STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Sumter County

Honorable Brian M. Gibbons, Circuit Court Judge

TREVAUGHN ZIONTAE JACKSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001172

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on the lesser included offense of assault and battery of a high and aggravated nature (ABHAN) when there was evidence from which the jury could have found Petitioner committed the lesser rather than the greater offense, where trial counsel failed to articulate any strategic reason whatsoever for failing to request such an instruction, and where Petitioner was prejudiced because if counsel had requested an instruction on the lesser offense there is a reasonable probability the jury would have found Petitioner guilty of only ABHAN?

STATEMENT OF THE CASE

A Sumter County grand jury indicted Petitioner on November 14, 2013 for two counts of attempted murder, discharging a firearm into a dwelling, and possession of a weapon during the commission of a violent crime. App. 505-506. His case was called to trial on April 15, 2014 before the Honorable W. Jeffrey Young, and a jury. App. 1. Assistant Solicitor John Meadors represented the state, and Tiffany Butler represented Petitioner. App. 1. The jury ultimately found Petitioner guilty as indicted. App. 390, ll. 6-24. Petitioner was sentenced to thirty years consecutive for each count of attempted murder, ten years concurrent for discharging a firearm into a dwelling, and five years concurrent for possession of a weapon during the commission of a violent crime. App. 405, ll. 1-25. The aggregate sentence is sixty years imprisonment.

On April 11, 2016, after Petitioner's direct appeal was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967), Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this brief. App. 424-458. The state filed a return to this application dated September 30, 2016. App. 459-463. An evidentiary hearing was convened on November 8, 2016 before the Honorable Brian M. Gibbons. App. 464. Assistant Attorney General Julie Coleman represented the state, and Timothy Griffith represented Petitioner. App. 464. By order filed May 4, 2017, the PCR judge denied Petitioner relief.

On January 26, 2018, Petitioner filed a petition for writ of certiorari and accompanying appendix with the South Carolina Supreme Court. The state filed a return to the petition for writ of certiorari on July 11, 2018. By order dated July 25, 2018, the Supreme Court transferred the appeal to this Court pursuant to Rule 243(l), SCACR. By order dated May 30, 2019, this Court granted the petition and ordered further briefing pursuant to Rule 243(j), SCACR.

This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

STATEMENT OF THE FACTS

On August 29, 2013, Frank Dwayne Cokeley and Lenard Johnson "got into an altercation" after Johnson called Cokeley's sister a "bitch." App. 144, l. 24 – 145, l. 8. The men engaged in a fistfight somewhere on Porter Street, which eventually turns into Dilbert Street. According to Cokeley, he "got the best of" Johnson and Johnson "was kind of bruised up" after the fight ended. App. 145, l. 12 – 146, l. 8.

Two days later, on August 31, 2013, Cokeley was at Joe and Julian Tomlin's house on Dilbert Street. He was sitting on the front porch when he saw Johnson and his brother Keith Williams walking down the street. The men "exchanged some words and end[ed] up fighting again." App. 146, l. 19 – 147, l. 8. Johnson and Cokeley engaged in a fistfight. Cokeley was struck above the eye and began to bleed. Keith Williams also became involved in the altercation. Williams took his shirt off and Cokeley "snatched his shirt" and wiped the blood from around his eye. App. 147, ll. 13-25. The Tomlins and others came outside and "broke the fight up." App. 148, ll. 13-16.

About twenty minutes later, Johnson and Williams returned with two to three other men. They were carrying baseball bats and chains. App. 148, l. 18 – 149, l. 7. The men rushed onto the Tomlin's front porch and jumped on Cokeley. They then forced their way inside the house. Cokeley, and the other occupants of the home, were able to shove the men back outside. Cokeley struck one of them on the head with a beer bottle. App. 149, ll. 4-15.

About twenty seconds later, after the men had scattered and Cokeley was in the safety of the Tomlin home, gunshots rang out from the backyard of the house. App. 150, ll. 4-16. The shooter fired approximately six bullets into the back of the house from the backyard. Cokeley,

and another occupant of the home, Sylvia Ann Welch, were both struck by a bullet. App. 150, l. 8 – 151, l. 18. After travelling by ambulance to Palmetto Health Tuomey in Sumter, Cokeley and Welch were eventually airlifted to the Palmetto Health Richland Trauma Center in Columbia. Cokeley was struck in the upper torso near his heart and spent two to three weeks in the hospital. App. 151, ll. 5-13. Welch was struck in the side and was hospitalized for nearly forty days. App. 164, l. 14 – 165, l. 22.

Lenard Johnson identified Petitioner as the shooter. App. 310, l. 19 – 312, l. 2; App. 236, ll. 22-24. Santana Bolden, a third party who was watching the confrontation unfold, also identified Petitioner in a photographic lineup as the shooter. App. 219, l. 8 – 222, l. 24; App. 238, l. 13 – 239, l. 15. There was also evidence presented indicating the possibility of two shooters. However, a second shooter was never identified nor arrested. App. 223, ll. 6-21; App. 310, l. 19 – 311, l. 21.

Petitioner was ultimately convicted as indicted of two counts of attempted murder, discharging a firearm into a dwelling, and possession of a weapon during the commission of a violent crime. App. 390, ll. 6-24. He was sentenced to an aggregate term of sixty years imprisonment. App. 405, ll. 1-25.

When questioned during Petitioner's PCR hearing as to why she did not request a jury instruction on the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), Tiffany Butler, Petitioner's trial counsel, testified, "*I honestly don't remember why I didn't*. I don't know what I was thinking at the time. It *may* have been a situation where I wanted to give the jury just one, one option but *I can't say for certain*." App. 475, ll. 9-20 (emphasis added). Butler explained that she does not have a standard practice when it comes to requesting jury instructions on lesser included offenses. She testified "it would depend on the

facts of the [specific] case" and what her strategy was for that particular case as to whether she would request an instruction on a lesser included offense. App. 475, ll. 21-24. When pressed by the assistant attorney general, Butler admitted that "*it is possible*" she did not request a jury instruction on ABHAN as part of a trial strategy. App. 476, ll. 3-8 (emphasis added).

The PCR judge ultimately found trial counsel was not ineffective for choosing not to request a jury instruction on the lesser included offense of ABHAN. App. 499. The judge found, "Although trial counsel could not recall her reasoning for choosing not to request the lesser included offense, she expressed that *it was possible* that she did not want [Petitioner] to be convicted of a lesser included offense when there was a chance he would be found not guilty of attempted murder. In this case, he would not have any convictions. It is reasonable to assume that this is a valid strategy that *trial counsel could have been choosing*. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective." App. 498 (emphasis added). Consequently, the judge denied Petitioner relief.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on the lesser included offense of assault and battery of a high and aggravated nature (ABHAN) when there was evidence from which the jury could have found Petitioner committed the lesser rather than the greater offense, where trial counsel failed to articulate any strategic reason whatsoever for failing to request such an instruction, and where Petitioner was prejudiced because if counsel had requested an instruction on the lesser offense there is a reasonable probability the jury would have found Petitioner guilty of only ABHAN.

There was ample evidence presented from which the jury could have found Petitioner committed only the lesser offense of assault and battery of a high and aggravated nature rather than the greater offense of attempted murder for which he was indicted. Trial counsel asserted at the evidentiary hearing that she could not recall having any strategic reason for failing to request a jury instruction on this lesser included offense. Counsel merely admitted that *it was possible* she may have had a trial strategy when she chose not to request such an instruction. App. 475, l. 16 – 476, l. 8. Consequently, there is no probative evidence to support the PCR court's finding that trial counsel had a strategic reason for failing to request an ABHAN instruction. Moreover, there is a reasonable probability that the jury would have acquitted Petitioner of attempted murder and found him guilty of only ABHAN if counsel would have properly requested an ABHAN instruction.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has established a two pronged test to evaluate

allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"The law to be charged is determined by the evidence presented at trial." State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004) (citing State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986)). "A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense." White, 361 S.C. at 412, 605 S.E.2d at 542 (citing Brightman v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999)). "Conversely, a trial judge does not err by refusing to charge a lesser included offense where there is no evidence tending to show the defendant was guilty only of the lesser offense." Id. (citing State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976). In determining whether the evidence requires a charge on a lesser-included offense, the court views the facts in the light most favorable to the defendant. State v. Williams, Op. No. 27893 (S.C. Sup. Ct. filed June 12, 2019) (citing State v. Byrd, 323 S.C. 319, 231, 474 S.E.2d 430, 431 (1996)).

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); See 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.").

The offense of attempted murder is codified in S.C. Code Ann. § 16-3-29. This statute states in relevant part, "A person who, *with intent to kill*, attempts to kill another person *with malice aforethought*, either expressed or implied, commits the offense of attempted murder." (emphasis added). Conversely, under § 16-3-600(B)(1), a "person commits the offense of assault and battery of a high and aggravated nature if the 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." For purposes of this subsection, "great bodily injury" means "bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-3-600(A)(1).

In this case, there was ample evidence to support all the elements of assault and battery of a high and aggravated nature. See Middleton, 407 S.C. at 317, 755 S.E.2d at 435 (holding it was undisputed that all the elements of assault and battery in the first degree were met and thus the trial judge erred in refusing to charge this lesser included offense). The state presented evidence that Petitioner discharged a firearm approximately six times into the back of the house on Dilbert Street while it was occupied. Two people were injured: Frank Cokeley and Sylvia Ann Welch. Both were struck by bullets and arguably suffered "great bodily injury." The two were airlifted to the Palmetto Health Richland Trauma Center where they spent an extensive period of time being treated for their various life threatening injuries. Welch testified that the bullet struck her

lungs and that, during her recovery, doctors inserted a feeding tube to provide her with nutrition and a "trache in her throat" to allow her to breathe. App. 164, l. 19 – 165, l. 11. Months later, Welch still had "trouble trying to talk plainly" and if she gets upset she stutters. App. 165, ll. 12-22. Cokeley testified that the bullet struck him in the upper torso near his heart and that the bullet is still lodged in his body. His doctor informed him that attempting to remove the bullet would cause "too much damage so . . . it was better off letting it stay in." App. 151, ll. 5-20.

Based on this evidence, if the jury found Petitioner acted without malice or without an intent to kill, it could have acquitted him of attempted murder and found him guilty of the lesser included offense of ABHAN. Consequently, trial counsel was ineffective for failing to request a jury instruction on this lesser included offense since there was evidence to support the charge.

As emphasized, counsel failed to articulate any strategic reason whatsoever for not requesting this instruction. While she testified she had previously employed the strategy of purposefully not requesting a lesser included offense in an "all or nothing" approach, she could not recall employing such a strategy in this case. Significantly, however, such a strategy would have been deficient since there is a reasonably probability that the jury would have convicted Petitioner only of the lesser offense if it had been properly charged to the jury subjecting Petitioner to a lesser prison sentence. Petitioner was clearly prejudiced by counsel's deficient performance.

Based on the foregoing argument, Petitioner respectfully requests this Court reverse the ruling of the PCR judge, hold trial counsel was ineffective, and grant Petitioner a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,

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Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of June, 2019.