

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Certiorari to Sumter County
Brian M. Gibbons, Post-Conviction Relief Judge

Appellate Case No. 2017-001172

TRE'VAUGHN JACKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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SC Court of Appeals

BRIEF OF RESPONDENT

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PCR Appeal Case #20173269

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ISSUES PRESENTED

PETITIONER'S 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 strategy 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?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE

Did the PCR court err in finding Petitioner failed to establish Trial Counsel was ineffective for failing to request a jury charge on the lesser-included offense of assault and battery of a high and aggravated nature where Trial Counsel articulated a reasonable trial strategy for not requesting a lesser-included offense charge, and where Petitioner not prejudiced by the instruction's omission?

STATEMENT OF THE CASE

Tre'Vaughn Jackson (Petitioner) is currently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. In November 2013, the Sumter County Grand Jury indicted Petitioner for two counts of attempted murder, possession of a weapon during the commission of a violent crime, unlawful carrying of a pistol, and discharging a firearm into a dwelling (2013-GS-43-1067). Assistant Public Defender Tiffany Butler (Trial Counsel) represented Petitioner. Assistant Solicitor John P. Meadors of the Third Circuit Solicitor's Office prosecuted the case. On August 28, 2014, Petitioner proceeded to a jury trial before the Honorable W. Jeffrey Young. The jury found Petitioner guilty as indicted for both counts of attempted murder, possession of a weapon during the commission of a violent crime, and discharging a firearm into a dwelling. The unlawful carrying of a pistol charge was dismissed. Judge Young sentenced Petitioner to a thirty-year term of imprisonment for each count of attempted murder, to run consecutively, as well as concurrent sentences of five years' imprisonment for possession of a weapon during the commission of a violent crime and ten years' imprisonment for discharging a firearm into a dwelling.

A notice of appeal was filed on Petitioner's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738 (1967) by Chief Appellate Defender Robert M. Dudek. The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Jackson, Op. No. 2016-UP-116 (filed on March 2, 2016). The Remittitur was issued on March 18, 2016.

Petitioner filed a timely application for post-conviction relief on April 11, 2016, alleging that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "...failing to object to the trial court's accomplice liability instructions when there was no evidence presented during trial to support such an instruction." (sic)
 - b. "...when counsel failed to object to the trial court's jury instruction of the hand of one is the hand of all charge, especially in light of the trial court's

request to counsel “any objection to the charge under the facts of this case?” Counsel merely stated “for the record” without establishing any particular argument as to why the instruction did not fit the facts of the case.” (sic)

- c. “...for failing to request a jury instruction on the lesser-included offense(s) of assault and battery with a high and aggravated nature and assault and battery in the first degree” (sic)
- d. “...for failing to object to the trial court’s jury instructions on “express malice” when the court used “hypothetical examples” of Applicant’s case, that a reasonable jurist could have concluded was a comment on the facts of the case.” (sic)
- e. “...for failing to object to the consecutive sentences handed down by the court since the crimes stemmed from a continuous course of conduct.”
- f. “...for failing to object to the trial court’s jury instructions when the court instructed the jury that “a specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury.”
- g. “...for failing to impeach State’s witness Lenard J. Johnson with this prior inconsistent statements made to trial counsel’s investigation that contradicted his trial testimony on material points”

2. “Denial of Due Process”

Respondent submitted its return on September 30, 2016. An evidentiary hearing was convened on November 8, 2016, at the Williamsburg County Courthouse before the Honorable Brian M. Gibbons. Applicant was present at the hearing and was represented by Timothy L. Griffith, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General’s Office. At the evidentiary hearing, Applicant presented testimony from Trial Counsel Butler. Applicant did not testify. Following the evidentiary hearing, Judge Gibbons denied and dismissed the application by Order signed April 25, 2017, and filed May 4, 2017. Thereafter, Petitioner filed a timely notice of appeal. Petitioner’s Petition for Writ of Certiorari and Appendix were filed on January 26, 2018. Respondent filed its Return to Petition for Writ of Certiorari on July 11, 2018. By Order dated July 25, 2018, the Supreme Court of South Carolina transferred this case to the South Carolina Court of Appeals pursuant to Rule 243(l) of the South Carolina Appellate Court Rules. On May 30, 2019, the South Carolina Court of Appeals

granted Applicant's petition for a writ of certiorari. On June 14, 2019, Petitioner filed his Brief of Petitioner. This brief follows.

STATEMENT OF THE FACTS

On August 29, 2013, Frank D. Cokeley got into a fistfight with Lenard Johnson, who called Cokeley's sister a "bitch." App. 144-145. Both Cokeley and Johnson ended the fight hit in the face and "bruised up." App. 146. Two days later, on August 31, Cokeley was sitting on the front porch of a home near his grandmother's house when he saw Johnson and Johnson's brother, Keith Williams, walking through his grandmother's yard. App. 146-147. Cokeley testified he began to fight the two men. App. 147. After he started bleeding from a hit above his eye, Cokeley took Williams' shirt off him and used it to wipe the blood off his face, then threw the shirt on the ground. App. 147. Cokeley's uncle and two others came outside to break up the fight, and everyone left the street. App. 148.

Twenty minutes later, Williams returned, warning Cokeley that there were four or five guys coming down the street with baseball bats and chains. App. 148. The armed men rushed onto the front porch and jumped on Cokeley, and the fight escalated into the house. App. 149. Cokeley hit one of the men in the head with a beer bottle, and all the men who attacked him left the house. App. 149. Fifteen to twenty seconds later, someone shot a gun into the house six times, hitting and severely injuring Cokeley as well as Sylvia Ann Welch, who was visiting the house to play a card game with her friends and her daughter. App. 149-151; App. 161-166. Cokeley and Welch were taken by ambulance to a hospital in Sumter, then airlifted to a trauma center in Columbia. App. 151. Both victims spent multiple weeks in the hospital and suffered long-term damage from their injuries. App. 151; App. 164.

Petitioner was identified as the shooter by multiple witnesses. Lenard Johnson testified at trial that, although there was more than one shooter,¹ he saw Petitioner shoot a gun into the trailer.

¹ The second alleged shooter was not found or prosecuted at the time of Petitioner's trial.

App. 310-311. Another witness, Santana Bolden, observed the shooter shoot into the trailer while she stood very close to him. App. 216. She testified that she recognized the shooter from seeing him pick someone up from her adult education class, and she was able to pick him out of a photo lineup. App. 220. She identified Petitioner as the shooter in the photo lineup. Bolden also identified Petitioner in court as the individual she saw shoot into the trailer on the day of the crime while she stood two feet away. App. 222-223.

Petitioner also gave a statement to Sergeant William Lyons, which was admitted at trial after a pre-trial admissibility hearing. The statement was recorded on an audio tape and played for the jury at trial. App. 275-276. Evidence was also presented that Petitioner called witness Lenard Johnson's sister on the phone from jail during his trial and asked her to tell her brother to change his testimony. App. 330-332. Petitioner did not present any witnesses or evidence in his defense at trial. Trial Counsel argued to the jury that Petitioner was not the shooter, and asserted the State's witnesses were not credible and the investigation surrounding the shooting was incomplete. She argued Petitioner was not involved in the fight and had no motive to shoot anyone involved in the fight. Essentially, Trial Counsel's strategy, as shown by the trial transcript, was to argue that Petitioner was simply not guilty at all.

The State argued in its closing argument the evidence was clear that Petitioner was the shooter. Assistant Solicitor Meadors argued Petitioner was guilty of attempted murder because his six shots into the trailer were accomplished with malice aforethought, which is a required element of the crime. Assistant Solicitor Meadors explained this case had evidence of both express and implied malice; that malice can be inferred from Petitioner's use of a deadly weapon, and that Petitioner's actions constituted "depraved heart" malice when he fired multiple times into an occupied dwelling, not caring who was inside. App. 345-46.

Before the jury charge, the trial judge asked if either party had any objections to the proposed jury charge. Trial Counsel responded that she had no objections. App. 342, line 12-16. She did not request a jury charge on the lesser-included offense of ABHAN. After jury charges and deliberations, the jury returned with a guilty verdict for both charges of attempted murder, discharging a firearm into a dwelling, and possession of a weapon during a violent crime.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo without deference to the lower court. Id. The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In a post-conviction relief proceeding, an applicant bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

The PCR court properly found Trial Counsel was not ineffective for failing to request a jury charge on the lesser-included offense of assault and battery of a high and aggravated nature where Trial Counsel articulated a reasonable trial strategy for not requesting a lesser-included offense charge, and where Petitioner was not prejudiced by any failure to request a lesser-included offense charge.

Petitioner argues the PCR court erred in failing to find Trial Counsel ineffective for failing to request a jury charge on the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). However, Trial Counsel was not deficient for failing to request an ABHAN charge because trial counsel articulated a reasonable trial strategy for not requesting a lesser-included offense charge. Furthermore, even if Trial Counsel's failure to request the ABHAN charge was deficient, there can be no resulting prejudice based on the strength of the evidence of Petitioner's intent to kill, because a jury would have reached an attempted murder conviction even if given the option to find ABHAN. Accordingly, the PCR court properly denied post-conviction relief, and this Court should affirm.

During Applicant's PCR hearing, Trial Counsel gave a reasonable trial strategy for her decision to not request a lesser-included jury charge. "[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Recognize, however, that a strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. Federal courts have held that it is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. Wood v. Allen, 558 U.S. 290 (2010).

Here, Trial Counsel testified, “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. Trial Counsel testified she makes her decision as to whether she will request a lesser-included offense charge on a case-by-case basis, after assessing the evidence. App. 475. As the PCR court properly ruled, this is a valid and acceptable reason to decide against requesting a lesser-included offense charge. See Abney v. State, 408 S.C. 41 (2014) (J. Pieper, concurring) (citing United States v. Estrada-Fernandez, 150 F.3d 491, 496 (“In deciding whether to request a lesser-included offense instruction, defense counsel must make a strategic choice; giving the instruction may decrease the chance that the jury will convict for the greater offense but it also may decrease the chance of an outright acquittal.”)); See also McKee v. State, 91 S.E.2d 814, 818 (Ga. 2004) (“Because counsel’s decision not to request the charge was a reasonable one in light of [an “all or nothing”] defense strategy, counsel’s performance cannot be deemed deficient.”); State v. Walker, 605 S.E.2d 647, 654 (N.C. Ct. App. 2004), vacated on other grounds, State v. Walker, 695 S.E.2d 750, 361 N.C. 160 (N.C. 2006) (“The record indicates defendants’ counsel were employing an “all or nothing” strategy...The strategy failed. The fact that it failed does not mean that defendants were deprived of effective assistance of counsel.”); Demurjian v. State, 727 So.2d 324 (Fla. Dist. Ct. App. 1999). Had Trial Counsel requested the ABHAN jury charge, the jury would have been given another opportunity to convict Applicant of a crime, as opposed to finding him not-guilty.

The record reflects Trial Counsel was pursuing an “all or nothing strategy” in many ways including, but not limited to: (1) emphasizing Petitioner was not involved in the initial altercation and, therefore, had no motive to shoot into the trailer; (2) questioning Lenard Johnson about conversations between Johnson and Trial Counsel’s investigator, in which Johnson stated to the investigator that he “told the police what [he] thought [police] wanted to hear”; (3) cross-examining witnesses regarding their statements identifying Petitioner as a shooter; and (4) calling

into question the reliability of Lenard Johnson's testimony given that he had incentive to implicate Petitioner. See e.g. App. 324, l. 20-25; 325, l. 1-25; 366-372. Accordingly, the PCR court properly found that Trial Counsel employed a reasonable strategy.

Furthermore, there can be no prejudice from Trial Counsel's failure to request an ABHAN charge because even if the charge had been given, the jury would have found Petitioner guilty of attempted murder. The strong evidence of Petitioner's actions shows an intent to kill and malice. Even if the charge had been requested, it is extremely likely the jury would still have found intent to kill and malice based on the evidence presented.

This case is similar to State v. Middleton, where the defendant approached a stopped vehicle on a moped and fired a handgun five times into the passenger-side window. Middleton, 407 S.C. at 314, 755 S.E.2d at 433. Middleton was charged with attempted murder, and the trial court denied his request for a charge on the lesser-included offense of ABHAN. Although the court found error under the particular facts of that case, it found the error was harmless based on the overwhelming evidence of Middleton's intent to kill with malice. In determining the error was harmless, the court explained:

In the instant case, the evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of attempted murder, given the facts that Appellant deliberately drove up to the passenger window and shot into the vehicle at least five times, and Stephens testified that the only reason he and Mack were not injured is because he had the wherewithal to jump into the driver's seat and run Appellant off the road. In our view, there is no other way to construe the evidence in this case but that Appellant was attempting to kill Stephens and Mack. Therefore, we hold any error in failing to charge the lesser-included offense harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt.

Middleton, 407 S.C. at 319, 755 S.E.2d at 436 (citations omitted).

Here, Petitioner similarly cannot show any adverse result from not receiving a jury instruction on ABHAN. The evidence presented supported a conclusion Petitioner intentionally

fired the gun six times into an occupied trailer during an ongoing altercation, which constituted compelling evidence of his malice and intent to kill.² There was no testimony or other evidence presented to refute this account of events, other than the argument that Petitioner was simply not the shooter at all. Therefore, the evidence presented in this case can only reasonably lead to the conclusion that Petitioner was either guilty of attempted murder or not guilty. Accordingly, the jury's verdict would not have been any different even if Trial Counsel had requested an ABHAN charge.

Therefore, because there is no deficiency or prejudice, this Court should affirm the PCR court's ruling denying post-conviction relief.

² It should be noted that the underlying incident and Petitioner's trial occurred before the ruling of State v. King, 422 S.C. 47 (2017), which held that attempted murder required proof that defendant had specific intent to kill.

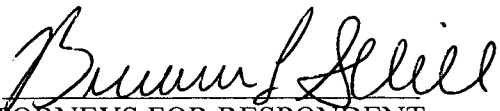
CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the PCR court's ruling denying post-conviction relief.

Respectfully submitted,

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