STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable Debra R. Chapman, Circuit Court Judge

Case No. 2019-CP-41-00162

Gerald R. Williams, #279073, ... Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Applicant, Gerald R. Williams, appeals the order of the Honorable Debra R. Chapman, filed June 18, 2021 and received by the undersigned on July 21, 2021.

July 21st, 2021

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STATE OF SOUTH CAROLINA COUNTY OF SALUDA	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Gerald Williams, #279073, Applicant,	)	Case No. 2019-CP-41-0162
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before the Court by on the application for post-conviction relief filed by Gerald Williams ("Applicant") on July 25, 2019. The State ("Respondent") filed its return on May 4, 2020. An evidentiary hearing in this matter was held before this court on April 28, 2021, with the parties appearing by WebEx due to the ongoing COVID-19 pandemic.[1] Applicant was represented by Ashley A. McMahan, Esquire, and the State was represented by Assistant Attorney General Taylor Z. Smith represented Respondent. At the hearing, applicant testified on his own behalf, and Bennett E. Casto, Esquire, and David Alexander, Esquire, testified as witnesses for Respondent. Following a thorough review of the record before this court and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief and therefore denies the application with prejudice.

PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. During its July of 2013 term, the Saluda County Grand Jury indicted Applicant for three counts of attempted murder (2013-GS-41-0257; -0258; -0259). On October 14-17, 2013, Applicant was tried

[1] At the start of his hearing before this Court, Applicant waived his right to an in-person hearing and agreed to allow the hearing to proceed over WebEx.

before a jury, with the Honorable J. Michael Baxley presiding. Applicant was represented at trial by Robert M. Madsen and Casto ("trial counsel"). Assistant Solicitors Ervin J. Maye and H. Franklin Young, III, prosecuted the case. At the conclusion of trial, the jury found Applicant guilty as indicted as to all counts. Judge Baxley sentenced Applicant to imprisonment for twenty years for each count, with the sentences running concurrently.

Trial counsel filed a timely notice of appeal. Appellate Defender David Alexander ("appellate counsel") of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Assistant Attorney General William F. Schumacher, IV, represented Respondent on appeal. On February 27, 2015, Appellate counsel filed a motion to be relieved as counsel and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing that Judge Baxley erred in refusing to compel the State to disclose information about SLED's investigation into the alleged conduct of a law enforcement officer who testified for the State at Applicant's trial. Applicant filed a *pro se Anders* response, arguing that Judge Baxley erred in admitting into evidence intrinsic fraud evidence in the form of perjured testimony, upon which Judge Baxley relied in denying trial counsel's motion for a directed verdict. The South Carolina Court of Appeals denied appellate counsel's motion to be relieved and directed the parties to brief the following issues and any others of arguable merit: (1) whether Judge Baxley erred in refusing to instruct the jury on the lesser-included offense of first-degree assault and battery and (2) whether Judge Baxley erred in instructing the jury on the doctrine of transferred intent. *State v. Williams*, S.C. Ct. App. Order filed March 31, 2016.

On April 6, 2016, Appellate counsel filed a brief, raising only the two arguments specifically requested by the Court of Appeals. On May 19, 2016, Respondent moved to hold the appeal in abeyance, noting that the Court of Appeals had recently issued its opinion in *State v.*

King, 412 S.C. 403, 772 S.E.2d 189 (S.C. Ct. App. 2015), until such time as the South Carolina Supreme Court could review the Court of Appeals' opinion in *King*. Appellate counsel opposed the motion, arguing that the possibility that Applicant's appeal could be affected by the outcome of the Supreme Court's decision in *King* did not make Applicant's case unique and that Applicant would be harmed by the delay if his appeal was held in abeyance and the Supreme Court eventually dismissed its writ of certiorari to Respondent as improvidently granted. The Court of Appeals denied Respondent's motion to hold the appeal in abeyance. *State v. Williams*, S.C. Ct. App. Order filed June 30, 2016. The Court of Appeals affirmed Applicant's convictions and found that Judge Baxley committed a harmless error in declining to instruct the jury on the lesser-included offense of first-degree assault and battery and that Judge Baxley did not err in instructing the jury on transferred intent. *State v. Williams*, 422 S.C. 525, 533-43, 812 S.E.2d 917, 921-26 (S.C. Ct. App. 2018), *reh'g denied*, *State v. Williams*, S.C. Ct. App. Order filed May 1, 2018.

On June 21, 2018, appellate counsel filed a petition for a writ of certiorari before the Supreme Court, arguing that the Court of Appeals erred (1) in affirming Judge Baxley's instructing the jury on transferred intent for attempted murder and (1) in finding that Judge Baxley's refusal to instruct the jury on the lesser-included offense of first-degree assault and battery was harmless. The Supreme Court granted appellate counsel's petition. *State v. Williams*, S.C. Sup. Ct. Order filed October 18, 2018. After the parties filed their briefs and the Supreme Court heard oral argument, the Supreme Court affirmed the Court of Appeals' opinion as modified. *State v. Williams*, 427 S.C. 148, 829 S.E.2d 702 (2019). The Supreme Court found that the doctrine of transferred intent applied in Applicant's trial because the case was tried as a general-intent crime without objection from trial counsel. *Id.* at 150, 829 S.E.2d at 702-03. The Court found that, since the general-intent framework had become the law of the case and the doctrine of transferred intent

applies to general intent crimes, Judge Baxley therefore did not err in instructing the jury on transferred intent. *Id.* at 157-58, 829 S.E.2d at 706-07. The Supreme Court also found that Judge Baxley did not err in declining to instruct the jury on the lesser-included offense of first-degree assault and battery because, no matter which version of the evidence the jury chose to believe, the jury could not have found Applicant guilty of the lesser-included offense over attempted murder. *Id.* at 156-57, 829 S.E.2d at 706 (citing *State v. Drayton*, 293 S.C. 417, 361 S.E.2d 329 (1987)). The remittitur was issued on June 27, 2019.

CURRENT PROCEEDING

In his application for post-conviction relief, Applicant alleges that he is entitled to post-conviction relief based on the following claims: (1) trial counsel was constitutionally ineffective for failing to object to the jury instruction that the specific intent to kill is not an element of attempted murder, (2) appellate counsel was constitutionally ineffective for failing to argue on appeal that Judge Baxley erred in instructing the jury that malice can be inferred from the use of a deadly weapon, and (3) both trial counsel and appellate counsel were constitutionally ineffective for failing to challenge Judge Baxley's ruling on the applicability of Rule 609, SCRE, to the prior convictions of O. J. Charley, Applicant's codefendant. Applicant asks this Court to grant his application and remand his case for a new trial.

At the start of the evidentiary hearing before this Court, McMahan clarified that Applicant would only be moving forward upon three claims: (1) that trial counsel was constitutionally ineffective for failing to object to Judge Baxley's instruction to the jury that the specific intent to kill is not an element of attempted murder, (2) that trial counsel was constitutionally ineffective for not objecting to the admission of evidence of Charley's prior convictions for the purpose of impeachment, and (3) that appellate counsel was constitutionally ineffective for failing to argue

on appeal that Judge Baxley erred in instructing the jury that malice could be inferred from the use of a deadly weapon. This Court finds that Applicant has waived all claims other than these three, and only these three claims will be addressed in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Saluda County Clerk of Court regarding Applicant's convictions and sentences; Applicant's direct appeal records, including the record on appeal, appellate counsel's *Anders* brief, Applicant's *pro se Anders* brief, the Court of Appeals' order directing the parties to brief certain issues, Respondent's motion to hold the appeal in abeyance, appellate counsel's return to the motion to hold the appeal in abeyance, the Court of Appeals' order denying the motion to hold the appeal in abeyance, the parties final briefs before the Court of Appeals, the Court of Appeals' dispositive opinion, appellate counsel's petition for rehearing, the Court of Appeals' order denying the petition for rehearing, appellate counsel's petition for a writ of certiorari, Respondent's return to appellate counsel's petition for a writ of certiorari, the Supreme Court's order granting appellate counsel's petition for a writ of certiorari, the parties' briefs before the Supreme Court, the Supreme Court's dispositive opinion, and the remittitur; Applicant's records from the Department of Corrections; and all filings in this matter. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80.

Summary of the testimony presented at the evidentiary hearing.

Applicant testified briefly on his own behalf before this Court. Applicant agreed with the summary of the claims and that he wanted to advance at the hearing. On cross-examination, he testified that trial counsel suggested that Charley be called as a defense witness at trial and that

Applicant went along with the idea. Applicant testified that, had he known then what he knows now, he would not have agreed that Charley should have testified.

Trial counsel testified before this Court as a witness for Respondent. He testified that he was not Applicant's original defense lawyer, but was appointed after Applicant's previous lawyer was relieved. Trial counsel testified that Madsen was his co-counsel in this case and that he and Madsen discussed how they would divide responsibility for certain aspects of Applicant's trial between them.

In his testimony, trial counsel summarized the facts of Applicant's crime. He testified that law enforcement officers received a tip that there was some type of imminent retaliation by individuals who lived outside of Saluda County against some individuals who lived in Saluda County. He testified that the officers issued a BOLO for the vehicle described to them. He testified that someone placed a 911 call saying that someone had shot up the victims' home. Law enforcement officers recognized a vehicle near the scene as the one described in the BOLO and found Applicant in the immediate vicinity. Law enforcement officers discovered discarded latex gloves around the crime scene, and later determined that Applicant's DNA was on the gloves. While he was being booked at the detention center, it was discovered that Applicant still had on his person fragments from the latex gloves that he had been wearing during the commission of the crimes.

Initially, trial counsel expected Applicant's codefendant Charley to take the stand for the defense at trial and testify that Applicant had no involvement in the crimes whatsoever. Trial counsel testified at the evidentiary hearing that Charley did testify in that manner during direct-examination, but immediately recanted on cross-examination that all of the testimony he had given on direct-examination in support of Applicant had been a lie and that Applicant was, in fact, an

active participant in the crimes. Trial counsel further testified that it was actually Applicant's idea that Charley should testify for the defense; trial counsel would not normally suggest that the defense call as a witness a codefendant who had already pleaded guilty to the offense for which the defendant was on trial. Trial counsel testified that he spoke personally with Charley before trial—with the permission of Charley's lawyer—and that Charley indicated that Applicant was not involved in the crimes.

Trial counsel testified that he was familiar with the statute codifying the crime of attempted murder in South Carolina, and believed that it had been codified only a few years before Applicant's trial. He testified that he was familiar with our appellate courts' opinions in *King*, and agreed that the opinions had been published after Applicant's trial. He explained that his understanding of the holding in *King* is that the specific intent to kill is an element of the crime of attempted murder. At the time of Applicant's trial, he did not believe that the specific intent to kill was required for the State to prove the crime of attempted murder. At the time of trial, he believed that Judge Baxley's jury instruction that the specific intent to kill was not an element of attempted murder was proper, and believed that the crime of attempted murder required some level of general intent. He testified that Applicant was tried in 2013, but the Court of Appeals' opinion in *King* was not published until 2015. The South Carolina opinion ultimately settling the issue was not published until 2017.

Trial counsel testified that he did not remember if he discussed with Applicant the possibility that evidence of Charley's prior convictions would be admitted at trial. He testified that Charley was going to be a witness for the defense and that they knew that Charley had pleaded guilty to attempted murder, the crime for which Applicant was on trial, making it obvious that Charley's guilty plea would be an issue. He agreed that Charley had five prior convictions, and

that he opposed the admission of evidence of all of them except for two: a conviction for giving false information to police and the conviction for the attempted murder. He testified that he knew that evidence of the conviction for giving false information to police would be admitted because the crime goes to the heart of the issue of Charley's credibility. He testified that he believed that evidence of Charley's pleading guilty to attempted murder was admissible because the conviction was a recent one and that Charley would be subject to impeachment on the basis that he had pleaded guilty to being a codefendant to Applicant in crimes for which Applicant was on trial. He considered Rules of Evidence 403 and 609 when reaching his decision not to oppose the admission of evidence of those two convictions. He did not believe that he had any basis upon which to challenge the admission of evidence of those two convictions for the purpose of impeachment.

Trial counsel testified that he questioned Charley on direct-examination at trial and that he elicited testimony from Charley about those two convictions. He testified that he had to ask Charley about the conviction for attempted murder because Charley was testifying that he acted alone when committing the crimes that he and another individual were the only people responsible for shooting up the victims' home, that Applicant had had no role in the crimes at all. He agreed that Charley was also subject to impeachment for bias or motive once Charley recanted his earlier testimony while being cross-examined because he could now argue that Charley was recanting his supportive testimony for Applicant because Charley knows that he will be sentenced soon. He did not have any expectation that Charley would testify without the two aforementioned convictions being admitted for impeachment purposes.

Trial counsel testified that he objected when Judge Baxley did not instruct the jury on certain lesser-included offenses. He believes that he may have raised the issue earlier on at trial, but could not recall whether or not that discussion was preserved on the record. He testified that

the State's theory of the case was that Applicant was one of the shooters and that his defense theory was that Applicant did not participate in the crimes at all. He agreed with the summary that the defense theory was that Applicant was an innocent "ride-along." He testified that Judge Baxley overruled his objection to the lack of an instruction on the lesser-included offenses.

Applicant cross-examined trial counsel. Trial counsel testified that Applicant was adamant that Charley wanted to confess to the crimes. He testified that Charley told them in their pre-trial meeting almost exactly what he said during his testimony on direct-examination at trial. He testified that neither Rule 609 nor 403 would have prevented the admission of Charley's two convictions.

Trial counsel testified that the law enforcement officers found fragments of a latex glove where the shooting took place. He testified that the officers were unable to match up the fragments, but noted that Applicant's DNA was found on the fragments of glove left behind at the crime scene. He could not remember if Charley's DNA was tested but does not think that would have mattered either way because Charley freely admitted that he was at the scene of the shooting and that he had been involved.

Trial counsel did not believe that he objected to Judge Baxley's jury instruction on transferred intent. He testified that there were three victims in the home at the time of the shooting, and noted that the home was a small trailer. He testified that the primary target was Al Young and that Applicant and Charley understood that Young was located somewhere in the trailer. He testified that there were two other victims—a man and a woman—in the trailer at the time of the shooting; the woman was the one who called 911, and was Applicant's cousin. He thought that the doctrine of transferred intent could be applied from Young to the other two victims. He agreed that transferred intent applies only when the crime at issue was one of general intent. Trial counsel

believed at the time that attempted murder was a general intent crime at the time of Applicant's trial. He could not remember the details of his conversation with Madsen about the level of intent required for attempted murder.

On re-direct, trial counsel testified that he had had some doubts about Charley's credibility but decided to put Charley on the stand because of what Charley had told them what he would say if called as a witness. He was not surprised when the State challenged Charley's credibility after Charley testified that Applicant had no involvement in the crimes. He testified that he renewed all earlier motions and objections at the end of the proceedings.

This Court posed additional questions to trial counsel. He testified that it is common practice for lawyers to stipulate certain things such as the prior criminal record of a witness. He testified that he stipulated to the admissibility of evidence of Charley's conviction for lying to a police officer because that conviction went to Charley's credibility.

Appellate counsel testified for Respondent at the hearing. He testified about the process he used to review the record of Applicant's trial for potential issues once he began representing Applicant. He testified that he read the transcript, took notes about potential issues, researched applicable authority, and then made his decision about whether or not to raise any issues. He did not think that there were any issues of arguable merit, which explained why he filed an *Anders* brief. He testified that, when the Court of Appeals directed him to raise certain issues, it did not direct him to argue that Judge Baxley erred in instructing the jury that malice could be inferred from the use of a deadly weapon. He did not seriously consider raising that issue because, under the applicable law at the time of Applicant's trial, it was not an error for a trial court to give the instruction. He agreed that the defense' trial strategy had been to argue that Applicant had been an innocent ride-along during the crimes. He testified that the defense elicited testimony from Charley

that Applicant was an innocent ride-along. He testified that he did not think that Judge Baxley had given the inference of malice instruction improperly, according to *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), because Judge Baxley had denied trial counsel's request for an instruction on a lesser-included offense. He noted that the Supreme Court had found that Judge Baxley did not err when he refused to give a lesser-included instruction.

Applicant cross-examined appellate counsel. He testified that he does not necessarily raise every issue, and focuses on the issues that he believes are the strongest. He agreed that the appellate courts review the record as a whole whenever an appellate attorney files an *Anders* brief. He testified that on only about four occasions during his time working as an Appellate Defender has he been directed to brief certain issues after filing an *Anders* brief. He testified that the Court of Appeals' opinion in *King* was published after Applicant's trial. He opposed Respondent's motion to hold Applicant's appeal in abeyance because it was uncertain what the Supreme Court would do. He testified that he sought a writ of certiorari after the Court of Appeals issued its opinion in Applicant's case because he believed that the Court of Appeals wrongly applied the law of transferred intent.

Applicant has failed to prove that trial counsel was constitutionally ineffective for not objecting to Judge Baxley's jury instruction that the specific intent to kill is not an element of attempted murder.

Section 16-3-29 of the South Carolina Code "was enacted in 2010 as part of the Omnibus Crime Reduction and Sentencing Reform Act." *King*, at 408, 772 S.E.2d at 192 (citation omitted). The statute provides, in part, that "[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." S.C. Code Ann. § 16-3-29. Applicant was tried for the crime of attempted murder, codified by

statute. ROA 23-25, 761-67.[2] At Applicant's trial in 2013, Judge Baxley gave the following instruction to the jury after the parties' finished their closing arguments:

> [A] specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury. Intent means intending the result that actually occurs, not accidentally or involuntarily.

ROA 705-06. Trial counsel raised multiple objections to Judge Baxley's jury instructions, but he did not object to this instruction. ROA 715-23. Applicant argues that trial counsel should have objected to this instruction because it was given in error.

Applicant, like any defendant, has a constitutional right to the assistance of effective counsel as provided by the Sixth Amendmen. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving all allegations in his post-conviction relief action, and Applicant must show that counsel was constitutionally ineffective, such that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." *Strickland*, at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 466 U.S. 668). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, at 690). In order for a post-conviction relief applicant to successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper

[2] Citations styled in this way are citations to the record on appeal from Applicant's direct appeal.

measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." *Id.* (citations omitted). The "preeminent authority' for all courts when they are considering an applicant's claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer's performance because:

> [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting *Strickland*). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards are not mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, at 670. Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-

conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. *Id.* at 690.

In its 2017 opinion in *King*, our Supreme Court considered the implications of the phrase "malice aforethought, either express or implied," which is found in the statute, and modified the Court of Appeals' opinion. 422 S.C. at 56-64, 810 S.E.2d at 22-27. In *King*, the Supreme Court approvingly cited the Nevada Supreme Court's reasoning that implied malice is incompatible with the specific intent to kill required for a defendant to be guilty of attempted murder, and with that court's summary that:

> Attempted murder . . . is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely with the deliberate intention unlawfully to kill.

422 S.C. at 58, 810 S.E.2d at 24 (quoting *Keys v. State*, 104 Nev. 736 (1988)). Importantly, however, in its discussion of the Court of Appeals' treatment of the issue, the Supreme Court agreed with the State that the Court of Appeals partly based its conclusion in *King* on dicta from *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), acknowledged that South Carolina has been afflicted with "conflicting case law regarding levels of criminal intent," and noted the "ambiguity" created by the language in the attempted murder statute. *King*, at 55-62, 810 S.E.2d at 22-26.

The Supreme Court recognized the lack of clarity in the Court of Appeals' opinion in *King*, writing that the opinion would have been clearer had the Court of Appeals considered the portion of the attempted murder statute regarding malice rather than focusing in isolation "on the phrase 'with intent to kill' . . . ." *Id.* at 61, 810 S.E.2d at 25. Justice Kittredge further emphasized in his concurring opinion in *King* the ambiguity of the attempted murder statute at issue, writing that the question of whether attempted murder is a specific-intent crime "is easily stated . . . but not easily answered." *Id.* at 71, 810 S.E.2d at 31 (Kittredge, J., concurring). The majority of the Supreme

Court acknowledged agreed with this sentiment regarding the lack of clarity on the issue. *Id.* at 62, 810 S.E.2d at 25-26. The Supreme Court was concerned enough to specifically request that the South Carolina General Assembly "re-evaluate the language" of the attempted murder statute. *Id.* at 64, 810 S.E.2d at 27, n.5.

At the time of Applicant's trial, trial counsel did not have the benefit of the guidance of our appellate courts' opinions in *King*. Trial counsel was unaware at the time that attempted murder was a specific-intent crime rather than a general-intent crime. Appellate counsel opposed Respondent's motion to hold Applicant's direct appeal in abeyance because the outcome of Respondent's appeal to the Supreme Court in *King* was uncertain, which suggests that appellate counsel was also unsure of the way that the Supreme Court would interpret the attempted murder statute. It is true that after the Supreme Court's opinion in *King*, attempted murder is clearly a specific-intent crime requiring the specific intent to kill, but that conclusion was far from clear back in 2013. Applicant's Trial counsel's understanding of the attempted murder statute at the time of trial is clearly perceptible now only because the parties and this Court have the luxury of post-*King* hindsight. This Court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Butler*, at 444-45, 334 S.E.2d at 815-16 (quoting *Strickland*). With the benefit of hindsight, this Court can see now that trial court's understanding at the time of Applicant's trial that attempted murder was a general-intent crime was clearly erroneous; however, this Court cannot say, in light of the Supreme Court's emphasis in King on the attempted murder statute's ambiguity, that trial counsel's understanding at the time of Applicant's trial of the level of intent required by the crime of attempted murder was unreasonable as a constitutional matter. As the Supreme Court wrote in its opinion in Applicant's direct appeal,

"To be fair to counsel, at the time of [Applicant's] trial, we had not yet handed down our decision in *King*, in which a majority of this Court held attempted murder was a specific-intent crime." *Id.* at 154, 829 S.E.2d at 705, n.5. To have required trial counsel to correctly assess the level of intent required by the statute at the time of Applicant's trial, before our appellate courts settled the matter, would be to hold trial counsel, wrongly, to the standard of a greater than that of any competent attorney. *See Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial").

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not objecting to Judge Baxley's jury instruction that the specific intent to kill is not an element of attempted murder because Applicant has failed to prove that trial counsel's understanding at the time of trial that attempted murder was a general-intent crime was deficient. Therefore, this Court denies this claim and dismisses it with prejudice.

The doctrine of transferred intent.

At the start of his hearing Applicant waived any claim that would have concerned trial counsel's performance with respect to the transferred intent instruction that Judge Baxley gave to the jury. For that reason, there is no need for this Court to address the merits of such a claim in this order; however, because there was (some) testimony on the transferred intent issue at the evidentiary hearing, this Court feels compelled to make a finding that the claim cannot properly be raised as an independent post-conviction relief claim in this case. Judge Baxley did give the transferred intent instruction to the jury. ROA 702. And then Judge Baxley overruled trial counsel's objection to the instruction. ROA 715-16. Trial counsel renewed that objection at the conclusion of the trial. ROA 743. On appeal, the Supreme Court noted that it had not yet addressed whether the doctrine of transferred intent can supply the *mens rea* for a specific intent crime.

Williams, at 150, 829 S.E.2d at 703. But the Supreme Court declined to address the issue in Applicant's case "[b]ecause this case was tried without objection as a general-intent crime" and vacated the portion of the Court of Appeals' opinion that addressed it. *Id.* When pointing out that trial counsel's objection to the transferred intent instruction did not include mention of Judge Baxley's instruction that attempted murder was a general-intent crime or that transferred intent did not apply when the crime in question is a specific-intent crime, the Supreme Court noted, in fairness to trial counsel, that it had not yet issued its opinion in *King* at the time of Applicant's trial. *Id.* at 154, 829 S.E.2d at 705, n.5. The Supreme Court found that it was the law of the case that attempted murder was a general-intent crime and that the doctrine of transferred intent applies to general-intent crimes. *Id.* at 157-58, 829 S.E.2d at 706-07 (citations omitted).

Even though the Supreme Court discussed the doctrine of transferred intent and the level of intent required for of attempted murder in its opinion in Applicant's direct appeal, it is clear that trial counsel's primary mistake at Applicant's trial was trying Applicant's case as a general-intent case. Once Applicant's case was tried a general-intent case, the application of the doctrine of transferred intent was a natural consequence. The question of whether the transferred intent instruction was properly given in Applicant's trial is a question that is merely subsidiary to the issue of whether trial counsel was constitutionally ineffective for not objecting to the specific-intent jury instruction. The Supreme Court laid out the nature of this connection in its opinion, and this Court does not need to address trial counsel's performance with respect to the transferred intent instruction; this Court has already addressed the root issue and found trial counsel's failure to object to the general-intent instruction was not constitutionally deficient.

Applicant has failed to prove that trial counsel was constitutionally ineffective for not objecting to the admission of evidence of Charley's prior convictions for the purpose of impeachment.

Applicant argues that trial counsel should have objected to the admission of evidence of Charley's prior convictions because the evidence was inadmissible under S.C. Rules of Evidence 403 and 609. Trial counsel credibly testified that having Charley testify was Applicant's idea. Applicant's testimony that the idea of having Charley testify for the defense originated with trial counsel was not credible. Trial counsel testified that he had reservations about calling Charley as a witness but looked into the possibility further at Applicant's insistence. Trial counsel testified that he eventually decided to call Charley as a witness because Charley had told them that he would testify that he and another individual were the shooters and that Applicant had no involvement in the crimes.

Outside the presence of the jury during the defense's case-in-chief, trial counsel notified Judge Baxley that the defense intended to call Charley as a witness and that Charley had a criminal history. ROA 561. Trial counsel conferred with Maye and reached a partial agreement about the admissibility of evidence of some of Charley's convictions. ROA 561-62. Trial counsel noted Charley's five convictions: (1) a 2004 conviction for possession with intent to distribute marijuana, (2) a 2011 conviction for possession with intent to distribute, (3) a 2012 conviction for attempted murder,[3] (4) a 2005 conviction for giving false information to police, and (5) a 2005 conviction for aiding in escape[4]. ROA 562. Trial counsel argued that evidence of Charley's two convictions for possession with intent to distribute should not be admitted because it would not be "probative for truthfulness . . . ." ROA 562. Trial counsel also opposed the admission of evidence of Charley's

[3] Charley plead guilty to the attempted murder of Young and the State dropped the charges as to Wrighton and Ycredra as part of its plea agreement with Charley. ROA 603-04. That is why there was only a single attempted murder conviction for Charley.

[4] Maye later referred to this conviction as one for "rescuing from escape." For the purpose of this Court's analysis, it does not matter which description of the offense applies.

conviction for aiding in escape. ROA 562. Maye initially maintained that evidence of all five of Charley's convictions should be admitted, but left it "to the Court's discretion on the balancing test issues or anything the Court thinks is appropriate." ROA 563. Trial counsel agreed with Maye that evidence of Charley's convictions for attempted murder and giving false information were admissible. ROA 562.

Later in the trial, Judge Baxley returned to the issue of Charley's prior convictions. ROA 572. Maye conceded that evidence of the two convictions for possession with intent to distribute should not be admitted and, after additional argument, conceded that evidence of the conviction for aiding in escape should not be admitted, either. ROA 573-76. Trial counsel admitted that the conviction for giving false information to police touched on "the heart of the rule" and would go to Charley's credibility. ROA 574. Trial counsel also admitted that he believed evidence of the conviction for attempted murder was "clearly relevant" because Charley had pleaded guilty "to his involvement in this case," even though that conviction did not "have that same ring of dishonesty and untruthfulness as the [conviction for giving] false information to law enforcement." ROA 574-75. Judge Baxley stated that, although evidence of the conviction for attempted murder and giving false information to police would be admitted by consent of the parties, he felt that they would have been admissible for impeachment purposes regardless. ROA 576-77.

Trial counsel then called Charley as a defense witness. ROA 576. Charley testified that he told Applicant that Applicant would be driving Charley to meet up with girls and that Charley did not reveal his true, criminal intentions to Applicant. ROA 587. Charley testified that there was nothing in the van in which he and Applicant were riding that would have given Applicant any reason to suspect the criminal nature of Charley's plans. ROA 588. Charley testified that Applicant did not know that Charley had Charley's criminal conspirators following along behind the van.

ROA 590. Charley testified that he told Applicant to wait at the van, which was parked down the road from the victims' trailer, while Charley went on foot to check on the girls. ROA 591. Charley testified that he and another individual[5] went to the victims' trailer on foot while Applicant stayed behind at the parked van. ROA 592. Charley denied that Applicant knew of Charley's true plans. ROA 598. Charley testified that he had written a letter to the Honorable William P. Keesley, in which he alleged that Applicant had no knowledge of the criminal nature of his plans. ROA 601. Charley again testified that Applicant did not know what Charley was actually doing. ROA 603. Before he finished questioning Charley on direct, trial counsel elicited testimony that Charley had a conviction for attempted murder "in this case" and to giving false information to police in 2005. ROA 589. On cross examination, Charley quickly admitted under questioning from Maye that all of the testimony he had just given in support of Applicant had been false. ROA 607. On re-direct, trial counsel attempted to impeach Charley's cross-examination testimony for bias or a motive of self-interest by questioning Charley about the fact that Charley had pleaded guilty but had not yet been sentenced, which was meant to imply that Charley was cooperating with the State only because he was afraid that there would be negative consequences for him at his sentencing hearing if he did not.[6] ROA 631.

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[5] In one of Charley's version of events for the night of the shooting, he testified that another man, his coworker, had been the shooter. *Williams*, at 152, 829 S.E.2d at 704. Law enforcement officers had used bloodhounds in a search of the area to see if there was an unidentified shooter who remained at large, but the bloodhounds found no trace of anyone other than Charley and Applicant. *Id.* at 151-52, 829 S.E.2d at 704.

[6] Charley's repudiation under cross-examination of his earlier testimony beneficial to Applicant was much more damaging to the defense than the impeachment of Charley's credibility through use of the evidence of the prior convictions. In fact, Maye never asked Charley about the two convictions in order to impeach him; instead, Maye got Charley to admit that he had been lying during his earlier testimony in an effort to save Applicant from prison. ROA 603-33. Charley's testimony during the cross-examination was so dramatically different than his testimony on direct that Judge Baxley said that Charley was "probably the most noncredible witness I think I've ever seen in 14 years of this job." *Williams*, at 152, 829 S.E.2d at 704, n.2.

Before this Court, trial counsel testified that he called Charley as a witness because he hoped to elicit testimony that Charley committed the crimes without any involvement on Applicant's part. He testified that he believed that evidence of Charley's conviction for giving false information to police was admissible because it went directly to the question of Charley's credibility as a witness. He believed that evidence of the conviction for attempted murder was admissible because Charley had only recently plead guilty and was Applicant's codefendant. In making his decision to agree that evidence of the two convictions should be admitted, trial counsel considered Rules of Evidence 403 and 609. Trial counsel was not aware of any other basis upon which he could have legitimately opposed the admission of evidence of those two convictions, and did not know of any way that he could have elicited testimony from Charley that he was guilty of the crimes but that Applicant was innocent without evidence of the prior conviction for attempted murder being admitted.

This Court finds that Applicant has failed to prove that trial counsel should have objected to the admission of evidence of Charley's conviction for giving false information to police. Rule 609, SCRE, provides, in part, as follow:

> (a) General Rule. For the purpose of attacking the credibility of a witness,
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . . ; and
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
> For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea . . . .
> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Since Charley's conviction was from 2005, subsection (b) of Rule 609 does not apply. Charley's crime of giving false information to police involved dishonesty or a false statement, so evidence of that conviction was admissible according to the mandatory language of subsection (a)(2) of Rule 609. Trial counsel's admissions to Judge Baxley about his position on the admissibility of the evidence and trial counsel's testimony before this Court indicate that trial counsel performed this same analysis and reached the correct conclusion: that evidence of the conviction for giving false information to police was admissible. Applicant presented no evidence whatsoever that the admission of the evidence was prohibited by either Rule 609 or 403.

This Court finds that Applicant has failed to prove that trial counsel should have objected to the admission of evidence of Charley's conviction for attempted murder. Since the conviction was from 2012, subsection (b) of Rule 609 does not apply. Because attempted murder is punishable by imprisonment in excess of one year, evidence of the conviction must be admitted, subject to Rule of Evidence 403. Applicant presented no evidence that the probative value of the evidence of Charley's conviction for attempted murder was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. In this case, where the defense strategy was to argue, relying upon Charley's testimony, that Charley committed the crimes and that Applicant was innocent of any wrongdoing, the probative value of evidence of Charley's pleading guilty to the crime could not have been more probative and relevant. Applicant has presented no evidence that the admission of the evidence was prohibited by Rule 609 or 403.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not objecting to the admission of evidence of two of Charley's five prior convictions

because Applicant has not proven that trial counsel should have objected to the evidence. This claim, too, therefor, is denied and dismissed with prejudice.

Applicant has failed to prove that appellate counsel was constitutionally ineffective for not arguing that Judge Baxley erred in instructing the jury that malice could be inferred from the use of a deadly weapon.

Applicant fianlly argues that appellate counsel was constitutionally ineffective for not arguing on direct appeal that Judge Baxley erred when he instructed the jury that malice could be inferred from the use of a deadly weapon. A defendant is entitled to effective assistance of appellate counsel. *Southerland v. State,* 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide the effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." *Thrift v. State,* 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes,* 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . ." *Jones,* at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Southerland,* at 616, 524 S.E.2d at 836. Thus, in this case, the court considers 1) whether appellate counsel's performance was deficient, and 2) whether Applicant was prejudiced by appellate counsel's deficient performance. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, Applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

At the close of Applicant's trial, Judge Baxley instructed the jury that:

> Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm.

ROA 705. Trial counsel objected to the instruction, citing *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), and arguing that "just because there's a deadly weapon present, doesn't automatically mean malice is involved . . . ." ROA 721. Judge Baxley overruled trial counsel's objection. ROA 722. Appellate counsel testified that he had read the entire transcript of Applicant's trial and researched applicable law when trying to determine what issues, if any, he would argue in Applicant's direct appeal. Appellate counsel testified that he considered arguing that Judge Baxley erred in giving the jury instruction that malice could be inferred from the use of a deadly weapon, but ultimately decided not to raise that issue because he did not believe that the argument had any merit.

Appellate counsel's judgment was sound. In *Belcher*, the Supreme Court held that a trial court could no longer instruct a jury that the jury could infer malice from the use of a deadly weapon "where evidence is presented that would reduce, mitigate, excuse or justify the homicide." 355 S.C. at 600, 685 S.E.2d at 803-043. At the same time, the Supreme Court affirmed that:

> The standard implied malice charge remains valid, as does the general permissive inference instruction: 'If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.'

Belcher, at 612, 685 S.E.2d at 810, n.9. Appellate counsel gave at the evidentiary hearing his understanding of the Supreme Court's holding in *Belcher*, and that understanding comported with the law. Appellate counsel did not believe that it was error for Judge Baxley to give the instruction in Applicant's trial because there was no evidence that would have reduced, mitigated, excused,

or justified the crimes. Applicant's strategy at trial was that he had no involvement in Charley's criminal acts and was completely innocent of all wrongdoing. Examples of trial counsel's implementation of that strategy can be seen in his opening statement that Applicant was found by police in the getaway van only because Applicant had been giving a ride to Charley, argued in in arguing that Charley began to implicate Applicant's participation in the crimes only when Charley began to fear that he would lose the benefit of a plea bargain if he did not cooperate with the State, and that Applicant's DNA was not found on the firearms that the shooters discarded near the crime scene, and argued in closing that law enforcement officers did not perform a gunshot residue test and thus did not have evidence that Applicant fired a weapon during the shootout. ROA 146, 645, 651, 654. In recognition of the defense strategy, Judge Baxley instructed the jury that Applicant's mere presence at the crime scene was not enough to establish his guilt. ROA 708. Judge Baxley did not instruct the jury on any lesser-included offenses, and overruled trial counsel's objection on that point. ROA 718-19. The Supreme Court found that Judge Baxley did not err in declining to charge the jury on lesser-included offenses because the jury, regardless of which theory of Applicant's involvement in the shooting that it believed, "could not have found [Applicant] guilty of the lesser, rather than the greater, offense. *Williams*, at 156-57, 829 S.E.2d at 706 (citation omitted).

This Court finds that Applicant has failed to prove that appellate counsel was constitutionally ineffective for not arguing that Judge Baxley erred in instructing the jury that malice could be inferred from the use of a deadly weapon because Applicant has failed to prove that there was evidence that would have reduced, mitigated, excused, or justified the crimes, and that appellate counsel's determination that the instruction was given in error. This claim is therefore denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, this Court finds that Applicant has failed to prove any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal, through counsel, within thirty days from the receipt of this order to secure the appropriate appellate review. *See* Rule 203 and 243, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an applicant has a right to the assistance of appellate counsel in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that, if the applicant wishes to seek appellate review, he must serve and file a notice of appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

IT IS SO ORDERED.

Debra R. McCaslin
Debra R. McCaslin
Circuit Court Judge

June 11, 2021

Lexington, South Carolina