

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2012-212353

DONALD JAMES HURLBERT,

RECEIVED

AUG 14 2013

S.C. Supreme Court

Petitioner,

v.

STATE OF SOUTH CAROLILNA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General
SC Bar No. 100269

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

- I. Did the Magistrate's court err in accepting the Petitioner's nolo contendere plea when the Petitioner did not knowingly and intelligently waive his right to a jury trial?

STATEMENT OF THE CASE

The Petitioner was issued a ticket for public drunkenness (Ticket #94310DV) for an incident occurring on July 3, 2008. The Petitioner proceeded upon that charge without counsel.

On March 4, 2009, the Petitioner entered a nolo contendere plea to the charge. He was sentenced by the Honorable Arthur C. McFarland to one (1) day of confinement, with credit for the one (1) day he already served.

The Petitioner filed a notice of appeal in the Circuit Court (2009-CP-10-7840). By order dated and filed June 18, 2010, the Honorable Thomas L. Hughston, Jr. denied all of Petitioner's outstanding motions and affirmed the conviction.

The Petitioner subsequently filed a Post-Conviction Relief (PCR) application on June 6, 2011. The Respondent made its return and motion to dismiss on April 23, 2012. A hearing was convened on May 22, 2012, at the Charleston County Courthouse at which time the Petitioner was represented by George E. Counts, Esquire. The Petitioner, who resides in Pennsylvania, was not present. Karen C. Ratigan, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. At the hearing, the Respondent made a Motion to Dismiss, arguing the Petitioner failed to articulate a cognizable claim for relief. Judge Harrington dismissed the PCR application on May 25, 2012.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

The issue presented is not preserved for appellate review and the lower court properly dismissed the Petitioner's application for post-conviction relief for failure to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

As an initial matter, the Respondent submits that the issue of whether or not the Magistrate's court erred in accepting the Petitioner's guilty plea was not properly preserved for appellate review. It is well settled that an issue that has not been presented to or passed upon by the trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). An issue cannot be raised for the first time on appeal. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Id.

The Respondent submits the Petitioner's application for post-conviction relief filed June 6, 2011, does not make any specific allegations. Rather, the Applicant refers to allegations and issues raised during his appeal to the circuit court. This Court could construe the "11th ground for appeal" listed in the "Motion to Amend Notice of Appeal" as raising the issue of whether or not the magistrate court erred in accepting the Petitioner plea. (App. 29). However, the record reflects that this issue was not ruled on by the lower court since the lower court properly ruled the issues raised by the Petitioner were not proper for review on post-conviction relief. This Court should dismiss this Petition for Writ of Certiorari as the issue presented is not properly preserved for appellate review.

However, if this Court is inclined to review this issue, the Respondent submits the lower court properly summarily dismissed the Petitioner's application for post-conviction relief for failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act (the Act). S.C. Code §§17-27-10 et seq. (2003). Pursuant to the Act, an Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Petitioner are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds.¹ In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

¹ At the Petitioner's post-conviction relief hearing, counsel for the Petitioner indicated if granted a continuance by the Court he would amend the Petitioner's application to include additional allegations. The Respondent's submits these vague amendments as presented by counsel were insufficient to withstand the State's request for summary judgment.

In addition, the allegations raised by the Petitioner in his application are appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised and did raise these issues on appeal. The Petitioner listed his post-conviction relief allegations by referencing the issues listed the Notice of Appeal attached to his application. This indicates they were the same issues raised and ruled on by the circuit court during his appeal. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner's application for post-conviction relief should be summarily dismissed for failing to state a claim cognizable under the Act. This Court should deny the Petition for Writ of Certiorari and affirm the lower court's ruling.

CONCLUSION

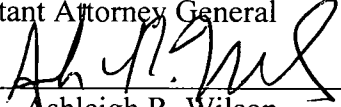
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By:  _____

Ashleigh R. Wilson
SC Bar No. 100269
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR THE RESPONDENT

August 14, 20 13

STATE OF SOUTH CAROLINA
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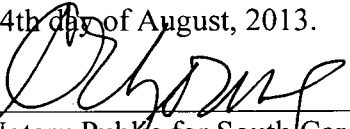
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel, George E. Counts, this 14th day of August, 2013.



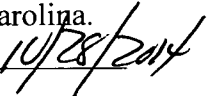
Anne R. Henley
Legal Assistant

SWORN to before me this
14th day of August, 2013.



Notary Public for South Carolina.

(L.S.)

My Commission Expires: 



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AUG 14 2013

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

August 14, 2013

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Donald James Hurlbert v. State of South Carolina
2011-CP-10-4018
Appellate Case No. 2012-212353

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this return today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: George F. Counts, Esquire