RECEIVED
Sep 17 2020
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

TAVARIS DEWBERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000140

PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the PCR court erred where it found counsel effectively represented Petitioner Dewberry on the charges of attempted murder, armed robbery, and burglary, where counsel failed to advise Petitioner that the State had to prove that Petitioner, rather than just his codefendants, had a specific intent to kill in order to convict Petitioner of attempted murder, and where Petitioner would have continued with his trial on the offenses had he known of this element, since counsel's deficient representation resulted in Petitioner's entry of pleas that were not knowingly, voluntarily, and intelligently tendered?

STATEMENT

During the August term of 2015, a Spartanburg County Grand Jury indicted the petitioner, Tavaris Dewberry, for the offenses of attempted murder, first degree burglary, and armed robbery. App. 101 – 106. Dewberry was also charged with two additional counts of armed robbery. App. 9, ll. 11-12.

Dewberry proceeded to trial before the Honorable J. Derham Cole, and a jury. App. 1; App. 17, ll. 22-25. Dewberry was represented by Michael Morin. App. 1. The State was represented by Barry Joe Barnette and Spenser Holloran. App. 1.

However, on February 22, 2017, during the trial, Dewberry accepted a plea offer from the State and pleaded pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to attempted murder, armed robbery, and the lesser offense of burglary in the second degree, violent. App. 8, l. 9 – 9, l. 13. As part of the plea bargain, the State recommended concurrent sentences and agreed to dismiss by nolle prosequi the two additional counts of armed robbery. App. 9, ll. 8-13.

According to the Solicitor, the charges arose from the robbery and shooting of the complainant, Marlon Davis, at his home. The complainant's wife and son were also present and were robbed. The State alleged that Dewberry was with two codefendants: Woodruff and Ray, and that the three men were driven by a fourth codefendant, Martin. The Solicitor said Petitioner Dewberry stayed outside as the lookout while Woodruff and Ray went inside the house and robbed the complainant, with both Woodruff and Ray shooting the complainant at least once each. App. 23, l. 9 – 24, l. 13.

However, the Solicitor alleged that a third shot was fired from outside. App. 23, ll. 24-25. Also, according to the Solicitor, Petitioner Dewberry did go inside the house to tell his codefendants to "hurry up." App. 23, l. 25 – 24, l. 1.

The following exchange took place between the court and the Solicitor:

> THE COURT: As I understand it, Solicitor, **as far as Mr. Dewberry's participation is concerned**, **he did not provide any weapon**, **he did not possess any weapon**, **and he did not discharge any weapon**. **Is that true**?
>
> MR. BARNETTE: **That's true, I believe**. I talked to Mr. Davis [the complainant]. I asked Mr. Davis. I didn't know if he wanted to say anything or not at the time, but he [Dewberry] was, obviously, involved with the planning and so forth but did not – not – was not – did not shoot a gun or have a gun when he went into the residence.

App. 34, l. 22 – 35, l. 6 (emphasis added).

Dewberry was sentenced to serve concurrent terms of imprisonment of eighteen years for attempted murder; eighteen years for armed robbery; and fifteen years for second-degree burglary. App. 35, ll. 10-20; App. 107 – 109.

No direct appeal was taken and on December 18, 2017, Dewberry filed an application for post-conviction relief (PCR). App. 37 – 43. The State made its return and Dewberry filed an amended PCR application. App. 44 – 49; App. 50 – 51. On October 8, 2019, a hearing was held on the matter before the Honorable G. Thomas Cooper. App. 52. Susannah Ross represented Dewberry. App. 52. Jacob Isenberg represented the State. App. 52.

At the PCR hearing, Dewberry explained that counsel did not advise him the State would have to prove that he, Dewberry, had the specific intent to kill in order to convict him of attempted murder. App. 61, ll. 13-17. Nor did counsel tell Dewberry of the then-recent decision in *State v. King*.[1] App. 61, ll. 18-20. Dewberry said that if he had known the State needed to

[1] Dewberry's plea occurred on February 22, 2017, after the Court of Appeals issued its opinion in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (2015), but before this Court issued its opinion in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). Both cases held that specific intent to kill was an element of attempted murder.

prove that he had a specific intent to kill, he would have continued with his trial. App. 61, l. 21 – 62, l. 2.

On direct examination, counsel testified that he advised Dewberry of the elements of attempted murder but said that he did not believe *King* was important because the State had alleged Dewberry's direct liability for the shooting. App. 72, l. 24 – 73, l. 14.

> Q. Okay. And did you have any discussions with [Dewberry] about the elements of attempted murder?
>
> A. Yes.
>
> Q. Okay.
>
> A. The biggest concern I had with what's being talked about in the *King* case is, as you can see in the transcript, is the State was going to allege that he actually fired the shot there at the scene.
>
> Q. Right.
>
> A. That he wasn't to – that he didn't go in, but the allegation was going to be that he also fired. And my concern was, given the number of people in the house, given the other elements, given the testimony of other people, that a jury might find that to be specific intent. It certainly would have been an issue.

App. 72, l. 20 – 73, l. 9.

On cross-examination, plea counsel, who had already started trial with Dewberry before Dewberry pleaded, said he "was aware" that there had been a change in law regarding intent for attempted murder but he could not say whether he had read *King* and could not say that he advised Dewberry the State was required to prove specific intent to kill.

> Q. Did you review that case [*King*] and that state of the law or change in the view of the law?
>
> A. I think I was aware of it. To say that I read the case, I wouldn't be able to say that, but I was aware that the specific intent on that charge had been changed.

> Q. **But you can't say whether you advised Mr. Dewberry of that** –
>
> A. **No**.
>
> Q. – **prior to his plea**?
>
> A. **No**, **I wouldn't say that**.

App. 76, ll. 12 – 77, l. 2 (emphasis added).

On redirect, counsel was again asked if he went over the element of specific intent with Dewberry and counsel said he could not remember.

> Q. **You testified that you can't recall if you reviewed the specific intent to kill element with Mr**. **Dewberry**?
>
> A. **Correct**.

App. 77, ll. 13-15 (emphasis added).

In summation, PCR counsel argued that, "Under *Pittman*,[2] for a plea to be knowingly and voluntarily made, it must be done upon correct advice of counsel . . . Mr. Dewberry would have had to have been made aware that the State had to prove specific intent to kill for the attempted murder, and we would allege that here that wasn't shown and compromises the plea and whether it was knowingly and voluntarily made." App. 79, ll. 7-14. The attorney general responded that Dewberry pleaded because his codefendant had agreed to testify against him, and not because of deficient advice. App. 80, l. 20 – 81, l. 20.

On January 6, 2020, the PCR court issued an order of dismissal in which it addressed Dewberry's claim that counsel provided deficient representation based on his failure to advise Dewberry that the State was required to prove Dewberry possessed the specific intent to kill in

[2] *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999).

order to secure a conviction for attempted murder. App. 84; App. 91. In addressing that allegation, the order of dismissal stated,

> Counsel testified the State believed Applicant blindly fired shots into the home and planned to present this fact at trial. Counsel testified he was aware of the specific intent to kill requirement at this time and this could apply if evidence is presented at trial that Applicant fired a shot into the home. Counsel believed this was going to be a material issue at trial. Counsel testified he also went over accomplice liability extensively. Counsel concluded he had discussed all material elements of attempted murder with Applicant.[3]
>
> On the other hand, Applicant testified Counsel never informed him of the specific intent to kill requirement.
>
> At the plea hearing, the Solicitor stated a shot was fired at the home while Applicant was outside. (Tr. 23). The Solicitor said Applicant was outside with Martin, who had planned to testify at trial. (Tr. 23-4). The Solicitor said Applicant entered the home to tell his co-defendants to hurry up. (Tr. 23-4). Applicant agreed with the Solicitor's version of events. (Tr. 28). The Solicitor questioned the victim about whether Applicant had a gun. (Tr. 35). The victim said Applicant did not have a gun. (Tr. 35). However, the Solicitor indicated he questioned the credibility of this response from the victim. (Tr. 35).[4]
>
> Accordingly, this Court finds the record supports Counsel's version of events. This Court finds it is more likely than not that Counsel discussed the specific intent requirement with Applicant. As a result, Applicant has failed to overcome the burden to prove Counsel was deficient based upon this allegation.

App. 91 – 92 (footnote omitted).

---

[3] This finding is without support in the record. Counsel did not testify that he went over all the material elements of attempted murder. In fact, as seen, counsel testified multiple times that he did not remember whether he went over the specific intent element with Dewberry. App. 76, ll. 12 – 77, l. 2; App. 77, ll. 13-15.

[4] This finding is also without support in the record. Nothing in the plea transcript indicates the Solicitor questioned the credibility of the victim. As seen, Solicitor Barnette was asked directly by the plea judge whether Dewberry fired shots and he said no. App. 34, l. 22 – 35, l. 6

The order of dismissal also stated that Dewberry agreed with the facts recited by the solicitor and said he wanted to plead guilty after the plea judge stated, "The State alleges that you did on or about July 14th of 2015 with intent to kill, attempt to kill Marlon Shermaine Davis with malice aforethought expressed or implied by shooting him with a firearm. You could be found guilty of attempted murder by committing those acts yourself or by acting in concert with other persons . . ." App. 93. Therefore, the PCR court found "Applicant presented inconsistent testimony at his plea and evidentiary hearings. Therefore, he must provide a valid reason to explain why the original testimony was given." App. 93 – 94. The PCR court found Dewberry had "not provided a valid reason to depart from the conclusive plea hearing statements," and thus, "failed to show prejudice from pleading guilty based upon accomplice liability."[5] App. 94.

The order of dismissal further found that although Dewberry said he would have demanded a trial if he had known of the specific intent to kill requirement, "[t]his Court finds Applicant's plea was based in part upon his co-defendant's decision to testify unfavorably to him at trial. Accordingly, this Court finds Applicant was not prejudiced by any alleged failure to adequately advise him about the law of attempted murder." App. 94. The order of dismissal also stated that the plea colloquy and Dewberry's discussions with counsel established that Dewberry's pleas were knowing and voluntary. App. 99.

This petition for writ of certiorari follows.

---

[5] Based his discussions with counsel, Dewberry incorrectly believed that he could be found guilty of attempted murder based on accomplice liability—even if he himself did not specifically intend to kill. Therefore, Dewberry was not being untruthful with the plea judge during the colloquy. Moreover, Dewberry pleaded under *Alford*.

ARGUMENT

The PCR court erred where it found counsel effectively represented Petitioner Dewberry on the charges of attempted murder, armed robbery, and burglary, where counsel failed to advise Petitioner that the State had to prove that Petitioner, rather than just his codefendants, had a specific intent to kill in order to convict Petitioner of attempted murder, and where Petitioner would have continued with his trial on the offenses had he known of this element, since counsel's deficient representation resulted in Petitioner's entry of pleas that were not knowingly, voluntarily, and intelligently tendered.

Counsel's failure to advise Dewberry that the State would have to prove he possessed a specific intent to kill in order to convict him of attempted murder was deficient performance that left Dewberry unaware of a crucial element of attempted murder: specific intent to kill. Based on counsel's advice, Dewberry incorrectly believed he could be convicted based on accomplice liability when he could not have been. Counsel's deficient performance prejudiced Dewberry because he would have continued with trial on the charges had he been aware of this element.

During the plea hearing, the Solicitor said the complainant had been shot by Dewberry's codefendants. Dewberry was the lookout and spend most of his time outside, according to the State. **Solicitor Barnette was directly asked by the plea judge whether Dewberry was alleged to have fired any shots and the Solicitor said no**. App. 34, l. 22 – 35, l. 6. Counsel could not recall whether he advised Dewberry the prosecution must prove Dewberry possessed a specific intent to kill. Dewberry said counsel did not tell him of this element. The PCR court did not make any credibility findings as to either counsel's or Dewberry's testimony about this matter.

Based his discussions with counsel, Dewberry incorrectly believed that he could be found guilty of attempted murder even if he himself did not possess a specific intent to kill. Unbeknownst to Dewberry, he had a legitimate defense to attempted murder—a defense that he did not possess the requisite specific intent to kill needed to secure a conviction. S.C. Code Ann. § 16-3-29 provides, in relevant part, "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."

Prior to Dewberry's pleas, in *State v. King*, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), and *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), the Court of Appeals held the "specific intent to commit murder is an element of attempted murder . . ." Later, this Court held that a specific intent to kill is an element of attempted murder. *State v. King*, 422 S.C. 47, 55, 810 S.E.2d 18, 22 (2017). Because specific intent to kill is an element of attempted murder, it would have been difficult to prove Dewberry guilty, since the prosecutor alleged that it was Dewberry's codefendants who shot the complainant. The record from the plea hearing is silent as to any evidence that Dewberry himself specifically intended the complainant's death.

Here, the State could not have merely relied on accomplice liability to prove intent but would have had to prove Dewberry himself possessed the specific intent to kill since this Court has made it clear that there is no crime of felony attempted murder in South Carolina. In *State v. Smith*, 430 S.C 226, 234, 845 S.E.2d 495, 499 (2020), this Court "h[e]ld that felony attempted-murder is not a recognized crime in South Carolina." That is because an actor cannot attempt to cause a death unless he intends that a death occur. *See State v. Sanders*, 827 S.E.2d 214 (W.Va. 2019) (cataloguing appellate court decisions of states that have rejected the crime of attempted

felony murder). In *State v. King*, 422 S.C. at 57, 810 S.E.2d at 23, quoting *Keys v. State*, 766 P.2d 270 (Nev. 1988), this Court explained, "One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." "[I]f there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600." *Id.* at 64 n. 5, 810 S.E.2d at 27 n. 5.

Nor could the legal fiction of transferred intent supply the requisite specific intent, since transferred intent applies when there is an unintended victim. Here, the complainant was the intended victim of Dewberry's codefendants. "Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual physical act constituting the offense." *State v. Fennel*, 340 S.C. 266, 531 S.E.2d 512 (2000). However, "[u]nder the common law, transferred intent makes a whole crime out of two halves by joining the intent to harm one victim with the actual harm caused to another." *State v. Williams*, 427 S.C. 148, 829 S.E.2d 702 (2019). In the "classic case" of transferred intent, "the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another." *Fennell*, 340 S.C. at 272, 531 S.E.2d at 515. Here, the complainant was not an unintended victim, so transferred intent is inapplicable.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to

plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

The record of a guilty plea must be sufficient to show the defendant "has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). *See McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts"). Before a guilty plea may be accepted, it is required "that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001); *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); *Pittman v. State*, 337 S.C. 597, 601, 524 S.E.2d 623, 625 (1999).

Here, Dewberry lacked knowledge of a crucial element of the crime of attempted murder: specific intent. Dewberry was under the mistaken impression that he could be convicted for attempted murder based on accomplice liability, even if he did not have a specific intent to kill. As discussed in the statement section, *supra*, the PCR court's finding that counsel "discussed all the material elements of attempted murder" with Dewberry is without factual support in the

record. App. 91. Counsel did not testify that he went over all the material elements of attempted murder. Instead, counsel testified twice that he did not remember whether he went over the specific intent element with Dewberry. App. 76, ll. 12 – 77, l. 2; App. 77, ll. 13-15. Counsel was not even sure whether he had read *King*. App. 76, ll. 12 – 77, l. 2.

To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

Here, Dewberry had already elected to exercise his right to a trial—his pleas occurred mid-trial. Dewberry's testimony that he would not have pleaded guilty to the charges had counsel advised him the State had to prove specific intent to kill for the attempted murder charge was not found to be incredible. Counsel did not remember whether he advised Dewberry about the element. Dewberry's pleas were not knowingly, voluntarily, and intelligently made here. *Rollison v. State*, 346 S.C. at 511, 552 S.E.2d at 292; *Hill v. Lockhart*, 474 U.S. at 56. Therefore, Dewberry established *Strickland* prejudice and the PCR court's finding to the contrary is unsupported by the record. *See Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Harden v. State*, 360 S.C. at 408, 602 S.E.2d at 49; *Frierson v. State*, 423 S.C. at 262, 815 S.E.2d at 436.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for certiorari to allow full briefing of this issue.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of September, 2020.

RECEIVED

Sep 17 2020

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari 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."

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 17th day of September, 2020.