

STATE OF SOUTH CAROLINA

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IN THE COURT OF APPEALS

SC Court of Appeals

Certiorari to York County

The Honorable Frank F. Addy, Jr., Post-Conviction Relief Judge

The Honorable John C. Hayes, III, Trial Judge

Appellate Case Number 2016-001363

Unp. Op. No. 2020-UP-144 (filed May 20, 2020)

Hubert Brown.....Respondent,

v.

State of South Carolina,Petitioner.

STATE'S PETITION FOR REHEARING

Through its unpublished, *per curiam* opinion issued on May 20, 2020, this Court affirmed the decision of the PCR court granting a new trial. In this unpublished opinion, this Court affirmed on all grounds for relief found by the PCR court: (1) trial counsel was constitutionally ineffective in failing to object to the trial court's general-intent jury charge as to the count of attempted murder; (2) trial counsel was constitutionally ineffective for consenting to the admission of a psychiatric evaluation prepared by a doctor who did not testify at trial; and (3) trial counsel was constitutionally ineffective for failing to object to testimony of another doctor about the contents of the report. Brown v. State, 20-UP-144 (S.C. Ct. App. filed May 20, 2020). Petitioner submits this Court has misapprehended or overlooked relevant facts of this case and the applicable law. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing and reverse the PCR judge's grant of relief.

Ineffective Assistance of Counsel for Failure to Object to the General-Intent Jury Instruction as to Attempted Murder

The PCR court's order in this case focused primarily on the prejudice prong, finding Brown's mental state "was the key issue in the case" and noting the charge likely influenced the jury's decision since they asked for a recharge on the elements of attempted murder. App. p. 545. However, because prejudice is irrelevant in the absence of a deficiency in trial counsel's performance, the PCR court's findings reflect an incorrect application of the Strickland standard. Moreover, the deficiency finding is premised on an error of law that this Court should correct.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under this prong, the court measures an attorney's performance by its reasonableness under prevailing professional norms. Id. (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). Importantly, Strickland requires only that counsel's actions be reasonable, not that counsel be infallible. See Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Then, only if an applicant has proved deficiency should the court then move on to conduct a prejudice analysis. Strickland, 466 U.S. at 687 ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."). In this case, prejudice is irrelevant because the PCR court's finding that trial counsel was deficient was an error of law given that the requisite level of intent for attempted murder was unsettled in South Carolina at the time of Brown's trial.

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). This Court, however, appears to have deferred to the PCR court’s finding of facts on this issue as its opinion cites to Sellner as support for affirming this ground. The PCR court improperly granted relief, and this Court should correct that error by conducting the proper analysis without any deference to the PCR court’s findings.

The relevant lens for that analysis is “counsel’s perspective at the time” of trial. Strickland v. Washington, 466 U.S. 668, 689 (1984); 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.”). At the time of trial, South Carolina law was unclear as to the level of intent required for attempted murder, particularly given the conflicting language of the statute, as noted by the Supreme Court in its analysis in King, 422 S.C. 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. . . .”).

South Carolina has 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).

The reasonableness of trial counsel’s failure to object is informed by the legislative history of attempted murder in South Carolina. In 2010, the General Assembly replaced the offense of assault and battery with intent to kill (ABWIK)¹ with the offense of attempted murder and codified ABHAN, along with three other lesser degrees of assault and battery, as a lesser-included offense. S.C. Code Ann. §§ 16-3-29, 16-3-600; see State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (“[T]he Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act)... substantially overhauled the state's criminal law.... Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. In place of these offenses, the Act codifies attempted murder in section 16–3–29...”). It was well-settled that the old crime of ABWIK required only a general intent to kill. State v. Foust, 325 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, attempted murder is now defined by statute as: “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]” Id. at § 16-3-29. In 2017, the Supreme Court decided 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. 2015), and found “[T]he

¹ Formerly S.C. Code Ann. §16-3-620.

Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder....” Moreover, the Supreme Court expressly acknowledged the ambiguity in the statute which required it to issue such a detailed and thorough opinion explaining its interpretation of the required level of intent. 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. . . .”).

However, the Court of Appeals’ decision was delivered in June 2015 and the Supreme Court’s decision in October 2017, years after Applicant’s case was tried. At the time of Applicant’s trial in 2014, which is the relevant time frame for analysis of counsel’s actions under Strickland, the law in South Carolina was not clear as to the required level of intent. If statute was clear as to the required level of intent, the Supreme Court would not have needed to issue a decision explaining what the Legislature meant by its wording. See id. 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). Further, as evidenced by Justice Kittredge’s concurrence, even five justices of our state’s Supreme Court could not agree on the appropriate level of intent, and therefore, trial counsel’s failure to object to the general-intent instruction was not unreasonable. 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?”).

The PCR court’s order granting relief on this issue is based on an appellate decision issued two years after Brown’s trial. Trial counsel can not be found constitutionally ineffective for failing

to predict how appellate courts in this state would interpret an ambiguous and unclear statute more than two years in the future.

Ineffective Assistance of Counsel for Consenting to the Admission of Psychiatric
Evaluation Prepared by Non-testifying Witness and Ineffective Assistance of Counsel for
Failing to Object to Testimony of Another Doctor about the Report

As discussed above, in a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler, 286 S.C. 441, 334 S.E.2d 813.

Here, the PCR court found, and this Court agreed, trial counsel should have objected to Dr. Frierson’s testimony since he had never examined Brown and could not give a diagnosis, and his testimony was merely “bolstering an unchallenged witness” – the doctor who prepared the report, Shannon Hansen, who was not present at trial. App. pp. 548. Frierson’s testimony, however, was not bolstering as it did not vouch for the credibility of anyone else. See State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) (“Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth. . . .”). Dr. Frierson testified as to the conclusion he helped develop, even if he did not personally examine Brown. Frierson testified he reviewed Brown’s medical records, the witness statements from law enforcement, and the social history obtained by a DMH social worker prior to Dr. Hansen’s examination. App. pp. 295-298. Additionally, he testified he raised the possibility Brown’s head injury could have been the cause of his actions and directed Dr. Hansen to obtain more information from Brown’s wife as to what happened at the scene immediately after Brown

was struck on the head. App. pp. 297-98. Dr. Frierson then opined, based on his review of the police reports and the information gathered by Dr. Hansen, he felt there was significant evidence to find Brown “knew what he was doing” and could distinguish right from wrong. App. pp. 297-98. As Dr. Frierson was independently qualified as an expert in psychiatry, this was appropriate testimony. App. pp. 292-93. See Hundley ex rel Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000) (explaining an expert witness “may state an opinion based on facts not within his firsthand knowledge” and “may base his opinion on information, whether admissible or not, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions.”).

Finally, the PCR court found, and this Court agreed, trial counsel was also constitutionally ineffective for consenting to the admission of the report itself because Dr. Hansen was not called to testify as a witness at trial. Although the PCR court correctly pointed out much of the information corroborated the defense expert’s findings, and she herself directly referred to and testified about the contents of the report during her own testimony – including, notably, Dr. Hansen’s debated conclusion that Brown was criminally responsible for his actions – the PCR court nonetheless found trial counsel was deficient and Brown was prejudiced by the report’s admission.

The PCR court pointed to two specific reasons for its findings, neither of which are logically supported by the record. First, the PCR court found it significant that “nowhere in her report did Dr. Hansen indicate that she had considered and excluded temporary insanity due to head trauma as a potential diagnosis, and trial counsel could have potentially brought this to the attention of the jury had the report’s author been required to testify.” App. p. 457. Notably, however, Dr. Frierson addressed this issue in his testimony, stating he directed Dr. Hansen to

consider head trauma as a potential explanation for Brown's behavior and asked her to collect more information in order to make that assessment. App. pp. 297-98. They then jointly concluded head trauma was not a sufficient explanation for his behavior and ruled it out. App. pp. 297-98. All of this was appropriately testified to by Dr. Frierson, so even if trial counsel should have objected to the physical document coming into evidence, Brown was in no way prejudiced by its admission because both experts testified about this issue and discussed the contents of the report at length.

Finally, the PCR court found Brown was prejudiced by the admission of Dr. Hansen's report "particularly. . . in light of the erroneous general-intent instruction and in light of the Assistant Solicitor emphasizing Dr. Hansen's report in his closing." App. p. 548. However, as discussed above, the general-intent instruction was proper at the time, and therefore, it cannot have caused unfair prejudice to Brown. Additionally, the contents of Dr. Hansen's report were testified to by both the defense expert and Dr. Frierson, so even if the physical document had been excluded from evidence, the assistant solicitor could have properly made the same argument. Because of these logical holes in the PCR court's order, its decision granting relief is not supported by the record, and this Court should reconsider its decision affirming the PCR court's grant of relief and reverse that decision.

Conclusion

For the foregoing reasons, Petitioner respectfully requests the Court grant this petition for rehearing and reverse the PCR court's order granting Respondent a new trial.

Respectfully submitted,

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June 4, 2020
Columbia, South Carolina

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STATE OF SOUTH CAROLINA,

PETITIONER.

PROOF 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 has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Wanda H. Carter, Esquire
wcarter@sccid.sc.gov

This 4th day of June, 2020.

s/ Lindsey A. McCallister
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Lindsey McCallister

From: Lindsey McCallister
Sent: Thursday, June 4, 2020 4:17 PM
To: 'wcarter@sccid.sc.gov'
Cc: 'lmatthews@sccid.sc.gov'
Subject: Hubert Brown - Petition for Rehearing
Attachments: BROWN Hubert - Petition for Rehearing (02294734xD2C78).pdf

Hi Wanda,

Hope you're doing well! Attached is the State's petition for rehearing in the Hubert Brown PCR appeal, along with a cover letter and a certificate of service. I will be e-filing this momentarily. Please let me know if you need anything further from me. Thanks!

Lindsey



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ALAN WILSON
ATTORNEY GENERAL

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SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk of Court — SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Hubert Brown, #161888 v. State of South Carolina
Appellate Case No.: 2016-001363

Dear Ms. Kitchings:

Enclosed for filing please find the State's Petition for Rehearing in the above-captioned case. Counsel for Respondent is also being served with a copy of the same. Please let me know if you need anything additional at this time.

Sincerely,

s/ Lindsey A. McCallister

Lindsey A. McCallister
Assistant Deputy Attorney General
S.C. Bar # 79054

LAM/em
Enclosures

cc: Wanda H. Carter, Esquire (email only)
Victim Advocacy Division