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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2013-001275

Bruce Wilson, #192733, Petitioner,

v.

State of South Carolina, Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES3

STATEMENT OF ISSUES ON APPEAL4

STATEMENT OF THE CASE.....5

STATEMENT OF FACTS7

STANDARD OF REVIEW8

ARGUMENT

I. The PCR Court did not specifically rule on whether Counsel was ineffective during the pre-trial motions phase because it found those issues not proper for PCR; thus, the issues Petitioner raises are not preserved for appellate review.....9

 A. The issue is not preserved for this Court’s review.....11

 B. Petitioner pleaded guilty and therefore waived any challenges to the sufficiency of the evidence.13

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) 9, 11

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) 9

Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) 12

Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012)..... 14

Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)..... 10

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) 14

Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) 12

Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) 13

Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)..... 10

Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006)..... 12

Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) 13

Smith v. State, 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012) 13

State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974)..... 12, 13

State v. Rice, 401 S.C. 330, 737 S.E.2d 485 (2013)..... 14, 15

State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) 13

Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982) 13

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)..... 12

Other Authorities

S.C. Code Ann. § 17-27-20(b) 13

Rule 59(e), SCRPC 7, 13

PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Did the PCR court err in failing to find trial counsel ineffective for not filing a motion to challenge the adequacy of the photographic lineup that identified Wilson as the guilty robber?
2. Did the PCR court err in failing to find trial counsel ineffective for not filing a suppression motion on Wilson's statement given to police after arrest?

RESPONDENT'S RESTATEMENT OF ISSUES ON APPEAL

1. Whether the PCR Court erred in not specifically ruling on whether Counsel was ineffective during the pre-trial motions phase because it found those issues not proper for PCR; the issues are not preserved for appellate review.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the April 2005 term of General Sessions for the Richland County Grand Jury for two (2) counts of Armed Robbery (2005-GS-40-00024, -00026) and at the July 2005 term for an additional charge of Armed Robbery (2005-GS-40-00056). Katherine H. Hudgins, Esquire, represented the Petitioner on the charges. Petitioner proceeded to trial on January 4, 2006, but ultimately pleaded guilty as indicted on January 5, 2006. The Honorable James W. Johnson, Jr. sentenced Petitioner to confinement for a period of twenty-three (23) years on each count, with the sentences to run concurrently. Petitioner did not appeal the pleas or sentence.

Petitioner filed an application for post-conviction relief (PCR) on May 23, 2006. (2006-CP-40-02981). He was represented by Charlie Jay Johnson, Jr., Esquire. An evidentiary hearing was convened into the matter on August 1, 2007, at the Richland County Courthouse at which Petitioner was present with counsel. By Order filed September 18, 2007, Judge James W. Williams, Jr. denied and dismissed the action with prejudice.

Petitioner subsequently filed a second PCR application on September 21, 2010 (2010-CP-40-06562). The State filed a Return and Motion to Dismiss the application on September 30, 2011, requesting the action be summarily dismissed. Pursuant to this motion, the Honorable James R. Barber, III issued a Conditional Order of Dismissal provisionally dismissing the action while giving Petitioner thirty (30) days to submit his objections in writing. Upon receipt of Petitioner's responses, Judge Barber requested the

matter be set for a hearing on Petitioner's claim of newly-and after-discovered evidence.

A hearing was convened into the matter on October 18, 2012, at the Richland County Courthouse before the Honorable Clifton B. Newman. Petitioner was present and represented by C. Cliff Rollins, Esquire. Respondent was represented by Robert D. Corney, Esquire. On February 19, 2013, Judge Newman filed an order dismissing the application with prejudice. Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCF. A hearing was held on the motion on April 2, 2013. On May 20, 2013, Judge Newman issued an Order denying Petitioner's motion to alter the judgment. Petitioner filed a notice of appeal and a Petition for Writ of Certiorari. Respondent submitted its return on October 9, 2014. The South Carolina Supreme Court granted the petition and directed the parties to brief the issues raised in Petitioner's Statement of Issues to be Considered in the Austin Appeal. Petitioner filed its brief on January 9, 2015. This Brief of Respondent follows.

STATEMENT OF FACTS

On March 29, 2004 at around 4:00am, August 20, 2004, and on October 25, 2004, Petitioner robbed a Pantry Express convenience store located on Farrow Road. (App. p. 236 line 9 – p. 237 line 9). Lottery tickets and money were stolen. (App. p. 162 line 17 – p. 163 line 21). This led investigators to track the stolen lottery tickets, so when the stolen tickets were cashed for money, store clerks got descriptions of vehicles and license plate numbers of those trying to exchange the tickets. Id. Investigators tracked down Franklin Dixon as the person providing those lottery tickets. Id. Dixon gives a statement that implicates Petitioner and himself in the robberies. Id. There was video surveillance evidence which showed the robberies as well. Id. Applicant was apprehended and gave statements to investigators amounting to a confession in all three cases. Applicant was armed with a knife during the March incident and with a crack pipe in the October incident. Id.

The Pantry Express store clerk, Gloria Norman, identified Petitioner out of a photo line-up as the man who robbed her on March 29, 2004 and on August 20, 2004. (App. p. 236 lines 18-24).

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

The PCR Court did not specifically rule on whether Counsel was ineffective during the pre-trial motions phase because it found those issues not proper for PCR; thus, the issues Petitioner raises are not preserved for appellate review.

Petitioner contends the PCR Court erroneously found that trial counsel was not ineffective for failing to file a motion challenging the photo line-up identification made by Gloria Norman that positively identified Petitioner as the assailant.¹ Petitioner also argues the PCR Court erred in finding Counsel not ineffective in failing to adequately challenge the voluntariness of Petitioner's statements to investigators. Respondent submits these issues were never ruled upon by the PCR Court and are, therefore, not preserved for appellate review.

How the Issues Arose Below

Petitioner initially proceeded to trial on January 4, 2006. A jury was picked and the trial court then dealt with pre-trial motions² made by Counsel. A Neil v. Biggers² and a Jackson v Denno³ hearing were held. The State presented witnesses Sergeant Shawn McDaniels, Sergeant Scott McDonald, and Gloria Norman, the Pantry Express store clerk. Petitioner testified on his own behalf. Sergeant McDaniels testified that Petitioner signed an Advice of Rights form where he agreed to freely speak with investigators. (App. p. 52, line 15 – p. 54, line 10). Sergeant McDonald testified to his similar interactions with Petitioner. He testified that Petitioner also signed an Advice of Rights form and agreed to give a second statement. (App. p. 63, line 15 – p. 64, line 19).

¹ Respondent notes that when referencing the PCR Court and its ruling it is referring to case number 2006-CP-40-02981.

² Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

³ Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

Petitioner testified that he wanted to speak with his common law wife before he gave a statement. (App. p. 80, line 6 – p. 82, line 16). Petitioner testified that Sergeant McDonald promised him if he gave a statement, then he would be allowed to speak with his wife. Id. Petitioner testified he would not have given a statement if not for the promise from Sergeant McDonald. Id. In his statement given to investigators, Petitioner denied being armed during the robbery but did admit he was involved and mentioned that a strong armed robbery charge was more appropriate. (App. p. 93, line 21 – p. 94, line 18).

Gloria Norman, the store clerk at the Pantry Express, testified that during the March 2004 robbery, the assailant had a knife in his right hand. (App. p. 103, lines 18-23). Norman testified she recognized the assailant as a man that had come into the store earlier that night. (App. p. 105, line 17-24). Norman testified that on August 20, 2004, the store was robbed again. (App. p. 107, lines 3-12). Norman further testified that she recognized the assailant as the same man from the previous robbery because of his height, build, and because he was wielding the same knife. (App. p. 109, lines 10-24). Norman testified Sergeant McDonald showed her a photo line-up where she recognized one man from the prior robberies. (App. p. 110, line 13 – p. 111, line 24). Norman testified that she was shown a second photo line-up on November 4, 2004, where she immediately recognized the assailant from the robberies. (App. p. 112, line 9 – p. 114, line 18).

Immediately after Sergeant McDonald was recalled by the State, the trial court ruled that Petitioner's statement was given freely and voluntarily and that the photo line-up identifications were admissible. (App. 136, line 18 – p. 137, line 11). Counsel then argued in support of her motions to exclude the statements and Norman's identification.

(App. p. 138, line 1 – p. 139, line 7). The trial court then reiterated its previous ruling that the placement of Petitioner and his codefendant Dixon in the same location on the line-up sheet was a “coincidence” and ruled that it was not intentional or in any way overly suggestive. (App. p. 139, line 17 – p. 140, line 1).

Relevant Law

For an applicant 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 ; Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” . “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” . With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Respondent submits Petitioner did not satisfy either requirement of the Strickland test.

A. The issue is not preserved for this Court’s review.

The PCR Court did not specifically rule on counsel’s alleged ineffectiveness with regards to the admission of the photographic line-up or to the voluntariness of Petitioner’s statements. 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 (Ct. App. 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. “Our Supreme Court has made it abundantly clear that, where a PCR Court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e), SCRCP motion requesting the PCR Court make specific findings of fact and conclusions of law on the allegations.” Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012) *citing* Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) – 410, Marlar, 653 S.E.2d at 266-67. No Rule 59(e), SCRCP, motion to alter or amend the PCR Court’s order was filed urging the PCR Court to specifically address these issues.

Although these issues was raised at the PCR hearing, the PCR Court properly interpreted Petitioner’s arguments as a challenge to the voluntary and knowing nature of his plea and did not rule on whether Counsel was ineffective at the Neil v. Biggers or Jackson v. Denno hearing. The issues Petitioner raised below were not proper before the PCR Court. Issues that could have been raised on direct appeal cannot be considered in a post-conviction relief proceeding absent a claim of ineffective assistance of appellate counsel. Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975); S.C. Code Ann. § 17-27-20(b). Petitioner attempted to frame his challenges to the trial court’s ruling as ineffective assistance of counsel, but the PCR Court properly found that since Petitioner pleaded guilty, he could only challenge the knowing and voluntary nature of his guilty plea.

Therefore, this issue is not properly preserved for this Court’s review.

B. Petitioner pleaded guilty and therefore waived any challenges to the sufficiency of the evidence.

Assuming *arguendo* that this Court finds the issue preserved, it is wholly without merit. Petitioner argues the photo line-up was irreparably suggestive to the point that there was substantial likelihood of misidentification. (Brief of Petitioner, p. 12). Petitioner also argues his statements to investigators were not given voluntarily and that he relied on the alleged promise from Sergeant McDonald that if he gave a statement, he would be allowed to talk to his common law wife. Petitioner argues this makes his statements involuntary.

Petitioner argues Counsel was ineffective for failing to present her argument before the trial court ruled the identification and statements would be admissible. This argument is meritless for many reasons, but chiefly because Petitioner pleaded guilty. He cannot now go back and challenge Counsel's performance and the trial court's evidentiary rulings. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014), reh'g denied (Dec. 3, 2014), (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id.(citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id.(citing Rice, 401 S.C. at 332). Because Petitioner pleaded guilty and was found to have done so knowingly and voluntarily, this Court must

affirm the PCR Court's decision.

Most notably, a pre-trial Neil v. Biggers and a Jackson v. Denno hearing were held where Counsel argued that the photo line-up identification and Petitioner's statements should not be admitted. (App. p. 138 line 1 – p. 139 line 7). Specifically Counsel argued that placing the suspects in the same location on the six person line-up tainted Petitioner's positive identification. Id. The trial court ruled that this was a mere coincidence and that it was not intentional or in any way overly suggestive. (App. p. 139, line 17 – p. 140, line 1). The issues Petitioner raises are not properly before this Court as they were issues ripe for direct appeal since Counsel properly objected to Petitioner's identification and to his statements, and because the trial court properly found the line-up identification admissible.

It is also significant note that Petitioner concedes he was involved in the incidents. (Supp. App. p. 27, lines 10-23; Supp. App. p. 12, lines 4-21). Respondent submits this concession makes the identification issue and challenges to his statements moot. At the PCR hearing, Petitioner argued that he did not have a weapon and therefore should have been charged with strong arm robbery. Id. The PCR Court clearly interpreted this allegation as a challenge to the voluntary and knowing nature of Petitioner's guilty plea. The PCR Court found that the record, especially, the guilty plea transcript fully support the finding that Petitioner knowingly and voluntarily pled guilty to the three armed robbery charges.

Finally, Petitioner has failed to present any credible evidence showing that he would have continued forward with trial but for Counsel's alleged ineffectiveness. Thus, Petitioner cannot prove any sort of prejudice.

Therefore, Petitioner's argument is clearly not preserved but also lacks merit under a thorough analysis. The PCR Court's ruling should be upheld.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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March 9, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2013-001275

Bruce Wilson,.....Petitioner,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

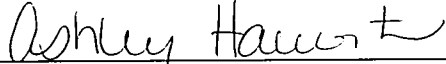
LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia SC 29211

This 9th day of March, 2015.



J. CLAYTON MITCHELL
ATTORNEY FOR RESPONDENT

SWORN to before me this 9th day of March, 2015.



Notary Public for South Carolina.
My Commission Expires: 3/18/23



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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

March 9, 2015

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

Re: Bruce Wilson v. State of South Carolina
Appellate Case No. 2013-001275

Dear Mr. Shearouse:

Enclosed for filing are the original and thirteen (13) copies of Respondent's Brief of Respondent.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
S.C. Bar No. 101443

JCM/sbm
Enclosures

cc: LaNelle C. DuRant, Esquire
Trisha Allen, Victim's Services