

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Clifton Newman, Circuit Court Judge

Appellate Case No. 2019-001925

Stewart R. Ard, Respondent,

v.

State of South Carolina, Petitioner.

Motion for Appeal Bond

Pursuant to Rule 243(k), SCACR, Stewart Ard moves this Court for an order granting him an appeal bond while the State seeks to appeal the Circuit Court's order granting him Post-Conviction Relief ("PCR").

I. Procedural and Factual Background.

The State initially charged Mr. Ard with four counts of assault and battery by mob, second degree. On April 9, 2014, the Richland County Grand Jury indicted Mr. Ard for attempted murder, three counts of second-degree assault and battery, and carrying a concealed weapon. On May 23, 2014, the State noticed its intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45.

From June 23-25, 2014, the State tried Mr. Ard before the Honorable James R. Barber, III and a jury. Kathryn "Luck" Campbell Hubbird, Dolly Justice Garfield, and Ramie Shalabi represented the State. Aimee J. Zmorczek and M. Wade Downtin

represented Mr. Ard. The jurors found Mr. Ard guilty of attempted murder, two counts, of second-degree assault and battery, third-degree assault and battery as a lesser-included offense of second-degree assault and battery, and carrying a concealed weapon. Judge Barber sentenced Mr. Ard to life imprisonment without the possibility of parole for attempted murder, a consecutive term of three years for second-degree assault and battery, and concurrent terms of three years for second-degree assault and battery, ninety days for carrying a concealed weapon, and thirty days for third-degree assault and battery.

Mr. Ard appealed his convictions and sentences. David Alexander represented Mr. Ard on appeal and filed an *Anders*¹ brief. The Court of Appeals affirmed Mr. Ard's convictions and sentences. *State v. Ard*, Unpublished Opinion No. 2016-UP-243 (filed June 1, 2016).

On October 19, 2016, Mr. Ard, through undersigned counsel, filed a PCR application asserting twelve grounds of ineffective assistance of trial counsel and two grounds of ineffective assistance of appellate counsel. On July 13, 2017, the State filed its return. On December 13, 2017, the Honorable Clifton Newman convened an evidentiary hearing. Charles Grose represented Mr. Ard. Jessica Kinard represented the State. At the conclusion the evidentiary hearing, Judge Newman called for proposed orders. Mr. Ard submitted his proposed order on February 13, 2018. Because of turnover in the Attorney General's Office, the State ordered a transcript of the evidentiary hearing and submitted its proposed order on August 16, 2018.

¹ *Anders v. California.*, 386 U.S. 738 (1967).

By written order filed on February 19, 2019, Judge Newman granted Mr. Ard's PCR application, in part, ordering a new trial on the attempted murder charge, because trial counsel failed to object to the trial judge instructing the jurors that attempted murder is a general intent crime. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017) (attempted murder required proof that defendant had specific intent to kill); *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) ("Attempted murder would require the specific intent to kill and conduct towards that end."). *See also State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery."); *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) ("Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime.") (citing *Sutton, supra*)).

On March 1, 2019, the State filed a Rule 59(e), SCRPC motion. On September 20, 2019, Judge Newman convened a hearing on the State's motion. By written order dated October 25, 2019, corrected on October 30, 2019, Judge Newman denied the State's Rule 59(e) motion. On November 20, 2019, the State file a notice of appeal.

II. Relevant Legal Principles.

A post-conviction relief applicant may be admitted to bail after the service of the notice of appeal by either the applicant or the State. Where the sentence originally imposed did not exceed imprisonment for ten (10) years, the petition for bail shall be made to the lower court. In all other cases, the petition for bail shall be made to the Supreme Court.

Rule 243(k), SCACR. The factors to be considered in admitting a person to bail pending appeal in PCR cases include the the probability of prevailing on appellate review, the seriousness of the crime involved, the potential danger the person may pose to the

community if released, the risk of flight, and the character and circumstances of the person. *Id.*; see also *In re Michael H.*, 360 S.C. 540, 553, 602 S.E.2d 729, 736 (2004) (citing *Nichols v. Patterson*, 202 S.C. 352, 25 S.E.2d 155 (1943)).

Mr. Ard has a strong chance of success on the merits of the appeal. As the court below concluded, *Sutton, Thompson, and Nesbitt* placed trial counsel on notice to object to the trial judge's instruction that attempted murder was not specific intent crime. The State's position is that *King*, which was decided after Mr. Ard's trial, could not have placed trial counsel on notice to object to the jury instruction. The State made a similar argument in *Briggs v. State*, regarding "the permissible limits of a forensic interviewer's testimony in the context of the prohibition against improper bolstering," asserting the standards made clear in [cases decided after 2010] were not so clear when *Briggs* was tried in 2010." 421 S.C. 316, 322, 806 S.E.2d 713, 716 (2017). This Court rejected the State's argument because, based on the pre-2010 decisions, a "reasonably competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose." *Id.* 421 S.C. at 325, 806 S.E.2d at 718. Mr. Ard will ask this Court to apply a similar analysis and reach a similar conclusion regarding the impact of *Sutton, Thompson, and Nesbitt*—that these cases placed trial counsel on notice to object to a jury instruction that attempted murder is a general intent crime.²

² This Court recently refused to reach the merits of issues because trial counsel did not object to the trial court instructing the jurors attempted murder is not a specific intent crime. *State v. Williams*, 427 S.C. 148, 155, 829 S.E.2d 702, 705 (2019) ("Petitioner did not argue the trial court erred in instructing the jury that attempted murder was a general-intent crime to which transferred intent applied, or that he (Petitioner) was entitled to a new trial based on that error of law alone.").

If Mr. Ard is released on an appeal bond, then he would live with Christine Lindale at 3319 Highway 23, Ridge Spring, South Carolina 29129. He would work for Southern Industrial, which is where Mr. Ard worked previously. Ms. Lindale contacted Charles McManus, who is Mr. Ard's former supervisor at Southern Industrial. Mr. McManus informed Ms. Lindale that Mr. Ard would have a position at Southern Industrial, if he is released on an appeal bond. See attached Affidavit of Christine Lindale.

Mr. Ard acknowledges his prior criminal record and that attempted murder is a serious crime. Nevertheless, this Court could "impose other conditions" of bond, such as monitored house arrest, that would provide adequate assurances that Mr. Ard would not be a flight risk or danger to the community. Rule 243(k), SCACR.

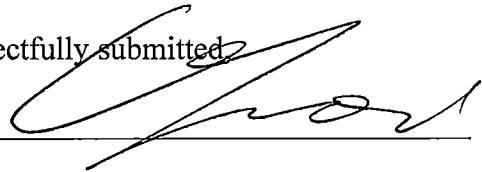
III. Conclusion.

For the foregoing reasons, this Court should grant Stewart Ard and appeal bond with appropriate conditions.

IT IS SO MOVED.

Respectfully submitted,

By



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January 21, 2020
Greenwood, South Carolina

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Certificate of Service

I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

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January 21, 2020.

