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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

March 24, 2014

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

Re: Warren Russell v. State of South Carolina
Appellate Case No. 2012-213313

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Daniel Gourley
Assistant Attorney General
S.C. Bar No. 100934

DG/ko
Enclosures

cc: LaNelle C. Durant, Appellate Defender
Warren Russell, #316802
Trisha Allen, Victim's Services

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

2008-CP-40-07960
Appellate Case No. 2012-213313

WARREN RUSSELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to file a direct appeal of Petitioner's guilty plea where Counsel advised Petitioner of his appellate rights prior to his plea, no objections were made during the plea proceeding, and Petitioner never requested Counsel file a direct appeal.
- II. The PCR court did not rule as to whether plea counsel was ineffective for stating during closing arguments that the jury should find Petitioner guilty of distribution of crack cocaine because he was a drug dealer and therefore, the issue is not preserved for appellate review; however, assuming *arguendo*, that the issue was preserved, Counsel was not deficient.
- III. Whether counsel was ineffective for failing to challenge the basis for probable cause to issue various arrest warrants for Petitioner is not properly before this court as Petitioner pled guilty waiving his right to challenge any non-jurisdictional defects or defenses, however, assuming *arguendo*, that the issue were proper, Counsel was not deficient.
- IV. Whether PCR Counsel was ineffective during Petitioner's first PCR proceedings.
- V. The PCR court did not rule as to whether Counsel was ineffective for failing to make sure the record reflects a factual basis for the plea and therefore, the issue is not preserved for appellate review; however, assuming *arguendo*, that the issue was preserved, Counsel was not deficient.
- VI. The PCR court did not rule as to whether the plea judge discussion regarding a potential plea offer rendered his plea involuntary and therefore, the issue is not preserved for appellate review; however, assuming *arguendo*, that the issue was preserved, Counsel was not deficient.
- VII. Whether Counsel was ineffective for failing to challenge an alleged double jeopardy violation is not proper for this court as Petitioner pled guilty thereby waiving any non-jurisdictional defects or defenses, however, assuming *arguendo*, that the issue was proper, Counsel was not deficient.
- VIII. Whether the trial judge abused her discretion in failing to grant a mistrial is a direct appeal issue which is not proper for PCR, furthermore, Petitioner pled guilty thereby waiving any right to challenge the trial court's error, and the PCR court did not rule on this issue and therefore, the issue is not preserved for appellate review.

- IX. Whether it was plain error of law for the trial court to issue a second Allen charge knowing the jury's numeral division and decisional disagreement is a direct appeal issue which is not proper for PCR, Petitioner pled guilty thereby waiving any right to challenge the trial court's error, and the PCR court did not rule on this issue and therefore, the issue is not preserved for appellate review.
- X. The PCR Court did not abuse its discretion in setting aside Petitioner's default judgment motion, where the State provided the Court with a proposed order in a timely fashion and Petitioner failed to establish any resulting prejudice.
- XI. The PCR court did not rule as to whether counsel was ineffective for failing to request a preliminary hearing and therefore, the issue is not preserved for appellate review; however, assuming arguendo, that the issue was preserved, Counsel was not deficient.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was true bill indicted at the June 2007 term of the Richland County Grand Jury for Possession With Intent to Distribute Crack Cocaine (2007-GS-40-3669); Assault and Battery With Intent to Kill (2007-GS-40-4163; -4166), Kidnapping (2007-GS-40-4164; -4167), and Blackmail (2006-GS-40-4165). Petitioner was subsequently true billed indicted at the February 2008 term for Kidnapping (2008-GS-40-1681) and Amended Assault and Battery With Intent to Kill (2008-GS-40-1683). He was represented by Mark Schnee, Esquire. Petitioner initially proceeded to a jury trial before the Honorable Deadra L. Jefferson. However, on February 28, 2008, while the jury was deliberating the Petitioner pled guilty. Pursuant to the plea deal, the State *nol prossed* one count of assault with intent to kill (2007-GS-40-3647); discharging a firearm into a dwelling (2007-GS-40-3649), use of a firearm during the commission of a violent crime (2007-GS-40-3649), and assault and battery with intent to kill (2007-GS-40-4332). (App. p. 66 Lines 8-20). Judge Jefferson sentenced Petitioner to a fifteen year term of imprisonment for possession with intent to distribute crack cocaine-second offense, fifteen year term of imprisonment for each count of kidnapping, and fifteen years for each count of assault and battery with intent to kill; and ten year term of imprisonment for blackmail; with all sentences to run concurrent. Petitioner did not appeal his guilty plea or sentence.

Thereafter, Petitioner filed a timely application for PCR on November 5, 2008, alleging he was being held in custody unlawfully. Respondent made its Return on April 29, 2009, requesting that an evidentiary hearing be held on Petitioner's application.

On December 8, 2009, an evidentiary hearing on the matter was convened before the Honorable L. Casey Manning at the Richland County Courthouse. . By Order dated February 1,

2011, Judge Manning denied and dismissed Petitioner's application with prejudice. Petitioner filed a motion for rehearing pursuant to Rule 59(a), SCRCRCP, and/or motion to alter or amend pursuant to Rule 59(e) on February 21, 2011. Subsequently, on July 26, 2011, a hearing was held on Petitioner's motion before Judge Manning. By Order dated October 10, 2012, Judge Manning denied Petitioner's motion to alter or amend.

Petitioner subsequently filed a *pro-se* Petition for Writ of Certiorari on December 6, 2013. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner 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 Petitioner 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. With respect to guilty plea

counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

ARGUMENT

- I. **Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to file a direct appeal of Petitioner's guilty plea where Counsel advised Petitioner of his appellate rights prior to his plea, no objections were made during the plea proceeding, and Petitioner never requested Counsel file a direct appeal.**

Petitioner argues the post-conviction relief (PCR) erred in finding that Counsel was not ineffective for failing to file a direct appeal of Petitioner's guilty plea. However, this argument is meritless as probative evidence supports the PCR court's finding that Counsel was not ineffective.

Petitioner argues that there were "many errors" plain on the face of the record which prompted Petitioner to request Counsel file a direct appeal. Petitioner further argues Counsel was deficient in his performance by failing to consult with Petitioner about filing a direct appeal. Petitioner argues that "trial counsel cannot be expected to assert his own incompetence on direct appeal" which resulted in Counsel's failure to file a direct appeal on Petitioner's behalf.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id. However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459

S.E.2d 838 (1995). Furthermore, a guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002).

By pleading guilty, Petitioner waived any challenges that could be sought on direct appeal stemming from Counsel's representation at trial. State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002). A review of Petitioner's guilty plea proceedings reveals that there were no objections made by either party. (App. p. 6590). The record reveals the plea court advised Petitioner of his right to a direct appeal of the *guilty plea proceedings and sentence*. (App. p. 79 lines 8-12) (emphasis added). The plea court further advised Petitioner that if he could not afford private counsel for his direct appeal, an attorney would be appointed to him. (App. p. 79 lines 13-16).

The post-conviction relief court found that Petitioner's testimony was not credible, while finding Counsel's testimony credible. (App. p. 280). During the post-conviction relief hearing, Counsel testified that he and Petitioner discussed his appellate rights prior to entering his plea. (App. p. 213 lines 4-10). Counsel further testified that Petitioner did not request a direct appeal be filed on his behalf. (App. p. 214 lines 11-13). Therefore, based off of the following, the post-conviction relief court did not err in finding that Petitioner did not knowingly and voluntarily waive his right to an appeal.

II. The PCR court did not rule as to whether plea counsel was ineffective for stating during closing arguments that the jury should find Petitioner guilty of distribution of crack cocaine because he was a drug dealer and therefore, the issue is not preserved for appellate review; however, assuming *arguendo*, that the issue was preserved, Counsel was not deficient.

Petitioner argues that plea counsel was ineffective for stating during closing arguments that the jury should find Petitioner guilty of distribution of crack cocaine because he was drug dealer. Initially, Respondent would note that only the jury charge from Petitioner's trial was introduced at the PCR hearing as Petitioner pled guilty and waived any non-jurisdictional defects or defenses. See Whetsell v. Hawley, 276 S.C. 295 (1981) (finding as a general rule, guilty pleas freely and voluntarily entered act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea). Furthermore, the court makes it clear that this rule applies to the claim of ineffective assistance of counsel. Id at 297. During the course of jury deliberations and prior to a verdict being read, Petitioner pled guilty. As a result of Petitioner's guilty plea, he is barred from raising any allegations stemming from Counsel's representation at trial.

Furthermore, the post-conviction relief did not rule on the issue of whether plea counsel was ineffective for his statements during closing arguments. Although Petitioner filed a motion pursuant to Rule 59(e), SCRPC, he did not request a ruling on this issue, and therefore, it is not preserved for appellate review. See Marlar v. State, 375 S.C. 407 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review in that defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations. Because Petitioner failed to secure a ruling on this issue below, Petitioner is barred from pursuing this issue on appeal.

As the post-conviction relief court did not make sufficient findings of fact and conclusions of law regarding counsel's deficiency, this issue is not preserved for appellate review. Regardless, Petitioner failed to meet his burden of establishing deficiency.

III. Whether counsel was ineffective for failing to challenge the basis for probable cause to issue various arrest warrants for Petitioner is not properly before this court as Petitioner pled guilty waiving his right to challenge any non-jurisdictional defects or defenses, however, assuming *arguendo*, that the issue were proper, Counsel was not deficient

Petitioner argues Counsel was ineffective for failing to challenge the basis for the probable cause established in the various arrest warrants. However, Petitioner pled guilty and waived any non-jurisdictional defects or defenses. See Whetsell v. Hawley, 276 S.C. 295 (1981) (Finding as a general rule, guilty pleas freely and voluntarily entered act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea). Furthermore, the court makes it clear that this rule applies to the claim of ineffective assistance of counsel. Id at 297. As a result, Respondent would submit that any issue stemming from Counsel's failure to challenge the basis for probable cause was waived by Petitioner's guilty plea.

Assuming *arguendo*, that this court determines that a guilty plea does not amount to a waiver of the non-jurisdictional issues and defenses, the Petitioner cannot meet his burden of proof in regards to this allegation. The PCR court addressed Petitioner's various claims of ineffective assistance of counsel stemming from Counsel's representation at trial, however the court specifically stated "the findings of this court related to claims of ineffective assistance of *trial* counsel are in this order only in the event that a reviewing court determines that claims of ineffective assistance of *trial* counsel are not abandoned when [Petitioner] instead pleads guilty."

(App. p. 284). (emphasis added). The PCR court found Petitioner failed to meet his burden of proof in regards to this allegation. (App. p. 282).

During the PCR hearing, Counsel testified that he reviewed the police report and evidence with Petitioner. (App. p. 201 line 23—p. 202 line 2). Counsel stated he reviewed the probable cause issue himself and explained the rationale to Petitioner. (App. p. 201 line 25). Counsel explained the probable cause was related to the alleged kidnappings and blackmail/extortion allegations. (App. p. 201 lines 15-17). Counsel explained that the “police were given information that [Petitioner] was coming with one of the victims to meet up with the victim’s sister for an exchange of money for the sister” and that’s when the police immediately arrested Petitioner, searched his persons, and found the drugs. (App. p. 201 lines 18-22). Therefore, probative evidence supports the PCR court’s finding that Counsel was not ineffective in regards to this allegation.

IV. Whether PCR Counsel was ineffective during Petitioner’s first PCR proceedings?

Petitioner argues that PCR Counsel was ineffective under Martinez v. Ryan, 132 S. Ct. 1309, 182 L. Ed. 272 (S.Ct. filed March 20, 2012) for failing to provide inadequate assistance of counsel at his “initial review of collateral proceedings” and is the cause of any of petitioner’s procedural defaults to claims of ineffective assistance of trial counsel.

In Martinez, the “precise question” addressed by the United States Supreme Court is “whether ineffective assistance in an initial review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.” Martinez, 132 S.Ct. at 1315 (emphasis added). The Court held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial

claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Martinez, 132 S.Ct. at 1320 (emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. Martinez, 132 S.Ct. at 1318–19. The South Carolina Supreme Court has subsequently held that “the holding in Martinez is limited to federal habeas corpus review. Kelly v. State, 4040 S.C. 365, 745 S.E. 2d 377 (2013). Therefore, Respondent submits Petitioner’s reliance on Martinez in support of his allegation of ineffective assistance of PCR counsel is not proper.

V. The PCR court did not rule as to whether Counsel was ineffective for failing to make sure the record reflects a factual basis for the plea and therefore, the issue is not preserved for appellate review; however, assuming *arguendo*, that the issue was preserved, Counsel was not deficient.

Petitioner argues that Counsel was ineffective for failing require that there be a factual basis for the plea. However, the post-conviction relief did not rule on the issue of whether plea counsel was ineffective for failing to require that a factual basis for the plea be placed on the record. Although Petitioner filed a motion pursuant to Rule 59(e), SCRPC, he did not request a ruling on this issue, and therefore, it is not preserved for appellate review. See Marlar v. State, 375 S.C. 407 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review in that defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations). Because Petitioner failed to secure a ruling on this issue below, Petitioner is barred from pursuing this issue on appeal.

However, assuming *arguendo* that the issue is properly before this Court, Petitioner did not meet his burden of establishing that Counsel was ineffective for failing to require that a factual basis be placed on the record. A review of the guilty plea reveals the court asking the

parties if a re-recitation of the facts were necessary. (App. p. 69 line 15). In response, the Solicitor moved to incorporate the trial record in lieu of reciting the factual basis.¹ (App. p. 69 lines 16-17). Both Counsel and Petitioner agreed. (App. p. 69 lines 20-24). Furthermore, the Petitioner agreed with the facts as presented during the course of his trial and did not feel anything else needed to be changed or added to the facts. (App. p. 69 21—p. 70 line 2).

As the post-conviction relief court did not make sufficient findings of fact and conclusions of law regarding counsel's deficiency, this issue is not preserved for appellate review. Regardless, Petitioner failed to meet his burden of establishing deficiency.

VI. The PCR court did not rule as to whether the plea judge discussion regarding a potential plea offer rendered his plea involuntary and therefore, the issue is not preserved for appellate review; however, assuming *arguendo*, that the issue was preserved, Counsel was not deficient.

Petitioner argues Counsel was ineffective “for allowing the trial court to initiate” a plea. (Pt. br. P. 34). However, the post-conviction relief did not rule on the issue of whether plea counsel was ineffective for failing to object to the courts discussion about potential plea offers. Although Petitioner filed a motion pursuant to Rule 59(e), SCRPC, he did not request a ruling on this issue, and therefore, it is not preserved for appellate review. See Marlar v. State, 375 S.C. 407 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review in that defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations). Because Petitioner failed to secure a ruling on this issue below, Petitioner is barred from pursuing this issue on appeal.

However, assuming *arguendo* that the issue is properly before this Court, Petitioner did not meet his burden of establishing that Counsel was ineffective for failing objecting to the

¹ Petitioner pled guilty after both the State and Defense had rested, but prior to the guilty verdict's being read.

courts discussion about potential plea offers. The South Carolina Supreme Court adopted the position of the ABA Standards for Criminal Justice, Standard 14-3.3, Pleas of Guilty, Responsibility of the Trial Judge, which reads, in pertinent part:

(e) Where the parties have neither advised the judge of a plea agreement, nor requested to meet for plea discussion purposes, the judge may inquire of the parties whether disposition without trial has been explored and may allow an adjournment to enable plea discussions to occur.

(f) All discussions at which the judge is relating to plea agreements *should be* recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions *should be* held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in the standard, the judge should never through word or demeanor either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

Id. at 253-55, 277 S.E.2d 694-95 (emphasis added). The Supreme Court stated, “the standard is designed to prevent both the fact and the appearance of the trial judge’s becoming an advocate against the desires of the defendant or the State of a particular resolution. Id. at 257, 277 S.E.2d, 695.

In the instant case, Petitioner argues Counsel was ineffective for failing to object or intervene to the allegedly coercive plea proceedings because the trial judge inquired as to whether the parties had considered a plea during a bench conference. Petitioner 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*. The guilty plea reveals Petitioner and Counsel came before the court to enter a guilty plea to the charges he faced. The court thoroughly reviewed the Petitioner's wanting to enter the guilty plea. The record shows, in part: Petitioner had not taken any medications, alcohol, drugs nor did he suffer from any mental, emotional, or nervous

conditions that would interfere with his judgment to understand the court proceedings. (App. p. 69 lines 4-14). Petitioner was fully satisfied with counsel's services. (App. p. 77 lines 11—p. 78 line 4).

Furthermore, the court firmly established that Petitioner was pleading guilty since he wanted to plead guilty, and he was guilty. (App. p. 70 line 3—p. 74 line 24). The Petitioner had not been pressured whatsoever or coerced in any way to enter the plea. (App. p. 78 lines 5-22). Petitioner affirmed that he was pleading guilty voluntarily and of his own free will. (App. p. 78 line 13-15). The Petitioner stated that he had answered all questions truthfully. (App. p. 79 lines 4-7). The court explained that he did not have to plead guilty; rather, he had the right to a jury trial, and he could only be convicted if all twelve jurors agreed that the state have proven each and every element of the crime beyond a reasonable doubt. (App. p. 74 line 24—p. 76 line 14). The court explained the constitutional rights that the defendant would waive by entering his guilty plea. (App. p. 74 line 24—p. 76 line 16). The court then asked if the Petitioner was guilty of the charges to which the Petitioner responded he was guilty. (App. p. 74 lines 21-23).

As the post-conviction relief court did not make sufficient findings of fact and conclusions of law regarding counsel's deficiency, this issue is not preserved for appellate review. Regardless, Petitioner failed to meet his burden of establishing deficiency.

VII. Whether Counsel was ineffective for failing to challenge an alleged double jeopardy violation is not proper for this court as Petitioner pled guilty thereby waiving any non-jurisdictional defects or defenses, however, assuming *arguendo*, that the issue was proper, Counsel was not deficient.

Petitioner argues Counsel was ineffective for failing to object to an alleged double jeopardy violation. Petitioner argues that prior to his guilty plea he had already been convicted

on one of the eight indictments presented to the jury for deliberations. Petitioner further argues that the guilty verdict was never set aside and instead was incorporated into the plea proceedings

However, Petitioner pled guilty and waived any non-jurisdiction defects or defenses. See Whetsell v. Hawley, 276 S.C. 295 (1981) (finding as a general rule, guilty pleas freely and voluntarily entered act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea). Furthermore, the court makes it clear that this rule applies to the claim of ineffective assistance of counsel. Whetsell, 276 S.C. 295, 297. As a result, Respondent would submit that any issue stemming from Counsel's failure to challenge an alleged double jeopardy violation was waived by Petitioner's guilty plea.

Assuming *arguendo*, that this Court determines that a guilty plea does not amount to a waiver of the non-jurisdictional issues and defenses, the Petitioner cannot meet his burden of proof in regards to this allegation. The PCR court addressed Petitioner's various claims of ineffective assistance of counsel stemming from Counsel's representation at trial, however the court specifically stated "the findings of this court related to claims of ineffective assistance of *trial* counsel are in this order only in the event that a reviewing court determines that claims of ineffective assistance of *trial* counsel are not abandoned when [Petitioner] instead pleads guilty." (App. p. 284). (emphasis added). The PCR court found Petitioner failed to meet his burden of proof in regards to this allegation. (App. p. 282).

During the PCR hearing, Counsel testified:

I had never heard of a double jeopardy claim because he was pleading guilty to all the charges. That was my understanding of what was going on at the time. The jury had reached a verdict on one count. We didn't know what it was. *It was never announced to the court*, it was never entered into evidence, so he was simply pleading guilty to all charges that he was on trial for.

(App. p. 213 lines 11-18) (emphasis added). A review of the guilty plea record reveals Petitioner was advised that the jury was still deliberating. (App. p. 76 lines 5-10). The plea court advised Petitioner if he desired the plea court would continue with the trial. (App. p. 76 lines 5-10). Subsequently, Petitioner chose to waive his rights and enter a plea of guilty. (App. p. 76 lines 11-15). “Generally, jeopardy attaches when the jury is sworn and impaneled, unless the defendant consents to the jury’s discharge before it reaches a verdict.” State v. Mathis, 359 S.C. 450, 458, 579 S.C. 872, 876 (Ct. App. 2004). Petitioner consented to the discharging of the jury prior to any verdict being read.

As Petitioner pled guilty and waived his right to challenge any non-jurisdictional defects or defenses, this issue is not properly before this Court. Regardless, Petitioner failed to meet his burden of establishing deficiency.

VIII. Whether the trial judge abused her discretion in failing to grant a mistrial is a direct appeal issue which is not proper for PCR, furthermore, Petitioner pled guilty thereby waiving any right to challenge the trial court’s error, and the PCR court did not rule on this issue and therefore, the issue is not preserved for appellate review.

Petitioner argues that the trial judge abused her discretion in failing to grant a mistrial. Initially, Respondent submits that this issue is a direct appeal issue and therefore is not proper for post-conviction relief. Post-conviction relief “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.” S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”). Petitioner alleges that the trial court erred in failing to grant a mistrial. This is

an allegation of trial court error. See State v. Wright, 304 S.C. 529, 532, 405 S.E.2d 825, 827 (1991). Petitioner should have raised this issue in a direct appeal to court of appeals.

Additionally, Petitioner pled guilty and waived any non-jurisdiction defects or defenses. See Whetsell v. Hawley, 276 S.C. 295 (1981) (finding as a general rule, guilty pleas freely and voluntarily entered act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea). As a result, Respondent would submit that any issue stemming from any alleged trial court error was waived by Petitioner's guilty plea.

Assuming *arguendo*, that this Court determines that this issue was proper for PCR and Petitioner's guilty plea did not amount to a waiver of the non-jurisdictional issues and defenses, this issue is not properly before the court. The post-conviction relief did not rule on the issue of whether the trial judge abused her discretion in failing to grant a mistrial. Although Petitioner filed a motion pursuant to Rule 59(e), SCRPC, he did not request a ruling on this issue, and therefore, it is not preserved for appellate review. See Marlar v. State, 375 S.C. 407 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review in that defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations).

Therefore, Respondent submits that this issue was not proper for PCR and Petitioner waived his right to challenge any non-jurisdictional defects or defenses when pleading guilty. Assuming *arguendo* this issue was proper and Petitioner did not waive his right to challenge the trial court's alleged error, this issue is not properly before this Court as it was not raised and ruled upon by the PCR Court. Therefore, Respondent submits this issue should be denied.

IX. Whether it was plain error of law for the trial court to issue a second Allen charge knowing the jury's numeral division and decisional disagreement is a direct appeal issue which is not proper for PCR, Petitioner pled guilty thereby waiving any right to challenge the trial court's error, and the PCR court did not rule on this issue and therefore, the issue is not preserved for appellate review.

Petitioner argues that it was plain error of law for the trial court to issue a second Allen charge knowing the jury's numeral division and decisional disagreement. Initially, Respondent submits that this issue is a direct appeal issue and therefore is not proper for post-conviction relief. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Petitioner alleges that the trial court erred in in issuing a second Allen charge. This is an allegation of trial court error. See State v. Wright, 304 S.C. 529, 532, 405 S.E.2d 825, 827 (1991). Petitioner should have raised this issue in a direct appeal to court of appeals.

Additionally, Petitioner pled guilty and waived any non-jurisdiction defects or defenses. See Whetsell v. Hawley, 276 S.C. 295 (1981) (finding as a general rule, guilty pleas freely and voluntarily entered act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea). As a result, Respondent would submit that any issue stemming from any alleged trial court error was waived by Petitioner's guilty plea.

Assuming *arguendo*, that this Court determines that this issue was proper for PCR and Petitioner's guilty plea did not amount to a waiver of the non-jurisdictional issues and defenses, this issue is not properly before the court. The post-conviction relief did not rule on the issue of

whether the trial judge erred in issuing a second Allen charge. Although Petitioner filed a motion pursuant to Rule 59(e), SCRPC, he did not request a ruling on this issue, and therefore, it is not preserved for appellate review. See Marlar v. State, 375 S.C. 407 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review in that defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations).

Therefore, Respondent submits that this issue was not proper for PCR and Petitioner waived his right to challenge any non-jurisdictional defects or defenses when pleading guilty. Assuming *arguendo* this issue was proper and Petitioner did not waive his right to challenge the trial court's alleged error, this issue is not properly before this Court as it was not raised and ruled upon by the PCR Court. Therefore, Respondent submits this issue should be denied.

X. The PCR Court did not abuse its discretion in setting aside Petitioner's default judgment motion, where the State provided the Court with a proposed order in a timely fashion and Petitioner failed to establish any resulting prejudice.

Petitioner argues the PCR court abused its discretion in setting aside his default judgment motion. Petitioner filed a motion for default on August 3, 2010. As a result, a hearing into the matter was convened on October 20, 2010. During the course of the hearing, Applicant's counsel specifically stated, "[Petitioner] and I had [] some original disagreement as to whether or not these are proper motions in a PCR form specifically since *the Court had not requested Orders.*" (App. p. 263 lines 16-20) (emphasis added). Subsequent to the hearing, a proposed order denying Petitioner's application with prejudice was submitted and signed by the Honorable L. Casey Manning. The order was filed on February 4, 2011. A Rule 59(e) motion, SCRPC, was filed on February 21, 2011. A hearing into the matter was held on July 26, 2011. The

Petitioner again addressed his concerns regarding the motion for default judgment. (App. p. 299 lines 14-19). Judge Manning issued an Order denying post-hearing motions, which included Petitioner's motion for default judgment. (App. p. 362-363). The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). Furthermore, to show prejudice, an Applicant must show that his application has merit. Herring v. State, 262 S.C. 597, 206 S.E.2d 885 (1974). The Respondent submits that the PCR Court did not abuse its discretion in denying Petitioner's motion for default nor can Petitioner show any prejudice as the PCR court found that his application was meritless.

XI. The PCR court did not rule as to whether counsel was ineffective for failing to request a preliminary hearing and therefore, the issue is not preserved for appellate review; however, assuming *arguendo*, that the issue was preserved, Counsel was not deficient.

Petitioner argues Counsel was ineffective for failing to request a preliminary hearing. However, Petitioner pled guilty and waived any non-jurisdiction defects or defenses. See Whetsell v. Hawley, 276 S.C. 295 (1981) (finding as a general rule, guilty pleas freely and voluntarily entered act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea). Furthermore, the court makes it clear that this rule applies to the claim of ineffective assistance of counsel. Whetsell, 276 S.C. 295, 297. As a result, Respondent would submit that any issue stemming from Counsel's failure to challenge an alleged double jeopardy violation was waived by Petitioner's guilty plea.

Furthermore, the post-conviction relief did not rule on the issue of whether counsel was ineffective for failing to request a preliminary hearing. Although Petitioner filed a motion pursuant to Rule 59(e), SCRPC, he did not request a ruling on this issue, and therefore, it is not

preserved for appellate review. See Marlar v. State, 375 S.C. 407 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review in that defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations. Because Petitioner failed to secure a ruling on this issue below, Petitioner is barred from pursuing this issue on appeal.

Assuming *arguendo*, that this Court determines that a guilty plea does not amount to a waiver of the non-jurisdictional issues and defenses, Petitioner cannot meet his burden of proof regarding this allegation. During the PCR hearing, Counsel testified Petitioner's charges were indicted by the grand jury prior to his preliminary hearing. Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a), SCRCrimP. If a defendant makes a timely request for a hearing, one should be held within ten days. Rule 2(a)-(b), SCRCrimP. However, the hearing "shall not be held ... if the defendant is indicted by a grand jury ... before the preliminary hearing is held." Rule 2(b), SCRCrimP; see also State v. Hawkins, 310 S.C. 50, 54-55, 425 S.E.2d 50, 53 (Ct.App.1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held). Furthermore, a defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982).

Since Petitioner pled guilty, waiving his right to challenge any non-jurisdictional defects or defenses and failed to seek a ruling from the PCR court, this issue is not properly before this Court. Regardless, Petitioner failed to meet his burden of establishing deficiency.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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March 24, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable L. Casey Manning, Circuit Court Judge
Case No. 2008-CP-40-07960
Appellate Case No. 2012-213313

WARREN RUSSELL,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.


PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. Durant, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 24 day of March, 2014.



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I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Warren Russell, #316802
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I further certify that all parties required by Rule to be served have been served.

This 24 day of March, 2014.



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