STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

ORIGINAL

Honorable R. Keith Kelly, Circuit Court Judge

KERWIN S. PARKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001575

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the judge's instruction to the jury that malice could be inferred from the use of a deadly weapon when there was evidence that would have reduced the charge from assault and battery with intent to kill to assault and battery of a high and aggravated nature and counsel was aware of the challenge to the implied malice charge decided in State v. Belcher, a case that was decided before Petitioner was sentenced but was pending at the time the judge instructed the jury?

STATEMENT

In April of 2007, the Lexington County Grand Jury indicted Petitioner, Kerwin S. Parker, for murder, possession of a firearm during the commission of a violent crime and assault and battery with intent to kill, indictments #07-GS-32-1540, 1541, 1542. (App. pp. 917-920; p. 19, lines 16-20). On September 14, 2009, Petitioner proceeded to a joint jury trial with his brother and co-defendant, Curtis T. Johnson. Johnson was charged with murder, two counts of assault and battery with intent to kill and possession of a firearm during the commission of a violent crime. (App. p. 19, lines 21-25) Jack Duncan represented Petitioner at trial. Elizabeth Fullwood represented the co-defendant. Donald V. Myers and Colleen E. Dixon prosecuted the case. The Honorable Robin B. Stillwell presided over the joint trial. The jury found Petitioner not guilty of murder but guilty of assault and battery with intent to kill and possession of a firearm during the commission of a violent crime. (App. p. 877, lines 1-13). The jury found the co-defendant guilty of the lesser included offense of voluntary manslaughter, guilty of two counts of the lesser included of assault and battery of a high and aggravated nature and possession of a firearm during the commission of a violent crime. (App. p. 876, lines 8-25). The judge delayed sentencing until a presentence investigation could be completed. (App. p. 878, line 13 – p. 879, lines 1-13). On October 21, 2009, Judge Stillwell sentenced Petitioner to an aggregate twenty (20) year sentence. (App. p. 913, line 22 – p. 914, lines 1-4; p. 921-922). Judge Stillwell sentenced the co-defendant to an aggregate thirty-five (35) year sentence. (App. p. 914, lines 5-22).

A timely notice of intent to appeal was filed and the direct appeal perfected by Deputy Chief Appellate Defender Wanda H. Carter. As a result of the trial transcript missing portions, a reconstruction hearing was held on October 3, 2011. The final briefs were filed with the South

Carolina Court of Appeals in February of 2013. The Court of Appeals affirmed the conviction and sentence. State v. Parker, 2013-UP-403 (S.C.Ct.App. filed October 30, 2013). A petition for rehearing was filed and then denied on December 27, 2013. A petition for writ of certiorari was filed and then denied on July 24, 2014.

On September 2, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on September 23, 2015. On November 10, 2016, an evidentiary hearing was held before the Honorable R. Keith Kelly. Aimee J. Zmroczek represented Petitioner at the PCR hearing. Johanna Valenzuela represented the State. In a written order signed July 3, 2019, Judge Kelly denied relief and dismissed the application. A timely motion to alter or amend was filed on July 24, 2019, and denied on August 19, 2019. A timely notice of intent to appeal was served on September 13, 2019. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the judge's instruction to the jury that malice could be inferred from the use of a deadly weapon when there was evidence that would have reduced the charge from assault and battery with intent to kill to assault and battery of a high and aggravated nature and counsel was aware of the challenge to the implied malice charge decided in State v. Belcher, a case that was decided before Petitioner was sentenced but was pending at the time the judge instructed the jury.

On the evening of November 19, 2006, and early morning of November 20, 2006, Petitioner and his brother and co-defendant Curtis Johnson drove to Isaak Wilson's apartment and confronted Isaak Wilson, A.J. Wilson and Walter Gadson about an earlier physical altercation involving Gadson, Isaak Wilson and Johnson. (App. p. 151, line 1 – p. 152, lines 1-25). There was conflict between Johnson and Isaak Wilson because of Rebekah Fleming. Fleming was Johnson's ex-girlfriend and the mother of his child but she had recently started to talk about dating Isaak Wilson. (App. p. 655, lines 14-16; p. 109, lines 3-7; p. 110, lines 3-12). During the confrontation, Isaak Wilson was fatally shot, A.J. Wilson was shot and Gadson was hit by a car.

A.J. Wilson is Isaac Wilson's cousin and was living with Isaac at the time of the shooting. (App. p. 239, lines 13-18). A.J. Wilson testified at trial that on the night of the shooting he was asleep at their apartment when he received a phone call from Isaac Wilson telling him they had been in a fight. (App. p. 241, lines 7-15). A.J. Wilson testified that shortly after receiving the phone call Isaac Wilson and Walter Gadson returned to the apartment. (App. p. 241, line 23 – p. 242, lines 1-2). Amy Fleming, Gadson's girlfriend, and her sister, Rebekah Fleming were already at the apartment. (App. p. 241, lines 17-22). Gadson and Amy Fleming were also living at Isaac Wilson's apartment in November of 2006. (App. p. 240, lines 17-24).

A.J. Wilson testified that while they were in the apartment Gadson heard somebody and went outside. (App. p. 244, lines 4-8). Gadson came back in and told them that the co-defendant, Curtis Johnson, was outside. (App. p. 244, lines 10-12). A.J. Wilson admitted that at that point Isaac Wilson got his shotgun and the three men went outside. (App. p. 244, lines 13-25). A.J. Wilson claimed that he did not have a gun but admitted that he had ecstasy and weed. (App. p. 245, lines 8-12). According to A.J., Petitioner came around the side of the apartment and asked, "[W]hy ya'll did that to my brother?" (App. p. 246, line 18 – p. 247, 248, lines 1-2). A.J. Wilson testified that although he did not see a gun, he saw Petitioner reach for something and yelled that Petitioner had a gun. A.J. claimed that he then took off running. (App. p. 249, lines 5-25). According to A.J., he made it inside the apartment and up some stairs when he heard gunshots and ran back outside to the patio. (App. p. 250, line 1 – p. 251, lines 1-13). He testified that he saw the co-defendant, Curtis Johnson, standing over Isaac Wilson. (App. p. 251, line 11 – p. 252, lines 1-2). According to A.J., as he was trying to pull the co-defendant off of Isaac, Petitioner shot A.J. (App. p. 252, line 3 – p. 253, 254, lines 1-20).

Gadson also admitted at trial that when Isaac Wilson learned that Petitioner and Johnson had come to the apartment, Isaac Wilson went upstairs and got his shotgun. (App. p. 157, lines 1-22). At trial Gadson claimed that when A.J. Wilson yelled that Petitioner had a gun (even though A.J. admitted he did not see Petitioner with a gun at that point), A.J. and Isaac Wilson ran toward the patio and Gadson "caught" the shotgun Isaac Wilson had. (App. p. 169, line 5 – p. 170, lines 1-4). According to Gadson, when he caught the gun Curtis Johnson, the co-defendant, aimed his SUV toward Gadson and drove toward him. (App. p. 170 line 6 – p. 171, lines 1-20). Gadson testified that he tried to shoot the SUV to stop it from hitting him but the safety was on the gun. (App. p. 170, lines 6-10; p. 171, lines 14-19). The SUV hit Gadson. (App. p. 172, lines

2-4). Gadson testified that Johnson got out of the SUV with a gun in his hand. (App. p. 173, line 19 – p. 174, lines 1-4).

At trial Johnson testified that during the first altercation Gadson was armed with a gun. (App. p. 670, line 12). Johnson testified that after that first altercation he and Petitioner went to talk with Isaac Wilson and Gadson and try to work things out. (App. p. 678, lines 3-24). Johnson drove Petitioner's SUV to the apartment, parked and Petitioner told Johnson to stay in the SUV. (App. p. 686, lines 5-17). Johnson testified that after Petitioner got out of the SUV, he saw three guys coming out of the back of the apartment armed with three shotguns. (App. p. 687, line 24 – p. 688, lines 1). Johnson identified two of the men as Isaac Wilson and Walter Gadson and described the weapons all three men carried. (App. p. 688, lines 1-25). Johnson testified that he heard Isaac Wilson say, "[W]e're going to shoot the niggers." (App. p. 691, lines 9-10; p. 692, lines 9-10).

During the reconstruction hearing Johnson testified that the three men had their shotguns pointed at Petitioner and Petitioner stated, "[P]lease, please, put the gun down. We just came to talk." (App. p. 944, lines 1-24). Rebekah Fleming agreed that she provided a statement that she heard Petitioner say, "[W]e don't have to shoot no one. We can fight it out or we can just talk about it." (App. p. 128, line 24 – p. 129, lines 1-2). Johnson testified that Petitioner told the men, "[O]kay, okay, you know, we didn't come here to harm anybody, we just came to talk about the situation which just occurred, but since we can't talk, me and my brother now we're just going to leave." (App. p. 945, lines 5-8). Petitioner crouched down with his hands up. (App. p. 945, lines 14-22). Johnson testified that as Petitioner was trying to leave Gadson cocked his shotgun and ran toward Petitioner. (App. p. 946, lines 6-8). Johnson then drove toward Walter Gadson to prevent him from shooting his brother. (App. p. 948, lines 22-25).

When the SUV crashed Johnson saw A.J. Wilson holding Petitioner back and Isaac Wilson pointing his gun at Petitioner. (App. p. 952, lines 16-20). Johnson took Petitioner's registered gun out of the glove box and shot once out of the window of the SUV. (App. p. 953, lines 13-22). When Johnson was able to squeeze out of the wrecked SUV, he saw A.J. Wilson holding Petitioner down with Isaac Wilson still holding the gun to Petitioner's face. (App. p. 954, lines 5-18). Johnson admitted shooting A.J. Wilson five times and then shooting Isaac Wilson twice. (App. p. 954, line 23 – p. 955, lines 1-3). Johnson testified that he shot the men in order to save his brother, the Petitioner's life. (App. p. 955, lines 2-3).

In defining murder the judge instructed the jury that, "An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case." (App. p. 852, lines 1-5). There was no objection to the implied malice charge at this point. The judge instructed the jury on the law of assault and battery with intent to kill [ABWIK] as it existed at the time. (App. p. 855, line 25 – p. 856, 857 line 1). The judge specifically instructed the jury, "In order to, in order to prove assault and battery with intent to kill, the State must prove, beyond a reasonable doubt, that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought." (App. p. 855, line 25 – p. 856, lines 1-4). The judge then instructed the jury on the law of the lesser included offense of assault and battery of a high and aggravated nature stating:

> Ladies and gentlemen, I have previously given you the charge as to malice and I have previously defined that for you. Now, if you find that the State has not proven the defendant guilty of assault and battery with intent to kill, you must then determine whether the State has proved that the defendant is guilty of assault and battery of a high and aggravated nature. Assault and battery of a high and aggravated nature includes all the elements of assault and battery with intent to kill except malice. In addition, the State must prove, beyond a reasonable doubt, an aggravating circumstance. The difference between assault and battery with

> intent to kill and assault and battery of a high and aggravated nature is the presence or absence of malice.

(App. p. 857, lines 2-15). The judge then instructed the jury on circumstances of aggravation including the use of a deadly weapon and the infliction of serious bodily injury. (App. p. 857, lines 16-24). There was not objection to the jury charge. (App. p. 868, line 2).

The jury found Petitioner not guilty of the murder of Isaac Wilson but guilty of assault and battery with intent to kill A.J. Wilson and guilty of the weapon charge. (App. p.877, lines 1-13). Prior to reaching a verdict the jury asked the judge about the difference between murder and voluntary manslaughter and at what point does malice determine murder or voluntary manslaughter. (App. p. 870, lines 16-21). The judge recharged the jury on the law of murder, including the implied malice charge and the law of voluntary manslaughter. (App. pp. 871-874). Again, there was no objection. The judge delayed sentencing until a presentence investigation could be completed. (App. p. 878, line 13 – p. 879, lines 1-13).

Sentencing took place on October 21, 2009, after the South Carolina Supreme Court decided State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), decided October 12, 2009. At sentencing Petitioner moved for a new trial based on the Belcher case. (App. p. 886, line 19 – p. 887, lines 1-20). The trial judge denied the motion for new trial. (App. p. 889, line 5 – p. 890, lines 1-4). On direct appeal Petitioner asserted that, "The trial judge erred in instructing the jury that the use of a deadly weapon implied malice in connection with the assault and battery with intent to kill charge given at trial because this instruction was confusing and prejudicial in light of the submission of evidence that clearly reduced, mitigated, excused or justified appellant's actions in the case." The Court of Appeals found that the issue was not preserved writing:

> Kerwin Parker was convicted of assault and battery with intent to kill (ABWIK) and the possession of a firearm during the commission of a violent crime. He appeals, arguing the trial court erred in instructing the jury with regard to the

> ABWIK charge that an implication of malice may arise from the use of a deadly weapon. Parker contends the jury instruction was confusing and prejudicial in light of evidence that clearly reduced, mitigated, excused, or justified his actions. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (providing the Belcher court's "ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved" (emphasis added)); State v. Price, 400 S.C. 110, 113-14, 732 S.E.2d 652, 653 (Ct. App. 2012) (recognizing an appellate court will "resolve the issue on preservation grounds when it clearly is unpreserved" (quoting Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012))); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. . . . Failure to object in accordance with this rule shall constitute a waiver of objection."); State v. Todd, 264 S.C. 136, 139, 213 S.E.2d 99, 100 (1975) ("In cases too numerous to cite, . . . it has been held that the failure of a defendant to object to the charge as made or to request additional instructions, when the opportunity to do so is afforded, constitutes a waiver of any right to complain of errors in the charge."); State v. Robinson, 238 S.C. 140, 150, 119 S.E.2d 671, 676 (1961) (stating South Carolina does not permit a party disappointed by a verdict to employ a motion for a new trial to raise, for the first time, an error committed at trial (overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991)))

State v. Parker, 2013-UP-403 (S.C.Ct.App. filed October 30, 2013).

During the PCR hearing Petitioner raised the Belcher issue as an ineffective assistance of counsel claim. (App. p. 1039, lines 6-9; pp. 1050 – 1057; pp. 1070 – 1073). Trial counsel admitted being present at a seminar where the implied malice inference had been discussed and admitted that he was aware of the challenge at the time of trial. (App. p. 1050, line 8 – p. 1052, 1053, lines 1-8; p. 1073, lines 11-13). When asked if he knew the challenge to the implied malice charge was pending trial counsel answered, "I should have – well, I mean, I should have – yeah, I did. I was at the seminar and I – yeah, I knew about it." (App. p. 1073, lines 11-13). When asked why he did not object to the implied malice charge, trial counsel answered, "I think it was exhaustion." (App. p. 1086, line 21).

In the order of dismissal denying relief the PCR judge wrote:

> This Court finds that trial counsel was not ineffective for failing to object to the implied malice instruction at any time prior to Applicant's sentencing hearing because, in the context of a PCR action, our courts have 'never required an attorney to be clairvoyant or anticipate changes in the law." *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). Trial counsel's presence at a CLE where another criminal defense attorney presented the *Belcher* issue as a basis for a potentially meritorious objection does not bind trial counsel to act in that manner at trial, nor does it render his performance deficient when the theory was not established as law in our State at the time of Applicant's jury trial. *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (declining to find trial counsel's performance deficient when "he followed a long-standing and well-settled rule of South Carolina criminal law – even when that rule was under attack in the United States Supreme Court at the time of trial'); *Honeycutt v. Mahoney*, 698 F.2d 213, 216-17 (4th Cir. 1983) (deciding that trial counsel was not ineffective for failing to object to the subsequently-overruled, but then long standing, North Carolina law where such objection would have been based on a recent, non-binding First Circuit decision); *Randolph v. Delo*, 952 F. 2d 243, 246 (8th Cir. 1983) (deciding that trial counsel was not ineffective by failing to raise *Batson* challenge two days before *Batson* was decided), *cert. denied*, 504 U.S. 920, 112 S.Ct. 1967 (1992). Trial counsel acknowledged as much, recognizing at PCR that he could not have, at the time, anticipated the change in the law. (PCR Tr. p. 38). Counsel otherwise acted to bring the *Belcher* holding to the trial court's attention at the first relevant point in time. There can be no finding of deficient performance on this allegation, as counsel did not act "outside the wide range of professionally competent performance," *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-65. This Court accordingly finds that absent any showing of deficient performance, Applicant cannot meet the *Strickland* standard, and **DENIES and DISMISSES** this final claim for relief.

(App. pp. 1143-1144). The PCR judge erred.

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.

In the present case trial counsel was ineffective in failing to object to the implied malice charge. 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 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 pending at the time the judge instructed the jury and was the law at the time of sentencing. There was evidence that could have reduced the charge from assault and battery with intent to kill to assault and battery of a high and aggravated nature and the judge properly instructed the jury with the lesser included offense. The error in giving the implied malice charge was not harmless where the trial judge specifically instructed the jury that, "The

difference between assault and battery with intent to kill and assault and battery of a high and aggravated nature is the presence or absence of malice." (App. p. 857, lines 2-15)

If trial counsel had timely objected to the implied malice charge, the issue would have been preserved for appellate review. In Belcher the Court wrote:

> Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved. Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final"); Harris v. State, 273 Ga. 608, 543 S.E.2d 716, 717–18 (2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline'—i.e., cases which are pending on direct review or not yet final"). Our ruling, however, will not apply to convictions challenged on post-conviction relief. *See generally* Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). We reverse and remand for a new trial.

385 S.C. at 612–13, 685 S.E.2d at 810–11 (n. #10 and #11 omitted).

In the present case the jury was instructed on September 18, 2009. Belcher was decided on October 12, 2009. The Court heard argument in the Belcher case on May 14, 2009. The judge sentenced Petitioner on October 21, 2009, after Belcher was decided. At sentencing trial counsel moved for a new trial based on the Belcher case. (App. p. 886, line 19 – p. 887, lines 1-20). The Court of Appeals found that the issue was not preserved because no objection was made at the time the charge was given. As provided in Belcher, if trial counsel had timely objected to the implied malice charge, the ruling of Belcher would have applied because the case would have been pending on direct review. Based on the very specific facts of this case, where trial counsel admitted to knowing about the challenge to the implied malice charge but failed to properly preserve the issue for appellate review, this Court should grant relief.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of April, 2020.