

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable George C. James, Circuit Court Judge

ROBERT MATTHEW FULMER,

APPELLANT
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001437

ANDERS BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in instructing the jury that a specific intent to kill is not an element of attempted murder?

STATEMENT OF THE CASE

In March of 2013, the Pickens County Grand Jury indicted Petitioner, Robert Fulmer, for attempted murder, burglary first degree, possession of a weapon during the commission of a violent crime and petit larceny, indictments #2013-GS-39-0716-0719. On August 25, 2014, Petitioner proceeded to jury trial before the Honorable Robin B. Stilwell. Scott D. Robinson represented Petitioner at trial. W. Douglas Richardson, Jr. prosecuted the case. The jury returned verdicts of guilty as charged. Judge Stilwell sentenced Petitioner to thirty (30) years for attempted murder, thirty (30) years concurrent for burglary first degree, five (5) years concurrent for the weapon violation and thirty days for petit larceny. The notice of intent to appeal was not filed.

On December 29, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on May 29, 2015. On June 13, 2016, an evidentiary hearing was held before the Honorable George C. James, Jr. R. Mills Ariail, Jr. represented Petitioner at the PCR hearing. Patrick Schmeckpeper represented the State. In a written order signed May 19, 2017, Judge James denied relief but granted a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). A timely notice of intent to appeal was served on June 23, 2017. This brief and a separately filed petition for writ of certiorari follow.

ARGUMENT

The trial judge erred in instructing the jury that a specific intent to kill is not an element of attempted murder.

The jury found Petitioner guilty of a burglary of a trailer and attempted murder in the shooting of the owner when he came home. There was no forensic evidence linking Petitioner to the crimes and the owner did not identify Petitioner. The State's case against Petitioner was based solely on the testimony of co-defendants. During the charge to the jury the judge said:

A specific intent to kill is not an element of attempted murder. But there must be a general intent to commit serious bodily injury. Intent means intending the result which, actually, occurred, not accidentally or involuntarily. Intent may be shown by acts and conduct of the Defendant and other circumstances from which you may naturally and reasonably infer intent.

(App. p. 280, lines 16-22). The trial judge erred.

Attempted murder was codified in 2010, by S.C. Code Ann. § 16-3-29 which 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. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted.

In State v. King, No. 2015-001278, 2017 WL 4800004, at *6 (S.C. Oct. 25, 2017)

(Petition for Rehearing pending), the South Carolina Supreme Court wrote:

In 2000, ten years prior to the statutory enactment of the crime of attempted murder, this Court declined to adopt the common law crime of attempted murder. State v. Sutton, 340 S.C. 393, 398-99, 532 S.E.2d 283, 286 (2000). In Sutton, the defendant was convicted of ABWIK, attempted murder, and possession of a firearm during the commission of a violent crime. Id. On appeal, the Court of Appeals vacated Sutton's attempted murder conviction and sentence, finding ABWIK and attempted murder are, in essence, the same offense. Id. at

395, 532 S.E.2d at 284. This Court affirmed as modified the decision of the Court of Appeals. Id. at 399, 532 S.E.2d at 286.

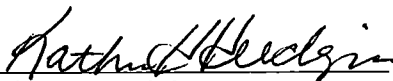
Citing Foust, this Court noted that “a specific intent is not required to commit [ABWIK].” Sutton, 340 S.C. at 396, 532 S.E.2d at 285. Premised on this principle, the Court distinguished the common law offense of attempted murder from the common law offense of ABWIK by concluding that attempted murder requires a specific intent to kill, while ABWIK does not require a specific intent. Id. at 397, 532 S.E.2d at 285 (“Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.” (citation omitted)).

In King the South Carolina Supreme Court found that the codified attempted murder offense includes a specific intent to kill as an element. “Accordingly, we agree with the Court of Appeals that the trial judge erred in charging the jury that a specific intent to kill is not an element of attempted murder. Further, we agree that this error cannot be deemed harmless.” King, No. 2015-001278, 2017 WL 4800004, at *8.

While King was decided in 2017, after Petitioner’s trial in 2014, the Sutton case, decided in 2000, and prior to the codification of attempted murder, was instructive as to attempted murder requiring a specific intent to kill. As in King, the trial judge in the present case erred in charging the jury that a specific intent to kill is not an element of attempted murder. As in King, the error cannot be deemed harmless.

CONCLUSION

Based on the above argument, this Court should reverse Petitioner's conviction and sentence for attempted murder and remand for new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable George C. James, Circuit Court Judge

ROBERT MATTHEW FULMER,

APPELLANT

V.

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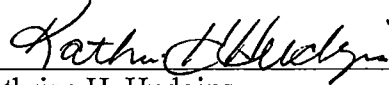
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Matthew Fulmer states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge George C. James, which was held on June 13, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Robert Matthew Fulmer.

Respectfully Submitted,

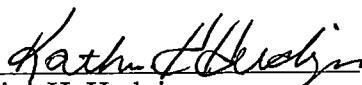

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 26th day of February, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 26, 2018.



Kathrine H. Hudgins
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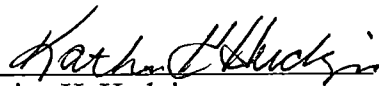
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant pursuant to White v. State in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Petitioner pursuant to White v. State has been served on Robert Matthew Fulmer, 317783, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of February, 2018.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.