ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Beaufort County

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 2013-UP-272 (S.C. Ct. App. filed 6/19/2013)

08-CP-07-02188

JAMES BOWERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. ~~2010-152167~~ 2013-002000

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 22, 2013.

QUESTION PRESENTED

Did the Court of Appeals err in finding unpreserved the issue that the PCR judge refused to find counsel ineffective for notchallenging petitioner's prior conviction for assault with intent to ravish as a most serious offense for purposes of imposing a sentence of life without parole pursuant to the two strikes law, when the State failed to prove that the prior conviction contained all of the elements necessary for a statutory most serious assault with intent to commit criminal sexual conduct?

STATEMENT OF THE CASE

In November of 2003, the Beaufort County Grand Jury indicted Bowers for armed robbery, indictment #2003-GS-07-2097. On October 25, 2004, Bowers proceeded to jury trial before the Honorable Thomas W. Cooper. Attorney Gene Hood represented Bowers at trial. The jury returned a verdict of guilty and Judge Cooper sentenced Bowers to life without parole pursuant to S.C. Code §17-25-45. The State relied on a prior conviction for assault with intent to ravish. A timely notice of intent to appeal was filed and a brief filed pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. State v. Bowers, Op. No. 2008-UP-214 (S.C.Ct.App. filed April 4, 2008).

Bowers filed an application for post conviction relief on May 23, 2008. The State filed a return on January 20, 2009. On September 2, 2009, an evidentiary hearing was held before the Honorable Alexander S. Macaulay. Attorney Kelly A. Dennis represented Bowers at the PCR hearing. In a written order filed November 2, 2009, Judge Macaulay denied relief and dismissed the PCR application. Bowers filed a motion to reconsider on December 4, 2009. The State filed a return on December 11, 2009. Judge Macaulay denied the motion to alter or amend on December 21, 2009. A timely notice of intent to appeal was filed on February 5, 2010. The petition for writ of certiorari was filed on November 8, 2010. The State filed a return on March 17, 2011. On June 29, 2012, the South Carolina Court of Appeals granted the petition for writ of certiorari and requested further briefing. The brief of Petitioner was filed on October 29, 2012. The brief of Respondent was filed on January 14, 2013. On April 9, 2013, the case was argued before a three judge panel of the Court of Appeals. On June 19, 2013, the South Carolina Court of Appeals affirmed the PCR judge's denial of relief. A timely petition for rehearing was filed and denied on August 22, 2013. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in finding that the issue of the PCR judge refusing to find counsel ineffective for not challenging petitioner's prior conviction for assault with intent to ravish as a most serious offense for purposes of imposing a sentence of life without parole pursuant to the two strikes law, when the State failed to prove that the prior conviction contained all of the elements necessary for a statutory most serious assault with intent to commit criminal sexual conduct was unpreserved for review.

At sentencing the State relied upon a prior conviction from 1976 for assault with intent to ravish as a prior most serious offense requiring imposition of a sentence of life without parole pursuant to S.C. Code §17-25-45. (App. p. 272, lines 14 – p. 273, lines 1-22). Trial counsel challenged the prior conviction from 1976 for assault with intent to ravish as being too remote and argued that imposition of a sentence of life without parole based on the remote prior conviction constituted cruel and unusual punishment. (App. pp. 275 – 278). Trial counsel did **not** challenge the trial judge's finding, and in fact conceded, that assault with intent to ravish was the equivalent of assault with intent to commit criminal sexual conduct in either the first or second degree. Trial counsel did not properly challenge the prior conviction. Trial counsel was ineffective in failing to argue that the prior assault with intent to ravish conviction was the equivalent of assault with intent to commit criminal sexual conduct in the third degree, rather than first or second degree, and should not qualify as a most serious offense triggering a sentence of life without parole. The PCR judge found that trial counsel properly challenged the prior conviction and thus provided effective assistance of counsel. The PCR judge erred.

Bowers was convicted of robbery at the same time as the conviction for assault with intent to ravish. The trial judge noted, in preparing to sentence Petitioner, "The indictment was for armed robbery, I note at the top. The sentence itself is not anymore specific than simply – than simply robbery. At the time there was common law robbery and armed robbery and this is not more

specific than that. So - " (App. p. 275, lies 2 – 7). Trial counsel agreed and then the judge stated, "And I think that the, the State obviously then, is relying upon the assault with intent to ravish which - " (App. p. 275, lines 9-11). Trial counsel then conceded, "I, I am satisfied was the same offense, basically, that we have here today and our laws concerning criminal sexual conduct." (App. p. 275, lines 13-15).

Trial counsel argued a completely distinct point that imposition of a sentence of life without parole based on a guilty plea from 1976 constituted cruel and unusual punishment. (App. p. 275, lines 17 – p. 276, 277, 278, lines 1-18). The sentencing judge found that imposition of a sentence of life without parole, based on Bowers' 1976 guilty plea to assault with intent to ravish, did not constitute cruel and unusual punishment. (App. p. 278, lines 21 – p. 279, 280, 281, lines 1-15). The sentencing judge stated, "And, as you have indicated, this particular offense, that is, assault with intent to ravish, is the same as assault with intent to commit criminal sexual conduct in either the first or the second degree which comes within the most serious crime classification, as does armed robbery, of course." (App. p. 279, line 25 – p. 280, lines 1-5). Trial counsel did not object to this finding. The State failed to present any evidence that the assault with intent to ravish contained all of the elements of assault with intent to commit criminal sexual conduct first or second degree. Counsel was ineffective for conceding and not objecting on the ground that the State failed to prove that the assault with intent to ravish conviction was a statutory most serious offense.

In his *pro se* PCR application Petitioner Bowers argued that the trial court lacked jurisdiction to sentence under S.C. Code §17-25-45. During the PCR hearing the following dialogue took place between the State and the PCR judge:

> Mr. Friedman (Assistant Attorney General): Your Honor, looking at page 280, it looks like the state was relying on the assault with intent to ravish.

The Court: That's what I was looking at.

Mr. Friedman: They seem to say it was the same as today as - - -

The Court: Criminal sexual conduct.

Mr. Friedman: - - - assault, intent to commit criminal sexual conduct.

The Court: All right, is there anything else? Argument?

(App. p. 340, lines 18 – p. 341, lines 1-3). PCR counsel then noted that the issue raised in the Anders brief on direct appeal concerned identification and did not challenge the prior conviction. (App. p. 341, lines 9-11). The PCR judge then stated:

> But again, in this case the one that concerns the court is whether or not the life without parole provisions applied, whether or not the trial counsel was ineffective in not addressing that. But from my view, and I do think the court was - - I mean, counsel – it's unfortunate the index doesn't have - - well, it references to the argument there at the end, and I thank you for finding it.
>
> But looking at it, it does seem that Mr. Hood [trial counsel] raised the question, not only of the robbery which the court apparently didn't rely on, but the assault with intent to ravish, which I think he said was 1976. **Might be some question about appellate counsel, but that's – here the ineffective assistance of counsel is trial counsel.** (emphasis added).

(App. p. 341, lines 12-25). The question as to appellate counsel is inaccurate. Appellate counsel could not have challenged the use of the prior conviction as a most serious offense because that issue was not objected to at trial.

The PCR judge later said, "All right, is there anything else on the issue of whether or not the matter of the prior -- and it was – well, that – the question is whether the assault with intent to commit, commit – assault with intent to ravish is the equivalent of criminal sexual conduct, assault with intent to commit criminal sexual conduct. Apparently, not only did the trial counsel raise it,

but also the trial judge addressed it at length." (App. p. 342, lines 1-8). The PCR judge erred. Trial counsel failed to argue that assault with intent to ravish was **not** the equivalent of assault with intent to commit criminal sexual conduct first or second degree, most serious offenses. To the contrary, counsel conceded that the two offenses were the same. "I, I am satisfied was the same offense, basically, that we have here today and our laws concerning criminal sexual conduct." (App. p. 275, lines 13-15). As a result, the trial judge sentenced Bowers as if he had a prior most serious conviction. Counsel was ineffective in failing to argue that assault with intent to ravish was **not** the equivalent of assault with intent to commit criminal sexual conduct first or second degree.

In the order of dismissal the PCR judge wrote, "This Court finds that counsel properly challenged Applicant's prior strike conviction. The trial judge found that Applicant's prior conviction for assault with intent to ravish was the equivalent of assault with intent to commit CSC." (App. pp. 349-350). Trial counsel only challenged the prior conviction from 1976 as being too remote and argued that imposition of a sentence of life without parole based on the remote prior conviction constituted cruel and unusual punishment. (App. pp. 275 – 278).

Trial counsel did **not** challenge the trial judge's finding, and in fact conceded, that assault with intent to ravish was the equivalent of assault with intent to commit criminal sexual conduct in either the first or second degree. Trial counsel was ineffective by failing to argue that the 1976 assault with intent to ravish conviction was the equivalent of assault with intent to commit criminal sexual conduct in the third degree. Assault with intent to commit criminal sexual conduct in the third degree would not qualify as a most serious offense triggering a sentence of life without parole. Bowers was prejudiced by counsel's deficient performance because he was sentenced to life without parole under the two strikes law when the State failed to prove that he had a prior most serious offense.

In State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000), the Court found that common law burglary, not listed in S.C. Code §17-25-45 as a most serious offense, qualified as a most serious offense because it contained all of the elements of first-degree burglary, as defined in S.C. Code Ann. § 16-11-311(a)(3) and listed as a most serious offense. In State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003), the Court found that a 1976 rape conviction, not listed in S.C.Code §17-25-45 as a most serious offense, did not qualify as a most serious offense because it did not contain all of the elements of criminal sexual conduct first or second degree, listed as most serious offenses.

In Lindsey the Court wrote:

> Under S.C.Code Ann. § 16-3-652(1)(1985), first degree CSC requires (1) a sexual battery and (2) **aggravated force** or forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or "any other similar offense or act." State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000). Second degree CSC requires the use of **aggravated coercion** to accomplish sexual battery. S.C.Code Ann. § 16-3-653 (1985). Third degree CSC (which is not listed as a "most serious offense" in § 17-25-45(C)) occurs where the actor engages in sexual battery with the victim and one or more of the following circumstances are proven: a) the actor uses **force** or coercion to accomplish the sexual battery **in the absence of aggravating** circumstances or b) the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

355 S.C at 19, 583 S.E.2d at 742.

In Lindsey, as in the present case, there was no evidence in the record concerning the 1976 conviction. As there was no evidence that the prior conviction involved aggravated force or coercion, as required for the most serious offense of criminal sexual conduct first or second degree, the prior conviction could have been the equivalent of criminal sexual conduct third degree, which is not a most serious offense. The 1976 rape conviction in Lindsey could not be

considered a most serious offense because the prior conviction could have been the equivalent of the updated criminal sexual conduct third degree, a charge not listed as a most serious offense.

Assault with intent to commit criminal sexual conduct first and second degree are listed as most serious offenses in S.C. Code §17-25-45. Assault with intent to commit criminal conduct third degree is not listed as a most serious offense. Following the reasoning of Lindsey, Bowers' 1976 conviction for assault with intent to ravish could have been the equivalent of assault with intent to commit criminal sexual conduct third degree and therefore not a most serious offense. There was no evidence that Bowers' prior conviction involved aggravated force or coercion.

Counsel was ineffective for failing to challenge the prior conviction as not being a most serious offense. Bowers was erroneously sentenced to life without parole because of counsel's deficient performance. The PCR judge erred in refusing to find counsel ineffective for not challenging petitioner's prior conviction for assault with intent to ravish as a most serious offense for purposes of imposing a sentence of life without parole pursuant to the two strikes law when the State failed to prove that the prior conviction contained all of the elements necessary for a most serious assault with intent to commit criminal sexual conduct. The sentence should be reversed and the case remanded for re-sentencing. (App. p. 340, lines 18-20).

The Court of Appeals affirmed the finding of the PCR judge and wrote, "Because we find the issue unpreserved for review, we must affirm the PCR court's denial of Bowers' application." Bowers v. State, No. 2013-UP-272 (S.C.Ct.App, filed June 19, 2013). (App. p. 2). The issue is preserved for appellate review because the PCR judge ruled on the issue. In the order of dismissal the PCR judge wrote, "This Court finds that counsel properly challenged Applicant's prior strike conviction. The trial judge found that Applicant's prior conviction for assault with intent to ravish

was the equivalent of assault with intent to commit CSC." (App. pp. 349-350). Trial counsel, however, did not properly challenge the prior strike conviction as discussed above. The issue raised on appeal was the PCR judge's erroneous ruling that trial counsel properly challenged the prior conviction. The Court of Appeals erred in finding the issue unpreserved.

The Court of Appeals discussed the facts of the case and then wrote, "However, we need not address whether the PCR court's finding is clearly erroneous. Despite the foregoing, PCR counsel did not raise the issue of the use of the assault with intent to ravish prior conviction as a 'most serious offense' to the PCR court." Bowers v. State, No. 2013-UP-272 (S.C.Ct.App, filed June 19, 2013). (App. pp. 2-3). The Court of Appeals then found that Petitioner did not meet his burden of proof because PCR counsel did not raise the issue of the use of the assault with intent to ravish prior conviction as a 'most serious offense' to the PCR court.

The issue, however, was before the PCR judge, the PCR judge ruled that trial counsel properly challenged the prior conviction and based on the record before this Court, Petitioner met his burden of proving counsel was ineffective for not properly challenging the prior conviction and requiring the State to meet its burden of proof. Petitioner was prejudiced by the deficient performance because he was sentenced to life without the possibility of parole without the State proving the required predicate offense.

"The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct.App. 2010). The issue of whether trial counsel properly challenged the prior conviction was ruled upon by the PCR judge. The issue is preserved for appellate review. The Court of Appeals additionally wrote, "Further, the Rule 59(e) motions did not challenge the PCR court's finding on trial counsel's challenge to the use of the prior assault with intent to ravish

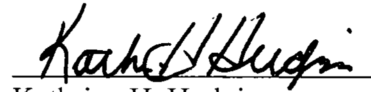
conviction as a 'most serious offense.'" A Rule 59(e) motion, however, was not necessary because the PCR judge had already ruled on the issue in the order.

. Trial counsel was ineffective in failing to argue that the prior assault with intent to ravish conviction was the equivalent of assault with intent to commit criminal sexual conduct in the third degree, which would **not** qualify as a most serious offense triggering a sentence of life without parole. In a footnote one the Court of Appeals conceded that "It is possible the prior conviction could have met the elements of only third degree CSC, and therefore, was not properly utilized for LWOP purposes; however, the details of the prior conviction are not reflected in the record." The State had the burden of proving the prior conviction qualified as a most serious offense at sentencing. The State failed to meet that burden. Bowers met his burden of proof by showing trial counsel was ineffective in failing to require the State to meet that burden. Bowers was prejudiced by counsel's deficient performance because he was sentenced to life without parole under the two strikes law when the State failed to prove that he had a prior most serious offense. As noted by the Court of Appeals, it is possible the 1976 conviction could have met the elements of only third degree CSC or some other non-triggering statutory most serious offense and therefore, was not properly utilized for LWOP purposes. See State v. Johnson, 84 S.C. 45, 65 S.E. 1023 (1908). The case should be remanded for sentencing outside of the LWOP statute found S.C. Code §17-25-45.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of November, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Alexander S. Macaulay, Circuit Court Judge

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JAMES BOWERS,

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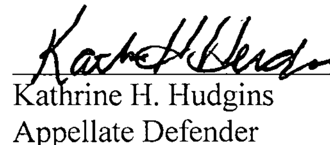
2013-002000
APPELLATE CASE NO. ~~2010-152167~~

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Ashleigh R Wilson, Esquire, and the S.C. Court of Appeals and also served upon Mr. James Bowers # 279049 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899 this 22nd day of November, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day of November, 2013.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.