

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2016-002186

RECEIVED

MAY 08 2018

S.C. SUPREME COURT

LA'QUAN DAMON BRYAN,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

Did the post-conviction relief court properly deny post-conviction relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to advise Petitioner he could have requested a jury charge on the lesser included offense of first-degree assault and battery if he had proceeded to trial, as Petitioner knowingly, voluntarily, and intelligently entered a guilty plea following a thorough colloquy and Petitioner would not have been entitled to a jury instruction on the lesser-included offense of first-degree assault and battery had he proceeded to trial?

STATEMENT OF THE CASE

Summary of Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its October 2014 term, the Charleston County Grand Jury indicted Petitioner for attempted murder (2014-GS-10-5988) and possession of a firearm during the commission of a violent crime (2014-GS-10-5989). Assistant Public Defender Charles Cochran represented Petitioner. Assistant Solicitor Richard Waring of the Ninth Circuit Solicitor's Office prosecuted the case.

On October 13, 2015, Petitioner appeared in the Charleston County Court of General Sessions before the Honorable W. Jeffrey Young, circuit court judge, where he pled guilty as indicted without negotiations or recommendations. Judge Young sentenced Petitioner to twenty years imprisonment for attempted murder and a consecutive five years imprisonment for possession of a firearm during the commission of a violent crime. Petitioner did not appeal his guilty pleas or sentences.

On April 18, 2016, Petitioner filed an application for post-conviction relief alleging plea counsel was ineffective for failing to properly advise him and involuntary guilty plea for the plea court's refusal to withdraw his plea. Respondent made its Return on July 28, 2016, requesting an evidentiary hearing be held. An evidentiary hearing was convened April 21, 2017, at the Charleston County Courthouse before the Honorable Brooks P. Goldsmith. Petitioner was present at the hearing and represented by James K. Falk, Esquire. Assistant Attorney General Alicia Olive from the South Carolina Attorney General's Office appeared on behalf of the State.

On July 28, 2017, Judge Goldsmith issued an Order of Dismissal denying and dismissing Petitioner's application. In the order, the PCR court found Counsel was not ineffective in his

advice to Petitioner because the record only supports the conclusion Petitioner was trying to kill the victim, and therefore, the trial court would have properly rejected any request to charge the jury with the lesser-included offense of first-degree assault and battery and the jury would likely have convicted Petitioner of attempted murder. The PCR court concluded Petitioner's argument that he would have been convicted of the lesser-included offense of first-degree assault and battery at trial was highly speculative and was wholly premised on the erroneous assumption that the trial court would have charged the jury with the lesser-included offense of first-degree assault and battery.

On August 11, 2017, Petitioner filed a timely notice of appeal. On January 26, 2018, Petitioner filed his petition for writ of certiorari and accompanying appendix in this Court through Appellate Defender Robert M. Pachak from the South Carolina Commission on Indigent Defense-Office of Appellate Defense.

Summary of Facts Adduced at the Plea Proceeding

These convictions arise from a shooting at the Dorchester Garden Apartments on the evening of March 11, 2014. At approximately 8:15 p.m., Victim and two co-workers were working to clear out an apartment and ready it for the next tenant. Petitioner and his friends arrived, walked by Victim and his co-workers and soon after, began yelling loudly. Victim and his co-workers approached Petitioner and his friends and asked them to leave. Petitioner and his friends began leaving and Victim took down their license plate number. Petitioner and his friends jump out of the vehicle. Petitioner's friend began punching and assaulting victim, who began defending himself. Petitioner then brandished a firearm and shot at Victim, who dove into a nearby ditch. Petitioner fired a second shot and then attempted to fire a third shot, but the weapon was slapped out of his hand by Victim's co-worker. Petitioner picked up the gun and

pointed it at this co-worker, who similarly dove into a ditch. Petitioner and his friends then fled the scene. Two witnesses positively identified Petitioner and Petitioner gave a full confession to law enforcement. (App. 6-7).

At his plea proceeding, the plea court inquired as to whether Petitioner agreed with these facts and Petitioner stated he did. Petitioner agreed he knowingly pointed a gun at Victim, shot him, and could have killed him. (App. 7-9). Petitioner stated he understood the plea was without negotiation or recommendation from the State and the court could sentence him to up to thirty-five years imprisonment. (App. 9-10). Petitioner also stated he was aware of his constitutional rights and wanted to waive them to enter his guilty plea. (App. 10-11). Petitioner stated he had not been threatened to induce his guilty plea. (App. 11). He stated he had not been made any promises, including promises from counsel as to what sentence he would receive. (App. p. 12). He stated he was satisfied with his attorney's services. (App. 13-15). Petitioner also stated he understood he had ten days to appeal his guilty plea. (App. 16).

Counsel informed the plea court that Petitioner had been detained for 575 days and Petitioner wanted to plead guilty the entire time. (App. 19). He elaborated Petitioner has always accepted responsibility and gave a full confession to law enforcement when he was arrested. (App. 22). He testified he attempted to negotiate a favorable plea deal on Petitioner's behalf and the State was requesting a very significant sentence. (App. 19-20). He testified he spoke with Petitioner and Petitioner's family at length and advised them Petitioner could potentially get the maximum sentence. (App. 20-21). Counsel testified he also called and spoke with Victim to see what type of sentence he would be asking seeking. (App. 23). Counsel requested the plea court sentence Petitioner to the minimum sentence. (App. 25).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, ___ S.C. ___, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly denied post-conviction relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to advise Petitioner he could have requested a jury charge on the lesser included offense of first-degree assault and battery if he had proceeded to trial, as Petitioner knowingly, voluntarily, and intelligently entered a guilty plea following a thorough colloquy and Petitioner would not have been entitled to a jury instruction on the lesser-included offense of first-degree assault and battery had he proceeded to trial.

Petitioner asserts trial counsel was constitutionally ineffective for failing to advise him that he could have proceeded to trial and requested a jury charge on the lesser-included offense of first-degree assault and battery rather than pleading guilty, thereby significantly reducing his sentence exposure. However, the post-conviction relief court properly denied Petitioner post-conviction relief, as Petitioner knowingly, voluntarily, and freely entered his guilty plea and there was no reasonable likelihood the trial court would have charged the lesser-included offense of first-degree assault and battery or that the jury would have convicted Petitioner of first-degree assault and battery. This Court should deny certiorari.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, Op No. 2015-000756 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse Adv. Sh. No. 17 at 60); see Jamison

v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

Trial counsel’s failure to apprise the accused of a lesser-included offense constitutes deficient performance when, under the facts of the case, he could be convicted of the lesser offense. Pelzer v. State, 672 S.E.2d 790, 792, 381 S.C. 217, 221 (S.C.App., 2009). However, it is well settled that a jury instruction on a lesser included offense is required only when the evidence warrants such an instruction. State v. Coleman, 342 S.C. 172, 536 S.E.2d 387 (2000) (citing Hopper v. Evans, 456 U.S. 605, 611 (1982)).

In the present case, Petitioner knowingly, voluntarily, and intelligently entered guilty pleas to attempted murder and possession of a firearm during the commission of a violent crime after admitting his guilt repeatedly and informing the plea court he knew he could be sentenced to up thirty-five years imprisonment. Despite entering these pleas knowingly, voluntarily, and intelligently, Petitioner now asserts he is entitled to post-conviction relief, and ultimately, a new trial, because his attorney failed to inform him he could have requested a jury instruction on the lesser-included offense of first-degree assault and battery. Petitioner asserts he could have been convicted of the lesser-included offense of first-degree assault and battery rather than attempted murder as indicted, had he proceeded to trial rather than entered a guilty plea.

Counsel specifically testified that he did discuss the lesser-included offense of first-degree assault and battery with Petitioner and that it carried a sentence of zero to ten years imprisonment. (App. 52-53). However, he testified he did erroneously advise Petitioner he would likely have been convicted of assault and battery of a high and aggravated nature if he had

proceeded to trial, which he now realizes is erroneous because there was no requisite injury for ABHAN. (App. 56-60). It is this testimony from counsel that Petitioner relies upon to support his argument that the post-conviction relief court erred in granting relief.

The post-conviction relief court properly rejected these arguments, finding Petitioner failed to establish counsel was constitutionally ineffective. The post-conviction relief court specifically found the record did not support a jury instruction on first-degree assault and battery, and therefore, the trial court likely would not have given an instruction on first-degree assault and battery, and Petitioner likely would not have been convicted of first-degree assault and battery based on the facts of his case. These ruling are supported by the record.

“A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed.” State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). “The mere contention that the jury might accept the State’s evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense.” State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 substantially overhauled the state’s criminal law in regard to assault and battery offenses. It codifies attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600. S.C. Code Ann. §§ 16-3-29 & 16-3-600 (Supp. 2013). The new degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature, and assault and battery in the first, second, and third degrees. Under the statute, assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder. Id. § 16-3-600(B)(3). Assault

and battery in the first degree is a lesser-included offense of both attempted murder and assault and battery of a high and aggravated nature. Id. § 16-3-600(C)(3).

S.C. Code Ann. § 16-3-29 provides: “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.” S.C. Code Ann. § 16-3-600(C)(1) provides: “A person commits the offense of assault and battery in the first degree if the person unlawfully: (a) injures another person, and the act: (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or (b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.” Assault and battery in the first degree is a lesser included offense of attempted murder. S.C. Code Ann. § 16-3-600(C)(3).

The record only supports a conclusion Petitioner was trying to kill Victim. Petitioner admitted he shot in Victim’s direction at fairly close range numerous times. At trial, Victim and numerous eyewitnesses would have testified Petitioner shot at Victim several times and repositioned his stance before the third shot to better aim at Victim. Based on this evidence, the post-conviction relief court properly found the trial court would have rejected any request to charge the jury with the lesser-included offense of first-degree assault and battery and the jury would likely find Petitioner committed attempted murder. See State v. Mallory, 270 S.C. 519, 523, 242 S.E.2d 693, 695 (1978) (“[I]t is not error to refuse to submit the question of simple assault and battery to the jury under an indictment for assault and battery of a high and aggravated nature, unless there is testimony tending to show that the defendant is only guilty of a

simple assault and battery.”); see also State v. Small, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992) (“The evidence does not warrant the charge of the lesser offense of simple assault. Small was guilty of assault and battery of a high and aggravated nature or not guilty. Accordingly, there is no merit to his claim that the court erred in refusing to give the requested charge.”). As no evidence was presented supporting a finding the assault on Victim was anything other than attempted murder, the trial court would decline to instruct the jury on the lesser included offense of first-degree assault and battery.

The post-conviction relief court correctly found Counsel was not constitutionally ineffective in his advice to Petitioner. Counsel fully advised Petitioner of all aspects of a guilty plea proceeding, and discussed with him the possibility of being convicted at trial of lesser included offenses of attempted murder, ABHAN, or first-degree assault and battery. Although, Counsel testified he was wrong in his advice concerning Petitioner being guilty of ABHAN, Counsel testified he did not advise Petitioner to plead guilty. He also testified following the plea, his thinking had drastically changed regarding Petitioner’s chances of being convicted of first-degree assault and battery. However, Counsel further testified that the potential risks of going to trial outweighed the potential benefits of Petitioner pleading guilty.

Ultimately, Petitioner made a knowing, voluntary, and intelligent decision to plead guilty. The record establishes Petitioner had a full understanding of the charges against him and the consequences of his plea. Petitioner was asked multiple times by the plea court if he wanted to proceed with the trial, and each time he expressed his desire to continue on with the guilty plea.

Therefore, the post-conviction relief court properly denied relief. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied. However, should this Court grant the Petition, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: Megan Harrigan Jameson
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LA'QUAN DAMON BRYAN,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two copies in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211

This 8th day of May, 2018.



Jennifer Jennison
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

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MAY 08 2018
PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113
S.C. SUPREME COURT

May 8, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: La'Quan Bryan v. State of South Carolina
Appellate Case No.: 2016-002186

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar # 100108

MHJ/jaj
Enclosures

cc: Robert M. Pachak, Esquire
Victim Advocacy Division