STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Edward B. Cottingham, Guilty Plea Judge
The Honorable Edwin M. Davis, Drug Court Termination Judge
The Honorable J. Michael Baxley, Post-Conviction Relief Judge

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Appellate Case No. 2011-197712

Lenson Clyburn, Jr., ... 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

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STATEMENT OF ISSUES ON APPEAL

1. The PCR court erred in denying Petitioner's allegation that his drug court termination proceeding violated due process because he received no prior notice that such a hearing would be held in his case. Petitioner was taken into custody on August 5, 2009, and his drug court termination hearing was held on August 6, 2009.

2. The PCR judge erred in denying Petitioner's allegation that his termination from the drug program was unconstitutional because he was not represented by counsel at the drug court termination hearing and he did not waive his right to counsel at that time.

3. The PCR court erred in dismissing Petitioner's claim that he did not voluntarily and intelligently waive his right to an appeal of the drug court termination proceeding even though he signed an agreement at his guilty plea proceeding pledging not to appeal the drug court termination proceeding because this characterized Petitioner's guilty pleas as conditional guilty pleas, which are not acceptable in court.

4. The PCR judge erred in ruling that Petitioner could not present his guilty plea proceeding issues (other than the right to appeal his guilty pleas) at the PCR hearing on the ground his PCR action referencing his guilty plea proceeding was allegedly untimely filed because Petitioner indeed filed a timely PCR action in reference to his guilty plea proceeding after his guilty plea suspended sentences were imposed at the subsequent drug court termination proceeding.

STATEMENT OF THE CASE

The Chesterfield County Grand Jury indicted Petitioner at the October 2007 term of General Sessions for possession with intent to distribute (PWID) marijuana (2007-GS-13-0702) and PWID crack cocaine (2007-GS-13-0703). (App.pp.106-09). Patricia C. Rivers, Esquire represented Petitioner.

On November 7, 2007, Petitioner pled guilty. The Honorable Edward B. Cottingham sentenced Petitioner to concurrent terms of seven years for PWID marijuana and seven years for PWID crack cocaine. The sentences, however, were suspended and Petitioner was deferred to drug court. (App.pp.14-15; Supp.App.pp.4-5). Petitioner did not appeal.

On August 6, 2009, Petitioner appeared in court for a drug court termination hearing. Petitioner was not represented by counsel. The probate judge for Chesterfield County, the Honorable Edwin M. Davis, levied the original sentences of seven years imprisonment for each charge. (App.pp.17-20). On September 30, 2009, the South Carolina Court of Appeals dismissed the subsequent notice of appeal, finding it was not timely filed. (Supp.App.pp.1-3).

Petitioner filed an application for post-conviction relief (PCR) on March 29, 2010 (2010-CP-13-0126). (App.pp.22-27). A hearing was held at the Darlington County Courthouse on June 8, 2011. (App.pp.33-94). Petitioner was present and represented by Melisa W. Gay, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable J. Michael Baxley denied relief in an order filed July 26, 2011. (App.pp.96-104).

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 denying Petitioner's allegation that his due process rights were violated at the drug court termination hearing because he was not afforded prior notice and was not represented by counsel.

A.

At the PCR hearing, Petitioner admitted he signed a waivers and agreements document before he pled guilty. (App.p.88). Petitioner admitted he initialed each clause of this document before he signed it and that one of those clauses advised he could be terminated from the drug court program if he was arrested on new charges. (App.p.89). Petitioner argued he had generally complied with the policies of the drug court program and – in May 2009 – had been excused from further participation in the program until graduation. (App.pp.81-82). Petitioner stated he was arrested the day before the drug court termination hearing. (App.pp.83-84; p.90). Petitioner stated the director of the drug court program (Mr. Harrington) never informed him either that the termination hearing would occur the next or that he could have counsel appointed for that hearing. (App.pp.83-85; p.89). Petitioner stated he would have requested an attorney to represent

him at the termination hearing if he had known he could do so. (App.p.86).

Assistant solicitor Mary Thomas Johnson-Lee, Esquire testified the Fourth Circuit Solicitor's Office administers the drug court program in Chesterfield County. (App.p.60). Johnson-Lee testified a defendant will sign a document called a waivers and agreement before pleading guilty and entering the drug court program and this document is attached to the sentencing sheet. (App.pp.53-55). Johnson-Lee testified this document – among other things – notified Petitioner that an arrest while in the drug court program was grounds for termination from the program. (App.p.57). Johnson-Lee testified Petitioner was arrested for four drug transactions – each recorded on video – while still in the drug court program and had several other violations. (App.p.57; p.63). Johnson-Lee testified an individual from the drug court program verbally notifies the defendant of the termination hearing. (App.pp.58-59; p.62). Johnson-Lee testified attorneys were not automatically appointed to represent defendants at termination hearings, but that attorneys were appointed if requested. (App.pp.63-64). Johnson-Lee testified Petitioner would not have been notified in writing about the termination hearing, violations, or appointment of counsel because he signed away the right to such notice in the waivers and agreements document and would have instead received verbal notice. (App.pp.62-63).

Chesterfield County Drug Court Coordinator Morris Harrington testified Petitioner had substantially completed the drug court program and only needed to attend graduation. (App.pp.69-71). Harrington testified, however, there was a six-month period before the drug court program was completed. (App.pp.69-70). Harrington testified he spoke to Petitioner after he had been accused of selling drugs, but that Petitioner said he

was not involved. (App.pp.71-72). Harrington testified he told Petitioner at that time that if he got "into some trouble" with selling drugs, he would not graduate from drug court. (App.p.72). Harrington testified he subsequently spoke to Petitioner at the jail after he was arrested. (App.pp.72-73; pp.75-76). Harrington testified he told Petitioner at this meeting that the drug court termination hearing would take place the next day and he could have an attorney at that hearing. (App.pp.72-73; pp.75-76). Harrington testified Petitioner said he did not want an attorney because he was not guilty, but that if Petitioner had requested counsel, he would have contacted Johnson-Lee to have counsel appointed. (App.p.73; p.76). Harrington testified Petitioner could have requested counsel up until the point the termination hearing began. (App.p.78). Harrington confirmed there was no written notice of a hearing or availability of counsel and that these things were verbally conveyed. (App.p.67; p.73; p.78). Harrington confirmed one could not participate in the drug court program after an arrest and that, in addition to Petitioner's arrest, he had three other sanctions. (App.p.75).

B.

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving there were constitutional violations in either the drug court termination hearing or process." The PCR judge found Petitioner executed a "knowing and voluntary" waivers and agreements document with the State before he pled guilty and entered the drug court program and that this document waived certain rights. The PCR judge found Harrington was a credible witness. The PCR judge found Petitioner was provided notice of the drug court termination hearing and was asked

if he wanted counsel at that hearing, which he declined. (App.pp.101-03).

C.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving his due process rights were violated because of the lack of written notice of either the drug court termination hearing date or the opportunity to have counsel at that hearing.

Petitioner signed a waivers and agreements document – while represented by counsel – before he pled guilty. Clause 20 of that document states:

> I must obey all laws and notify the Drug Court Director of any criminal charges that are made against me, including any driving violations or minor offenses. My arrest or conviction on other charges, or my failure to report other charges, may result in termination from the Program. I understand that I can be terminated from the program if I am rearrested on any new charge.

(Supp.App.p.8). Clause 35 of the waivers and agreements document states:

> My participation in the Program requires that I waive very important rights. I have fully discussed my rights with a lawyer before agreeing to enter the Program, if applicable. I am satisfied that I understand how the program will affect my rights. At the time of executing this document, my thinking is clear and I am not under the influence of any substance. The decision to waive my rights and enter the Program is mine alone and made of my own free will. I expressly agree to accept and abide by all the terms and conditions of the Drug Court Program.

(Supp.App.p.9). Clause 36 of the waivers and agreements document states:

> I certify that I have read the above Waiver and Agreement and that it has been fully explained to me, and I am desirous of treatment services in accordance with the Drug Court Program. I understand that in all cases strict standards of confidentiality and professional ethics will be maintained.

(Supp.App.p.10). These clauses were initialed by Petitioner and Petitioner signed the document the day before his guilty plea hearing. (Supp.App.pp.6-10). These clauses also

corroborate Johnson-Lee's and Harrington's testimony that signing the waivers and agreements document waived certain rights such as that of written notice of a hearing or counsel. This Court has long held a defendant's knowing and voluntary waiver of various constitutional rights does not constitute a violation of due process. See, e.g., Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding an individual may waive the right to both direct appeal and post-conviction relief); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) (holding an individual can waive his Fifth Amendment privilege against self-incrimination); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) (holding an individual can waive his Sixth Amendment confrontation right by his own conduct); State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997) (holding an individual can waive his Sixth Amendment right to counsel); State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007) (holding an individual may waive the right to have his indictment presented to the grand jury).

Petitioner's constitutional due process rights were protected in this case. This Court held in State v. Perkins, 378 S.C. 57, 61, 661 S.E.2d 366, 368 (2008) that "a Drug Court Program participant is entitled to notice and a hearing to determine whether he has violated the conditions of his suspended sentence before his sentence may be imposed." "The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d

352, 354 (2008). Petitioner failed to demonstrate there is a constitutional right to written notice of a drug court termination hearing or the right to counsel at such. Rather, the record clearly indicates Petitioner's constitutional rights were protected in this case through Harrington's in-person, oral notice of the drug court termination hearing to be held the following day. Petitioner did not simply attend a court hearing without prior knowledge and have his liberty revoked without explanation. Petitioner's due process rights were safeguarded because he was afforded the opportunity for a hearing on the allegations made that would subject him to a loss of liberty – this was the drug court termination hearing. (App.pp.17-20). Petitioner's violations were recited to the judge and Petitioner was given an opportunity to comment and explain his version of events before the judge made a decision as to whether he would be terminated from the program and what sort of sentence he could receive. (App.pp.17-20). As such, Petitioner's constitutional right of due process was satisfied when he received proper notice of the drug court termination hearing and then a full hearing to determine whether he violated the terms and conditions of drug court. See id.

Petitioner was afforded proper notice of the drug court termination hearing. Johnson-Lee testified a member of the drug court team advised a defendant verbally of the date of his hearing. (App.pp.58-59; p.62). Harrington testified he visited Petitioner at the jail on the night of his arrest and advised him the drug court termination hearing would be the following day. (App.pp.72-73; pp.75-76). While Petitioner claimed Harrington never visited him and advised him of his termination hearing, the PCR judge found Harrington's testimony was credible. (App.p.102). 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."). Petitioner was given proper notice that there would be a drug court termination hearing the following day in order to address his arrest and possible termination from the program.

Similarly, Petitioner was afforded the opportunity to have counsel represent him at the drug court termination hearing but chose not to do so. Initially, Respondent notes this Court has never held one has the constitutional right to counsel at a drug court termination hearing. Cf. Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986) (holding defendants at a probation revocation proceeding have the right to counsel). Regardless, Johnson-Lee testified attorneys were appointed to represent defendants at the termination hearing if requested. (App.pp.63-64). Harrington testified he visited Petitioner the night before the termination hearing and told him he had the right to an attorney if he desired. (App.pp.72-73; pp.75-76). Harrington testified Petitioner declined to have an attorney at that time but stated he could have changed his mind up until the termination hearing began. (App.p.73; p.76; p.78). This Court should afford great deference to Harrington's testimony, as the PCR judge found him to be credible. See Drayton v. Evatt, 312 S.C. at 13, 430 S.E.2d at 522; Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. at 567, 629 S.E.2d at 696. Having been through the guilty plea process with an attorney,

Petitioner was aware of the potential advantages and disadvantages of experiencing a legal proceeding with the assistance of counsel. Petitioner was afforded the opportunity to have counsel represent him at the drug court termination hearing and simply chose not to avail himself of that opportunity, which was his right. See, e.g., State v. Brewer, 328 S.C. at 119, 492 S.E.2d at 98.

D.

Petitioner – while represented by counsel for his original charges and subsequent guilty plea proceeding – voluntarily waived many of his constitutional rights in entering the drug court program. He was advised verbally, however, of both the hearing date for his drug court termination proceeding and the opportunity to be represented by counsel at that proceeding. Petitioner has failed to meet his burden of proving the drug court termination proceeding did not meet the minimal requirements of due process. Cf. Dangerfield, 376 S.C. at 181, 656 S.E.2d at 355 (noting parole and probation termination proceedings must comply with minimum due process requirements). Accordingly, 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.").

II. The issue of whether Petitioner is entitled to review of appellate issues from his drug court termination proceeding is not preserved for review by this Court.

Petitioner argues he is entitled to a review of appellate issues from his drug court termination hearing. This issue, however, is not preserved for review by this Court. This issue is not addressed in the order of dismissal. As the issue was not raised to and ruled on by the PCR judge, it is not preserved for appellate review. 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."). While Petitioner may have obliquely mentioned the issue at the PCR hearing, he did not file a post-trial motion pursuant to Rule 59(e), SCRCP to request the court alter or amend the order of dismissal to include a ruling on this purported issue. 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 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).

III. The PCR judge did not err in finding Petitioner was time-barred from raising issues at the PCR hearing related to his guilty plea hearing.

Respondent filed a return and partial motion to dismiss in this case. (App.pp.28-32). Respondent argued all post-conviction relief allegations related to the drug court termination hearing were timely, but that allegations related to the guilty plea hearing were barred by the expiration of the statute of limitations. (App.pp.28-32). Respondent and Petitioner argued this motion at the PCR hearing. (App.pp.36-41). The PCR judge found Respondent's partial motion to dismiss was well taken and ruled issues related to the guilty plea hearing were untimely because of the expiration of the one year statute of limitations. (App.pp.41-42; pp.98-99).

The PCR judge did not err in granting Respondent's partial motion to dismiss and finding allegations related to Petitioner's guilty plea hearing were time-barred. The Uniform Post-Conviction Procedure Act clearly sets forth a one year statute of limitations for filing a PCR application:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a) (2003) (emphasis added).

Petitioner pled guilty on November 7, 2007 and received a sentence of seven years imprisonment suspended upon completion of drug court. (App.pp.14-15; Supp.App.pp.4-5). This was the date of his conviction. See Deal v. United States, 508 U.S. 129, 132, 113 S. Ct. 1993, 1996 (1993) (finding it "unambiguous that 'conviction' refers to the

finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction. A final judgment of conviction includes both the adjudication of guilt and the sentence."). Any post-conviction relief issues – such as the issues in Petitioner's application about plea counsel's failure to review discovery before the plea hearing or file a notice of an appeal after the hearing[1] – were known or should have been known to Petitioner within one year of November 7, 2007. The statutory period in which to file a PCR application and challenge issues related to Petitioner's guilty plea hearing expired on November 7, 2008. See S.C. Code Ann. § 17-27-45(a).

Contrary to Petitioner's assertions, he did not enter conditional guilty pleas. This Court has long held that when a condition or qualification is attached to a guilty plea, the plea is conditional and the judge must not accept it. See, e.g., State v. Inman, 395 S.C. 539, 555, 720 S.E.2d 31, 40 (2011); State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982). In this case, however, there were no conditions or qualifications attached to Petitioner's guilty pleas to PWID marijuana and PWID crack cocaine. Petitioner merely pled guilty to suspended sentences – similar to when an individual pleads guilty and the sentence is suspended upon successful completion of probation. There is no provision in statutory or case law that a sentence suspended to successful completion of drug court is either conditional or somehow tolls the conviction. As such, Petitioner had until November 7, 2008 to file a PCR application to challenge any perceived constitutional violations experienced during the guilty plea proceeding. See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). As Petitioner filed this PCR

[1] App.pp.22-27.

application on March 29, 2010, the PCR judge was correct in finding any and all PCR issues relating to the guilty plea proceeding in this case were time-barred.

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

September 3, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Edward B. Cottingham, Guilty Plea Judge
The Honorable Edwin M. Davis, Drug Court Termination Judge
The Honorable J. Michael Baxley, Post-Conviction Relief Judge

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Appellate Case No. 2011-197712

Lenson Clyburn, Jr., ... 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 depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, 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 3rd day of September, 2014.

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

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SEP - 3 2014
S.C. Supreme Court

September 3, 2014

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

Re: **Lenson Clyburn, Jr. v. State of South Carolina**
Appellate Case No. 2011-197712
Lower Court Case 2010-CP-13-0126

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: Wanda H. Carter, Esquire
Trisha Allen, Victim Services