

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2016-001363

RECEIVED

JAN 20 2017

S.C. SUPREME COURT

Hubert Brown, #161888.....Respondent,

v.

State of South Carolina.....Petitioner.

**MOTION TO HOLD APPEAL
IN ABEYANCE PENDING RESOLUTION OF
ISSUE BY SUPREME COURT**

Petitioner, through its undersigned counsel, would respectfully show unto the Court as follows:

I.

Respondent is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. Respondent was indicted at the September 2013 term of the York County Grand Jury for first degree burglary (2012-GS-46-3185) and attempted murder (2012-GS-46-3187). David C. Cook, Esquire represented him.

On July 9-11, 2013, Respondent underwent a jury trial before the Honorable John C. Hayes, III. Pursuant to S.C. Code Ann. § 17-25-45, the State served notice of its intention to seek life imprisonment without the possibility of parole. At the conclusion of the trial, Respondent

was found guilty as charged and was sentenced to imprisonment for a term of life without the possibility of parole on each charge.

Respondent filed a notice of appeal and a direct appeal was perfected by Appellate Defender Carmen V. Ganjehsani of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. Both parties submitted briefs, with Respondent specifically arguing that the trial court erred in instructing the jury that the charge of attempted murder does not require a specific intent to kill. The South Carolina Court of Appeals affirmed Respondent's convictions by unpublished opinion, finding that Respondent's issue was not preserved for appellate review. State v. Brown, Op. No. 2014-UP-425 (S.C. Ct. App. filed November 26, 2014).

II.

Respondent filed an application for post-conviction relief on June 12, 2013. Petitioner filed a return on or about December 31, 2014. An evidentiary hearing on the application was convened at the Moss Justice Center in York, South Carolina on April 19, 2016. The Honorable Frank R. Addy, Jr., presided over the hearing. Respondent was present and represented by Tommy Thomas, Esquire. Petitioner was represented by Assistant Attorney General Justin J. Hunter, Esquire.

By an Order signed June 16, 2016, and filed June 20, 2016, the PCR Court granted relief on two grounds. First, the PCR Court found that Trial Counsel was ineffective for failing to object to the trial judge's attempted murder charge. The PCR Court found that Trial Counsel should have objected to the attempted murder charge because the trial judge charged that "[a] specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily injury." App. 350, 1. 25 – 351, 1. 2. The trial judge also re-charged

attempted murder, again stating, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit the serious bodily injury." App. 368, ll. 21-22. After this re-charge, the State questioned the trial judge as to the charge, stating that attempted murder should be charged to the jury as a specific intent crime. See App. 372-374. Trial Counsel did not object in this instance either and the PCR Court found him ineffective for failing to do so.

In granting relief, the PCR Court specifically held the following:

...Having reviewed the transcript, the Court finds that the capable trial judge did mistakenly instruct the jury that the State need only prove general intent as opposed to specific intent. See Trial Transcript, p. 350, line 25 - p. 351, line 4. The Assistant Solicitor did point this fact out to the trial court, but trial counsel did not join in the Assistant Solicitor's efforts to have the jury correctly charged on the law, and the trial court declined to alter the erroneous instruction.

Significantly, the erroneous charge gave the jury the impression that they only had to find general intent to harm, as opposed to a specific intent to kill. See State v. King, 412 S.C. 403 (Ct. App. 2015). The fact that the jury may have struggled with this issue is evident in the jury's request for a recharge on the elements of attempted murder. Trial Transcript, p. 366, lines 14-19. In response to this request, the trial court again recharged general as opposed to specific intent. Therefore, twice the trial court mistakenly stated that specific intent to kill is not an element of attempted murder.

App. 545. (Emphasis added)

The PCR Court also granted relief on a second issue, finding that Trial Counsel was ineffective for consenting to the admission of Respondent's mental evaluation without the authoring evaluator being called to testify. The PCR Court held that "this deficiency clearly resulted in prejudice...in light of the erroneous general intent instruction..." App. 548.

III.

As it was the only case cited by the PCR Court in granting relief, Petitioner asserts that State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), reh'g denied (June 5, 2015) clearly

had an impact on the PCR Court's ruling and its further resolution will impact how Petitioner argues this current appeal.

In State v. King, King was convicted of attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime following the robbery and shooting of a taxi driver. The Court of Appeals held "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder" and the trial court erred in charging the jury that attempted murder is a general intent crime. State v. King, 412 S.C. 403, 410, 772 S.E.2d 189, 193 (Ct. App. 2015), reh'g denied (June 5, 2015). The Court of Appeals additionally found the trial court erred in admitting hearsay testimony from the responding officer as to how many shots were fired. The Court concluded the trial court's errors prejudiced King as to his attempted murder charge, finding the officer's "inadmissible testimony as to the number of shots King fired affected the jury's verdict on attempted murder, and [the court] cannot say that either the admission of the evidence or the erroneous jury charge are harmless beyond a reasonable doubt." Id. 412 S.C. at 417, 772 S.E.2d at 196. The Court of Appeals affirmed the other convictions, finding that the trial court's errors did not prejudice King as to his armed robbery and possession of a firearm convictions because the errors did not affect the result of his trial those charges. Id. Both King and the State filed timely petitions for rehearing, which the Court of Appeals denied by order filed June 5, 2015.

The State filed a petition to this Court, arguing along with a second unrelated argument that the Court of Appeals erred in finding the circuit court erroneously charged the jury that attempted murder was a general intent crime, and erred in finding that the charge as given was not harmless error. Among other issues, this Court granted certiorari. Briefs were submitted and oral argument was held before this Court on September 7, 2016.

As of the date of this motion's submission, the King matter is still under advisement and has not been ruled upon by this Court.

IV.

In the State's case, the main issue being raised to this Court to resolve is whether the PCR Court erred in finding Trial Counsel was ineffective for failing to object to the trial judge's jury charge on attempted murder. The State's argument is premised on what it raised to the Court of Appeals and to this Court in King, that Trial Counsel was not ineffective in this case because the attempted murder charge was not erroneous.

V.

Because the Supreme Court's decision in King is highly relevant to the State's case and will likely play a large and perhaps decisive role in the ultimate outcome of the State's appeal, the State believes it is necessary for the final decision in King to be issued before the State can fully challenge the PCR Court's ruling. Accordingly, the State asks this Court to hold this appeal and the time for filing the Petition for Writ of Certiorari in abeyance pending the Supreme Court's resolution of King and to permit the State additional time to file the Petition for Writ of Certiorari after the Supreme Court issues its final decision in King. The State also asks this Court to hold the filing deadlines in abeyance pending resolution of this motion. Further, the State also asks that should this Court deny the State's motion, the State have thirty days from such order to submit its Petition for Writ of Certiorari.

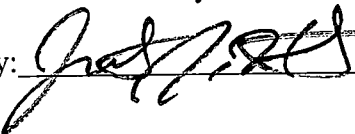
WHEREFORE, Respondent prays that the Court hold the time for filing the Petition for Writ of Certiorari, in abeyance pending a final disposition by the Supreme Court in State v. King; extend the deadline for the service and filing of the Petition for Writ of Certiorari in this case for thirty days from the date the Supreme Court issues the final decision in State v. King; hold the

filing deadlines in abeyance pending resolution of this motion; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN JAMES HUNTER
Assistant Attorney General

By:  _____

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

January 20, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2016-001363

RECEIVED

JAN 20 2017

S.C. SUPREME COURT

Hubert Brown, #161888,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,


RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Motion to Hold Appeal In Abeyance Pending Resolution of Issue By Supreme Court has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Robert M. Dudek, Esquire
SC Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 20th day of January, 2017.



DEONNA ROGERS
LEGAL ASSISTANT