STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2014-001288
Lower Case No. 2010-CP-38-0292

Reginald Montgomery, #257290, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF THE ISSUE ON APPEAL

Did the PCR judge err in refusing to find appellate counsel ineffective for not raising on direct appeal the trial judge's failure to declare a mistrial when the State violated the discovery rules by failing to notify the defense that the assistant solicitor showed a photo line-up to witness April Johnson and she identified Petitioner Montgomery?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Petitioner was indicted at the December 2006 term of the Orangeburg County Grand Jury for Armed Robbery (2006-GS-38-2052). (App. p. 320-22). Petitioner was represented by Thomas R. Sims, Esquire. On April 3, 2007, Petitioner proceeded to trial before the Honorable J.C. Nicholson. Petitioner was convicted by the jury of Armed Robbery and was sentenced to twenty-two (22) years' imprisonment. Id.

A notice of appeal was filed, and Wanda H. Carter, Esquire, of the South Carolina Commission on Indigent Defense, perfected an Anders[1] brief and petitioned to be relieved as counsel. The South Carolina Court of Appeals dismissed the appeal and granted Counsel Carter's motion to be relieved. State v. Montgomery, Unpublished Op. No. 2009-UP-134 (S.C. Ct. App. filed March 9, 2009). The remittitur was sent on March 25, 2009.

Petitioner filed an application for post-conviction relief (PCR) on February 23, 2010. (App. p. 323-29). An evidentiary hearing convened on December 1, 2011, before the Honorable Diane S. Goodstein. Belinda Davis-Branch, Esquire, represented Petitioner, and the State was represented by Mary S. Williams, Esquire. Judge Goodstein denied Petitioner relief by order filed on May 27, 2014. (App. p. 397-409). Petitioner filed a notice of appeal and a Petition for Writ of Certiorari was filed on December 8, 2014. The Return was filed on February 23, 2015. This Court granted the Petition for Writ of Certiorari on April 22, 2015. The Brief of Petitioner was filed on August 19, 2015. This Brief of Respondent follows.

[1] Anders v. California, 386 U.S. 738 (1967).

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 Court did not rule on whether Counsel Carter was ineffective in failing to brief Judge Nicholson's denial of the mistrial motion.

Petitioner asserts that appellate counsel was ineffective in her representation. Specifically, Petitioner argues that appellate counsel was deficient in not raising the issue of whether the trial court erred in failing to declare a mistrial because of an alleged violation of the discovery rules or prosecutorial misconduct. Petitioner argues the assistant solicitor was required to turn over a photo line-up where Witness April Johnson (April) identified Petitioner. Petitioner believes Counsel Carter was ineffective by failing to raise the denial of Counsel Sims's motion for a mistrial as an issue in her brief. Respondent submits this issue is without merit. This issue is not preserved for this Court's review as the PCR Court did not rule on the issue. Furthermore, an appeal of the trial court's ruling would have been futile. Finally, the South Carolina Court of Appeals' dismissal after an Anders review indicates it also found this issue to be meritless.

How the Issue was Raised at Trial

Petitioner was charged, tried, and convicted of armed robbery. Evidence adduced at trial showed that two men entered a 24-hour Shell gas station in Bowman, S.C. One was armed with a pistol equipped with a laser sight. (App. p. 93, lines 5-12). The other man approached the clerk, Nicholas Herrington, who recognized one of the perpetrators as a former schoolmate who had been in the store just a few nights before. (App. p. 149-50). Herrington gave a statement to investigators that implicated his former schoolmate James Green. Id.

Green testified as a State's witness at Petitioner's trial. Green admitted he was the

man holding the gun during the robbery and testified that Petitioner was the man who approached Herrington to retrieve the money from the register. (App. p. 122-25). Green testified that he, Petitioner, and Shawon Johnson (Shawon) met at a club in Bowman on the evening in question. (App. p. 199, lines 2-7). While walking to Green's house from the club they discussed committing a robbery on the way. (App. p. 119, line 22 – p. 120, line 9). According to Green, the three return to his house where Shawon gave Green the pistol he had been carrying. (App. p. 121, lines 13-14). Petitioner and Green then left Shawon at Green's house to commit the robbery at the Shell station. (App. p. 121, lines 16-22).

Shawon Johnson's sister, April Johnson, testified that Green and Petitioner came to her house looking for a ride after they had committed the robbery. (App. p. 175, lines 8-25). April drove Petitioner and Green to Green's house in her white Mustang. Officers roved the area for potential suspects and saw the Mustang leave and return. (App. p. 164, line 16 – p. 165, line 13). April Johnson reported that Green and another man had come by for a ride. (App. p. 165, line 19 – p. 169, line 21).

At trial, Counsel Sims made a motion for a mistrial following April's in court identification of Petitioner as the person in her car with Shawon. On cross-examination, Counsel asked about her written statement in which she stated she had never seen the other individual before. (App. p. 173, line 3 – p. 179, line 25). April Johnson insisted that she had seen the man before but had never seen him with Green and did not know his name. Counsel Sims eventually asked whether April Johnson had been shown a photographic lineup. To his surprise, she responded that she had been shown a lineup by the solicitor. (App. p. 182, lines 2-20). Counsel Sims then moved for a mistrial based on

the prosecution's failure to disclose the lineup. (App. p. 191, line 21 – p. 192, lines 17). Counsel Sims argued that because the lineup had not been disclosed prior to trial he had lost he opportunity to move for suppression of the identification. (App. p. 195, lines 6-17; p. 198, lines 3-10). Counsel Sims also stated he had prepared for trial based on April Jonson's statement which indicated she did not know who the man with Green was. (App. p. 197, line 14 – p. 198, line 3).

The solicitor initially stated that he had not shown April Johnson a photo lineup, only a booking photo which had been provided in discovery during an interview in his office shortly before trial. (App. p. 193, line 2 – p. 195, line 5). The solicitor then corrected himself, stating that he had shown April a six-photograph lineup, the same lineup shown to Green by law enforcement. (App. p. 200, lines 2-15). The trial court denied the motion for a mistrial. (App. p. 201, lines 10-20).

PCR Hearing and Order of Dismissal

Counsel Carter was unavailable to testify at the PCR hearing. (App. p. 391-92). Both parties agreed to allow Counsel Carter to submit an affidavit. Id. Counsel Carter submitted, in response to the allegation that she was ineffective in failing to raise certain issues on appeal, that there was "no indication **from the record** that prosecutorial misconduct . . . occurred at trial." See Carter Affidavit (emphasis in original).

The PCR Court found appellate counsel was not deficient in any aspect of her representation. See Order of Dismissal (App. p. 397-409). The PCR Court ruled that appellate counsel did in fact brief the photo line-up issue in her Anders brief. (App. p. 408). The PCR Court also found Petitioner failed to meet his burden to prove that the result of the trial would have been different had the photo identification been raised in a

merits brief. Id.

A. The issue regarding Counsel Carter's failure to brief Judge Nicholson's denial of the mistrial motion was not raised nor ruled upon.

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. 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."); State v. Sheppard, 391 S.C. 415 --, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C 461, 719 S.E.2d 640 (2011).

Respondent submits this issue is not preserved for this Court's review. The allegation that appellate counsel was ineffective for failing to raise the issue of prosecutorial misconduct was not ruled upon by the PCR Court. The Order of Dismissal does not address the issue of whether appellate counsel was ineffective in failing to raise the issue of a discovery violation or prosecutorial misconduct. The Order does fully

address the allegation that Counsel Carter should have raised the issue of an illegal show-up identification in her brief. This specific issue was also not raised at the PCR hearing. Petitioner also failed to file a Rule 59(e), SCRCP, in an attempt to have the PCR Court rule upon the issue. This Court should find this allegation is not preserved.

B. Counsel Carter was not deficient in failing to raise the trial judge's denial of Petitioner's motion for a mistrial because it is a frivolous issue.

Assuming *arguendo* that this Court finds the issue is preserved, it is wholly without merit. Counsel Carter stated that, in her opinion, "there was no indication **from the record** that prosecutorial misconduct . . . occurred at trial." See Carter Affidavit (emphasis in original). This was a reasonable and strategic determination made by appellate counsel to not raise she seemed unsupported by the record.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme

Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86,

120 S. Ct. at 764).

Here, Counsel Carter determined from the record that there was no indication of prosecutorial misconduct or a violation of discovery rules. Because Counsel Carter did not believe the issue to be meritorious, she chose to brief another issue, albeit pursuant to Anders. She raised a similar issue regarding the admissibility of April's identification of Petitioner. Since Counsel Carter articulated a reason for not challenging the trial court's decision to allow April Johnson's show-up identification into evidence, she was not deficient in failing to frame her argument as one of prosecutorial misconduct or a discovery rules violation.

C. If the issue had been raised, it would not have been successful on appeal.

Petitioner was not prejudiced by the brief submitted by Counsel Carter because he would not have been successful on appeal had Counsel Carter argued the trial court erred in denying the motion for a mistrial. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (no prejudice where there is no merit to arguments that were not briefed). Petitioner also suffered no prejudice because the Court of Appeals conducted an Anders review and ultimately dismissed the appeal.

First, Judge Nicholson did not err in allowing April's identification to be admitted. "The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Foster, 354 S.C. 614, 620, 582 S.E.2d 426 (2003). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id at 621, 582 S.E.2d at 429. To warrant reversal, an appellant must show not only an alleged error, but also resulting prejudice. State v. Fulton, 333 S.C. 359, 363-64, 509 S.E.2d 819, 821 (Ct. App. 1998). There was

no abuse of discretion in allowing the identification, including the lineup, to be admitted.

Notably, the State presented overwhelming evidence in support of its case at trial. The testimony of accomplice Green and of Herrington, the gas station clerk, was particularly devastating to Petitioner's defense. Since this evidence overwhelmingly indicates Petitioner's guilt, he would not have been successful on appeal if Counsel Carter had challenged Judge Nicholson's denial of the motion for mistrial on prosecutorial misconduct grounds or as a violation of the discovery rules. A harmless error analysis would apply.

Second, Petition has not shown he was prejudiced by appellate Counsel Carter's decision to file an Anders brief because the Anders procedure ensures that no meritorious issues are overlooked. In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), this Court outlined the Anders procedure as follows:

> [A]ccording to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant 'the assistance of counsel to argue the appeal.' The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal.

McKennedy, 348 S.C. at 279, 559 S.E.2d at 855. While this Court does not recognize a presumption of no prejudice in such cases, the fact that the Court of Appeals dismissed the appeal and did not order briefing on any issue can be considered by this court in its determination. This Court has made clear that a Strickland analysis applies even when an Anders brief has been submitted. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 n.6 (2009) (citing Smith v. Robbins, 528 U.S. 259, 284, 120 S. Ct. 746, 145 L.E2d

756 (2000). When applying this standard, Petitioner is unable to prove prejudice.

Accordingly, this Court should consider the Court of Appeals' review of this preserved issue. See McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) ("Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991))). The issue of April's identification is clearly apparent from the face of the transcript. If the Court of Appeals believed the trial court's ruling was questionable, it would have directed counsel to file a merits brief.

Furthermore, the United States Supreme Court has indicated applicants face a difficult burden to prove prejudice in cases where counsel has filed an Anders brief. Smith v. Robbins, 528 U.S. 259, 287 (2000) ("[I]n most cases in which a defendant's appeal has been found, pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous."). The burden is high because "it is reasonable to presume that when the court affirms an Anders appeal it has fully considered and rejected all potential issues that were apparent on the face of the record." Towbridge v. State, 45 So. 3d 484, 487 (Fla. Dist. Ct. App. 2010). The Anders procedure requires the court to independently examine the trial proceedings and consider "any errors apparent on the face of the record." Id at 486-87 (citations omitted); see also McHam, 404 S.C. at 475, 746 S.E.2d at 46 (appellate court reviews all preserved issues for merit). The Georgia Supreme Court has gone so far as to do away with Anders briefs. See Huguley v. State, 253 Ga. 709, 710, 324 S.E.2d 729 (1985). The Georgia court refuses to grant counsels' motions to be relieved pursuant to Anders because the Anders process "is unduly burdensome in that it tends to force the

court to assume the role of counsel for appellant." Id. Petitioner's argument essentially challenges the Court of Appeals' decision in dismissing the appeal. Therefore, this Court should note that the Court of Appeals' compliance with the Anders procedure included a review of the trial court's denial of the motion for mistrial, and its dismissal indicated it found no fault with those rulings. Accordingly, Petitioner has not demonstrated that he was prejudiced in any manner.

Therefore, Petitioner's argument is not preserved but also lacks merit under a comprehensive analysis. The PCR Court's ruling should be upheld.

CONCLUSION

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

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

December 30, 2015

STATE OF SOUTH CAROLINA
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APPEAL FROM ORANGEBURG COUNTY
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Appellate Case No. 2014-001288

Reginald Montgomery,.....Petitioner,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Kathrine H. Hudgins, Appellate Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 30th day of December, 2015.

J. CLAYTON MITCHELL
ATTORNEY FOR RESPONDENT

SWORN to before me this 30th day of December, 2015.

Notary Public for South Carolina.
My Commission Expires: April 28, 2015

ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

December 30, 2015

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

Re: Reginald Montgomery v. State of South Carolina
Appellate Case No. 2014-001288

Dear Mr. Shearouse:

Enclosed for filing are the original and thirteen (13) copies of Respondent's Brief of Respondent.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
S.C. Bar No. 101443

JCM/jcb
Enclosures

cc: Katherine Hudgins, Esquire
Trisha Allen, Victim's Services