STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
Jul 22 2020
S.C. SUPREME COURT

Certiorari to Richland County
Court of Common Pleas

The Honorable Clifton Newman, Post-Conviction Relief Judge
The Honorable James R. Barber, III, Trial Judge

Appellate Case No. 2019-001925

Stewart Randall Ard, #217645,

Respondent,

v.

State of South Carolina,

Petitioner,

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General
SC Bar #79054

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

[1] State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017).

ISSUE PRESENTED

The PCR court erred in finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury charge on attempted murder where Ard's trial took place years before the Court of Appeals and this Court issued their decisions in King v. State,[2] finding attempted murder is a specific-intent crime, and trial counsel is not required to be clairvoyant.

[2] State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017).

STATEMENT OF THE CASE

Stewart Randall Ard (Ard) is presently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment by the Richland County Clerk of Court. During its April 2014 term, the Richland County Grand Jury indicted Ard for one count of attempted murder (2014-GS-40-1777), three counts of second-degree assault and battery (2014-GS-40-1756, -1766, -1767), and carrying a concealed weapon (2014-GS-40-1771). Aimee J. Zmroczek and M. Wade Dowtin, Esquires, represented Ard on these charges. Assistant Solicitors Kathryn "Luck" Campbell Hubbird, Dolly Justice Garfield, and Ramie Shalabi, Esquires, prosecuted the case.

Ard proceeded to a jury trial with the Honorable James R. Barber, III, presiding on June 23 - 25, 2014, at the Richland County Courthouse. The jury returned a verdict of guilty as indicted for attempted murder, two counts of second-degree assault and battery, and carrying a concealed weapon. On the final charge for second-degree assault and battery the jury convicted Ard of a lesser-included charge of third-degree assault and battery.

Judge Barber sentenced Ard to life without parole (LWOP) for attempted murder; three years for each count of second-degree assault and battery, thirty days for third-degree assault and battery (a time-served sentence), and ninety days for carrying a concealed weapon (a time-served sentence). Judge Barber issued each sentence concurrent except for the sentence issued for one count of second-degree assault and battery (2014-GS-40-1766). Judge Barber set the sentence on that charge to run consecutively to the life sentence for attempted murder.

Ard filed a timely notice of appeal. David Alexander, Esquire, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Ard's appeal after consideration of his *pro se* brief and a review as required by Anders, supra. State v.

Ard, Op. No. 2016-UP-243 (S.C. Ct. App. filed June 1, 2016). That court returned the Remittitur on June 17, 2016.

Ard filed an application for post-conviction relief on October 19, 2016. The State made its Return on July 12, 2017. An evidentiary hearing into the matter was convened on December 13, 2017, at the Richland County Courthouse before the Honorable Clifton Newman. E. Charles Grose, Jr., Esquire, represented Ard. Jessica E. Kinard then of the South Carolina Attorney General's Office represented the State. Trial counsel Aimee Zmrocek and appellate counsel David Alexander testified at the evidentiary hearing. At the conclusion of the hearing, the PCR court took the matter under advisement and requested proposed orders from each party. By written order filed February 19, 2019, the PCR court issued an order granting PCR on the ground trial counsel rendered ineffective assistance for failing to object to the general intent jury charge on attempted murder. The PCR court denied relief on all other grounds.

The State filed a timely motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. Through counsel, Ard filed a response to the motion on August 22, 2019. The PCR court convened a hearing on the State's motion on September 20, 2019. On November 5, 2019, the PCR court issued an order denying the State's motion. The State then filed a timely notice of appeal of the grant of post-conviction relief.

STATEMENT OF THE FACTS

This case arises from a bar fight in the Five Points area of Columbia. Ard and three friends were patrons at the bar Group Therapy. One of the patrons (not Ard) punched a wall, causing a bouncer to ask the group of four to leave. App. pp. 90-91. After a cross exchange, the bouncers escorted Ard's group out of the bar. App. p. 91. Jesse Patterson was the bouncer working the door at Group Therapy that night. App. p. 213. Sometime after the four patrons were escorted away, Patterson was outside the door talking to the bar's owner, Scott Flemming, when he heard screaming behind him, turned, and saw Ard's co-defendant Benjamin Geno walking towards him and throwing punches. App. pp. 219-20. Ard came from behind Geno and stabbed both Patterson and Flemming with a knife. App. pp. 220, 260-61. Then Ard ran back toward his parked car at the Post Office across the street. Two bouncers at the neighboring bar, Gabe McDaniel and Joe Molino, chased Ard. App. pp. 273, 279, 284-85, Ard attempted to stab these men as well, but was unsuccessful, as McDaniel and Molino both turned and ran away when Ard came at them. App. pp. 275-77, 280-81, 286-87. Ard then fled the scene in his vehicle with the three other men who were originally kicked out of Group Therapy. App. pp. 74, 286. The altercation was captured on video by cameras in and around the bar, including outside on the sidewalk. App. pp. 224-35.

The Fifth Circuit Solicitor's Office charged Ard with attempted murder for the stabbing of Patterson and three counts of assault related to Flemming and the two other bouncers who received no injuries. App. pp. 16-17. In her opening statement, trial counsel conceded Ard was guilty of second-degree assault and battery with respect to Patterson, but denied Ard was guilty of attempted murder. App. p. 71. Trial counsel also conceded guilt as to second-degree assault and battery as to Flemming and to third-degree assault and battery as to the other two bouncers, McDaniel and

Molino. App. p. 71. In closing, trial counsel argued Ard lacked malice or intent to kill Patterson. App. p. 402.

Judge Barber gave the standard charges on reasonable doubt, burden of proof, and presumption of innocence. App. pp. 337-45, 355-57. When the trial judge instructed the jury regarding the attempted murder charge, he stated:

> A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily injury. Intent means intending the result which actually occurs, it means something which – acts which is [sic] not accidental or involuntary. Intent may be shown by acts and conduct[] of the defendant and other circumstances from which you may naturally and reasonably infer intent.
>
> Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injury may be considered in determining the intent with which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully committed an act a natural tendency of which is to destroy another's life.

App. pp. 350-51. Trial counsel did not object to the general-intent charge. App. p. 429.

Later, the jury sent a note requesting to be recharged on attempted murder. App. p. 366. The trial judge replayed the portion of the instructions regarding ABHAN and attempted murder, App. p. 440. When the trial judge asked whether there was anything from the defendant on the recharge, trial counsel said no. App. p. 441. Shortly thereafter, the jury reached a verdict and convicted Ard of attempted murder. App. pp. 441-42.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court erred in finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury charge on attempted murder where the trial took place years before the Court of Appeals and this Court issued their decisions in King v. State,[3] finding attempted murder is a specific-intent crime, and trial counsel is not required to be clairvoyant.

In its Order granting relief, the PCR court found trial counsel did not understand that attempted murder is a specific-intent crime, and this deficiency prejudiced Ard by influencing (a) trial counsel's failure to object to the jury instruction 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," and (b) trial counsel's failure to object to the prosecution's argument that attempted murder is a general intent crime. The PCR court also found prejudice flows from the combination of trial counsel's closing argument conceding guilt to the lesser-included offenses and the jury instruction because the instruction diluted the jury's ability to consider those lesser-included offenses. The PCR court erred, however, because prejudice is irrelevant in the absence of a deficiency in trial counsel's performance, and the finding trial counsel was deficient was error given the state of the law at the time of Ard's trial. Additionally, even if trial counsel was deficient, Ard was not prejudiced because there was substantial, compelling evidence of specific intent.

As an initial matter, the State agrees the trial court's instruction 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" is no longer valid after this Court's decision in State v. King. 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017) aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App.

[3] State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017).

2015) ("We agree with the Court of Appeals that 'the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.'") (citations omitted). However, the Court of Appeals' decision was delivered in June 2015 and this Court's decision in October 2017; this case was tried in June 2014, well before either court's King decision was issued. Id.

Therefore, the PCR court's decision granting Ard relief on this ground is premised on an error of law in that it requires trial counsel to be clairvoyant, and this Court should grant certiorari and reverse that decision.

A. The PCR court erred in finding trial counsel was constitutionally ineffective because trial counsel cannot be not deficient where the ruling establishing the specific-intent standard for attempted murder was not issued until years after the trial took place, and trial counsel is not required to be clairvoyant.

The reasonableness of trial counsel's failure to object to the challenged general-intent instruction is informed by the legislative history of attempted murder in South Carolina. Until 2010, the offense of attempted murder did not exist in South Carolina; instead, South Carolina recognized the offense of assault and battery with intent to kill (ABWIK). In 2010, however, the General Assembly "abolished all common law assault and battery offenses and all prior statutory assault and battery offenses," and in their place codified attempted murder. S.C. Code Ann. §§ 16-3-29, 16-3-600; State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). It was well-settled that the old crime of ABWIK required only a general intent to kill.[4] State v. Foust, 325

[4] For this reason, the PCR court's reliance on State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), and State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001), which cites Sutton, is misplaced because Sutton was decided before attempted murder was ever recognized as an offense in South Carolina. The PCR court order relies in part upon dicta from Sutton which states,"[i]n general, '[a]ttempt is a specific intent crime.'" 340 S.C. at 397, 532 S.E.2d at 285.

S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) (for ABWIK, the required finding of "malice aforethought, either express or implied" encompasses a requirement of general intent). However, the statutory definition of someone who commits attempted murder, as codified in 2010, now reads: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" S.C. Code Ann. § 16-3-29. Unfortunately, this definition created ambiguity as to the level of intent – general or specific – required for the crime to be committed. It was not until 2017 that this Court decided King and found "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder...." 422 S.C. at 56-57, 810 S.E.2d at 23.

At the time of Ard's trial in 2014, the law in South Carolina was not clear as to the required level of intent for attempted murder. Importantly, the relevant lens for analysis is "counsel's perspective at the time" of trial. Strickland, 466 U.S. at 689; see also Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765.

As noted by both the majority opinion and by Justice Kittredge's concurrence in this Court's King decision, existing authority supported the general-intent instruction given at Ard's trial. 422 S.C. at 74-75, 810 S.E.2d at 32 (Kittredge, J., concurring in result only) (concluding he would "affirm the trial court's finding and related jury instruction that '[a] specific intent to kill is

---

However, the holding in Sutton found "specific intent [was] *not* required to commit" ABWIK, which was South Carolina's equivalent offense to attempted murder at the time. Id. at 396-99, 532 S.E.2d at 285-86 (emphasis added).

not an element of attempted murder but it must be a general intent to commit serious bodily harm.'"); State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("malice aforethought encompasses both the specific and general intent to commit murder"); Foust, 325 S.C. at 14-15, 479 S.E.2d at 5 (explaining, for ABWIK, the required finding of "malice aforethought, either express or implied" encompassed a requirement of general intent). Justice Kittredge, writing separately, noted, "The majority and I agree that the statutory language creates an ambiguity – 'with intent to kill' speaks to a specific intent crime while 'malice aforethought, either expressed or implied' points to a general intent crime." King, 422 S.C. at 72, 810 S.E.2d at 31. Given this ambiguous language and the legislative history of the attempted murder statute, it was not unreasonable for trial counsel also to interpret the elements of attempted murder as set forth in South Carolina's statute as requiring only general intent. See id. at 73, 810 S.E.2d at 32 ("If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?").

Indeed, the very fact this Court went to such lengths to discuss the history of ABWIK and attempted murder in this state and to clarify the standard demonstrates the law was not clearly defined until that decision was rendered. If the statute at issue was so clear as to the required level of intent, this Court would not have needed to issue such a detailed a decision explaining what the Legislature meant by its wording of that statute. Trial counsel, therefore, cannot be deficient because King was not the law at the time of Ard's trial, and given the ambiguous and confusing wording of the attempted murder statute, trial counsel was not on notice that she needed to object to the general-intent instruction. . Id. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section

16-3-29. . . ."); see also Frierson v. State, 417 S.C. 287, 297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue).

In sum, the PCR court's order finding deficiency and granting relief on this issue is based on appellate decisions that occurred years after Ard's trial, which is an incorrect application of the Strickland standard. 466 U.S. at 687 ("Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."); id. at 688 ("The proper measure of attorney performance remains reasonableness under prevailing professional norms."). This Court has repeatedly made clear that attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765; Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (explaining an attorney is not required to "be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."). Similarly, there exists ample authority interpreting Strickland from other jurisdictions, including the Fourth Circuit, which recognizes that trial counsel "is not required to forecast changes in the existing law." Mayo v. Henderson, 13 F.3d 528, 533 (2nd Cir. 1994). See also Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995) ("Skipper was on appeal to the Supreme Court at the time of Kornahrens's trial, and [counsel] testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); United States v. McNamara, 74 F.3d 514, 515-17 (4th Cir.1996) (finding counsel cannot be considered ineffective for failing to anticipate changes in law).

Even the justices of this Court could not unanimously agree on which level of intent the Legislature intended to assign to attempted murder, and the majority was notably unable to fully

reconcile its holding with the wording of the statute. See King, 422 S.C. at 64 n. 5, 810 S.E.2d at 27 n. 5 ("[W]e would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of the word 'implied' in section 16-3-29 *is arguably inconsistent with a specific-intent crime*.") (emphasis added). It would be unfair and contrary to the dictates of Strickland to find trial counsel constitutionally ineffective because she failed to divine the interpretation this Court ultimately settled on, given the belief the statute encapsulated only general intent was a reasonable interpretation of the ambiguous language. See Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

Because the PCR court's order granting relief is based on an error of law, this Court should grant certiorari and reverse the decision of the PCR court.

B. Notwithstanding the issue of deficiency, Ard was not prejudiced by the general-intent instruction because there was substantial evidence of a specific intent to kill where Ard announced his intention to retaliate against the victims and where the most seriously injured victim was stabbed multiple times.

Moreover, notwithstanding the lack of any deficiency on trial counsel's part, the PCR court also erred in granting relief because Ard has not met his burden of establishing prejudice due to substantial and compelling evidence of malice and specific intent.[5] See Strickland, 466 U.S. at 687 (explaining when evaluating prejudice, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"); Smalls

[5] Even had the jury been charged that attempted murder required a finding of specific intent to kill, and even had Ard been convicted of the lesser-included offense of ABHAN, Petitioner would still have faced a mandatory LWOP sentence because he had three prior armed robbery convictions. S.C. Code Ann. § 17-25-45; App. p. 450. When considered in conjunction with trial counsel's strategy to concede guilt as to a lesser-included offense, and the facts outlined above, including the jury's request to be re-instructed only as to attempted murder and ABHAN, no prejudice appears in the nature of the sentence received as a result of the conviction.

v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (explaining "the PCR court should consider the specific impact counsel's error had on the outcome of the trial" as well as "the strength of the State's case in light of all the evidence presented to the jury"); see generally, Jackson v. State, 355 S.C. 568, 573, 586 S.E.2d 562, 564 (2003) ("Our confidence in the outcome of Jackson's trial is not undermined by his failure to receive a self-defense charge [due to an error by counsel].").

The facts established at trial show Ard acted with malice and a specific intent to kill. At the evidentiary hearing, trial counsel testified Ard "drove the knife in" in regards to the victims who received medical treatment, and "it was all on video." App. p. 537. After he and three other patrons were made to leave the bar by its bouncers, Ard was nearly immediately thereafter overheard by a restaurant employee on the sidewalk telling his companions that they should go back to the bar to retaliate against being kicked out. App. pp. 319-24. Patterson, the most seriously injured victim, testified he heard Ard and his friends "yelling down the sidewalk how they were about to fuck somebody up" immediately prior to the attack. App. p. 233. Ard did in fact return and came at each of the four victims with a knife, making contact with and causing injury to two of the four victims, all of which was captured on video. App. pp. 228-35. Patterson's treating trauma surgeon described his injuries as life threatening and testified Patterson had been stabbed *twice* in the torso, resulting in two "pretty deep" lacerations. The lacerations penetrated one lung and the chest wall and caused his blood pressure to drop. Patterson's lung was noticeably injured and required a chest tube for treatment. App. pp. 196-205.

Thus, there is no other reasonable interpretation of Ard's actions other than a specific intent to kill, at least towards Patterson, whom Ard stabbed multiple times. Ard was therefore not prejudiced by the jury instruction on general intent due to the substantial evidence of malice and

specific intent. Cf. State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652 (Ct. App. 2012) (finding no error in the trial court's jury charge where "it is not possible to interpret the evidence to support any conclusion other than that the person who shot [Victim] committed ABWIK."). Therefore, because Ard was not prejudiced by the general-intent instruction, trial counsel was not constitutionally ineffective in failing to object to it.

This Court should therefore grant certiorari and reverse the PCR court's grant of relief on this ground.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari and reverse the PCR court's grant of relief. Should this Court grant certiorari, Petitioner requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General

BY: s/Lindsey A. McCallister
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

July 22, 2020

ATTORNEYS FOR RESPONDENT