

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2015 – 000883

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MAY - 6 2016

SC SUPREME COURT

Robert Singletary,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. CROOM HUNTER
Assistant Attorney General
SC Bar #101253

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

Did the PCR court err in not finding trial counsel ineffective for not objecting to Debbie Elliott being qualified as an expert in child abuse assessment when there was not a sufficient showing of her individual reliability as there was no evidence her conclusions from the interview were accurate, and her qualification as an expert allowed her to give her improper opinion recommendations that Singletary should have no contact with this child or any child, and that Petitioner should have a complete sex offender assessment which was highly prejudicial to Petitioner Singletary and irrelevant to the jury's finding of guilt or innocence?

RESPONDENT'S ARGUMENT

Certiorari is not warranted where the issue is not preserved for review because Petitioner did not specifically raise and the PCR judge did not specifically rule upon the issue of whether trial counsel was ineffective for failing to challenge the individual reliability of Debbie Elliott's testimony prior to her being qualified as an expert witness in child abuse assessment.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections on Orders of Commitment from the Florence County Clerk of Court. Petitioner was direct indicted at the September 2009 term of the Florence County Grand Jury for lewd act on a minor (2009-GS-21-1350, count 1) and criminal sexual conduct with a minor, first degree (2009-GS-21-1350, count 2). William Vickery Meetze, Esquire, represented Petitioner. On June 21-23, 2010, Petitioner went to trial before the Honorable D. Craig Brown and a jury. The jury found Petitioner guilty as indicted. Judge Brown sentenced Petitioner to thirty (30) years for criminal sexual conduct with a minor, and a concurrent 15 years for lewd act on a minor.

Petitioner filed a timely notice of appeal. Breen Richard Stevens, Esquire, of the Office of Appellate Defense represented Petitioner on appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on October 31, 2012. *State v. Singletary*, Op. No. 2012-UP-589 (S.C. Ct. App. filed October 31, 2012). The remittitur was returned to the circuit court on November 16, 2012.

Petitioner then filed an application for post-conviction relief on April 30, 2013. Respondent made its Return on September 13, 2013. An evidentiary hearing was held on October 9, 2014, at the Florence County Courthouse. Petitioner was present and represented by Jonathan D. Waller, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office represented Respondent. The Honorable Edgar W. Dickson issued an Order of Dismissal on March 25, 2015, denying relief.

A Petition for Writ of Certiorari was filed on December 21, 2015. This Return 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

Certiorari is not warranted where the issue is not preserved for review because Petitioner did not specifically raise and the PCR judge did not specifically rule upon the issue of whether trial counsel was ineffective for failing to challenge the individual reliability of Debbie Elliott's testimony prior to her being qualified as an expert witness in child abuse assessment.

Petitioner argues the PCR court erred in not finding trial counsel ineffective for not objecting to Debbie Elliott being qualified as an expert in child abuse assessment when there was not a sufficient showing of her individual reliability as there was no evidence her conclusions from the interview were accurate, and her qualification as an expert allowed her to give her improper opinion recommendations that Singletary should have no contact with this child or any child, and that Petitioner should have a complete sex offender assessment which was highly prejudicial to Petitioner Singletary and irrelevant to the jury's finding of guilt or innocence. Respondent submits this issue is not preserved for review and asks this Court to deny the petition.

Because the reliability of Elliott's testimony was not raised to and ruled upon by the PCR court, this Petition should be denied. The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). An issue must be raised to and ruled upon by the trial court to be preserved for appellate review. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004). Our supreme court has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations. Marlar v. State, 375 S.C. 407, 408-10, 653 S.E.2d 266, 266-67 (2007). The court in Marlar noted that "[p]ursuant to

S.C.Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented,” and the failure to specifically rule on the issues precludes appellate review of the issues. Id. at 408, 653 S.E.2d at 266. Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012).

At the PCR hearing, Petitioner did not raise the issue of whether trial counsel was ineffective for failing to challenge the reliability of Debbie Elliott’s testimony prior to her being qualified as an expert witness; rather, he challenged counsel’s effectiveness with regard to failing to challenge her qualifications. Because effective assistance of counsel with regard to challenging Elliott’s reliability was not raised, the PCR judge did not specifically address it in the Order of Dismissal. Furthermore, Petitioner did not file a Rule 59(e) motion. In fact, the first instance of Petitioner raising trial counsel’s effectiveness for failing to challenge Elliott’s reliability with respect to her being qualified as an expert is in the Petition for Writ of Certiorari.

Expert testimony in the field of child abuse assessment is nonscientific. See State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), reh'g denied (May 6, 2015). Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter. State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009). Under White, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert's testimony will be reliable. State v. Chavis, 412 S.C. 101, 106-07, 771 S.E.2d 336, 339 (2015), reh'g denied (May 6, 2015).

Petitioner’s entire line of questioning at the PCR hearing related to counsel’s effectiveness in failing to challenge Elliott’s qualifications, not her reliability. At the PCR hearing, after a line of questions relating to Elliott’s background (App.p.308-09), PCR counsel asked trial counsel “Did you have any issue with her qualifications to be an expert in the field of

child assessment?" (App.p.309, lines 3-4). Counsel replied he did not. (App.p.309, line 5). However, at no point did PCR counsel question trial counsel about any issues he may have had with regard to Elliott's reliability. Additionally, the PCR court's order does not address whether trial counsel was ineffective for failing to challenge Elliott's reliability. The PCR judge specifically found, "Applicant failed to meet his burden to prove trial counsel ineffective in failing to object to Elliott's qualifications as an expert." (App.p.324). The word "reliability" is not to be found anywhere in the transcript of the PCR hearing or the Order of Dismissal.

Because, under White, qualifications and reliability are two separate and distinct determinations that must be made, Petitioner's challenge of trial counsel's effectiveness with regard to Elliott's qualifications at the PCR hearing did not constitute a challenge of counsel's effectiveness with regard to Elliott's reliability. As the issue of trial counsel's effectiveness with regard to challenging Elliott's reliability was neither raised at the PCR hearing nor addressed in the PCR court's order, the issue is not preserved for this Court's review, and the petition should be denied.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

J. CROOM HUNTER
Assistant Attorney General
SC Bar # 101253

BY: 

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

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ROBERT SINGLETARY,

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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:

Lanelle C. Durant, Esquire
Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 6th day of May, 2016.


NORMA BIGBEE
LEGAL ASSISTANT