App. 121, l. 16 - 123, l. 10. Williams' friends identified Petitioner to the responding police officers, who quickly arrested him. App. 121, l. 16 - 123, l. 10. Williams died from the resulting loss of blood while being transported to the hospital. App. 88, l. 4 - 91, l. 18.

Petitioner's Trial

Whether Petitioner acted in self-defense or killed Williams with malice aforethought was the determinative issue at trial. The existence or non-existence of malice was so essential to the case, that the trial court- at the behest of the State and without a recorded objection from the defense - provided an additional opening instruction to the jury defining the term. App. 76, l. 19 - 80, l. 15. Included in this supplemental instruction was the charge that, "an inference of malice can arise where a deadly weapon is used. And a deadly weapon, you know, is anything that can cause serious bodily harm." App. 77, ll.13-22.

Central to the State's malice argument was that Petitioner had armed himself with a large knife prior to fighting Williams. App. 61, l. 5 - 64, l. 6. The State benefitted from almost all of the eyewitnesses to the fight being friends of Williams. Nevertheless, all but one testified that Williams had initiated the altercation by throwing the beer bottle at Petitioner and by leaving the front porch to confront him.

The defense countered that Petitioner acted in lawful self-defense after being attacked by Williams and under the reasonable fear that Williams and his friends were going to kill or inflict

serious bodily injury on him. App. 69, l. 3 - 72, l. 25. Williams' autopsy revealed that he had BAC of .15 and police found a small vial of crack cocaine on him. App. 406, l. 21 - 411, l. 23.

The State's most effective evidence that Petitioner had acted with malice aforethought was the large knife that Petitioner had used to stab Williams. Accordingly, the State repeatedly emphasized in its closing and opening remarks that jurors could infer malice from the use of a deadly weapon. App. 57, l. 7 - 58, l. 22. **"The instant a knife was plunged four inches into somebody's gut that is an inference of malice that we'll ask y'all to consider at the end of the case."** App. 58, ll. 19-22 (*emphasis added*).

In his closing argument, Solicitor Meadors posited that Petitioner and Williams were in "an even fight" until Petitioner made a conscious decision to "gut [Williams] with [the knife]." App. 442, l. 18 - 443, l. 7. Meadors then rhetorically asked the jury, "You want to infer malice? That is malice. That is malice. You can write it on here. And come in and cut. There is nothing more malicious." *Id.*

At the State's request, and without a recorded objection by the defense, the trial court instructed the jury that:

> Malice may also be inferred from the use of a deadly weapon. That is not to say that because a deadly weapon was involved you jurors are necessarily required to infer that malice existed. It is just an evidentiary fact in the case. Malice may be inferred from conduct indicating a total disregard for human life.
>
> As I mentioned, it is possible for a jury to infer malice where a person is killed as a result of the use of a deadly weapon.

App. 459, l. 20 - 460, l. 4. The court also charged the lesser included offenses of voluntary and involuntary manslaughter and instructions on self-defense. App. 459, l. 5 - 464, l. 23. After receiving its instructions, the jury deliberated for two hours before requesting to be recharges on

the elements of murder, voluntary manslaughter and involuntary manslaughter. App. 470, l. 5 - 472, l. 16.

The court again charged the jury that malice may be inferred from the use of a deadly weapon:

> Inferred malice exists where circumstances demonstrate a wanton or reckless disregard for human life or where a reasonable prudent man would have known, according to common experience there was a plain and strong likelihood that death would follow the contemplated act.
>
> The law says if one person intentionally kills another person with a deadly weapon, implication of malice may arise.
>
> If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case and you may give it such weight as you determine it should receive.
>
> A deadly weapon is an article, instrument or substance which is likely to cause death or great bodily harm. Although malice must be aforethought, there is no requirement that it must exist for any appreciable length of time before the commission of the act. There must be a combination of evil intent and of the act producing the result.
>
> Now, that is murder and that is malice. And the rest of it that is attached to this are just cases saying that a jury could have found malice to have existed under the circumstances, cases on that point.

App. 474, l. 17 - 476, l. 7. As with the other inferred malice instructions, there was no objection made on the record by the defense.

Following this second charge and the jurors returning to their deliberations, the trial court observed that he believed either voluntary or involuntary manslaughter was the most likely verdict. App. 483, ll. 6-18. However, after additional deliberations, the jury found Petitioner guilty of murder. App. 485, ll. 3-13.

***Belcher* and Petitioner's Direct Appeal**

While Petitioner's case was on direct appeal, this Court issued its decision in *State v. Belcher*, holding that:

> the 'use of a deadly weapon' implied malice instruction has no place in a murder (or [ABIK]) prosecution ***where evidence is presented that would reduce, mitigate, excuse or justify*** the killing (or the alleged [ABIK]); ***the trial court's error in charging jury that malice could be inferred by the use of a deadly weapon could not be considered harmless error.***

385 S.C. at 612, 685 S.E.2d at 810 (*emphasis added*). This Court held that its ruling "represents a clear break from our modern precedent [and is] . . . . effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved." *Id.* This issue was not raised in Petitioner's appeal.

Petitioner's PCR Evidentiary

Defense counsels Cornelius Riley (lead counsel) and Jason Kirincich (second chair) both testified at Petitioner's PCR hearing.

Testimony of Counsel Jason Kirinich

Counsel Kirincich testified that he began working on the case about a week before trial. App. 554, l. 14 - 559, l. 24. He further testified that Counsel Riley asked him to work on crafting the defense's requested jury instructions. *Id.* Counsel Kirinich specifically recollected that he argued to the trial court that a jury instruction on the inference of malice from the use of a deadly weapon would be improper in Petitioner's case because of the significant evidence of self-defense. App. 555, l. 14 - 556, l. 9.

At the hearing, Counsel Kirinich reflected that the issue came up "at a bench conference where we had been discussing some jury charges. Looking back through the transcript, I make

mention that our prior conversation was not on the record. I bring up another case. During the bench conference, it was Judge Kinard, John Meadors . . . and myself." *Id.*

Counsel Kirinich recalled that during this bench conference, Deputy Solicitor Meadors and Judge Kinard "both told me that [the *Belcher* charge] was the law of the land and malice could be inferred from the use of a deadly weapon even if self-defense [was] raised as an issue." App. 557, ll. 3-14. According to Counsel Kirinich, Petitioner's knife was "dangerous looking" and Deputy Solicitor Meadors stressed to the jury how menacing the knife appeared. App. 557, l. 20 - 558, l. 15.

Counsel Kirinich stated that after trial, while Petitioner's case was pending on appeal, the solicitor's office indicated that they believed Petitioner's case was going to be overturned because of the *Belcher* decision. App. 558, ll. 11-15. He and Counsel Riley also believed that it was going to be overturned. *Id.*

Counsel Kirinich admitted that he failed to put his objection to the inferred malice charge on the record and, thus it could not have been raised on appeal, "I think, upon reflection, is being up there with Judge Kinard and John Meadors when they said that is the way the law was, I just kind of let it go there and didn't attempt to put it on later. App. 559, l. 22 - 560, l. 20.

Towards the end of his testimony, Counsel Kirinich acknowledged that, "Tommy McNight's case was a perfect *Belcher* issue. It wasn't retroactive. The case on appeal would be remanded to a lower court. We really thought at the time that this case was coming back." App. 568, ll. 16-25.

Testimony of Lead Counsel Cornelius Riley

Counsel Riley corroborated Counsel Kirinich's testimony. He recalled that he asked Counsel Kirinich to help prepare proposed jury instructions and that that Counsel Kirinich had

anticipated the *Belcher* decision. App. 687, l. 2 - 688, l. 12. He also recalled that the attorneys had either a lengthy side-bar or chambers argument regarding the propriety of charging the jury that malice may be inferred from the use of a deadly weapon. App. 665, l. 9 - 666, l. 17.

He too believed that the objection had been made on the record but, like Counsel Kirinich, he now realized that the defense attorneys had failed to preserve the objection. App. 687, l. 2 - 688, l. 12. He also admitted that had they preserved the issue, Petitioner would have very likely received a new trial. *Id.*

Order of Dismissal

The PCR court found that defense counsels were not ineffective for failing to preserve on the record an objection to a jury charge instructing the jury that they could infer malice from the use of a deadly weapon when self-defense was raised. App. 815 - 817. Specifically, the court concluded that the instructions at Petitioner's trial were a correct statement of the then-existing law. App. 816.

Moreover, the PCR court determined that "trial counsels are not required to be clairvoyant" and that while "Kirinich's objection to the inferred malice charge was creative and forward looking argument, this Court finds counsel was not deficient for neglecting to preserve the argument for appellate review." App. 816 - 817.

Discussion

Petitioner's case represented "a perfect *Belcher*" issue. App. 569, l. 16-25. On no fewer than three occasions, the trial court instructed jurors that malice could be inferred by the use of a deadly weapon. App. 76, l. 19 - 80, l. 15; App. 459, l. 20 - 460, l. 4; App. 474, l. 17 - 476, l. 7. Additional jury instructions were given for self-defense and the lesser included offenses to murder of voluntary and involuntary manslaughter.

The State emphasized the inference of malice from the use of a deadly in its opening and closing arguments. App. 58, ll. 19-22; App. 442, l. 18 - 443, l. 7. There was no evidence that, prior to the fight, Williams and Petitioner even knew each other, let alone had any reason to hate one another. In short, Petitioner's use of the knife to defend himself during his fight with Williams was the State's only evidence of malice.

To establish ineffective assistance of counsel, the Petitioner must satisfy a two-prong test set forth in *Strickland.* "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). *v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

The second prong of the *Strickland* test requires a showing that the deficient performance of counsel prejudiced the petitioner 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. *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

At the evidentiary hearing, trial Counsel Kirinich admitted that *Belcher* would have been applicable, and that he anticipated the *Belcher* holding at the time of the trial. App. 555, l. 14 - 556, l. 9. Counsel Kirinich and Counsel Riley both conceded that they should have ensured that

their objection to the inference of malice from the use of a deadly weapon instruction was on the record. *Id.*; App. 687, l. 2 - 688, l. 12.

The PCR court erred in ruling that counsels were not ineffective for failing to preserve the objection because defense attorneys are not required to be clairvoyant. App. 816. This ruling misapprehends defense counsels' ineffectiveness.

Defense counsels were clairvoyant. Their deficient performance is not based on their failure to anticipate *Belcher*, as the PCR court ruled. Their performance was constitutionally deficient because they simply failed to preserve their "creative and forward looking argument" for appellate review. App. 816. This is essentially a failure of trial strategy. *Watson v. State,* 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (citing *Dawkins v. State,* 346 S.C. 151, 156–57, 551 S.E.2d 260, 263 (2001) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness); *see also Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (counsel's decision not object to hearsay was part of strategy to discredit witness and not ineffective).

Both attorneys frankly admitted that they had no strategic reason for not preserving their objection beyond the State and the trial court's hostility to their argument. *See Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (presumption of adequate representation based on a valid trial strategy is inapplicable where counsel cannot articulate a valid trial strategy); *see also Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (holding that the failure to object to prejudicial closing arguments by solicitor was not a valid trial strategy).

Prejudice

As to prejudice, had this issue been preserved for review, there is a reasonable probability that Petitioner's conviction would have been reversed and remanded for a new trial on appeal. As an initial matter, *Belcher* holds that:

> the 'use of a deadly weapon' implied malice instruction has no place in a murder (or [ABIK]) prosecution ***where evidence is presented that would reduce, mitigate, excuse or justify*** the killing (or the alleged [ABIK]); ***the trial court's error in charging jury that malice could be inferred by the use of a deadly weapon could not be considered harmless error.***

385 S.C. at 612, 685 S.E.2d at 810 (*emphasis added*). Erroneous jury instructions are subject to harmless error analysis. *Lowry v. State*, 376 S.C. 499, 509, 657 S.E.2d 760, 765 (2008).

However, whether an improper "use of a deadly weapon" implied malice instruction is harmless error turns on ***whether there is overwhelming evidence of malice apart from the use of a deadly weapon***. *Belcher*, 385 S.C. at 611 - 612, 685 S.E.2d at 809-811. As detailed above, the only evidence of malice was the use of the knife.

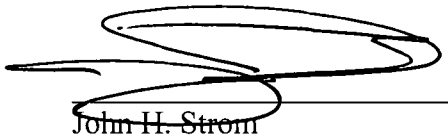
Had the objection to the inferred malice instruction had been preserved; the appellate court would have applied the *Belcher* analysis. Under *Belcher,* the trial court not only erred by improperly charging the jury that it could infer malice from the use of a deadly weapon, but the error could not have been harmless because evidence of self-defense forward by Petitioner, "thereby highlighting the prejudice resulting from the charge." 385 S.C at 612, 685 S.E.2d at 810.

Accordingly, there is a reasonable probability that but for defense counsels' failure to preserve their farsighted objected to the improper implied malice jury instruction, thus preserving it for appeal; Petitioner would have been entitled to a new trial. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. In short, counsel's deficient performance prejudiced Petitioner

such that it "undermin[ed] confidence in the outcome of [his] trial." *See Strickland*, 466 U.S. at 694; *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Honorable Diane Schafer Goodstein, Circuit Court Judge

TOMMY MCKNIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johanna C. Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Tommy McKnight, #186784, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of September, 2016.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of September, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025