

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Craig D. Brown, Trial Judge
The Honorable William P. Keesley, PCR Judge

Appellate Case No. 2014-001426

Arthur R. Ladia, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Whether the PCR Judge correctly found that Applicant is entitled to appellate review of direct review issues pursuant to White v. State?
2. Is Petitioner's ineffective assistance of counsel argument preserved for this Court's review?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the February 2012 term of General Sessions for armed robbery (2012-GS-32-0284), burglary, first-degree (-0285) and criminal conspiracy (-0286). **App.pp.155-62.** John W. Locklier, III., Esq., represented Petitioner.

On June 21, 2012, Petitioner pled guilty to the lesser-included offenses attempted armed robbery, burglary second-degree, and to criminal conspiracy as indicted. The Honorable D. Craig Brown sentenced Petitioner to an aggregate term of fifteen (15) years imprisonment. **App.pp.1-39.** Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief (PCR) on June 18, 2013. **App.pp.40-54.** A hearing was convened at the Lexington County Courthouse on April 14, 2014. **App.pp.61-139.** Petitioner was present and represented by Anna R. Good, Esq. Undersigned Counsel for Respondent represented the State. The Honorable William P. Keesley denied relief in an order dated June 5, 2014. **App.pp.140-54.**

This discretionary appeal follows.

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

I.

The PCR Judge's finding that Applicant is entitled to appellate review of direct review issues pursuant to White v. State is uncontested.

Respondent submits that Petitioner met his burden requisite to obtain limited relief pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974); See Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739 (2010).

II.

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 counsel's performance was purportedly ineffective for failing to "enforce the terms of the plea agreement between Petitioner and the State." Petitioner's PWC, p.7. This argument is not preserved for appellate review because the order of dismissal does not address Petitioner's present argument.

In the order of dismissal, the PCR Judge ruled Petitioner failed to meet his burden to prove counsel's performance was ineffective on the allegation that his "plea was not freely, knowingly, and voluntarily made." **App.p.152**. 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 (E)" as follows:

[t]here is no proof that adding charges on the day of the plea made it involuntary or unknowing. The credible evidence is that all those charges were discussed before the plea and a decision made to accept the offer.

If [Petitioner]'s contention that he was placed in a situation where he had no choice but to accept the plea bargain, primarily because counsel was

telling him that he would get probation and because counsel was not prepared for trial. Those claims are not proven. The court does not find it credible that [Petitioner] only admitted guilt because counsel told him to go along with plea.

App.p.152; p.153 (emphasis added). In PCR litigation, an allegation of ineffective assistance of counsel for failing to move to enforce the terms of a plea agreement is categorically distinct from an allegation of failing to advise an inmate-litigant on the terms and consequences of pleading guilty.

In an entirely separate matter, the PCR Judge ruled, “[Petitioner]’s allegation that counsel was ineffective for failing to negotiate a more favorable plea agreement is without merit.” Pursuant to Rainey v. Haley, 404 S.C. 320, 332-33, 745 S.E.2d 81, 87 (2014), the PCR Judge correctly noted that the underlying allegation lacked merit where Strickland¹ does not extend to the imposition of a novel duty of defense attorneys that would invade the sole constitutional province of the Solicitor’s Office. **App.p.148**. The PCR Judge found, “[t]he claim that [Petitioner] would have benefited had his attorney somehow brokered a deal involving more cooperation is purely speculative and unproven.” **App.p.149**.

Similarly, an allegation of ineffective assistance of counsel for failing to move to enforce the terms of a plea agreement is categorically distinct from an allegation of failing to negotiate a better plea offer from the solicitor. This is not a ‘chicken or the egg’ dilemma. Certainly, counsel cannot logically be found ineffective for failing to move to enforce the terms of a non-existent plea agreement filled with ‘golden parachutes’ and Petitioner’s post-hoc wishful musings when counsel was also purportedly ineffective for

¹ Strickland v. Washington, 466 U.S. 668 (1984)

failing to elicit the plea offer from the solicitor necessitated to establish the non-existent plea agreement in question. Petitioner's "argument is full of internal contradictions and (it must be said) gobbledy-gook." Glossip v. Gross, No. 14-7955 (U.S. June 29, 2015) (Scalia, J. concurring) Thus, this argument is not preserved for appellate review because the order of dismissal logically does not address Petitioner's present argument.

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 the evidence and testimony at issue were solely limited to two separate allegations: (1) counsel's performance in the initial step of plea negotiations, eliciting the offer; (2) counsel's ultimate advice on the general consequences of pleading guilty.²

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, 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

² See also State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one ground at trial and then an alternative ground on appeal).

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: 
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July 1st, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Lexington County
Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001426

ARTHUR R. LADIA,

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
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This 1st day of July, 2015.


ASHLEY HAWORTH
LEGAL ASSISTANT