

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Diane S. Goodstein, Trial Judge
The Honorable Edgar W. Dickson, PCR Judge

Appellate Case No. 2014-000669

Jimmy Taylor, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
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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 "Petitioner's Sixth Amendment rights were violated when trial counsel failed to object or to supplement the State's on the record recitation of a stipulation agreed to between the parties in chambers that counsel would later argue did not accurately reflect the complete terms of the parties' agreement." Petitioner's PWC, p.4 (emphasis added).

In the order of dismissal, the PCR Judge addressed Applicant's allegation for "failure to object to the admissibility of expert testimony." **App.p.731**, Allegation (j) (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 (D)" as follows:

[t]his Court finds Applicant failed to meet his burden to prove trial counsel was deficient for not objecting when Lt. Dixon testified the collision caused by Applicant resulted in one of the victim's head going through the windshield. Trial counsel objected. The trial judge ruled the testimony was relevant and did not necessitate an expert study. Therefore the allegation is denied and dismissed

App.p.738 (emphasis added). Thus, the PCR Judge addressed the allegation for failure to object to purportedly inadmissible opinion testimony outside of the scope of the witnesses' knowledge or qualification. (emphasis added). Thus, Petitioner's argument that counsel was ineffective for failing to further buttress his objection on an entirely separate matter concerning a purported violation of a stipulation was not addressed by the PCR Judge; this argument is not preserved for appellate review because the order of dismissal does not address Petitioner's present argument. (emphasis added). Lost in translation, the argument concerning the stipulation had previously been litigated on direct appeal. **App.pp.547-57; p.564**.

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 that Trial Judge ruled that Lt. Dixon's testimony at issue¹ was within the scope of his expertise in "collision reconstruction" as a result of counsel's objection, in camera questioning, and argument.² **App.p.318, ln. 8-15**. Counsel's performance concerning the effects of a momentum study was heavily litigated on numerous grounds before the PCR Judge, including whether counsel made the appropriate objection to preserve his objection to Lt. Dixon's testimony on how Ms. Neeley's head went through her windshield.

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,

¹ In qualifying Lt. Dixon as an expert in accident collision reconstruction, the Trial Judge astutely noted the limits to this witness's expertise as follows: "do not delve into the medical part of it. If you have any question you can stop and just say I'm concerned about answering this and lawyer will approach, okay?" **App.p.291, ln. 9-13**.

² The PCR Judge addressed whether counsel made the appropriate objection and preserved the issue of whether Lt. Dixon could testify to his opinion "with regards to the impacts of when Ms. Neeley went through the windshield." **App.p. 311, ln. 7-12**. Simply, counsel argued that Lt. Dixon's testimony on this matter was not admissible absent a momentum study, a matter counsel argued was outside the scope of accident reconstructionist's qualifications. **App.pp. 312-13** (emphasis added).

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.

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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By: 

ATTORNEYS FOR RESPONDENT

April 24th, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Orangeburg County
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

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S.C. Supreme Court

JIMMY TAYLOR,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

John H. Strom, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 24th day of April, 2015.

ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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APR 24 2015

April 24, 2015

S.C. Supreme Court

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

RE: Jimmy Taylor v. State of South Carolina
Lower Court Case No: 2011-CP-38-0766
Appellate Case No. 2014-000669

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,

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

JWW/ah
Enclosures

cc: John H. Strom, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)