

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Trial Judge
The Honorable Brian M. Gibbons, PCR Judge

Appellate Case No. 2014-000656

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MAR - 2 2015

S.C. Supreme Court

George T. Middleton,..... Petitioner,

v.

STATE OF SOUTH CAROLINA,..... Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Is Petitioner's ineffective assistance of counsel argument preserved for this Court's review?

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case.

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 unwarranted to review whether the PCR Judge properly denied and dismissed Petitioner's PCR Application where the issue raised by Petitioner is not preserved for appellate review.

Petitioner argues that the PCR Judge erred in denying Petitioner's Application for Post-Conviction Relief (PCR) because counsel's performance was purportedly ineffective for failing to object to evidence of the video surveillance system located in Petitioner's residence where the admission of the "evidence invited a verdict on the improper basis that Petitioner was a dangerous drug dealer." Petitioner's PWC, p.4.

In the order of dismissal, the PCR Judge found Petitioner failed to meet his burden to prove counsel's performance was ineffective on the allegation for "failure to make a motion [sic] suppress fruits of an alleged unlawful search and seizure." **App.p.494** (emphasis added). Pursuant to S.C. Code Ann. §17-27-80 (2003), the PCR Judge fully addressed the allegation in his "Findings of Fact and Conclusions of Law, Section (C)" as follows:

Upon review of the trial transcript, this Court finds Applicant had no

reasonable expectation of privacy in the wire worn by the informant's person. The record clearly shows that the Applicant invited the informant into his home for the narcotics transaction. Applicant's arrest and conviction were supported by a standard controlled buy procedure utilized by law enforcement.

App.p.499. Thus, the PCR Judge reasoned that the informant's testimony and evidence obtained from her wire did not run afoul of the Fourth Amend. because the informant was an invitee. **App.p.499.**

In his petition for a writ of certiorari, Petitioner argues counsel was ineffective in: "failing to make a motion to exclude and object to evidence of the video surveillance system located in Petitioner's residence" based on a purported Rule 404/403 SCRE, evidentiary violation because "the evidence invited a verdict on the improper basis that Petitioner was a dangerous drug dealer."¹ Petitioner's PWC, pp.7-9. This argument is not preserved for appellate review because the order of dismissal does not address Petitioner's present argument.

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) is controlling. In Dunbar, this Court held, "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." Id., at 142, 587 S.E.2d at 693-94. In the present case, the PCR Judge found the evidence and testimony at issue was reasonable solely limited to a Fourth Amend. analysis underlying the claim of ineffective assistance

¹ Petitioner's cites to Mitchell v. State for the proposition that "[t]his Court found a reasonable probability that, had defendant's character not been improperly placed into issue, the outcome would have been different." See Petitioner's PWC, p.7 (citing Mitchell v. State, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989)).

of counsel.² **App.p.499.**

As the PCR Judge did not specifically rule upon the present issue, it is 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 the present issue 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, it 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).

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.

² See also State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one ground at trial and then an alternative ground on appeal).

CONCLUSION

Respondent submits this Court must deny the Petition for Writ of Certiorari. The allegation raised by Petitioner is not preserved for appellate review because it was 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 issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 2nd, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2014-000656

GEORGE MIDDLETON,

PETITIONER,

V.

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:

Tiffany L. Butler, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211

This 2nd day of March, 2015


Ashley Haworth
LEGAL ASSISTANT for the Respondent



ALAN WILSON
ATTORNEY GENERAL

March 2, 2015

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

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MAR - 2 2015

S.C. Supreme Court

RE: George Middleton v. State of South Carolina
Appellate Case No: 2014-000545

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six (6) copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/ah
Enclosures

cc: Tiffany L. Butler, Esquire
Trisha Allen, Victim Services