STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Post-Conviction Relief Judge
The Honorable John C. Few, Guilty Plea Judge

Appellate Case No. 2011-190808

Ricky Dale Gilstrap,.....Petitioner,

v.

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

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

STATEMENT OF ISSUE ON APPEAL

1. Did the PCR court err in finding that plea counsel provided effective assistance of counsel where Petitioner would have accepted the prior more favorable plea offer had he not been misadvised by plea counsel about the maximum sentence for his charges, as the Sixth Amendment right to effective assistance of counsel now extends to the consideration of plea offers that lapse or are rejected?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the March 2009 term of General Sessions for two counts of forgery (2008-GS-23-8163, -8164) and Petitioner waived presentment on the charge of possession of cocaine base (crack cocaine) (2009-GS-23-4457). (App.pp.67-78). Brian P. Johnson, Esquire represented Petitioner.

On October 6, 2009, Petitioner pled guilty. The Honorable John C. Few sentenced Petitioner to concurrent terms of seven years for each count of forgery and three years imprisonment and a $2000 fine suspended on the service of one year imprisonment, a $1000 fine, and three years probation for possession of cocaine base, first offense. (App.p.13). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on January 25, 2010 (2010-CP-23-0612). (App.pp.15-21). A hearing was convened at the Greenville County Courthouse on February 22, 2011. (App.pp.32-55). Petitioner was present and represented by Daniel J. Farnsworth, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed March 31, 2011. (App.pp.58-66).

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 raised by Petitioner is not preserved for appellate review.

Petitioner argues the PCR judge erred in finding he failed to meet his burden of proving plea counsel was ineffective. Petitioner argues plea counsel was deficient because he misadvised Petitioner about the maximum sentence he could receive. This issue, however, is not preserved for appellate review.

While Petitioner testified at the PCR hearing about a prior plea offer in this case (and why he rejected it), he failed to specifically raise the issue that plea counsel was ineffective for misadvising him about his maximum possible sentence.[1] As such, this issue was not addressed in the order of dismissal. Since this issue was neither raised to the PCR judge nor ruled upon in the final order, it is not preserved for review by this Court. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). If Petitioner had intended to raise this argument as an articulated post-conviction relief issue, he should have filed a post-trial motion to alter or amend the final order, pursuant to Rule 59(e), SCRCP, to have the PCR judge make findings of fact and conclusions of law on this issue. Petitioner, however, did not file any post-trial motions. As such, this issue is not preserved for appellate review. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that where a trial court does not explicitly

[1] The order of dismissal reflects Petitioner's specific issues at the PCR hearing were that counsel was ineffective for failing to (1) object to the plea judge's decision to treat the forgery charges as third property offenses and (2) advise Petitioner of the right to appeal. (App.pp.63-64).

rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue).

II. Petitioner has failed to meet his burden of proving his plea attorney's representation was deficient.

Petitioner alleges plea counsel was ineffective because he gave incorrect advice about the maximum possible sentence he faced. Even assuming arguendo that Petitioner's issue is preserved for appellate review, Petitioner has not met his burden of proving he is entitled to relief.

A.

Petitioner appeared in court to plead guilty to these charges on October 6, 2009. The plea judge noted the maximum sentence for one forgery charge was three years and the maximum sentence on the second charge was five years. (App.pp.3-4). The assistant solicitor stated, however, that the two forgery charges were being treated as third or subsequent property offenses. (App.p.4). The plea judge advised these offenses carried a maximum penalty of ten years imprisonment. (App.p.5). A break was taken and plea counsel was given the opportunity to review this with Petitioner. (App.p.5). Petitioner told the plea judge that he understood the maximum sentences on all charges. (App.pp.5-6). Petitioner agreed to waive the various constitutional rights associated with a jury trial. (App.pp.6-7). Petitioner stated he was satisfied with plea counsel's representation and had not been coerced into entering a guilty plea. (App.pp.7-8). Petitioner stated he was guilty and agreed with the assistant solicitor's recitation of the facts. (App.pp.7-9). Petitioner did not dispute the assistant solicitor's assertion that there was no

recommendation in this case. (App.pp.7-8). During mitigation, plea counsel stated there was prior plea offer from the State for a five year sentence but that Petitioner "just wanted a better plea deal." (App.p.11). Plea counsel asked the judge to impose a three year sentence. (App.p.12).

B.

At the PCR hearing, Petitioner stated he believed five years was the maximum sentence for the forgery charges and that was why he did not accept a five year plea recommendation. (App.pp.39-40). Petitioner stated plea counsel advised that he would ask for a three year sentence. (App.p.40). Petitioner stated "I was informed that it was a subsequent third and above property crime. I thought there was a chance that we could get it to three. But at the very most, you know, I was looking at five." (App.p.41). Petitioner stated he did not realize the forgery charges each carried a ten year penalty (instead of three and five years) until the day of the plea. (App.pp.41-42). Petitioner stated plea counsel told him during the plea hearing that he would ask for a three year sentence but that the five year sentence was still available. (App.p.42; pp.47-48). Petitioner admitted he did not object when the State noted there was no sentence recommendation. (App.p.47). Petitioner also admitted he told the plea judge that he had not been promised anything in exchange for his guilty plea. (App.pp.47-48). Petitioner stated he would have accepted the five year plea offer if he had known the forgery charges carried a maximum sentence of ten years. (App.pp.43-44).

Plea counsel testified he told Petitioner the maximum sentence on each of the forgery charges was five years and that they could be run consecutive. (App.pp.50-52).

Plea counsel testified the assistant solicitor had made a five year offer for the forgery charges and that this offer remained after Petitioner accrued the possession of cocaine base charge. (App.pp.50-51). Plea counsel testified Petitioner chose not to accept the five year offer because this was the maximum sentence and he had cooperated. (App.p.52). Plea counsel testified the assistant solicitor had never chosen to treat the forgery charges as third property offenses but the plea judge opted to do so. (App.p.51). Plea counsel testified he explained the concept of the third or greater property offense during the plea hearing (including the maximum penalty) and Petitioner chose to go forward. (App.pp.53-54).

As this issue was not specifically raised to the PCR judge, it is not addressed in the order of dismissal. The only mention of the prior plea offer in the order's findings of fact and conclusions of law was that the PCR judge found "[Petitioner]'s assertion that he would have taken the five (5) year plea offer if he had known he was facing a ten (10) year sentence is not compelling." (App.p.64).

C.

Petitioner alleges plea counsel was ineffective because he gave incorrect advice about the potential maximum sentence. This allegation is without merit.

For an applicant to be granted relief 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). 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.

The State made a plea offer of five years for two forgery charges and a possession of cocaine base charge. Plea counsel properly conveyed the plea offer to Petitioner. Cf. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). Petitioner, however, chose not to accept the plea offer. See Rule 1.2(a), RPC, Rule 407, SCACR (noting the decision whether to accept a plea offer rests solely with the client). Plea counsel testified at the PCR hearing that he had advised Petitioner of the maximum penalties of these charges **and that the plea judge could order them to be consecutive**. The PCR judge specifically found plea counsel's testimony on this point was credible. (App.p.63). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

As such, it is clear that while plea counsel and Petitioner did not know the forgery charges would be treated as third or greater property offenses, **Petitioner was certainly aware that he was facing a potential sentence in excess of five years**. Both Petitioner and plea counsel stated Petitioner did not accept the five-year plea offer because he believed it was excessive. Plea counsel made this statement at both the plea hearing and

the PCR hearing. As Petitioner knew that if the charges were run consecutively he was facing a sentence much greater than the five year recommendation from the State, it is simply not believable that Petitioner would have taken the plea offer if he had known the plea judge would treat the forgery charges as third or greater property offenses. This is corroborated by the fact that Petitioner never informed the plea judge – when advised of the potential ten year penalty for the third or greater property offenses by both the court and his attorney – that he would have accepted the prior five-year offer if he had known this. It should also be noted that – based on plea counsel's testimony – the State made the five-year offer without considering the forgery charges to be third or greater property offenses. It is doubtful that the State would have made a five-year plea offer once the charges were treated as enhanced property offenses.

D.

Petitioner argues the following United States Supreme Court companion cases are applicable to his appeal: Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376 (2012) and Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399 (2012). As these opinions were issued on March 21, 2012, however, they cannot be applied retroactively to this appeal. The Supreme Court did not indicate that either of these opinions were new constitutional rules that were intended to be retroactive.

In order to conclude whether the holding announced in these cases constitutes an "old rule" or a "new rule" for the purposes of determining whether it can be applied retroactively, it must be examined under the framework set forth in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). In Teague, the United States Supreme Court found "a

case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Id. at 301, 109 S. Ct. at 1070. The Teague Court also noted the concern that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 309, 109 S. Ct. at 1074. The Teague Court held that – unless they fell into one of two (2) exceptions to the general rule, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310, 109 S. Ct. at 1075.

The first exception that would allow a new rule to be applied retroactively is "if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Id. at 311, 109 S. Ct. at 1075 (internal quotation and citation omitted). This exception has been subsequently defined as being a substantive (not procedural) new rule. See, e.g., Beard v. Banks, 542 U.S. 406, 411 n.2, 124 S. Ct. 2504, 2510 n.2 (2004) ("Rules that fall within what we have referred to as Teague's first exception are more accurately characterized as substantive rules not subject to Teague's bar.") (internal quotation and citation omitted); see also Wharton v. Bockting, 549 U.S. 406, 416, 127 S. Ct. 1173, 1180 (2007).

The second exception that would allow a new rule to be applied retroactively is "if it requires the observance of those procedures that are implicit in the concept of ordered liberty." Teague, 489 U.S. at 311, 109 S. Ct. at 1076 (internal quotation and citation omitted). The Teague Court explained this second exception was "to be reserved for

watershed rules of criminal procedure" and limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Id. at 311, 313, 109 S. Ct. at 1076-77. To determine whether a new rule is a watershed rule, it must (1) "be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." See Wharton, 549 U.S. at 418, 127 S. Ct. at 1182 (internal quotations and citations omitted).

Respondent submits the holdings in the companion cases of Lafler v. Cooper and Missouri v. Frye do not set forth a new rule that should be applied retroactively. These cases did not enact a substantive new rule in criminal procedure. Further, nothing in these opinions indicates the United States Supreme Court intended their decisions to be a watershed rule retroactively applicable to all prior criminal convictions. In fact, nine of the eleven United States Courts of Appeal have addressed this issue and none have found these cases to be a new rule of constitutional law and retroactive. See Pagan-San Miguel v. United States, No. 13-1343 (1st Cir. filed Nov. 20, 2013); In re Liddell, 722 F.3d 737 (6th Cir. 2013); In re Graham, 714 F.3d 1181 (10th Cir. 2013); Gallagher v. United States, 711 F.3d 315 (2d Cir. 2013); Williams v. United States, 705 F.3d 298 (8th Cir. 2013); Buenrostro v. United States, 697 F.3d 1137 (9th Cir. 2012); In re King, 697 F.3d 1189 (5th Cir. 2012); Hare v. United States, 688 F.3d 878 (7th Cir. 2012); In re Perez, 682 F.2d 930 (11th Cir. 2012). While the Fourth Circuit Court of Appeals has not yet addressed whether Lafler v. Cooper and Missouri v. Frye are retroactive, it is highly doubtful that court would reach the conclusion that these cases set forth a new watershed

rule of criminal procedure.

Petitioner cannot sustain his claim that the holdings in these March 2012 cases should be applied to a PCR application that was denied in March 2011.

E.

As Petitioner failed to meet this burden of proving he was entitled to relief, the PCR judge did not err in denying Petitioner's 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 reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

December 4, 2013

RECEIVED
DEC - 4 2013
S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Post-Conviction Relief Judge
The Honorable John C. Few, Guilty Plea Judge

Appellate Case No. 2011-190808

Ricky Dale Gilstrap,.....Petitioner,

v.

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

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by delivering a copy of the same to:

Carmen V. Ganjehsani, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 4th day of December, 2013.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

December 4, 2013

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

Re: **Ricky Dale Gilstrap v. State of South Carolina**
Appellate Case No.: 2011-190808
Lower Court Case: 2010-CP-23-0612

Dear Mr. Shearouse:

Attached is the original and thirteen (13) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

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

KCR/jacc

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services