STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2012-208626

Ruben Ramirez — Petitioner,

v.

State of South Carolina — Respondent.

BRIEF OF RESPONDENT

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ATTORNEY'S FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the PCR judge err in denying Petitioner's Rule 59(e), SCRCP, motion filed in the case because there was newly discovered evidence presented in that motion establishing that trial counsel erred in failing to arrange for an independent competency evaluation for Petitioner, particularly where the newly discovered evidence was actually a report containing proof that Petitioner was not competent to stand trial in the case?

2. Has Petitioner abandoned the issue of whether the PCR judge erred in granting a review of direct appeal issues pursuant to White v. State?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the April 2007 term of General Sessions for lewd act upon a child (2007-GS-23-3245) and at the May 2007 term for assault and battery with intent to kill (ABIK) (2007-GS-23-4394), kidnapping (2007-GS-23-4395), first-degree criminal sexual conduct (CSC) with a minor (2007-GS-23-4396), and first-degree burglary (2007-GS-23-4397). (App.pp.134-43). Monte D. Desai, Esquire represented Petitioner.

On November 3, 2008, Petitioner pled guilty but mentally ill. The Honorable Edward W. Miller sentenced Petitioner to concurrent terms of 20 years for ABIK, 20 years for kidnapping, 20 years for first-degree CSC with a minor, and 20 years for first-degree burglary. Judge Miller levied a consecutive sentence of 15 years suspended with 5 years probation for lewd act upon a child. (App.p.24). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on November 2, 2009 (2009-CP-23-9285). (App.pp.27-34). A hearing was convened at the Greenville County Courthouse on May 9, 2011. (App.pp.40-81). Petitioner was present and represented by Matthew Kappel, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker took the matter under advisement. (App.p.81). On May 23, 2011 – while the matter was still under advisement – Petitioner filed a "Motion to Hold the Record Open and Allow Submission of a New Competency Evaluation." (Supp.App.pp.1-3). Respondent filed a return in opposition. (App.pp.128-30). Judge Welmaker denied both the PCR application and post-trial motion in an order filed August 1, 2011. (App.pp.114-

21). After Petitioner filed a second post-trial motion (pursuant to Rules 59(a), (e), SCRCP) and Respondent filed a return,[1] Judge Welmaker issued an order filed November 23, 2011 in which he denied the motion but granted a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). (App.pp.122-27; pp.132-33).

[1] Petitioner did not include this return in the Appendix or Supplemental Appendix.

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 did not err in denying Petitioner's post-trial motion filed pursuant to Rule 59(e), SCRCP.

Petitioner argues the PCR judge erred in denying his motion to alter or amend the order of dismissal in his case. Specifically, Petitioner argues the PCR judge erred because he presented newly-discovered evidence in his Rule 59(e), SCRCP motion. This issue is without merit.

A.

At Respondent's guilty plea hearing, the plea judge noted he wished to enter a plea of guilty but mentally ill. (App.p.4). Plea counsel stated they were making this plea after receiving reports from two doctors. (App.p.5). The assistant solicitor stated they did not contest the findings. (App.p.5). The evaluations and reports were reviewed by the plea judge. (App.pp.5-6). The plea judge found Petitioner "does suffer from a mental illness" and noted some of the findings from the evaluations and reports. (App.p.6).

The plea judge read the indictments and noted the maximum possible sentences for the charges. Petitioner stated he understood. (App.pp.7-9). Petitioner confirmed he

wanted to feel guilty and that he had not been threatened, coerced, or made any promises. (App.pp.9-10). The plea judge explained the right to trial and Petitioner confirmed he wanted to plead guilty. (App.p.11). Petitioner confirmed he was guilty and that he was satisfied with plea counsel. (App.p.12).

After the assistant solicitor recited the facts of the charges,[2] plea counsel made his mitigation argument. (App.pp.18-23). Plea counsel explained the circumstances of Petitioner's childhood. (App.pp.18-19). Plea counsel also discussed Dr. Gedo's report about his evaluation of Petitioner and quoted several passages from the report. (App.pp.19-23).

B.

At the PCR hearing on May 9, 2011, counsel for Petitioner stated the only issue he was proceeding upon was "based on the psychological evaluations." (App.p.44). During the direct examination of plea counsel, the PCR judge admitted into evidence the following reports from evaluations performed before Petitioner's plea hearing: the 2007 competency evaluation (performed by Mayank H. Dalal, M.D.) ordered by the circuit court and the 2008 psychological evaluation (performed by Stephen M. Gedo, Jr., Ph.D.) subsequently obtained by plea counsel. (App.pp.83-85; pp.86-90). Dr. Dalal found Petitioner was competent to stand trial. Dr. Gedo diagnosed Petitioner with Attention Deficient Hyperactivity Disorder and noted he had severe mental retardation. These were the two reports that were before the judge at the guilty plea hearing.

[2] Included in the factual recitation was the information that Petitioner had been cooperative with police and admitted to the conduct. (App.pp.14-16).

Plea counsel was the sole witness at the PCR hearing and the parties examined him about the two evaluations in this case and whether – based on the reports from these evaluations – he believed he should have obtained an additional competency evaluation. Plea counsel testified Petitioner had undergone a State-ordered competency evaluation before he assumed representation. (App.pp.48-49; p.68). Plea counsel testified this was Dr. Dalal's evaluation, which found Petitioner was competent to stand trial. (App.p.48). Plea counsel testified he obtained a psychological evaluation (by Dr. Gedo) when it became clear Petitioner did not understand the gravity of the charges. (App.p.47; pp.68-69). Plea counsel noted that Dr. Gedo's report did not make a determination of competency, it was merely for psychological diagnosis. (App.p.55; pp.56-57). Plea counsel testified he never contemplated a second competency evaluation. (App.p.63). Plea counsel testified he had several conversations with Dr. Gedo about the results of the psychological evaluation and that Dr. Gedo never recommended Petitioner undergo another competency evaluation. (App.p.69). Plea counsel testified he would have pursued another competency evaluation if Dr. Gedo had suggested it. (App.p.71). Plea counsel testified he believed a plea of guilty but mentally ill was appropriate in this case after he received Dr. Gedo's report. (App.p.70). Plea counsel noted Petitioner was easy to communicate with and understood his explanation of both the court process and what would happen at the plea hearing. (App.pp.69-70).

Petitioner did not present any evidence – in the form of either expert testimony or a new competency evaluation – to corroborate his claim that plea counsel was deficient in failing to obtain a second competency evaluation. Petitioner, in fact, did not raise the

issue of obtaining a new evaluation in this case until after the parties had rested and counsel for Respondent argued Petitioner failed to meet his burden of proof without having presented such an evaluation at the PCR hearing. (App.pp.73-75). The PCR judge took the case under advisement.

C.

On May 23, 2011 – two weeks after the conclusion of the PCR hearing – Petitioner filed a Motion to Hold the Record Open and Allow Submission of a New Competency Evaluation." (Supp.App.pp.1-3). Petitioner admitted (1) the "only ground for post conviction relief was that the competency evaluation conducted by Dr. Dalal was defective" and (2) there had never been an additional competency evaluation. Petitioner argued the PCR judge should keep the matter under advisement until a new competency hearing could be completed. (Supp.App.pp.2). Respondent countered the motion should be denied because Petitioner should have known well before the PCR hearing that he could not meet his burden of proof without a second competency evaluation. Respondent argued Petitioner should not be allowed more than one bite at the apple. (App.pp.129-30). The PCR judge addressed his denial of this motion in a separate section of the order of dismissal filed August 1, 2011. (App.pp.114-21).

On August 11, 2011, Petitioner filed a "Motion to Reconsider, Open, Alter or Amend SCRCP 59(a), 59(e)." (App.pp.122-27). Attached to this Motion were an affidavit and report from Thomas Martin, M.D. that were prepared after he conducted an evaluation of Petitioner on May 31, 2011. (Supp.App.pp.5-10). Respondent submitted a return in opposition arguing the record in this matter was closed and that Petitioner

should have been prepared to present this evidence at the PCR hearing. The PCR judge denied the motion. (App.pp.132-33).

D.

The PCR judge did not err in denying Petitioner's "Motion to Reconsider, Open, Alter or Amend SCRCP 59(a), 59(e)."[3] "The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." Brenco v. South Carolina Dep't of Transp., 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008). There can be no abuse of discretion in declining to reopen the record in this case because Petitioner could have provided a second competency evaluation at the PCR hearing. See Spinx Oil Co., Inc. v. Fed. Mut. Ins. Co., 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993), overruled on other grounds, Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997).

A PCR applicant is given "one bite at the apple" in the PCR setting, and the PCR hearing is the venue for all evidence and arguments to be made to the court. See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) ("[A]n applicant is entitled to a full adjudication on the merits of the original petition, or 'one bite at the apple.'"). Petitioner, therefore, should have been prepared to present all evidence and testimony at the scheduled PCR hearing. Petitioner's counsel filed the PCR application on November 2, 2009 and the PCR hearing was held on May 9, 2011. Petitioner's counsel had more than 18 months to fully investigate his claims and present them to the PCR court. If he needed

[3] Though Petitioner's post-trial motion also requested the PCR judge grant a new trial pursuant to Rule 59(a), SCRCP or reopen the record, as Petitioner only addresses the Rule 59(e) aspect of the Motion in his petition for writ of certiorari, Respondent will not address these other grounds.

additional time for an evaluation or to have an expert witness available to testify, he should have requested a continuance at the start of trial. He failed to do so. Cf. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742-43 (Ct. App. 2001) (holding the issue of whether the trial judge erred in granting the defendant's motion to quash further discovery was unpreserved because plaintiff's counsel failed to (1) argue the necessity for additional discovery until after summary judgment was granted and (2) move for a continuance to conduct further discovery). Rather, Petitioner's counsel declared they would proceed solely upon "the psychological evaluations." As such, Petitioner should have been prepared to present all evidence and testimony related to this issue.

The sole issue raised at the PCR hearing was whether plea counsel should have requested a second competency evaluation. Petitioner had the burden of proving – under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) – both that plea counsel should have requested a second competency evaluation and that the lack of such prejudiced his case. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence."); see also Rule 71.1(e), SCRCP. As such, Petitioner was on notice that he would have to present a second competency evaluation at trial in order to sustain his claim that plea counsel should have requested this evaluation before Applicant pled guilty. See, e.g., Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"); cf. Palacio v. State, 333 S.C. 506, 513,

511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

Post-conviction relief is governed by the South Carolina Rules of Civil Procedure. See Rule 71.1(a), SCRCP. This case, therefore, should not be treated differently than any other civil case. Petitioner is arguing he should be allowed to supplement his case with additional facts and an expert witness after the close of both his case and the trial itself. This would be comparable to a plaintiff in a negligence action filing suit in a slip-and-fall case, going to trial and presenting his case, resting his case, and then – after the defendant rested its case and realizing he presented no evidence about the injuries sustained in the slip-and-fall – asking for a second chance to meet his burden of proof with expert testimony. Such a scenario would be outrageous and contrary to the spirit of the law. The issue Petitioner hoped to bolster with Dr. Martin's report was not an issue developed during the course of the PCR hearing – it was the only issue argued at the hearing. The PCR judge did not err in finding Petitioner's "Motion to Reconsider, Open, Alter or Amend SCRCP 59(a), 59(e)" was unsupportable under the South Carolina Rules of Civil Procedure.

The proper use of a Rule 59(e), SCRCP motion is to preserve issues that were raised to – but not ruled upon – by the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). The purpose of Petitioner's Rule 59(e) motion, however, was not to request the PCR judge rule upon an issue. Rather, Petitioner argued in his Rule 59(e) motion that the PCR judge should consider the affidavit and report prepared

by Dr. Martin from when he evaluated Petitioner three weeks after the close of evidence in this case. A Rule 59(e) motion is not intended to be used to introduce evidence for the first time. It is axiomatic that one cannot raise an issue for the first time in a post-trial motion. See South Carolina Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999) (holding "it is improper to argue new matter in a motion for reconsideration"). As Dr. Martin's affidavit and report were presented to the court for the first time in the Rule 59(e), SCRCP motion, the PCR judge did not err in denying said motion.

E.

Petitioner argues Dr. Martin's affidavit and report were newly-discovered evidence that should have been considered by the PCR judge. As an initial matter, this argument is not preserved for appellate review. The aforementioned affidavit and report were attached to Petitioner's "Motion to Reconsider, Open, Alter or Amend SCRCP 59(a), 59(e)" filed on August 11, 2011. Petitioner did not raise the issue of newly-discovered evidence in this motion. In fact, the issue of newly-discovered evidence was raised for the first time in the petition for writ of certiorari. As such, this issue is clearly 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.").

Dr. Martin's affidavit and report do not constitute newly-discovered evidence. Petitioner's evaluation was performed on May 31, 2011 – which was 22 days after the PCR hearing was held and the record was closed. (Supp.App.pp.6-10). By the very definition, this was new evidence – not newly-discovered evidence. Regardless, even assuming arguendo this was newly-discovered evidence, it does not meet the newly-discovered evidence standard. The South Carolina Supreme Court has held that, for an applicant to be granted post-conviction relief based on after-discovered evidence, he must show the alleged evidence:

> (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983) (citation omitted) (emphasis added). Further, the Supreme Court has recent held

> when a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated.

Jamison v. State, Op. No 27454, at *7 (S.C. Sup. Ct. filed Oct. 22, 2014). Assuming arguendo Dr. Martin's affidavit and report were newly-discovered evidence, Petitioner failed to demonstrate this purported evidence satisfies either the five-part Hayden test or the heightened criteria set forth in Jamison. Petitioner failed to demonstrate his is the "rare case" contemplated by the Jamison court where relief based on newly-discovered

evidence would be appropriate. Id.

F.

Accordingly, the PCR judge did not err in denying Petitioner's "Motion to Reconsider, Open, Alter or Amend SCRCP 59(a), 59(e)."

II. Petitioner has abandoned the issue of whether the PCR judge erred in granting a review of direct appeal issues pursuant to White v. State.

In the Petition for Writ of Certiorari, Petitioner argued two issues – the second of which was whether the PCR judge was correct in granting a White review of Petitioner's guilty plea. (Cert. Pet., pp.10-11). This Court granted the Petition for Writ of Certiorari by order dated June 25, 2014. This order, however, did not state certiorari was granted only to issue 1 in the petition for writ of certiorari. As such, certiorari was clearly granted as to both issues. The Brief of Petitioner, however, does not address issue 2. As Petitioner failed to address issue 2 in the Brief of Petitioner, the issue of whether the PCR judge was correct in granting a White review has been abandoned and this Court should not consider either it or the Brief of Appellant pursuant to White v. State that was filed on December 17, 2012. See, e.g., Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.") (citations omitted).

Regardless, Petitioner cannot prevail upon this issue. In the order filed November 23, 2011, the PCR judge granted a review of direct appeal issues (from Petitioner's guilty plea hearing) pursuant to White v. State. (App.pp.132-33). This was error. While the

PCR application lists an allegation of "[n]ot advised of right to appeal,"[4] no evidence related to this issue was presented at the PCR hearing.[5] Petitioner did not testify at the hearing and plea counsel was not questioned by either party about the issue. The issue was never actually raised to the PCR judge and is, therefore, not properly before this Court. 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)). In fact, Petitioner affirmatively waived this issue at the outset of the hearing when his counsel stated "we wish to proceed solely on the psychological ground." (App.p.44). Cf. State v. Dicapua, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007) (holding counsel's stated lack of objection to introduction of evidence at trial amounted to a waiver of any issue defendant may have had with this evidence). As there was no probative evidence to support the PCR judge's grant of a belated direct appeal, it must be reversed. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

[4] App.p.29.

[5] And the United States Supreme Court has held that plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal after a guilty plea only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR judge's ruling and deny the requested relief.

Respectfully submitted,

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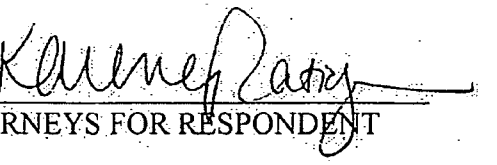
By: 
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November 21, 2014

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Ruben Ramirez,.....Petitioner,

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
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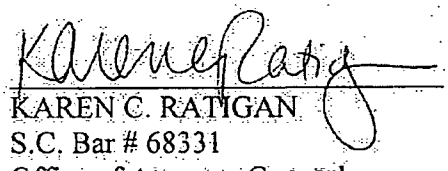
I further certify that all parties required by Rule to be served have been served. This 21st day of November, 2014.



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