

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
Hon. DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2018-001647

THE STATE,

Petitioner,

v.

ROBERT XAVIER GETER,

Respondent.

Opinion No. 5815 (S.C. Ct. App. filed August 18, 2021)

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 5, 2021.

QUESTION PRESENTED

1. Did the Court of Appeals err in deciding that the doctrine of transferred intent cannot be applied to attempted murder when the Respondent committed acts of malice in the commission of this crime killing one person and seriously injuring another?

STATEMENT OF THE CASE

On March 7, 2015, Respondent Geter and victim Mr. James Lewis got into an altercation at Cullers Bar in Richland County, South Carolina. During this altercation Mr. Lewis beat the Respondent about his face causing swelling and a cut above one eye. A second victim, Mr. Clarence Stone -- a person who at times attempts to keep peace within the establishment -- broke up this fight. Once the fight had ended, the owner of the bar, Ms. Deborah Culler, told Respondent that he had to leave. R. p. 31 l. 18-19. Mr. Stone then pulled Mr. Lewis out of the establishment onto the deck out back. R. p. 138 l. 10-11. Instead of leaving out the front door, Respondent decided to go out back where the deck was located. While leaving the establishment a witness by the name of Michael Harkness overheard Respondent stating, "I'm gonna kill somebody tonight." R. p. 75 l. 12-13. Respondent went out the back door where the deck was located.

While both victims were on the deck Mr. Stone attempted to calm Mr. Lewis down. Respondent came outside and made both men think he was offering a handshake in peace. R. p. 139 l. 7-21. However, once he approached, Respondent pulled out a knife and attacked both men. Mr. Stone, while attempting to stop the altercation, was stabbed in the eye. R. p. 141 l. 4-6. Bloodied and in pain Mr. Stone went back into the establishment for assistance. Respondent and Mr. Lewis continued fighting. Respondent stabbed Mr. Lewis twice once in the chest puncturing his heart. While Mr. Lewis lay bleeding, Respondent pulled the knife out of his chest and left the establishment. R. p. 100 l. 7-12. Mr. Lewis was assisted back into the bar, he laid in front of the doorway waiting for emergency medical services (EMS) to arrive. Once EMS arrived they transported Mr. Lewis to the hospital where he later died due to excessive bleeding. Mr. Stone lost vision in the eye in which he was stabbed by the Respondent. R. p. 141 l. 23-24. Richland County Sheriff's Department later responded to the incident location. Lead investigator Joseph Clarke got

statements from several eyewitnesses, who informed him that “Boo” committed the murder. R. p. 212 l. 18-21. It was later determined that “Boo” was the Respondent’s nickname. At the completion of this investigation warrants were issued for murder and attempted murder.

Respondent was contacted by the Richland County Sheriff’s Department and advised to turn himself in. Respondent turned himself in the next day. At the time of his arrest Respondent maintained he was “jumped” by five individuals and he stabbed Mr. Lewis in self-defense. R. p. 219 l. 19-21.

On June 17, 2015, the Richland County Grand Jury indicted Respondent for the offenses of murder and attempted murder (Indictment No. 2015-GS-40-002757, 002758) R. pp. 661-664. This case was originally called for trial on May 15, 2017, before the Honorable Alexander S. Macaulay. Representing the State of South Carolina were Assistant Solicitor’s Richard Cathcart and Jeremiah Shellenburg of the Fifth Circuit Solicitor’s Office. Representing the Respondent was attorney Aimee Zmroczek. During this trial the judge denied Respondent immunity under the Protection of Persons and Property Act.¹ R. p. 4 l. 12-14. Subsequently, two jurors informed the trial judge that they knew the mother of one of the victims. The mother spoke to them about this case, so due to their prior knowledge, the trial judge decided to declare a mistrial.

This case was once again called for trial on April 9, 2018 before the Honorable DeAndrea G. Benjamin. Once again representing the State of South Carolina were Assistant Solicitors Cathcart and Shellenburg. This time representing the Respondent was attorney Zmroczek along with attorney Ryan Schwartz. The trial concluded on April 12, 2018, as a jury of Respondent’s peers found him guilty of all charges. R. p. 613 l. 21 – p. 614 l. 6. At the conclusion of this trial

¹ “A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force. S.C. Code Ann. §16-11-450 (2020).

the trial judge sentenced the Respondent to a forty year term of imprisonment for murder and twenty years for attempted murder. The trial judge ordered these sentences were to be served concurrently. R. p. 623 l. 19-24. The Respondent filed a timely notice of appeal before the South Carolina Court of Appeals.

On June 7, 2021, a panel of the Court of appeals consisting of Judges Konduros, McDonald, and Geathers heard oral arguments. On August 18, 2021, the court issued a published opinion authored by Judge Konduros affirming in part, reversing in part and remanded. Judge Geathers issued a dissenting opinion. In the denial for rehearing Judge Geathers voted to grant the petition.

ARGUMENT

The Court of Appeals erred in deciding that the doctrine of transferred intent cannot be applied to attempted murder when the Respondent committed acts of malice in the commission of this crime killing one person and seriously injuring another.

Reason for Granting Certiorari

According to the South Carolina Appellate Court rules, though not controlling, certain criteria indicates whether certiorari will be considered. Of the five reasons listed two apply in the present case. A novel question of law exists; and, there exists a dissent in the decision of the Court of Appeals. Rule 242(b) SCACR.

The issue of transferred intent as it applies to attempted murder has been before the Court of Appeals on numerous occasions with different outcomes. *State v. Williams*, 422 S.C. 525, 812 S.E.2d 917 (Ct. App. 2018)(transferred intent doctrine could be applied to attempted murder of intended and unintended victims, even though no victim was injured.); *State v. Smith*, 425 S.C. 20, 819 S.E.2d 187 (Ct. App. 2018)(defendant's intentional use of deadly force firing a pistol at rival gang members which resulted in injury to an unintended victim supported defendant's conviction for attempted murder); *State v. Williams*, 2021 WL 2944778 (Ct. App. 2021)(doctrine of

transferred intent inapplicable to this charge of attempted murder); *State v. Geter*, 2021 WL 3641733 (Ct. App. 2021)(doctrine of transferred intent was inapplicable to attempted murder); *State v. Bessellieu*, 2021 WL 5355632 (Ct. App. 2021)(the evidence overwhelmingly supports convictions for four counts of attempted murder and any error in charging transferred intent was harmless).

There have been previous cases presented before this Court but this issue has yet to be addressed.² Petitioner submits that a failure to address this issue continues to result in lower courts applying varying opinions as to how transferred intent should be applied to attempted murder; thereby, leading to more confusion as to the law regarding this issue. This is a matter that should no longer be left to the lower court's interpretation and should be addressed by this Court.

Court of Appeals errors regarding the merits

Petitioner submits that the Court of Appeals erred in its decision regarding how transferred intent cannot be applied to the offense of attempted murder. In *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000) this Court determined that a person acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim. *Id.* 340 S.C. at 276, 531 S.E.2d at 517-518. Within this opinion this court cited with approval the Nevada Supreme Court decision of *Ochoa v. State*, 115 Nev. 194, 981 P.2d 1201 (1999). In *Ochoa*, the Court specifically applied "transferred intent" to all crimes where an unintended victim is harmed as a result of a defendant's specific intent to harm an intended victim regardless of whether intended

² *State v. Williams*, 427 S.C. 148, 829 S.E.2d 702 (2019)("we vacate the portion of the opinion dealing with issue of transferred intent and save for another day the determination of whether the doctrine applies to attempted murder."); *State v. Smith*, 430 S.C. 226, 845 S.E.2d 495 (2020) n.9 ("We need not address this issue because the prior issue are dispositive.")

victim is injured. In that case, the Nevada Court found it was appropriate to charge the defendant who killed the intended victim and injured a bystander with a stray bullet with murder and attempted murder. *Ochoa*, 981 P.2d at 1205. In *Ochoa*, the Court also held, “The doctrine of transferred intent is based upon a legal fiction that imposes criminal liability upon a person based upon his or her participation in a factual scenario which connects him to person or property.” *Id.*, 115 Nev. at 198, 981 P.2d 1204, quoting, *State v. Wilson*, 71 Wash.App. 880, 863 P.2d 116 (1993).

Statutorily, our legislature has provided, “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 (2015). While *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017) required the State to prove a specific intent to kill, it did not require a specific intent to kill any specific person. Here the State was required to prove Respondent acted with the intent to commit an act that would have the natural and probable consequences of another person being killed. Respondent demonstrated a specific intent to kill by after being told to leave the premises going to the deck and attacking both victims with a knife killing one and seriously injuring the other.

Respondent’s actions clearly indicate an intent to kill “another person” and the act of stabbing both victims is certainly the overt act taking a step towards fulfilling that intent. As a result, he is guilty of the crime of attempted murder as set forth by Section 16-3-29 and defined by the Supreme Court in *King*. See e.g. *People v. Stone*, 205 P.2d 272, 274 (Cal. 2009)(“Can a person who shoots into a group of people, intending to kill one of the group, but not knowing or caring which one, be convicted of attempted murder? Yes. The mental state required for attempted murder is the intent to kill a human being, not a *particular* human being.”)(emphasis in original); *Commonwealth v. Palmer*, 192 A.2d 85, 98-99 (Pa. Super. 2018)(“It does not matter whether

Petitioner’s intent was generalized or specific with respect to his **target**. It matters only that he had a specific intent to inflict serious bodily injury upon someone.”)(emphasis in original) The trial court did not err in charging transferred intent, this was not a reversible error.

In the Court of Appeals opinion, the majority raised attention to this footnote in *Smith*, where this Court stated,

Nonetheless we note the State indicated that – were the Court to reverse Smith’s convictions – it intended to charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim. ABHAN is a general-intent crime, and thus there would be no question on remand as to the applicability of the doctrine of transferred intent.

Smith, 460 S.C. at 234, 845 S.E.2d at 499 n.9

Because of the above referenced footnote, the Court of Appeals wrongfully made the interpretation that this Court ruled that ABHAN and not attempted murder is the only sufficient charge that could be made regarding transferred intent. Petitioner argues that this Court never recommended that ABHAN would be a more appropriate charge. This Court just stated that if the Appellant in *Smith* was convicted of ABHAN this issue could not be raised. As stated by the dissent in the present case, “while our Supreme Court reversed our decision to affirm *Smith*’s attempted murder conviction on other grounds there is nothing to indicate that the court rejected our interpretation of its jurisprudence as to transferred intent.” *State v. Geter*, 2021 WL 3641733, 7 (Ct. App. 2021)(Geathers J. dissenting)³

The majority is also of the belief that this Court vacating the issue of transferred intent in *Williams* equates to a decision as to the legality of the issue of transferred intent as it applies to

³ “In sum I find nothing in *King*, *Gerald Williams II*, and *Smith II* to indicate our courts have concluded the doctrine of transferred intent is inapplicable to a charge of attempted murder. *Williams*, 2021 WL 2944778, 15 (Ct. App. 2021)(Huff J. dissenting).

attempted murder. Petitioner disagrees. This Court made no such decision. In *Williams*, the attempted murder was tried as a general intent crime, so this Court decided to “leave it for another day the determination of whether the doctrine applies to attempted murder.” *Williams*, 427 S.C. at 158, 829 S.E.2d at 707. Well that day has come and this Court should address this issue so there can finally be one settled opinion regarding this issue that all courts within the State of South Carolina are obligated to follow.

CONCLUSION

For the foregoing reasons, Petitioner requests this honorable Court grant certiorari, and ultimately reverse the decision of the Court of Appeals.

Respectfully submitted,

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