

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2014-001834

RECEIVED

MAR 25 2015

S.C. Supreme Court

John Forrest Ham, Jr., Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Did the PCR court err in concluding Petitioner did not establish ineffective assistance of counsel because nothing in the plea transcript showed he did not understand the potential for consecutive sentencing where both Petitioner and plea counsel testified without contradiction at the PCR hearing that Petitioner believed the terms of his plea deal dictated that he would serve all of his sentences concurrently?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner for assault and battery with intent to kill (ABIK) (2009-GS-23-9547, count 1), pointing and presenting a firearm (2009-GS-23-9548), resisting arrest with a deadly weapon (2009-GS-23-9549), failure to stop for a blue light (2009-GS-23-9554), and kidnapping (2009-GS-23-9570). (App.pp.105-06; pp.108-09; pp.111-12; pp.114-15; pp.117-18). Alex Stalvey, Esquire represented Petitioner.

On May 19, 2010, Petitioner pled guilty before the Honorable Edward W. Miller. (App.pp.1-11). Sentencing was deferred. (App.p.11). On September 1, 2010, Petitioner appeared before the Honorable G. Edward Welmaker for sentencing and received concurrent terms of 20 years for ABIK, 5 years for pointing and presenting a firearm, 5 years for resisting arrest with a deadly weapon, and 3 years for failure to stop for a blue light. (App.p.28; p.107; p.110; p.113; p.116). Judge Welmaker levied a sentence of 22 years for kidnapping, to be consecutive to the 3-year sentence for failure to stop for a blue light. (App.p.29; p.119). Petitioner did not file an appeal.

Petitioner filed an application for post-conviction relief (PCR) on September 14, 2011 (2011-CP-23-6136). (App.pp.31-43). A hearing was held at the Greenville County Courthouse on June 18, 2014.¹ (App.pp.50-95). Petitioner was present and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina

¹ Petitioner also filed a PCR application for his convictions arising from a separate proceeding – where he had narcotics-related State Grand Jury charges and was represented by a different attorney (2012-CP-39-0177). For purposes of efficiency, the PCR hearing for that case was held at the same time as the hearing for this case – but the two applications were not consolidated. Petitioner has filed an appeal from the dismissal of his PCR action for his State Grand Jury cases (Appellate Case Number 2014-001608).

Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed August 5, 2014. (App.pp.97-104).

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 issue of whether Petitioner was aware he could receive consecutive sentences is not preserved for appellate review.

Petitioner argues he "did not understand he could receive consecutive sentences for his state charges." (Pet. Cert., p.6). Petitioner argues "plea counsel wrongly led [him] to believe that all of his state and federal sentences would run concurrent, and he would not be subject to consecutive sentencing that the sentencing judge imposed." (Pet. Cert., p.7). This issue is not preserved for appellate review.

While the PCR judge's order of dismissal addresses an allegation that plea counsel did not ensure Petitioner would serve his sentence in federal custody,² it does not address any kind of allegation that plea counsel advised he would not receive consecutive sentences on these state court charges. The issue of consecutive sentences is not, in fact, addressed at all in the final order. As such, this issue is not preserved for review by this

² App.pp.102-03.

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.”). See 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) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)).

Further, while there may have been some testimony at the PCR hearing about consecutive sentencing, this testimony was related to the claims in Petitioner’s other PCR application (related to his State Grand Jury convictions³) and was given by his attorney on those separate and unrelated charges. Regardless, if Petitioner had wanted the issue of consecutive sentencing addressed by the PCR judge in this case, he should have filed a Rule 59(e), SCRCP motion. As no such motion was filed in this case, the issue 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).

³ See supra footnote 1.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: 
ATTORNEYS FOR RESPONDENT

March 25, 2015

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The Honorable Robin B. Stilwell, Circuit Court Judge

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John Forrest Ham, Jr., 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:

Benjamin J. Tripp, 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 March, 2015.


KAREN C. RATIGAN
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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

March 25, 2015

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

Re: John Forrest Ham, Jr. v. State of South Carolina
Appellate Case No: 2014-001834
Lower Court Case No: 2011-CP-23-6136

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MAR 25 2015
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: Benjamin J. Tripp, Esquire
Trisha Allen, Victim Services Counselor