STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

RICHEY LAMONT BOYD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000051

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Whether defense counsel provided ineffective representation, in derogation of the Sixth Amendment to the United States Constitution, where counsel failed to object to a jury instruction that "malice may be inferred from conduct showing a total disregard for human life" since the instruction was confusing given its vagueness and the fact that this was an accomplice liability case where the foreseeability the decedent would be killed during the burglary was a major issue because he unexpectedly showed up while the burglary was taking place?

ARGUMENT

Defense counsel provided ineffective representation, in derogation of the Sixth Amendment to the United States Constitution, where counsel failed to object to a jury instruction that "malice may be inferred from conduct showing a total disregard for human life" since the instruction was confusing given its vagueness and the fact that this was an accomplice liability case where the foreseeability the decedent would be killed during the burglary was a major issue because he unexpectedly showed up while the burglary was taking place.

Relevant facts

The state's theory of the case was that the five co-defendants planned to burglarize the decedent's home because they knew large quantities of drugs and money were stored there. Noah Cruell happened to unfortunately be home at the time of the burglary. The decedent was not home.

Noah remembered that the masked burglars asked him for money and took him in the back bedroom. They tied him up. App. 121, ll. 11-22. During the burglary the decedent unfortunately came home. Noah heard "scuffling back there" in the back room where the decedent was taken, and also tied up. Noah then heard one gunshot. The masked men then ran away. App. 122, l. 20 – 126, l. 4.

Noah admitted he knew Jay, his decedent nephew, was involved in drugs. The decedent died as a result of a single gunshot to the chest. App. 124, l. 18 – 126, l. 4; App. 144, ll. 1-25; App. 179, l. 5 – 182, l. 13.

Significantly, even Greenville County Sheriff's Investigator Chris Hammett testified that he thought the burglary was interrupted unexpectedly by the decedent returning home. App. 194, ll. 7-15. There were not any fingerprints or blood found other than that of the victim's in

the residence. No gunshot shells were recovered either. Although there was no forensic evidence, Scottie Butler, Jeffrey Dornberg, both white males, and Lamar Williams and Willie Taylor, both black males, were identified as suspects. App. 238, l. 5 – 254, l. 18. While petitioner was a suspect, Butler was not able to pick petitioner out of a lineup. App. 254, l. 19 – 255, l. 7.

Taylor had his charges reduced from murder to voluntary manslaughter with sentencing deferred until after the trial. App. 315, l. 2 – 317, l. 2. Taylor testified the plan was to wait until everybody left the house and then go into the house. They all covered their faces with masks. Taylor remembered that Noah Cruell was tied up during the burglary, and they also tried to tie up the decedent, but he fought the men. When the decedent tried to get off of the floor, and run, Williams shot the decedent. App. 326, l. 6 – 337, l. 5.

Scottie Butler also got sentencing consideration, a fifteen year sentence for accessory after the fact of murder. Butler claimed that petitioner was involved in the burglary – armed robbery. Butler also said Williams - - apparently totally unexpectedly to the other men - - shot the decedent. App. 381, l. 1 – 382, l. 4.

Charles Jeffrey Dornberg also pled guilty to voluntary manslaughter prior to trial. He testified the co-defendants did not commit the burglary on the first attempt because some people apparently did not leave the house as expected. Dornberg said he did not have a gun during the burglary and planned robbery but he claimed three of the men, petitioner included, had guns. It was undisputed that petitioner did not shoot the decedent.

Dornberg recalled that co-defendant Williams was trying to tie the decedent up, but the decedent was resisting. Dornberg also testified that the decedent got up, tried to run, and that Williams unexpectedly shot him.

Petitioner was convicted of murder, first degree burglary, attempted armed robbery, kidnapping, conspiracy, and possession of a weapon during a violent crime following a joint jury trial before the Honorable Carmen T. Mullen. Bill Godfrey represented petitioner. App. 618, ll. 1- 16. Co-defendant, Lamar Williams, was also found guilty on each charge. App. 616, ll. 2-19.

Judge Mullen sentenced petitioner to thirty years imprisonment for murder, kidnapping and burglary in the first degree. Judge Mullen also sentenced appellant to twenty years imprisonment for armed robbery and five years for conspiracy and possession of a weapon during a violent crime. App. 633, ll. 5-23.

Petitioner's convictions were affirmed following oral argument in the Court of Appeals. State v. Richey Lamont Boyd, 2014-UP-263 (Filed June 30, 2014). The Court of Appeals rejected petitioner's argument that the judge abused her discretion in not granting a mistrial where the clerk of court erroneously informed the jurors that the co-defendant was charged in an indictment for intimidating or attempting to intimidate witnesses.

Petitioner filed an application for post-conviction relief, with attachments, on August 2, 2014. App. 635 – 677. The state filed a return to this application and attachments dated January 8, 2015. App. 678 – 683.

An evidentiary hearing was convened before the Honorable Perry E. Gravely on October 20, 2015. Caroline Horlbeck represented petitioner and Karen Ratigan represented the state.

App. 685. Trial Counsel Bill Godfrey was unable to attend and testify due to health reasons. [1] App. 687, l. 9 – 697, l. 6.

Petitioner testified that Godfrey was appointed to represent him. App. 697, l. 21 – 698, l. 9. Godfrey only met with petitioner twice prior to the trial. App. 698, ll. 7-9.

Petitioner raised a host of allegations of ineffective assistance of counsel. However, in pertinent part here, petitioner complained that his attorney was ineffective for not objecting to a jury instruction that "malice may be inferred from conduct showing a total disregard for human life." App. 604, ll. 17-18. Petitioner testified the failure to object to this instruction was very prejudicial, and that the result of his trial – his conviction for murder in this burglary case -- would have been different without this highly prejudicial instruction. App. 709, l. 23 – 710, l. 21. App. 604, ll. 17-18; App. 709, l. 23 – 710, l. 21.

The PCR court ruled this was a proper jury instruction, and it therefore reasoned that defense counsel was not deficient for not objecting to it. The court obviously did not conduct a prejudice analysis given this erroneous conclusion. App. 750.

Discussion

In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court held that a jury instruction that malice could be inferred from the use of a deadly weapon instruction should not be given in a murder case where there is evidence which would reduce, mitigate, excuse or justify the killing. This Court explained, inter alia, that a killing in self-defense is intentional but

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[1] PCR Counsel Horlbeck moved for a continuance. The state argued trial counsel Godfrey being unable to attend for health reasons was no different than "witnesses who've been disbarred, we do the hearing without them. Witnesses who have dementia we do the hearing without them. I don't know that this really puts it in any separate kind of category." App. 695, l. 10 – 696, l. 18. Horlbeck did not respond to this argument, and the judge stated he did not think that by continuing the case that it would make Defense Counsel Godfrey available. App. 696, l. 21 – 697, l. 8.

that it would not make any sense for the jury to infer malice from the intentional killing because self-defense was a complete defense.

The problem with the inference of malice instruction in this case is that under the theory of accomplice liability the state is always going to urge the jury that a homicide is foreseeable in an armed robbery or a burglary case. Yet, this case shows why a jury instruction that "malic may be inferred from conduct showing a total disregard for human life" is erroneous given the facts of this case.

The defendants did not commit the burglary on the first occasion because the occupants did not leave the house as the men planned. Here, as seen above, even the police investigator acknowledged that the decedent came home unexpectedly during the burglary. The burglars had tied up Noah Cruell when he happened to be home at the time of burglary. The evidence was undisputed that they also attempted to tie up the decedent but the decedent attempted to run and Williams unexpectedly shot him.

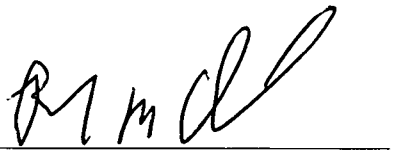
The jury could have taken the inference of malice from the total disregard for human life instruction to mean it could infer malice from the underlying armed robbery-burglary in the first degree crime. Meaning, an armed robbery and first degree burglary in and of itself entails a disregard for human life because it is arguably foreseeable that someone could get killed during the robbery, and burglary. Many homeowners are obviously armed with deadly weapons.

Defense counsel's failure to object to the inference of malice instruction in this case constituted ineffective assistance of counsel given its misleading nature in this unusual armed robbery and burglary case. See Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011); McKnight v. State, 378 S.C. 33, 48-49, 661 S.E.2d 352, 361-362 (2008). Petitioner was prejudiced by

defense counsel's failure to object to this inference of malice charge, and petitioner should be granted a new trial. See Strickland v. Washington, 366 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of October, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richey Lamont Boyd states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's trial before Judge Perry H. Gravely, which was held on October 20, 2015 (PCR Hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Consequently, counsel requests that the Court relieve him as counsel for Richey Lamont Boyd.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of October, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Richey Lamont Boyd, #344612, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 3rd day of October, 2016.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of October, 2016.

(L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.