

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000298

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FEB 25 2015

S.C. Supreme Court

Darnell Colin Russell,.....Petitioner,

v.

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

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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Attorney General

KAREN C. RATIGAN
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where (1) trial counsel failed to object pre-trial to inadmissible evidence of prior drug transactions on an audiotape played to the jury; (2) trial counsel did not contemporaneously move for a mistrial once the inadmissible evidence was heard by the jury; and (3) trial counsel elicited the inadmissible evidence himself during cross-examination of the confidential informant?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the June 2010 term of General Sessions for possession with intent to distribute (PWID) cocaine base within proximity of a school (2010-GS-39-0868) and distribution of cocaine base (2010-GS-39-0869). (App.pp.197-98; pp.202-03). Scott D. Robinson, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On October 24, 2012, the Honorable D. Garrison Hill sentenced Petitioner to concurrent terms of 8 years for PWID cocaine base within proximity of a school and 5 years for distribution of cocaine base, second offense. (App.p.132; p.199; p.204). Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief (PCR) on January 22, 2013 (2013-CP-39-0066). (App.pp.135-41). A hearing was held at the Pickens County Courthouse on December 16, 2013. (App.pp.149-80). Petitioner was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker denied relief in an order filed January 22, 2014. (App.pp.187-84).

STANDARD OF REVIEW

The proper standard for review of a PCR 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

The issues raised by Petitioner are not preserved for appellate review.

Petitioner argues trial counsel was ineffective in: (1) failing to make a pre-trial objection to an audiotape, (2) failing to contemporaneously move for a mistrial when the audiotape was played, and (3) eliciting inadmissible evidence during cross-examination of the confidential informant. These allegations are not preserved for review by this Court.

In the order of dismissal, the PCR judge found Petitioner failed to meet his burden of proving trial counsel was ineffective. The PCR judge noted trial counsel objected to the admission of the audiotape and later moved for a mistrial after it was played for the jury. The PCR judge noted the audiotape was redacted prior to being given to the jury for their deliberations. The PCR judge concluded the references to prior bad acts on the audiotape “likely had minimal effect on the outcome of the trial” and that “any prejudicial effect was minimized due to the highly ambiguous nature of the references” on the tape. (App.p.192).

In his petition for writ of certiorari, Petitioner argues trial counsel was ineffective in: failing to make a pre-trial objection to an audiotape, failing to contemporaneously move for a mistrial when the audiotape was played, and eliciting inadmissible evidence during cross-examination of the confidential informant. These arguments are not preserved for appellate review because the order of dismissal does not address any of these issues. As the PCR judge did not specifically rule upon these issues, they are not preserved for review by this Court. 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.”); Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (holding an issue is procedurally barred if it is not both raised to and ruled upon by the PCR judge) (citation omitted). To the extent there was some vague testimony about these issues at the PCR hearing, as Petitioner failed to file a Rule 59(e) motion to alter or amend the order of dismissal to address these issues, they are 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).

Accordingly, Petitioner has failed to raise any issues that are preserved for review by this Court. As such, the petition for writ of certiorari must be denied.

CONCLUSION

Respondent submits this Court must deny the Petition for Writ of Certiorari. None of the allegations raised by Petitioner are preserved for appellate review because they were not addressed in the PCR judge's order of dismissal and no post-trial motions were filed. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By: 
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February 25, 2015

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The Honorable G. Edward Welmaker, Circuit Court Judge

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Darnell Colin Russell,..... 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:

Laura R. Baer, 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 25th day of February, 2015.


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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

February 25, 2015

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

Re: Darnell Colin Russell v. State of South Carolina
Appellate Case No: 2014-000298
Lower Court Case No: 2013-CP-39-0066

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S.C. Supreme Court

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: Laura R. Baer, Esquire
Trisha Allen, Victim Services Counselor