

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2014 – 000633
Lower Court Case No. 2008-CP-40-3854

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APR 27 2015

S.C. Supreme Court

JERENE HAYWARD, #314451,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

- I. Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel where a juror indicated during trial that he was a member of the country club where the homeowner whose house was burglarized works and where the homeowner's domestic employee, who was assaulted, and her husband used to work, and trial counsel failed to object to the Court's further inquiry of the juror outside the presence of Petitioner and his counsel?

RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED

- I. The trial court made inquiry into a juror's ability to be fair and impartial after the juror disclosed his membership at the same club where the victims were employed. Trial counsel did not object or move to have the juror removed from the panel. Is there any probative evidence to support the PCR Court's ruling that Petitioner failed to meet his burden in proving trial counsel was deficiency and resulting prejudice?

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 and June 2005 term of the Richland County Grand Jury for first-degree burglary 2005-GS-40-2824), petit larceny (2005-GS-40-2825), kidnapping (2005-GS-40-5072, assault and battery with intent to kill (2005-GS-40-5073), and possession of marijuana (2005-GS-40-4570).¹ (App. p. 983-1004). Petitioner was represented by Jeanette Van Ginhoven and Lauren Mobley, Esquires. On March 16, 2006, Petitioner proceeded to trial before the Honorable James W. Johnson, Jr. Petitioner was convicted by the jury of first-degree burglary, the lesser included offense of ABHAN, petit larceny, and possession of marijuana. Judge Johnson sentenced Petitioner to consecutive terms of thirty (30) years' imprisonment for first-degree burglary and ten (10) years' imprisonment for ABHAN, plus concurrent terms of thirty days (30) each for the remaining convictions. Id. Petitioner was found not guilty of kidnapping. Id.

A notice of appeal was filed and Aileen P. Clare, Esquire, of the South Carolina Commission on Indigent Defense represented Petitioner. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Hayward, Unpublished Op. No. 2008-UP-088 (S.C. Ct. App. filed February 8, 2008). The remittitur was sent on February 26, 2008.

Petitioner filed his first application for post-conviction relief (PCR) on February 1, 2008 (2008-CP-40-00780). (App. p. 830-39). Following the denial of the direct appeal, Petitioner filed a second PCR application on May 29, 2008 (2008-CP-40-03845). The court merged the two cases with case number 2008-CP-40-03854 being the surviving case on March 25, 2009. (App. p.

¹ Petitioner was also indicted for unlawful possession of a pistol (2005-GS-40-5074) which was quashed by the trial court and for pointing and presenting a firearm (2005-GS-40-2902) upon which the trial court directed a verdict in his favor at the conclusion of the State's case at trial.

861-62). An evidentiary hearing convened on May 13, 2009, before the Honorable Alison R. Lee. Charlie J. Johnson, Jr., Esquire, represented Petitioner, and the State was represented by Brian T. Petrano, Esquire. Judge Lee denied Petitioner relief by order filed on April 9, 2010. (App. p. 893-99). Petitioner then filed a third application for PCR on July 17, 2013 (2013-CP-40-04135), alleging that he did not knowingly and voluntarily waive his right to appeal his PCR case. A hearing was held on November 20, 2013, at the Richland County Courthouse. The court entered a Consent Order Granting an Appeal Pursuant to Austin v. State² on March 4, 2014. (App. p. 978-82). Petitioner was present and represented by Kristy G. Goldberg, Esquire. Id. Megan E. Harrigan represented Respondent. Id. The Order ruled that Petitioner did not voluntarily waive his right to appeal the PCR Court's denial and dismissal of his 2008 application. Id.

Petitioner filed a notice of appeal and a Petition for Writ of Certiorari. This Return follows.

² 305 S.C. 453, 409 S.E.2d 395 (1991).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Certiorari is not warranted where Petitioner did not raise the issue to the PCR Court of whether he had a right to be present during *voir dire* of the juror who disclosed his membership at the country club where the victims were employed. Certiorari is also not warranted where Petitioner failed to present any valid basis for an objection or motion to have the juror removed from the panel.

In his petition, Petitioner, for the first time, asserts trial counsel was ineffective in failing to request that the *voir dire* of the juror who disclosed he is a member of the club where the victims were employed occur in the presence of both Petitioner and trial counsel. Respondent submits this issue is not preserved for this Court's review as it was not raised at the PCR hearing and was not ruled upon in the Order of Dismissal. Furthermore, Petitioner argues trial counsel was ineffective in failing to object and move to have the juror removed from the panel when the juror disclosed that he was a member of the club. This issue is without merit as Petitioner failed to present any evidence or argument that would support a ruling removing the juror. Finally, Petitioner cannot show he was prejudiced as he cannot show that Judge Johnson would have removed the juror, cannot show that the outcome would have been different, and cannot show the issue would have been successful on direct appeal.

A. The issue of whether trial counsel was ineffective in failing to ensure Petitioner was present during the *voir dire* of the juror is not preserved for review.

This argument is not preserved for this Court's review. It is well settled that an issue that has not been presented to or passed upon by the 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 (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, 204 S.E.2d 727. 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.”); State v. Sheppard, 391 S.C. 415 --, 706 S.E.2d 16, 20 (2011) (“Our law is clear that an issue may not be raised for the first time on appeal.”); I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C 461, 719 S.E.2d 640 (2011).

The allegation that trial counsel was ineffective for failing to ensure Petitioner was present during the trial court’s *voir dire* of the juror was never presented to the PCR Court and is therefore not preserved for this Court’s review. There was no evidence presented or argument made to the PCR Court that the *voir dire* was done outside the presence of Petitioner in violation of his rights and that trial counsel should have objected. This was not an allegation before the PCR Court. Petitioner speculates that the “record indicates that the judge made an independent, off-the-record inquiry of the juror and was relaying that to counsel.” (PWC p. 9). According to the transcript, the questioning of the juror was done off of the record, but Petitioner did not present any evidence that it was done outside of his presence. (App. p. 222, lines 11-17). The Order of Dismissal makes no mention of this argument and predictably does not rule on it. Respondent notes there was no Rule 59(e), SCRCF, filed. This Court should find this allegation is not preserved.

Even if this Court finds the argument preserved, it is without merit. There is no presumption of prejudice when a defendant is not present during *voir dire* and such error is

subject to a harmless error analysis. See State v. Whaley, 290 S.C. 463, 351 S.E.2d 340 (1986) (holding that “[a]lthough the trial judge improperly excluded appellant from voir dire, we find the error was harmless beyond a reasonable doubt.”). Petitioner failed to present any evidence to the PCR Court that the juror was not fair and impartial. A more thorough prejudice analysis is set forth below.

B. Probative evidence supports the PCR Court’s finding that trial counsel was not ineffective in failing to object to the juror remaining on the panel and that Petitioner did not suffer any resulting prejudice.

The issue properly before this Court is whether the PCR court erred in finding counsel was not ineffective in failing to object when a juror disclosed that he was a member of the same country club as the victims were employed. Petitioner argues trial counsel should have object to the juror’s alleged impartiality and moved to have him removed. Petitioner also argues trial counsel did not articulate a valid trial strategy to justify that decision. Respondent submits this issue is without merit.

How the Issue was Raised at Trial

During the trial and following direct examination of the victim whose house was broken into, Jeffrey Connell, a note was passed to Judge Johnson. According to Judge Johnson, the note stated that the juror was a member of the country club where the victim was employed. (App. p. 222, lines 11-17). The record is nearly devoid of any substantive discussions regarding the juror’s note. The exchange on the record was very brief:

THE COURT: Counsel, the note that I had from the juror, I made inquiry and he said that would not in any way effect [sic] his ability to be fair and impartial in this case. The fellow said he was a member of the country club, he doesn’t now that witness. Anything else that needs to go on the record concerning that? I will make this a court exhibit in the case.

(App. p. 222, lines 11-17). At the time, Connell was the golf course superintendent at Columbia

Country Club and had been since 2002. (App. p. 195, lines 7-14). Connell lived right across the street from the club, about an eighth of a mile away. Id. The victim of the ABHAN, Lourdes Antonio, previously worked for the country club and at the time of the incident was employed by Connell to care for his young child. (App. p. 196, line 10 – p. 197, line 11).

PCR Hearing and Order of Dismissal

At the PCR hearing, Petitioner argued trial counsel was ineffective for failing to object to the juror remaining on the panel or in failing to move for a mistrial. Unfortunately, neither Counsel Mobley nor Counsel Van Ginhoven were available to testify at the hearing. Petitioner alleged trial counsel was ineffective in failing to object and/or move for a mistrial after Judge Johnson receive the note from the juror. In support of his argument that he was prejudiced, Petitioner testified the issue was not preserved for appeal and that the note affected his decision of whether to testify in his defense.

The Order of Dismissal ruled that Petitioner failed to meet his burden in proving trial counsel was ineffective in any regard. (App. p. 893-900). The Order found Petitioner's testimony to not be credible. Id. The PCR Court found that Petitioner failed to establish how the note from the juror warranted an objection or motion for a mistrial. Id. The Order relied on authority that the trial court has broad discretion in handling allegations of juror misconduct and alleged conflicts. Id.

The PCR Court properly denied Petitioner's application by finding no deficiency and no resulting prejudice.

Petitioner seems to take the position that if trial counsel does not offer any testimony or is not available to testify then the court should make a finding of *per se* deficiency. That is not the correct standard of law. The law is clear that the burden is squarely on an applicant to prove his allegations by the preponderance of the evidence. Butler v. State, 286 S.C. 441, 334 S.E.2d 813

(1985). There is a strong presumption that counsel rendered adequate assistance and made all significant decision in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); 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." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). Respondent submits Petitioner did not satisfy either requirement of the Strickland test.

Counsel was not deficient.

Here, we are dealing with the issue of whether Counsel was ineffective in failing to object to the juror remaining on the jury. Judge Johnson made an inquiry as to whether the juror could remain fair and impartial and the juror assured him that he could. The juror informed Judge Johnson that he did not know Connell. Petitioner bases his argument on the fact that trial counsel failed to exercise any expertise or strategy regarding the issue, and therefore the PCR Court's Order cannot stand. Contrary to Petitioner's assertions, the PCR Court did not rule that trial counsel made a strategic decision to not object to the juror remaining on the panel. Instead, the PCR Court ruled Petitioner "made only general allegations, nothing specific was presented to

criticize trial counsel performance . . .” (App. p. 898). The PCR Court ruled that Petitioner failed to articulate a basis for an objection or motion to have the juror removed.

Petitioner seems to question the juror’s truthfulness with Judge Johnson. Judge Johnson was in the best position to judge the credibility of the juror. “[T]he trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue.” State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 105 (1998). Judge Johnson found the juror credible and able to render an impartial verdict based solely on the evidence presented at trial. Petitioner did not present a coherent argument in support of his allegation that trial counsel was ineffective. The PCR Court based its ruling that trial counsel was not deficient because it found no valid basis for an objection to have the juror removed from the panel. Petitioner did not assert any grounds or cite any rules in arguing why trial counsel should have objected to Judge Johnson’s decision to let the juror remain. There were no allegations of juror misconduct or any allegations that the juror intentionally withheld any information. The opposite is true as the juror disclosed his membership with the club right after the testimony was elicited on examination. Therefore, there is ample evidence of probative value to support the PCR Court’s denial or relief with regards to deficiency.

Petitioner failed to prove he was prejudiced in any way.

A prejudice analysis is likely the most efficient way to dispose of this case and deny the petition. Even if this Court finds trial counsel was deficient, Petitioner cannot show he was prejudiced by any alleged errors. A criminal defendant is entitled to a fair trial, not a perfect one. Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). A defendant does not have a “right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007). “There is no rule of the

common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree.” State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910).

Here, Petitioner presented no evidence that he was prejudiced. It is dispositive that the PCR Court found Petitioner’s testimony that he would have testified in his defense if not for the juror’s note to be not credible. Petitioner presented no evidence that the result of his trial would have been different if not for trial counsel’s failure to object to the juror remaining on the panel. Petitioner presented no evidence that the juror was biased and affected the trial.

Petitioner failed to show that an objection to have the juror removed from the panel would have been successful. “The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue.” Id. Petitioner failed to articulate under what grounds an objection would have likely been successful. Respondent submits that in allowing the juror to remain on the panel, Judge Johnson was obviously satisfied with the juror’s responses to his questions and if he had any doubts, he would have replaced the juror with an alternate.

Petitioner similarly failed to show that, if unsuccessful in removing the juror from the panel, the issue would be successful on appeal and require a reversal. A decision of whether to release a juror and replace her with an alternate is within the sound discretion of the trial court, and such decision will not be reversed on appeal absent an abuse of discretion. State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (S.C. Ct. App. 2007). See State v. Ivey, 331 S.C. 118, 123, 502 S.E.2d 92, 94 (1998) (holding a juror’s competence is within the trial court’s discretion and is not reviewable on appeal unless wholly unsupported by the evidence).

Importantly, the juror did not conceal any information, intentionally or otherwise, during

voir dire. During pretrial *voir dire* the juror did not indicate that he knew Connell when asked by Judge Johnson. He reiterated that when questioned directly by the judge of whether he could remain impartial. Judge Johnson acted well within in his discretion in finding the juror could be fair and impartial. State v. Burgess, 391 S.C. 15, 18-19, 703 S.E.2d 512, 515 (2010). The record reflects Judge Johnson properly inquired into the juror's membership and the effect that would have on his ability to be fair and impartial juror. Judge Johnson noted that the juror did not know Connell and had no relation to him. Contrary to Petitioner's assertion, the juror stated that his membership at the club would not affect his decision or his ability to be fair and impartial. Accordingly, Petitioner cannot show that an objection or motion would have been successful. He also cannot show the issue would have been successful on appeal. Respondent also submits there is overwhelming evidence of Petitioner's guilty. Specifically, he was arrested and identified by the victim in close proximity to the scene in possession of Connell's stolen handgun. Therefore Petitioner cannot demonstration the PCR Court erred in finding no prejudice.

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

CONCLUSION

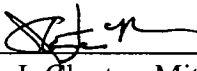
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

(signatures on following page)

Respectfully submitted,

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J. CLAYTON MITCHELL
Assistant Attorney General

BY: 

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ATTORNEYS FOR RESPONDENT

April 27, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2014-000633

Jerene Hayward, #314451Petitioner,

v.

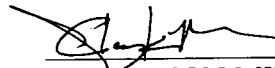
State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

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

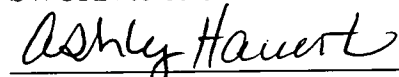
**Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia SC 29211**

This 27th day of April, 2015.



J. CLAYTON MITCHELL
ATTORNEY FOR RESPONDENT

SWORN to before me this 27th day of April, 2015.



Notary Public for South Carolina.
My Commission Expires: 3-18-2023



ALAN WILSON
ATTORNEY GENERAL

April 27, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
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APR 27 2015

S.C. Supreme Court

Re: Jerene Hayward v. The State of South Carolina
Appellate Case No. 2014-000633

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Respondent's Return to the Petition for Writ of Certiorari.

Sincerely,

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

JCM/sbm
Enclosures

cc: Laura R. Baer, Esquire