

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-213036

RECEIVED

AUG 21 2013

S.C. Supreme Court

David Andres Ortiz Molina, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General
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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did the PCR Judge err in not allowing the testimony of an original juror?
2. Did the PCR Judge err in not granting Petitioner relief on the basis that Counsel was ineffective for not presenting evidence that it would not have been possible for Petitioner to have been at the location of the crime during the time in question?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the April 2006 term of General Sessions for assault and battery with intent to kill (2005-GS-23-6796). (App.pp.760-61). Jeffrey Falkner Wilkes, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty as indicted. On May 18, 2006, the Honorable D. Garrison Hill sentenced Petitioner to twenty (20) years imprisonment. (App.p.722).

A notice of appeal was filed at the South Carolina Court of Appeals. Eleanor Duffy Cleary, Esquire of the South Carolina Office of Appellate Defense represented Petitioner on appeal. (App.pp.777-88). The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Molina, Op. No. 2009-UP-073 (Filed Feb. 10, 2009). (App.pp.789-90).

Petitioner filed an application for post-conviction relief (PCR) on December 15, 2009 (2009-CP-23-10561). (App.pp.791-96). A hearing was held at the Greenville County Courthouse on April 3, 2012. (App.pp.803-88). Petitioner was present and represented by Tommy A. Thomas, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order dated June 6, 2012. (App.pp.889-97).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction

relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The issue of whether the PCR judge erred in not allowing a juror to testify is not preserved for appellate review. Regardless, such testimony is barred by Rule 606(b), SCRE.

At the PCR hearing, Petitioner argued a juror's decision was influenced by other members of the jury during deliberations. (App.pp.807-08). Petitioner argued the exception to the general rule of allowing juror testimony, where "an internal situation it's incumbent to show that it's necessary to ensure due process and fundamental fairness." (App.pp.807-08). The PCR judge denied Petitioner's pre-trial motion for the admission of the juror's testimony. (App.p.807).

Respondent submits this issue is not preserved for appellate review. Counsel for Petitioner did not object to the PCR judge's ruling that the juror testimony was not allowed. As such, this issue cannot be raised on appeal. See, e.g., State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal). Further, this issue was not addressed in the order. (App.pp.889-97). The record indicates that Petitioner did file a Rule 59(e), SCRPC motion; however, Petitioner later withdrew his Motion to Alter and Amend and stated the Order adequately addressed all of the issues presented to the PCR judge. (App.pp.898-99; pp.913-14). A "party must timely file a Rule 59(e), SCRPC, motion to preserve for review any issues

not ruled upon by the court in its order.” Al- Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (1992) (issue must be raised and ruled on by the PCR judge in order to be preserved for review)).

In the alternative, the PCR judge did not err in barring the juror’s testimony at the PCR hearing:

[A] juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith, ... [n]or may a juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule 606(b), SCRE. This Court has recognized an exception to the categorical prohibition to juror testimony. See Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008). Under this exception, juror testimony involving internal misconduct may be received only when necessary to ensure fundamental fairness. Id. at 67, 661 S.E.2d at 371. The PCR judge ruled the exception did not apply and the juror’s testimony would not be permissible. (App.p.808). Petitioner failed to present any compelling evidence to the PCR judge that would have characterized the juror’s testimony as that involving internal misconduct of the jury. Accordingly, the PCR judge did not err in denying the juror’s testimony at the PCR hearing.

II. The PCR judge did not err in denying relief on the basis of testimony given by an investigator about the possible location of Petitioner during the crime when Petitioner failed to establish deficient performance by counsel or any resulting prejudice.

Petitioner argues trial counsel was ineffective for failing to fully investigate the timeline presented by the State to determine if Petitioner could have committed the crime. This argument is without merit.

At trial, Petitioner's office manager testified the last record of Petitioner on the night in question was when his timecard was clocked-in (after a break) at 11:40 p.m. (App.p.345, lines 4-13). The office manager also explained the clock was seven minutes slow. (App.p.345, line 7). The victim testified – after referring to phone records – that she called 911 right after the attack at 12:12 a.m. (App.p.121, lines 5-8).

At the PCR hearing, trial counsel testified “there was an issue of where [Petitioner] was in relationship to that [911] call, the call's proximity to the time of the offense so that somehow, some way, there were issues there with time and distance. (App.p.818). Furthermore, trial counsel testified, “[t]he distance, obstacles included, took a certain amount of time for him to reach point A to point B and the State's theory is that [Petitioner] did it in time less than that allows, that would have been important.” (App.p.821). Although trial counsel stated the importance of the timeline, he also agreed the testimony by the victim was sufficient to establish the amount of time it would take to get from Petitioner's work to her home. (App.pp.824-25).

Private investigator Leigh Connelly also testified on behalf of Petitioner at the

PCR trial. (App.p.852). According to her own independent investigation of the timeline, Connelly stated work conditions on the road would have delayed Petitioner's arrival at the victim's home that night. (App.p.856). Connelly also testified she only drove the same route twice and completed these drives in 20 and 21 minutes. (App.pp.858-59). This is the same amount of time presented by the State at trial and testified to by the victim. (App.p.122).

In denying the application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proving trial counsel should have obtained an independent witness to verify the distance from Petitioner's workplace to the victim's home was possible in the timeframe. (App.p.893). The PCR judge also found Petitioner failed to meet his burden of proving trial counsel should have better challenged the timeline in this case because, due to the distance between Petitioner's workplace and the victim's home, it was possible for him to have perpetrated the attack. (App.pp.893-94).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C.

182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in denying relief on the basis of testimony given by an investigator about the possible location of Petitioner during the crime. The timeline established through trial testimony was that 25 minutes elapsed between when Petitioner left his workplace that night and when he appeared at the victim's house. Private investigator Connelly testified at the PCR hearing that she drove this distance twice and it took her 20 and 21 minutes. As such, having similar testimony at Petitioner's trial would not have benefitted the defense. Furthermore, trial counsel articulated reasons for not pursuing a different line of questioning regarding the timeline. (App.pp.820-25). Petitioner presented no compelling evidence at the PCR hearing that trial counsel's actions substantially affected the outcome of his trial. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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Attorney General

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By: 
ATTORNEYS FOR RESPONDENT

August 21, 2013

STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-213036

David Andres Ortiz Molina, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

I further certify that all parties required by Rule to be served have been served. This 21st day of August, 2013.



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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

August 21, 2013

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

Re: David Andres Ortiz Molina v. State of South Carolina
Appellate Case No: 2012-213036
Lower Court Case No: 2009-CP-23-10561

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AUG 21 2013

S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Tommy A. Thomas, Esquire
Trisha Allen, Victim Services Counselor