

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Clarendon County
Court of Common Pleas
Clifton Newman, Circuit Court Judge

2013-CP-14-393
Appellate Case No. 2015-000019

BRIAN GARRIS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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SC SUPREME COURT

INDEX

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW4

ARGUMENT.....6

CONCLUSION.....11

ISSUES PRESENTED

- I. Whether any probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for not properly objecting to testimony and a report about gun shot residue found on Petitioner's hands?
- II. Whether the PCR judge err in finding that the issue involving testimony about gun shot residue was briefed, argued and ruled upon by the South Carolina Court of Appeals on direct appeal when the issue raised on direct appeal did not involve the admission of the gun shot residue testimony but instead challenged the trial judge's denial of Petitioner's request to call an expert to rebut the reply testimony from the State's expert that the gun shot residue came from a pistol rather than a shotgun?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Petitioner was indicted at the October 2006 term of the Clarendon County Grand Jury Armed Robbery, Assault and Battery with Intent to Kill, Possession of a Firearm During the Commission of a Crime of Violence (2006-GS-14-265). Garryl Deas, Esquire, represented Petitioner. The Petitioner proceeded to a jury trial and was found guilty as indicted to all counts on September 5, 2008. The Honorable George C. James, Jr., sentenced Petitioner to twenty years for Assault and Battery with Intent to Kill to run consecutively to twenty years for Armed Robbery. Additionally, Judge James sentenced Petitioner to five years for Possession of a Weapon During a Crime of Violence to run concurrently.

Petitioner filed a timely Notice of Appeal on September 9, 2008. Assistant Appellate Defender LaNelle DuRant of the South Carolina Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed his sentence and conviction. State v. Garris, Op. No 4859 (S.C. Ct. App. filed August 10, 2011). A petition for rehearing was submitted on August 24, 2011. An Order denying the Petition for Rehearing was filed September 22, 2011. A Petition for Writ of Certiorari was filed October 24, 2011. The State made its Return to Petition for Writ of Certiorari on June 7, 2012. By Order Dated and filed on May 15, 2013, the South Carolina Supreme Court of denied the petition for writ of certiorari. The Remittitur was issued on May 20, 2013

Petitioner filed an application for post-conviction relief on October 1, 2013. Respondent filed a Return February 28, 2014. An evidentiary hearing into the matter was convened at the Sumter County Courthouse on October 2, 2014, before the Honorable Clifton Newman.

Petitioner was present at the hearing and represented by Charles T. Brooks, III, Esquire. Judge Cothran dismissed Petitioner's post-conviction relief application by Order on December 22, 2014. Petitioner filed his Petition for Certiorari on or about August 26, 2015.

This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 668. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for not properly objecting to testimony and a report about gunshot residue found on Petitioner's hands.

Petitioner argues the PCR court erred in finding the Trial Counsel was not ineffective for failing to properly object to testimony and a report about gunshot residue found on Petitioner's hand. In support of his argument, Petitioner contends that Trial Counsel should have objected to the prosecutions questioning of whether he had ever fired a gun based on Rule 608(b) and Rule 404(b), SCRE (PWC, p. 7). Initially, Respondent submits that this issue is clearly not preserved for appellate review. 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).

The PCR Court did not rule on the issue of whether Trial Counsel *properly* objected to testimony and a report about gunshot residue. The PCR Court ruled on the limited issue of as to whether Trial Counsel “failed to object to Agent Robert’s report dealing with gunshot residue.” As noted in the Final Order of Dismissal, the PCR Court properly found that Trial Counsel did make appropriate objections to the admission of the gunshot residue report. Petitioner failed to present any argument, evidence, or request a ruling from the PCR Court in a 59(e) motion to alter or amend that Trial Counsel did not *properly* object under Rule 608(b) and 404(b), SCRE. As a result this issue is clearly not preserved for appellate review.

Assuming *arguendo* that this Court finds the issue is preserved, it is wholly without merit. Initially, Respondent would submit that Petitioner can show no deficiency or prejudice as a result of Trial Counsel’s failure to couch his numerous objections to testimony and evidence regarding Petitioner’s prior handling of firearms as a Rule 608(b) and Rule 404(b) violation. In Wilder v. State, 388 S.C. 282, 285, 696 S.E.2d. 587, 588 (2010) this Court wrote:

Under Rule 608(b)(1), a trial judge may allow a witness to be cross-examined about “specific instances of [that witness’s] conduct” if the trial judge, in his discretion, finds these instances probative of the witness’s credibility. An abuse of discretion occurs when the trial court’s ruling lacks evidentiary support or where it is controlled by error of law. E.g., State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

In the instant case, Petitioner was charged with armed robbery, assault and battery with intent to kill, and possession of weapon. On cross-examination, the prosecution questioned Petitioner about whether he had ever fired a gun. This question was proper because it was a broad inquiry into Petitioner’s experience with firearms and deals with the *res gestae* of the case. Petitioner consistently denied owning, possessing, or firing a weapon on the day of his arrest. It was only after Petitioner’s consistent denial of owning, handling, or firing a firearm on the day of

his arrest that the State properly presented rebuttal testimony impeaching Petitioner's prior testimony.

A Rule 608(b) objection would have been more appropriately made when the State called the GSR expert on rebuttal not when the prosecutor asked whether Petitioner had ever handled a firearm. Regardless, the Trial Judge would not have abused his discretion in overruling the Rule 608(b) objection because Petitioner consistently denied firing a weapon the day of his arrest. The GSR report was clearly probative of the witness's credibility because it directly contradicted Petitioner's prior testimony about not firing a weapon on the day of his arrest. As a result Petitioner can show no prejudice due to Trial Counsel's failure to couch his objections as a Rule 608(b) and Rule 404(b), SCRE violation.

II. Whether the PCR judge err in finding that the issue involving testimony about gunshot residue was briefed, argued and ruled upon by the South Carolina Court of Appeals on direct appeal when the issue raised on direct appeal did not involve the admission of the gun shot residue testimony but instead challenged the trial judge's denial of Petitioner's request to call an expert to rebut the reply testimony from the State's expert that the gun shot residue came from a pistol rather than a shotgun.

Respondent submits that Petitioner can show no prejudice due to the PCR Court's error in noting that the issue of whether the trial court erred in allowing Agent Roberts GSR report into evidence was briefed, argued, and ruled upon by the South Carolina Court of Appeals. Regardless, Respondent submits that there are additional sustaining grounds within to affirm the denial of Petitioner's post-conviction relief.

Notably, the issue of whether Trial Counsel properly objected to testimony and a report about gunshot residue found on Petitioner's hand is not preserved for appellate review. Petitioner simply argued that Trial Counsel failed to object to the Agent Robert's report dealing

with gunshot residue. At no point in time did Petitioner argue, present evidence, or request the PCR Court to rule upon the issue of whether Trial Counsel was ineffective for failing to object to testimony and report about gunshot residue as a violation of Rule 608(b) and Rule 404(b). As a result, this issue is not preserved for appellate review. 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).

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In the instant case, Petitioner was charged with armed robbery, assault and battery with intent to kill, and possession of weapon. On cross-examination, the prosecution questioned Petitioner about whether he had ever fired a gun. This question was proper because it was a broad inquiry into Petitioner’s experience with firearms and deals with the res gestae of the case. Petitioner consistently denied owning, possessing, or firing a weapon on the day of his arrest. It was only after Petitioner’s consistent denial of owning, handling, or firing a firearm on the day of his arrest that the State properly presented rebuttal testimony impeaching Petitioner’s prior testimony.

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CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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By: 
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January 14, 2016

STATE OF SOUTH CAROLINA
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Court of Common Pleas
The Honorable Clifton Newman, Circuit Court Judge

BRIAN GARRIS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Kathrine H. Hudgins, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 14th day of January, 2016



CAROLINE COLLINS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

January 14, 2016

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JAN 14 2016

SC SUPREME COURT

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

Re: Brian Garris v. State of South Carolina
Appellate Case No. 2015-000019
Lower Court Case No. 2013-CP-14-393

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/cc
Enclosures

cc: Appellate Defender Kathrine H. Hudgins (2 copies)