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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2022-001592

Jason R. Franks,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PETITIONER'S STATEMENT OF THE ISSUE PRESENTED

I. Whether the PCR court erred finding Petitioner's allegation, that his Sixth Amendment right to advice of counsel was violated during plea negotiations, was "outside the scope" of PCR where the solicitor offered and later rescinded plea deal to Petitioner before he was appointed counsel and before Petitioner had seen any discovery in his case?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE PRESENTED

1. The PCR court correctly found Petitioner's Sixth Amendment allegation—i.e., that his right to counsel was violated when Petitioner, acting *pro se*, rejected the solicitor's initial plea offer—was outside the scope of PCR because the issue could have been raised at trial or on direct appeal.

STATEMENT OF THE CASE

On June 7, 2010, a white SUV operated by Petitioner ran over a moped operated by Edward Mullins ("Victim"), causing Victim to be hospitalized. Petitioner left the scene of the collision, but later turned himself in to the police and claimed that the collision was an accident.

Petitioner's neighbor, Anthony Valenti, testified at Petitioner's trial. Valenti testified that he had observed Victim and Petitioner "having words" in a hostile manner approximately a week before the incident, although he could not hear what was said. The following day, Petitioner came to Valenti's house with a baseball bat and said he was going to "beat the brakes off of" Victim and "stick it up his ass." Valenti testified Petitioner continued making threats against Victim on two other occasions. He recalled that Victim came to Valenti's house on the day of the incident, and Valenti and Victim arranged to run some errands and then return to the house to hang out. Victim left on his moped, and Valenti followed him in his pickup truck. As Valenti was leaving the driveway, he saw Petitioner, who lived at the house next door, jump off his front porch and get into a white SUV. Petitioner cut off Valenti, nearly colliding with him, and started driving behind Victim's moped on the highway. Although Victim was driving slowly, Petitioner followed Victim for approximately two miles, even though there was room to pass him in the other lane. Valenti, who had a doctor's appointment to get to, eventually passed Petitioner and Victim, but he harbored a bad feeling about the situation. (App.pp.129–40).

Patricia Johnson, mother of Petitioner's fiancé, testified that she had been at Petitioner's house one day when Petitioner began complaining that Victim had insulted him by saying Petitioner would have been Victim's "bitch" if they had been in prison together. Petitioner "didn't take this too well," and he paced up and down while telling Patricia he was going to "slice [Victim's] belly" and "go for his throat." Finally, Petitioner stated, "That's okay, I'll get him";

Patricia replied that he needed "to drop it, because it's not worth getting into trouble over." (App.pp.166–67).

Victim testified that, a week prior to the collision, he had teased Petitioner by calling him "queer" on account of Petitioner's face tattoo and earrings, and he had goaded that Petitioner would have been his "girl" if they had been in prison at the same time. Petitioner replied that he was going to stab Victim, but he left without any physical altercation. On the day of the incident, Victim testified he left Valenti's house on his moped to go run some errands. He was traveling at the rightmost edge of the right-hand lane on a four-lane highway and going about 25 miles an hour. In his mirror, he saw a white SUV behind him, and he wondered why it wasn't passing him like the rest of the traffic. After Valenti's truck passed him, the white SUV drove up beside him and rolled down the window. Victim saw Petitioner inside the SUV "hollering and screaming" at him. Petitioner "whipped" in front of Victim, pulled off to the side of the road, and got out of the car wielding a baseball bat. Victim kept driving. When he next looked in his mirror, he saw Petitioner's SUV approaching him at a high rate of speed, and he could hear the engine revving high. The SUV struck Victim's moped from behind, and the next thing Victim could remember was lying on his back in the road with a nurse "putting towels and stuff on me because I was bleeding real bad." Victim was placed on a stretcher and taken to the hospital in an ambulance. (App.pp.252–61).

Officer Michael Scurlock investigated the crash after Victim was taken to the hospital. He located Victim's moped at the end of a trail of "gouge marks" approximately 75 to 100 yards long. After Officer Scurlock learned of Petitioner's involvement, he arranged a meeting with Petitioner. He testified that Petitioner met with him at the Tega Cay Police Department and, after being read his *Miranda* rights, gave a written statement. In his statement, Petitioner stated Victim had called

him a "bitch" on two occasions prior to the day of the incident. Petitioner claimed that, on the day of the crash, he got into his fiancé's SUV to go get gas for his lawnmower. He saw Victim driving his moped out of Valenti's driveway, so he waited three to five minutes to avoid a confrontation. However, he encountered Victim about two miles up the road, and Victim smiled at him and began slowing down. Petitioner claimed he could not pass Victim due to cars in the left lane; however, he then stated he pulled up beside Victim and asked him if he wanted to "fight or play games." Victim said something that Petitioner interpreted as wanting to fight, so Petitioner drove ahead of Victim, pulled over to the side of the road, and "got out of my vehicle preparing for confrontation." Victim drove by, "running his mouth," so Petitioner got back into his vehicle and resumed following Victim. Petitioner claimed Victim was still driving slowly, so Petitioner "tried to fake him out" by swerving into the left lane but ended up running into Victim's moped. Petitioner stated he did not hit Victim on purpose, but he left the scene and waited at the gas station for a few minutes to calm down. When he returned to the scene and saw ambulances, he panicked and went to his mother's house, before he eventually called the police and turned himself in. Petitioner also stated he saw Victim in his rearview mirror immediately after the crash, and Victim was walking around and flipping him off. (App.pp.181–97).

Petitioner was initially charged with assault and battery with intent to kill ("ABWIK"). While detained at the York County Detention Center, he was approached by Assistant Solicitor E. B. Springs, who asked him if he wanted a lawyer. Petitioner replied, "No, I'll handle this." Solicitor Springs offered to let Petitioner plead guilty to leaving the scene of an accident resulting in bodily injury and reckless driving, for a one-year active sentence. Petitioner initially seemed willing to accept the offer. Solicitor Springs then asked Petitioner again if he wanted a lawyer, clarified that the offer would still be available if Petitioner got a lawyer, and offered to help

Petitioner get a public defender. Petitioner again stated, "no, I'll handle it myself." (App.pp.445–46).

When the time came for Petitioner to take the plea deal, however, Petitioner came to Springs' office and told Springs he had changed his mind and wanted to go to trial. Springs reminded Petitioner that he would be tried for attempted murder and would be facing life imprisonment if found guilty. Petitioner stated he understood that, but he insisted on a trial. Springs brought Petitioner before a judge and stated he needed to have a public defender appointed. Petitioner stated, "yeah, I want a public defender because I want a trial." (App.p.446, lines 8–22).

Eik Delaney and B. J. Barrowclough were ultimately appointed to represent Petitioner. After he was appointed, Delaney approached Springs asking for another plea offer. Petitioner, meanwhile, had picked up a separate charge of lewd act upon a minor, so Springs offered to let Petitioner plead no contest to the lewd act charge and guilty to assault and battery of a high and aggravated nature ("ABHAN") for a twelve-year sentence. Petitioner rejected that offer, and he proceeded to trial on December 13, 2010, before the honorable John C. Hayes, III, and a jury. (App.pp.446–47).

The jury found Petitioner guilty of attempted murder, and Judge Hayes sentenced him to life imprisonment without parole ("LWOP"). A notice of appeal was filed on Petitioner's behalf, and an appeal was perfected. The South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence. *State v. Franks*. 2013-UP-020 (S.C. Ct. App. filed January 16, 2013). Petitioner then filed a petition for writ of certiorari in the South Carolina Supreme Court, which was denied on May 22, 2014. The Remittitur was issued on June 3, 2014.

Petitioner filed an application for post-conviction relief ("PCR") on August 26, 2014, and an amended application on October 26, 2017. An evidentiary hearing was convened on April 12,

2022, at the Moss Justice Center in York, South Carolina. Following the hearing, the PCR court denied relief in an order dated October 4, 2022. Petitioner filed his petition for a writ of certiorari on July 14, 2023.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

1. **The PCR court correctly found Petitioner's Sixth Amendment allegation—i.e., that his right to counsel was violated when Petitioner, acting *pro se*, rejected the solicitor's initial plea offer—was outside the scope of PCR because the issue could have been raised at trial or on direct appeal.**

In his amended PCR application, Petitioner alleged that his Sixth Amendment right to counsel was violated during the plea negotiation process because he was not represented by counsel at the time he rejected the one-year offer. (App.pp.463–64). The PCR court found this issue was outside the scope of PCR because the issue was known to Petitioner's trial counsel and to the trial court, and it was developed in the trial court record. (App.p.666). Because this issue was known to Petitioner and his trial counsel and could have been raised at trial or on direct appeal, the PCR court correctly found it was not within the scope of issues appropriate for a PCR proceeding.

PCR "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B). "It is uniformly held that an application for post-conviction relief is not a substitute for an appeal . . . Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." *Simmons v. State*, 264 S.C. 423, 215 S.E.2d 883, 885 (1975); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal . . . Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of

counsel."); *Johnson v. Lee*, 578 U.S. 605, 609 (2016) (noting the "well-established and ubiquitous" rule that state PCR proceedings may not be used to litigate claims that were, or that could have been, litigated at trial or on direct appeal); 24 C.J.S. *Criminal Procedure and Rights of the Accused* § 2109 (noting that issues, including questions of a constitutional dimension, that were or could have been raised at trial or on appeal are waived for purposes of PCR and barred by the doctrine of res judicata).

The facts behind Petitioner's allegation—which was *not* framed as an allegation of ineffective assistance of counsel,[1] but as a separate Sixth Amendment claim—were clearly known to Petitioner and to his attorneys prior to his trial. Judge Hayes directed Solicitor Springs and Petitioner's counsel to put those facts on the record during the trial proceeding, saying "this case has, from what I understand, a unique wrinkle that I think needs to be put on the record, because obviously this case would not end here." (App.p.444, lines 22–24). Solicitor Springs then put on the record his account of the plea negotiations between him and Petitioner, including Petitioner's refusal of counsel and ultimate rejection of the one-year plea offer. (App.pp.445–47). Delaney and Barrowclough also put on the record their understanding of the plea negotiation process, which was consistent with Springs' account. (App.pp.447–50). Judge Hayes then asked Petitioner if he had anything to say, and Petitioner admitted that he rejected the plea offer because he had been trying to "buy time" so he could marry his fiancé. (App.p.450, lines 8–24).

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[1] Petitioner also alleged that trial counsel was ineffective for failing to request a charge on the defense of accident. (App.p.463). However, he has never alleged or argued that his attorneys were ineffective for failing to challenge his rejection of the one-year plea deal at trial or on appeal. The PCR court found counsel was not ineffective as to the accident charge issue, and Petitioner has not appealed that finding. (App.p.666).

Springs, Delaney, and Barrowclough each testified at the PCR evidentiary hearing, and the PCR court found their testimony was consistent with the facts put on the record during trial. (App.pp.665–66). The PCR court commended trial counsel's diligence in trying to persuade the State to revive the rejected offer, but found that the issue was "known to the presiding judge" and was, consequently, "outside the scope of an application for Post-Conviction Relief." (App.p.666). Because the issue was known to all parties, put on the record at trial, and clearly could have been litigated at trial or on direct appeal, the PCR court correctly found that it could not be asserted in a PCR proceeding. This finding is necessitated by section 17-27-20(B) of the Uniform PCR Act and this Court's precedents in *Simmons*, *Drayton*, and other cases. Petitioner has not explained why he should be permitted, for the first time, to raise this Sixth Amendment challenge on PCR when he failed to raise it at trial or on appeal.[2]

Because the PCR court correctly found that Petitioner's constitutional challenge to his own rejection of the State's one-year plea offer was outside the scope of PCR, the State asks this Court to deny the petition for a writ of certiorari.

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[2] Even if this court were to reach the merits, Petitioner's constitutional claim must fail. Solicitor Springs testified that he asked Petitioner if he wanted a lawyer and even offered to help him get a public defender while the plea offer was still on the table, but Petitioner repeatedly stated he wanted to handle the matter himself. Petitioner consistently refused representation until after he had rejected the plea offer and insisted on going to trial. Because Petitioner declined Solicitor Springs' offer to obtain representation for him before rejecting the one-year plea deal, it is outrageous for him now to complain that he was "denied the right to advice of counsel during plea negotiations." (Pet.p.10).

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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