

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Michael G. Nettles, Circuit Court Judge

ORIGINAL

TORREN M. EADY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002206

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to object to the jury instruction that malice “may be inferred from the use of a deadly weapon” in violation of this Court’s holding in State v. Belcher when there was evidence presented at trial that Petitioner was merely present at the scene of the shooting but was not the actual shooter therefore strongly mitigating his involvement and exempting him from the “inference of malice” instruction under Belcher?

STATEMENT

On April 6, 2012, Adrian King was shot and killed while on the front porch with three other people in North Charleston. At trial, Teresa Jenkins testified that she and Petitioner were dating at the time of the shooting and they were at Petitioner's house that afternoon. App. 77, l. 4 – 78, l. 9. Teresa stated that while she was over at Petitioner's house, his former girlfriend, Rochelle Grant, came over with several other people and confronted Petitioner. App. 80, l. 10 – 81, l. 11.

According to Teresa, after this altercation Petitioner left his house and returned later with Da'Quan, T.J. and Jigg. App. 85, ll. 5 – 9. T.J. allegedly had a shotgun with him and the four of them left the house together. App. 86, l. 19 – 87, l. 21. Teresa testified that the next thing she remembered hearing were gunshots. App. 89, ll. 16 – 24. After that, Petitioner came back to his house and Teresa gave him and Da'Quan a ride to downtown Charleston. App. 90, ll. 5 – 10; App. 92, l. 1 – 93, l. 9.

Gabrielle McCulley, one of the alleged victims, testified that she was at the location of the shooting which was less than two blocks from Petitioner's house. App. 110, ll. 6 – 23; App. 113, ll. 16 – 24. While she was on the porch with several other people, she stated that two individuals approached the house wearing all black and one of them was wearing a "black fisherman's hat." App. 115, ll. 13 – 24.

Gabrielle remembered: "One [man] asked if we knew something about somebody trying to gang them. I asked what they were talking about. He said, I know it wasn't none of y'all. Everything was good. And we thought he was about to leave and that's when somebody started

shooting.”¹ App. 116, ll. 8 – 12. Gabrielle did not know which of the two individuals was the shooter and she did not pick Petitioner out of a subsequent photo line-up. App. 116, ll. 13 – 15; App. 120, ll. 7 – 11.

Another one of the alleged attempted murder victims, Antione Foster, also testified at trial. App. 136, l. 1 – 165, l. 6. Antione was the only eye witness who picked Petitioner out of a photo line-up and claimed that Petitioner was the shooter. App. 153, l. 21 – 154, l. 25; App. 219, ll. 14 – 18. Antione testified that he did not know the identity of the second person who was there during the shooting. App. 150, l. 22 – 151, l. 4.

Petitioner was arrested on April 17, 2012 at his aunt’s house. App. 209, ll. 23 – 24; App. 276, l. 21 – 279, l. 5. When he was interrogated by Detective Reiter, Petitioner denied being involved in the shooting and stated he went downtown with Teresa after the altercation with Rochelle that took place at his house. App. 207, l. 24 – 208, l. 7. Petitioner’s cell phone records were obtained and introduced at trial along with testimony that Petitioner’s cell phone was in North Charleston at the time of the shooting, not in downtown as Petitioner had told law enforcement. App. 249, l. 16 – 250, l. 1; App. 262, l. 3 – 264, l. 8. Detective Reiter claimed that Petitioner admitted to being in possession of his cell phone for the entire duration of the night in question. App. 208, ll. 8 – 22.

Petitioner was indicted in August 2012 by the Charleston County Grand Jury for murder, three counts of attempted murder, and possession of a firearm during the commission of a violent crime. App. 549 – 563. His jury trial was held before the Honorable J.C. Nicholson from February 18, 2014 to February 20, 2014. App. 1. Petitioner was represented by Assistant Public Defenders Benjamin Lewis and Christina Parnell and the state was represented by Assistant

¹ Adrian King was killed. Gabrielle McCulley, Antione Foster, and Martell Brown survived the shooting. App. 549 – 559.

Solicitors Timothy Finch and Gregory Voigt. App. 1. The jury convicted Petitioner as charged on February 20, 2014 and Judge Nicholson sentenced him to forty-five years imprisonment for murder and concurrent sentences for the remaining charges. App. 366, l. 9 – 367, l. 7; App. 384, l. 16 – 385, l. 2.

Petitioner filed an appeal and was represented by Chief Appellate Defender Robert M. Dudek, of Appellate Defense. On appeal, appellate counsel raised the following two issues:

1. The court erred by refusing to charge “mere presence” and “mere association” are insufficient to convict where there were allegedly two men present at the time of the shooting, it was undisputed several eyewitnesses were unable to identify which one was the shooter, and where there was also evidence the shooter acted spontaneously since this instruction was necessary given the facts of this case; and
2. The court erred by allowing witness Teresa Jenkins to speculate that something “bad had happened” based on the way the appellant and the other man “were acting” when she dropped them off in Charleston on the day of the incident, since it was improper for the solicitor to elicit such improper speculation.

The South Carolina Court of Appeals affirmed Petitioner’s convictions. State v. Eady, 2016-UP-288 (filed June 15, 2016).

Petitioner filed an application for post-conviction relief on January 23, 2017 and was appointed Rodney D. Davis as counsel on March 9, 2017. App. 427 – 433. The state filed its Return and Motion to Dismiss on July 18, 2017 arguing that Petitioner failed to raise a claim for relief in his application. App. 434 – 441. On July 26, 2017 the Honorable Deadra Jefferson issued a Conditional Order of Dismissal giving Petitioner twenty days to respond with a reason why the Conditional Order should not become final. App. 443 – 451. Petitioner did not respond to the order and the Honorable Kristi Harrington signed the Final Order of Dismissal on May 21, 2018. App. 452 – 454. Petitioner then filed a Motion to Alter/Amend Judgment on June 6, 2018 and Judge Harrington issued an Order Vacating Dismissal on June 14, 2018. App. 455 – 457; App. 458.

Petitioner filed an amended application for post-conviction relief on July 2, 2018. App. 459 – 461. The state filed its amended return to this application on September 17, 2018. App. 462 – 471. An evidentiary hearing was held on October 3, 2018 in Charleston County before the Honorable Michael G. Nettles. App. 472 – 527. Rodney Davis represented Petitioner at the evidentiary hearing and Assistant Attorney General Benjamin Limbaugh represented the state. App. 472. Petitioner and his trial counsel, Benjamin Lewis, were the only witnesses called at the hearing. App. 473.

Petitioner argued at the PCR hearing that trial counsel was ineffective for failing to object to the trial judge instructing the jury that “inferred malice may also arise when the deed is done with a deadly weapon” in violation of this Court’s holding in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).² App. 519, l. 22 – 523, l. 3. At the PCR hearing, trial counsel testified that he did not object to this instruction even though he could have done so under Belcher. App. 492, ll. 12 – 22.

Trial counsel testified that the basic defense strategy was in challenging identity and arguing that Petitioner was not there or was not the shooter. App. 495, ll. 5 – 17. Counsel further stated that “it would’ve been tough to say, well, this was done in self-defense or this was done for some other justifiable reason . . . [s]o, we were sort of limited to identity.” App. 495, ll. 14 – 17. However, counsel also acknowledged that he argued to the jury in closing that “[Petitioner]’s brother who had a hairstyle that matched the original description of the person from who [he] believed to be unbiased witnesses said that . . . the actual shooter had dreads . . . [and Petitioner] did not.” App. 490, ll. 21 – 24. Furthermore, counsel requested a mere presence

² This Court recently overruled Belcher and held that trial courts should never instruct a jury that malice may be inferred from the use of a deadly weapon regardless of the evidence presented at trial. State v. Burdette, Op. No. 27910 (S.C. Sup. Ct. filed July 31, 2019).

instruction at trial in furtherance of his argument that Petitioner was not the shooter. App. 362, l. 14 – 363, l. 12.

Petitioner argued to the PCR judge that trial counsel was ineffective for failing to object to the trial court's instruction that 'malice may be inferred from the use of a deadly weapon' when that instruction was improper under Belcher. App. 519, l. 22 – 523, l. 3. The PCR judge denied relief on this issue and found that trial counsel was not ineffective for failing to object to this jury instruction. App. 545 – 546. Specifically, the PCR judge found that the "jury instruction was properly used by the trial judge because there was no evidence presented that would 'reduce, mitigate, excuse, or justify the homicide.'" App. 546; quoting State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). The PCR judge further found that "the defense strategy was to try to show that the [Petitioner] was not there or was not the shooter" and that "[trial counsel's] testimony concerning the case not . . . being one of self-defense to be dispositive in deciding this issue." App. 546.

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to object to the jury instruction that malice “may be inferred from the use of a deadly weapon” in violation of this Court’s holding in *State v. Belcher* when there was evidence presented at trial that Petitioner was merely present at the scene of the shooting but was not the actual shooter therefore strongly mitigating his involvement and exempting him from the “inference of malice” instruction under *Belcher*.

In order to prove ineffective assistance of counsel, Petitioner must show that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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.

Court’s use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient,” meaning that it fell below reasonable professional norms, and 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.

This Court held in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) that “a jury charge instructing 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.” Id. at 600, 685 S.E.2d at 803-804. Belcher was convicted of murder which stemmed from a family gathering in which the defendant intervened in an argument between the victim and a third party. Id. at 601, 685 S.E.2d at 804. The state alleged that Belcher shot the victim without any justification. Id. Belcher, on the other hand, argued that the victim had confronted him with a gun without provocation and Belcher then fled to a truck to retrieve a gun and shot the victim while the victim was approaching him. Id. The trial judge instructed the jury that “malice may be inferred from the use of a deadly weapon.” Id.

Belcher argued to this Court that this instruction was error because the evidence presented a jury question as to self-defense. Id. This Court agreed and reversed the trial court holding that instructing the jury that malice may be inferred from the use of a deadly weapon is an improper charge when there is evidence that would “reduce, mitigate, excuse or justify the killing.” Id. at 610, 685 S.E.2d at 809.

This Court again dealt with the issue of charging a jury that malice may be inferred from the use of a deadly weapon in State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). In Stanko, the defendant presented an insanity defense at his trial for murder and, pursuant to Belcher, objected to the trial judge giving the inferred malice instruction. Id. at 260, 741 S.E.2d at 712. In overruling the defendant’s objection, the trial judge stated that “I find nothing, absolutely nothing in the Supreme Court opinion that would so indicate . . . in any way, that it would be proper under these circumstances for the court to charge – or delete that as far as the inference of malice.” Id. at 263, 741 S.E.2d at 714. The Stanko Court found this to be error, holding that Appellant’s insanity defense was sufficient evidence to have “reduced, mitigated, or excused the victim’s murder.” Id.

In this case, trial counsel was ineffective for failing to object to the jury instruction that malice may be inferred from the use of a deadly weapon. Although trial counsel testified that this was never going to be a self-defense case, that did not end the analysis. Self-defense is not the only scenario where giving this jury instruction is improper. Counsel requested a mere presence instruction be given which, if believed by the jury, could have resulted in a not guilty verdict. See State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) (holding that mere presence at the crime scene was not sufficient to establish guilt). Counsel's request for a mere presence instruction showed that he was aware there was sufficient evidence in the record to mitigate Petitioner's involvement in the shooting. Thus, his failure to object to the "inference of malice" charge was ineffective.


Petitioner's trial counsel argued in closing that Petitioner was not the shooter. Realizing that the jury could have found that based on the cell phone records introduced during trial that Petitioner was in fact at the scene of the shooting rather than miles away in downtown Charleston, trial counsel requested the trial court to instruct the jury on mere presence. Counsel's request of the mere presence instruction demonstrates that he knew there was evidence in the record to mitigate Petitioner's involvement making the "inference of malice" instruction improper. Counsel should have objected to the "inference of malice" instruction because it was improper given that he argued to the jury that Petitioner was not the shooter.

If the jury found that Petitioner was merely present at the scene of the shooting but not the shooter then Petitioner's involvement would be "reduced, mitigated or excused." Because there was evidence presented at trial that Petitioner may have been present at the scene but not actually involved in the shooting, trial counsel was ineffective for not objecting to the court instructing the jury that malice could be inferred from the use of a deadly weapon. Therefore,

the PCR judge erred in finding that trial counsel was not ineffective for his failure to object to the trial court's jury instruction that malice may be inferred from the use of a deadly weapon. See State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013); State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully request this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of August, 2019.

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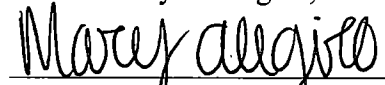
CERTIFICATE OF SERVICE

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 Torren M. Eady, #358893, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of August, 2019.



Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027.