STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2012-213290

Wendell G. Delarge,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. If is the present argument is even preserved for this Court's review, did the record show Petitioner's plea was rendered involuntary by counsel's advice and the plea judge's colloquy?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the January term of General Sessions for criminal sexual conduct, first-degree (2009-GS-32-5188) and kidnapping (2009-GS-32-5187). (App.pp.42-7). Casey Cornwell, Esquire, represented Petitioner.

Petitioner entered a guilty plea as indicted on October 14, 2009. The solicitor presented the factual basis for the offense: upon driving away from a quick stop at a convenience store, an unknown male, Petitioner, startled the victim when he placed his hand on her throat; the victim was directed to drive to various locations at the threat of death; she was ordered to park the vehicle in an unlit elementary school parking lot; an order to disrobe followed with a sexual assault; A C.O.D.I.S. match from the rape kit identified Petitioner as the perpetrator; police forcibly located and detained Petitioner despite his attempts to resist the arrest. (App.pp.11-5). The solicitor requested the plea judge impose consecutive sentences of thirty years imprisonment on each offense. Counsel disputed facts only related to the kidnapping offense. (App.pp.28-9). Petitioner ensured the plea judge that his decision to plea correlated with his guilt. (App.p.9). Petitioner further ensured the plea judge he understood was facing a maximum thirty year term of imprisonment on each offense. (App.p.6; p.7). The Honorable Robin B. Stillwell sentenced Petitioner to consecutive terms of twenty-five years imprisonment on each offense. (App.pp.1-41).

A notice of appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. By order dated on or about December 7, 2009, the South Carolina Court of

Appeals dismissed the appeal.

Petitioner filed an Application for Post-Conviction Relief (PCR) on October 29, 2010 (App.pp.48-58). A hearing was convened at the Lexington County Courthouse on January 30, 2012 and February 2, 2012. (App.pp.65-233). Petitioner was present and represented by Benjamin Stitely, Esquire. Kaelon May, Esquire, of the South Carolina Attorney General's Office represented Respondent. The Honorable Eugene C. Griffith denied relief in an order dated October 2, 2012. (App.pp.234-52). No post-trial motions were filed. This appeal follows.

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

The unpreserved argument that Petitioner's plea was rendered involuntary by counsel's performance and the plea judge's colloquy is without merit because the record clearly shows Petitioner was aware of the terms of the plea, the full sentencing range, and the option to withdraw the entry of the plea.

At the PCR hearing, Petitioner raised nearly a dozen separate claims for relief predicated upon ineffective assistance of counsel or prosecutorial misconduct.

Counsel testified he met with Petitioner on at least six occasions. (App.p.103). Counsel explained that "without negotiation or recommendation" to Petitioner in the context of the judge's sentencing discretion. (App.p.90). Counsel reviewed the proscribed sentencing range for the charged offenses with Petitioner. (App.p.103). He described Petitioner as an engaged client. (App.p.105). Counsel testified that he specifically told Petitioner that he could stand down during the course of the plea hearing. Counsel explained to Petitioner that he would move to withdraw Petitioner's entry of a plea upon request. (App.pp.110-1). Counsel testified it was Petitioner's decision to plead guilty. (App.p.109). Counsel elaborated that Petitioner's case was scheduled on the trial roster when Petitioner decided to plead guilty as indicted. Counsel was prepared to take Petitioner's case to trial. (App.p.99).

In denying Petitioner's application for post-conviction relief, the PCR judge did not rule on the issue raised before this Court. (App.p.243-51).[1]

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

[1]Respondent notes the PCR judge ruled on ten ineffective assistance of counsel allegations and one prosecutorial misconduct allegation in the filed Order of Dismissal.

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)).

Respondent submits the issue presented by Petitioner is unpreserved for this Court's review. "An issue that was neither raised to nor ruled upon by the PCR court is not preserved for appellate review." Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). A PCR court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C.Code Ann. § 17-27-80 (2003). Marlar v. State, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (Ct. App. 2007) cert. granted, opinion rev'd, 375 S.C. 407, 653 S.E.2d 266 (2007); see also State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review.).

The PCR judge did not address any issues related to ineffective assistance for failure to advise or involuntary guilty plea allegations within the section four of the order of dismissal. (App.pp.243-51). The Order was structured in a manner that categorically delineated the PCR judge's finding of facts and conclusions of law from the remainder of

the Order. Petitioner's mere reference to the PCR judge's summary of facts found in section two of the Order does not satisfy this Court's unambiguous issue preservation requirements. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007); see also Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013).

Furthermore, Petitioner did not file a motion to alter or amend to preserve the argument for this Court's review. "It is incumbent upon a party in a PCR action to file a Rule 59(e), SCRCP, motion in the event the PCR court fails to make specific findings of fact and conclusions of law regarding an issue." Burgess, 402 S.C. at 95, 738 S.E.2d at 265; see also Marlar, 375 S.C. at 410, 653 S.E.2d at 267 (citing Pruitt v. State, 310 S.C. at 256, 423 S.E.2d at 128) ("Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP."). Therefore, this Court should affirm the PCR judge's denial of the Application without an unnecessary substantive review of the present argument.

Notwithstanding the preservation bar, Respondent submits the unpreserved issue lacks merit because the record unequivocally shows Petitioner's plea was not rendered involuntary as a result of counsel's performance or the plea judge's colloquy. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "The

voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

The record clearly shows counsel's performance in advising Petitioner on entering the guilty pleas was nothing less than satisfactory. Counsel indisputably advised Petitioner of the maximum possible sentence for both offenses. (App.p.103; p.108; p.110). Counsel advised Petitioner on the terms of the plea agreement that allowed for absolute judicial discretion in sentencing. Simply, the PCR judge did not make an adverse credibility finding to negate the propriety of counsel's testimony. See Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984) ("When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing.").

Although Petitioner submits counsel's failure to adequately advise him on the difference between a plea pursuant to the State recommendation and a "straight-up" plea constituted ineffective assistance of counsel, the argument lacks traction. First, it is objectively unreasonable for Petitioner to assert he failed to understand the difference between the two. Petitioner's arrest record spanned five prior convictions at the time of the plea. Certainly Petitioner's General Sessions experience educated him on the matter. Second, Petitioner's contradictory testimony from the PCR hearing lacked any credibility. Petitioner first testified he spoke truthfully at the plea hearing then immediately testified

he lied to the plea judge at counsel's insistence. (App.pp.163-4; p.165). The PCR judge commented on the systemic contradiction. (App.p.170, line 22).

Last, the plea judge's thorough colloquy rendered the plea voluntary. "A defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). In the present case, the plea judge advised Petitioner elements and maximum punishment for each offense. The plea judge questioned Petitioner on each significant constitutional waiver. Furthermore, counsel ensured the plea judge that he previous discussed all of the above with Petitioner. Petitioner's admission of guilt accompanied the solicitor's detailed recitation of both offenses. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that 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 counsel's performance. At the plea hearing, the solicitor asked the plea judge to impose a maximum sentence to be served consecutively. During the mitigation phase of the hearing, counsel asked the plea judge not to sentence Petitioner to a consecutive term of imprisonment. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (citing Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). Counsel unequivocally told Petitioner that he would make

a motion to withdraw Petitioner's guilty plea on command during the plea hearing. Petitioner's decision not to withdraw his guilty plea negated any claim of prejudice. Additionally, Petitioner noticeably did not apprise the plea judge of his alleged misinterpretation of counsel's previous advice on the matter when Petitioner addressed the court during the mitigation phase of hearing. (App.p.35). Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347 (4th Cir.1975) ("Statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements.").

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 issue discussed above.

Respectfully submitted,

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By: _____
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Nov. 21st, 2013

STATE OF SOUTH CAROLINA

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WENDELL G. DELARGE,

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RESPONDENT.

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 by mailing two (2) copies in the United States mail, postage prepaid:

Kathrine H. Hudgins, Esq.
1330 Lady St. Suite 401
Columbia, SC 29201

This 21th day of November, 2013

Troyeshi Brailey
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

November 21, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211-1330

RE: **Wendell G. Delarge v. State of South Carolina**
Appellate Case No.: 2012-213290
Lower Court Case No: 2010-CP-32-4741

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: Kathrine H. Hudgins, Esq. (2 copies with all the attachments)