STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County
Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2022-000296

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO MACK V STATE

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Petitioner failed to challenge on appeal the judge's ruling that new testing for items previously tested would not provide a substantially more probative result, so under the two issue rule the petition should be denied. Further, Petitioner failed to show the physical items once located in an apartment and never taken into evidence were available for testing and subject to a reliable chain of custody. Finally, the order was sufficient since it determined that Petitioner failed to meet his burden of showing retesting would provide a substantially more probative result (Petitioner's issues II & III). Respondent takes no position on Petitioner's issue I concerning belated review.

STATEMENT OF THE CASE

For purposes of this return only, Respondent State agrees that Petitioner's accounting of the *procedural* history is substantially correct as it relates to the question of belated review. Petitioner's intermingling of facts and evidence elicited at trial or during the hearing under the DNA act within Petitioner's Statement of the Case is addressed separately by Respondent within Respondent's statement of facts and the argument.

STATEMENT OF FACTS

On September 6, 2005, Victim, who lived alone, returned from a five day trip over the Labor Day weekend to Boone, North Carolina. Walking into the entrance to the garage, Victim saw her freezer door was left open with a pool of water formed in front of it. Peering into the house through the open door, Victim saw it was rummaged through. Inside, she discovered her television, her computer, and various electronics were stolen. Her jewelry was dumped out on the bed and various items of jewelry were missing. App. pp. 55-61.

Victim saw blood on her white bookcase, her entertainment center, and by a light switch.

App. pp. 61-62. The responding officer swabbed the blood from the three locations. App. pp. 70-72. The SLED DNA analyst tested two of these swabs and the swabs were a one in 1.3 quadrillion match with Petitioner's DNA. App. p. 115.

By the time of trial in 2011, Victim lived in Canada. App. p. 54. After discovering the burglary, Victim did not stay another night in the house she rented because she was scared. App. p. 55; p. 61. So by the time of trial, she had not lived at the burglarized residence for over five years.

STANDARD OF REVIEW

"In criminal cases, this Court reviews errors of law only." State v. Lynch, 375 S.C. 628, 630, 654 S.E.2d 292, 294 (Ct. App. 2007). "An appellate court is bound by the trial court's factual findings unless they are clearly erroneous." Id.

ARGUMENT

Petitioner failed to challenge on appeal the judge's ruling that new testing for items previously tested would not provide a substantially more probative result, so under the two issue rule the petition should be denied. Further, Petitioner failed to show the physical items once located in an apartment and never taken into evidence were available for testing and subject to a reliable chain of custody. Finally, the order was sufficient since it determined that Petitioner failed to meet his burden of showing retesting would provide a substantially more probative result. (Petitioner's issues II & III) Respondent takes no position on Petitioner's issue I concerning belated review.

The circuit court did not err in denying the petition for DNA testing because the items were previously tested and petitioner failed to show the requested DNA test would provide a substantially more probative result. Further the items sought to be tested were not in the custody of a custodian of evidence and were not subject to a chain of custody sufficient to establish it was not tampered or altered in any manner.

The items Petitioner sought to test were the bookshelf, entertainment center, and the portion of the wall next to the light switch where blood was originally swabbed following the burglary over Labor Day weekend in 2005. App. pp. 309-10. Petitioner's counsel agreed the physical items were not taken into custody by law enforcement or the State. App. p. 308, lines 16-25.

Solicitor Barnette noted the items were swabbed and the swabs were tested and found to match Petitioner's DNA. App. pp. 310-11. Solicitor Barnette explained:

> To ask the Court now to go back and get the actual items would be impossible from this standpoint. Obviously, it was years ago. The victim actually moved shortly after that. She'd actually moved to Canada. We'd actually brought her back from Canada to testify in this case, Your Honor.

App. p. 311, lines 4-9. Solicitor Barnette noted the items were previously tested, and under S.C. Code § 17-28-90 (B)(6), Petitioner would need to show the requested DNA testing "would provide a substantially more probative result." App. p. 311, lines 10-18.

When the trial court asked if the physical items would no longer be available, Solicitor Barnette replied:

> The actual physical items I would not think so, Your Honor, because that's from 2006. And he wasn't arrested until 2009 when we had the CODIS hit from that situation.
>
> And this person's moved. It's been rerented. I'm sure it's been repainted[1] and recleaned and whatever. I mean, it's been eight years ago.
>
> Now, the actual swabs are still available that was swabbed from those items.[2]

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[1] At trial, the landlord testified he painted the walls before Victim moved in, explaining he repaints the walls "almost every time" a tenant moves out. App. pp. 121-22.

[2] Petitioner made clear he was not requesting the swabs be retested. App. p. 308, lines 16-22; p. 315, lines 21-24. During the PCR hearing, a similar issue was raised, and the PCR court surmised, "I don't know how you are going to [test the items]" because "especially in light of the fact that the victim has moved to Canada, how you would ever actually be able to get these items . . . ." App. p.

App. p. 316, lines 5-13.

Under S.C. Code § 17-28-90 (B), the Petitioner was required to show by a preponderance of the evidence:

> (1) The physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
> (2) The physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
> (3) The physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contender or made or is alleged to have made an incriminating statement or admission as to identity;
> (4) The DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;
> (5) If the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;
> (6) The physical evidence or biological material sought to be tested was not previously subjected to DNA testing, **or if the physical evidence or biological material sought to be tested was previously subject to DNA testing, the requested DNA test would provide a substantially more probative result**; and
> (7) The application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

(Emphasis added).

258, lines 4-15. Trial counsel also doubted the items existed anymore at the time of trial. App. p.

In the instant case, the trial court denied relief because Petitioner failed to meet the requirements of paragraph (B)(6). The trial court explained in its order: "The items Defendant is seeking to be tested were previously subjected to DNA testing and further testing would not provide a more probative result. Defendant's application does not state a sufficient basis for this court to grant relief under this Act." App. p. 324.

Petitioner argues in its brief that an insufficient showing was made to establish the items to be tested no longer existed. However, Petitioner fails to argue that the trial court erred in finding that the items were already tested and further testing would not provide a more probative result. Failure to challenge this ruling amounts to concession. Burton v. County of Abbeville, 312 S.C. 359, 440 S.E.2d 396 (Ct. App. 1994) (finding circuit court ruling that was not mentioned or challenged in appellant's brief was the law of the case); State v. Sampson, 317 S.C. 423, 454 S.E.2d 721 (Ct. App. 1995) (unchallenged rulings are the law of the case). "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), *abrogated on other grounds by* Repko v. County of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018).

Petitioner also claims the circuit court should have followed the statutory procedures calling for a list of inventory from custodians of evidence. Petitioner complains there is no evidence in the record this was done. However, Petitioner's counsel did not complain that the statutory procedure was not followed. "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750, 759 (1997). Further, Petitioner's counsel conceded

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254, lines 6-16.

that the physical items were not in the custody of the State or clerk of court, and did not argue that the items might be attainable from a custodian. App. p. 308. "A litigant cannot concede an issue at trial and then raise it on appeal." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011). Petitioner argues for the first time on appeal that the State or the trial court failed to follow statutory procedures. The issue is not preserved for review. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal).

Petitioner also misapprehends his burden. The burden is with the applicant to establish by a preponderance of evidence (1) whether the material to be tested is available (section 17-28-90(B)(1)); and (2) whether it was subject to a chain of custody sufficient to establish it has not been "tampered with, replaced or altered in any material aspect" (section 17-28-90(B)(2)).

It is simply absurd to expect the blood on furniture or on the wall to be available seven to ten years later in an apartment the victim moved away from several years before trial. It is further absurd to believe any materials that could be tested in 2012 when the petition was filed, or 2015, when the hearing was held, would provide information usable in a trial for the 2005 burglary of the apartment because of the gap in time would make the chain unreliable.

Finally, assuming without agreeing that a trial court should provide analysis of each of the seven paragraphs for which an applicant must meet his burden, there is no need for a remand in the instant case where Petitioner failed to offer any proof as to paragraph (6) and further has not challenged the lower court's ruling that Petitioner failed to meet his burden of proving the contemplated testing meets the requirements of paragraph (6). If an applicant feels an order is not specific enough, the applicant should file a motion to reconsider, which was not done in this case.

Accordingly, remand for a more specific remedy is not appropriate in this case. This Court should deny the petition for writ of certiorari.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the writ, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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January 3, 2023

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari To Spartanburg County
The Honorable Robin B. Stillwell, Circuit Court Judge

JOHN WILLIE MACK, SR., Petitioner,

vs.

THE STATE OF SOUTH CAROLINA, Respondent.

Appellate Case No: 2022-000296

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the State's Return To Petition For Writ Of Certiorari Pursuant To Mack v State on Appellant by electronic mail of the same to Appellant's counsel of record, Wanda H. Carter, Esquire, to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 3rd day of January, 2023.

Anne Mueller

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From:	Anne Mueller
To:	"wcarter@sccid.sc.gov"
Cc:	Scott Leverett (sleverett@sccid.sc.gov); David Spencer; Anne Mueller
Bcc:	Victim Services
Subject:	John Willie Mack, Sr., v. State, 2022-000296
Date:	Tuesday, January 3, 2023 3:05:00 PM
Attachments:	image001.png Mack John - 2022-000296 - Return To Petition For Writ For Petition For Writ Of Certiorari Pursuant to Mack v. State (03186148xD2C78).PDF

Good afternoon, Ms. Carter.
Attached to this email you will find the State's Return To Petition For Writ Of Certiorari Pursuant To Mack v. State. We plan to file our Return this afternoon.
If you would, please confirm your receipt of the Return by return email.
Thank you in advance for your cooperation in this matter.
Sincerely,
Anne Mueller
Legal Assistant to Senior Assistant Attorney General David Spencer

Anne A. Mueller, Legal Assistant
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