

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2013-001797

Benjamin R. Nabors,..... Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the PCR court properly allow Petitioner to waive PCR counsel by forfeiture because Petitioner was repeatedly abusive, threatening and coercive toward his PCR attorneys?
- II. Whether Petitioner can prove prejudice from plea counsel's failure to obtain an independent mental health examination during his representation of Petitioner, where Petitioner failed to present any report at the PCR hearing that he was not competent at the time of his plea?
- III. Whether Petitioner's case should be remanded to see if he was competent to proceed pro se at his PCR hearing?

STATEMENT OF THE CASE

Benjamin R. Nabors, (“Petitioner”), was indicted at the October 2009 term of the Laurens County Grand Jury for Carjacking (2009-GS-30-1276), and Armed Robbery (2009-GS-30-1387). He was represented by Alex Stalvey, Esquire. On October 18, 2010, the Applicant pled guilty as indicted to both charges. The Honorable J. Derham Cole sentenced the Applicant to incarceration for a period of twenty-five (25) years for armed robbery, and twenty (20) years suspended with five (5) years’ probation to run consecutively. He did not appeal his convictions or sentences.

Petitioner subsequently filed an application for post-conviction relief (PCR) on March 30, 2011. Respondent made its Return on or about August 25, 2011. Petitioner was appointed William K. Charles, II, Esquire, as PCR counsel. Mr. Charles was relieved as counsel and Ms. Elizabeth Wiygul, Esquire, was appointed. On March 23, 2012, Ms. Wiygul was relieved and Ms. Caroline Horlbeck, Esquire, was appointed. During a hearing on November 14, 2012 before the Honorable Frank R. Addy, Jr., Petitioner moved to have Ms. Horlbeck relieved, claiming she was out to get him and had written letters to her to that effect. See App. p.208-210; p. 224. At this hearing, Judge Addy warned Petitioner that he would substitute PCR counsel but this would be the last attorney Petitioner would be appointed. (App. p. 216). On March 13, 2013, an evidentiary hearing was held at the Greenwood County Courthouse. Petitioner was present and represented by Rodney Richey, Esquire. Respondent was represented by J. Rutledge Johnson, Esquire of the South Carolina Attorney General’s Office. At the PCR hearing, Petitioner once again expressed that he could not cooperate with PCR counsel and testified that he wanted counsel relieved. Judge Newman obliged and the hearing proceeded. On April 25, 2013, the Honorable Clifton B. Newman denied and dismissed the Petitioner’s application with prejudice

by written Order. Petitioner subsequently filed a Petition for Writ of Certiorari on September 9, 2014. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENTS

I. The PCR court properly allowed Petitioner to waive PCR counsel by forfeiture because Petitioner was repeatedly abusive, threatening and coercive toward his PCR attorneys.

Petitioner asserts “the PCR court erred in allowing petitioner to waive PCR counsel when it did not advise petitioner of the dangers and disadvantages of self-representation.” This argument is not preserved for appeal and nevertheless, meritless.

First, “[t]o be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal.” State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). “Because [Petitioner] did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review.” Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

Here, Petitioner did not object to the PCR court’s decision to relieve counsel. Instead, Petitioner blatantly stated, “I’ll represent myself.” (App. p. 238 line 14). Petitioner never objected to the PCR court relieving counsel and did not file a 59(e) motion asking the PCR court to make a finding of fact or conclusion of law as to this issue. Therefore, this issue is not properly before this Court.

Nevertheless, this issue is without merit.

Rule 71.1(d), SCRPC, provides:

If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent....

In Whitehead v. State, 310 S.C. 532, 534, 426 S.E.2d 315, 316 (1992), this Court expressed:

In our view, the plain and unambiguous language of Rule 71.1(d) mandates the appointment of counsel for indigent PCR applicants whenever a PCR hearing is held to determine questions of law or fact. Therefore, we hold that when a PCR application is not dismissed *before* a hearing is held, the PCR judge must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant. To establish a valid waiver of the right to counsel, the PCR applicant must be made aware of the right to counsel and the dangers of self-representation.

“Courts have recognized three ways in which a defendant may relinquish his right to counsel. First, a defendant may waive his Sixth Amendment right to counsel. A waiver is an intentional and voluntary relinquishment of a known right.” State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). “A defendant may also waive his right to counsel through his conduct.” State v. Boykin at 556, 478 S.E.2d at 69. “Finally, some courts have held a defendant may forfeit his Sixth Amendment right to counsel. Forfeiture results in the loss of the right regardless of the defendant’s knowledge of either the consequences of his actions or the dangers of self-representation.” Id. “A defendant who is abusive toward his attorney may forfeit his right to counsel. United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995).

In United States v. McLeod, 53 F.3d 322 (11th Cir.1995), the defendant dismissed his first attorney and then was verbally abusive and threatening to his second attorney, including threatening to sue his second attorney and attempting to persuade him to engage in unethical conduct in connection with defendant’s case. Although the court was troubled that the defendant was not warned that his misbehavior would lead to *pro se* representation, it “cannot say that the district judge erred by concluding that McLeod had forfeited this right to counsel.” United States v. McLeod at 326.

McLeod is analogous with Petitioner’s case.

In Petitioner's case, Petitioner had several attorneys appointed to his criminal case before the Honorable D. Garrison Hill appointed Counsel (Alex Stalvey) to Petitioner's case. (App. p. 310 lines 5-8). Counsel represented Petitioner throughout the guilty plea proceedings. Petitioner was then appointed PCR counsel pursuant to Rule 71.1(d), SCRCF. The first two attorneys were relieved and other counsel substituted. On November 14, 2012, a hearing was held at which Petitioner requested Counsel Horlbeck be relieved. Ms. Horlbeck handed Judge Addy a letter written by Petitioner which alleged Ms. Horlbeck committed some type of misconduct. See p. 208 lines 18-22; p. 210 lines 4-15). Judge Addy then explained to Petitioner that he would appoint another attorney in his PCR case, but that Petitioner would have to cooperate with that attorney and allow that attorney to "do the leg work" of the case. (App. p. 213 line 19- p. 214 line 9). Judge Addy also explained that this next attorney would be the last attorney appointed to Petitioner's case. (App. p. 216 lines 6-14). Petitioner then stated he wanted to represent himself and Judge Addy began to advise him on the dangers and disadvantages of self-representation. (App. p. 219 line 19- p. 223 line 10). Judge Addy then decided to appoint Petitioner one final attorney. (App. p. 224 lines 1-7).

At the PCR hearing held on March 13, 2013, Counsel Richey explained to the PCR court that Petitioner expressed to Mr. Richey that he did not want Counsel Richey to represent him. (App. p. 230 lines 19-25). Counsel Richey then explained that he had investigated Petitioner's case, including calling and contacting witnesses, investigating a psychiatrist for an insanity defense, reviewing prior counsel's file and reviewing the report from the Department of Mental Health. (App. p. 231 lines 1-12; 233 lines 8-15). Counsel Richey further stated that Petitioner had filed a lawsuit against him, which Petitioner confirmed, and that Petitioner wanted him to take some actions which he did not know he could ethically take. (App. p. 233 lines 16-25).

As in McLeod, Petitioner's behavior has been "repeatedly abusive, threatening, and coercive." McLeod at 326. He has relieved multiple attorneys in both his criminal case and PCR case. He has written letters to counsel which have "[crossed] the line" and asked counsel to take actions that are arguably unethical. (App. p. 210 lines 8-9; p. 233 lines 23-25). He further filed a lawsuit against Counsel Richey. All of Petitioner's actions prove he waived his right to counsel by forfeiture pursuant to McLeod. Therefore, this Court should affirm the PCR court's order as there are no reversible errors of law presented by Petitioner.

II. Petitioner cannot prove prejudice from plea counsel's failure to obtain an independent mental health examination during his representation of Petitioner because Petitioner failed to present any report at the PCR hearing that he was not competent at the time of his plea or that he did not understand his options in deciding to plea.

Petitioner asserts "[p]lea counsel was ineffective in failing to request an independent mental health examination to help petitioner better understand his options in deciding whether to plead guilty." This issue is without merit.

The test of competency to enter a plea is the same as required to stand trial. The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. In a PCR action, the petitioner bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea. SCRPC Rule 71.1(e). Any evidence of probative value to support the post-conviction judge's factual findings is sufficient to uphold those findings on appeal.

Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992)

"This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

In this case, Petitioner failed to present any evidence of an independent evaluation or witnesses which would prove that he was either not competent to stand trial or that he did not understand his options in deciding whether to plead guilty. Therefore, he can prove no prejudice by an alleged shortcoming of plea counsel.

To the contrary, Counsel Stalvey testified at the PCR hearing that he knew Petitioner has been evaluated by the Department of Mental Health and obtained the necessary medical history files for Petitioner. (App. p. 31 lines 17-25). Counsel testified he discussed this written report with Petitioner. (App. p. 313 lines 21-13). This report stated that “there is little to suggest that [Petitioner] did not understand the wrongfulness of the acts for which he is charged” and that “it does not appear that [Petitioner], at the time of the alleged offenses, was suffering from a mental disease or defect that caused him to lack sufficient capacity to conform his conduct to the requirements of the law.” (App. pp. 384-385). Counsel also stated he consulted with Dr. Martin several times as Petitioner’s treating psychiatrist, but that Dr. Martin was not prepared to offer a specific finding of Petitioner’s criminal responsibility. (App. p. 312 line 21-p. 313 line 4). Counsel further stated that he discussed plea offers with Petitioner and prepared for trial, but that it was Petitioner’s decision to reject the plea offers. (App. p. 316 line 10- p. 317 line 9). Counsel lastly testified that a trial was begun and during a break, Petitioner decided he wished to plead guilty and understood everything Counsel explained to him. (App. p. 318 line 11-p. 319 line 23).

The PCR court found Counsel’s testimony was credible while finding Petitioner’s testimony not credible. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (Great deference is given to the PCR court’s findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses). The PCR correctly held that Petitioner failed to meet his burden of proving Counsel’s ineffectiveness based on the aforementioned reasons.

Accordingly, there is clear “evidence of probative value” to support the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

III. Petitioner’s case should not be remanded to determine whether he was competent to proceed pro se because he failed to present any evidence that he was not competent to represent himself.

Petitioner asserts this case should be remanded to determine if he was competent to proceed pro se at his PCR hearing. This claim is without merit.

A PCR action is a civil action. Therefore, the constitutional protections that forbid a criminal trial of a mentally incompetent defendant do not apply. Council v. Catoe, 359 S.C. 120, 125, 597 S.E.2d 782, 784-85 (2004). Where a collateral attack on trial counsel’s conduct regarding petitioner’s mental state and criminal responsibility at the time of the crime was dependent on the petitioner’s records and testimony of experts at the time of the crimes, petitioner’s competency need not be an issue where there was ample evidence presented at the PCR hearing to make a factual determination. Council v. State, 380 S.C. 159, 181, 670 S.E.2d 356, 367 (2008).

In this case, Petitioner failed to present any evidence that he was incompetent at the time of his PCR hearing. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Nevertheless, Petitioner’s competency should not be an issue because the factual determination can be made based on the evidence presented at the PCR hearing. At the hearing, the PCR judge had before him the guilty plea transcript, the clerk of courts records, Counsel Stalvey’s testimony and the Report from the Department of Mental Health stating petitioner understood the wrongfulness of his acts and suffered from no mental disease or defect that caused him to lack sufficient capacity to conform his conduct to the requirements of the law. Therefore, Petitioner’s has presented no

reason that this case should be remanded to determine whether Petitioner was competent to proceed pro se at his PCR hearing.

Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By:



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January 29, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County

The Honorable Clifton B. Newman, Circuit Court Judge

BENJAMIN NABORS, 233844

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

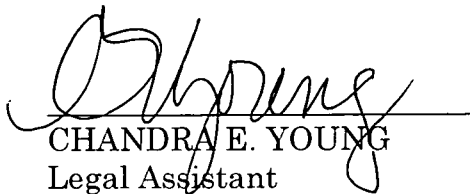
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
South Carolina Office of Indigent 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 29th day of January 2015.


CHANDRA E. YOUNG
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ALAN WILSON
ATTORNEY GENERAL

January 29, 2015

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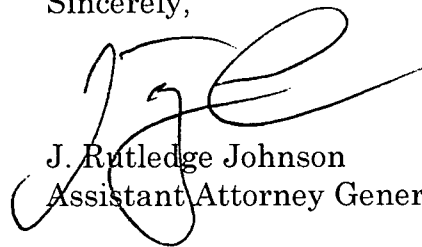
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Benjamin Nabors, # 233844 v. State of South Carolina
2013-001195**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,



J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Robert M. Pachak, Esquire
Trisha Allen, Victim Services