STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County
Honorable Edgar W. Dickson, Circuit Court Judge

RODNEY C. BRYAN,

Petitioner/Respondent,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

Appellate Case No. 2019-00001887

PETITIONER'S BRIEF OF RESPONDENT/PETITIONER

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT/PETITIONER

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STATEMENT OF ISSUE PRESENTED

This Court does not have appellate jurisdiction to a second or supplemental direct review of a conviction and therefore the PCR court erred by ordering a "belated" review despite already directly reviewing the convictions pursuant to Anders; and the PCR court erred in *sua sponte* finding, without Strickland analysis, appellate counsel ineffective for not raising an issue which was not preserved for review and to which trial counsel acquiesced.

STATEMENT OF THE CASE

Petitioner-Respondent Rodney C. Bryan (Bryan) was indicted for criminal domestic violence of a high and aggravated nature (CDVHAN), violating an order of protection, kidnapping, and two counts of spousal sexual assault. App. 807-08; 810-11; 813-14; 716-19. Robert "Theo" Williams, Sr., Esquire represented Bryan. Assistant Solicitors Shawn Graham and Emily Howard prosecuted the case. App. 1.

Judge R. Knox McMahon presided over Bryan's jury trial on July 14, 2008. App. 1. The jury convicted Bryan as indicted for CDVHAN, violation of order of protection, kidnapping, and one count of spousal sexual battery. The jury acquitted Bryan of the second count of spousal sexual battery. App. 434; 816-17. Judge McMahon sentenced Bryan to serve concurrent terms of imprisonment of ten years for spousal sexual battery, ten years for CDVHAN, thirty days for violating an order of protection, and twenty-five years for kidnapping. App. 448-49; 809; 812; 815; 820.

Bryan appealed. Appellate Defender Robert Pachak submitted an Anders[1] brief arguing the following issue:

> Whether the trial court erred in ruling that two minor children of the victim could testify against [Bryan] without him being physically present in the courtroom?

App. 454. Thereafter, Petitioner submitted a *pro se* brief to the Court of Appeals, presenting the following issues:

1. Did the trial judge abuse his discretion in finding the necessity to conduct an alternative procedure for the testimony of [Bryan's] ten-year-old daughter and seven-year-old son, by invoking S.C. Code Ann. § 16-3-1550(e)?

2. Did the trial judge err by failing to implement the correct procedure to invoke S.C. Code Ann. § 16-3-1550(e) and violate [Bryan's] Constitutional Rights by removing him from the Court Room prior to and during the testimony of [Bryan's] ten-year-old daughter and seven-year-old son?

3. Did the trial judge err in allowing the state[']s Expert Witness to be physically present in the Court Room during the victims['] testimony, for the purpose of the Expert Witness to bolster the victims['] testimony?

4. Did the trial judge err in allowing State's Exhibit No. 8 to be entered as evidence?

5. Did the trial judge abuse his discretion by failing to recuse himself?

App. 462.

The Court of Appeals dismissed the appeal "[a]fter thorough review of the record, [appellate] counsel's brief, and Bryan's *pro se* brief." App. 481; State v. Bryan, Op. No. 2010-UP-136 (S.C. Ct. App. filed Feb. 22, 2020). Bryan then filed a *pro se* petition for rehearing. App. 482-83. The State made its return to the petition for rehearing on April 5, 2010. App. 484-95. The Court of Appeals denied the petition for rehearing on April 23, 2010. App. 497-98. Bryan petitioned the

[1] Anders v. California, 386 U.S. 738 (1967).

South Carolina Supreme Court for a writ of certiorari to the Court of Appeals. App. 499-511. The South Carolina Supreme Court denied the petition. App. 513-14. The case was remitted back to the circuit court on May 28, 2010. App. 515. Bryan sought review in the United States Supreme Court (USSC). App 516. The USSC denied review on January 10, 2011. App. 569.

Bryan filed a PCR application on February 17, 2011. App. 570-83. Judge Edgar W. Dickson convened an evidentiary hearing on August 15, 2013. App. 610. Petitioner appeared *pro se*. App. 610. Assistant Attorney General J. Walt Whitmire represented the State. App. 610. The State moved to reconvene the evidentiary hearing to present trial counsel's testimony regarding his discussions with Bryan about Bryan's right to testify. App. 697; 699. The PCR hearing reconvened on November 13, 2014, before Judge Dickson. App. 699. On February 2, 2018, Judge Dickson found Bryan was "entitled to a new appeal as a result of appellate counsel's deficient performance regarding [Bryan's] right to testify," but denied relief on all other grounds. App. 741-53. The State timely moved to alter or amend pursuant to Rule 59(e), SCRE, on February 12, 2018. App. 754-65. Without analysis, Judge Dickson denied the State's motion on October 19, 2019. App. 804-05. On November 6, 2019, Bryan served his notice of appeal. The State served its notice of cross-appeal on November 13, 2019.

Both parties filed their respective petitions and returns to the other's petition for writ of certiorari. In addition, Bryan filed a Brief of Petitioner pursuant to White and the State in turn filed its Brief of Respondent pursuant to White. This Court, following transfer from the Supreme Court, granted the State's petition and granted Bryan's petition in part. The State's Brief of Cross-Petitioner follows.

STANDARD OF REVIEW

When reviewing post-conviction relief decisions, the standard of review depends on the specific issue involved. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). The instant case presents questions of law, including questions of this Court's appellate jurisdiction.

ARGUMENT

This Court does not have appellate jurisdiction to a second or supplemental direct review of a conviction and therefore the PCR court erred by ordering a "belated" review despite already directly reviewing the convictions pursuant to Anders; and the PCR court erred in *sua sponte* finding, without Strickland analysis, appellate counsel ineffective for not raising an issue which was not preserved for review and to which trial counsel acquiesced.

1. This Court does not have appellate jurisdiction for a second or supplemental direct appeal

The procedure developed from White v. State was created to provide a remedy when a defendant's waiver of an appeal did not occur freely and voluntarily. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the instant case, Bryan did not waive direct review but actually enjoyed a direct appeal. In White, the PCR court determined White did not freely and voluntarily waive the right to appeal his guilty plea convictions. The PCR court then attempted to secure a belated appeal, but the Supreme Court noted: "We know of no authority for the hearing judge granting defendant a full right of appeal and he cites none." Id. at 118-19, 208 S.E.2d at 39. The Court further noted, "it is well settled that in the absence of a notice of appeal having been given and timely served this Court has no jurisdiction over such an appeal." Id. at 119, 208 S.E.2d at 39

(citation omitted). The Court then determined the trial record failed to reflect any meritorious ground for appeal and affirmed the denial of a new trial. Id.

In Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), the Supreme Court provided procedural guidelines for belated review. Further, under Rule 243(i), SCACR, the PCR court makes a factual determination if the applicant knowingly and intelligently waived the right to appeal, and then **the applicant** petitions the Supreme Court for review along with a brief raising the issues the applicant seeks to have reviewed. The appellate court then determines if it will take jurisdiction to conduct a belated direct review of the convictions.

In Poston v. State, 339 S.C. 37, 39, 528 S.E.2d 422, 423-24 (2000), the Supreme Court found that the PCR court erred in granted a belated appeal on the basis that Poston did not waive his right for counsel to petition for a writ of certiorari after his convictions were affirmed by this Court. The Supreme Court explained:

> The cases of White v. State, supra, and Davis v. State, supra, upon which the PCR judge relied in granting petitioner/respondent relief, deal with waiver of the right to direct appeal, or a first appeal of right. Those cases are not applicable here because a petition for writ of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which petitioner/respondent is entitled as a matter of right. Rule 226(b), SCACR. Since petitioner/respondent had no right to a discretionary appeal, the PCR judge erred in addressing the issue of waiver after finding appellate counsel was not ineffective.

Id. at 39-40, 528 S.E.2d at 424.

In the instant case, "belated appeal" is a misnomer. The PCR court ordered what is essentially a second or supplemental appeal, because Bryan already enjoyed a first appeal of right, and a defendant does not have a right to a second or supplemental appeal any more than a defendant is entitled as a matter of right to a discretionary appeal.

In Wise v. South Carolina Department of Corrections, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007), the Supreme Court noted, "When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter." In that case, the Supreme Court found that because the remittitur was validly issued, the Supreme Court did not have jurisdiction over the case. In the present case, once the remittitur for the direct appeal was issued, this Court lost the ability to directly review Bryan's convictions. Again, Bryan did not waive his right to appeal, but instead enjoyed his right to appeal. Following Bryan's convictions, trial counsel filed a notice of appeal and appellate counsel submitted an Anders brief. Bryan submitted a pro se petition. Therefore, this case does not fall within the limited remedies of White, Davis, and Rule 243, SCACR. Accordingly, this Court lacks appellate jurisdiction to review the direct appeal question posed. See Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011).

Bryan argues the State failed to object to the remedy of "belated" review to the PCR court and therefore the State waived the argument. However, the appealability of an order may be raised at any time. Levi v. Northern Anderson County EMS, 409 S.C. 374, 379, 762 S.E.2d 44, 47 (Ct. App. 2014). "South Carolina . . . has made clear appellate jurisdiction can be raised by appellate courts even if none of the parties have raised it." Levi, 409 S.C. at 380, 762 S.E.2d at 47.

In Levi, a workers' compensation case, the employer appealed the single commissioner's denial of the employer's motion to dismiss to the Appellate Panel. The Appellate Panel reversed the single commissioner's order and dismissed Levi's claims. Levi then appealed to this Court and raised the issue of whether the single commissioner's order was immediately appealable. Even though Levi never raised appealability to the Appellate Panel, this Court found it could address the issue "because appealability may be raised at any point." Id. at 380, 762 S.E.2d at 47.

The appropriate remedy for ineffective assistance of appellate counsel is a new trial. See Ezell v. State, 345 S.C. 312, 315-16, 548 S.E.2d 852, 854 (2001) (stating the appropriate remedy for ineffective assistance of appellate counsel is a new trial); Relief pursuant to White v. State is "limited to situations where the PCR applicant did not knowingly and intelligently waive his right to a direct appeal." Douglas v. State, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006); see also Legge v. State, 349 S.C. 222, 224 n.1, 562 S.E.2d 618, 619 n.1 (2002) (noting the PCR court's grant of a belated appeal pursuant to White v. State due to ineffective assistance of appellate counsel was in error because White is inapplicable to cases where the applicant was not denied his right to a direct appeal).

There is no question Bryan received a direct appeal in this case. Accordingly, the PCR court erred in granting a belated appeal pursuant to White v. State because Bryan already had a direct appeal of his conviction and lacked authority to order a supplemental appeal.

2. Bryan never raised a claim of ineffective assistance of appellate counsel for failing to argue he unknowingly and involuntarily waived his right to testify, and therefore, the PCR court's ruling on this issue *sua sponte* was improper.

The PCR court, *sua sponte*, found appellate counsel ineffective for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial. The PCR court found, "[Appellate counsel's] failure to address [this issue] on appeal without explanation to the court [was] ineffective assistance of appellate counsel." App. 751-51. The problem is that because Bryan never raised this claim of ineffective assistance of appellate counsel, the State did not know to defend it. The answer is easy, once posed: appellate counsel is not ineffective for raising a purported trial court error where defense counsel acquiesces to the purported error. The discussion of counsel's acquiescence is discussed in the next section. It was error for the PCR court to sua sponte grant relief on an issue not raised and for which the State was not provided an opportunity to defend.

Bryan simply never raised whether appellate counsel was ineffective for failing to brief whether he knowingly and voluntarily waived his right to testify at trial. Therefore, the PCR court erred in ruling on an issue that was never presented to the court. See Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017) (upholding the PCR court's refusal to address an issue that was not presented in the PCR application or amendment, and no testimony was presented to support the allegation); see generally State v. Stewart, 283 S.C. 104, 110, 320 S.E.2d 447, 450 (1984) ("It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial."). Considering that the State was taxed for not presenting a defense to the claim never raised, the grant of relief raised sua sponte in the ruling was improper.

3. The PCR court improperly shifted the burden of proof to the State, and failed to conduct Strickland analysis of the claim that appellate counsel was ineffective to determine if appellate counsel's performance was deficient for failing to raise an unpreserved issue and whether Bryan was prejudiced by the supposed deficiency.

The PCR court erred in finding appellate counsel was deficient for failing to raise the waiver issue because appellate counsel the State does not have the burden of proof to "produce . . . evidence as to why it was not addressed," and this issue was not preserved at trial so appellate counsel cannot be deficient for failing to raise it. App. 751.

First, the PCR court erred by shifting the burden of proof to the State in concluding, "The State produced no evidence as to why the issue was not addressed." App. 751. It is well settled that a PCR applicant bears the burden of proving both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984) ("First, the [applicant] must show that counsel's performance was deficient. . . . Second, the [applicant] must show that the deficient performance prejudiced the defense."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the

allegations in his application."); Rule 71.1, SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

It was Bryan's burden to overcome the high bar of Strickland, not the State's burden of showing appellate counsel was not ineffective. See Strickland, 466 U.S. at 669 ("Judicial scrutiny of counsel's performance must be highly deferential, and 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. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").

Wholly absent from the PCR court's analysis is any Strickland analysis including an explanation as to why the issue would be meritorious, or analysis as to whether a reasonable likelihood for success existed if the issue was raised on direct appeal. Appellate counsel appointed to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983); United States v. Mason, 774 F.3d 824, 828-29 (4th Cir. 2014) ("Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit." (citation and internal quotation marks omitted)). Appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). "We likewise **presume** that appellate counsel decided which issues were most likely to afford relief on appeal." Mason, 774 F.3d at 828 (emphasis added, citation and internal quotation marks omitted).

"[I]t is still possible to bring a [claim of ineffective assistance of counsel] based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259 (2000) (favorably quoting the following observation in Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985): "Generally, only when ignored issues are **clearly stronger** than those presented will the presumption of effective assistance of counsel be overcome" (emphasis added)). In the instant case, the issue is patently not preserved for review and lacking merit to suggest the possibility of reversible error.

Trial counsel represented to the trial court that he fully discussed the right to testify with Bryan. At the conclusion of the State's case, the following colloquy occurred:

> Court: All right. Mr. Williams, do – do I need to interview Mr. Bryan with regard to his right to testify or not testify?
>
> (Sotto voce discussion between Mr. Williams and the defendant.)
>
> Mr. Williams: Your Honor, you do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying.
>
> Court: All right. With that being said the, and your advising the Court I do not need to interview him, I – I will not do so. Again, I am sure you've explained it to him fully and completely, and if you need any more time to discuss that with him, you certainly may have that, Mr. Williams.
>
> Mr. Williams: You Honor, I think we're okay on this.
>
> Court: All right.

App. p. 373, line 25 – p. 374, line 15. Therefore, counsel conceded and represented that Bryan understood his right to testify and that Bryan was freely and voluntarily waiving his right to testify.

As noted above, the trial court asked trial counsel if it should advise Bryan of his right to testify at trial. "A defendant's knowing and voluntary waiver of . . . constitutional rights . . . 'may be accomplished by colloquy between the Court and the defendant, *between the Court and*

defendant's counsel, or both.'" Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (emphasis added). Trial counsel not only did not object to the lack of questioning of his client, he informed the trial court, "[Y]ou do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying." The trial court clarified that trial counsel was advising the court it did not need to interview Bryan. Trial counsel stated the trial court did not. App. 373-74.

The waiver issue was not preserved for appeal as there was no objection to the trial court failing to advise Bryan of his right to testify at trial. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011) ("A litigant cannot concede an issue at trial and then raise it on appeal."); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial, but then complain on appeal). It was reasonable for appellate counsel not to argue the unpreserved issue, as this Court directed in Dunbar, "An issue that was not preserved for review should not be addressed . . . ." 356 S.C. at 142, 587 S.E.2d at 694. Further, this Court has held appellate counsel is not ineffective for failing to raise an issue that was not preserved. See Legge, 349 S.C. at 225, 562 S.E.2d at 620 (finding appellate counsel not ineffective for failing to raise an unpreserved issue).

In concluding the State failed to produce no evidence as to why the issue was not addressed on appeal, the PCR court ignored the "highly deferential" standard that is to be applied to appellate counsel's performance and improperly shifted the burden of proof to the State, patent errors of law. Further, the PCR court failed to offer a Strickland analysis for determining if not raised the

unpreserved error amounted to deficient performance or prejudice. Accordingly, the PCR court's order granting a "belated" appeal due to ineffective assistance of appellate counsel should be reversed.

CONCLUSION

Based on the forgoing, the PCR court erred in granting Bryan a "belated" or supplemental appeal due to ineffective assistance of appellate counsel. This Court only has jurisdiction to conduct proper belated review after an involuntary waiver of the right to appeal and does not have appellate jurisdiction to conduct a second or supplemental review. Further, the issue of whether Bryan freely and voluntarily waived the right to testify is not preserved for review and the record reflects that counsel assured the trial court that counsel discussed the right to testify, so the trial court did not commit error.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR THE STATE

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