

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO KERSHAW COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No.: 2016-000821

TOMMY MCKNIGHT,.....Petitioner,

v.

STATE OF SOUTH CAROLINA,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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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. Belcher¹ 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.

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

STATEMENT OF THE CASE

During its June 2008 term, the Kershaw County Grand Jury indicted Petitioner for murder (2008-GS-28-2183). Kershaw County Public Defender Cornelius J. Riley and Assistant Public Defender Jason D. Kirincich represented Applicant. On March 16-19, 2009, Petitioner proceeded to a jury trial before the Honorable J. Ernest Kinard, Jr., where the jury convicted Petitioner as indicted. Sentencing was deferred to allow Petitioner's counsel to file post-trial motions. On April 28, 2009, all parties reconvened for a sentencing hearing and Judge Kinard sentenced Petitioner to thirty years' imprisonment.

Petitioner appealed his conviction and an appeal that was perfected on his behalf by Chief Appellate Defender Robert M. Dudek. Following the submission of an Anders² brief, the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Tommy McKnight, 2012-UP-341 (Ct. App. filed June 6, 2012). The Remittitur was issued on June 25, 2012.

Petitioner filed a *pro se* application for post-conviction relief on November 19, 2012. Respondent made its Return on January 25, 2013, requesting an evidentiary hearing be held. Thereafter, Petitioner, by and through his counsel Tara D. Shurling, filed an amended application on June 3, 2013, and a second amended application on June 14, 2013. At the evidentiary hearing, Petitioner proceeded forward on the twenty-four allegations as set forth in his two amendments.

A hearing on this application and its subsequent amendments was held on August 5 and 6, 2013, at the Richland County Courthouse before the Honorable Diane S. Goodstein. Testimony was taken from trial counsels Riley and Kirincich. Respondent was represented by Assistant Attorney General Megan H. Jameson. Judge Goodstein denied Petitioner's application in a written order issued on March 7, 2016. A timely notice of appeal was filed by Ms. Shurling

² Anders v. California, 386 U.S. 738 (1967).

on April 13, 2016, and the appeal was perfected by the filing of a petition for writ of certiorari by John H. Strom, Appellate Defender, on September 28, 2016. This return follows.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

Probative evidence exists to uphold the post-conviction relief judge's finding that trial counsel was not ineffective in his representation when he did not put arguments and objections regarding an implied malice charge on the record to preserve them for appellate review.

In his post-conviction relief application, Petitioner alleged ineffective assistance of appellate counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, supra.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

That presumption cannot be overcome in the case at hand. Petitioner's argument revolves around Counsel Kirincich's alleged failure to object on the record to an implied malice charge, particularly in light of the fact that the decision in Belcher was handed down during the pendency of Petitioner's direct appeal. This expressly contravenes a tenet of post-conviction relief law in South Carolina, which is that trial attorneys are not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (holding an attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction) (citing

Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)). Petitioner specifically states that because trial counsels *were* clairvoyant, then they should be held to that standard because their alleged deficiency was not based on a failure to anticipate the ruling in Belcher. This is nonsensical and antithetical to the post-conviction relief process. As noted by Judge Goodstein in her order of dismissal denying relief, the inferred malice argument made by Counsel Kirincich, which was eventually adopted in Belcher, was “creative and forward-looking,” but was not the state of the law at the time. App. 816. This is the reality of this matter and of counsels’ performance at trial.

Similarly, Petitioner stretches the bounds of logic when arguing that, “but for defense counsels’ failure to preserve their *farsighted* objected [*sic*] to the improper implied malice jury instruction, thus preserving it for appeal; [*sic*] Petitioner would have been entitled to a new trial.” PWC p. 12, emphasis added. This admission that the potential objection was outside the scope of applicable law in this matter comes after speculation about what the appellate court would have done if an objection had been made on the record. The Court found that Petitioner was unable to show any requisite prejudice from that deficiency, and Petitioner has provided no new evidence or argument to show why that would have changed in the interim.

In attempting to prove deficiency, Petitioner argues that trial counsels’ alleged failure to place argument or objections on the record regarding this charge was a failure of trial strategy that constitutes deficient performance. To support this position, he cites two cases, one³ of which is irrelevant as it refers to failure to object to prejudicial closing arguments. The other, Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), is cited for the proposition that the presumption of

³ Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009) (holding that the failure to object to prejudicial closing arguments by solicitor was not a valid trial strategy).

adequate representation is inapplicable when counsel cannot articulate a valid trial strategy.⁴ Regardless, Respondent argues that the questioning of the trial attorneys' strategy is overwrought and unnecessary, as it would require that their strategy be one that argues against the current state of the law – a tactic that would be considered deficient in the majority of cases. Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland v. Washington, *supra*. Therefore, a high degree of deference is granted to the trial counsel. As the PCR Court found, counsel was not ineffective for neglecting to preserve the argument for appellate review. (App. p. 816-7). This stands to reason, as this was before Belcher. Therefore, the lack of objection was a reasonable decision well within trial counsel's discretion.

Notwithstanding the fact that trial counsel was not inefficient, the holding from Belcher is irrelevant to both Petitioner's conviction and his application for post-conviction relief. As the PCR Court observed, this Court's opinion in Belcher specifically noted that the holding did not apply to convictions challenged on post-conviction relief. "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." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). "Our ruling, however, *will not apply to convictions challenged on post-conviction relief.*" Id. (emphasis added). Belcher cited generally to Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989), which had held that, largely in the interest of finality, that new rules for habeas corpus proceedings could not be retroactively

⁴ Respondent avers that this interpretation is not strictly accurate as it states the holding of Smith and its predecessors in the negative, rather than the positive – the actual language is, "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)." Smith, 386 S.C. at 567, 689 S.E.2d at 632.

applied to convictions already final.

CONCLUSION

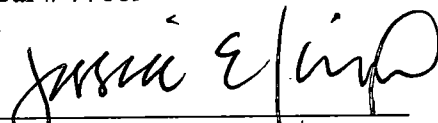
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Austin Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211

This 16th day of February, 2017



FELICIA V. HAYES
Legal Assistant For Respondent