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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County
Court of Common Pleas
D. Craig Brown, Circuit Court Judge

2013-CP-21-1347
Appellate Case No. 2015-001854

SYLLVESTER D. TAYLOR,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Trial Counsel's alleged failure to move for a continuance was not preserved; the allegation related to failure to move for a continuance was not presented to the PCR Court, was not addressed in the PCR Court's Order of Dismissal, and there was no Rule 59(e) Motion.

II. Assuming the issue is treated as preserved, Trial Counsel was not ineffective and no prejudice was established where the jury had already been selected while Petitioner was present and the Trial Court allowed a full day from the time Petitioner was supposed to be in court before proceeding forward with the trial.

STATEMENT OF THE CASE

On April 17, 2007, the State called Petitioner's case to trial for possession of cocaine base with intent to distribute. (App. p. 6, ll. 1-8.) Petitioner and his attorney were present for jury selection. Leading up to the trial, when it came time to plead or go to trial, Petitioner told Trial Counsel that he did not want to do either, which led the State to start the process of jury selection. (App. p. 215, ll. 9-12.) Immediately prior to jury selection, Petitioner asked Trial Counsel if he could see if the State would allow him to plead the next morning. (App. p. 215, ll. 15-19, ll. 2-4.) Trial Counsel had a bench conference with the State and the Trial Court to explain this development. (App. p. 6, ll. 9-15, p. 7, ll. 1-3; p. 215, ll. 9-19.) The State agreed, but wanted to proceed forward with jury selection. (App. p. 215, ll. 21-25.) After the jury was selected, the Trial Court held another bench conference and then released the jury and the parties by stating: "Those [who are] . . . associated with this trial, y'all are excused until the morning." (App. p. 28, l. 19 – p. 29, l. 3.)

The next day when court reconvened, the State explained to the Trial Court that Petitioner "signed up to plead guilty yesterday to what I offered,[1] but he's not shown up today, which I had a feeling might happen the way he was waffling." (App. p. 29, ll. 8-11.) The State suggested letting the jury go until 2:30 PM that day and giving "Mr. White" a chance to try and find Petitioner. (App. p. 29, ll. 11-15.) When asked by the Trial Court, Trial Counsel explained he had not heard from Petitioner that morning. (App. p. 29, ll. 22-25.)

Before 2 p.m. that same day, court reconvened and Trial Counsel made eight pretrial motions, (App. p. 31, l. 16 – p. 36 , l. 12.) to include a motion to suppress the drug evidence in the case. (App. p. 52, ll. 2 – p. 54, l. 17.) The Court denied the motion. (App. p. 57, ll. 2 – p. 58,

[1] The plea offer was for Petitioner to plead to possession of cocaine base with intent to distribute, second offense, for a negotiated five-year sentence. (App. p. 183, ll. 18-22.)

l. 14.) During these pretrial motions, the State also elicited testimony from the bailiff about calling Petitioner's name out three times in the courthouse (App. p. 81, l. 23 – p. 82, l. 10) and from the Clerk of Court about Petitioner's bond conditions. (App. p. 83, l. 1 – p. 84, l. 12.) Petitioner's bond paperwork was made an exhibit. (App. p. 83, l. 14-21.) After the Trial Court asked if either party had anything further, the State said, "That's all at this time, Your Honor. Of course, if they find the defendant in the next hour. . . ." (App. p. 58, ll. 18-19 (ellipses in original)). The Trial Court then stated the parties would break to allow another roll call at 2:15 p.m. and then reconvene at 2:30 p.m. on the same day. (App. p. 58, ll. 20-22.)

When court reconvened, it was to announce that due to juror issues the trial could not start until the next morning, April 19, 2007. (App. p. 58, l. 23 – p. 60, l. 17.) In announcing that the trial would not begin until the next morning, the following exchange occurred:

> Court: ". . . [a]nd it gives you the opportunity to find [Petitioner]."
> Trial Counsel: "No question, it is nothing but a fortunate break for [Petitioner]."
> State: "If law enforcement can help you at all, there is a bench warrant out now."
> Trial Counsel: "I understand."

(App. p. 60, ll. 16-22.) Had Petitioner shown up or been found, he could still have benefitted from his offer. (App. p. 226, ll. 5-7.)

On April 19, 2007, court reconvened. (App. p. 62, ll. 21-22.) After confirming Petitioner was not present; hearing from Trial Counsel that he had personally searched the courtroom, been in contact with Petitioner's bondsman, and searched the detention center (App. p. 63, ll. 2-11); and having the bailiff call Petitioner's name three times (App. p. 64, ll. 17-19; p. 81, l. 23 – p. 82, l. 10), the Trial Court went ahead and swore in the jury. (App. p. 62, l. 24 – p. 65, l. 18-19.) The trial proceeded without Petitioner present.

After completion of the trial, the jury found Petitioner guilty of possession of cocaine base with intent to distribute.[2] (App. p. 172, l. 19 – p. 173, l. 2.) Trial Counsel asked the Trial Court to consider the minimum sentence in the case. (App. p. 178, ll. 6 - p. 179, ll. 11.) The Trial Court sealed the sentence.

On the evening of April 19, 2007, deputies located Petitioner and arrested him pursuant to his pending bench warrant. (App. p. 181, ll. 17-20.) On April 20, 2007, court reconvened for the purpose of unsealing the sentence. (App. p. 181, ll. 3-5.) The Trial Court asked Petitioner if he had anything to say, and Petitioner indicated he did not. (App. p. 182, ll. 5-7.) The Trial Court sentenced Petitioner to thirty years in prison and a fine of $100,000. (App. p. 182, ll. 16-18.)

Petitioner filed a timely notice of appeal, and the South Carolina Court of Appeals reversed Petitioner's conviction on May 13, 2010. State v. Taylor, 388 S.C. 101, 694 S.E.2d 60 (Ct. App. 2010). The South Carolina Supreme Court granted the State's petition for writ of certiorari to review the Court of Appeal's opinion on April 20, 2011. The Supreme Court reversed the Court of Appeals and affirmed Petitioner's conviction on Jan. 9, 2013. State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013). The remittitur was returned to the circuit court on January 25, 2013.

On May 17, 2013, Petitioner filed his post-conviction relief (PCR) application, alleging: "Ineffective assistance of trial counsel . . . counsel failed to investigate the facts and laws surrounding my whole case" and "Violation of due process per the Federal, United States and South Carolina Constitution [a]nd fourth amendment . . . counsel failed to properly attack search and seizure." (App. pp. 185-86.) No amendments to the application were filed.

The PCR Court convened an evidentiary hearing into the matter on April 15, 2015, at the

[2] Petitioner had two prior qualifying convictions, making this a third offense.

Florence County Courthouse. (App. p. 195.) At the start of the hearing, PCR Counsel "inform[ed] the Court of [Petitioner's] specific issues" for the hearing by stating Petitioner "alleges that trial counsel was ineffective for failure to challenge the chain of custody of the drug evidence that was admitted and for – two, and for failing to object to two impermissible comments during the State's closing argument." (App. p. 199, ll. 12-17.) No further allegations were made.

The hearing proceeded forward on those *limited* issues. In fact, at one point in the hearing, when Respondent asked Petitioner why he did not come back to court the next day to plead guilty, PCR Counsel objected, stating, "I don't see how this has anything to do with [Trial Counsel]'s representation." (App. p. 208, ll. 19-22.) After which, Petitioner answered: "Exactly." (App. p. 208, l. 23.)

Later on in the hearing, Trial Counsel was able to outline a reason why Petitioner may not have wanted to return to court, explaining "[i]t seems like [Petitioner] . . . told me something along the lines of once he had signed up that they wouldn't go forward with the trial." (App. p. 223, ll. 18-20.)

After the hearing, the PCR Court denied and dismissed Petitioner's PCR, outlining its reasoning in its Order and addressing the allegations made in the PCR Hearing, which were summarized as "Chain of Custody" (App. p. 239) and "The State's Closing Argument." (App. p. 240). Petitioner did not file a Rule 59(e) motion. Petitioner filed his Notice of Appeal on or about September 1, 2015, and his Petition for Certiorari on April 4, 2016.

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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Trial Counsel's alleged failure to move for a continuance was not preserved; the allegation related to failure to move for a continuance was not presented to the PCR Court, was not addressed in the PCR Court's Order of Dismissal, and there was no Rule 59(e) Motion.

Petitioner argues the PCR Court erred in finding Trial Counsel was not ineffective for failing to move for a continuance. However, this argument was not preserved and not addressed by the PCR Court and therefore is not properly before this Court.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" Id. (quoting Wilder Corp. v. Wilke, 330 S.C. at 76, 497 S.E.2d at 733). "Imposing such a requirement on the appellant 'is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). 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, 423, 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).

At the PCR hearing, PCR Counsel specifically outlined the allegations he was proceeding forward with and those allegations did not include any allegations related to the failure to move

for a continuance. (App. p. 199, ll. 12-17.) Additionally, Petitioner did not include this allegation in his application, (App. pp. 185-86) and there were no amendments or Rule 59(e) motions filed in this case.

At the hearing, very few questions were asked about the situation leading to the trial in absence and very few facts were outlined in the hearing as to the trial in absence. In fact, the continuance and the situation leading to the trial in absence were considered to be so far removed from the allegations before the PCR Court that PCR Counsel objected on the basis of relevance when Respondent asked Petitioner why he did not come back to court the next day to plead guilty. (App. p. 208, ll. 19-22.)[3]

Because this was not an allegation before the PCR Court and because Trial Counsel was not provided notice of this allegation, there is no information as to why Trial Counsel did not move for a continuance, the likelihood of a continuance resulting in a different result, or the circumstances surrounding Petitioner's failure to appear in court when ordered to be there the next day by the Trial Court. At the PCR hearing, Trial Counsel was never asked about why he did not move for a continuance; there was very little information as to why Petitioner did not return to court to plead; there were no questions on how long and what efforts were made to look for Petitioner; and there were no questions on whether any off-the-record discussions took place with the Court or the State as to attempts made to find Petitioner. The issues presented to the PCR Court, offered to Trial Counsel to address, and ruled upon by the PCR Court were limited to the allegations outlined at the start of the hearing by PCR Counsel.

[3] Not only did PCR Counsel object, but Petitioner exclaimed, "Exactly" after PCR Counsel's objection, indicating that he also did not believe this to be an issue before the PCR Court. (App. p. 208, l. 23.)

Because this issue was not raised or ruled upon, it was not preserved. This Court should find Petitioner's issue was not preserved and is unreviewable at this stage.

II. Assuming the issue is treated as preserved, Trial Counsel was not ineffective and no prejudice was established where the jury had already been selected while Petitioner was present and the Trial Court allowed a full day from the time Petitioner was supposed to be in court before proceeding forward with the trial.

Should this Court elect to treat the issue as preserved, the petition should still be denied because Trial Counsel was not ineffective. Further, a review of the testimony at issue and the evidence in this case shows there was no prejudice to Petitioner. Petitioner presented no evidence the Trial Court would have abused its discretion by denying a continuance motion. In fact, the limited evidence in the record on this issue indicates Petitioner was allowed over twenty-four hours to appear in court before the jury was sworn and the trial started. Therefore, the post-conviction relief judge properly denied relief.

In Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006), the defendant arrived at court and signed a sentencing sheet prior to the commencement of any trial proceedings, to include jury selection. After signing the sentencing sheet, the defendant left the courthouse and was tried *in absentia* immediately thereafter. Id. at 280-81, 639 S.E.2d at 55. The defendant was sentenced three months later. Id. 371 S.C. at 281 n.3, 639 S.E.2d at 55 n.3. This Court ruled the defendant's attorney was deficient for failing to request a continuance. Id. at 282, 639 S.E.2d at 56. This Court ruled the defendant proved prejudice because it was one of "the rare case where the refusal of the continuance would have amounted to an abuse of discretion" by the trial judge. Id. at 283, 639 S.E.2d at 56.

Leading up to the trial, Petitioner refused to make a decision on whether to go to trial or

to plead. When faced with jury selection, Petitioner told Trial Counsel he did not want to plead or go to trial and then asked Trial Counsel to see if he could get permission for Petitioner to come back the next day to plead. (App. p. 215, ll. 2-4, 9-12, 15-19.) A jury was selected, and the Trial Court released the jury and the parties, which included Petitioner, by stating: "Those [who are] . . . associated with this trial, y'all are **excused until the morning**." (App. p. 28, l. 19 – p. 29, l. 3 (emphasis added).) Petitioner was allowed to remain out on bond; however, in violation of his bond conditions (p. 81, l. 1 – p. 82, l. 10; p. 83, l.1 – p. 84, l. 12.), Petitioner never showed back up to Court until law enforcement located him and brought him in on his bench warrant after his trial. (App. p. 181, ll. 17-20.)

Before the trial started, but after Petitioner failed to show up as instructed, the State offered to delay proceeding forward with the jury trial for several hours while "Mr. White"[4] tried to find Petitioner. (App. p. 29, ll. 11-15.) At a minimum, Trial Counsel, Petitioner's bondsman, and law enforcement were looking for Petitioner to bring him to court. (App. p. 63, ll. 2-19.) In addition to that agreed-upon delay, the trial was additionally delayed until the next day due to issues with the jurors. This additional delay was something the Trial Court and Trial Counsel recognized were beneficial to Petitioner as highlighted by this exchange:

> Court: ". . . [a]nd it gives you the opportunity to find [Petitioner]."
> Trial Counsel: "No question, it is nothing but a fortunate break for [Petitioner]."
> State: "If law enforcement can help you at all, there is a bench warrant out now."
> Trial Counsel: "I understand."

(App. p. 60, ll. 16-22.)

[4] Because the issue before this Court was never raised to the PCR Court, there are several essential and material facts that are not known, to include who Mr. White is and how extensive his efforts were to locate Petitioner prior to the trial starting.

And, as testified to by Trial Counsel at the PCR hearing, had Petitioner been found or elected to come to court prior to the trial starting, he would have still been able to take the plea offer. (App. p. 226, ll. 5-7.)

Considering the instructions from the Trial Court to return the next day, the twenty-four hour delay in starting the trial, the efforts made to find Petitioner, the fact that a jury was already selected and was being kept on standby while everyone waited to see if Petitioner would comply with his bond conditions, and Petitioner's clear "affront to the dignity and authority to the court[,]" Bagwell v. Dretke, 376 F.3d 408, 411 (5th Cir. 2004), the Trial Court would not have abused its discretion in denying a motion for a continuance.

Petitioner's statements that he did not want to plead or go to trial and his statement to Trial Counsel that "once he . . . signed up that they wouldn't go forward with the trial" (App. p. 223, ll. 18-20) combined show that Petitioner did not want to be found and was hoping his "third option" to a plea or a trial would be to have nothing happen on his case. Petitioner's blatant disregard for the law should not be rewarded. Considering the lengthy delay allowed by the State, the Trial Court, and the circumstances related to the jury, Trial Counsel was not ineffective for failing to move for an additional delay in the trial. And because the Trial Court would not have abused its discretion in denying a motion for continuance if one had been made, Petitioner was not prejudiced by Trial Counsel's failure to make a motion for continuance.

CONCLUSION

For the foregoing reasons, 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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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**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
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This 18th day of August, 2016

DEONNA ROGERS
LEGAL ASSISTANT