STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2017-001474

Georgia Woodberry,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTION PRESENTED

Is there probative evidence in the record to support the PCR court's finding Counsel was not ineffective because Counsel correctly advised Petitioner she could be convicted of murder for the death of an unintended victim under the felony-murder theory of criminal liability and where there was no prejudice to Petitioner in any event because she was still liable for the murder under the doctrine of transferred intent?

STATEMENT OF THE CASE

Georgia Woodberry (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In April 2013, the Florence County Grand Jury indicted Applicant for one count of murder, two counts of attempted murder, discharging a firearm into a vehicle, and stalking (2013-CP-21-0411). Scott P. Floyd, Esquire, represented Petitioner. On July 30, 2013, after starting a jury trial, Petitioner appeared before the Honorable D. Craig Brown and pleaded guilty as indicted to all charges. Judge Brown sentenced her to incarceration for concurrent terms of forty years for murder, twenty-five years for one count of attempted murder, twenty years for the other count, five years for discharging a firearm into a vehicle, and five years for stalking.

Petitioner filed a timely notice of appeal. However, on September 17, 2013, the South Carolina Court of Appeals dismissed the appeal for failing to provide a sufficient explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was returned to the circuit court on October 8, 2013.

Petitioner then timely filed an application for post-conviction relief on November 11, 2013. Respondent made its Return on April 23, 2014, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on August 9, 2016, at the Florence County Courthouse before the Honorable William H. Seals. Petitioner was present at the hearing and represented by Tristan M. Shaffer, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent. By order dated May 30, 2017, Judge Seals denied and dismissed the application.

Petitioner filed a timely notice of appeal challenging the denial of post-conviction relief. Petitioner filed a Petition for Writ of Certiorari and Appendix on March 19, 2018. This Return follows.

STATEMENT OF THE FACTS

Petitioner was charged with murder for causing the death of Lori Pruett. App. p. 15. Petitioner chased a vehicle occupied by Jimmy Askins (Askins) and Carolina Gray (Gray), and fired on the vehicle while chasing it. App. p. 15. Petitioner continued to chase Gray and Askins all the way through a red light, where they collided with Pruett as she was passing through the intersection. App. p. 15. Gray and Askins suffered serious injuries, and Gray was trapped in the burning vehicle, which she barely managed to escape. App. pp. 34, 37-39. Pruett died as a result of injuries she sustained in the crash. App. p. 16.

Petitioner and Askins previously had an intimate relationship and had a child together. App. p. 17. Petitioner began stalking Gray and Askins near Gray's home several days before the incident. App. p. 17. Petitioner also made harassing, obscene telephone calls to Gray, which the State was prepared to introduce at trial. App. p. 17. She also gave a statement in which she admitted she shot into the vehicle occupied by Askins and Gray, chasing it until it crashed with Pruett's car at the intersection. App. p. 35. One of the investigators would have testified Petitioner also made a statement indicating she hoped Askins had been hurt in the crash. App. p. 36. The State was also prepared to present expert testimony that Petitioner tested positively for gunshot residue, and while the slugs recovered from the scene could not be exclusively matched to the .45 caliber pistol recovered from Petitioner, an expert would have testified the .45 could have shot the projectile. App. p. 16. In addition, the evidence would have shown Petitioner purchased the weapon about a month before to the incident. App. p. 16.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (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. Id. at 180, 810 S.E.2d at 839. (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. at 180-81, 810 S.E.2d at 839-40. 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).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Petitioner must show there is a reasonable probability that, but for counsel's alleged errors, she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

There is probative evidence in the record to support the PCR court's finding Counsel was not ineffective because Counsel correctly advised Petitioner she could be convicted of murder for the death of an unintended victim under the felony-murder theory of criminal liability or the theory of transferred intent.

Petitioner argues Counsel was ineffective because he incorrectly "advised [her] that if the solicitor could prove her acts were the proximate cause of Lori Pruett's death, that she would be liable under the felony-murder rule." PWC p. 8. Counsel actually advised Petitioner, according to his testimony at the evidentiary hearing, "[i]f you commit a felony that involves some inherently dangerous activity and a homicide – unintended homicide – results. . . from that, that the malice can be. . . inferred from the commission of the underlying felony." App. p. 85. Counsel further testified he believed and advised Petitioner that attempted murder would fit into the category of "inherently dangerous." App. p. 85.

Petitioner argues this advice by Counsel amounts to a statement of the proximate-cause theory of the felony-murder rule, rather than the agency theory Petitioner contends has been followed in South Carolina. PWC pp. 6-7. On the contrary, South Carolina does not recognize the traditional "felony-murder rule" as it is applied in other states, and Counsel's advice was a correct statement of the law in South Carolina. Therefore, his advice was not deficient, and this Petition should be denied.

A. Felony-Murder in South Carolina

The state of the law of "felony murder" in South Carolina, is confusing, at best. Under the agency theory of felony murder, "a participating felon is not guilty of murder when the killing is done by a person other than the participating felon or his co-felons." Campbell v. State, 293 Md. 438, 443, 444 A.2d 1034, 1037 (Ct. App. 1982). The competing theory of the felony-murder rule is the proximate cause theory. States applying this rule "hold[] a person responsible

for deaths which occur as a direct and foreseeable result of a felony committed by that person." The controlling issue in the proximate-cause theory is causation – if the acts of the defendant "set in motion the cause which occasioned the death of [the] deceased. . . he would be as culpable as if he had done the deed with his own hands." Miers v. State, 157 Tex. Crim. 572, 578, 251 S.W.2d 404, 408 (Ct. Crim. App. 1952). However, South Carolina does not distinguish murder and felony murder, as discussed below, so Petitioner's argument that Counsel advised her according to the incorrect theory is inapposite.

This Court has repeatedly stated, "South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder." State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1986), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Although several cases purport to discuss the "felony-murder rule," the circumstances of those cases and the rules proscribed therein are, in actuality, discussing the concept of accomplice liability. For example, in Gore v. Leeke, Gore was convicted of the murder of a policeman who was shot and killed by one of his codefendants as they fled the scene of an armed robbery. 261 S.C. 308, 313-14, 199 S.E.2d 755, 756-57 (1973). Gore challenged the application to his case of what this Court termed "the felony-murder rule," specifically an instruction by the trial court instructing the jury as follows:

> [I]f several persons agree or conspire to commit a felony such as grand larceny or robbery or burglary, each of those persons is criminally responsible for the acts of his associates or confederates which are done in furtherance or in prosecution of the common purpose for which they combined. The common purpose, ladies and gentlemen, may have not included or may not have been involved in the killing and the murder of anyone but if in executing this common design and purpose and if it were unlawful as, for instance, breaking in and stealing, and in the execution of this common purpose a homicide is committed by one of the confederates or one of the associates and you, the jury, determine from the proof beyond a reasonable doubt that the homicide was a probable or natural consequence of the acts which were done in pursuance of this common design then, ladies and

> gentlemen, all who are present, either actually or constructively, and participating in the unlawful, common design are as guilty as the slayer himself.

Id. at 314-15, 199 S.E.2d at 757. This language is nearly identical to what is referred to in this Court's current jurisprudence as "the hand of one is the hand of all theory of accomplice liability."[1] See, e.g., State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 278 (2017) (upholding murder conviction of defendant who participated in confrontation of victim over alleged theft of television but did not fire the fatal shots). In Harry the trial court charged the jury, "[u]nder the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Id. (brackets in original).

A more accurate statement of the "felony-murder rule" in South Carolina is: if a killing occurs during the commission of a felony, the jury may, based on the facts and circumstances of the case, infer malice sufficient to support a conviction for murder. The commission of a felony, then, is simply a circumstance from which a jury can find implied malice. See, e.g., Lowry v. State, 376 S.C. 499, 502, 657 S.E.2d 760, 761-62 (2008) ("The murder charge specifically explained the finding of malice beyond a reasonable doubt and addressed inferences of malice which may be drawn from certain facts, such as the performance of an unlawful act, the use of a deadly weapon, and the commission of a felony (known as the felony-murder doctrine)."). For example, in Norris, the defendant became angry and beat the victim during the course of a sexual assault, although he maintained at trial he had no intention of killing her. 285 S.C. at 92, 328

[1] Petitioner argues the similarity between South Carolina's theory of accomplice liability and what is known as the agency theory of the felony-murder rule in other states indicates South Carolina applies the agency theory. PWC pp. 13-14. As noted above, the issue of which version of felony murder applies in South Carolina is irrelevant, and this Court does not need to consider that question in order to resolve this petition. However, should this Court grant certiorari on this issue, Respondent requests the opportunity to address the application of the agency theory and/or proximate-cause theory of felony murder through further briefing.

S.E.2d at 343, overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). This Court expressly approved the Norris jury charge as to the malice element of murder in which the trial judge instructed "if [the killing] was during the commission of a felony, you can consider that as facts and circumstances from which malice can be inferred." Id. at 91-92, 406 S.E.2d at 342 (characterizing this instruction as a "comment upon the felony-murder rule").

Murder, at common law, is defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2018). See also Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) ("There is no distinction between statutory and common law murder: the statute is merely declaratory of the common law."). All that is needed, then, for a defendant to be guilty of "felony murder" in South Carolina is for the jury to find a defendant killed the victim, with malice, which may be inferred from the fact that the killing took place during the commission of another felony. Petitioner argues her case is distinct from cases such as Norris because she was not the "one who inflict[ed] an injury" on Pruett as Pruett collided with as Gray and Askins's car, not her car. PWC pp. 6, 16-17. Essentially, Petitioner argues because Pruett was killed by injuries sustained in the car crash rather than from being shot, Petitioner cannot be the criminally liable as the killer. PWC p. 18. This argument ignores the totality of the circumstances giving rise to the victim's death.

The State's evidence showed Petitioner was actively involved in stalking, chasing, and firing upon the car carrying Gray and Askins at the time the crash occurred. App. pp. 15, 35, 88. Gray was struck by a bullet, and Petitioner was pursuing Gray and Askins at a high rate of speed, crossing into oncoming traffic to pull up alongside their car. App. pp. 36-37. The State presented facts at the plea hearing to show Petitioner's pursuit of Gray and Askins was still in progress at the time of the collision. For example, Askins was on the phone with the 911 operator when

shots were fired and the crash occurred. App. p. 16, 36. If Petitioner had succeeded in killing them, either by shooting them or by injuries sustained in the crash, there can be no question it would have been proper to charge Petitioner with their murders. The same is true regarding Pruett, despite the fact that she was not the intended victim. The issue of whether Pruett was killed by car-crash injuries or by a bullet is of no importance because her death was directly attributable to Petitioner's action either way.

It is axiomatic that malice may be inferred from conduct showing a total disregard for human life. See, e.g., State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) ("Although it may be fairly assumed there was no intent to injure or kill another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice."); State v. Heyward, 197 S.C. 371, 15 S.E.2d 669, 671 (1941) ("[M]alice as an essential ingredient of murder does not necessarily import ill-will toward the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others. . . ."). Here, *Petitioner's actions*, not those of Gray and Askins, of recklessly driving her car – speeding, pulling into oncoming traffic, discharging a firearm into another moving vehicle while driving her own – during the course of her attempt to murder Gray and Askins caused the death of a third party. Simply because Petitioner managed to avoid being hit and continue home does not mean she did not cause the other two cars to crash.

In other words, Petitioner killed a person (Pruett) with malice (inferred from the commission of an inherently dangerous felony or from conduct showing a total disregard for human life), which is, by definition, murder. This is the exact advice Counsel gave Petitioner, and it is a correct statement of the law in South Carolina. Counsel testified he advised Petitioner, "[i]f you commit a felony that involves some inherently dangerous activity and a homicide –

unintended homicide – results... from that, that the malice can be... inferred from the commission of the underlying felony." App. p. 85. He also stated he discussed with Petitioner the argument that she may not have been the proximate cause of the death and informed her that would be an issue to be decided at trial either by the judge through a motion for a directed verdict or by the jury. App. p. 97, 103. Counsel gave Petitioner correct advice, and she chose to plead guilty freely and voluntarily. App. pp. 11-15, 100. Therefore, Counsel was not deficient, and the Petition should be denied.

B. Applicability of the doctrine of transferred intent

During the plea hearing, Solicitor Clements informed the plea court the State would have presented its case based on the theory of transferred intent had Petitioner's trial continued. App. p. 16. However, Petitioner contends transferred intent only applies in cases where a "direct act by the defendant... result[s] in the death of an unintended victim." PWC pp. 16-17. Petitioner cites State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), among others, in support of this contention. However, this assertion is inconsistent with the broad interpretation of the doctrine of transferred intent set forth in Fennell, regardless of whether this Court agrees the crash was a direct act of Petitioner or not.

In Fennell, Fennell shot and killed an acquaintance over a dispute about money. Id. at 269-70, 531 S.E.2d at 514. A stray bullet also struck a bystander, who survived his injuries, and who Fennell had no intent to injure or kill. Id. at 270, 531 S.E.2d at 514. Fennell was nonetheless charged with assault and battery with intent to kill (ABIK) as to the bystander. Id. "The required mental state for ABIK, like murder, is malice aforethought." Id. at 275, 531 S.E.2d at 517. Fennell moved for a direct verdict, arguing the State had failed to prove any intent to kill and the doctrine of transferred intent did not apply because the harm he intended to

inflict on the acquaintance (the intended victim) was different than the harm inflicted on the bystander (the unintended victim) and because any intent to kill was "fully satisfied" by the death of the intended victim. Id. at 270-71, 531 S.E.2d at 514.

In analyzing whether the trial court properly denied Fennell's motion, this Court explained the idea of transferred intent "like a spotlight emanating from its source – the defendant's mind – to its target – the intended victim," which "is not extinguished at the moment a bullet strikes and kills the intended victim, such that there is no mental state left upon which to convict an unintended victim who is also injured or killed." Id. at 271, 531 S.E.2d at 515. Further, this Court cited with approval cases from other jurisdictions standing for the proposition that "transferred intent [applies] to all crimes where an unintended victim is harmed as a result of defendant's specific intent to harm an intended victim, regardless of whether the intended victim is injured. . . ." Id. at 276, 531 S.E.2d 518 (citing Ochoa v. State, 981 P.2d 1201, 1205 (Nev. 1999)). This Court then explicitly concluded malice, or intent to kill, is transferrable from one victim to another through the doctrine of transferred intent. Id. at 276-77, 531 S.E.2d at 517-18. As this Court explained, "[a] person who, acting with malice, *unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.*" Id. at 273, 531 S.E.2d at 517 (emphasis added). This is a broad concept of intent clearly encompassing unintentional or indirect consequences, approaching the proximate-cause felony-murder rule discussed above.

Applying the broad concept of intent from Fennell to Petitioner's case, it is clear the "deadly force" unleashed by Petitioner was not just the bullets she fired from her gun, but also her conduct in stalking and pursuing Gray and Askins in her car, even if she had never fired on

them. Petitioner used both her car and her gun to drive Gray and Askins into oncoming traffic, resulting injury and death to Pruett. Petitioner's intent was to kill Gray and Askins, and had she succeeded, whether by a bullet or by causing them to wreck their car, she would have been guilty of murder.

Instead, the deadly force she unleashed merely injured its intended victims but killed an unintended victim – the opposite of what occurred in Fennell. Regardless, the broad concept of intent articulated in Fennell requires Petitioner to answer for her actions as if the intent to kill had been directed towards Pruett all along. "When a defendant contemplates or designs the death of another, the purpose of deterrence is better served by holding that defendant responsible for the knowing or purposeful murder of the unintended as well as the intended victim." Id. at 276, 531 S.E.2d at 517 (quoting State v. Worlock, 117 N.J. 596, 569 A.2d 1314, 1325 (1990)). Therefore, under Fennell, the intent to kill motivating Petitioner's conduct in injuring and attempting to kill Gray and Askins was transferrable to Pruett.

Accordingly, Petitioner's murder conviction was proper under the doctrine of transferred intent. Even if Counsel improperly advised Petitioner was to the applicability of felony murder in her case, the State's theory of transferred intent was sufficient to convict Petitioner, so there was no prejudice to Petitioner.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR court's finding Counsel provided effective assistance where he properly advised Petitioner as to her criminal responsibility for murder under the felony-murder theory of liability and where there was no prejudice to Petitioner in any event because she was still liable for the murder under the doctrine of transferred intent. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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September 5, 2018

STATE OF SOUTH CAROLINA

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Certiorari to Florence County
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Appellate Case No. 2017-001474

Georgia Woodberry,

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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:

Laura R. Baer, Esquire
SC Commission on Indigent Defense
Post Office Box 11589
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This 5th day of September, 2018.

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September 5, 2018

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

Re: **Georgia Woodberry v. State of South Carolina**
Appellate Case No. 2017-001474
Lower Court Case No. 2013-CP-21-2969

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,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/cc
Enclosures

cc: Laura R. Baer, Esquire (2 copies)

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