STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Pickens County
Robin B. Stilwell, Circuit Court Judge
2012-CP-39-00177

Appellate Case No. 2014-001608

JOHN FORREST HAM, JR., #240615,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Did the PCR Court err is dismissing the Petitioner's application and enforcing the written plea agreement where the Petitioner waived his rights to a direct appeal and post-conviction relief?

STATEMENT OF THE CASE

The Petitioner is presently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the State Grand Jury Clerk of Court. Petitioner was indicted at the October 2008 term, with a Superseding Indictment at the June 2009 term of the State Grand Jury for: Count 3 - trafficking methamphetamine, 400 or more grams (conspiracy); Count 13 - distribution of methamphetamine; Count 14 - trafficking methamphetamine (400 or more grams); Count 15 – simple possession of marijuana; Count 16 - trafficking methamphetamine (28-100 grams); and Count 17 - trafficking cocaine (10-28 grams) (2008-GS-47-0011). R. Mills Ariail, Jr., Esquire represented the Applicant.

On April 9, 2010, Petitioner pled guilty to Count 1 – trafficking methamphetamine, 28-100g (conspiracy); Count 13 - distribution of methamphetamine; Count 14 - trafficking methamphetamine, 28-100g; Count 15 – simple possession of marijuana; Count 16 - trafficking methamphetamine, 28-100g; and Count 17 - trafficking cocaine (10-28 grams). On September 1, 2010, the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of fifteen (15) years for trafficking methamphetamine, 28-100 grams (conspiracy), fifteen (15) years for distribution of methamphetamine, fifteen (15) years for two counts of trafficking methamphetamine (28-100 grams), thirty (30) days for simple possession of marijuana, and ten (10) years for trafficking cocaine (10-28 grams). The Applicant did not appeal his conviction and

sentence.

Petitioner filed an Application for Post-Conviction Relief on February 7, 2012. The Return was filed on or about July 31, 2012. Respondent filed an Amended Return and Motion to Dismiss on or about May 13, 2014. A hearing was held on June 18, 2014, before the Honorable Robin B. Stilwell.[1] Rodney W. Richey represented the Petitioner. Assistant Attorney General Ashley A. McMahan represented the Respondent. The Respondent's Motion to Dismiss was granted on or about July 6, 2014. The Notice of Appeal was filed on July 20, 2014. Petitioner filed his Petition for a Writ of Certiorari on March 4, 2015. Certiorari was granted on June 19, 2015.

[1] Petitioner also filed a PCR application for his convictions arising from a separate proceeding from Greenville County and was represented by a different attorney (2011-CP-23-06136). 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 never consolidated into one matter. Petitioner has also filed an appeal from the denial of his PCR action for this Greenville case. (Appellate Case Number 2014-001834).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence" exists to sustain the post-conviction relief judge's findings. Moore v. State, 399 SC 641, 646, 732 SE2d 871, 873 (2012). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The reviewing Court "gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). Accordingly, the reviewing Court will affirm the PCR court's findings if any evidence of probative value exists in the record. Narciso v. State, 397 SC 24, 34-35, 723 SE2d 369, 374 (2012). The appellate court must reverse where the PCR judge's decision is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

ARGUMENT

The PCR Court did not err in dismissing Petitioner's application and enforcing the written plea agreement where the Petitioner waived his rights to direct appeal and post-conviction relief.

Petitioner claims that he did not voluntarily waive his right to a PCR. The record refutes this assertion. A waiver of appellate and PCR rights will be held effective only if it is knowing and voluntary. Spoone v. State, 379 SC 138, 142, 665 SE2d 605, 607 (2008). However, a defendant can still challenge the attorney's conduct in advising a defendant to enter into the waiver. Sanders v. State, 412 SC 611 (2015). In order to determine whether a waiver of the right to appeal and PCR is voluntarily, knowingly, and intelligently made, it is necessary to look at the particular facts and circumstances of the case including: 1. The background, experience, and conduct of the accused, 2 the text of the plea agreement, and 3 the transcript of the plea hearing. Spoone at 143, 608.

Petitioner graduated from high school and was familiar with the court system at the time of this plea. *See* App. p. 5, lines 10-13; Supp. App. p. 1-2; Supp. App. p. 23, lines 4 – 12; Supp. App. p. 50, lines 12-18. Certainly someone that has graduated from high school and has admitted that he can read, write, and speak the English language is intelligent enough to know what type of agreement he is entering into and what that agreement entails. *See* Supp. App. p. 23, lines 16-25. Secondly, the text of the plea agreement is straightforward. In reads in pertinent part: "...understands that he has a right to file a post-conviction relief (PCR) action in this case but agrees to knowingly and

voluntarily waive any post-conviction relief action." Supp. App. p. 7, subpart 12. The agreement was signed by the Petitioner and his attorney. Supp. App. p. 8.

As for the third prong, the Court questioned the Petitioner about plea agreement:

THE COURT: Now I have before me an agreement that's been signed by you and your attorney and the State. Are you – do you understand this agreement?

MR. HAM: Yes, sir.

THE COURT: And you've gone over it with your attorney?

MR. HAM: Yes, sir.

THE COURT: And you understand it's binding upon you if I accept this plea?

MR. HAM: Yes, sir.

App. p. 6, lines 3-11.

Furthermore, trial counsel stated that the Petitioner signed the plea agreement voluntarily and that he discussed all parts with the Petitioner. App. p. 167, line 18 – p. 168, line 12. ("We went over it in detail.") Petitioner voluntarily signed the plea agreement. App. p. 167, lines 21-22. Petitioner is has not challenged or attacked counsel's advice to waive PCR in this proceeding. Rather, Petitioner is attacking how the Federal Bureau of Prisons determined he was in state custody.

Based on the foregoing, Petitioner's waiver of the right to file a PCR was

done knowingly, voluntarily, and without attacking or challenging the effectiveness of counsel's advice to agree to the waiver of PCR. Therefore, the PCR Court did not err in dismissing the application.

Ineffective Assistance of Counsel

Whether or not trial counsel was ineffective is not preserved for appellate review because the order of dismissal does not address ineffective assistance of counsel. "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." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 69, 693-941 (2003). *See also* Summersell v. S.C. Dep't of Pub. Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) ("The circuit court did not specifically address the issue, and where an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review." (*citing* Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997))); *See also* 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.")

Accordingly, ineffective assistance of counsel is now being raised for the first time and is not preserved for review by this Court. As such, this Court should affirm the lower court's ruling.

However, Petitioner claims that trial counsel was ineffective because his federal and state sentences are running consecutively. Specifically because counsel failed to ensure the Petitioner was in Federal custody prior to pleading guilty on state charges and for failing to put in the plea agreement that the Petitioner would serve his time in a federal prison. These claims are without merit

To establish a claim of ineffective assistance of counsel, the PCR applicant must prove: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant's case. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). When challenging a conviction entered after a guilty plea, the Applicant must show that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001).

The plea agreement was in writing. The State recommended concurrent sentences in that agreement and both the Petitioner and counsel signed it. The record reflects a herculean effort by trial counsel to try to have the federal and state sentences run concurrently. "He is pleading guilty to a written plea agreement.... He has been sentenced...on a federal charge...we would like for them to run concurrent with the federal charge." App. p. 32, lines 19-25. "It is our hope that ... [the court] would go with the recommendation and give him concurrent time." App. p. 34, lines 1-4. "[W]e just hope that you could give him

the recommendation of fifteen years and let him serve that time in the federal system." App. p. 34, lines 15-17. "This is to be concurrent to the federal sentence...and be given credit for time served." App. p. 36, lines 12-14. "This will be concurrent to that federal sentence of August 31, 2010." App. p. 44, lines 17-18. Furthermore, at Petitioner's federal sentencing his public defender stated the following:

> [M]y client has pending state charges that he has pled to in Greenville County. He has pending awaiting to be sentenced on state charges in Pickens County and he's waiting to be sentenced on State Grand Jury. All three of those are scheduled for tomorrow. I've had the cooperation of John [C]rout, the State Attorney General's Office, from Mark Moyer from the Solicitor's Office, from Max Cauthen from Judge Stilwell and from Mills Ariail to arrange to get this man out of state custody and into federal custody for today...so a lot of people have done a lot of work for him to get this whole sentencing set up in this fashion. Supp. App. p. 71, lines 8-20.

However, the Bureau of Prisons ultimately decided that the Petitioner was not in federal custody at the time of his federal plea after they had indicated otherwise. This is something outside of the control of the State. It is important to note the Federal Public Defender's efforts to try to rectify that issue:

> On August 27, 20110 Judge Robin B. Stilwell signed an order releasing Ham to Federal custody. Prior to this Order being issued I submitted [the] proposed order to the US Marshal to make sure that it would put Ham in federal custody. I was informed that the Bureau of Prisons had approved the Order. After BOP approval it was submitted to and signed by the state judge and Ham was released to federal custody.
>
> ...
>
> Prior to his assignment to a federal facility, the BOP informed

> the US Marshal that, the Order they had approved on August 27, 2010, did not in fact transfer Ham to the federal custody and that since he had been in state custody when he received his federal sentences they would not accept him in the BOP until he has satisfied all of his state sentences. This doubles Ham's total sentence to over 51 years.
>
> After receiving his federal sentence Ham filed a [federal] appeal and jurisdiction of the case was transferred to the appellate court. Ham was informed that I had explained his situation to the federal judge and that the judge was willing to re-sentence Ham and to order that the federal sentenced begin the date of the original federal sentence and that he begin serving his sentence in the state system. It was explained to Ham that to accomplish this it would be necessary to dismiss his direct appeal and return jurisdiction to the district court. It was also explained that he could file a new appeal after receiving his new sentence. **Ham chose not to be re-sentenced and elected for his sentence to remain at over 51 years.**
>
> The destruction of all this hard work was when the BOP decided that the previously BOP approved order did not transfer custody of Ham to the federal government. This appears to be a monetary decision. At current cost the BOP saved over $500,000.00 when they refused to take Ham. Supp. App. P. 135-135. Emphasis added.

The issue regarding the federal sentence was settled in Federal Court. The District Court of South Carolina, Greenville Division addressed this issue in *United States of America v. John Forrest* Ham, Cr. No. 6:10-46-TMC. Supp. App. p. 138-151. The Honorable Timothy M. Cain noted in his order:

> The Bureau of Prisons (BOP) apparently concluded that Ham could not serve his state and federal sentences concurrently while in a federal facility because the BOP determined that Ham was not in federal custody when he was sentenced in federal court. [D]efense counsel states that he had explained the situation to the [federal] sentencing judge and the judge was willing to re-sentence Ham, which would have allowed

> Ham to serve his sentences concurrently. (citations omitted.) Ham...had to first dismiss his pending direct appeal. [H]am, however, chose not to be re-sentenced. ...Ham's failure to withdraw his appeal and be re-sentenced was his decision... Supp. App. p. 150.

Furthermore, trial counsel testified that he "couldn't give him any guarantees or say [concurrent sentences] is going to be for certain because I've been to federal court and most of the judges, the time you're over there, say we can't tell the Bureau of Prison to do anything." App. p. 161, lines 22-25. "[The federal public defender] thought [it] was going to work to try to get him into the Bureau of Prisons" App. p. 162, lines 1-3.

Even assuming *arguendo* that trial counsel was ineffective, Petitioner can't meet the second prong of Strickland, that the outcome would have been different. Based on trial counsel's testimony, Petitioner wasn't going to not plead guilty. App. p. 164, lines 6-9. The outcome would have still been the same. Petitioner still would have pled guilty and still would have been sentenced accordingly. "[F]rom the beginning, he came to me, acknowledged his guilt..." App. p. 33, lines 12-14. "The question of guilty was never an issue." Supp. App. p. 134. "At no time did – was this – I don't think [the BOP issue] was going to hang it up to be able to say he wasn't going to plead because of that. Because he was going to get a lot more time if we went to trial. And...we both knew that." App. p. 164, lines 5-9. "[Petitioner] understood, you know, he didn't want to be in the Department of Corrections. That's why we were trying to help him that route. And that's what I was trying to do and I think that was – but I don't think it was

going to hang up the pleas in this based on if I said 'no, you can't go to the Bureau of Prisons.' From my recollection of conversations with him." App. p. 165, lines 4-10.

In fact, it was in Petitioner's hands as to how to get his federal and state sentences to run concurrently – by dismissing his 4th Circuit appeal and being re-sentenced in federal court. Petitioner chose not to do this. *See* Supp. App. p. 134 – 136. The fault lies with the Petitioner, not with trial counsel. *See* Supp. App. p. 150.

The Petitioner's request for relief to "remand [t]his case to the lower court with an order that Petitioner is be immediately released into federal custody, resentenced on his state charges only after he is in federal custody..." is extreme. State court, by its very nature, only operates within the state boundaries and is separate and distinct from the federal government. "Although federal and state courts form one system of jurisprudence, federal courts have no general supervisory power over the state courts, and there is nothing a state court can do to affect federal practice and procedure." Limehouse v. Hulsey, 404 SC 93, 104, 744 SE2d 566, 572 (2013) *citing* 21 C.J.S. Courts § 274 (Supp.2013).

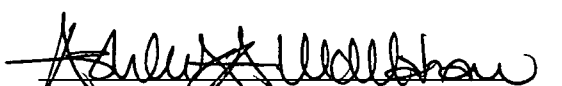
CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and affirm the conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEY A. McMAHAN
Assistant Attorney General

By: 
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STATE OF SOUTH CAROLINA
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Appellate No.: 2014-001608

John Forrest Ham, Jr. #240615,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

CERTIFICATE OF SERVICE

I certify that a true copy of the Brief of Respondent has been served on Tiffany L. Butler, Esquire at the SC Office of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 on this 20th Day of November, 2015.

ASHLEY A. McMAHAN
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SWORN TO BEFORE ME this 20th
day of November, 2015

_____(L.S.)
Notary Public for South Carolina
My commission Expires: October 13, 2019.

ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

November 20, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
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RE: **John Forrest Ham, #240615 v. State of South Carolina**
2012-CP-39-00177
Appellate No.: 2014-001608

Dear Mr. Shearouse:

Please find enclosed the Brief of ~~Petitioner~~ Respondent with Certificate of Service along with fifteen copies.

Should you have any questions, please contact me at the number listed below.

Best regards,

Ashley A. McMahan
Assistant Attorney General

AAM
Enclosures

cc: Appellate Defender Tiffany L. Butler