

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jan 18 2022

S.C. SUPREME COURT

—————
Certiorari to Saluda County

Honorable Debra R. McCaslin, Circuit Court Judge

—————
GERALD R. WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000783

—————
PETITION FOR WRIT OF CERTIORARI

—————
ADAM SINCLAIR RUFFIN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT.....2

ARGUMENT

The PCR judge erred in finding that trial counsel was not ineffective for failing to object to the trial judge’s improper jury instruction that attempted murder was not a specific-intent crime because this Court’s opinion in *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000) had been decided and found that although attempted murder was not a recognized crime in South Carolina at that time, attempted murder would require the specific intent to kill the victim.5

CONCLUSION.....12

ISSUE PRESENTED

Did the PCR judge err in finding that trial counsel was not ineffective for failing to object to the trial judge's improper jury instruction that attempted murder was not a specific-intent crime, where this Court's opinion in State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000) had been decided and found that although attempted murder was not a recognized crime in South Carolina at that time, attempted murder would require the specific intent to kill the victim?

STATEMENT

Petitioner was indicted in July of 2013 by the Saluda County Grand Jury for three counts of attempted murder. App. 1094 – 1102. Petitioner’s trial was held before the Honorable J. Michael Baxley and a jury from October 14 – 17, 2013. App. 1. Petitioner was represented by Bennett Casto and Robert Madsen. The state was represented by Ervin Maye and H. Franklin Young, III. App. 1.

Petitioner was found guilty as charged. App. 722, l. 23 – 723, l. 10. He was sentenced to concurrent terms of twenty-years-imprisonment for each offense. App. 738, ll. 4 – 11.

On direct appeal, Petitioner was represented by David Alexander with Appellate Defense. Alexander initially filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) along with a petition to be relieved as Petitioner’s counsel. App. 743 – 755. Petitioner filed his own pro se brief as well. App. 756 – 766.

On March 31, 2016, the Court of Appeals denied Alexander’s petition to be relieved as counsel and directed Alexander to brief the following issues:

- (1) Whether the trial court erred in refusing to charge the jury on the lesser-included offense of first-degree assault and battery?
- (2) Whether the trial court erred in charging the jury on the doctrine of transferred intent?

App. 767.

Alexander filed the Brief of Appellant arguing the two issues as directed on May 5, 2016. App. 769 – 782. The state filed a motion to hold Petitioner’s appeal in abeyance because this Court had issued a writ of certiorari to review the Court of Appeals’ decision in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015). App. 783 – 814. The Court of Appeals denied

the state's motion to hold the appeal in abeyance and the state filed its Brief of Respondent on September 30, 2016. App. 817 – 840.

On February 28, 2018, the Court of Appeals affirmed Petitioner's convictions holding that the trial judge did not err in instructing the jury on the doctrine of transferred intent and the trial judge's error in refusing to instruct the jury on the lesser-included offense of first-degree assault and battery was harmless beyond a reasonable doubt. App. 841 – 855.

On June 21, 2018, Alexander filed a petition for a writ of certiorari on behalf of Petitioner in this Court raising both issues that had been argued before the Court of Appeals. App. 864 – 882. The state filed its return on July 23, 2018. App. 883 – 904. This Court granted Petitioner's petition for writ of certiorari on October 18, 2018. App. 905. Alexander filed the Brief of Petitioner on November 16, 2018 and the state filed its Brief of Respondent on December 7, 2018. App. 907 – 952.

This Court held oral arguments on the case on March 26, 2019 and affirmed the Court of Appeals decision as modified on June 12, 2019. App. 953. Specifically, this Court found that because trial counsel did not object to Petitioner having been tried for attempted murder as a general-intent crime, that the doctrine of transferred intent was applicable to Petitioner's case. This Court then declined to address whether transferred intent applies to specific-intent crimes and vacated the portion of the Court of Appeals' opinion that dealt with that issue. This Court further concluded that the trial judge had not erred in refusing to charge the jury on first-degree assault and battery because, regardless of what version of events the jury believed, Petitioner could not have been found guilty of first-degree assault and battery. App. 953 – 962.

Petitioner filed his PCR application on July 25, 2019 and the state filed its return on May 4, 2020. App. 963 – 1013. An evidentiary hearing was held on April 28, 2021 via WebEx

before the Honorable Debra R. McCaslin. App. 1014. Petitioner was represented by Ashley McMahan and the state was represented by Taylor Smith. App. 1014. Petitioner, his trial counsel, and his appellate counsel all testified at the hearing. App. 1015. The PCR judge denied Petitioner's application for relief. App. 1068 – 1093.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that trial counsel was not ineffective for failing to object to the trial judge's improper jury instruction that attempted murder was not a specific-intent crime because this Court's opinion in *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000) had been decided and found that although attempted murder was not a recognized crime in South Carolina at that time, attempted murder would require the specific intent to kill the victim.

Relevant Facts

Petitioner and his co-defendant, O.J. Charley ("Charley"), were both charged with three counts of attempted murder. The alleged victims were Al Jerome Young ("Young"), Ycedra Williams ("Ycedra") and Joseph Wrighton ("Joseph").

Young was a drug dealer who testified that Charley paid him \$26,000 for drugs. However, Young did not give Charley any drugs because he wanted to "rip [Charley] off." App. 272, l. 18 – 273, l. 13. Young's house was subsequently shot at by two people on the night of April 13, 2012. Young, Ycedra and Joseph were all present in the home at the time of the shooting. App. 275, l. 3 – 276, l. 5. Petitioner and Charley were both apprehended shortly after the shooting near the residence that had been targeted. App. 326, l. 23 – 327, l. 8.

Charley, who was not called as a witness by the state, testified on behalf of Petitioner. App. 576, ll. 1 – 10. Charley testified that Young robbed him at gunpoint and stole \$32,000. Charley then intended to go to Young's house and take his money back by force. Charley asked Petitioner to give him a ride but did not tell Petitioner what his intentions were. Instead, Charley told Petitioner that they were going to "see some girls." App. 584, l. 5 – 585, l. 25.

Charley maintained that after they arrived at Young's house, Charley went up to the house while Petitioner stayed in the car. App. 590, l. 3 – 591, l. 7. According to Charley, Young

opened the door of the home and shot a gun in the air. Charley said that he shot his gun in the air in response. App. 592, l. 2 – 21. Charley ran back to the car where Petitioner was, but the police arrived “within five seconds” and apprehended them. App. 592, ll. 16 – 25. However, on cross-examination, Charley stated that he lied in his direct examination. Charley proceeded to testify that Petitioner was an active participant in the shooting. App. 605, l. 13 – 631, l. 24.

The trial judge instructed the jury as to the offense of attempted murder: “A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury.” App. 703 ll. 22 – 24. Trial counsel did not object to this instruction.

At Petitioner’s PCR hearing, trial counsel acknowledged that he did not object to this instruction and stated that at the time of the trial he believed the instruction was proper. App. 1039, ll. 6 – 8. Counsel stated that at the time of the trial it was not clear to him what level of criminal intent was required for attempted murder cases because neither the Court of Appeals’ opinion nor this Court’s opinion in State v. King¹ had been decided. App. 1038, l. 15 – 1039, l. 24.

The PCR judge acknowledged that this Court’s opinion in King, 422 S.C. 47, 810 S.E.2d 18 (2017) made clear that attempted murder is a specific-intent crime and that, post-King, any jury instruction to the contrary is improper. App. 1082. However, the PCR judge concluded that “back in 2013,” this was “far from clear.” App. 1082. The PCR judge found that “[t]rial counsel was unaware at the time [of Petitioner’s trial] that attempted murder was a specific-intent crime” because counsel “did not have the benefit of the guidance of our appellate courts’ opinions in King.” App. 1082.

¹ State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) aff’g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015).

The PCR judge went on to say that requiring trial counsel to have correctly assessed the level of intent required by the attempted murder statute at the time of Petitioner's trial would "hold trial counsel, wrongly, to the standard of a greater than that of any competent attorney." App. 1083. The judge thus found that trial counsel was not deficient in his failure to object to the trial judge's erroneous jury instruction. App. 1083.

Discussion

In order to prove ineffective assistance of counsel, Petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668.)

In State v. Sutton, 340 S.C. 393, 398, 532 S.E.2d 283, 286 (2000), this Court held that the offense of attempted murder was not a recognized crime in South Carolina at that time. In Sutton, the defendant shot the victim three times and the victim died more than one year and one day later. Sutton was charged with assault and battery with intent to kill ("ABIK"), attempted

murder, and possession of a firearm during the commission of a violent crime. Id. at 395, 532 S.E.2d at 284. At trial, Sutton moved for a directed verdict, arguing that ABIK and attempted murder were the same offense. Id. The trial judge denied the motion. The Court of Appeals found that, “[i]n South Carolina, the offense of assault and battery with intent to kill embraces the whole of attempted murder,” and vacated Sutton’s attempted murder conviction. State v. Sutton, 333 S.C. 192, 194, 508 S.E.2d 41, 42 (Ct. App. 1998).

In reviewing the Court of Appeals’ conclusion, this Court noted: “Attempted murder *would require the specific intent to kill* and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not.” Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (emphasis added).

In 2010, the South Carolina General Assembly enacted a statute creating the offense of attempted murder. The statute reads: “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 § 16-3-29 (emphasis added).

Here, trial counsel’s failure to object to the judge’s erroneous jury instruction that attempted murder was not a specific-intent crime was ineffective assistance of counsel. The PCR judge erred in its heavy reliance on the fact that the King² cases had not been decided at the time of Petitioner’s trial. While counsel is not expected to be clairvoyant, counsel is expected to act reasonably and conform to professional norms. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial). “When evaluating the

² State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) aff’g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015).

reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland v. Washington, 466 U.S. at 690).

Counsel did not need to be clairvoyant in order to realize that attempted murder was a specific-intent crime at the time of Petitioner's trial. At the time of Petitioner's trial, counsel should have been aware of this Court's opinion in Sutton, 333 S.C. 192, 508 S.E.2d 41 (Ct. App. 1998) and the newly created attempted murder statute in S.C. Code § 16-3-29, which both strongly indicated that attempted murder was a specific-intent crime. Counsel should have also been aware of this Court's decision in State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) where this Court noted that "[t]o prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation, in furtherance of the intent." The prevailing professional norm among the criminal defense bar in this state after the passage of S.C. Code § 16-3-29 was to object to the jury instruction that attempted murder was not a specific-intent crime.

The fact that this issue had not been squarely decided by this Court at the time of trial does not obviate counsel's duty to conform to the prevailing professional norm of making this objection to preserve the issue for appellate review. Trial lawyers must make objections so that our appellate courts are given the opportunity to decide issues. If the trial lawyers in King had not made this exact objection at trial, then this Court would not have been able to reach the issue as to whether attempted murder was a specific or general-intent crime. The lawyers in King knew to make the objection because it was the reasonable and prevailing position of the criminal

defense bar years before this Court's 2017 opinion in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

Finally, although the King cases were decided after Petitioner's trial, it is important to note that both of those opinions relied heavily on Sutton, 333 S.C. 192, 508 S.E.2d 41 (Ct. App. 1998) and the language in S.C. Code § 16-3-29. In the Court of Appeals' opinion in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), the Court noted that our appellate courts have a history of requiring the state to prove specific intent in attempt crimes and found it significant that, in light of this history, the General Assembly included the phrase "with intent to kill" in S.C. Code § 16-3-29. The Court further noted that "[t]he Legislature is presumed to know how the terms and phrases it uses in a statute have been interpreted in the past." King, 412 S.C. at 409, 772 S.E.2d at 192.

The Court of Appeals then found that "[t]he Legislature's use of the phrase 'with intent to kill,' considered in light of our courts' prior rulings that specific intent is required for attempt crimes – particularly the supreme court's statement in Sutton, 'Attempted murder would require the specific intent to kill' – indicates the Legislature intended to require the State to prove the specific intent to kill as an element of attempted murder." Id. at 410, 772 S.E.2d at 193 (Ct. App. 2015) (quoting Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). When this Court reviewed the Court of Appeals decision, it also relied heavily on Sutton, noting: "while we agree with the State that the statement referenced from Sutton [that attempted murder would require a specific intent to kill] constitutes dicta, it is still an accurate statement of law." State v. King, 422 S.C. 47, 55-56, 810 S.E.2d 18, 22 (2017).

Petitioner is not now asking this Court to hold trial counsel to the impossible standard of accurately predicting the future of appellate decisions--rather that Petitioner is entitled to an

attorney who represents him within the bounds of the prevailing professional norms. At the time of Petitioner's trial, both Sutton and S.C. Code § 16-3-29 provided trial counsel with a substantial basis for raising an objection to the trial judge's erroneous instruction on attempted murder not being a specific-intent crime. Trial counsel was ineffective in failing to recognize the prevailing professional norm that was based on then existing case law and the statute defining the offense. The PCR judge erred in finding that trial counsel was not ineffective. Petitioner's convictions should be reversed.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of January, 2022.