

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2013-001537

THEODORE COBBS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. Supreme Court

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QUESTION PRESENTED

I. Did the lower court err by failing to entertain the Petitioner's *pro se* request for new counsel when the Petitioner never raised the issue to the lower court, the Petitioner abandoned his request for new counsel by proceeding with appointed counsel at his evidentiary hearing, the Petitioner failed to show satisfactory cause for removal of counsel, and the interest of justice would not be served by entertaining Petitioner's post-hearing complaints about PCR counsel?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Petitioner was indicted at the May 2008 term of the Charleston County Grand Jury for five counts of criminal sexual conduct with a minor- first degree (2008-GS-10-3721, -3722, -3724, -3732, -3737), six counts of criminal sexual conduct with a minor- second degree (2008-GS-10-3725, -3727, -3728, -3729, -3739, -3742), and two counts of unlawful conduct towards a minor (2008-GS-10-3744, -3745). He was represented by Carl B. Grant, Esquire, and Eduardo Curry, Esquire.

The Petitioner proceeded to trial and was found guilty. The evidence presented by the State at trial included the testimony of two sisters who testified the Petitioner touched them inappropriately and forced them to have vaginal and oral sex with him while the Petitioner was dating their mother over the course of several years. (App. 220--522). On September 19, 2008, the Petitioner was sentenced by the Honorable J.C. Nicholson, Jr. to a total of thirty-eight years imprisonment.

A timely Notice of Appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Robert Dudek, Esquire, of the South Carolina Office of the Appellate Defense represented the Petitioner on appeal. The South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Cobbs, No. 2011-UP-355 (S.C. Ct. App. June 30, 2011).

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 30, 2012. The Respondent made its Return on August 16, 2012. An evidentiary hearing on the matter was convened on May 20, 2013 at the Charleston County Courthouse. The Petitioner was present at the hearing and represented by Charles T. Brooks, III,

Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

At the evidentiary hearing, the Petitioner testified along with Carl B. Grant, Esquire, and Eduardo Curry, Esquire. By Order filed July 11, 2013, the Honorable Deadra L. Jefferson denied and dismissed the Petitioner's application for post-conviction relief with prejudice. The Petitioner filed a Notice of Appeal. This Return to Petition for Writ of Certiorari follows.

ARGUMENT

I. The lower court did not err by failing to entertain the Petitioner's *pro se* request for new counsel when the Petitioner never raised the issue to the lower court, the Petitioner abandoned any requests for new counsel by proceeding with appointed counsel at his evidentiary hearing, the Petitioner failed to show satisfactory cause for removal of counsel, and the interest of justice would not be served by entertaining Petitioner's post-hearing complaints about PCR counsel.

In his Petition, the Petitioner asserts this Court should grant a new trial or in the alternative a new post-conviction relief hearing based on the lower court's failure to address the Petitioner's cursory requests to obtain new post-conviction relief counsel. The Respondent submits this issue is not preserved for appellate review. The Petitioner never filed a *pro se* motion to relieve counsel and the Court was never given the opportunity to rule on such request. If this Court is inclined to construe the Petitioner's *pro se* musings about post-conviction relief counsel as a *pro se* motion to relieve counsel, the Respondent submits this Court should follow its ruling in State v. Graddick and find no reversible error. The Respondent asks this Court to deny and dismiss the Petition for Writ of Certiorari.

A. This issue is not preserved for appellate review.

As an initial matter, the Respondent submits this issue is not preserved for appellate review. The lower court was never presented with a motion to relieve counsel and the Petitioner failed to make such a request at his evidentiary hearing. It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised, but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727.

The Respondent submits the Petitioner never filed a *pro se* motion to relieve counsel. Ten days prior to his evidentiary hearing, the Petitioner filed an “Affidavit of Applicant”. (App. 1312-14). In this filing in the very last paragraph, the Petitioner says “At this time I would like to ask the Court to remove Mr. Charles T. Brooks, III, from my PCR application and assign another lawyer in the interest of justice.” (App. 1313). Because the Petitioner’s filing was not captioned a motion to relieve counsel, it was properly disregarded by the Court as a filing in violation of the prohibition against hybrid representation. The filing’s caption provided no indication to the Court that the Petitioner was making a *pro se* request to have counsel relieved. See State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998) (“Since there is no right to “hybrid representation” that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”)

Even if this Court construes the Petitioner’s “Affidavit of Applicant” as a proper *pro se* motion to relieve counsel, the Petitioner abandoned his request to relieve counsel at the evidentiary hearing by willingly proceeding with his present post-conviction relief counsel. At the start of the evidentiary hearing, post-conviction relief counsel indicated to the Court that the Petitioner had a motion for recusal that he wanted to bring to the Court’s attention. (App. 1181:4-6, 18-20). After denying the motion for recusal, the Court gave the Petitioner the opportunity to express his concerns about post-conviction relief counsel’s representation. The Petitioner tells the Court “this is the first time of seeing this man. It’s been only, what? Ten minutes? And he’s all ready to go to trial? I don’t know what he’s got prepared for my case.” (App. 186:1-5). The Petitioner goes on to tell the Court he wanted PCR counsel to subpoena a medical expert. (App. 1186:8-9). The Court explains to the Petitioner the purpose of his post-conviction relief action

and the legal standard that would be applied to his claims (App. 1186:10-1187:24). After this colloquy with the Court, the Court asks the Petitioner “Sir, is there anything else that you want to tell me?” The Petitioner responded “No.” (App. 1189:25-1190:2).

The Petitioner never indicated to the Court during his evidentiary hearing a desire to have his counsel removed. He was given ample opportunity by the Court to raise the issue if he did not want to proceed with appointed post-conviction relief counsel. The record is also void of any indication that counsel was aware of the Petitioner’s desire to relieve him. The Respondent submits this issue is not preserved for appellate review. The Petitioner’s request to relieve counsel was not expressed to the Court in a *pro se* motion to relieve counsel. If the Petitioner wanted to have counsel removed, he abandoned his request by proceeding with counsel at the post-conviction relief hearing. Because this issue was not properly raised to the lower court, it was also not ruled on by the lower court and is not proper for appellate review.

B. The lower court’s failure to entertain the Petitioner’s *pro se* requests for new counsel is not reversible error.

If this Court is inclined to construe the Petitioner’s *pro se* “Affidavit of Applicant” as a properly raised *pro se* motion to relieve counsel, the lower court’s failure to entertain and rule on the issue is not reversible error. This Court should following its reasoning in State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001). In Graddick, the appellant filed a *pro se* letter addressed to the trial court four days before the start of his trial asking for help firing his attorney. The record in Graddick contained no action by the Court in response to this letter. This Court found no reversible error and held the trial court did not abuse its discretion in refusing to grant appellant’s request for a new counsel days before trial. The Court went on to hold the appellant made only conclusory arguments about why his counsel should be relieved: “Mr. Runyon is not

representing my interest and is not fully prepared for this case. I do not feel comfortable going to court with him as my lawyer.” Id. at 385-386, 548 S.E.2d at 211.

Like in Graddick, the Petitioner in this case submitted a *pro se* filing asking the Court to fire his attorney several days before his court proceeding. Also like in Graddick, the lower court took no action in response to the Petitioner’s filing. The Petitioner in this case also failed to carry his burden of showing a satisfactory cause for removal. In his *pro se* filing, the Petitioner complained he was unable to reach counsel by phone and that counsel did not subpoena certain people he wanted present for his evidentiary hearing. (App. 312-1313). At his evidentiary hearing, the Petitioner complained that he had just met counsel and did not know what counsel was prepared to present in his case. (App. 186:1-5).

A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. Id. at 385. “While an applicant may have the right to reject or discharge court-appointed counsel and proceed *pro se* or retain his own counsel, he does not have the right, without a showing of satisfactory cause to refuse or dismiss the counsel appointed and have other counsel appointed. Richardson v. State, 377 S.C. 103, 106, 659 S.E.2d 493, 495 (2008). The Respondent submits the Petitioner has failed to show satisfactory cause for removal of his post-conviction relief counsel. This Court should also consider persuasive the Petitioner’s decision to abandon his request for new counsel and proceed with appointed counsel at his evidentiary hearing. This Court should find no reversible error for the lower court’s failure to entertain the Petitioner’s *pro se* request for new counsel.

The Respondent submits further the lower court did not err in failing to entertain the Petitioner’s post-hearing complaints about post-conviction relief counsel in his *pro se* “Notice of

Motion and Motion for Reconsideration and Rehearing”¹. Compelling judicial interest would be poorly served if the lower court were required to entertain a *pro se* motion to relieve counsel after the conclusion of a proceeding in which a criminal defendant was unsuccessful.

“A defendant’s right to have a lawyer of his or her choosing is an essential element of the Sixth Amendment right to assistance of counsel. The individual’s right to counsel of his choosing, however, is not an absolute right. Rather, the right is circumscribed by the need for the orderly administration of justice. The exercise of the right to counsel of choice may neither “obstruct orderly judicial procedure” nor “deprive courts of the exercise of their inherent power to control the administration of justice.” United States v. Ellerbe, 172 F.3d 864 (4th Cir. 1999).

Entertaining a *pro se* request to relieve counsel after the Petitioner’s claims have been fully litigated and rejected by the Court would essentially be equal to giving the Petitioner a second “bite of the apple” with new counsel merely because he expressed dissatisfaction with the outcome of his proceeding. Cf. State v. Cabrea-Pena, 350 S.C. 517, 533-34, 567 S.E.2d 472, 481 (Ct. App. 2002) aff’d in part, remanded in part, 361 S.C. 372, 605 S.E.2d 522 (2004) (“There is a presumption that a defendant’s post-trial request for the assistance of counsel should not be refused. However, there are times when the criminal justice system would be poorly served by allowing the defendant to reverse his waiver at the last minute particularly where delay would result”). Also, judicial resources should not be expended on matters which have fully run their course in the lower court and been concluded.

The Petitioner also asserts he should receive a new post-conviction relief hearing in the alternative to this Court granting a new trial. The basis for the Petitioner’s request for a new post-conviction relief hearing appears to be his argument that the Court’s failure to entertain the Petitioner’s request for new counsel was a “structural error” that should automatically result in

¹ The Respondent notes this *pro se* filing, though ruled on by the lower court, should be considered a nullity since the filing violated the prohibition on hybrid representation. See Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) (holding since the Petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, should not have been ruled on, and was essentially a nullity).

remand. The Respondent submits the Petitioner's reliance on "structural error" is misguided. There is no question from this Court's holding in Graddick that under this factual circumstance the Petitioner has the burden of proving an abuse of discretion and a satisfactory cause to remove counsel. State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001).

Lastly, the Petitioner claims the Court's alleged failure to entertain his *pro se* request for new counsel resulted in prejudice because trial counsel was ineffective for failing to call the doctor who examined the victim as a witness at trial.² The Respondent is unable to ascertain how **trial counsel's** performance at trial could be used to support the Petitioner's claim that the lower court erred by not entertaining the Petitioner's *pro se* motion to relieve **post-conviction relief counsel**.

Nevertheless, the Respondent submits there is probative evidence to support the lower court's finding that counsel was not ineffective for failing to present an expert witness to testify regarding the victim's herpes and intact hymen. (App. 1338). For the Petitioner 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 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

The Court correctly found trial counsel articulated a valid strategic basis for his decision not to call as a witness the doctor who examined the victims. (App. 1338-1339). "Representation

² On page 3 of the Petition, the Petitioner comments "At the very least, any failure of PCR counsel to vigorously and effectively pursue Petitioner's claim regarding the complainant's intact hymen should not be held against Mr. Cobbs." The Respondent notes the issue regarding the victim's hymen was pursued by post-conviction relief counsel and ruled upon by the lower court. (App. 1338-1339). What appears to be the Petitioner's arguments regarding the effectiveness of post-conviction relief counsel are terribly misguided since South Carolina does not recognize as proper claims regarding post-conviction relief counsel's ineffectiveness. See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987) ("There is no constitutional right to appointed counsel for collateral review of a conviction."); and Coleman v. Thompson, 501 U.S. 722 (1991) ("The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief action.").

is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Strickland at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

At the evidentiary hearing, both of the Petitioner’s attorneys articulated a valid strategic basis for their decision not to call the doctor as a witness at trial. They stated they spoke to the Petitioner about the issue, had concerns about the hymen evidence backfiring, and had problems finding factual evidence to support the Petitioner’s claims about the victim’s previous medical history. Counsel also testified he did not see a need to hire an expert witness to testify about the victim’s hymen and herpes. (App. 1125:2-1226:6, 1233:18-1234:13, 1246:10-15). There is probative evidence to support the lower court’s finding that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to present testimony from the doctor who examined the victim’s at trial. The Respondent submits this Court should affirm the lower court’s denial of post-conviction relief and deny the Petition.

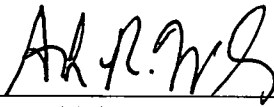
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 29, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

THEODORE COBBS

Petitioner

v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari To The SC Supreme Court has been mailed to the respondent's attorney Brooks R. Fundenberg.



Anne R. Henley
Legal Assistant

SWORN to before me this

29th day of January, 2015.

 (L.S.)
Notary Public for South Carolina.

My Commission Expires: 5/30/23



ALAN WILSON
ATTORNEY GENERAL

January 29, 2015

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JAN 29 2015

Honorable Daniel E. Shearouse
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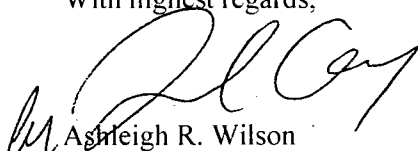
S.C. Supreme Court

RE: Theodore Cobbs v. State of South Carolina
Appellate Case No. 2013-001537
Lower Court Case No. 2012-CP-10-0684

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return to Petition for Writ of Certiorari.

With highest regards,


Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Brooks R. Fundenberg, Esquire