

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2017-001172

RECEIVED

JUL 11 2018

S.C. SUPREME COURT

TRE'VAUGHN JACKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX1

RESPONDENT’S ISSUE PRESENTED2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW5

ARGUMENT

The PCR court properly found Trial Counsel was not ineffective for failing to request a jury charge on the lesser-included offense of assault and battery of a high and aggravated nature where the evidence presented at trial only supported a jury instruction on attempted murder.....7

CONCLUSION.....13

RESPONDENT'S ISSUE PRESENTED

Did the PCR court err in finding Petitioner failed to establish Trial Counsel was ineffective for failing to request a jury charge on the lesser-included offense of assault and battery of a high and aggravated nature where the evidence presented at trial only supported a jury instruction on attempted murder, and therefore counsel's failure to request the lesser-included jury instruction was neither constitutionally deficient performance nor was Petitioner prejudiced by the instruction's omission?

STATEMENT OF THE CASE

Petitioner is currently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. In November 2013, the Sumter County Grand Jury indicted Petitioner for two counts of attempted murder, possession of a weapon during the commission of a violent crime, unlawful carrying of a pistol, and discharging a firearm into a dwelling (2013-GS-43-1067). Assistant Public Defender Tiffany Butler, Esquire, represented Petitioner. Assistant Solicitor John P. Meadors prosecuted the case. On August 28, 2014, Petitioner proceeded to a jury trial before the Honorable W. Jeffrey Young. The jury found Petitioner guilty as indicted for both counts of attempted murder, possession of a weapon during the commission of a violent crime, and discharging a firearm into a dwelling. The unlawful carrying of a pistol charge was dismissed. Judge Young sentenced Petitioner to a thirty year term of imprisonment for each count of attempted murder, to run consecutively, as well a concurrent sentence of five years' imprisonment for possession of a weapon during the commission of a violent crime and ten years' imprisonment for discharging a firearm into a dwelling.

A notice of appeal was filed on Petitioner's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738 (1967) by Chief Appellate Defender Robert M. Dudek. The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Jackson, Op. No. 2016-UP-116 (filed on March 2, 2016). The Remittitur was issued on March 18, 2016.

Petitioner filed a timely application for post-conviction relief on April 11, 2016, alleging that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "...failing to object to the trial court's accomplice liability instructions when there was no evidence presented during trial to support such an instruction." (sic)
 - b. "...when counsel failed to object to the trial court's jury instruction of the

hand of one is the hand of all charge, especially in light of the trial court's request to counsel "any objection to the charge under the facts of this case?" Counsel merely stated "for the record" without establishing any particular argument as to why the instruction did not fit the facts of the case." (sic)

- c. "...for failing to request a jury instruction on the lesser-included offense(s) of assault and battery with a high and aggravated nature and assault and battery in the first degree" (sic)
- d. "...for failing to object to the trial court's jury instructions on "express malice" when the court used "hypothetical examples" of Applicant's case, that a reasonable jurist could have concluded was a comment on the facts of the case." (sic)
- e. "...for failing to object to the consecutive sentences handed down by the court since the crimes stemmed from a continuous course of conduct."
- f. "...for failing to object to the trial court's jury instructions when the court instructed the jury that "a specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury."
- g. "...for failing to impeach State's witness Lenard J. Johnson with this prior inconsistent statements made to trial counsel's investigation that contradicted his trial testimony on material points"

2. "Denial of Due Process"

Respondent submitted its return on September 30, 2016. An evidentiary hearing was convened on November 8, 2016, at the Williamsburg County Courthouse before the Honorable Brian M. Gibbons. Applicant was present at the hearing and was represented by Timothy L. Griffith, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the evidentiary hearing, Applicant presented testimony from Trial Counsel Tiffany Butler, Esquire. Applicant did not testify.

Judge Gibbons denied and dismissed the application in an Order signed April 25, 2017, and filed May 4, 2017. Petitioner filed a timely Notice of Appeal on May 8, 2017. Petitioner's Petition for Writ of Certiorari and Appendix were filed on January 26, 2018.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo without deference to the lower court. Id. The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

ARGUMENT

The PCR court properly found Trial Counsel was not ineffective for failing to request a jury charge on the lesser-included offense of assault and battery of a high and aggravated nature where the evidence presented at trial only supported a jury instruction on attempted murder.

Petitioner argues the PCR court erred in failing to find Trial Counsel ineffective for failing to request a jury charge on the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). However, Trial Counsel cannot be deficient for failing to request an ABHAN charge because Petitioner was not entitled to an ABHAN charge, as the only conclusion that can be drawn from Petitioner's conduct is an intent to kill. Furthermore, even if Trial Counsel's failure to request the ABHAN charge was deficient, there can be no resulting prejudice based on the strength of the evidence of Petitioner's intent to kill, because a jury would have reached an attempted murder conviction even if given the option to find ABHAN. Accordingly, the PCR court properly denied post-conviction relief, and this Court should deny certiorari.

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

“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). In reviewing a trial judge’s jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge’s decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

Assault and battery of a high and aggravated nature (ABHAN) is a lesser included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3); State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (“Under the statute [§ 16-3-600 (B)(3)], ABHAN is a lesser-included offense of attempted murder.”). An attempted murder occurs when a “person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied.” S.C. Code Ann. Section 16-3-29. However, ABHAN occurs when a person “unlawfully injures another person, and: (a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury.” S.C. Code Ann. Section 16-3-600(B)(1). The distinguishing factor which increases an ABHAN to attempted murder is the existence of malice aforethought and the intent to kill.

Petitioner contends he was entitled to a jury instruction on the lesser-included offense of ABHAN, and that Trial Counsel was ineffective for failing to request the instruction because

there was enough evidence presented from which the jury could have found Petitioner only committed ABHIAN rather than attempted murder. Respondent asserts the contrary, as the evidence presented at trial only supported a conclusion that Petitioner was trying to kill the occupants inside the trailer in which he was firing.

Petitioner was convicted of two counts of attempted murder after shooting six times into a trailer, hitting and severely injuring two victims. The State's evidence at trial showed there were two fights between several people within a couple of days in August, 2013. On August 29, 2013, Frank D. Cokeley got into a fistfight with Lenard Johnson, who called Cokeley's sister a "bitch." App. 144-145. Both Cokeley and Johnson ended the fight hit in the face and "bruised up." App. 146. Two days later, on August 31, Cokeley was sitting on the front porch of a home near his grandmother's house when he saw Johnson and Johnson's brother, Keith Williams, walking through his grandmother's yard. App. 146-147. Cokeley testified he began to fight the two men. App. 147. After he started bleeding from a hit above his eye, Cokeley took Williams' shirt off him and used it to wipe the blood off his face, then threw the shirt on the ground. App. 147. Cokeley's uncle and two others came outside to break up the fight, and everyone left the street. App. 148.

Twenty minutes later, Williams returned, warning Cokeley that there were four or five guys coming down the street with baseball bats and chains. App. 148. The armed men rushed onto the front porch and jumped on Cokeley, and the fight escalated into the house. App. 149. Cokeley hit one of the men in the head with a beer bottle, and all the men who attacked him left the house. App. 149. Fifteen to twenty seconds later, someone shot a gun into the house six times, hitting and severely injuring Cokeley as well as Sylvia Ann Welch, who was visiting the house to play a card game with her friends and her daughter. App. 149-151; App. 161-166.

Cokeley and Welch were taken by ambulance to a hospital in Sumter, then airlifted to a trauma center in Columbia. App. 151. Both victims spent multiple weeks in the hospital and suffered long-term damage from their injuries. App. 151; App. 164.

Petitioner was identified as the shooter by multiple witnesses. Lenard Johnson testified at trial that, although there was more than one shooter,¹ he saw Petitioner shoot a gun into the trailer. App. 310-311. Another witness, Santana Bolden, observed the shooter shoot into the trailer while she stood very close to him. App. 216. She testified that she recognized the shooter from seeing him pick someone up from her adult education class, and she was able to pick him out of a photo lineup. App. 220. She identified Petitioner as the shooter in the photo lineup. Bolden also identified Petitioner in court as the individual she saw shoot into the trailer on the day of the crime while she stood two feet away. App. 222-223.

Petitioner also gave a statement to Sergeant William Lyons, which was admitted at trial after a pre-trial admissibility hearing. The statement was recorded on an audio tape and played for the jury at trial. App. 275-276. In his statement, Petitioner admitted to being at or very near the scene of the crime on the day in question, and that he knew there were people inside the trailer which was shot. App. 275-280. Evidence was also presented that Petitioner called witness Lenard Johnson's sister on the phone from jail during his trial and asked her to tell her brother to change his testimony. App. 330-332.

Petitioner did not present any witnesses or evidence in his defense at trial. Trial Counsel argued to the jury that Petitioner was not the shooter, and asserted the State's witnesses were not credible and the investigation surrounding the shooting was incomplete. She argued Petitioner was not involved in the fight and had no motive to shoot anyone involved in the fight.

¹ The second alleged shooter was not found or prosecuted at the time of Petitioner's trial.

Essentially, Trial Counsel's strategy, as shown by the trial transcript, was to argue that Petitioner was not the shooter.

The State argued in its closing argument the evidence was clear that Petitioner was the shooter. Solicitor Meadors argued Petitioner was guilty of attempted murder because his six shots into the trailer were done with malice aforethought, which is a required element of the crime. Solicitor Meadors explained this case had evidence of both express and implied malice; that malice can be inferred from Petitioner's use of a deadly weapon, and that Petitioner's actions constituted "depraved heart" malice when he fired multiple times into an occupied dwelling, not caring who was inside. App. 345-46. He pointed to Petitioner's statement to law enforcement, in which he admitted he knew the victims were inside the trailer before he shot into it, and argued this showed Petitioner malice. App. 355.

Before the jury charge, the trial judge asked if either party had any objections to the proposed jury charge. Trial Counsel responded that she had no objections. App. 342, line 12-16. She did not request a jury charge on the lesser-included offense of ABHAN. After jury charges and deliberations, the jury returned with a guilty verdict for both charges of attempted murder, discharging a firearm into a dwelling, and possession of a weapon during a violent crime.

Trial Counsel cannot be ineffective for failing to request a charge on the lesser-included offense of ABHAN. First, the failure to request the charge is not deficient, as the facts of this case clearly fit into the elements of attempted murder, so Petitioner was not entitled to an ABHAN charge. There was no evidence presented that Petitioner shot into the home without malice or without the intent to kill. There is nothing to support the speculation that a jury may have concluded there was a lack of malice or intent to kill. The evidence presented showed Petitioner discharged a firearm six times into the back of a trailer which he knew was occupied,

and he shot during or immediately following a fight between several people. Although Petitioner was never even originally involved in the altercation, he appeared with weapons alongside the aggressors of the fight and shot into the trailer after the men he came with exited the trailer. The evidence fully supports the jury's conclusion that Petitioner, who was enraged by the fight, intentionally shot into an occupied trailer with malice aforethought and the intent to kill.

Petitioner presented no evidence in his defense at trial that he was shooting for any reason other than with the intent to kill; rather the record shows Trial Counsel's defense strategy was to argue that Petitioner was not the shooter at all. Accordingly, based on the evidence presented, the only conclusion the jury could reach was either that Petitioner committed two counts of attempted murder, or he was not guilty. 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.” (emphasis added)); 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.”).

Furthermore, there can be no prejudice from Trial Counsel's failure to request an ABHAN charge because even if the charge had been given, the jury would have found Petitioner guilty of attempted murder. The strong evidence of Petitioner's actions shows an intent to kill and malice. Even if the charge had been requested, it is extremely likely the jury would still have found intent to kill and malice based on the evidence presented.

This case is similar to State v. Middleton, where the defendant approached a stopped vehicle on a moped and fired a handgun five times into the passenger-side window. Middleton, 407 S.C. at 314, 755 S.E.2d at 433. Middleton was charged with attempted murder, and the trial court denied his request for a charge on the lesser-included offense of ABHAN. Although the court found error under the particular facts of that case, it found the error was harmless based on the overwhelming evidence of Middleton's intent to kill with malice. In determining the error was harmless, the court explained:

In the instant case, the evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of attempted murder, given the facts that Appellant deliberately drove up to the passenger window and shot into the vehicle at least five times, and Stephens testified that the only reason he and Mack were not injured is because he had the wherewithal to jump into the driver's seat and run Appellant off the road. In our view, there is no other way to construe the evidence in this case but that Appellant was attempting to kill Stephens and Mack. Therefore, we hold any error in failing to charge the lesser-included offense harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt.

Middleton, 407 S.C. at 319, 755 S.E.2d at 436 (citations omitted).

Petitioner's case is very similar. His intentional firing of the gun six times into a trailer which he knew was occupied during an ongoing altercation is very strong evidence of his malice and intent to kill. There was no testimony or other evidence presented to refute this account of events, other than the argument that Petitioner was not the shooter. Therefore, the evidence presented in this case can only lead to the conclusion that Petitioner was either guilty of attempted murder or not guilty. Accordingly, the jury's verdict would not have been any different even if Trial Counsel had requested an ABHAN charge. Accordingly, because there is no deficiency or prejudice, this Court should affirm the PCR court's ruling denying post-conviction relief and deny the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
S.C. Bar No. 102214

By: 
ATTORNEYS FOR RESPONDENT

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IN THE SUPREME COURT

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CERTIORARI TO SUMTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2017-00117

TRE'VAUGHN JACKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

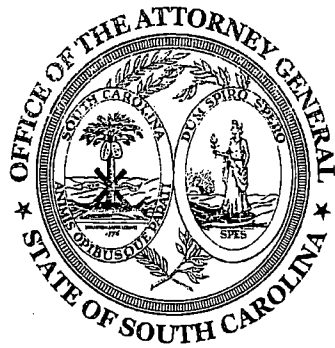
CERTIFICATE OF SERVICE

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

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 11th day of July, 2018


KAITLYN S. SLICE
LEGAL ASSISTANT



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JUL 11 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

July 11, 2018

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

Re: Tre'Vaughn Jackson, #349787 v. State of South Carolina
Appellate Case No. 2017-00117
Lower Court Case No. 2016-CP-43-0632

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Julie A. Coleman
Assistant Attorney General
SC Bar No. 102214

JAC/ks
Enclosures

cc: Lara M. Caudy, Esquire (2 copies)