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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ALLENDALE COUNTY
COURT OF COMMON PLEAS
PERRY M. BUCKNER, III, CIRCUIT COURT

OPINION No. 2020-UP-207 (S.C.ct.APP)
FILED JULY 1, 2020

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

LAPARIS S. FLOWERS,

APPELLANT.

PETITION FOR WRIT OF CERTIORARI

Laparis S. Flowers #375098
Lee Correctional Inst.
990 Wisacky HWY
Bishopville, SC 29010

TABLE OF CONTENTS

Issue Presented.....ii
Statement of the case.....3
Legal Argument.....4
Conclusion.....10

ISSUE PRESENTED

!. WHETHER THE APPEALS COURT ERRED IN DENYING PETITIONER'S APPEAL IN LIGHT OF THE NEW RULE MADE RETROACTIVE IN STATE V. BURDETTE, INFRA, WHICH THE PETITIONER CLAIM IS APPLICABLE TO HIS CASE.

STATEMENT OF THE CASE

The Petitioner appeals the decision of the court of appeals denial of his appeal from a jury conviction for one count of Murder, three counts of attempt murder and weapon possession out of Allendale County in 2018. Petitioner's appellate counsel was relieved pursuant to *Anders v. California*, 875 S.ct. 1396 (1967). After filing a Pro Se brief, petitioner petitioned the court and was granted permission to file a supplemental petition pertaining to the new rule under *State v. Burdette*, 427 SC 490 832 S.E. 2d 575 (2019). The appeal was later denied on or about July 1, 2020. This petition for Writ of Certiorari follows.

This petition for Writ of Certiorari is filed in regard to the new rule which is/was made effective in cases pending on direct review, and therefore, Petitioner asserts that the circumstances of his case qualify him for the benefits of the same.

LEGAL ARGUMENT
POINT ONE

Prior to the commencement of the jury charge, trial counsel expressed concern about the malice instruction charge as indicated by the trial judge decision to alter the charge. See Transcript page 588, line 20-25; 589, line 1-8. The same led to a colloquy between both counsels. See Transcript page 546, line 3-6, 13-20. Nevertheless, the malice instruction, which allowed the jury to infer malice from the use of a deadly weapon was still used.

The Petitioner contends that the use of this charge violates his right to due process insofar as the new rule apply to his case. Whereas, in *State v. Burdette*, 427 SC 490, 832 S.E.2d 575 (2019), the court held:" regardless of the evidence presented at trial, the trial court shall not instruct the jury that the element of malice could be inferred from the use of a deadly weapon". Moreover, the court further added:" that this ruling is effective in cases pending on direct appeal so long as the issue is preserved.

The Petitioner contends that a proper review of his case will establish that he is eligible to have this new rule apply to his case. The record reflect that a situation occurred with respect to the trial judge intention and later use of the malice

charge in question. As indicated by the action of the judge, trial counsel initially questioned the use of the charge and the possible due process violation if used. See Transcript page 588, line 20-25. This occurrence and the fact that his case was pending on direct appeal, qualify him to the benefit of the new rule, as the issue is preserved based on the above.

Petitioner contends that what transpired during the colloquy and the decision reached by the judge is sufficient under the law to preserve the issue. As held in *State v. Johnson*, 505 S.E. 2d 29 (1998), "Where a party request for a jury charge, and after the opportunity for discussion and the court decide the matter, the issue is considered preserved". Such is a longstanding rule and therefore Rule 20(b) objection requirement have no effect. This situation involves and therefore encompass the malice instruction as a hold.

As to the preservation requirement, the court has made clear that its not a "gotcha" game, that instead of being hyp-technical, appellate court approach preservation issue with a practical eye. *State v. Bowers*, 832 S.E. 2d 623 (2019). "If the court had entertained them in a colloquy, and had given or refused, they would have been reviewable.

In *State v. Miller*, 725 S.E. 2d 724 (2012), the appeals court did not require a direct, nor specific objection in order to preserve the malice instruction, so long as the objection was implicit in the challenge. As in the case at bar, the challenge or objection was implicit by trial counsel's action which resulted in what can be construed as the court response to the same.

As mentioned above, this new requirement is rather stringent to say the least. It do not conform with the U.S. Supreme Court standard articulated in *Griffith v. Kentucky*, 479 US 314, 328, 107 S.ct. 708, 93 L.Ed 2d 649 (1987), holding, " a new rule is to be applied retroactively to all cases period. The retroactive effect of a new rule is appropriate when the purpose is to chance the accuracy of a criminal trial". Thus, the court's objection -ive was to extend a new rule that's found to be unjust to all within reason. Therefore, cases pending on direct review was considered to be within reason, if, subjected to this unjust law.

In *Teague v. Lane*, 489 US 288 (1989), the Supreme Court held that the failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basis notions of

constitutional adjudication. (Quoting) Griffith v. Kentucky, Supra. This and other reasoning by the court on this matter appears to take under consideration the fact that no one would know to preserve an issue in anticipation of a new rule, and therefore no stringent requirement was warranted. After all, counsel is not held to such high standard so as to have clairvoyance or the ability to foresee a change in the law and thereby move to preserve the issue for review. It is only a luck of the draw that an issue, under circumstance, is objected to at the right time, since at the time there was no violation to object to, as in the present case.

For these reasons, the appeals court denial of the petitioner's right to benefit from the new rule is in error. Moreover, the appeals court erred in failing to find that, as applicable to this case, the trial court's use of the inferred malice instruction violated his right under due process insofar that the malice instruction worked to shift the prosecution burden of proving each element based on the evidence presented. Arnold v. State, 420 S.E. 2d 834, 838 (1992). In this case, the evidence is far from overwhelming so as to be sufficient to prove beyond a reasonable doubt the elements of the charges.

The evidence in this case consist primarily of victim witness whose testimony was inconsistent and contradictory through the process. The testimony furthermore, was one-sided, with only the view of a possible adversary giving testimony against his enemy. No evidence was presented connecting the victim witness to the initial altercation. In otherwords, they were not involved and therefore not the shooter's target. In light of these facts, the elements of attempted murder was, more likely than not, attributed to the malice instruction. State v. William, 812 S.E. 2d 917 (2018).

In light of the above, the petitioner contends the malice instruction shifted the burden of the proof required to find him guilty of these charges. Particularly, with respect to the attempted murder charges, where it contributed to the jury verdict in violation of his rights under due process. Lowry v. State, 657 S.E. 2d 760 (1988); 5th and 14th Amendments US Constitution.


In applying the new rule to his case, the Appellate Court is require to determine beyond a reasonable doubt, whether the error did not contribute to the verdict. State v. Middleton, 785 S.E. 2d 432 (2014). The court's decision did not include any such determination and therefore the ruling of the Appeals court

was not in accordance with proper standard, nor with the holding articulated in *State v. Burdette, Supra*. For these reasons the Appeals court erred in denying his appeal with respect to the new rule.

CONCLUSION

Based on the above arguments, the petition for Writ of Certiorari should be granted to allow further briefing on the issue, or in the alternative, whatever this honorable court deem just and fair.

Respectfully submitted,



Dated: 9-17-2020