

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Aug 27 2020
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DESHANNDON MARKELLE FRANKS,

PETITIONER.

APPELLATE CASE NO. 2016-002244

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 5758

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, petitioner requests that this Court grant rehearing because it may have overlooked the fact that its harmless error analysis on the erroneous inference of malice instruction regarding the use of a deadly weapon was unconstitutionally defective because it was burden shifting to petitioner to show that a defense or a lesser-included offense was viable in this case before this Court would find the jury instruction error was not harmless.

The opinion in this case merely shifts the State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) gatekeeping function on the presence of a lesser included offense or other “mitigating

factor” being the reason *not to give the inference of malice from the use of a deadly weapon jury instruction* to a reason to find the erroneous inference of malice jury charge harmless if the defendant cannot prove such evidence of a lesser-included offense or “other mitigating factor” was present in the case.

Our Supreme Court recently held in State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019), that “[r]egardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon.” Petitioner is obviously entitled to the benefit of Burdette while this direct appeal is still pending. See, Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

Yet, this Court’s harmless error analysis renders the Burdette instruction error meaningless unless petitioner can demonstrate to this Court that the improper inference of malice instruction would have been improper under Belcher because there was evidence that would “reduce, mitigate, excuse or justify the homicide.” This Court reasoned in this case that the error was harmless, inter alia, because “the trial court did not charge any lesser-included offenses and the record contains no evidence that would tend to reduce, mitigate, excuse or justify the homicide. Therefore, notwithstanding this was a circumstantial evidence case, no conflicting evidence of the shooter’s intent was presented.” State v. Franks, Op. No. 5758, 2020 WL 4660717, Shearouse’s Adv. Sh. #31, at 82, 2020 (August 12, 2020).

This was burden shifting to petitioner to show why the error was not harmless. However, due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979). As our Supreme Court explained in Burdette, its holding was based on the constitutional requirement that the state bears the burden

of proving each element of an offense beyond a reasonable doubt. Burdette, 427 S.C. at 502, 832 S.E.2d 582 (“[W]hen the trial court tells the jury it may use evidence of the use of a deadly weapon *to establish the existence of malice*, a critical element of the charge of murder, the trial court *has directly commented upon facts* in evidence, elevated those facts, and emphasized them to the jury.”). (emphasis added).

The burden shifting problems with this Court’s harmless error analysis in this case, respectfully, did not end there. This Court also wrote, “Aside from the instruction challenged on appeal, the trial court charged the jury that malice was the ‘intentional doing of a wrongful act without just cause or excuse...and with an intent to inflict an injury’ and that malice could be inferred from conduct showing a total disregard for human life.” State v. Franks, Op. No. 5758, Shearouse’s Adv. Sh. #31 at 82 (Filed August 12, 2020). Petitioner is also called upon to disprove this definition of malice by pointing to certain evidence.

As petitioner has consistently argued, there was no evidence of a motive offered for the crime in this case. While petitioner understands the state does not have to prove motive, a burden cannot be placed upon petitioner to show that the homicide did involve just cause or excuse and that it was not the result of a total disregard for human life. It was unconstitutional to place such a burden upon this petitioner.

This Court also wrote that petitioner’s defense focused on discrediting the state’s theory that he was the shooter “and suggesting a third, unknown person may have committed the act. However, the trial court did not allow Franks to present evidence of third-party guilt at trial, and Franks did not appeal that ruling.” State v. Franks, Op. No. 5758, Shearouse’s Adv. Sh. #31 at 82 (Filed August 12, 2020).

Again, petitioner did not bear the burden of proving that a third party committed the murder. Under State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941), evidence of third-party guilt is limited “to such facts as are inconsistent with [the defendant’s] own guilt and such facts as raise a reasonable inference or presumption as to his own innocence.” While there was no evidence of a motive for petitioner to commit this murder, to put the burden upon petitioner to prove his innocence by showing a third party committed the murder was once again unconstitutional burden shifting. It also, respectfully, should not be suggested that this case would have been reversed had petitioner raised the issue of third-party guilt under the surviving onerous State v. Gregory standard. See Holmes v. South Carolina, 547 U.S. 319, 328 (2006) (approving the State v. Gregory standard and abrogating State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001)).

Finally, even if putting the burden on petitioner to show there was evidence, which would “reduce, mitigate, excuse, or justify the homicide” was not an unconstitutional burden shifting harmless error standard, there, nonetheless, was evidence in this case, which would “reduce, mitigate, excuse, or justify the homicide,” as petitioner has previously argued to the Court.

The jury in this case could have concluded that appellant was present at the murder scene with Tevin Hill but determine that appellant was not the shooter or merely present. Appellant did not have gunshot residue on the clothes he allegedly wore on the night of the shooting. R. 342, l. 18 - 345, l. 19. There was no DNA, fingerprints, or other forensic evidence linking appellant to the murder. R, 339, l. 8 – 342, l. 8.

Further, evidence that appellant had a gun, and that he allegedly told Pulley it was a nine-millimeter “Ruger” on the night of the shooting, and that a nine-millimeter Ruger was the murder

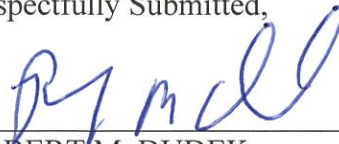
weapon was all speculation. The murder weapon was never found, and all the state's witnesses could opine was that the same gun fired the shots that killed both victims.

If appellant was present with another person who shot the victims (Tevin Hill) or knew who may have shot the victims (James Morgan Hill) but he was not the shooter, that could be evidence appellant was guilty of some other crime, but it was mitigated or reduced against a finding of his guilt for murder, even though it was not evidence of voluntary manslaughter or involuntary manslaughter, which the trial judge erroneously found conclusive. R. 296, l. 2 – 298, l. 19; R. 336, l. 13 – 338, l. 11. The trial judge's reasoning that because voluntary manslaughter and involuntary manslaughter were not lesser-included offenses to be charged in this case, that the jury instruction on implied malice from the use of a deadly weapon was therefore proper was erroneous.

The state admitted it could not point to a single reason why appellant would kill these two victims. Again, the state did not have to prove motive, but here it admitted it knew of none, did not theorize of one, and none appeared in this record. A jury instruction that malice could be implied from appellant having a deadly weapon was consequently very prejudicial in a case where no motive to kill existed, and the evidence was purely circumstantial as to whom the shooter was in this case.

Because the Court's harmless error analysis in this case was burden shifting to petitioner as to the inferred malice instruction from the use of a deadly weapon instruction, and also because there was nonetheless evidence in this record which would "reduce, mitigate, excuse, or justify the homicide" for purposes of the harmless error analysis, rehearing should be granted.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 27th day of August, 2020.

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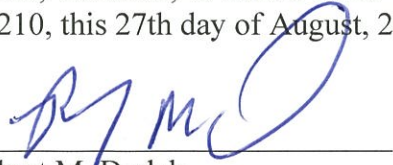
V.

DESHANNDON MARKELLE FRANKS,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon William Edgar Salter, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of August, 2020; and Deshanndon Franks, #370250, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of August, 2020.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT