STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable George C. James Jr., Circuit Court Judge

Appellate Case No. 2014-001389

Nicholas Macklen, ... 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

Did the post-conviction relief judge properly find Petitioner knowingly and voluntarily waived his right to confront his accusers where the plea judge advised him of the right to challenge the evidence against him and his attorney advised him of his right to cross-examine witnesses?

STATEMENT OF THE CASE

In March 2009, the Horry County Grand Jury indicted Petitioner for murder, first degree burglary, leaving the scene of a watercraft accident resulting in death, and three counts of leaving the scene of a watercraft accident resulting in great bodily injury. (App. pp. 78-85).[1] Ralph J. Wilson Sr., Esquire ("plea counsel"), represented Petitioner. (App. p. 2). On May 18, 2010, Petitioner entered a negotiated plea of guilty to first degree burglary, leaving the scene of a watercraft accident resulting in death, and three counts of leaving the scene of a watercraft accident resulting in great bodily injury. (App. p. 8). As part of the negotiations, the State dismissed the murder indictment in exchange for the plea. (App. p. 18) The Honorable Larry B. Hyman Jr. ("the plea judge") accepted the negotiations, and on June 9, 2010, sentenced Petitioner to concurrent terms of twenty-seven years for first degree burglary, twenty-five years for leaving the scene of a watercraft accident resulting in death, and ten years for each count of leaving the scene of a watercraft accident resulting in great bodily injury. (App. p. 76).

Petitioner filed a timely notice of appeal, and Wanda H. Carter, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders[2] brief. State v. Macklen, Op. No. 2012-UP-106 (S.C. Ct. App. filed February 22, 2012). The South Carolina Court of Appeals dismissed Petitioner's appeal on February 22, 2012. Id.

Petitioner filed an application for post-conviction relief on July 9, 2012. (App. p. 90). The Honorable George C. James Jr. ("the post-conviction relief judge") convened a hearing on the application at the Horry County Courthouse on March 20, 2014. (App. p.

[1] Respondent notes the appendix does not contain copies of the indictments for murder and one count of leaving the scene of a watercraft accident resulting in great bodily injury. However, the information relating to these indictments is otherwise available in the appendix (App. p. 8; p. 18-20) and only tangentially related to this appeal.

[2] Anders v. California, 386 U.S. 738 (1967).

102). Charles T. Brooks III, Esquire, represented Petitioner. (App. p. 102). The post-conviction relief judge denied relief in an order filed June 11, 2014. (App. p. 131).

ARGUMENT

I. The argument Petitioner's plea was involuntary because Petitioner was emotional and the plea judge reminded Petitioner the State could still pursue murder charges against him is not preserved for appellate review.

Petitioner asserts the post-conviction relief judge erred in finding Petitioner's plea was knowingly and voluntarily entered because Petitioner's "emotional state during the plea indicate[s] that he did not intend to plead guilty." (Pet. for Writ of Cert. p. 5). At no point in the pleadings or at the evidentiary hearing did Petitioner assert his emotional state at the time of his plea rendered his plea involuntary.[3] Petitioner also asserts the post-conviction relief judge further erred in finding Petitioner's plea was knowingly and voluntarily entered because "the plea judge's 'reminder' to [Petitioner] about the murder charge and the potential life sentence was improper."[4] (Pet. for Writ of Cert. p. 7). Petitioner also did not assert this ground for relief in the pleadings or at the evidentiary hearing. The order of dismissal does not address either of these challenges to the validity of Petitioner's plea.[5] Because Petitioner did not raise either of these challenges to the validity of his plea to the post-conviction relief judge, he cannot now ask this Court to grant him relief on these grounds. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. (citations omitted)); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal." (citations omitted)).

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[3] Respondent will not dignify this argument by addressing its merits.

[4] Respondent is aware of no authority curtailing a judge's ability to inform a defendant of the terms of his plea bargain or the range of sentencing possibilities.

[5] The order of dismissal indicates Petitioner proceeded on an allegation his plea was involuntary because the plea judge did not inform him of his right to confront his accusers. (App. p. 133).

II. Probative evidence supports the post-conviction relief judge's finding Petitioner fully understood his plea waived his right to confront his accusers at trial.

The only preserved issue raised by Petitioner is that the post-conviction relief judge erred in finding his plea was voluntary where the plea judge did not specifically inform him his plea waived his right to confront his accusers. The record does not support this allegation.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

The voluntariness of a guilty plea is determined in light of the entire record before the Court, "including the transcript of the guilty plea[] and the evidence presented at the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). Here, the plea judge advised Petitioner of his right to remain silent, his right to testify, and his right to have plea counsel represent him throughout trial and challenge the State's case, as well as put up a case or raise defenses that could be helpful to him. (App. p. 24-25). The fact the plea judge did not use the magic words "confront your accusers" is not dispositive where the plea judge clearly explained to Petitioner he could challenge the State's evidence. See State v. Lambert, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976) (plea judge need not provide an "enumeration of specific rights waived ... where the record otherwise reveals affirmative awareness of the consequences of a guilty plea." (citing Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973))). Furthermore, plea

counsel testified he explained to Petitioner he could cross-examine witnesses at trial. (App. p. 121, lines 14-16). Thus, the record unequivocally demonstrates Petitioner understood he was waiving the right to confront his accusers by entering his guilty plea. Because the record is conclusive in this regard, the post-conviction relief judge did not err in finding Petitioner knowingly and voluntarily entered his plea.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Assistant Attorney General
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By: 
ATTORNEYS FOR RESPONDENT

March 12, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable George C. James, Jr., Circuit Court Judge

NICHOLAS MACKLEN,

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:

Appellate Defender Kathrine H. Hudgins
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 12th day of March, 2015

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

March 12, 2015

RECEIVED
MAR 12 2015
S.C. Supreme Court

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

RE: **Nicholas Macklen v. State of South Carolina**
Appellate Case No: 2014-001389

Dear Mr. Shearouse:

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

Sincerely,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)