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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Guilty Plea Judge
The Honorable G. Edward Welmaker, Sentencing Judge
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

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Appellate Case No. 2014-001834

John Forrest Ham, Jr., ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. Did the PCR court err in concluding Petitioner did not establish ineffective assistance of counsel because nothing in the plea transcript showed he did not understand the potential for consecutive sentencing where both Petitioner and plea counsel testified without contradiction at the PCR hearing that Petitioner believed the terms of his plea deal dictated that he would serve all of his sentences concurrently?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner for assault and battery with intent to kill (ABWIK) (2009-GS-23-9547, count 1), pointing and presenting a firearm (2009-GS-23-9548), resisting arrest with a deadly weapon (2009-GS-23-9549), failure to stop for a blue light (2009-GS-23-9554), and kidnapping (2009-GS-23-9570). (App.pp.105-06; pp.108-09; pp.111-12; pp.114-15; pp.117-18). Alex Stalvey, Esquire represented Petitioner.

On May 19, 2010, Petitioner pled guilty before the Honorable Edward W. Miller and sentencing was deferred. (App.pp.1-11). On September 1, 2010, Petitioner appeared before the Honorable G. Edward Welmaker for sentencing and received concurrent terms of 20 years for ABWIK, 5 years for pointing and presenting a firearm, 5 years for resisting arrest with a deadly weapon, and 3 years for failure to stop for a blue light. (App.p.28; p.107; p.110; p.113; p.116). Judge Welmaker levied a sentence of 22 years for kidnapping, to be consecutive to the sentence for failure to stop for a blue light. (App.p.29; p.119). Petitioner did not file an appeal.

Petitioner filed an application for post-conviction relief (PCR) on September 14, 2011 (2011-CP-23-6136). (App.pp.31-43). A hearing was held at the Greenville County Courthouse on June 18, 2014.[1] (App.pp.50-95). Petitioner was present and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina

[1] Petitioner also filed a PCR application for his convictions arising from a separate proceeding – where he had narcotics-related State Grand Jury charges and was represented by a different attorney (2012-CP-39-0177). For purposes of efficiency, the PCR hearing for that case was held at the same time as the hearing for this case – but the two applications were not consolidated. Petitioner has filed an appeal from the dismissal of his PCR action for his State Grand Jury cases (Appellate Case Number 2014-001608).

Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed August 5, 2014. (App.pp.97-104).

STANDARD OF REVIEW

The proper standard for 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, 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

The issue of whether Petitioner was aware he could receive consecutive sentences is not preserved for appellate review. Regardless, this issue is not supported by the record before this Court.

Petitioner argues he "did not understand he could receive consecutive sentences for his state charges." (Brief of Petitioner, p.8). Petitioner argues "plea counsel was deficient in allowing Petitioner to plead guilty while believing that all of his state and federal sentences would run concurrently." (Brief of Petitioner, p.9). This issue is not preserved for appellate review. Regardless, this issue is not supported by the record before this Court.

A. Issue Preservation

While the PCR judge's order of dismissal addresses an allegation that plea counsel did not ensure Petitioner would serve his sentence in federal custody,[2] it does not address any kind of allegation that plea counsel advised he would not receive consecutive sentences on these state court charges. The issue of consecutive sentences is not, in fact,

[2] App.pp.102-03.

addressed at all in the final order. As such, this issue 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."). 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)).

Further, if Petitioner believed he properly raised the issue of consecutive sentencing at the PCR hearing – and germane to the Greenville charges at issue in this case – he should have filed a Rule 59(e), SCRCP motion. As no such motion was filed in this case, the issue 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).

B. Issue Not Supported By The Record

Regardless, Petitioner's arguments are not supported by the record before this Court. While Petitioner argues plea counsel led him to believe his sentences would be concurrent and not consecutive, the testimony at the PCR hearing about consecutive sentencing was related to the claims in Petitioner's other PCR application (concerning the State Grand Jury convictions[3]) and was given by his attorney on those separate and unrelated charges.

[3] See supra footnote 1.

Underlying Facts

Petitioner's various Greenville County charges stem from three separate incidents. First, on August 2, 2009, Petitioner stabbed the victim after the two had a heated argument. Petitioner was charged with ABWIK. (App.p.8). Second, on August 28, 2009, an officer approached a vehicle parked on a dead end street and noticed a pistol on the floor near Petitioner (who was in the driver's seat). While Petitioner was ordered to exit the vehicle, he instead drove away and was able to elude police – who later identified him in a mug shot photograph. Petitioner was charged with failure to stop for a blue light. (App.pp.8-9). Third, on September 17, 2009, police were called after Petitioner was seen attempting to steal a license plate. Petitioner ignored orders to get on the ground and instead ran away. Petitioner approached a South Carolina Department of Disabilities and Special Needs (DDSN) van, pointed a pistol at the driver, and demanded she exit the vehicle. Petitioner drove the DDSN van – which still had one patient as a passenger – and attempted to elude police. After the DDSN van was shot several times, Petitioner exited and fled the scene, but was apprehended with a K-9 unit and a Taser . Petitioner was charged with pointing and presenting a firearm, resisting arrest with a deadly weapon, and kidnapping. (App.pp.9-10).

Guilty Plea Hearing

Petitioner pled guilty to these charges on May 9, 2010. The plea judge advised Petitioner of the sentence ranges for the charges and Petitioner said he understood. (App.pp.4-5). After the plea judge asked "[u]nderstanding the nature of the charges against you and the maximum possible punishment, how do you want to plead?" and

Petitioner replied "[g]uilty." (App.p.6). Petitioner stated he had not been made any promises in exchange for pleading guilty and stated he was guilty. (App.pp.6-7). After the assistant solicitor recited the facts of the case, he asked the plea judge to accept the plea and defer sentencing, noting "[Petitioner] has pled guilty in federal court on some separate charges that were also related to this incident. He is to be sentenced as soon as he is sentenced in federal court." The assistant solicitor confirmed this was to allow Petitioner to serve his time in federal custody. (App.p.11).

Sentencing Hearing

A sentencing hearing was held on September 1, 2010 in which Petitioner was sentenced on both sets of state court charges: (1) the Greenville charges at issue in this case and (2) unrelated narcotics charges prosecuted by the State Grand Jury. It was noted that Petitioner had been sentenced the previous day in federal court and would receive a federal sentence of 22-26 years. (App.pp.16-17).

The judge first took up the matter of the State Grand Jury charges. The assistant attorney general indicated there was a written plea agreement for these charges and that he "would like for them to run concurrent to that federal charge." (App.p.16). Petitioner's attorney for his State Grand Jury charges asked for the judge to follow the 15-year recommendation and for the sentences to be concurrent with his federal sentence. (App.p.18). The judge confirmed the recommendation was for concurrent sentences and the assistant attorney general agreed. (App.p.19). The judge followed the recommendation and levied a total sentence of 15 years imprisonment, to be concurrent to the federal sentence. (App.p.20).

The assistant solicitor then relayed the underlying facts of the various Greenville charges at issue in this case. (App.pp.21-24). There is no mention of a sentence recommendation.[4] Plea counsel then gave a mitigation argument. (App.pp.24-26). Plea counsel requested the judge "impose a fifteen year concurrent sentence on his charges," noting one of the charges Petitioner pled guilty to in federal court was the carjacking that arose from the theft of the DDSN van in this case. (App.p.25). A representative of the father and sister of the patient who was in the DDSN van when it was stolen relayed their request "that whatever sentence that Your Honor imposes that it be ran consecutive to the time that he's already been sentenced." (App.pp.26-27). The assistant solicitor recited Petitioner's lengthy prior record – at the judge's request – and the judge imposed sentence. (App.p.27). The judge levied a total sentence of 20 years imprisonment for the following charges: ABWIK, pointing and presenting a firearm, resisting arrest with a deadly weapon, and failure to stop for a blue light. The judge then levied a 22-year sentence for kidnapping, to be consecutive to the 3-year sentence for failure to stop for a blue light. (App.pp.28-29).

PCR Hearing

As noted supra in footnote 1, the PCR hearing in this case was actually a joint hearing on the separate PCR applications regarding the Greenville charges (the case at bar) and the State Grand Jury charges. While a single attorney represented Petitioner in both actions, each case was handled by a separate attorney for Respondent. Petitioner

[4] The sentencing sheets indicate Petitioner was pleading guilty to these Greenville charges without a recommendation. (App.p.107; p.110; p.113; p.116; p.119).

was called as a witness, as was plea counsel in this case and plea counsel from the State Grand Jury case.

Petitioner stated the plea attorneys for both of his cases, the state prosecutor, the federal prosecutor, and his federal public defender agreed "that they would let me be in federal custody when I got sentenced and do my time in federal prison and run all my state time concurrent corn [sic] with it." (App.pp.60-61). Petitioner stated the prosecutor for the State Grand Jury charges visited him in prison and said "they was going to make that happen." (App.pp.61-62). Petitioner stated he believed he would serve his sentence in federal prison and that the state sentences would be concurrent. (App.p.63; p.73).

Plea counsel testified there was "no possible defense" to the third incident (the pointing and presenting a firearm, resisting arrest with a deadly weapon, and kidnapping charges) and that

> [w]e would try to help him get sentenced and do his time in the Federal Bureau of Prisons instead of the South Carolina Department of Corrections. So, that's what we were trying to do. You know, we couldn't guarantee that. We couldn't promise him that we could do that. I had no control over what happened in the federal case. But I mean, that was -- that was what we were going to try to do to help him.

(App.p.78). Plea counsel stated he would not have made any promises to Petitioner that he would have been allowed to serve his federal sentence first. (App.p.83).

As Petitioner did not allege that plea counsel advised he would not receive consecutive time on these charges, this issue – as noted supra – was not addressed in the PCR judge's order of dismissal. Instead, the order of dismissal addressed Petitioner's contention that plea counsel represented he would serve his sentence in federal custody.

(App.pp.102-03). The issue as framed by Petitioner in his brief is not supported by the record before this Court. The issue of whether Petitioner was misadvised about the issue of a consecutive sentence was not discussed in relation to the charges in this case.[5]

There was no plea recommendation in this case and plea counsel testified he did not make any promises to Petitioner about how his sentences would be served. The PCR judge found plea counsel's testimony to be credible. (App.p.102). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). And plea counsel's testimony is supported by the plea transcript. Cf. Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). Petitioner acknowledged he was aware of the maximum and minimum sentences for his charges. Petitioner stated he had not been made any promises in exchange for his guilty pleas. Petitioner failed to mention at either his guilty plea hearing or subsequent sentencing hearing that he believed he was pleading guilty in exchange for

[5] Rather, Petitioner's attorney on his State Grand Jury charges provided limited testimony about the possibility of a consecutive sentence in that case. Petitioner's attorney on his State Grand Jury charges stated: Petitioner's chief concern was to serve his sentence in the federal system, he did not believe anyone involved with his case was angling for consecutive sentences, and he did not discuss consecutive sentencing with either plea counsel or Petitioner's federal public defender. (App.pp.86-88).

a concurrent sentence. In contrast to the State Grand Jury charges, there was no recommendation in this case. Rather, plea counsel merely requested during his mitigation argument that the judge impose a fifteen-year concurrent sentence. While Petitioner may have been hopeful that the judge would sentence him to concurrent sentences, he clearly knew the only recommendation was for the State Grand Jury charges and that there was no recommendation on the charges in the instant case. See Holden v. State, 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (citing Roddy v. State, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000)) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.").

Petitioner has failed to prove any of the allegations in the Brief of Petitioner. His allegation that plea counsel advised he would receive a concurrent sentence on these charges is not preserved for appellate review. Further, this allegation is not supported by the record in this case. Testimony regarding consecutive sentencing was given by Petitioner's plea counsel on his State Grand Jury charges – not plea counsel in this case. Accordingly, Petitioner has not demonstrated he is entitled to any form of post-conviction relief related to his Greenville charges.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

November 19, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Guilty Plea Judge
The Honorable G. Edward Welmaker, Sentencing Judge
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2014-001834

John Forrest Ham, Jr., ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail, addressed to:

Benjamin John Tripp, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 19th day of November, 2015.

KAREN C. RATIGAN, S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

November 19, 2015

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

Re: **John Forrest Ham, Jr. v. State of South Carolina**
Appellate Case No. 2014-001834
Lower Court Case No. 2011-CP-23-6136

Dear Mr. Shearouse:

Attached are the original and thirteen (13) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc

cc: Benjamin J. Tripp, Esquire
Trisha Allen, Victim Services