STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

William H. Seals, Circuit Court Judge

TITO HARRIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000047

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial judge's instruction that malice could be inferred from the use of a deadly weapon where the trial judge determined there was sufficient evidence to reduce the charge to voluntary manslaughter?

STATEMENT

Shantay Harris and Petitioner were married with two children. App, 129, ll. 22-23; App. 133, ll. 2-5; App. 134, ll. 19-21; App. 155, ll. 8-24. In the summer of 2009, Shantay and Petitioner were having marital problems, prompting Shantay and the children to move to Moncks Corner with her sister, Tonia Watkins. App. 130, ll. 2-15; App. 140, ll. 6-13; App. 162, ll. 4-13; App. 178, ll. 14-21. Petitioner was very upset regarding the dissolution of his marriage and his separation from his wife and children. App. 155, l. 25 – App. 156, l. 6. In August 2009, Petitioner was upset because Shantay and his children stayed with his uncle over a weekend, provoking Petitioner's suspicions that Shantay and his uncle were having an affair. App. 139. ll. 1-10.

On August 18, 2009, one of the children, E.H., got into trouble, and as a result, had to sleep in the room with his mother. App. 163, ll. 2-4; App. 164, l. 1 – App. 165, l. 4. Around 5 a.m. the following morning, Tonia heard a noise and looked outside where she saw Petitioner's car. App. 146, l. 21 – App. 147, l. 1; App. 147, ll. 8-9.

Petitioner entered the house and went to Shantay's bedroom, where Shantay and E.H. were sleeping. App. 150, ll. 8-12; App. 167, l. 21 – App. 168, l. 13. Petitioner asked Shantay to go outside with him so the two could talk, but Shantay refused. App. 168, ll. 14-24. While the two were arguing, Petitioner found his uncle's name and phone number in Shantay's phone. App. 171, ll. 9-14. When Petitioner saw Marcus's name and number in Shantay's phone, he went "berserk." App. 178, ll. 1-9. Upset at losing his family, Petitioner shot Shantay. App. 173, ll. 19-20; App. 174, ll. 7-9. Petitioner then left. App. 175, ll. 1-5.

When the police arrived, they stopped Petitioner about a block away from Shantay's home. App. 191, ll. 1-23; App. 200, ll. 11-18. The police found a small gun in Petitioner's

pocket. App. 205, ll. 3-10. Petitioner cooperated fully with the police, even providing a statement. App. 248, l. 18 – App. 249, l. 1.

Petitioner explained to the police that he and his wife had been arguing for several days because his wife was having an affair with Petitioner's uncle. App. 253, l. 19 – App. 254, l. 3. Petitioner was extremely upset with Shantay regarding her affair with his uncle. App. 282, ll. 2-20. Hoping to reunite his family, Petitioner left his home in North Carolina at 1:45 a.m. on August 19, 2009, driving to Shantay's home to discuss their marital problems. App. 270, ll. 8-19. When Petitioner arrived at Shantay's home, he got a gun from the closet. App. 254, ll. 3-6. As the two argued, Petitioner shot Shantay. App. 254, ll. 7-11. Petitioner did not realize he had shot Shantay until he was told so by the police. App. 280, ll. 2-4.

Shantay ultimately "died of brain stem, cerebral and cerebellar disruption due to a penetrating gunshot wound to the head." App. 317, ll. 15-23. She suffered a single gunshot wound. App. 318, ll. 1-2.

Trial

On February 17, 2010, a Berkeley County grand jury indicted Petitioner for murder (2010-GS-08-91). App. 533-534. On March 14-17, 2011, the state, represented by Bryan Alfaro and Anne Williams, called the case to trial before the Honorable Deadra L. Jefferson and a jury. App. 1. Guy J. Vitetta represented Petitioner. App. 1.

At the conclusion of the trial, Judge Jefferson instructed the jury regarding murder and voluntary manslaughter. App. 424, l. 20 – App. 428, l. 18. When instructing the jury concerning malice, Judge Jefferson explained that malice could be express or inferred. App. 425, ll. 11-12. After defining express malice, the judge told the jury: "Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when a deed is done

with a deadly weapon." App. 426, ll. 1-4. Trial counsel posed no objection to this jury instruction. App. 495, ll. 15-19.

The jury found Petitioner guilty as charged. App. 440, ll. 3-8. Judge Jefferson sentenced Petitioner to life imprisonment. App. 457, ll. 6-8, App. 535.

Direct appeal

Robert M. Dudek represented Petitioner on appeal. App. 459-474. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 459-474. On December 18, 2013, the Court of Appeals dismissed the appeal. State v. Harris, 2013-UP-477 (S.C. Ct. App. filed Dec. 18, 2013); App 475-476. Remittitur was issued on January 8, 2014. App. 477.

Post-conviction relief proceedings

Thereafter, Petitioner filed an application for post-conviction relief (PCR) on July 29, 2014. App. 478-484. The matter proceeded to a hearing on January 13, 2017, before the Honorable William H. Seals. App. 491. Alicia Olive represented the state, and C. Rauch Wise represented Petitioner. App. 491.

At the PCR hearing, trial counsel explained he was not familiar with State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), at the time of Petitioner's trial. App. 495, ll. 20-25. Trial counsel admitted Petitioner's trial occurred *over a year **after*** this Court rendered its opinion in Belcher. App. 496, ll. 3-8.

By an order filed on October 31, 2017, Judge Seals denied Petitioner relief. App 512-523. The PCR court held "the inference of malice from the use of a deadly weapon jury instruction was proper based on the facts presented at trial." App. 520. Despite the trial judge's decision to charge the jury with the lesser-included offense of voluntary manslaughter, the PCR

judge concluded "there was no evidence presented during [the] trial that would have reduced, mitigated, excused, or justified the shooting death" of Shantay. App. 520. Additionally, the PCR court concluded that "any purported error in giving the inference of malice charge would be harmless based on the overwhelming evidence of malice presented." App. 520. According to the PCR court, Petitioner failed to prove prejudice resulting from trial counsel's deficient performance because there was "no reasonable probability the result of [Petitioner]'s trial would have been different had counsel objected to the inference of malice charge as instructed by the trial court." App. 520.

Subsequently, Petitioner moved to alter or amend the judgment. App. 524-526. In his motion to alter or amend, Petitioner argued the PCR judge erred by failing "to consider the findings of the trial judge that concluded there was sufficient evidence to submit manslaughter to the jury." App. 524. As Petitioner explained, "[t]he trial judge was in a better position to judge the credibility of witnesses on the crucial issue" and the PCR court should have been bound by the factual findings of the trial court. App. 524. Nevertheless, the PCR court rejected Petitioner's argument. App. 532. By an order filed on December 28, 2017, Judge Seals denied the motion. App. 532.

On January 9, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial judge's instruction that malice could be inferred from the use of a deadly weapon where the trial judge determined there was sufficient evidence to reduce the charge to voluntary manslaughter.

Trial counsel's failure to object to the jury instruction regarding inferred malice from the use of a deadly weapon resulted in ineffective assistance of counsel based on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Had counsel objected to the jury instruction, then Petitioner would have been granted a new trial upon review by the Court of Appeals. In Belcher, 385 S.C. at 600, 685 S.E.2d at 803-804, this Court overruled prior law and held "that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Belcher, 385 S.C. at 600, 685 S.E.2d at 803. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. This Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id. Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state's constitutional prohibition against charging juries on the facts. Belcher, 385 S.C. at 602, 685 S.E.2d at 804.

After an extensive review of South Carolina's jurisprudence in this area, this Court discovered that when the permissive inference charge first developed in the late nineteenth century it was subject to "some qualification," specifically "the recognition that some facts will not permit the inference of malice from the use of a deadly weapon." Belcher, 385 S.C. at 604, 685 S.E.2d at 806. This Court stated, "We are persuaded . . . that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified." Belcher, 385 S.C. at 605, 685 S.E.2d at 806. This Court recognized that it later "began a slow, and at first almost imperceptible, retreat" from above established law and that "by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that 'malice is presumed from the use of a deadly weapon.'" Belcher, 385 S.C. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflected the "proper application of the charge," this Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," this Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Belcher, 385 S.C. at 612, 685 S.E.2d at 810.

In effect, the Belcher ruling "return[ed] to the rationale" of prior South Carolina jurisprudence on the matter dating back to the late nineteenth century, and overturned existing case law to the contrary that occurred in the intervening century. Id. Because the rule in Belcher marked a "clear break from our modern precedent," this Court applied its effect to "all cases which [were]

pending on direct review or not yet final where the issue [was] preserved." Id. (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final")).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "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). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant 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. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR 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, 466 U.S. at 692.

Ultimately, the PCR judge held trial counsel's failure to object to the improper Belcher instruction was not deficient performance prejudicial to Petitioner by comparing Petitioner's case to State v. Price, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012). App. 519-520. According to the PCR judge, the Court of Appeals affirmed Price's assault and battery with intent to kill conviction despite the judge instructing the jury that malice could be inferred from the use of a

deadly weapon. App. 519. Specifically, the PCR judge explained "[t]he Court of Appeals affirmed Price's conviction, finding the trial court committed no reversible error in charging the jury on inferring malice form the use of a deadly weapon because there was no evidence presented during trial that would have reduced, mitigated, excused, or justified the assault and battery committed by Price." App. 519.

Thus, after explaining the Court's reasoning in Price, the PCR judge found "that the inference of malice from the use of a deadly weapon jury instruction was proper based on the facts presented at trial." App. 520. According to the PCR judge, Shantay did not provoke Petitioner. App. 520. As a result, the PCR judge found "there was no evidence presented during trial that would have reduced, mitigated, excused, or justified the shooting death" of Shantay. App. 520. The court also found that "any purported error in giving the inference of malice charge" was "harmless based on the overwhelming evidence of malice presented." App. 520. Thus, the PCR judge found Petitioner could not establish prejudice resulting from trial counsel's failure to object. App. 520.

The PCR judge erred in concluding there was no evidence to reduce or mitigate the murder charge. The evidence in the record supported the jury instruction for voluntary manslaughter, which reduced or mitigated the offense. The undisputed evidence was that Petitioner went "berserk" when he found his uncle's name and phone number in Shantay's phone. His worst fears were realized in that moment – his wife was having an affair with his uncle and she had exposed his children to her adulterous relationship. As the trial judge indicated, there was some evidence in the record to support the jury instruction for voluntary manslaughter. The trial judge observed the demeanor of the witnesses and could gauge the evidence presented in a way that the PCR judge simply could not. See Milledge v. State, 422

S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (explaining that "[i]n determining whether a PCR applicant has established prejudice, the PCR court does not act as a finder of fact and substitute its judgment for that of the trial court," but "must view the trial court's ruling through the same lens that would be applied on appeal"). Therefore, the jury instruction on voluntary manslaughter was proper in light of the evidence tending to reduce or mitigate the charged offense of murder.

Trial counsel's failure to object to the erroneous instruction prejudiced Petitioner. As in Belcher, the erroneous instruction that malice may be inferred from the use of a deadly weapon cannot be considered harmless here. The erroneous inference of malice from the use of a deadly weapon jury instruction was reversible error because it was not harmless beyond a reasonable doubt. See Rose v. Clark 478 U.S. 570 (1986). When the jury was instructed that it could infer malice from the use of a deadly weapon, its consideration of voluntary manslaughter was precluded because the use of a deadly weapon – a gun – was undisputed.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants certiorari but dispenses with full briefing, Petitioner respectfully requests this Court reverse the PCR court and grant him a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of July, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tito Harris states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the documents in Petitioner's case, including his trial transcript and his post-conviction relief hearing transcript, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

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

Therefore, counsel requests that the Court relieve her as counsel for Tito Harris.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of July, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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 Megan Harrigan Jameson, 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 Tito Harris, #345287, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 10th day of July, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of July, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023