

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

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S.C. SUPREME COURT

RYAN P. DELESTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001475

PETITION FOR WRIT OF CERTIORARI

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1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to a jury instruction that was an improper charge on the facts?
2. Did the PCR judge err in refusing to find counsel ineffective for failing to argue that, by introducing Petitioner's statement to police that he heard co-defendant Bryan Rivers shot a drug dealer named "Chopper" with the same gun used to shoot Marty Lion, the State opened the door to allowing the defense to question Rivers about the "Chopper" shooting?

STATEMENT

In October of 2012, the Charleston County Grand Jury indicted¹ Petitioner, Ryan P. Deleston, for murder, attempted armed robbery, possession of a hand gun with an obliterated serial number and possession of a weapon during the commission of a violent crime. On October 7, 2013, Petitioner proceeded to jury trial before the Honorable Kristi L. Harrington. D. Ashley Pennington and John T. Kozelski represented Petitioner at trial. Scarlett A. Wilson and Bruce Durant prosecuted the case. The jury returned verdicts of guilty and Judge Harrington sentenced Petitioner to life in prison for murder, twenty (20) years concurrent for attempted armed robbery and five (5) years concurrent for the unlawful weapon. The judge did not impose a sentence for the possession of a weapon during the commission of a violent crime because of the life sentence imposed for the murder². A timely notice of intent to appeal was filed and the direct appeal perfected.

The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Deleston, 2-16 UP-)55 (Ct. App. filed February 10, 2016). A petition for rehearing was filed and then denied on April 21, 2016. On May 23, 2016, a petition for writ of certiorari was filed with the South Carolina Supreme Court. The return was filed on June 29, 2016. On December 1, 2016, the South Carolina Supreme Court granted the petition for writ of certiorari. Following briefing and argument, the South Carolina Supreme Court dismissed the petition for writ of certiorari ad improvidently granted.

¹ It is unclear who testified before the Grand Jury because the witness is listed as the Charleston City Police Department on all four indictments.

² S.C. Code §16-23-490(A).

On September 5, 2017, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 12, 2017, and an amended return on May 23, 2018. On May 24, 2018, an evidentiary hearing was held before the Honorable Roger M. Young Senior. Christopher L. Murphy represented Petitioner at the PCR hearing. Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Kelly Oppenheimer represented the State. In a written order filed July 25, 2018, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on August 7, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to object to a jury instruction that was an improper charge on the facts.

The jury found Petitioner guilty of the fatal shooting of Marley Lion. In defining express malice to the jury, the trial judge said, “Expressed malice is shown when the person speaks words or which -- words which express hatred or ill-will of another person or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant’s mind would be expressed malice.” (App. p. 1132, lines 14-21). Trial counsel did not object to the instruction.

In the application for post-conviction relief Petitioner alleged, “Applicant submits he was denied the effective assistance of counsel when counsel failed to object to trial court’s jury instructions on express malice that impermissibly commented on the facts of Applicant’s case.” (App. p. 1189). During the PCR hearing when trial counsel was asked about the failure to object to the express malice jury instruction, trial counsel testified, “I think the record speaks for itself. I did not object, and I would have been listening and paying attention to anything that came my way on that front.” (App. p. 1277, lines 9-11).

In the order of dismissal the PCR judge wrote:

This Court must conclude that counsel was not deficient under the standards required of criminal defense counsel in 2013 when the matter was tried. Then and now, there is no binding caselaw that suggest that the lying in wait instruction was improper. To the contrary, the Supreme Court implicitly has approved a similar instruction of lying in wait and malice. See State v. Kelsey, 331 S.C. 50, 78, 502 S.E.2d 63, 77 (1988) (“Proof of malice may be express or direct, such as, where there is evidence of previous threats or evidence of lying in wait. In other words, circumstances which show directly that an intent to kill existed). Cf. State v. Hardin, 114 S.C. 280, 103 S.E. 557, 558 (1920), overruled by State v. Belcher,

385 S.C. 597, 685 S.E.2d 802 (2009) (“Express malice is manifested by some outward act – lying in wait, making threat to take his life, or something of that kind.”).

(App. pp. 1317-1318). The PCR judge erred.

The PCR judge’s reliance on both Kelsey and Hardin is misplaced because the express malice charge was not challenged in either of those cases. In Kelsey the challenge was to the judge’s failure to charge the jury on the law of mistake of fact. The Court found no error in the failure to charge mistake of fact, in part due to the fact that the judge charged the jury with the requisite criminal intent for murder and included the express malice, lying in wait language given to the jury and cited in the order of dismissal. In Hardin the challenge was to the charge that malice could be inferred from the use of a deadly weapon as a charge on the facts. The Court found no error in charging the jury that malice could be inferred from the use of a deadly weapon and in the discussion included the express malice, lying in wait language cited in the order of dismissal. The Hardin case was later overruled by the Belcher case which held that instructing the jury 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. None of these cases challenged the express malice charge using lying in wait as an example as an improper charge on the facts.

The South Carolina Constitution provides, “Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. art. V, § 21. In State v. Stukes, 416 S.C.493, 787 S.E.2d 480 (2016), the South Carolina Supreme Court held that the trial court’s jury charge that a victim’s testimony need not be corroborated by additional evidence is an impermissible charge on the facts. In the present case, the trial court’s jury charge that express malice is shown by lying in wait is an impermissible charge on the facts. According to State’s

witness and co-defendant Julius Brown, Petitioner, Brown and another co-defendant, Bryan Rivers, waited outside Famous Joe's for the employees to leave so they could rob them. (App. pp. 385-387). According to Brown, the plan was foiled when the deceased, Marty Lion pulled into the Famous Joe's parking lot at the same time the employees were leaving. (App. p. 387, lines 14-21). Based on the facts of this case, the express malice charge using the lying in wait example constituted an impermissible comment on the facts and diluted the State's burden of proving all elements, including malice.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to object to the jury instruction on express malice using the lying in wait example because the charge, under the facts of this case, was an

impermissible comment on the facts. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

2. The PCR judge erred in refusing to find counsel ineffective for failing to argue that, by introducing Petitioner's statement to police that he heard Bryan Rivers shot a drug dealer named "Chopper" with the same gun used to shoot Marty Lion, the State opened the door to allowing the defense to question Rivers about the "Chopper" shooting.

Prior to trial the State moved to exclude evidence that the gun used in the Lion shooting, for which Petitioner stood trial, was the same gun used by co-defendant Bryan Rivers two weeks earlier to shoot and rob LeRoy Townsend, aka "Chopper." (App. pp. 124-127). The State argued the evidence did not meet the requirement of Rule 404(b), SCRE, because the two shootings were not similar. (App. p. 125, line 7 – p. 126, lines 1-20). Petitioner argued that the evidence was admissible as third- party guilt and the right to present a complete defense. (App. pp. 127 – 131). The trial judge found that the prior shooting did not meet the requirement for admissibility as a common scheme or plan pursuant to Rule 404(b). (App. p. 210, line 17 – p. 211, 212, lines 1-24). Additionally, the trial judge found that the "Chopper" shooting did not meet the requirement for admissibility as third- party guilt. (App. p. 216, line 7 – p. 217, lines 1-16).

Later Petitioner proffered the questions he sought to ask Rivers on cross-examination stating:

[W]hat I would cover with him [Rivers] in the context of an overall Cross-Examination would be that . . . about six days after the Marley Lion murder, there was an opportunity for Detective Osborne to have a formal meeting, sit down with Bryan Rivers where they talked on tape and Osborne asked him about being involved in a robbery at the Saint Andrews Garden Apartments with Tino, which he denied, and which was not truthful . . . I would use that to show that . . . when he needed to lie, he knew how to lie.

With regard to the follow-up conversation that he had after his arrest on these charges on July 30th and 31st, I would cover the fact that he now admits that he, on June 1st, rode along on the preplanned robbery of Leroy Townsend, a.k.a. "Chopper," in the Saint Andrews Garden Apartments; that he got \$1,300 in cash and drugs; he used the Marley Lion murder weapon to rob Townsend; He shot Townsend in the leg; it was George Brown's gun; that he's not been charged with this armed robbery pursuant to his proffer agreement; and he has not also been charged with attempted armed robbery pursuant to his agreement. And that's the sum and substance of what I would cover with Bryan Rivers.

(App. p. 348, line 4 – p. 349, lines 1-11). Based on the earlier ruling, Petitioner did not cross-examine Rivers about the "Chopper" shooting, including the fact that he initially lied to the police about his involvement in the "Chopper" shooting.

Later in the trial Detective Williams with the Charleston City Police Department testified about a statement made by Petitioner in regard to the Lion shooting. Detective Williams testified:

He said that – basically, he, Julius Brown and Bryan Rivers went to rob Famous Joe's, and he indicated that – he identified Julius Brown as the person walking across in front of the car of Marley Lion's vehicle, and he said that Bryan Rivers had the firearm and went up to the vehicle and shot into the vehicle.

(App. p. 1012, lines 7-12).

After both Rivers and Brown had testified, the State, despite the earlier ruling by the judge excluding the "Chopper" shooting, introduced a video of an interview between a detective and Petitioner, in which Petitioner told the detective that he heard that Rivers shot a drug dealer named "Chopper" with the same gun used to shoot Lions. (App. p. 1036, line 18 – p. 1037, lines 1-5). The video was marked State's Exhibit #30 and played for the jury. Trial counsel did not argue that the admission of State's Exhibit #30 opened the door to allow the questioning of Rivers about the "Chopper" shooting. Trial counsel was ineffective.

The issue raised on direct appeal was:

Whether the court erred by refusing to allow Appellant to cross-examine witnesses about an armed robbery and shooting that occurred approximately two weeks before the murder where it was undisputed that Bryan Rivers was the shooter in the prior robbery and that the same firearm was used in both cases, since this prevented Appellant from fully developing and presenting his defense at trial, namely that Bryan Rivers was the shooter who killed the decedent, Marley Lion, and that Appellant was merely present at the scene, in violation of Rule 404(b), SCRE, the rule on third party guilt, and Appellant's due process right to present a defense?

The Court of Appeals affirmed the conviction writing:

As to whether the trial court erred in limiting cross-examination: Rule 404(b), SCRE (“Evidence of other crimes, wrongs, or acts ... may ... be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.”); State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013), cert. denied, 135 S.Ct. 400 (2014) (“Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan.”); id. (“When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity.” (quoting State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009))); id. at 338 n. 4, 748 S.E.2d at 205 n. 4 (noting we must look at the commonality of the entire crimes when determining admissibility if the purpose of the evidence is to show that the allegedly guilty third party acted pursuant to a common scheme); id. at 341, 748 S.E.2d at 206 (“The admissibility of evidence of third-party guilt is governed by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941).”); Gregory, 198 S.C. at 104–05, 16 S.E.2d at 534 (“[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; *evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.*” (emphasis added)); Cope, 405 S.C. at 339, 748 S.E.2d at 205–06 (addressing a similar due process argument in which the appellant relied on Holmes v. South Carolina, 547 U.S. 319, 323 (2006), and finding the facts were distinguishable from Holmes; holding “[i]t was not the strength of the State's case that led to exclusion of evidence of [the alleged guilty third party's] other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible”).

State v. Deleston, No. 2016-UP-055 (S.C. Ct. App. Feb. 10, 2016).

In correspondence between PCR counsel and counsel for the State Petitioner alleged that

trial counsel was ineffective because he “did not recall Bryan Rivers and cross-examine him on the Chopper shooting’ when the State opened the door by presenting the Deleston statement.” (App. p. 1208). During the PCR hearing trial counsel was asked about calling Rivers as a witness and questioning him about the “Chopper” shooting based on the State opening the door. (App. p. 1267, lines 22-25). Trial counsel testified, “I could have attempted to. It was something I never thought of.” (App. p. 1268, lines 1-2). When asked to explain, trial counsel testified:

Well, to be honest, what happened is, as I discussed the case with Mr. Deleston and looked at the pleadings, it dawned on me that it was right. I could have at least attempted to call Mr. Rivers in my case and forced another ruling, giving the Court another opportunity to consider since, essentially, we were making the Holmes argument all the way through, that we have the right to put on a defense, so it would have been another opportunity to raise the issue, which I failed to do.

(App. p. 1268, lines 5-14). Trial counsel agreed that the defense theory was that Bryan Rivers shot Marley Lion and was acting spontaneously and unforeseeably. (App. p. 1269, lines 1-7). Counsel should have argued that the State opened the door to allow the questioning of Rivers about the “Chopper” shooting by introducing Petitioner’s videotaped statement, State’s Exhibit #30, inculcating Rivers in the “Chopper” shooting. Rivers testified against Petitioner at trial and his credibility was an important factor for the jury to determine. The jury should have heard Rivers admit to the “Chopper” shooting and should have heard that Rivers initially lied to the police about his involvement in order to properly assess credibility.

Trial counsel was ineffective in failing to argue that the State opened the door to the admission of evidence that Rivers used the same gun in both the “Chopper” shooting and the Lion shooting by admitting State’s exhibit #30. The State should not be permitted to exclude evidence to prevent cross-examination and then later introduce that same evidence, from Petitioner’s statement, to show foreseeability. The State’s purported change in trial strategy

allowed the introduction of Petitioner's statement that Rivers used the same gun in both the "Chopper" shooting and the Lion without allowing cross-examination or allowing the jury to hear Rivers admit to using the same gun in the "Chopper" shooting. By admitting Petitioner's statement that included testimony excluded by the judge at the request of the State, it appeared that Petitioner was simply trying to shift the blame to Rivers.

When questioned about the need to cross-examine Rivers when the jury was made aware of his involvement in the "Chopper" shooting with the same weapon through the introduction of Petitioner's statement, trial counsel testified, "When I prepared my post-trial memo to appellate defense, I noted that I felt that I actually said that I thought that the fact that that was in there was valueless because I – my fear was that it was viewed by – would be viewed by the jury as self-serving. In other words, this was a defendant's statement, so so what? So that's why it would carry such a great weight if there was a confession to the same conduct by Mr. Rivers through my cross-examination." (App. p. 1279, lines 15-23).

In the order of dismissal the PCR judge wrote:


The Court finds that Sixth Amendment has not been proven. In order for this Court to grant post-conviction relief, prejudice must be shown. Strickland v. Washington, supra. The Court finds that had counsel Pennington introduced further cross-examined Rivers that there is no reasonable probability that the result of the proceeding would have been different. Because the admitted State Exhibit 30 (Petitioner's statement) included his sought after assertion that Rivers shot Chopper with the murder weapon – the information he sought to develop through the cross-examination of Rivers and Brown – any exclusion or limitation on the cross-examination is harmless and without Sixth Amendment prejudice. Its earlier exclusion was not prejudicial because it would be cumulative to other evidence that was ultimately admitted. The earlier limitation on cross-examination does not warrant a new trial.

(App. p. 1339-1340). The PCR judge erred. Petitioner's statement was not cumulative to Rivers admitting to the "Chopper" shooting with the same weapon.

Trial counsel was ineffective in failing to argue that the State opened the door to the admission of evidence that Rivers used the same gun in both the “Chopper” shooting and the Lion shooting by admitting State’s exhibit #30. While the evidence of the “Chopper” shooting was initially excluded, and that issue addressed on direct appeal, trial counsel failed to move to admit evidence of the “Chopper” shooting once the State opened the door to admission through Petitioner’s statement. Trial counsel should have been allowed to cross-examine both Rivers and Brown. Trial counsel’s representation of Petitioner fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner was prejudiced by trial counsel’s deficient performance. There is a reasonable probability that if trial counsel had cross-examined co-defendants Rivers and Brown about the “Chopper” shooting, the result of the Lion shooting trial would have been different. There was not overwhelming evidence of guilt. See Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

RYAN P. DELESTON,

PETITIONER

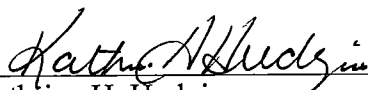
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STATE OF SOUTH CAROLINA,

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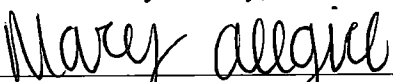
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Ryan P. Deleston, #307106, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of May, 2019.



Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 13th day of May, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.