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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000124

Anthony Maurice Lounds, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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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QUESTIONS PRESENTED

1. Did trial counsel err in failing to inquire into and communicate to Petitioner the State's plea offers presented in the case?

2. Did trial counsel err in failing to call defense witnesses Brigham Young and Zeldric Vance, both of whom testified at the PCR hearing, to testify at trial because both of these witnesses would have provided favorable testimony for the defense by offering testimony that Petitioner was not guilty as neither a principle [sic] nor an accomplice liability [sic], and by presenting testimony that the case was a drug deal gone awry rather than a robbery in the first place?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the November 2010 term of General Sessions for armed robbery (2009-GS-23-10155, count 1) and possession of a weapon during commission of a violent crime (2009-GS-23-10155, count 2). (App.pp.334-35). Scott D. Robinson, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On July 13, 2011, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of life imprisonment without parole for armed robbery and 5 years for possession of a weapon during commission of a violent crime. (App.p.236).

A notice of appeal was filed at the South Carolina Court of Appeals. Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Lounds, Op. No. 2013-UP-289 (S.C. Ct. App. filed June 26, 2013. The remittitur was sent on July 17, 2013.

Petitioner filed an application for post-conviction relief (PCR) on August 2, 2013 (2013-CP-23-4178). (App.pp.239-45). A hearing was held at the Greenville County Courthouse on October 21, 2014. (App.pp.251-322). Petitioner was present and represented by R. Mills Ariail, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Letitia H. Verdin denied relief in an order filed December 19, 2014. (App.pp.324-33).

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 issue of whether trial counsel was deficient in his inquiry into or conveyance of plea offers is not preserved for appellate review.

Petitioner argues trial counsel was deficient because he failed to "inquire into and communicate" to him any plea offers from the State. This issue, however, is not preserved for appellate review because it was not addressed in the final order of dismissal. As such, it was not raised to and ruled upon by the PCR judge and 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 also 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)). While there may have been some testimony about plea offers at the PCR hearing, Petitioner did not file a post-trial motion to alter or amend the order to include a ruling on this issue. In the absence of such a post-trial motion, this Court may not review

the issue on appeal. 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).

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was deficient in not calling certain witnesses at trial.

Petitioner argues trial counsel was deficient in not calling Brigham Young and Zeldric Vance as defense witnesses at his trial because these witnesses would have testified the incident in this case was not an armed robbery. Petitioner's argument is without merit.

A.

At the PCR hearing, Petitioner stated he told trial counsel's investigator that the man in the Ingles video with him was someone he knew by his street name, Al Capone. (App.pp.261-62). Petitioner stated his family later "got his name" and told the investigator this person was Brigham Young. (App.p.261). Petitioner stated Young asked him for a ride to the motel, that they saw Anthony Watkins and Zeldric Vance there, and that Young spoke to someone about marijuana and received a checkbook. (App.p.263). Petitioner stated Watkins and Vance could have testified there was no robbery. (App.p.263). Petitioner stated his prior attorney had said Watkins and Vance would testify at his trial but that trial counsel did not call them. (App.pp.268-70). Petitioner also stated Young was not allowed to testify at his trial. (App.p.264).

Brigham Young stated he had known Petitioner for years. (App.p.287; pp.294-

95). Young stated he went to the motel that night and sold marijuana to someone. Young stated this person did not have any cash, so he gave Young his identification card and checkbook. (App.pp.291-92). Young stated he asked Petitioner to give him a ride to Ingles and he used a check there. (App.pp.292-93; p.295). Young stated there was no robbery. (App.p.294). Young stated he came to the courthouse for Petitioner's trial but was not allowed to testify. (App.pp.288-89).

Zeldric Vance stated he knew Young but did not know Petitioner. (App.pp.297-98). Vance stated he was at the motel that night and saw Young receive a checkbook. (App.pp.298-301). Vance stated he would have testified at trial that this was a drug deal, not a robbery. (App.p.302).

Trial counsel confirmed he had an investigator working on Petitioner's case. (App.pp.304-05). Trial counsel testified he did not know whether Young's name was ever provided to him prior to trial because Petitioner did not know this person's name (and referred to him as "Allen" when he spoke to detectives). (App.pp.307-08). Trial counsel testified he would have asked his investigator to follow up if he had been given Young's name. (App.p.308). Trial counsel testified he subpoenaed any witnesses that Petitioner requested. (App.p.308). Trial counsel noted Petitioner admitted to being in the motel room and then later at Ingles when the check was cashed. (App.p.312). Trial counsel also noted he did not believe it would have been a good trial strategy to argue this was a drug deal instead of an armed robbery. (App.pp.308-09).

B.

In denying Petitioner's application for post-conviction relief, the PCR judge found

Petitioner failed to meet his burden of proving both that trial counsel was ineffective and that he was prejudiced as the result of trial counsel's representation. (App.pp.324-33).

C.

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) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

D.

Deficiency

Petitioner failed to meet his burden of proving trial counsel failed to render reasonably effective assistance under prevailing professional norms. Petitioner failed to demonstrate trial counsel was provided with the proper contact information for Young prior to trial. Trial counsel testified Petitioner only knew this person by his street name ("Allen" or "Al Capone"). Trial counsel testified he did not recall Petitioner's family giving him any contact information for potential witnesses, but that he would have had

his investigator look into anyone Petitioner requested.

Trial counsel's testimony is supported by the record. Investigator Martin testified at trial that Petitioner said he was at Ingles with Allen but that Martin was unable to verify Allen's identity. (App.p.139). Young and Vance were also not listed as a potential defense witness during voir dire. (App.p.8). As trial counsel testified his investigator would have followed up with potential witnesses, it is reasonable to infer their contact information was never provided. This is especially true since another person Petitioner noted was in the motel room (Anthony Watkins) was listed as a potential witness. Petitioner's sister even stated at the PCR hearing that she did not provide names or addresses of potential witnesses to trial counsel and Young said Petitioner's sister is who asked him to come to the courthouse on the day of trial. (App.p.296; pp.318-19). Trial counsel stated at trial that he "had no idea who this guy was" when asked about Young's presence at Petitioner's trial and noted Petitioner never said anything to him "regarding a gentleman in the room." (App.p.189).

The record fully supports trial counsel's assertion that he was not made aware of Young and Vance as potential witnesses prior to Petitioner's trial. There is ample probative evidence to support the PCR judge's finding that Petitioner failed to demonstrate trial counsel was ineffective. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

Prejudice

Regardless, Petitioner failed to meet his burden of proving he was prejudiced by trial counsel's representation. The State presented strong evidence of Petitioner's guilt at

trial. The victim – both in a photographic lineup and in court – identified Petitioner as the man who robbed him at gunpoint at the motel and took his cash and checkbook. (App.pp.64-67; pp.76-77; p.78; pp.145-46). There was an in-store surveillance video at Ingles showing Petitioner was present when one of the victim's checks was used. (App.pp.122-32; pp.163-66). As the State presented such a strong case against Petitioner, he cannot demonstrate prejudice. See Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (holding no prejudice occurs, even if trial counsel was deficient, where there is otherwise overwhelming evidence of the defendant's guilt).

Further, Petitioner cannot demonstrate the outcome of his trial would have been different if Young and Vance had testified. It is unlikely the jury would have found Young and Vance to be credible witnesses because Young had a criminal record and was a drug dealer and Vance "[a]lready had some weed" when the incident allegedly took place. (App.pp.291-92; p.296; p.298). In addition, they would have offered testimony that this was a drug deal gone awry and not an armed robbery. (App.pp.291-92; pp.298-302). It is doubtful testimony from these witnesses would have curried favor with the jury and changed the result of Petitioner's trial. There is no reasonable probability the outcome of Petitioner's trial would have been any different with Young's and Vance's testimony. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

E.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he

was prejudiced by trial counsel's performance.

As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel, the PCR judge did not err in denying the PCR application. 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.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

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: Karen Ratigan
ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same into inter-agency mail and addressed to:

Wanda H. Carter, 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 4th day of January, 2016.

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

RECEIVED
JAN 04 2016
SC SUPREME COURT

January 4, 2016

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

Re: Anthony Lounds v. State
Appellate Case No. 2015-000124

Dear Mr. Shearouse:

Attached for filing please find an original and six copies of the Return to Petition for Writ of Certiorari in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General

cc: Wanda H. Carter, Esquire