STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable William Jeffery Young, Circuit Court Judge

Appellate Case No. 2012-000129

Elizabeth Ann Tillman..... .....Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTIONS PRESENTED

1. If the present argument is even preserved for this Court's review, did the record show Petitioner received ineffective assistance of counsel for failure to investigate and pursue a guilty but mentally plea?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the October 2007 term of General Sessions for burglary – first degree (2007-GS-32-3035), assault and battery with intent to kill (2007-GS-32-3036), and possession of a firearm during the commission of a violent crime (2007-GS-32-3037). Elizabeth C. Fullwood, Esq., represented Petitioner.

On October 30, 2007, Petitioner pled guilty as indicted. (App.pp.1-34). The Solicitor presented the factual basis that supported the plea: Petitioner broke into victim's home, after victim hid in her child's room; Petitioner shot the victim multiple times while the victim was barricaded inside of her room in the residence. (App.pp.15-7). The victim's four year old son opened the back window in flight. (App.pp.15-6; p.20). Petitioner continued to shoot at them while they escaped down the neighborhood street. (App.pp.15-6). Petitioner stated she attacked the victim because of comments made about her brother's recent death. (App.pp.27-8). Petitioner was evaluated by both the South Carolina Department of Mental Health. An independent psychiatrist, Dr. Thomas D. Martin, stated Petitioner did not suffer from mental illness. (App.p.4). Counsel noted Petitioner did not have a history of substance abuse or delinquent behavior. (App.p.23). The solicitor noted the offense resulted from a sophisticated and planned attempted execution. (App.p.32). The Honorable Kenneth G. Goode sentenced Petitioner to twenty years imprisonment for assault and battery with intent to kill, five years imprisonment for possession of a firearm charge, and five years imprisonment for the lesser included charge of burglary, second-degree violent. The sentences were to be served consecutively and aggregated to a thirty year term of imprisonment. (App.pp.32-3).

A Notice of Appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. By order on or about February 8, 2010, The South Carolina Court of Appeals dismissed the appeal.

Petitioner filed an Application for Post-Conviction Relief (PCR) on November 23, 2010. (App.pp.35-43). A hearing was convened at the Lexington County Courthouse on August 14, 2012. (App.pp.58-77). Petitioner was present and represented by Charles T. Brooks, III, Esq. Kaelon E. May, Esq., of the South Carolina Attorney General's Office represented Respondent. Applicant testified the sentences were supported by her guilt. (App.p.67). Counsel testified she had Petitioner independently evaluated subsequent to the solicitor's evaluations. (App.p.70). Neither medical findings proved fruitful to the establishment of a meritorious insanity defense (App.p.70). The Honorable W. Jeffery Young denied relief in an order dated January 4, 2013. (App.pp.78-87). This appeal follows from a matter that was neither raised nor specifically ruled upon in the lower court.

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

Certiorari is not warranted where the unpreserved argument that counsel was ineffective for not investigating and pursing a guilty but mentally ill plea is without merit because the record fails to show that the medical findings from counsel's independently sought evaluations could have even supported the plea judge's acceptance of the qualified plea.

At the PCR hearing, Petitioner raised only one claim for relief based upon ineffective assistance of counsel. The Honorable W. Jeffery Young made relevant credibility findings and ruled Petitioner failed to present any evidence showing the specific beneficial results that additional investigation would have yielded (App.p.82). Furthermore, the PCR judge found counsel's investigation of a potential insanity defense to be exceptionally thorough. (App.p.82). Petitioner failed to establish any resulting prejudice from counsel's representation.

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). 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 present argument is not preserved for this Court 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). 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.").

Petitioner did not pray for relief presently at issue. (App.pp.37-8; pp.55-6). Neither was the issue raised in Petitioner's testimony. (App.pp.60-8). The PCR judge specifically found counsel conducted a sound investigation unrelated to the phantom allegation of ineffective assistance of counsel that now manifests itself before this Court. See 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.). Therefore, this Court should affirm the PCR judge's denial of the Application without engaging in an unnecessary substantive review of the present argument.

Notwithstanding the preservation bar, the record shows Petitioner's argument is without merit. A criminal defense attorney has a duty to investigate but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 596, 597 (2007) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)). S.C. Code Ann. § 17-24-20(D) states

> A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the

> defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

Section 17-24-20(A) qualified a judge's discretion as follows:

> A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), **but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.** (emphasis added).

Petitioner presented absolutely no evidence to show the plea judge could have entertained a GBMI plea from Petitioner. Instead, the record clearly shows the solicitor had the Department of Mental Health conduct competency and criminal responsibility evaluations on Petitioner. (App.p.4; p.70), A summary of Dr. Domino's findings were incorporated into the record. (App.pp.3-4). Furthermore, counsel independently had Petitioner undergo competency and criminal responsibility evaluations. (App.p.27; p.70). Counsel testified she advised Petitioner to enter a guilty plea subsequent to adverse medical findings that negated an insanity based defense. (App.p.74). Absent relevant testimony or evidence, the PCR judge's evaluation of witness credibility and findings of fact and conclusions of law rule the day. See Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885-86 (1994) (the sitting judge was in the best position to determine the credibility of the witnesses.).

Petitioner's contention that the plea judge's decision to provide Petitioner mental health counseling evidenced a willingness to have accepted a GBMI plea from Petitioner is factually speculative and legally unsound. See State v. Hornsby, 326 S.C. 121, 127, 484 S.E.2d 869, 872 (1997) ("[T]he statute was not designed to "benefit" GBMI inmates to the exclusion of guilty inmates. Psychiatric care should be available for all inmates, and GBMI inmates should not receive better treatment than guilty inmates.). Furthermore, there was no finding by Dr. Martin

that Petitioner was mentally ill, only that she had emotional problems. (App.p.27). "Emotional problems" indicates angst and not a substantively diagnosed mental health disease as required by Section 17-24-20(A). Thus, Petitioner's argument rests on unpersuasive speculation. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 9 ("[A]pplicant's mere speculation as to what witness's testimony would have been had she been called at trial cannot, by itself, satisfy applicant's burden of showing prejudice resulting from counsel's failure to call such witness at trial."). Instead, the record shows Petitioner acted with malice in a measured act of revenge for her brother's death and the victim's unrequited friendship. (App.pp.15-7; p.27). Petitioner completed college courses and had no history substance abuse. (App.p.23). Instead, evidence of probative value supports the PCR judge's finding that counsel's investigation into the matter was exemplary. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance of counsel under prevailing professional norms.

Similarly, Petitioner also failed to prove the second prong of the Strickland test – that she was prejudiced by counsel's performance. A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a "reasonable probability" or a probability sufficient to undermine confidence in the outcome of trial, that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial; plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements. Kolle v. State, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010). Petitioner testified at PCR hearing she wanted new trial. (App.pp.62-6). Petitioner did not assert a newfound desire for GBMI classification within the Department of

Corrections was the but for underlying basis for the PCR action. Guilty but mentally ill is still guilty. See S.C. Code Ann. § 17-24-70 (2003) (requiring that a GBMI defendant be sentenced as guilty); see also State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004) ("The difference between guilty and guilty but mentally ill pertains only to post-sentencing medical treatment.").

As Petitioner failed to meet this burden of proving ineffective assistance of 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 unpreserved issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

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

By: _____
ATTORNEYS FOR RESPONDENT

Nov. 21st, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

ELIZABETH TILLMAN,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

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:

Wanda H. Carter, Esq.
1330 Lady St. Suite 401
Columbia, SC 29201

This 21th day of November, 2013

Troyesh 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: **Elizabeth Tillman v. State of South Carolina**
Appellate Case No.: 2013-000129
Lower Court Case No: 2010-CP-32-5070

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: Wanda H. Carter, Esq. (2 copies with all the attachments)