



ALAN WILSON
ATTORNEY GENERAL

March 26, 2014

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MAR 26 2014

S.C. Supreme Court

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

Re: Harold Anthony (Tony) Trout v. State of South Carolina
Appellate Case No: 2013-001047
Lower Court Case No: 2011-CP-23-4926

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

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

KCR/jacc
Enclosures

cc: Jeffrey Falkner Wilkes, Esquire
Trisha Allen, Victim Services Counselor

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2013-001047

Harold Anthony (Tony) Trout,..... Petitioner,

v.

State of South Carolina,Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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Attorney General

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the record support the court's granting a belated appeal in this case?
2. Did the PCR court improperly limit the Petitioner's presentation of other issues?

STATEMENT OF THE CASE

The State Grand Jury indicted Petitioner for official misconduct in office (2009-GS-47-0006, count 1) and attempting to influence a juror by written or oral communication (2009-GS-47-0006, count 2). Kenneth C. Gibson, Esquire represented Petitioner.

After the State brought the case to trial, Petitioner was found guilty of attempting to influence a juror by written or oral communication. (App.pp.796-97). On March 31, 2011, the Honorable D. Garrison Hill sentenced Petitioner to six months imprisonment. (App.p.806). A notice of appeal was filed at the South Carolina Court of Appeals, but it was dismissed based on counsel's failure to properly perfect the appeal.

Petitioner filed an application for post-conviction relief (PCR) on July 25, 2011 (2011-CP-23-4926) and an addendum on September 14, 2011. (App.pp.23-27; pp.29-47). A hearing was convened at the Greenville County Courthouse on March 15, 2012. (App.pp.55-69). Petitioner was present and proceeded pro se. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable W. Jeffrey Young issued an order dated February 22, 2013 and filed March 4, 2013 in which he: (1) granted Respondent's partial motion to dismiss all issues related to the March 2011 trial as untimely and (2) granted a review of Petitioner's direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). (App.pp.1-6).

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 PCR judge did not err in finding Petitioner was entitled to a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

At the PCR hearing, trial counsel testified he filed a notice of appeal after Petitioner’s trial but did not order the trial transcript. Trial counsel testified the appeal was subsequently dismissed. (App.p.65).

In granting Petitioner’s request for a review of direct appeal issues pursuant to White v. State, the PCR judge found Petitioner “did not knowingly and voluntarily waive his right to a direct appeal.” (App.pp.4-5).

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 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).

Based on trial counsel’s testimony, Petitioner met his burden of proof on this issue. See Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (“To waive

a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.”). The PCR judge did not err in finding Petitioner was entitled to a review of direct appeal issues pursuant to White.

II. The PCR judge did not err in dismissing Petitioner’s remaining issues.

Petitioner argues the PCR judge erred in “limiting the Petitioner’s claims.” (Pet. Cert., p.4). This argument is without merit. The PCR judge did not limit Petitioner’s claims or issues. Rather, the PCR judge properly granted Respondent’s partial motion to dismiss the majority of Petitioner’s issues.

In his PCR application and addendum, Petitioner raised the following issues: prosecutorial misconduct and vindictive prosecution, trial court error, and perjury. (App.pp.23-27; pp.29-47). At the PCR hearing, Respondent made a partial motion to dismiss these issues. (App.pp.57-58).

The PCR judge granted Respondent’s partial motion to dismiss. In the final order, the PCR judge agreed with Respondent’s position that, aside from the White v. State issue, the remaining issues raised in the PCR application and addendum “were not proper issues for post-conviction relief.” (App.pp.3-4).

First, Petitioner has the burden of proving the existence of prosecutorial misconduct or vindictive prosecution. To establish vindictive prosecution a defendant must prove “that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus.” United States v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001). To establish genuine animus, the defendant

may prove actual vindictiveness through direct evidence or raise a presumption of vindictiveness when the prosecutor's actions "pose a realistic likelihood of 'vindictiveness.'" Blackledge v. Perry, 417 U.S. 21, 27, 94 S. Ct. 2098 (1974). Petitioner provided no evidence to make such a showing in his PCR application and addendum or in his argument at the hearing. While Petitioner made a vague argument in his PCR application that the State was vindictive in pursuing a second charge against him, this alone is not sufficient to prevail upon a claim of misconduct or vindictiveness. See State v. Dawkins, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989) ("[A]n initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution."); see also United States v. Armstrong, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486 (1996) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). As Petitioner failed to meet his burden of providing any evidence to sustain his allegation of prosecutorial misconduct or vindictiveness, the PCR judge did not err in granting Respondent's partial motion to dismiss this allegation.

Second, in order to attack errors made by the trial court judge, one must raise these issues on appeal, not in post-conviction relief. Petitioner raised several allegations of trial court error in his PCR application and addendum. This Court has long held, however, that post-conviction relief is not a substitute for a direct appeal. See Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974); see also S.C. Code Ann. § 17-

27-20(b) (2003) (noting PCR “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”). This Court has expressly held “errors which can be reviewed on direct appeal may not be asserted for the first time . . . in post-conviction proceedings.” Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993). As Petitioner was alleging errors by the trial judge that could be handled on direct appeal, the PCR judge did not err in granting Respondent’s partial motion to dismiss these allegations.

Third, while Petitioner made allegations that witnesses perjured themselves at this trial, such allegations are not cognizable under the Uniform Post-Conviction Procedure Act (the Act). The Act sets forth the grounds upon which one may allege he is entitled to post-conviction relief. See S.C. Code Ann. §17-27-20(a) (2003). Petitioner’s allegations of perjury do not support a cognizable claim for post-conviction relief under any of the statutory grounds. As such, the PCR judge did not err in granting Respondent’s partial motion to dismiss these allegations.

As Petitioner failed to meet his burden of proof, the PCR judge did not err in denying all of the issues in the PCR application except for that of a White v. State review. 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 grant Issue I and deny Issue II in this Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: 
ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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The Honorable W. Jeffrey Young, Circuit Court Judge

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Harold Anthony (Tony) Trout, Petitioner,

v.

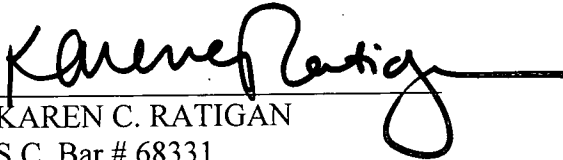
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Jeffrey Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.
This 26th day of March, 2014.


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