STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

BILAL S. HAYNESWORTH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001249

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

In this trial for attempted murder, did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the implied malice charge when the trial judge found there was evidence to support the lesser included offense of assault and battery first degree and the trial judge instructed the jury on the law of assault and battery first degree?

STATEMENT

In August of 2013, the Lexington County Grand Jury indicted Petitioner, Bilal S. Haynesworth, for attempted murder, possession of a weapon during the commission of a violent crime and conspiracy, indictments #2013-GS-32-2373, 2374, 2375. (App. pp. 407-412). On May 19, 2014, Petitioner proceeded, with his co-defendant and brother, Lywone Shatete Capers, to jury trial before the Honorable Thomas A. Russo. David M. Mauldin represented Petitioner at trial. The jury found both guilty as charged. Judge Russo sentenced them both to twelve (12) years for attempted murder, five (5) years concurrent for the weapon charge and five (5) years concurrent for conspiracy. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Haynesworth, Op. No. 2016-UP-119 (S.C.Ct.App. filed March 2, 2016). Petitioner filed a petition for rehearing that was denied on April 21, 2016. Petitioner then filed a petition for writ in the South Carolina Supreme Court. The petition was denied on March 8, 2017.

On February 2, 2018, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on May 9, 2018. On April 5, 2019, an evidentiary hearing was held before the Honorable Walton J. McLeod, IV. Arthur K. Aiken represented Petitioner at the PCR hearing. Johnny E. James, Jr. represented the State. In a written order filed June 27, 2019, Judge McLeod denied relief and dismissed the application. A timely notice of intent to appeal was served on July 25, 2019. This petition for writ of certiorari follows.

ARGUMENT

In this trial for attempted murder, the PCR judge erred in refusing to find trial counsel ineffective for failing to object to the implied malice charge when the trial judge found there was evidence to support the lesser included offense of assault and battery first degree and the trial judge instructed the jury on the law of assault and battery first degree.

The jury found Petitioner guilty of shooting into a house where JayQuan Bell lived. No one was injured during the shooting. Petitioner denied shooting into the house. (App. p. 296, line 20 – p. 297, lines 1-4). There was an ongoing argument between Petitioner and Bell that involved the mother of Bell's child. (App. p. 159, line 25 – p. 160, lines 1-5). The argument included threats on Facebook. (App. pp. 286-289, pp. 167-170). According to Bell, earlier in the morning on the day of the incident Petitioner's brother and co-defendant, Lywone Shatete Capers, threatened Bell and his grandmother. (App. p. 141, line 6 – p. 142, line 1). Soon after on the same morning there was a confrontation between Petitioner and Bell in the parking lot of an Exxon gas station. (App. p. 293, line 11 – p. 294, lines 1-21; p. 145, line 5 – p. 146, 147, 148, lines 1-10). Petitioner's mother, brother and a family friend were present as was Bell's grandmother.

According to Bell, five minutes after leaving the gas station and returning home Petitioner and his brother drove by and shot into the house. (App. p. 148, line 14 – p. 149, 150, 151, lines 1-20). Petitioner denied driving to Bell's house. Instead, Petitioner testified that after leaving the gas station, he drove to the alternative school to pick up a friend but once he realized he was too early, he returned home. (App. p. 294, line 22 – p. 295, lines 1-23). Petitioner testified that his mother and brother, Capers, followed him to the alternative school and then followed him home. (App. p. 295, line 24 – p. 296, lines 1-11). Petitioner's mother, Tammy

Coleman, testified at trial and confirmed that she and Petitioner's brother followed Petitioner to the alternative school and then back home. (App. p. 313, line 4 – p. 314, 315, lines 1-13).

During the charge conference Petitioner requested an instruction on the lesser included offense of assault and battery first degree. (App. p. 324, line 9 – p. 325, 326, lines 1-23). The State objected. The State argued that Petitioner was not entitled to the lesser included offense because he presented an alibi defense. (App. p. 324, line 18 – p. 325, line 1). The State then argued, "Your Honor, the only thing that I would further add is under the State v. Belcher case and the State v. Miller case – State v. Belcher is 385 S.C. 597, and State v. Miller is 397 S.C. 630 – that the inference of malice can be used in this case because there's no indication of mitigation evidence in this case. Whereas there's no self-defense argument or anything like that. So I would say that malice could be inferred in that act, and I would also argue that charge would come in, in your jury charge." (App. p. 326, lines 9-18).

The trial judge agreed to charge the lesser included offense of assault and battery first degree and stated, "Okay. Well, I'm going to note that objection. But I think the evidence in the case, the way the case has been presented, the evidence that's before the jury, there is evidence which would completely support a conviction of Assault and Battery First Degree as evidence that I think would completely support a conviction for Attempted Murder, depending on how the jury views the evidence, or an outright acquittal – depending on how the jury views the evidence. So I'm going to grant the motion and note the objection." (App. p. 327, lines 13-22). The inference of malice charge was not discussed.

When instructing the jury with the law of attempted murder the judge said:

> Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. The following are

> examples of instruments which may be deadly weapons: A pistol, a shotgun, a rifle, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, or a firebomb. A gun may be a deadly weapon even if it's not operating.
>
> If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you, the jury, along with other evidence in the case. And you may give it whatever weight you decide it should receive.

(App. p. 374, line 16 – p. 375, lines 1-6). The judge correctly instructed the jury that a specific intent to kill is an element of attempted murder. (App. p. 375, lines 7-8). Trial counsel failed to object to the inferred malice charge. (App. p. 382, lines 6-8).

In the second amendment to the PCR application Petitioner alleged that. "The trial court erred in giving a jury instruction that '[I]nferred malice may arise when the deed is done with a deadly weapon.' (Tr. p. 374 ll. 16-17) State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Trial counsel rendered deficient representation to Haynesworth at trial when he failed to object to the trial court's jury instruction permitting the jury to infer malice from the use of a deadly weapon. Haynesworth was prejudiced by the failure." (App. p. 444).

During the PCR hearing trial counsel admitted that he did not consider objecting to the inferred malice charge. (App. p. 486, lines 19-20). When asked why not, trial counsel answered:

> Well, my interpretation of Belcher, I guess at that time, was that the evidence of reducing, excusing, and mitigate would be something along the lines that it was evidence that it would be something in self-defense or an accident or something of that nature.
>
> The fact that I requested and was allowed a lesser included, I did not contemplate that as such a thing to object to by charge. Basically, our defense was alibi and not that he was shot at and he shot back or that he was waving a gun out of a car and it accidently went off or anything like that. The thrust of the defense was, basically, that he had this alibi-type thing where they had left the gas station and had gone home.

(App. p. 486, line 22 – p. 487, lines 1-13).

In the order of dismissal the PCR judge wrote:

> The court finds Belcher was distinguishable from the present case. Notwithstanding the trial court's cautious concession to Applicant to charge the jury on the lesser-included offense of assault and battery, first degree, no evidence was presented a trial to reduce, excuse, mitigate, or justify the acts committed. Applicant shot into a house in which the victims were known to reside. Applicant did not advance any facts to show self-defense, accident that his intent was something other than the death of the victims, or that his actions were compelled by the sudden heat of passion. Applicant's defense was that he was not there and did not commit the acts alleged. Counsel incorrectly narrows the applicability of Belcher to only cases of self-defense but is correct in his belief that the instruction of a lesser included offense *alone* does not trigger Belcher's prohibition, especially where the lesser-included was instructed based solely on the jury's ability to reject the State's evidence in part and accept it in part. Geiger[1], supra; see also State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652, 653-54 (Ct.App. 2012) ("Belcher does not prohibit the trial court from instructing the jury that it may infer malice from the use of a deadly weapon where the only question created by the evidecne is whether the defendant is the person who committed ABWIK[,]" where the trial court also charged ABHAN.).

(App. p. 510).

The PCR judge found that State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018) was not applicable because the decision in Shands became final after Petitioner's 2014 trial. (App. pp. 510-511). The PCR judge also distinguished the present case from Shands, again finding no facts to reduce, excuse, mitigate or justify shooting into the house. (App. p. 511). Finally, the PCR judge found no prejudice because the State did not argue that malice could be inferred from the use of a deadly weapon in closing and because there was overwhelming evidence of malice. (App. pp. 511-512). The PCR judge erred.

In State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the South Carolina Supreme Court wrote:

> Today we return to the rationale underlying *Hopkins, Levelle* and *Jackson* and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.[9] The permissive inference charge concerning the use of a

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[1] State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct.App. 2006).

deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

While in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the South Carolina Supreme Court held that regardless of the evidence presented at trial, trial courts shall not instruct the jury that the element of malice may be inferred when the deed is done with a deadly weapon, Belcher was the law at the time of Petitioner's trial. In the present case the trial judge erred in instructing the jury that malice could be inferred from the use of a deadly weapon because there were facts presented that would reduce the shooting into a house from attempted murder to assault and battery first degree. As the PCR judge correctly found in the order of dismissal, trial counsel erroneously believed that Belcher was limited to self-defense. Trial counsel was ineffective in failing to object to the inference of malice charge.

S.C. Code §16-3-29 Provides, "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."

S.C. Code §16-3-600(C)(emphasis added) provides:

(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:
(a) injures another person, and the act:
(i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or
(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
(b) offers or attempts to injure another person with the present ability to do so, and the act:
(i) is accomplished by means likely to produce death or great bodily injury; or
(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

(2) A person who violates this subsection is guilty of a felony, and, upon conviction, must be imprisoned for not more than ten years.

(3) Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and **attempted murder, as defined in Section 16-3-29.**

Based on the facts presented by the State, there is evidence from which the jury could infer that Petitioner committed assault and battery first degree, a lesser included offense of attempted murder. Shooting into an occupied house is an offer or attempt to injure another with the present ability to do so and the act of shooting into an occupied house is likely to produce death or great bodily injury. It was up to the jury to decide if this act was done with malice as required for attempted murder. "Where there is evidence from which the jury could infer that the defendant committed a lesser offense, the trial judge must submit the lesser-included offense to the jury. State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004); State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993)." State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). The trial judge would have erred if he had failed to charge the lesser included offense. The PCR judge erred in finding there were no facts presented that would reduce the shooting into a house from attempted murder to assault and battery first degree.

The present case is easily distinguished from State v. Geiger and State v. Price cited in the order of dismissal. In both cases there was no evidence to show that the defendant was guilty only of the lesser included offense. In State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct.App. 2006), the Court of Appeals found that the evidence did not warrant an instruction on assault and battery of a high and aggravated nature as a lesser included offense of assault with intent to commit sexual conduct in light of the victim's undisputed testimony that defendant put a gun to her head, put his penis in her mouth and attempted to force her legs apart to have sexual intercourse.

In State v. Price, 400 S.C. 110, 114, 732 S.E.2d 652, 654 (Ct. App. 2012), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the Court of Appeals found no error in the judge instructing the jury that malice could be inferred from the use of a deadly weapon because there was no evidence that could reduce, mitigate, excuse or justify the assault and battery with intent to kill. In Price the shooter raised the gun, pointed it at the victim, approached as victim held his hands up and then shot the victim in the neck. The Court found there was no evidence that would reduce the acts to only assault and battery of a high and aggravated nature.

The State's evidence of a shooting into a house in the present case, unlike the acts in Geiger and Price, could show that Petitioner was guilty only of the lesser included offense of assault and battery first degree. The fact that Petitioner presented an alibi defense and denied being involved in the shooting should not preclude a proper instruction on malice. In this case, the improper instruction on inferred malice prejudiced Petitioner.

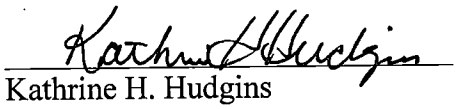
A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel 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 deficient for failing to object to the inferred malice charge pursuant to Belcher. Petitioner was prejudiced by the deficient performance. The improper implied malice charge prevented the jury from properly considering the lesser included offense of assault and battery first degree.

CONCLUSION

Based on the above argument, 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 9th day of March, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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BILAL S. HAYNESWORTH,

PETITIONER

V.

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RESPONDENT

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 Taylor Z. Smith, 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 Bilal Sincere Haynesworth, #360072, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 9th day of March, 2020.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of March, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 29, 2020