

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 19 2014

Appeal from Beaufort County
Court of Common Pleas
The Honorable Alexander S. Macaulay, Circuit Court Judge

S.C. Supreme Court

Opinion No. 2013-UP-272 (S.C. Ct. App. Filed June 19, 2013)

Appellate Case Number 2013-002000

JAMES BOWERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General
S.C. Bar # 100269

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

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....2
ISSUE PRESENTED.....3
STATEMENT OF CASE.....4
ARGUMENT.....6
CONCLUSION.....12

ISSUE PRESENTED

1. Did the Court of Appeals correctly find the issue of whether or not counsel provided ineffective assistance of counsel for failing to challenge the use of the Petitioner's 1976 assault with intent to ravish conviction as a most serious offense was unpreserved for appellate review when the issue raised on appeal was not present to nor passed upon by the lower court and the Petitioner failed to carry his burden of proving counsel was ineffective?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Petitioner was indicted at the November 2003 term of the Beaufort County Grand Jury for armed robbery (2003-GS-07-2097). Gene Hood, Esquire, represented the Petitioner. The Petitioner proceeded to trial and was found guilty as indicted. The Honorable Thomas W. Cooper, Jr. sentenced the Petitioner to confinement for life without the possibility of parole.

A timely Notice of Appeal was filed on the Petitioner's behalf and an appeal was perfected. Following a brief 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). The Remittitur was issued on April 22, 2008.

On May 23, 2008, the Petitioner filed an application for post-conviction relief. The Respondent made its Return on January 20, 2009. An evidentiary hearing into the matter was convened on September 2, 2009 at the Beaufort County Courthouse. The Petitioner was represented by Kelly A. Dennis, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent. By Order dated October 24, 2009, the Honorable Alexander S. Macaulay denied and dismissed with prejudice the Petitioner's application for post-conviction relief.

The Petitioner filed a Motion to Reconsider pursuant to SCRCP 59(e). The Respondent filed a Return and Motion to Dismiss on December 11, 2009. The Petitioner's Motion to Reconsider was denied on December 21, 2009. The Petitioner filed a Notice of Appeal and a Petition for Writ of Certiorari. The Court of Appeals granted the Petition and requested briefing on June 29, 2012. The Court heard oral argument on April 9, 2013. The Court of Appeals

affirmed the lower courts findings. Bowers v. State, No. 2013-UP-272 (S.C. Ct. App. Filed June 19, 2013). The Petitioner filed a Petition for Rehearing which was denied on August 22, 2013. The Petitioner filed a Petition for Writ of Certiorari to this Court. This Return follows.

ARGUMENT

The Court of Appeals properly held that the issue of whether counsel was ineffective for failing to challenge the Petitioner's prior conviction for assault with intent to ravish as a most serious offense for purposes of imposing a life sentence pursuant to the two strikes law was not preserved for appellate review.

The Respondent submits the Court of Appeals properly held that the issue of trial counsel was ineffective for failing to challenge the use of the Petitioner's prior conviction for assault with intent to ravish as a most serious offense for purposes of imposing a life without parole sentence pursuant to the two-strikes law was not preserved for appellate review. The Court of Appeals correctly affirmed the denial of the Petitioner's application for post-conviction relief.

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. Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011).

The Respondent submits the Petitioner did not raise the issue of whether or not counsel was ineffective for failing to challenge the use of the Petitioner's 1976 assault with intent to ravish conviction on the basis that the State failed to establish the conviction was a most serious crime to the post-conviction relief court. On post-conviction relief, the Petitioner alleged counsel was ineffective for failing to challenge his sentence based on a prior conviction for common law robbery. (App. 319:17-22). At the Petitioner's evidentiary hearing, PCR counsel's line of questioning for both the Petitioner and trial counsel was about the use of the Petitioner's prior

common law robbery conviction as a first strike for purposes of the two strikes law. (App. 325:2-9, 338:6-339:25). Counsel for the Petitioner never made any argument to the court about the use of the Petitioner's prior **assault with intent to ravish conviction** for purposes of the two strikes law.

Even after counsel for the Respondent brought to the Court's attention during the PCR hearing that it appeared from the record the State had relied on the Petitioner's prior assault with intent to ravish conviction for purposes of the two strike law instead of the Petitioner's prior common law robbery conviction, counsel made no argument about the use of the Petitioner's assault with intent to ravish conviction for purposes of imposing a sentence of life without parole. (App. 340:18-20, 341:20-23). The record also reflects the Petitioner filed two Motions to Reconsider pursuant to SCRCP 59(e) following the denial and dismissal of his application for post-conviction relief. In both motions, the Petitioner failed to make any reference to counsel's alleged failure to challenge the use of the Petitioner's prior conviction for assault with intent to ravish. (App. 352- 355). Both motions stated the issue to be reconsidered by the Court was whether "Petitioner's trial counsel failed to challenge the sentence based on prior conviction of common law robbery." (App. 352-355).

The Petitioner asserts the issue of whether trial counsel properly challenged the prior conviction was ruled upon by the PCR court. The Respondent submits the PCR court correctly ruled that "counsel properly challenged Applicant's prior strike conviction". (App. 349). However, the Courts finding was in response to the Petitioner's allegation that counsel failed to challenge the life without parole sentence based on his prior **common law robbery conviction**. The PCR court's ruling was not in response to the argument raised on appeal which is that

counsel was ineffective for failing to challenge the use of the prior **assault with intent to ravish conviction** as a most serious offense for purposes of imposing a life without parole sentence.

The Respondent submits the Petitioner should not be allowed to raise an issue for the first time on appeal. See Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). The post-conviction relief court was not presented with the argument that counsel was ineffective for failing to challenge the use of the Petitioner's assault with intent to ravish conviction based on the fact that the State failed to establish the Petitioner's prior conviction was a most serious crime equivalent to assault with intent to commit criminal sexual conduct first or second degree. The Respondent submits the record is void of any evidence that the issue raised on appeal was raised and ruled on in lower court. The Respondent submits the Court of Appeals was correct in ruling the issue was not preserved for appellate review.

If this Court is inclined to grant the Petition for Writ of Certiorari and address the merits of the issue presented, the Respondent submits trial counsel was not ineffective and properly challenged the use of the Petitioner's prior conviction for assault with intent to ravish during sentencing. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The record reflects counsel adequately challenged the use of the Petitioner's prior conviction for assault with intent to ravish for purposes of imposing a life without parole sentence during the Petitioner's sentencing proceeding.

At the sentencing phase of trial, counsel indicated that he had researched the two strikes law and had not been successful in finding any cases that would support his argument. (App. 273:19-274:5). Counsel stated that he was satisfied that assault with intent to ravish was the same offense as the present-day criminal sexual conduct, but he argued to the court that the conviction was not intended to be used for purposes of the two-strike law because it resulted from a guilty plea and the conviction was over twenty-six years old. (App. 274:6-276:4). Counsel also argued that the extent of Petitioner's involvement in the prior assault with intent to ravish was unknown

and there was another person involved in the commission of that offense. (App. 276:5-277:4). Counsel further argued that in enacting the two strikes law, the legislature did not intend to enhance a punishment from a guilty plea that occurred twenty-six years prior to the second most serious offense, and counsel believed that a life without parole sentence would amount to cruel and unusual punishment in this case. (App. 277:6-278:18).

After hearing trial counsel's argument, the trial court found that S.C. Code Ann. §17-25-45 applies to any serious or most serious conviction, including guilty pleas, and that assault with intent to ravish is the same as assault with intent to commit criminal sexual conduct in the first or second degree- a most serious offense. (App. 279:19-280:5). The trial court also found that the legislature would have placed a time limit on prior convictions if they intended to limit the application of the statute. (App. 280:19-281:15). The Respondent submits counsel researched the applicability of the two-strikes law and challenged the use of the Petitioner's assault with intent to ravish conviction. The Respondent submits the Petitioner failed to carry his burden of proving counsel's performance was deficient.

Further, the Petitioner has failed to show that had trial counsel further challenged the classification of the prior conviction for assault with intent to ravish on the basis that it was not a most serious offense, the result at sentencing would have been different. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668 (1984). It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every

error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id. at 693.

The Petitioner has not provided any evidence that his prior assault with intent to ravish conviction is not the equivalent to assault with intent to commit criminal sexual conduct in the first or second degree as the trial court ruled. Counsel cannot be found ineffective for failing to challenge Petitioner's prior convictions when doing so would likely have been futile. The Respondent submits that the Petitioner carries the burden of proving that the facts of the prior assault with intent to ravish conviction would have been equivalent to assault with intent to commit criminal sexual conduct in the third degree. The Petitioner is merely speculating as to the nature of the Petitioner's prior conviction and its classification as assault with intent to commit criminal sexual conduct in the third degree.

"The statutes dealing with rape and assault with intent to ravish were repealed by Act No. 157 of the 1977 Acts and Joint Resolutions of the General Assembly. In the same Act, the crime of criminal sexual conduct was established." State v. Stewart, 283 S.C. 104, 109, 320 S.E.2d 447, 450-51 (1984). In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), this Court held that the legislature intended the terms "rape" and "criminal sexual conduct" be interchangeable. Likewise, "assault with intent to ravish" and "assault with intent to commit criminal sexual conduct" are interchangeable. Id. at 109, 320 S.E.2d at 451. At the time of the Petitioner's conviction for assault with intent to ravish, varying degrees of criminal sexual conduct had not been established. Therefore, the equivalent of criminal sexual conduct in the third degree had not been established at the time of the Petitioner prior conviction. Also, considering the lengthy nature of the Petitioner's twenty-one year sentence for assault with intent to ravish, it is unlikely

that the conviction was the result of a crime equivalent to criminal sexual conduct in the third degree which only carries a sentence of up to ten years. S.C. Code Ann. §16-03-0654(2).

The Respondent submits the Court of Appeals correctly found the issue raised on appeal was not properly preserved for appellate review. The Respondent also submits that there is probative evidence to support the post-conviction relief court's finding that the Petitioner failed to carry his burden of proving trial counsel was ineffective for failing to challenge the use of the Petitioner's prior convictions. Trial counsel sufficiently challenged the Petitioner's prior convictions and any further challenge would likely have been futile. Further, the Petitioner has failed to show that had counsel further challenged the use of the prior conviction for purposes of the two-strike law, the result at sentencing would have been different.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General


Attorneys for Respondent

March 19, 2014

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803)734-3737

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Alexander S. Macaulay, Circuit Court Judge

JAMES BOWERS

Petitioner,

v.

STATE OF SOUTH CAROLINA,

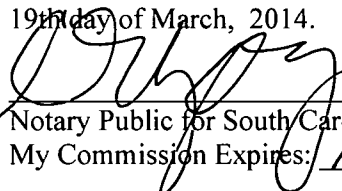
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to Petition for Writ of Certiorari To The Court of Appeals has been served upon opposing counsel, Kathrine Hudgins , this 19th day of March, 2014.


Anne R. Henley
Legal Assistant

SWORN to before me this
19th day of March, 2014.


Notary Public for South Carolina.

(L.S.)

My Commission Expires: 11/20/2014