STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 01 2016

S.C. SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Greenville County

The Honorable Edward W. Miller, Guilty Plea Judge
The Honorable G. Edward Welmaker, Post-Conviction Relief Judge

---

Appellate Case No. 2015-002063

Ruben Ramirez,.....Petitioner,

v.

State of South Carolina,.....Respondent.

BRIEF OF RESPONDENT

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

TABLE OF AUTHORITIES

Cases

Court Rules

STATEMENT OF ISSUE ON APPEAL

1. Whether the court of appeals erred in upholding the PCR judge's ruling under the "any evidence" standard by finding that no ineffective assistance of counsel or prejudice occurred with respect to Petitioner's claim that plea counsel mishandled the issue of his mental competency prior to his plea proceeding because the evidence relied upon by the court of appeals was an incomplete state mental examination that lacked probative value, and because there was overwhelming probative evidence in existence in the form of an independent mental exam and a psychological exam that established that petitioner was incompetent to stand trial?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the April 2007 term of General Sessions for lewd act upon a child (2007-GS-23-3245) and at the May 2007 term for assault and battery with intent to kill (ABWIK) (2007-GS-23-4394), kidnapping (2007-GS-23-4395), first-degree criminal sexual conduct (CSC) with a minor (2007-GS-23-4396), and first-degree burglary (2007-GS-23-4397). (App.pp.134-43). Monte D. Desai, Esquire represented Petitioner.

On November 3, 2008, Petitioner pled guilty but mentally ill. The Honorable Edward W. Miller sentenced Petitioner to concurrent terms of 20 years for ABWIK, 20 years for kidnapping, 20 years for first-degree CSC with a minor, and 20 years for first-degree burglary. Judge Miller levied a consecutive sentence of 15 years suspended with 5 years probation for lewd act upon a child. (App.p.24). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on November 2, 2009 (2009-CP-23-9285). (App.pp.27-34). A hearing was held at the Greenville County Courthouse on May 9, 2011. (App.pp.40-81). Petitioner was present and represented by Matthew Kappel, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker took the matter under advisement. (App.p.81). On May 23, 2011 – while the matter was still under advisement – Petitioner filed a "Motion to Hold the Record Open and Allow Submission of a New Competency Evaluation." (Supp.App.pp.1-3). Respondent filed a return in opposition. (App.pp.128-30). Judge Welmaker denied both the PCR application and post-trial motion in an order filed August 1, 2011. (App.pp.114-21). After Petitioner filed a second post-trial motion (pursuant to Rules 59(a), (e), SCRCP) and Respondent filed a return, Judge Welmaker issued an order filed November 23,

2011 in which he denied the motion but granted a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). (App.pp.122-27; pp.132-33).

A notice of appeal was filed at this Court. Wanda H. Carter, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner. After a petition for writ of certiorari and return to petition for writ of certiorari were filed, the case was transferred to the South Carolina Court of Appeals. The court of appeals granted the petition for writ of certiorari. The parties submitted two sets of briefs to the court.[1] After oral argument, the court of appeals affirmed the PCR judge's denial of relief. Ramirez v. State, 413 S.C. 351, 776 S.E.2d 101 (Ct. App. 2015). (App.pp.1-21). Petitioner filed a Petition for Rehearing, which the court of appeals denied by order filed September 3, 2015. (App.pp.22-30; p.31).

Petitioner filed a petition for writ of certiorari with this Court on October 19, 2015.[2] This Court granted the petition on June 16, 2016 and ordered the parties to submit briefs.

---

[1] At the request of the court of appeals, the parties each submitted two briefs. None of these briefs are included in the Appendix.

[2] Respondent notes Petitioner did not appeal the court of appeals' ruling on the issue of newly-discovered evidence; therefore it is the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (finding unchallenged and unappealed rulings are the law of the case); see also Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."); cf. Moseley v. All Things Possible, Inc., 395 S.C. 492, 495, n. 4, 719 S.E.2d 656, 658, n.4 (2011) ("That finding [of the court of appeals] is the law of the case, for the Moseleys did not seek certiorari on that issue."); South Carolina Dep't of Soc. Servs., 393 S.C. 387, 393, 712 S.E.2d 452, 456 (2011) ("Because these rulings [of the court of appeals] have not been challenged, they are the law of the case.").

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). The appellate court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. See Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). 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

The court of appeals did not err in finding Petitioner failed to meet his burden of proving he is entitled to post-conviction relief.

The court of appeals was correct in finding and concluding that Petitioner failed to meet his burden of proof.

A.

Petitioner pled guilty to charges arising from two separate incidents. On January 25, 2007, Petitioner approached a seven year-old girl and put his hands down her shirt. Petitioner also had the victim sit in his lap. The victim told her father, who saw Petitioner but did not report the incident to police because he planned to "take care of it and prevent another incident on his own." (App.pp.15-16).

On January 26, 2007, an incident with a different victim took place at the same apartment complex as the incident the day before. An eight year-old girl opened the door to Petitioner, who

pushed his way into her apartment. Petitioner hit and choked the victim while inside. Petitioner then took the victim into some woods near the apartment building and called her a bitch, beat her, felt her breasts, and put his penis into her mouth and buttocks. Petitioner stomped on the victim's face and left the scene. The victim said Petitioner repeatedly threatened to kill her during the incident and later positively identified him in a line-up. (App.pp.12-14). When he was apprehended, Petitioner was cooperative with police and "told a story very similar to [the victim's] account." (App.p.14).

B.

At Petitioner's guilty plea hearing, the plea judge noted Petitioner wished to enter a plea of guilty but mentally ill. (App.p.4). Plea counsel stated they were making this plea after receiving reports from two doctors. (App.p.5). The assistant solicitor stated they did not contest the findings. (App.p.5). The evaluations and reports were reviewed by the plea judge. (App.pp.5-6). The plea judge found Petitioner "does suffer from a mental illness" and noted some of the findings from the evaluations and reports. (App.p.6).

The plea judge read the indictments and noted the maximum possible sentences for the charges. Petitioner stated he understood. (App.pp.7-9). Petitioner confirmed he wanted to feel guilty and that he had not been threatened, coerced, or made any promises. (App.pp.9-10). The plea judge explained the right to trial and Petitioner confirmed he wanted to plead guilty. (App.p.11). Petitioner confirmed he was guilty and that he was satisfied with plea counsel. (App.p.12).

After the assistant solicitor recited the facts of the charges, plea counsel made his mitigation argument. (App.pp.18-23). Plea counsel explained the circumstances of Petitioner's

childhood. (App.pp.18-19). Plea counsel also discussed Dr. Gedo's report – which had already been reviewed by the plea judge – and reiterated several of the doctor's findings to the court. (App.pp.19-23). The plea judge sentenced Petitioner to 20 years for ABWIK, 20 years for kidnapping, 20 years for first-degree CSC with a minor, 20 years for first-degree burglary, and a consecutive sentence of 15 years suspended with 5 years probation for lewd act. (App.p.24).

C.

At the PCR hearing on May 9, 2011, counsel for Petitioner stated the only issue he was proceeding upon was "based on the psychological evaluations." (App.p.44).

During his direct examination of plea counsel, the PCR judge entered into evidence the following reports from evaluations performed before Petitioner's plea hearing: the 2007 competency evaluation (performed by Mayank H. Dalal, M.D.) ordered by the circuit court and the 2008 psychological evaluation (performed by Stephen M. Gedo, Jr., Ph.D.) subsequently obtained by plea counsel. (App.pp.83-85; pp.86-90). Dr. Dalal found Petitioner was competent to stand trial. Dr. Gedo diagnosed Petitioner with Attention Deficient Hyperactivity Disorder and noted he had severe mental retardation. These two reports were before the judge at the guilty plea hearing. (App.pp.5-6).

Plea counsel was the sole witness at the PCR hearing and the parties examined him about the two evaluations in this case and whether – based on the reports from these evaluations – he believed he should have obtained an additional competency evaluation. Plea counsel testified Petitioner had undergone a State-ordered competency evaluation before he assumed representation. (App.pp.48-49; p.68). Plea counsel testified this was Dr. Dalal's evaluation, which found Petitioner was competent to stand trial. (App.p.48). Plea counsel testified he

obtained a psychological evaluation (by Dr. Gedo) when he believed Petitioner did not understand the gravity of the charges. (App.p.47; pp.68-69). Plea counsel noted that Dr. Gedo's report did not make a determination of competency, it was merely for psychological diagnosis. (App.p.55; pp.56-57). Plea counsel testified he never contemplated a second competency evaluation. (App.p.63). Plea counsel testified he had several conversations with Dr. Gedo about the results of the psychological evaluation and that Dr. Gedo never recommended Petitioner undergo another competency evaluation. (App.p.69). Plea counsel testified he would have pursued another competency evaluation if Dr. Gedo had suggested it. (App.p.71). Plea counsel testified he believed a plea of guilty but mentally ill was appropriate in this case after he received Dr. Gedo's report. (App.p.70). Plea counsel noted Petitioner was easy to communicate with and understood his explanation of both the court process and what would happen at the plea hearing. (App.pp.69-70).

Petitioner did not present any evidence – in the form of either expert testimony or a new competency evaluation – to corroborate his claim that plea counsel was deficient in failing to obtain a second competency evaluation. Petitioner, in fact, did not raise the issue of obtaining a new evaluation in this case until after the parties had rested and counsel for Respondent argued Petitioner failed to meet his burden of proof without having presented such an evaluation at the PCR hearing. (App.pp.73-75). The PCR judge took the case under advisement. (App.p.81).

D.

On May 23, 2011 – two weeks after the conclusion of the PCR hearing – Petitioner filed a Motion to Hold the Record Open and Allow Submission of a New Competency Evaluation." (Supp.App.pp.1-3). Petitioner admitted (1) the "only ground for post conviction relief was that

the competency evaluation conducted by Dr. Dalal was defective" and (2) there had never been an additional competency evaluation. Petitioner argued the PCR judge should keep the matter under advisement until a new competency hearing could be completed. (Supp.App.pp.2). Respondent countered the motion should be denied because Petitioner should have known well before the PCR hearing that he could not meet his burden of proof without a second competency evaluation. Respondent argued Petitioner should not be allowed more than one bite at the apple. (App.pp.129-30). The PCR judge addressed his denial of this motion in a separate section of the order of dismissal filed August 1, 2011. (App.p.120).

On August 11, 2011, Petitioner filed a "Motion to Reconsider, Open, Alter or Amend SCRCP 59(a), 59(e)." (App.pp.122-27). Attached to this Motion were an affidavit and report from Thomas Martin, M.D. that were prepared after he conducted an evaluation of Petitioner on May 31, 2011 – three weeks after the conclusion of the PCR hearing. (Supp.App.pp.5-10). Respondent submitted a return in opposition, arguing the record in this matter was closed and that Petitioner should have been prepared to present this evidence at the PCR hearing. The PCR judge denied Petitioner's motion. (App.pp.132-33).

E.

The court of appeals affirmed the PCR judge's order of dismissal. Ramirez v. State, 413 S.C. 351, 776 S.E.2d 101 (Ct. App. 2015). (App.pp.1-21). While the court of appeals found the PCR judge erred in determining plea counsel was not deficient, the court found Petitioner failed to meet his burden of proving prejudice. (App.pp.14-15). The court of appeals noted Petitioner failed to demonstrate there was no probative evidence to support the PCR judge's finding of a lack of prejudice. (App.p.16). The court of appeals properly concluded evidence of probative

value supported the PCR judge's order of dismissal and affirmed. (App.p.18).

F.

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). 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).

An applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. at 686, 104 S. Ct. at 2064. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066. An applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

G.

The court of appeals was correct in finding and concluding Petitioner failed to meet his burden of proving both prongs of the Strickland test. The court of appeals was correct in finding and concluding there was evidence of probative value to sustain the PCR judge's order of

dismissal.

Petitioner failed to produce any evidence at the PCR hearing to support his allegation that plea counsel should have obtained a second competency evaluation. Accordingly, the PCR judge properly denied Petitioner's "Motion to Reconsider, Open, Alter or Amend SCRCP 59(a), 59(e)."[3] "The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." Brenco v. South Carolina Dep't of Transp., 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008). There can be no abuse of discretion in declining to reopen the record in this case because Petitioner could have provided a second competency evaluation at the PCR hearing. See Spinx Oil Co., Inc. v. Fed. Mut. Ins. Co., 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993), overruled on other grounds, Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997).

A PCR applicant is given "one bite at the apple" in the PCR setting, and the PCR hearing is the venue for all evidence and arguments to be made to the court. See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) ("[A]n applicant is entitled to a full adjudication on the merits of the original petition, or 'one bite at the apple.'"). Petitioner, therefore, should have been prepared to present all evidence and testimony at the scheduled PCR hearing. Petitioner's counsel filed the PCR application on November 2, 2009 and the PCR hearing was held on May 9, 2011. Petitioner's counsel had more than 18 months to fully investigate his claims and present them to the PCR court. If he needed additional time for an evaluation or to have an expert

[3] Though Petitioner's post-trial motion also requested the PCR judge grant a new trial pursuant to Rule 59(a), SCRCP or reopen the record, as Petitioner only addresses the Rule 59(e) aspect of the Motion in his Brief of Appellant, Respondent submits any argument regarding Rule 59(a) has been abandoned.

witness available to testify, he should have requested a continuance at the start of trial. He failed to do so. Cf. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742-43 (Ct. App. 2001) (holding the issue of whether the trial judge erred in granting the defendant's motion to quash further discovery was unpreserved because plaintiff's counsel failed to (1) argue the necessity for additional discovery until after summary judgment was granted and (2) move for a continuance to conduct further discovery). Rather, Petitioner's counsel declared they would proceed solely upon "the psychological evaluations." As such, Petitioner should have been prepared to present all evidence and testimony related to this issue.

The sole issue raised at the PCR hearing was whether plea counsel should have requested a second competency evaluation. Petitioner had the burden of proving – under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) – both that plea counsel should have requested a second competency evaluation and that the lack of such prejudiced his case. 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."); see also Rule 71.1(e), SCRCP. As such, Petitioner was on notice that he would have to present a second competency evaluation at trial in order to prevail on his claim that plea counsel should have requested this evaluation before Applicant pled guilty. See, e.g., Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"); cf. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). As Dr. Martin's evaluation

was not performed prior to the PCR hearing, Petitioner could not prove he suffered prejudice by relying on this evaluation. Dr. Martin's evaluation was not subjected to examination by either party or the PCR judge and was properly not considered by the PCR judge when he weighted the merits of the PCR case.

Post-conviction relief is governed by the South Carolina Rules of Civil Procedure. See Rule 71.1(a), SCRCP. This case, therefore, should not be treated differently than any other civil case. Petitioner is arguing he should be allowed to supplement his case with additional facts and an expert witness after the close of both his case and the trial itself. This would be comparable to a plaintiff in a negligence action filing suit in a slip-and-fall case, going to trial and presenting his case, resting his case, and then – after the defendant rested its case and realizing he presented no evidence about the injuries sustained in the slip-and-fall – asking for a second chance to meet his burden of proof with expert testimony. Such a scenario would be outrageous and contrary to the spirit of the law. The issue Petitioner hoped to bolster with Dr. Martin's report was not an issue developed during the course of the PCR hearing – it was the only issue argued at the hearing.

The proper use of a Rule 59(e), SCRCP motion is to preserve issues that were raised to – but not ruled upon – by the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). The purpose of Petitioner's Rule 59(e) motion, however, was not to request the PCR judge rule upon an issue. Rather, Petitioner argued in his Rule 59(e) motion that the PCR judge should consider the affidavit and report prepared by Dr. Martin from when he evaluated Petitioner three weeks after the close of evidence in this case. A Rule 59(e) motion is not intended to be used to introduce evidence for the first time. It is axiomatic that one cannot raise an issue for the first time in a post-trial motion. See South Carolina Dep't of Transp. v. First

Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999) (holding "it is improper to argue new matter in a motion for reconsideration"). As Dr. Martin's affidavit and report were presented to the court for the first time in the Rule 59(e), SCRCP motion, the PCR judge did not err in denying said motion and finding Petitioner thus failed to meet his burden of proving the prejudice prong of Strickland.

H.

Accordingly, the court of appeals did not err in finding Petitioner failed to meet his burden of proving he is entitled to post-conviction relief by satisfying both prongs of the Strickland analysis. As the court of appeals correctly found Petitioner did not meet his burden of proving he suffered prejudice as the result of counsel's representation, he cannot demonstrate he is entitled to post-conviction relief. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814; see also Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

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

September 1, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 01 2016
S.C. SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Greenville County

The Honorable Edward W. Miller, Guilty Plea Judge
The Honorable G. Edward Welmaker, Post-Conviction Relief Judge

---

Appellate Case No. 2015-002063

Ruben Ramirez,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail, addressed to:

Wanda H. Carter, 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 1st day of September, 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