STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 5591 (S.C. Ct. App. Filed August 15, 2018)

THE STATE,

RESPONDENT,

V.

MICHAEL JUAN SMITH,

PETITIONER

APPELLATE CASE NO. 2018-002050

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 19, 2018.

QUESTION PRESENTED

1.

In this self-defense case, whether the Court of Appeals erred in affirming a jury charge on inferred malice based on the "felony murder rule" where the underlying predicate felonies were not inherently dangerous and involved only possession of a firearm and in finding citation to and argument by analogy based on a leading case on inferred malice unpreserved for appeal?

2.

Whether the Court of Appeals erred in affirming the trial court's denial of a directed verdict on the attempted murder charge because the State failed to prove petitioner had the specific intent to kill the victim where it was undisputed that the victim was not petitioner's intended target in self-defense?

3.

Whether the Court of Appeals erred in finding petitioner was not entitled to a mistrial when, during the solicitor's closing argument, she tossed the gun on top of the clothing petitioner wore the night of the shooting and told the jury that if they had not proved their case, "then find him not guilty. We will give him back all of his stuff and put him back out on the street[?]"

STATEMENT OF THE CASE

On November 13, 2013, a Richland County grand jury indicted petitioner for attempted murder, possession of a stolen pistol, possession of firearm or ammunition by person convicted of a violent felony, unlawful carrying of a pistol, unlawful possession of a weapon by a person convicted of a crime of violence, and possession of a weapon during the commission of a violent crime. R. 1190-1201. On August 10 – 17, 2015, petitioner was tried before the Honorable Robert E. Hood and a jury. R. 1. Luck Campbell, Meghan Walker, and Dolly Garfield represented the State. R. 1. Aimee Zmroczek and Bridgette Brown represented petitioner. R. 1.

Judge Hood directed a verdict on the possession of a stolen pistol charge. R. 871, ll. 6 – 18. The jury convicted petitioner on the remaining three charges. R. 1170, ll. 1 – 25. Judge Hood sentenced petitioner to thirty years' imprisonment for attempted murder, a consecutive term of five years' imprisonment for possession of a weapon during the commission of a violent crime, a consecutive term of five years' imprisonment for possession of a weapon by a person convicted of a violent felony, a concurrent term of five years' imprisonment for possession of a weapon by a person convicted of a crime of violence, and a sentence of one year's imprisonment for unlawful carrying of a pistol. R. 1187, ll. 3 – 22.

On June 7, 2018, a panel of the Court of Appeals consisting of Judges Huff, Geathers, and McDonald heard oral argument. App. 1. On August 15, 2018, the court issued a published opinion authored by Judge Geathers affirming petitioner's convictions. App. 1. State v. Smith, 425 S.C. 20, 819 S.E.2d 187 (2018). After denial of rehearing, this petition for certiorari follows.

ARGUMENT

1.

In this self-defense case, the Court of Appeals erred in affirming a jury charge on inferred malice based on the "felony murder rule" where the underlying predicate felonies were not inherently dangerous and involved only possession of a firearm and in finding citation to and argument by analogy based on a leading case on inferred malice unpreserved for appeal.

Reasons for Granting Certiorari

The Court of Appeals' drastic expansion of South Carolina's felony murder rule to status crimes, also known as *malum prohibitum* offenses, is a novel issue which should be decided by this Court. Rule 242(b)(1), SCACR. The Court of Appeals' language attempting to limit this decision to its facts fails because, logically, it allows circuit judges to determine whether the felony murder rule can be expanded based on the facts before them. Op. at 18. The question of law cannot be avoided so easily. Solicitors will cite this case and tell trial judges that, under Smith, they can instruct the felony murder rule on any felony if they believe the facts warrant it. This ruling cannot be limited to its facts and this Court should grant certiorari to squarely confront the answer to the purely legal question presented. Furthermore, the Court of Appeals' extension of error preservation rules to forbid argument by analogy on appeal and refusal to consider a leading case concerning the issue raised below requires correction by this Court.

The Court's Errors Regarding the Merits

The trial judge erred in charging the felony murder rule based on petitioner's status as a felon who could not lawfully possess a firearm. The Court of Appeals affirmed, resulting in an unprecedented expansion of South Carolina's felony murder rule to status crimes. The court first errs in attempting to couch its ruling as fact-based and limited to "the circumstances of this

specific case." Op. at 18. Because of how the issue is presented, its ruling cannot be limited. Petitioner's argument is that, **as a matter of law**, status crimes cannot form the basis of a felony murder rule instruction. Finding no error unquestionably answers this novel question in the affirmative. The Court's ruling means that trial judges are free to apply the felony murder rule whenever they feel like the facts of the case warrant it—no matter the underlying felony. The effect of this ruling is that solicitors will urge application of the felony murder rule whenever they can find any criminal statute has been violated.

Second, the Court erred in its interpretation of Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973). Petitioner did not misinterpret the argument of the defendant in Gore for the holding of the case. Petitioner's brief clearly stated the holding of Gore was that, "Ultimately, the Court determined that it did not need to decide this issue because the felony murder rule clearly applied to a burglary and shootout with police." Br. App. at 15. Petitioner traced the history of South Carolina's felony murder rule from 1897 to the present, including an in-depth analysis of what Gore held and did not hold.

Gore did not create a rule that trial judges always get to decide if the felony murder rule applies, no matter the underlying felony. Gore analyzed the various approaches to the felony murder rule from other jurisdictions, but declined to adopt a rule because burglary was clearly *malum in se* and the Court needed no further analysis. The Gore Court did use the *malum prohibitum* distinction to dispatch the defendant's cited cases in Gore, which indicates hostility towards expansion of the rule. Felon-in-possession is **not** equivalent to burglary and is not a moral wrong. It is a crime of status and policy, not morality. The question avoided in Gore cannot be avoided in this case. Upholding the instruction adopts the "any felony" approach, which is an error that needs to be corrected by this Court.

The court also erroneously held that felon-in-possession is not a status, or *malum prohibitum* offense. The court's sole reasoning is that felon-in-possession must be a *malum in se* offense because the Legislature "recognized the inherent danger involved." Op. at 18. This reasoning collapses the distinction between the meaning of *malum prohibitum* and *malum in se*. If the court's reasoning were correct, then every criminal act passed by the Legislature would be, by definition, *malum in se.*

The court also erred in holding that the trial judge's charge was not error under Norris because he followed the charge given by the trial judge in Norris. The holding of Norris is that the trial judge's charge (as given at the time) was not incorrect, but then promulgated a "proper" charge. After Norris, it cannot be seriously contended that using the charge this Court rejected instead of the charge this Court wrote is not error.

Finally, in its harmless error analysis, the court errs in weighing the evidence and improperly assessing petitioner's credibility. Both are solely jury functions. The court wrongly states that the evidence of malice was "uncontested." This statement is a factual error. Smith's testimony alone contests this point. Smith said they were getting ready to leave **when he heard a shot** and "somebody screamed they had a gun." R. 938, ll. 2 – 7. Smith fired one shot back. R. 938, ll. 6 – 9. Smith testified that he "was scared for my life. I was scared I was going to get shot, so I returned a shot." R. 939, ll. 17 – 19. Ellison testified that one of the men in the Samuel Group was "clutching" like he was about to pull out a gun. R. 489, ll. 3 – 6. In the statement White gave the night of the shooting, she told police that a man with braids had a gun. R. 495, ll. 22 – 24. The defense argued extensively that the video showed Samuel with a gun in his hand. R. 1099, l. 5 – 1103, l. 3; (State's Ex. 101). Moving a gun from one pocket to another is consistent with both self-defense and malice—it is the jury's role, not the appellate court's, to

decide which theory was correct when given the proper law. The trial judge determined the evidence was sufficiently contested to charge the jury on self-defense. The felony murder instruction—nor the other errors—can be harmless in this case.

The Court's Errors Regarding Issue Preservation

The Court of Appeals erred in its issue preservation analysis. First, the court found citation of and analysis of the leading case on inferred malice from the last twenty years—as part of an argument on why it should not adopt the felony murder rule as interpreted by the trial judge—unpreserved. Without question, the application of the felony murder rule to a status crime as was done in this case is a novel legal issue in South Carolina. In petitioner's argument concerning the improper felony murder rule instruction, petitioner cited State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Petitioner did not cite Belcher as part of a separate issue on appeal, but in an attempt to show the court the felony murder instruction given in this case is inconsistent with South Carolina law on inferred malice.

Like the felony murder rule, Belcher deals with an instruction on implied malice and is one of the most important implied malice cases in South Carolina. Petitioner cited Belcher for the point that if it is improper to charge a jury that it cannot infer malice from the **use** of a deadly weapon, then it is improper to charge the jury that it can infer malice from the **mere possession** of a deadly weapon as was done in this case. The question before the court was whether a status offense such as felon in possession of a firearm can form the basis of a felony murder rule charge. Petitioner applied the reasoning of Belcher to this case and did create a brand new issue on appeal. The logic of Belcher unquestionably bears on this question, yet the court mistakenly refused to even consider this logic because the trial lawyer never cited Belcher. South Carolina has *issue* preservation rules, not *analogy* preservation rules.

The point of an appeal should be to reach the right result on the law. In every case, appellate courts conduct their own research to find the right result. Had the court applied Belcher as a result of its own research, no one would bat an eye because of the clear applicability of Belcher's logic to the case at bar. Yet, under the reasoning of this opinion, because petitioner cited the case, the court ignored precedent from this Court whose logical applicability cannot be questioned. No such error preservation rule exists. Appellate lawyers must conduct extensive research and bring precedent from both South Carolina and other jurisdictions to the Court's attention.

However, even if such a rule existed, it would have little utility and would waste judicial resources. This Court owes no deference to a trial court on purely legal issues. Purely legal ideas—like the logical force of an analogy to Belcher—are reviewed de novo. This Court neither needs nor defers to the opinions of trial judges on pure questions of law. Refusing to consider a logical application of a case or an analogy has zero utility except to play "gotcha" with criminal defense attorneys. Atlantic Coast Bldrs & Contractors v. Lewis, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring).

The court also erred in finding of one of petitioner's arguments on why the error below was prejudicial unpreserved. At trial, judges must rule on error/non-error. Trial judges do not decide and trial lawyers do not argue prejudice or harmless error. In an appeal, the State argues harmless error in nearly every case. Here, petitioner argued the felony murder instruction was prejudicial (i.e., not harmless error) in part because it "negated the jury's duty to determine whether the State disproved self-defense beyond a reasonable doubt." Br. App. at 23-24. Part of this argument came from a Kansas case that—like our precedent of State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999)—recognized the contradiction between the ability to be legally

armed in self-defense and applying the felony murder rule to a status offense. The charge is contradictory and confusing.

Again, this is a purely legal argument meant to show the charge was improper, yet the Court of Appeals refused to consider it. The court's refusal to consider a purely legal argument about the prejudice of an objected-to charge has no logical force or basis in error preservation law. Had the court considered the logic of Belcher, the difference between *malum prohibitum* and *malum in se*, the conflict with our self-defense jurisprudence, and the fact that the trial court did not even give the right charge under Norris, the court would not have drastically expanded the scope of South Carolina's felony murder rule. Such an expansion should not be undertaken at all, much less without action by the Legislature. This Court should grant certiorari and order full briefing to consider this novel issue of law.

2.

The Court of Appeals erred in affirming the trial court's denial of a directed verdict on the attempted murder charge because the State failed to prove petitioner had the specific intent to kill the victim where it was undisputed that the victim was not petitioner's intended target in self-defense.

This Court should grant certiorari on this issue because it is an novel issue of law on which this Court has not yet rendered a decision. This Court granted certiorari to review the Court of Appeals' decision in State v. Williams, 422 S.C. 525, 812 S.E.2d 917 (Ct. App. 2018), which also deals with transferred intent and attempted murder. The Court of Appeals erred in holding that the doctrine of transferred intent applies to the specific intent crime of attempted murder. Because it was undisputed that Childress was not petitioner's target, without the doctrine of transferred intent, petitioner is entitled to a directed verdict.

The Court of Appeals' reasoning conflicts with this Court's reasoning in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). If left intact, the Court of Appeals' decision would render the requirement of showing specific intent virtually meaningless. King also states this Court's observation that without express malice or specific intent, a "crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600." King at 26-27, n.5, 810 S.E.2d at 63-64, n.5. The dissent in King agreed with the majority that, after its ruling, the notion of implied malice for specific intent crimes would be problematic. Id. at 73-74, n.9, 810 S.E.2d at 32, n.9. See also State v. Shands, ___ S.C. ___, ___ S.E.2d ___, Op. No. 5569, 2018 WL 2944992 at *10 (Ct. App. June 13, 2018) ("Therefore, we question whether an implied malice instruction is proper in any attempted

murder trial."). This part of the King decision indicates that transferring intent for attempted murder is error.

Attempted murder did not exist in South Carolina prior to its creation by the Legislature in 2010. See State v. Sutton, 340 S.C. 393, 398-99, 532 S.E.2d 283, 286 (2000) ("We decline to recognize a separate offense of attempted murder."); S.C. Code Ann. § 16-3-29; King at 62, 810 S.E.2d at 25-26 (noting that the attempted murder statute was part of legislation passed in 2010). The primary case the court relied on, State v. Fennell, was decided in 2000 and dealt with the question of transferred intent under the abolished crime of assault and battery with intent to kill ("ABIK"). State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). ABIK did not require specific intent. King at 57-64, 810 S.E.2d at 23-27, analyzing, *inter alia,* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), Sutton, and State v. Kinard, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007). Because petitioner was charged with a statutory crime that did not exist in 2000, and that this Court expressly declined to recognize under the common law, cases like Fennell do not compel the conclusion that because transferred intent applied to ABIK it must also apply to attempted murder. Especially after this Court's decision in King that attempted murder is a specific intent crime, transferred intent does not apply.

Petitioner submits that, considering the careful analysis given to the Legislature's intent in King, South Carolina would adopt the rationale of a jurisdiction like Alabama, which declined to read transferred intent into its statutory crime of attempted murder. Cockrell v. State, 890 So.2d 174 (Ala. 2004). The Alabama Supreme Court's decision in Cockrell is well-researched and cites the differing points of view around the nation, including South Carolina law as it existed under ABIK. Id. at 175-82. After analyzing the various rules adopted by other jurisdictions and the intent of the Alabama legislature, the court applied the rule of lenity and

determined that it would not adopt transferred intent for attempted murder. Id. at 180-82. The Court of Appeals mentions the rule of lenity, but fails to apply it or analyze its impact. Op. at 9-10.

Particularly helpful from Cockrell is the concurrence of Justice Harwood. Id. at 183-84. Justice Harwood wrote separately to emphasize that the Alabama legislature had "'covered all the bases'" with both attempted murder and the different degrees of assault and battery. Id. He wrote, "This complete allocation of criminal culpability under a comprehensive legislative scheme furnishes some insight concerning the legislative intent regarding the applicability of the doctrine of transferred intent to the offense of attempted murder." Id. South Carolina's comprehensive statutory scheme enacted in 2010 along with the attempted murder statute created new degrees of assault and battery. See S.C. Code Ann. § 16-3-600. The logic of Justice Harwood's concurrence carries equal force in South Carolina. The lower courts erred in applying transferred intent and petitioner is entitled to a directed verdict.

3.

The Court of Appeals erred in finding petitioner was not entitled to a mistrial when, during the solicitor's closing argument, she tossed the gun on top of the clothing petitioner wore the night of the shooting and told the jury that if they had not proved their case, "then find him not guilty. We will give him back all of his stuff and put him back out on the street."

The Court of Appeals correctly found that the solicitor's closing argument was improper, but erred in finding that the improper argument does not require reversal. Petitioner's case is spectacularly rare in that direct evidence of the jury's fear exists in the form of the notes the jurors sent the trial court. The solicitor's argument played directly to this fear. Petitioner has proven prejudice to a greater extent than the numerous cases cited in his brief that warranted reversal. See, e.g., State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965) (holding that the effect of the solicitor's "Let him go" argument was to "completely destroy and nullify all sense of impartiality in a case of this kind."). The court noted the repeated, recent conduct of these solicitors in a footnote, but regretfully it appears that repeated chastisements unaccompanied by reversals have no effect. Reversals deter this kind of conduct; affirmances with chastisement appear only to embolden them. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, order full briefing, and ultimately reverse petitioner's conviction.

Respectfully Submitted,

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of December, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Honorable Robert E. Hood, Circuit Court Judge

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2013-GS-40-08047;8049;8052;8053;8336

THE STATE,

RESPONDENT,

V.

MICHAEL JUAN SMITH,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Juan Smith, #350413, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 10th day of December, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 10th day of December, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.