STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2015-001310

Shane K. Young, ...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

QUESTIONS PRESENTED

1. Did the circuit court err in denying Petitioner's application for post-conviction relief based on the ineffective use of counsel by Petitioner's trial counsel?

2. Was counsel for the PCR hearing ineffective in failing to adequately communicate with Petitioner to prepare for the hearing, and in not being prepared to properly represent Petitioner at the PCR hearing in accordance with professional norms?

3. Did the circuit court err in denying Petitioner's motion to continue the PCR hearing so that Petitioner could obtain new representation?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the July 2013 term of General Sessions for eight counts of attempted murder (2013-GS-23-6411, -6413, -6414, -6416, -6420, -6423, -6425, -6426) and one count each of: first-degree burglary (2013-GS-23-6419), murder (2013-GS-23-6424, count 1), and possession of a weapon during commission of a violent crime (2013-GS-23-6424, count 2). (App.pp.80-82; pp.84-86; pp.88-90; pp.92-94; pp.96-98; pp.100-02; pp.104-06; pp.109-11; pp.113-15; pp.117-19). Joseph B. Maxwell, Esquire and John I. Mauldin, Esquire represented Petitioner.

On November 19, 2013, Petitioner pled guilty – pursuant to a negotiated plea agreement – to eight counts of attempted murder and one count each of first-degree burglary and murder. The Honorable Letitia H. Verdin sentenced Petitioner to consecutive sentences of thirty years for each count of attempted murder, life imprisonment for first-degree burglary, and life imprisonment for murder. (App.p.26; p.79; p.83; p.87; p.91; p.95; p.99; p.103; p.107; p.112; p.116). Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief (PCR) on June 17, 2014 (2014-CP-23-3381). (App.pp.28-35). A hearing was held at the Greenville County Courthouse on April 23, 2015. (App.pp.40-69). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order filed June 8, 2015. (App.pp.70-77).

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), SCRCP.

ARGUMENT

I. The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsels' representation was deficient and that he was prejudiced as a result.

Petitioner argues the PCR judge erred in finding he failed to meet his burden of proving both that his plea attorneys' representation was deficient and that he suffered prejudice. Specifically, Petitioner argues there is no evidence of probative value to support the PCR judge's holding that Petitioner failed to meet his burden of proving plea counsel were ineffective because they did not file a notice of appeal after his guilty plea hearing. (Cert. Pet., pp.3-4). This allegation is without merit.

A.

At some point after Petitioner and his girlfriend (Kayla) broke up, he approached her and threatened to kill her. (App.p.9). Kayla left the scene and went to her grandmother's house. Kayla's grandmother, mother, younger sister, and family friend were already there. (App.pp.9-10). Petitioner arrived at the residence but left after being told to leave. (App.p.10). Petitioner returned later with what two witnesses described as "a long gun." (App.p.10). Petitioner fired into the residence, killing Kayla's friend. (App.p.10). Petitioner entered the residence to look for

Kayla and one of the victims called 911. (App.pp.10-11). The Greenville County SWAT team responded to the residence and engaged in negotiations with Petitioner for two hours. (App.p.11). During the negotiations, Petitioner admitted to killing Kayla's friend and threatened to kill the remaining hostages. (App.pp.11-12; p.14). When the SWAT team ultimately entered the residence, Petitioner fired towards both the hostages and the officers. (App.pp.12-13). In addition to the fatal gunshot that killed Kayla's friend, the following individuals were injured: Officer Grice (shot in arm), Officer Maxwell (shot in leg), Kayla's grandmother (shot in hip), Kayla's mother (shrapnel in knees and leg), and Kayla's ten-year-old sister (shot in leg). (App.pp.13-14).

At the guilty plea hearing, Petitioner admitted the factual scenario recited by the Solicitor was true and stated he wanted to plead guilty. (App.pp.14-15). The plea judge advised Petitioner of the sentence ranges for the charges and Petitioner said he understood. (App.pp.4-5). Petitioner stated he had reviewed the charges with his attorneys and was satisfied with their representation. (App.p.5). Petitioner stated he had not been forced to plead guilty and acknowledged he had not been promised anything "other than the plea negotiations." (App.p.6). Petitioner waived the constitutional rights associated with a jury trial and the plea judge advised he had ten days to file an appeal. (App.pp.8-9). After the Chief Public Defender (one of Petitioner's two attorneys) presented a mitigation argument, the plea judge imposed sentence. (App.pp.21-24; p.26).

B.

At the PCR hearing, Petitioner stated he asked one of his attorneys (Maxwell) to file an appeal after his guilty plea hearing. Petitioner stated Maxwell replied he would come to see

Petitioner in the morning but that they never had another conversation. (App.pp.46-47). Petitioner noted he had no issues with either his attorneys' performance or the sentence he received. (App.pp.53-54). Petitioner stated he would have liked for an appeal to have been filed but was "not sure" what he wanted to appeal. (App.p.47; p.53). Petitioner confirmed that he knew he would receive a life sentence as a result of the guilty plea but stated he just wanted to start over with a new trial. (App.pp.55-56).

Chief Public Defender, John Mauldin, testified he negotiated for a life without parole sentence in lieu of the matter proceeding as a capital case. (App.pp.58-60). Mauldin testified he did not believe Petitioner ever wanted to go to trial. (App.p.59). Mauldin testified Petitioner never told him that he wanted to appeal his guilty plea. (App.p.62).

Assistant Public Defender, Joseph Maxwell, testified he had primary contact with Petitioner. (App.pp.62-63). Maxwell testified Petitioner agreed to plead guilty to the charges in exchange for a sentence of life imprisonment without parole and that Petitioner understood this sentence meant he would never be released from prison. (App.pp.65-66). Maxwell testified Petitioner never asked him to file an appeal after the plea hearing. (App.p.66). Maxwell confirmed he told Petitioner they would meet the following morning but that Petitioner had already been transported by that time. (App.p.66). Maxwell testified there were no appealable issues from the plea hearing. (App.66). Maxwell testified he would have filed an appeal if requested but would not have been able to identify a viable appellate issue. (App.p.67).

In denying Petitioner's application for post-conviction relief, the PCR judge made the following findings of fact and conclusions of law:

> This Court finds [Petitioner] has failed to meet his burden of proving he is entitled to an appeal of his direct appeal issues from his guilty plea hearing. This Court

> finds credible Maxwell's testimony that [Petitioner] never asked him to file an appeal. This Court finds it is not believable [Petitioner] – or any reasonable defendant – would have wanted to file an appeal from a negotiated guilty plea on these charges. This Court further finds [Petitioner] has failed to articulate what legal errors or omissions should have been appealed.

(App.pp.75-76).

C.

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). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving both deficiency and prejudice regarding whether plea counsel erred in not filing a notice of appeal. Maxwell testified Petitioner never asked him to file a notice of appeal after his plea hearing. The PCR judge found Maxwell's testimony was credible – while finding Petitioner was not credible – and this Court must give these findings great deference on appeal. (App.pp.75-76). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); Menne v. Keowee Key Prop. Owners' Ass'n,

Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."); see also Kolle v. State, 386 S.C. 578, 593, 690 S.E.2d 73, 81 (2010) (Pleicones, J., concurring) (stating the appellate court's deference to the PCR court's credibility findings is so great that it required the court to uphold the PCR court's determination even when the trial record unequivocally contradicted the testimony at the PCR hearing). The PCR judge's credibility findings are supported by the record. Petitioner entered knowing, voluntary, and intelligent guilty pleas to several extremely serious charges and told the plea judge he agreed with the State's version of the facts, wanted to plead guilty, and had not been forced to enter his guilty pleas. (App.p.6; pp.14-15). Petitioner also acknowledged at the PCR hearing that he knew he would receive a life sentence in exchange for his guilty pleas to the charges. (App.pp.55-56). As such, Petitioner cannot meet his burden of proving plea counsel were deficient regarding the matter of whether a notice of appeal should have been filed. Furthermore, Petitioner also cannot demonstrate he suffered any prejudice, as he cannot state an issue he wanted appealed from his guilty plea hearing and Maxwell testified there were no viable, appealable issues in this case. (App.pp.53-54; pp.66-67).

E.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by plea counsels' performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel, the PCR judge did not err in denying the PCR application. See Frasier

v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

II. The issue of whether PCR counsel was ineffective is not properly before this Court.

Petitioner argues appointed PCR counsel's representation was deficient and that he was prejudiced as a result. Petitioner argues appointed PCR counsel "had never met with him personally to discuss his case" and "was unaware of the arguments his attorney would present at the PCR hearing." (Cert. Pet., p.5). This issue is not properly before this Court.

Petitioner's issue is not preserved for appellate review. The "facts" supporting this issue that are set forth in the petition for writ of certiorari are merely anecdotal. The South Carolina Appellate Court Rules, however, dictate a petition for writ of certiorari "shall include citation of authority and specific reference to pertinent portions of the lower court record." Rule 243(e)(3), SCACR. Petitioner does not include any page citations for the alleged facts supporting this issue and cannot point to any place in the record to support or corroborate these alleged facts. As such, Petitioner's allegation is not properly before this Court.[1] See generally 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."). Accordingly, Respondent submits this issue must be

[1] Even assuming arguendo that this Court finds this issue was properly raised and is not procedurally barred, the issue itself is not properly argued in a post-conviction relief appeal in state court. See, e.g., Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987) (holding there is no constitutional right to appointed counsel for collateral review of a conviction); Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991) (finding the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions); cf. Martinez v. Ryan, ___ U.S. ___, 132 S. Ct. 1309 (2012) (holding "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective").

summarily dismissed.

III. The PCR judge did not err in denying Petitioner's motion for a continuance in order to obtain new counsel.

After Respondent called the PCR case for trial, attorney Whitney Thwaites addressed the PCR judge. Thwaites stated:

> I was approached on Monday by [Petitioner]'s father to retain me as counsel in this case. I was then later made aware that there was a hearing today, and I have not had an opportunity to prepare. And I believe that it would be extremely prejudicial to my client to move forward with this hearing today with the counsel that he has chosen to represent him.

(App.pp.42-43). Respondent stated it objected to the continuance and requested the case go forward that day, noting: (1) the matter had been continued once before, (2) two victims and a law enforcement representative were in court that day for the proceedings, (3) one witness, the Chief Public Defender, was in attendance and could be a difficult witness to reschedule, and (4) Petitioner had at least one month's notice the matter would be heard that day. (App.p.43). The PCR judge denied the motion for a continuance, stating "[h]e's had adequate notice. He can't wait to the last minute to try and get new counsel." The PCR judge stated Petitioner's appointed PCR counsel (Brian Johnson) would represent him. (App.pp.43-44). Neither Petitioner nor Johnson registered any objection to the matter going forward. (App.p.44).

"In South Carolina the grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." State v. Hill, 409 S.C. 50, 59, 760 S.E.2d 802, 807 (quoting Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007)). Furthermore,

> [w]hen a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case[,] its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such

motions must depend upon the particular facts and circumstances of each case. State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Babb, 299 S.C. 451, 454–55, 385 S.E.2d 827, 829 (1989)). "[R]eversals of refusal of continuance are about as rare as the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

The PCR judge abuse his discretion in denying Petitioner's request for a continuance. Petitioner's case was continued two months beforehand, at Johnson's request. Respondent informed the PCR judge the matter had been rescheduled and notice given one month in advance. Respondent also noted two victims, a representative from the Sheriff's Department, and the witnesses were present that day for the PCR hearing, and specifically noted the difficulty in scheduling matters with the Chief Public Defender's busy calendar. Further, Petitioner had ample notice that his case was ready to be called to court – as the matter had been continued two months prior and the roster for the date in question had been published one month before – yet his father did not attempt to retain new PCR counsel until the week of trial. The PCR judge did not err in finding Petitioner had adequate notice of the PCR hearing and ordering the case go forward that day with appointed counsel.

In Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992), a defendant's sister attempted to hire counsel several days before trial; however, when the trial judge denied counsel's motion for a continuance because he did not have time to prepare the case, the defendant proceeded to trial with his appointed counsel. This Court found no reversible error because the defendant did not "point to any other evidence or witnesses which could have been produced if a continuance had been granted." Id. at 175, 414 S.E.2d at 146; see also State v. Bennett, 259 S.C. 50, 190

S.E.2d 497 (1972); State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968). Similarly, in Petitioner's case, it is unclear what additional trial preparation would have yielded. The facts of Petitioner's case were not in dispute and he pled guilty pursuant to a negotiated sentence. Johnson thoroughly argued two issues on Petitioner's behalf at the PCR hearing. There was no evidence presented at the PCR hearing showing how additional preparation would have had any possible effect on the result.

Accordingly, Petitioner failed to meet his burden of proving the PCR judge abused his discretion in refusing to grant a continuance. See State v. Hill, 409 S.C. at 59, 760 S.E.2d at 807; State v. Lytchfield, 130 S.C. at 409, 95 S.E.2d at 859.

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 issues 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: Karen Ratigan
ATTORNEYS FOR RESPONDENT

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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 in the United States mail, postage prepaid, addressed to:

L. Whitney Thwaites, Esquire
604 University Ridge
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served. This 8th day of June, 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