

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Clarendon County

J. Cordell Maddox, Jr., Circuit Court Judge

2013-CP-14-444
Appellate Case No. 2015-000886

BILLY LIENBY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

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PETITIONER'S ISSUES PRESENTED

- I. Whether the PCR Court erred by refusing to allow Petitioner to orally amend his application to include an additional claim of ineffective assistance of counsel when the amendment did cause any prejudice to the state, particularly where the court allowed Petitioner to present extensive testimony in support of the claim during the evidentiary hearing, and the state was able to cross-examine Petitioner's witnesses on the claim?**

- II. Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel improperly advised Petitioner that assault on a correctional facility employee was a misdemeanor when in fact it was classified as a felony, and where Petitioner testified that if he would have known the proper classification of the offense he would not have pled guilty?**

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Petitioner was true bill indicted during the October 2010 term of the Clarendon County Grand Jury for Assault on a Correctional Facility Officer (2010-GS-14-0484). Scott Robinson, Esquire, (hereinafter "Trial Counsel") represented him. On July 19, 2010, Petitioner pled guilty. He was sentenced by the Honorable Howard P. King to six months imprisonment.

A timely Notice of Appeal was filed. The appeal was dismissed in a written order dated and filed March 6, 2012, for failing to establish any preserved issues. The Remittitur was sent on March 22, 2012.

Petitioner subsequently filed an application for post-conviction relief (PCR) on March 14, 2012 (C.A. No. 2012-CP-14-00132). An evidentiary hearing into the matter was convened on March 20, 2013, at which Petitioner was present and represented by Shaun C. Kent, Esquire. The Honorable W. Jeffrey Young denied and dismissed Petitioner's application with prejudice by written Order dated April 11, 2013 and filed April 17, 2013. No appeal was filed.

On October 25, 2013, Petitioner filed a second application for post-conviction relief seeking the right to a belated appeal of the denial of his original application. The State filed its Return and Motion to Dismiss on April 14, 2014. An evidentiary hearing was held on December 18, 2014, before the Honorable J. Cordell Maddox, Jr. Assistant Attorney General Daniel Gourley represented the State, and Steven W. Fowler, Esquire, represented Petitioner. By order dated March 12, 2015, Judge Maddox granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Petitioner filed the Petition for Writ of Certiorari on December 8, 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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR Court did not err in declining to allow Petitioner to orally amend his application to include an additional claim of ineffective assistance of counsel.

Petitioner argues the PCR court erred in refusing to allow Petitioner to orally amend his application at the PCR hearing. At the PCR hearing, Petitioner testified that Trial Counsel did not adequately inform him about the charges he was facing and that he thought the charge of assault on a correctional facility employee was a misdemeanor when in fact it was classified as a felony. Respondent objected to this testimony because it was not an allegation in Petitioner's application. In response to the objection, the PCR Court stated, "I understand. I'll note your objection. You may proceed." App. 45, ll. 15-18.

Petitioner continued with his testimony and was cross-examined on the issue of whether he knew when he pled guilty that the charge was a misdemeanor or felony. Following Petitioner's testimony, Trial Counsel was examined and questioned on the issue, as well. At the conclusion of the PCR hearing, the PCR Court took the action under advisement to review the plea transcript and the evidence presented at the hearing. In the Order of Dismissal filed on January 8, 2014, the Court held that it "decline[d] to allow [Petitioner] to proceed on his claim on misadvice regarding his charge classification." App. 60.

An amendment to an application made during the course of the hearing would have improperly prejudiced Respondent under Rule 15(b), S.C. Rules of Civil Procedure. Although a party may amend pleadings to conform to the evidence at any time under the Rule, the decision to allow lies in the sound discretion of the court and should not be allowed where such an amendment would prejudice the opposing party in maintaining its action or defense.

The decision to admit affidavits, depositions, oral testimony, or other evidence at a PCR hearing is within the PCR Court's discretion and will not be reversed absent an abuse of discretion resulting in prejudice to a party. Simpson v. Moore, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006). Petitioner has not adequately supported the argument that the PCR Court's decision to refuse the oral amendment was an abuse of discretion. The Court had an opportunity to hear testimony and evidence on the issue of the proposed amendment. At the close of the PCR hearing, the PCR Court took Petitioner's case under advisement and later issued an Order of Dismissal declining to add the amendment at issue. Respondent asserts that the PCR court did not abuse its discretion in excluding the amendment.

II. Probative evidence supports the PCR Court's finding that Petitioner's plea was knowingly, intelligently, and voluntarily made.

Petitioner argues that the PCR Court erred in finding Petitioner knowingly, voluntarily, and intelligently pleaded guilty. This argument rests on Petitioner's allegation that Trial Counsel was ineffective in advising Petitioner of the classification of the charge he faced. Respondent submits that this issue was not preserved for appeal, and even if it were, the claim is meritless, as ample probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective, and thus the plea was knowingly, intelligently, and voluntarily made.

Issue Not Preserved for Appeal

It is well settled that an issue that has not been presented to or passed upon by a 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 trial counsel improperly advised Petitioner that assault on a correctional facility officer is a misdemeanor when it is in fact a felony was not ruled upon by the PCR Court. The Order of Dismissal does not address the issue of whether trial counsel was ineffective for misadvising on the classification of the charge Petitioner faced. Petitioner also failed to file a motion under 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.

Merits

Assuming *arguendo* that this Court finds the issue is preserved, the argument that Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made is meritless.

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). With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

At the PCR hearing, Petitioner testified that if Trial Counsel had made it clear that the charge was a felony and not a misdemeanor, he would not have pled but would have gone to trial. App. 45, ll. 8-10. Petitioner further testified that Trial Counsel told him that the charge was a misdemeanor. App. 49, ll. 1-2. However, Trial Counsel testified that he did not remember a discussion about the charge being a felony or a misdemeanor. App. 52, ll. 24-25.

In the Order of Dismissal, the Court found that Petitioner failed to meet his burden to prove that Trial Counsel was ineffective. Specifically, the court found that trial counsel's testimony is credible while Petitioner's testimony is not credible. App. 64. Since Petitioner's testimony was found to be not credible, it cannot stand alone as the only evidence that he was misadvised by Trial Counsel. "We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994).

Furthermore, Trial Counsel's testimony that he did not remember a conversation about the classification of the charge is not enough evidence to meet the burden of proof that he was ineffective for misadvising his client. In order to succeed on an ineffective assistance claim, a

petitioner must make a sufficient factual showing to substantiate the claims. U.S. v. Schaflander, 743 F.2d 714, 721 (9th Cir. 1984). Courts have also recognized that trial counsel's "I don't remember" responses and inability to recall specific conversations will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance. Reaves v. Secretary, Florida Dept. of Corrections, 717 F.3d 886, 900 n.9 (11th Cir. 2013); Romine v. Head, 253 F.3d 1349, 1357 (11th Cir. 2001); Harris v. Pulley, 885 F.2d 1354, 1368 (9th Cir. 1989). See also Greiner v. Wells, 417 F.3d 305, 319, 325-26 (2nd Cir. 2005); Fretwell v. Norris, 133 F.3d 621, 623-24 (8th Cir. 1998), reversing the district court's grant of the writ based in part on counsel's inability to recall which is contrary to the presumption of correctness. See also Williams v. Head, 185 F.3d 1223, 1227-28 (11th Cir. 1999) (where the record is unclear about what counsel did because of inability to recall due to the passage of time, the presumption that counsel did what should have been done and exercised reasonable judgment prevails); Murtishaw v. Woodford, 255 F.3d 926, 949-50 (9th Cir. 2001) (where record did not reflect whether counsel gave advice, court would not presume to the contrary that advice had not been given).

Certiorari is not warranted where the record supports the PCR court's finding that the plea was knowingly, voluntarily, and intelligently made. The PCR court made its findings based on credible evidence in the record including the guilty plea transcript and the credible testimony of Trial Counsel at the PCR hearing. The record clearly supports the PCR court's finding that Trial Counsel was not ineffective and thus the guilty plea was knowingly and voluntarily entered into. Because Petitioner pleaded guilty and was found to have done so knowingly and voluntarily, Respondent asks this Court to deny the petition.

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

JULIE A. COLEMAN
Assistant Attorney General
Bar No. 102214

By 
ATTORNEYS FOR RESPONDENT

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April 22, 2016

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Court of Common Pleas
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

SC SUPREME COURT

BILLY LIENBY,

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 Pursuant to Austin v. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 22th day of April, 2016



CAROLINE COLLINS
LEGAL ASSISTANT



RECEIVED
APR 22 2016
SC SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

April 22, 2016

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

Re: Billy Lisenby v. State of South Carolina
Appellate Case No. 2015-000886
Lower Court Case No. 2013-CP-14-444

Dear Mr. Shearouse:

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

Sincerely,

Julie A. Coleman
Assistant Attorney General
SC Bar No. 102214

JAC/cc
Enclosures

cc: Appellate Defender Lara M. Caudy (2 copies)