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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

The Honorable John C. Hayes, III, Trial Judge
The Honorable Frank F. Addy, Jr., Post-Conviction Relief Judge

Appellate Case No. 2016-001363
Unpub. Op. No. 2020-UP-144 (Ct. App. filed August 20, 2020)

Hubert Brown, #161888,.....Respondent,

v.

State of South Carolina,Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Brown asserts Counsel was on notice of the need to object to the general-intent instruction because of precedent recognizing a specific intent requirement for attempted murder. However, the issue this Court must decide is whether, despite Counsel ultimately being wrong about the level of intent required, his conduct was unreasonable and outside of prevailing professional norms at the time of the trial.... 1

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ARGUMENT

Brown asserts Counsel was on notice of the need to object to the general-intent instruction because of precedent recognizing a specific intent requirement for attempted murder. However, the issue this Court must decide is whether, despite Counsel ultimately being wrong about the level of intent required, his conduct was unreasonable and outside of prevailing professional norms at the time of the trial.

In its petition, the State argues South Carolina law was not sufficiently clear as to the level of intent required for attempted murder at the time of Brown’s trial to put Brown’s counsel on notice he needed to object to the general-intent instruction, and therefore, his failure to object did not fall outside of the range of reasonable representation. PWC pp. 9-14. In response, Brown relies primarily on State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), to argue Counsel was on notice because “historically attempt crimes included the element of specific intent.” Return p. 5. However, the statute at issue in South Carolina is not clearly drafted as it combines elements of specific intent (“with intent to kill”) and general intent (“malice aforethought either express or implied”), and there is case law to support the general-intent interpretation as well. See King, 422 S.C. 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.”); see also, e.g., 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). Moreover, regardless of this Court’s determination in King that specific intent is required, the issue this Court must now resolve is whether it was reasonable under prevailing professional norms, at the time of trial, for Counsel not to object to the general-intent instruction.

“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough v. Gentry, 540 U.S. 1, 6 (2003). Reasonable, however, does not necessarily equate to correct. For example, in the context of federal habeas corpus review, a federal court may not grant the writ simply because a state court incorrectly applied federal law; it may only do so if the state court’s application was also unreasonable. See Williams v. Taylor, 529 U.S. 362, 411 (2000) (“Under [section] 2254(d)(1)’s ‘unreasonable application’ clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”). “Thus, a federal court might agree with a petitioner that the relevant federal law should have been interpreted differently than the way it was interpreted by the state court yet still conclude that the state court’s application of the federal law was not unreasonable. Dunlap v. Burge, 583 F.3d 160, 165-66 (2d Cir. 2009).

Similarly, here, this Court’s decision in King clearly established Counsel was incorrect in his interpretation that only general intent was required for attempted murder. King, 422 S.C. at 56-57, 810 S.E.2d at 23 (“We agree with the Court of Appeals that ‘the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.’”). However, Counsel’s *incorrectness* on the issue does not automatically equate to *unreasonableness*, and Counsel can only be found constitutionally ineffective under Strickland if his conduct in failing to realize the conflicting statutory language required specific intent rather than general intent was unreasonable based on prevailing professional norms. 466 U.S. at 688 (“The proper measure of attorney performance remains reasonableness under prevailing professional norms.”).

Surely a lawyer is not unreasonable simply for taking a position on a question or issue that an appellate court ultimately deems incorrect. If “correctness” were the rule, then the losing party in every case would automatically also be unreasonable. See, e.g., Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (“‘Objectively unreasonable’ means something more than an ‘erroneous’ or ‘incorrect’ application of *clearly established* law. . . .”) (emphasis added). To continue the analogy from above, in the context of federal habeas review of state court decisions, this means “the state court decision must be ‘so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded agreement.’” Woods v. Etherton, ___ U.S. ___, 136 S.Ct. 1149, 1151 (2016) (citation omitted).

Here, although Counsel was ultimately wrong as to the level of intent required, his conduct, judged based on the circumstances at the time of trial, did not fall so far outside of prevailing professional norms as to be unreasonable. Counsel did not make an error in interpretation or application of clearly established or well-settled law. Therefore, his conduct in failing to object to the general-intent instruction was not unreasonable, and he was not constitutionally ineffective. This Court should therefore grant certiorari and reverse the decision of the PCR court granting relief.

CONCLUSION

As to all other issues, the State reiterates the arguments made in its Petition for Writ of Certiorari. For all the foregoing reasons and the reasons contained in the Petition for Writ of Certiorari, the State requests this Court grant the petition and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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