

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2015-001773

RECEIVED

MAY -2 2016

SC SUPREME COURT

Michael Lee Robinson,Petitioner

v.

State of South Carolina,Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW5

ARGUMENT

 The issue raised by Petitioner is not preserved for appellate review5

CONCLUSION.....7

QUESTION PRESENTED

1. Did plea counsel's ineffective assistance render Petitioner's guilty plea involuntary where plea counsel advised Petitioner to accept an offer to enter a guilty plea and be sentenced under the law in existence at the time of the commission of the alleged crime, which provided for a maximum sentence of thirty years, rather than risk losing at trial where the state would seek a sentence under the amended law that provided for a mandatory minimum sentence of twenty-five years and a maximum sentence of life imprisonment, which would have violated the ex post facto clauses of the state and federal constitutions?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the February 2013 term of General Sessions for first-degree criminal sexual conduct with a minor (2013-GS-39-0666). (App.pp.70-71). John "Jake" Kenneth Erwin, Jr., Esquire represented Petitioner.

On October 9, 2013, Petitioner pled guilty to the charge as indicted. The Honorable Edward W. Miller sentenced Petitioner to twenty-five (25) years imprisonment. (App.p.11; p.72). Petitioner did not file an appeal.

Petitioner filed an application for post-conviction relief (PCR) on July 8, 2014 (2014-CP-23-3760). (App.pp.13-24). A hearing was held at the Greenville County Courthouse on June 16, 2015. (App.pp.30-60). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Perry H. Gravely denied relief in an order filed July 20, 2015. (App.pp.63-69).

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); Rule 71.1(e), SCRPC.

ARGUMENT

The issue raised by Petitioner is not preserved for appellate review.

Petitioner argues the PCR judge erred in finding Petitioner failed to meet his burden of proving plea counsel was ineffective. Specifically, Petitioner now argues plea counsel’s representation was deficient because he advised Petitioner to accept a plea offer and offered advice that would have been inapplicable if accepted because it would have been ex post facto. (Cert. Pet., pp.11-13). This issue is not preserved for review by this Court.

This issue is not preserved for appellate review because it was not properly raised to the PCR judge and ruled upon in the order of dismissal. The allegation of an ex post facto issue was not addressed in the PCR judge’s order of dismissal. As such, it is not preserved for review on appeal. 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)).

If Petitioner had, in fact, intended to raise his allegation of ineffective assistance of plea counsel as an ex post facto issue, he should have filed a post-trial motion to alter or amend the judgment. As Petitioner did not file such a motion, however, the issue as raised in the petition for writ of certiorari is not preserved for review by this Court. 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).

As the issue raised by Petitioner in his petition for writ of certiorari was not both raised to the PCR judge and ruled upon in the order of dismissal – and a post-trial motion was not filed – it is not preserved for appellate review.

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 issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

May 2, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY - 2 2016

SC SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2015-001773

Michael Lee Robinson,Petitioner

v.

State of South Carolina,Respondent.

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:

Susan B. Hackett, 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 2nd day of May, 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