STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2012-212070

Vondell Sanders, #241308, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PETITIONER'S STATEMENT OF ISSUES ON APPEAL

I. Trial counsels erred in failing to recognize that petitioner's jury verdicts were unconstitutional because the record revealed that one juror was missing at polling and one juror stated adamantly that she voted "not guilty" in the case.

RESPONDENT'S RESTATEMENT OF ISSUES ON APPEAL

I. Is there evidence of probative value in the record to support the post-conviction relief court's finding that trial counsels were not ineffective for failing to object to a jury of less than twelve jurors rendering Petitioner's verdicts, where Counsels stated that there were twelve jurors present throughout Petitioner's entire trial and deliberations and where the alleged missing juror testified that she was present and rendered her verdict?

II. Did the post-conviction relief court rule on the claim of ineffective assistance of counsel for failure to object to a non-unanimous jury verdict?

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 2003 term of General Sessions for the Orangeburg County Grand Jury for Possession with Intent to Distribute Schedule I, II, III Drugs (2003-GS-38-02369); Possession with Intent to Distribute Marijuana within Proximity of a School or Park (2003-GS-38-02370); Possession with Intent to Distribute Crack Cocaine (2003-GS-38-02371); and Possession with Intent to Distribute Crack Cocaine within Proximity of a School or Park (2003-GS-38-02372). (App. p. 700-706). Samuel M. Kramer, Esquire, and Margaret E. Hinds, Esquire, represented Petitioner on the charges. Petitioner proceeded to trial on April 20, 2004 before the Honorable John L. Breeden, Jr. where he was convicted of Possession with Intent to Distribute Crack Cocaine (Third Offense) and Possession with Intent to Distribute Crack Cocaine within Proximity of a School of Park; he was acquitted of Possession with Intent to Distribute Schedule I, II, III Drugs, and Possession with Intent to Distribute Marijuana within Proximity of a School or Park. Id. Judge Breeden sentenced Petitioner to confinement for a period of nineteen (19) years for possession with Intent to Distribute Crack Cocaine (Third Offense), and fifteen (15) years for Possession with Intent to Distribute Crack Cocaine within Proximity of a School or Park, with the sentences to run concurrently.

A timely notice of Appeal was filed and an appeal was perfected on Petitioner's behalf. (App. p. 549-59). Following the submission of an Anders[1] brief, the South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Sanders, Op. No. 2006-

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

UP-171 (S.C. Ct. App. filed March 22, 2006). The Remittitur was issued on April 7, 2006.

Petitioner filed an application for post-conviction relief (PCR) on May 22, 2006. (2006-CP-38-00585). (App. p. 560-68). Respondent made its Return on February 16, 2007, requesting an evidentiary hearing be held on Petitioner's application. (App. p. 569-75). An evidentiary hearing was convened into the matter on September 7, 2010, at the Orangeburg County Courthouse before the Honorable Diane S. Goodstein. Petitioner was present and represented by Mathis G. Chaplin, Esquire. Respondent was represented by Mary S. Williams, Esquire, of the South Carolina Attorney General's Office of the South Carolina Attorney General's Office. Testimony from Petitioner and Counsel Hinds was heard by the court. At the conclusion of the hearing, Judge Goodstein left the record open to take testimony from Counsel Kramer, who was employed overseas, and to gather further information regarding Petitioner's allegation that only eleven jurors deliberated and rendered a verdict in this case.

A second evidentiary hearing before Judge Goodstein was convened on September 21, 2011. Petitioner was present and represented by Counsel Chaplin. Respondent was represented by Robert D. Corney, Esquire, of the South Carolina Attorney General's Office. Testimony of Christopher Furtick, the foreman of the jury from Petitioner's trial, and Willie Mae Prioleau, the alleged missing juror, was presented to the court.

By Order filed March 8, 2012, and filed March 27, 2012, Judge Goodstein denied and dismissed Petitioner's application with prejudice. (App. p. 682-99). Petitioner filed a notice of appeal and a Petition for Writ of Certiorari on November 14, 2012.

Respondent submitted its return on January 21, 2013. The South Carolina Court of Appeals granted the petition. Petitioner filed its brief on January 15, 2015. This Brief of Respondent follows.

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. There is probative evidence in the record to support the post-conviction relief court's finding that trial counsels were not ineffective for failing to object to a jury of less than twelve jurors rendering Petitioner's verdicts.

Petitioner contends the PCR Court erroneously found that trial counsels were not ineffective for failing to object to an eleven juror verdict. This argument is without merit, as there is a plethora of probative evidence to support the PCR Court's ruling.

How the Issues Arose Below

Trial

Following the presentation of all testimony and evidence in Petitioner's trial, the jury retired to the jury room to deliberate on the four charges with which Petitioner was charged. (App. pp. 482 lines 4-5). After *one* hour of deliberations, the jury returned to open court and stated their verdict, finding Petitioner guilty of Possession with Intent to Distribute Cocaine Base and Possession with Intent to Distribute Cocaine within Proximity of a School or Park, but acquitting Petitioner of both marijuana charges. (App. p. 482 line 8 – p. 483 lines 20). Upon the reading of the verdicts, Counsels requested the jury be polled. (App. p. 483 line 21 – p. 484 line 1). As the trial court polled the eleventh juror, he asked for a "Mr. Proveaux," and the transcript reflects no response.[2] (App. p. 484 line 2 - p. 485 line 20). The trial court immediately asked the jury, "[w]ho has not been polled? Is there any member of the jury panel who has not been polled?" (App. p. 485 lines 10-11). Shortly thereafter, the trial court stated: "[a]11 of the jurors have been polled, all of them indicated it was their verdict and it is still their verdict." (App. pp. 485

[2] It is clear from the trial transcript that there was no "Mr. Proveaux;" however, there was a Ms. Prioleau, whose verdict is questioned by Petitioner.

lines 18-20). Neither the trial court, defense counsel, prosecuting assistant solicitor, nor other court personnel made any further remarks regarding a "missing juror" or a panel of less than twelve jurors. The transcript reflects that only eleven jurors responded when polled. (App. pp. 484 line 2- p. 485 line 20).

September 7, 2010 PCR Hearing

During the September 7, 2010, evidentiary hearing, Petitioner testified that he did not count the jurors during polling nor did he "remember any other juror being missing--or anything like that." (App. p. 604 lines 10-18). However, despite testifying that he could not recall any juror who was not present or missing and he did not count the jurors during polling, Petitioner testified that he questioned Counsels regarding the missing juror and was told that the issue would be addressed during his direct appeal. (App. p. 604 line 3 – p. 605 line 5).

Counsel Hinds testified that she took notes during the trial, resulting in twenty-six pages of notes covering from pre-trial motions through jury polling. (App. p. 608 lines 9 – 12). She further testified that nothing in her notes referenced that a juror was not present during deliberations or polling. (App. p. 608 lines 13-19). When questioned regarding "why the transcript doesn't reflect a response from Juror Praleaux", Hinds replied:

> No. I am absolutely perplexed. It would have been so huge for a juror to be missing, particularly after we had just let the alternate leave. I can't imagine. This would have stuck out in my mind. I know this was a long time ago, but that would have been one I remembered forever. I can't imagine that neither Sam nor I nor Judge Breeden, nor even the Solicitors. They would have wanted to make sure that their – their verdict was gonna stand. Surely it would have been discussed or there would have been something on

> the record. To – ***to my recollection, there was not a juror missing.*** I can't explain the transcript.

(App. p. 609 lines 5-17) (emphasis added). Additionally, Counsel Kramer testified, through his sworn affidavit:

> To the best of my knowledge and recollection, twelve (12) jurors were present for the entirety of the trial, as well as deliberations and publishing of the verdict, which was a split decision. Further, I do not recall Mr. Sanders ever bringing to my attention during the reading of the verdict or polling of the jury that there was a missing juror. To the best of my knowledge, we never discussed a missing juror.

(Supp. App. p. 1).

September 21, 2011 PCR Hearing

During the September 21, 2011 evidentiary hearing, jury foreperson Christopher Furtick (herein "Furtick") testified that he recalled the jury rendering a guilty verdict in Petitioner's trial. (App. p. 637, lines 5-12). Furtick further testified that he did not recall any member of the jury leaving the courtroom. (App. p. 638, lines 6-9).

Additionally, Willie Mae Prioleau (herein "Prioleau") testified that she was a member of the jury for Petitioner's trial. (App. p. 640, line 22- p. 641, line 7). Prioleau, the alleged missing juror, testified she recalled going back into the jury room and deliberating with the rest of the jury. (App. p. 641 line 20 - p. 642 line 1). Furthermore, Prioleau testified that she was present with the other juror's when they rendered their verdicts. (App. p. 642, lines 2-14). She further testified that she was present in the courtroom when the jury was polled and she recalled being asked whether the verdict was her own. (App. p. 644, lines 15-21). The post-conviction relief court further questioned Prioleau to bring out any inconsistencies in her testimony. During such questioning,

Prioleau testified that she remembered coming to the Orangeburg County Courthouse for jury duty and being selected as a juror. (App. p. 645, line 20 – p. 646, line 7). She further testified that this trial was her first and only time she served on a jury and that she recalled listening to both the evidence being presented and the witnesses' testimony. (App. p. 648-50). Prioleau testified she recalled participating in jury deliberations. (App. p. 654, lines 4-25). Prioleau further testified that she recalled saying, "not guilty," to the jurors and then returning to the court room. (App. p. 659, lines 19-20). However, Prioleau also testified, "like I say, he was guilty, yes." (App. p. 650, lines 12-13). Prioleau testified that following the conclusion of the trial, she asked the judge for permission to leave to care for her granddaughter. (App. p. 649, line 17 – p. 650, line 1).

PCR Court's Order of Dismissal

In its Order of Dismissal, the post-conviction relief court found that "the testimony before this Court reflects there was no missing juror as alleged by Applicant." (App. pp. 694). The court elaborated that "[t]he credible testimony of both trial attorneys for [Petitioner], coupled with the testimony of Willie Mae Prioleau, have firmly convinced this Court that any issue with the transcript regarding a missing juror is a mere scrivener's error." (App. p. 694).

Relevant Law

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). Respondent submits Petitioner did not satisfy either requirement of the Strickland test.

Analysis

Based on the foregoing, there is ample evidence of probative value in the record to support the post-conviction relief court's findings that Counsels were not ineffective for failing to object to a jury of less than twelve members rendering the verdicts during Petitioner's trial. Numerous witnesses, including the alleged missing juror, all consistently testified that twelve jurors were present during deliberations, the rendering of the jury's verdict, and polling.

"Absent evidence to the contrary, the regularity and legality of proceedings in general sessions court is presumed." Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (S.C. 1995) *citing* Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (S.C. 1986). This presumption necessarily carries greater weight where the issue in question relates to something so fundamental as the required number of members on a jury. See State v. Burket, 9 S.C.L. 155, 311 (S.C. Const. App. 1818) ("every lawyer knows that twelve lawful men are necessary [to constitute a jury], and that without this number no jury can exist").

In the present case, the facts speak loudly. Not only does the PCR Court's finding rest on credible testimony from the lawyers and jurors who were present at trial; it also

rests on a complete reading of the transcript.

The PCR Court, after examining the record and analyzing the trial transcript *in context*,[3] found ample probative evidence to support her finding that there was no impropriety or missing juror. Such evidence certainly consists of the credible testimony of the lawyers and jurors who were present at the time; but it also includes a detailed reading of the transcript.

At the end of the trial, immediately prior to sending the jury to deliberate, the trial judge goes into explicit detail as to the requirements of rendering a verdict and the responsibility of the jury. In his charge, the trial judge explains:

> [the] verdicts have to be unanimous, they have to be the verdicts of all twelve jurors. Now, that may sound redundant to you, the unanimous verdict of all twelve jurors. It's not. I recall having a jury come back at one time and said, is your verdict unanimous? Yes, sir, everybody that voted not guilty. But only eleven of them voted. One guy refused to vote. So, that threw a little kink in it. But when I say the unanimous of all twelve jurors that's what I mean.

(App. p. 477, line 21 – p. 478, line 5).

Further, the trial court then turns to the alternate juror and thanks her for being present, explaining that she was present in the event "a juror became ill or something happened to one of the jurors." (App. p. 478, lines 6-9). The trial judge *then* referenced the possibility of a missing juror and says "thank goodness that has not happened." (App. p. 478, lines 9-11). Almost immediately thereafter, the trial judge promptly thanks the alternate for her patience and attendance, before excusing her from the court. (App. p.

[3] While perhaps self-evident, context is crucial in resolving questions or ambiguities from the record. See, e.g., Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984) ("[T]he voluntariness of a guilty plea is *not determined by an examination of the specific inquiry made by the sentencing judge alone*, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing" (emphasis added)).

479, lines 13-22).

In light of the trial judge's care in instructing the jury, as well as the fact that he then dismissed the alternate, the PCR Court's conclusion—that the confusion is the result of a mere scrivener's error—is the only explanation that can be justified. Further, the jury would have been unable to comply with the judge's instructions in reaching a verdict had there been only eleven jurors. See Francis v. Franklin, 471 U.S. 307, 324 n. 9 (1985) ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."); see also, United States v. Olano, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions"); Gray v. Maryland, 523 U.S. 185, 200 (1998).

Petitioner has failed to carry his burden in proving the PCR Court erred by dismissing this allegation. Therefore, the post-conviction relief court's Order of Dismissal should be affirmatively upheld.

II. The PCR Court did not rule on the allegation of ineffective assistance of counsel for failure to object to a non-unanimous jury verdict because such a claim was not timely; thus, the claim is not preserved for this Court's review.

Petitioner contends that Counsels were ineffective for failing to object to a non-unanimous jury verdict. This argument is clearly not preserved for review as the PCR Court refused to allow Petitioner to amend his pleadings at such a late junction in the case since all testimony had been presented by both sides.

A. The issue is not preserved for this Court's review.

The PCR Court ruled this allegation was improperly raised at such a late junctive in the proceedings. The PCR Court sustained Respondent's objection to this attempted

amendment and ruled Respondent would be prejudiced because Respondent would be unable to rebut such allegations. 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 (Ct. App. 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.

Petitioner first attempted to raise this allegation at the end of his second evidentiary hearing, after all evidence had been submitted. (App. p 676, line 16 – p. 677, line 16). Additionally, there was no testimony taken regarding Counsels' failure to object to a non-unanimous decision by the jury. However, there was specific testimony presented in each of the Petitioner's post-conviction relief hearings regarding all of the Petitioner listed allegations in his application for post-conviction relief. The post-conviction relief court's order "denied and dismissed" the amendment to the Petitioner application as it was "improperly made at this late juncture." (App. pp. 696).

Therefore, this issue is clearly not properly preserved for this Court's review.

B. Merits

Assuming *arguendo* that this Court finds the issue preserved, it is wholly without merit. Petitioner cannot have it both ways. First, Petitioner argues juror Prioleau was not present during the reading of the verdict and was not polled. Next, Petitioner argues that juror Prioleau was present, was polled, but actually found Petitioner not guilty of the charges. Respondent submits these inconsistent positions show the implausible nature of Petitioner's arguments.

There is nothing to suggest that Counsels were ineffective for failing to object to a non-unanimous jury. First, Prioleau testified that it was her first time serving as a juror and it was evident through her testimony that she was wholly unfamiliar with the judicial process. (App. p. 640 – 662). Second, Prioleau's testimony reveals that she was uncertain as to which verdict she actually rendered. (App. p. 660, lines 11-13). Prioleau reiterated her uncertainty multiple times throughout the evidentiary hearing, stating that she was uncertain as to which verdict she actually rendered. (App. p. 658-60). Additionally, Prioleau stated that she "had to put her hand up" when asked to render her verdict. (App. pp. 656 lines 7-18). However, the trial transcript indicates that when the jury was polled, the jurors were to respond with a "yes" or "no." (App. p. 484, line 2 – p. 485, line 20). Finally, Prioleau contradicted her own testimony and stated that she rendered a guilty verdict. (App. pp. 650, lines 9-13). Therefore, Prioleau's testimony clearly shows that her memory regarding the events of the trial was contradictory and uncertain at best.

Furthermore, Petitioner was on trial for multiple crimes and was acquitted of two of the four charges. Prioleau stated at the evidentiary hearing that she was certain that the Petitioner was only charged with one crime, despite the post-conviction relief court's assertions to the contrary. (App. pp. 652, lines 7-14). This direct contradiction further supports the assertion that Prioleau was not certain of her testimony at the evidentiary hearing and was not a credible witness. Therefore, Counsel cannot be found to be ineffective for failing to object to a non-unanimous verdict, as the record shows that Prioleau provided conflicting testimony as to which verdict she actually rendered in court and, significantly, failed to recall the majority of events surrounding the actual trial.

As the post-conviction relief court did not rule on this allegation, it is not

preserved for appeal. Nonetheless, Counsel cannot be found ineffective because it cannot be said with any certainty that the Petitioner was convicted by a non-unanimous jury.

Therefore, Petitioner's argument is clearly not preserved but also lacks merit under a thorough 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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March 19, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2012-212070

Vondell Sanders,.....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:

Wanda H. Carter, Appellate Defense
Division of Appellate Defense
Post Office Box 11589
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This 19th day of March, 2015.

J. CLAYTON MITCHELL
ATTORNEY FOR RESPONDENT

SWORN to before me this 19th day of March, 2015.

Notary Public for South Carolina.
My Commission Expires: 8/9/21

JUSTIN J. HUNTER NOTARY PUBLIC MY COMMISSION EXPIRES 8/9/21 SOUTH CAROLINA

2006-CP-38-0585