

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal From Richland County
The Honorable James R. Barber, III, Circuit Court Judge

Opinion No. 2015-UP-191 (S.C. Ct. App. filed April 8, 2015)

Appellate Case No. 2015-001299

Carmen L. Rice, #308637, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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PETITIONER'S QUESTION PRESENTED

1. The Court of Appeals erred in finding unpreserved the issue of whether the PCR judge erred in finding Arletta Frierson's testimony that Iris Bryant, the co-defendant and the State's main witness at trial, told her that the petitioner had nothing to do with the murder of Bernard Brennan was inadmissible hearsay.
2. The Court of Appeals erred in finding that the PCR judge's decision that trial counsel was not ineffective for failing to call Arletta Frierson as a witness at trial to testify as to statements made by Iris Bryant when the PCR judge did not rule on the merits of this ineffective assistance of counsel claim, finding Frierson's testimony inadmissible at the PCR hearing.
3. The Court of Appeals erred in finding that if trial counsel was deficient for failing to call Frierson as a witness, petitioner failed to show prejudice because the testimony was merely cumulative when the PCR judge did not rule on the merits of the ineffective assistance of counsel claim and did not find the testimony merely cumulative.

STATEMENT OF THE CASE

Petitioner is currently incarcerated in the South Carolina Department of Correction pursuant to orders of commitment from the Richland County Clerk of Court. Petitioner was indicted at the March 2004 term of the Richland County Grand Jury for Murder and Armed Robbery (2004-GS-40-8754, --8755). (App. p. 1159-61). John T. Mobley, Esquire, and Chris Hart, Esquire, represented Petitioner on the charges. On April 4, 2005, Petitioner proceeded to a jury trial before the Honorable Reginald I. Lloyd, where he was found guilty of both charges as indicted. Judge Lloyd sentenced Petitioner to life imprisonment for Murder and thirty (30) years imprisonment for Armed Robbery to run concurrently. (App. p. 1162-63).

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. Then Deputy Chief Appellate Defender Robert M. Dudek of the South Carolina Office of Appellate Defense represented Petitioner on appeal. By opinion filed October 5, 2007, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (cert. denied December 4, 2008).¹ The remittitur was issued on December 8, 2008.

Thereafter, Petitioner filed an application for post-conviction relief (PCR) on January 14, 2009 (2009-CP-40-00234). (App. p. 1164-71). The State made its Return on July 7, 2009. (App. p. 1172-79). An evidentiary hearing was held on June 6, 2011 before the Honorable James R. Barber, III. Petitioner was present and represented by counsel, Mark Schnee, Esquire. The State was represented by Brian T. Petrano of the South Carolina Attorney General's Office. By Order

¹ This case was overruled by State v. Byars, 710 S.E.2d 55 (S.C. 2011), regarding only a method of error preservation which the PCR Court found immaterial to the action.

filed August 22, 2011, Judge Barber denied Petitioner's request for relief and dismissed the PCR application with prejudice. (App. p. 1244-56).

Petitioner filed a timely notice of appeal on September 15, 2011. A Petition for Writ of Certiorari was filed on September 21, 2012. The State filed its return on January 22, 2013. This case was transferred from the South Carolina Supreme Court to the South Carolina Court of Appeals on July 29, 2013. The court of appeals granted the petition for writ of certiorari on May 21, 2014. Petitioner filed its brief on June 25, 2014. Respondent filed its brief on November 24, 2014. An oral argument was scheduled but then canceled by the court of appeals notifying the parties that the case would be decided on the briefs. The court of appeals issued an unpublished opinion affirming the PCR court's denial of relief on April 8, 2015. Petitioner filed a petition for rehearing on April 16, 2015, which was denied May 19, 2015. Petitioner then filed a Petition for Writ of Certiorari to the Court of Appeals on June 18, 2015. This return follows.

CERTIORARI IS NOT WARRANTED

Petitioner argues that this Court should grant certiorari because the court of appeals erred in finding the issue regarding the admissibility of Arletta Frierson's testimony to be unpreserved. Petitioner argues it was clear that PCR counsel argued the testimony was admissible as non-hearsay impeachment and thus that it was raised and ruled upon by the PCR Court. Petitioner further argues that this Court can only reach issues II and III if Frierson's testimony is found to be admissible. She argues she is then entitled to a remand to the PCR court to make specific findings of fact and conclusions of law on the issue of whether trial counsel was ineffective in failing to call Frierson as a witness. Respondent submits this Court can dispose of this case by affirming the court of appeals' ruling that issue I is not preserved and that Frierson's statements are not admissible.

Petitioner further argues the court of appeals misapplied Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011) in addressing whether Petitioner was prejudiced by assuming trial counsel was deficient. Petitioner argues that since the PCR court did not make a prejudice finding, that the court of appeals erred in addressing the issue on the merits by assuming deficiency. Petitioner asks this Court for a remand so that the PCR court can make a finding as to whether she was prejudiced.

Respondent submits the court of appeals properly found Petitioner's issue regarding Arletta Frierson's testimony at the PCR hearing to be not preserved. The court of appeals also properly ruled that the PCR court correctly excluded Frierson's testimony. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the court of appeals in this matter. Indeed, the court

of appeals' decision determined the issue was not preserved, as Petitioner conceded in her brief. (BOP, p. 10). The court of appeals was correct in affirming the PCR court's ruling that trial counsel was not ineffective in failing to call Frierson as a witness at trial because Petitioner failed to present any admissible testimony from Frierson that would have likely changed the result of the trial. The court of appeals was also correct in finding that Frierson's proffered testimony was cumulative in nature. Frierson's testimony would have been nearly identical to trial witness Alana Quattlebaum's testimony. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

ARGUMENT

I. The court of appeals did not err in affirming the PCR court's ruling that Arletta Frierson's testimony was inadmissible hearsay.

Certiorari is not warranted in this case because the court of appeals was correct in finding that the issue regarding the admissibility of Arletta Frierson's testimony was not preserved.

Petitioner contended the PCR Court erroneously found Arletta Frierson's statements proffered at the PCR hearing to be inadmissible. Respondent submits the PCR Court properly found the statement to be inadmissible hearsay not within the Rule 804(b)(3), SCRE, exception to hearsay as a statement against interests as PCR counsel argued. Petitioner contends this testimony was admissible pursuant to Rule 801(d)(2), SCRE, as non-hearsay impeachment testimony. However, PCR counsel did not argue for the statements to be admitted under this rule, so the issue was never raised or ruled upon by the PCR court and was not preserved for the court of appeals' review.

How the issue was raised below

At Petitioner's April 2005 trial for the murder and armed robbery of Bernard Brennan (Victim), Iris Bryant testified as a state's witness in its case-in-chief. Bryant testified she first met Petitioner at Allen Benedict Court apartment complex off of Oak Street in Columbia sometime after September 11, 2001. (App. p. 509, ln. 5-22). Bryant said on October 25, 2001, Petitioner and another friend picked her up to meet Victim for dinner at The Varsity. (App. p. 512, ln. 8-21). After leaving The Varsity, Bryant said, the three went to Calloway's Restaurant for a while before leaving in Victim's Mercedes. (App. p. 515, ln. 2-17). Bryant went on to testify that at about 9:00 or 9:30pm, they pulled onto Crawford Road, off of Interstate 20, where Petitioner pulled a gun out and told Bryant to get out of the car. (App. p. 516, ln. 11-20). Bryant testified that after getting out of the car, she heard several gun shots in the car, after which Petitioner got out of the car and fire two more shots at Victim. (App. p. 517, ln. 1-3). According to Bryant, the two fled the scene and got a ride from one of Petitioner's friends. (App. p. 518, ln. 7 – p. 521, ln. 25). On cross-examination, Bryant said she did not know "right offhand" who Arletta Frierson was. (App. p. 560, ln. 1-5). Thereafter, trial counsel asked the following series of questions of Bryant:

Q: "Isn't it true that you told Alana Quattlebaum that [Petitioner] was not there and was not involved when you robbed [Victim] that that it was you and your cousin who shot [victim]?"

A: "No, sir."

Q: "And didn't you tell the exact same thing to Arletta Frierson when she was also at the detention center with you that you – that [Petitioner] was not involved in that robbery, that you and your cousin shot [Victim]?"

A: "Who is Frierson? Sir, these people don't even – I know Quattlebaum, like I said, she's [Petitioner's] friend . . ."

(App. p. 561, ln. 20 – p. 562, ln. 7). Frierson was subpoenaed to trial by Petitioner's trial counsel but not called as a witness before being released from that subpoena and returned to the South

Carolina Department of Corrections. (App. p. 974, ln, 6-8).

At the June 2011 PCR hearing, Petitioner attempted to offer her own testimony as to statements made by Bryant to Frierson while at the Alvin S. Glenn Detention Center indicating Petitioner was not involved in the murder and robbery of Victim. (App. p. 1186, ln. 17-22). Respondent objected to the testimony as hearsay, which PCR counsel contested was erroneous as it fell with the “statement against interest” exception to the hearsay rule. (App. p. 1186, ln. 23 – p. 1887, ln. 3). Respondent noted the Rule 804(b)(3), SCRE, exception for “statements against interest” only applies to situations where the declarant is unavailable and Petitioner had not made a showing that Bryant was unavailable at the PCR hearing. (App. p. 1187, ln. 4-7). PCR counsel stated he had “no idea where Ms. Bryant [was],” but had tried contacting her last known address. (App. p. 1887, ln. 8-14). The PCR Court maintained its ruling that Petitioner’s testimony on Bryant’s comments to Frierson at the Alvin S. Glenn Detention Center set forth inadmissible hearsay. (App. p. 1187, ln. 14).

Thereafter, PCR counsel called Arletta Frierson as a witness to provide testimony regarding the same statements allegedly made by Bryant while at the detention center prior to Petitioner’s trial. Upon calling Frierson, PCR counsel noted the court’s previous ruling on the hearsay statement, but argued Frierson’s purported testimony in the matter was non-hearsay under Rule 801(d)(2), SCRE, as an admission by a party opponent. (App. p. 1192, ln. 18-22). Respondent objected to the introduction of Frierson’s testimony on those alleged comments, noting Bryant was not a party opponent but rather a codefendant brought in to provide testimony for the State. (App. p. 1193, ln. 10-25). The PCR Court ruled the testimony was inadmissible hearsay, but allowed Petitioner to proffer Frierson’s testimony. (App. p. 1194, ln. 1-7).

Relevant Law

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).

The decision to admit affidavits, depositions, oral testimony, or other evidence at a PCR hearing is within the PCR Court's discretion and will not be reversed absent an abuse of discretion resulting in prejudice to a party. Simpson v. Moore, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006).

Analysis

At no point during the course of the PCR hearing did PCR counsel argue Bryant's alleged statements were admissible under Rule 801(d)(1)(A), SCRE, as a prior inconsistent statement to be used for impeachment. In fact, Petitioner conceded this point. (Brief of Petitioner p. 10). It is well settled that an issue that has not been presented to or passed upon by 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.

The record before this Court is entirely void of any argument by PCR counsel that Frierson's statement and/or testimony was admissible as non-hearsay under Rule 801(d)(1), SCRE, nor did the PCR Court make a ruling upon such an argument. Petitioner asks this Court to broadly interpret PCR counsel's argument to include any exclusions to the hearsay rule list under Rule 801(d), SCRE. Significantly, PCR counsel explicitly argued for the statements' admissibility as an admission by a party opponent. (App. p. 1192, lines 18-24). PCR counsel made no mention of non-hearsay impeachment testimony. Therefore, this issue was first raised before the court of appeals and was not properly preserved for review. If this Court finds the court of appeals properly found issue I not preserved, then it need not reach issues II and III because those issues presume Frierson's statements are admissible and deal with the merits of the ineffective assistance of counsel allegation.

II. The court of appeals properly ruled there was probative evidence to support the PCR court's ruling that trial counsel was not ineffective in failing to call Arletta Frierson as a witness.

Petitioner argues the court of appeals erred in ruling that there was evidence to support the PCR court's finding that trial counsel was not ineffective in failing to call Frierson as a witness. Petitioner argues he is entitled to a remand for the PCR court to make the appropriate findings of fact and conclusions of law. Respondent submits that the court of appeals' opinion is proper.

In its brief, Respondent argued this issue was not properly preserved² and that even if

² Respondent argued that the issue was not properly preserved because the PCR Court's Order of Dismissal failed to specifically address the issue of whether trial counsel was ineffective for failing to call Arletta Frierson. The court of

reviewed on the merits, the PCR court did not err in denying relief on this ground. The court of appeals found the issue of whether trial counsel was ineffective for failing to call Frierson as a witness was preserved and held that there was probative evidence to support the ruling. At the PCR hearing, Petitioner alleged that trial counsel was ineffective in failing to call Frierson as a witness. Petitioner was unable to present any *admissible* testimony from Frierson. In its Order of Dismissal, the PCR court found Petitioner failed to meet her burden of proof in finding trial counsel was ineffective.

Petitioner argues that she is only entitled to a remand if this Court reverses the court of appeals' decision that the issue of whether Frierson's testimony was not admissible is preserved. This Court need not reach this issue to dispose of this case. Petitioner argues the PCR court did not make specific findings of fact and conclusions of law and, therefore, is entitled to a remand. Respondent submits the proper avenue to request the PCR court to specifically address an issue is through a Rule 59(e), Motion to Alter or Amend a Judgment, made at the circuit level. Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012) citing Marlar v. State, 375 S.C. 407, 408 – 410, 653 S.E.2d 266-67 (2007). Petitioner is now attempting to circumvent the rule and asks this Court to allow a remand for the PCR court to address this issue with more specificity.

Respondent submits it is clear the PCR court ruled that Petitioner wholly failed to present any evidence as to what Frierson would have testified to at trial. The PCR court ruled that Frierson's testimony was not credible. (App. p. 1251, fn. 5) ("This Court notes for the purposes of the record that the proffered witnesses were not credible."). "We give great deference to a

appeals rejected that argument and determined that the issue was preserved and addressed its merits.

judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994). It is apparent the PCR Court found Frierson not credible because of her multiple forgery convictions and because she is codefendant Bryant's cousin. The credibility findings set forth in the order of dismissal show that Frierson's testimony was of no evidentiary value. The court of appeals properly ruled that the PCR court's credibility findings provided evidence that Petitioner failed to carry her burden.

III. The court of appeals properly ruled that Petitioner was not prejudiced by trial counsel's alleged deficiency in failing to call Frierson as a witness at trial.

Finally, Petitioner argues the court of appeals erred in addressing the merits of her argument because the PCR court failed to address this allegation in its Order of Dismissal and therefore concludes that the case should be remanded to have the PCR court ruled on the merits. Petitioner takes issue with the fact that the court of appeals stated the PCR court found trial counsel was not ineffective for failing to call Frierson as a witness. As discussed above, the PCR court found Frierson did not present credible testimony, so this ruling is correct. (App. p. 1251, fn. 5).

Petitioner argued in her brief that the PCR court erred in failing to address whether trial counsel was ineffective in failing to call Frierson as a witness. The court of appeals ruled that even if they found trial counsel ineffective, Petitioner is not entitled to relief because prejudice cannot be shown. Petitioner faults the court of appeals for addressing the merits of the allegation.

Respondent submits the PCR court ruled that trial counsel was not ineffective in failing to call Frierson as a witness because she could not provide any *admissible* testimony. The PCR

court properly ruled that Petitioner wholly failed to meet her burden of proving prejudice. The court of appeals employed an examination akin to harmless error analysis when they ruled that Petitioner failed to show prejudice in trial counsel's failure to call Frierson as a witness. The court of appeals' ruling is supported by the record because Frierson's testimony would have been cumulative to Alana Quattlebaum's testimony. Essentially it would have been almost identical. The court of appeals properly ruled Frierson's testimony would have been cumulative to Quattlebaum's testimony. Petitioner argues Frierson's testimony would not have been cumulative. Petitioner argues Frierson should have been able to testify that Nikki (or Tiki) killed Victim and not Petitioner. Quattlebaum was allowed to testify at trial that Bryant told her that Petitioner was not present at the murder scene. (App. p. 965, lines 14-21). Frierson's testimony was proffered at the PCR hearing and she stated that Bryant said that Petitioner was not involved in the murder. (App. p. 1196, lines 9-16). This testimony was already before the jury and the court of appeals properly found it cumulative.

Finally, the court of appeals' reliance on Edwards v. State³ was not error. Petitioner attempts to show that this case is distinguishable from Edwards, but the court of appeals merely cited it for its holding that where "evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." Edwards, 392 S.C. 459, 710 S.E.2d at 66. This rule is well settled. See Cherry, 300 S.C. at 118-19, 386 S.E.2d at 625-26; Jackson v. State, 329 S.C. 345, 350-51, 495 S.E.2d 768, 770-71 (1998); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995).

A remand is not warranted because the court of appeals found the issue preserved and

³ 392 S.C. 449, 710 S.E.2d 60 (2011).

then addressed why Petitioner failed to prove prejudice: because Frierson's testimony would have been cumulative to Quattlebaum's testimony at trial.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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By: 
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CARMEN RICE, #308637,

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari in the Court of Appeals**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 30th day of July, 2015



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LEGAL ASSISTANT