

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2015 – 001688
Lower Court Case No. 2014-CP-40-05098

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S.C. SUPREME COURT

Trey Levar Garner, #248321,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

The PCR court erred in denying Petitioner's application alleging newly discovered evidence of juror misconduct where Petitioner presented admissible evidence and testimony that showed juror Chanda L. Davis had intentionally concealed her belief that she was related by marriage to Joe Brooks, the man Petitioner was convicted of murdering.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. He was indicted at the September 1997 term of the Richland County Grand Jury for Murder (1997-GS-40-21496), Attempted Armed Robbery and Robbery (1997-GS-40-21497), and Conspiracy to Armed Robbery (1997-GS-40-21498). On March 9-12, 1998, Petitioner proceeded to trial before the Honorable J. Derham Cole. At trial, he was represented by James P. Rogers, Esquire. The State was represented by R. Knox McMahon and Joenathan S. Chaplin, Assistant Solicitors for the Fifth Judicial Circuit. On March 12, 1998, the jury found Petitioner guilty as indicted. Judge Cole sentenced Petitioner to imprisonment for thirty (30) years for Murder, five (5) years, consecutive, for Attempted Armed Robbery, and five (5) years, concurrent, for Conspiracy.

A timely notice of appeal was filed and an appeal was perfected by Melody J. Brown, Esquire, then of the South Carolina Office of Appellate Defense. The Supreme Court of South Carolina affirmed the convictions pursuant to Rule 220(b)(1), SCACR, State v. Garner, Mem. Op. No. 107 (filed August 23, 2000).

Petitioner subsequently filed an application for post-conviction relief on August 20, 2001. On January 21, 2004, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. Petitioner testified on his own behalf. Counsel Rogers testified for the State. On March 24, 2004, Judge Kinard issued an Amended Order of Dismissal with Prejudice, denying relief. Petitioner served and filed a notice of appeal to the South Carolina Supreme Court.

He was represented by Joseph L. Savitz, III, then Acting Chief Attorney of the S.C. Office of Appellate Defense on the appeal. Counsel Savitz filed a Petition for Writ of Certiorari

pursuant to Johnson¹ on Petitioner's behalf on November 3, 2004, where he requested to be relieved as counsel. In an order dated December 2, 2005, the Supreme Court of South Carolina issued an order denying certiorari and granting counsel's petition to be relieved as counsel. The remittitur was issued on December 20, 2005.

Petitioner then filed a petition for writ of habeas corpus on January 20, 2006, in federal district court. On March 13, 2006, Respondent filed its return and motion for summary judgment requesting that the case be dismissed. The federal district court granted Respondent's motion for summary judgment and dismissed the case with prejudice by order filed February 2, 2007. Petitioner then filed a notice of appeal on April 4, 2007. The United States Court of Appeals for the Fourth Circuit dismissed the appeal by order dated October 24, 2007, and mandated the judgment on November 15, 2007.

Petitioner filed a second application for post-conviction relief on August 20, 2014², making allegations that he possessed newly discovered evidence proving that a juror was related to the victims of the crime. An evidentiary hearing was held on April 3, 2015, at the Richland County Courthouse. Petitioner was present and represented by Tara Dawn Shurling. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent. The Honorable Brooks P. Goldsmith, issued an Order of Dismissal filed on July 8, 2015, denying relief.

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

² This matter was originally filed as a Motion for New Trial pursuant to Rule 29(b), SCRCrim P, in the Richland County Court of General Sessions. At the PCR hearing, the State argued the application was not timely filed and that a consent order from the Fifth Circuit Solicitor's Office treating the motion as a timely filed PCR was not binding. The PCR court denied the motion and allowed the hearing to go forward on the merits of newly discovered evidence.

Petitioner filed a notice of appeal. A Petition for Writ of Certiorari was filed on June 20, 2016. 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 Petitioner failed to argue that a hearsay exception applies to the admission of testimony and affidavits regarding a juror's relationship to the victim.

Petitioner argues the PCR court erred in denying the application alleging newly discovered evidence proving that juror, Chandra L. Davis, was related to the victim's family. Specifically, he argues the PCR court erred in not granting relief on the merits and in finding the evidence presented inadmissible hearsay. Petitioner cites Rule 803(19), SCRE, in support of his argument. First, this argument is not preserved because PCR counsel made no argument that the testimony and affidavits were subject to a hearsay exception. Second, the PCR court was correct in finding Petitioner failed to meet his burden.

How the Issues was Raised

Petitioner alleged that Chandra L. Davis, a juror seated on Petitioner's trial was the niece of the victim's daughter, Michelle Davis. (App. p. 645-62). Petitioner framed the allegation as one of newly discovered evidence of juror misconduct and cited McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013). At the PCR hearing, Petitioner presented testimony from the victim's family, Michelle and Wilbert Leroy Davis. (App. p. 703-14). Mr. Davis was an assistant football coach at Lower Richland High School. (App. p. 704). Petitioner also presented testimony from others who attended Lower Richland High School and who knew a woman named Chandra Davis. (App. p. 714-31). Petitioner attempted to introduce testimony that witnesses believed Chandra Davis was somehow related to Mr. Davis. (App. p. 714-52). The PCR court sustained multiple hearsay objections to the witnesses' testimony regarding the relationship between Chandra Davis and Mr. Davis. (App. p. 724, 725, 727, 745). Petitioner also attempted to introduce affidavits drafted in support of this allegation, but the PCR court suppressed them as

inadmissible hearsay. (App. p. 725-26).

Discussion

A. The issue of whether the PCR court erred in suppressing testimony and affidavits concerning the juror's relationship to the victim is not preserved.

This argument is not preserved for this Court's review. It is well settled that an issue that has not been presented to or passed upon by the trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. 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, 420-21, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); 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). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011).

Here, the PCR court sustained objections to testimony regarding the juror's relationship to the victim's family through witnesses who attended Lower Richland High School. (App. p. 724, 725, 727, 745). Petitioner also attempted to introduce affidavits into evidence attesting the same but the PCR court suppressed the documents. (App. p. 725-26). At the hearing, Petitioner did not argue that any exceptions to hearsay apply and that the testimony and affidavits should be

admitted. On appeal, Petitioner asserts that the testimony and affidavits should have been admitted under a hearsay exception: Rule 803(19), SCRE, Reputation Concerning Personal or Family History. This issue was neither raised nor ruled upon by the PCR court and is therefore unpreserved for this Court's review.

B. The PCR court correctly ruled that Petitioner failed to meet his burden.

Petitioner failed to meet his burden in proving that a juror was related to the victim's family. Petitioner proceeded on the allegation that Chandra Davis attended Lower Richland High School while the victim's daughter's husband was an instructor and football coach. (App. p. 645-62). McCoy is the standard for any newly discovered juror issues and held that an issue of fact exists and a hearing is therefore required where an allegation would establish an exception to either the statute of limitations or the prohibition against successive applications when those allegations are not conclusively refuted by the record. McCoy also held the traditional five part test governing newly discovered evidence in PCR actions is not applicable to allegations of juror misconduct. This Court enunciated a two-part test for when the grant of a new trial is warranted on the basis of juror misconduct: "if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." McCoy v. State, 401 S.C. at 371, 737 S.E.2d at 627. Applicant must file an application for post-conviction relief "within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. §17-27-45(C).

The PCR court properly denied relief. First, Petitioner did not present any evidence to show that the Chandra Davis who served on the jury was the same Chandra Davis who attended

Lower Richland High School. Second, Petitioner failed to present Chandra Davis as a witness to support a finding that she *intentionally* concealed her alleged relationship with the victim's family. Even assuming the testimony and affidavits were admitted, there was no evidence presented establishing that the same Chandra Davis served on the jury. Further, Mr. and Mrs. Davis both testified that they knew of no relative name Chandra. (App. p. 706, 712). They did not recognize anyone seated on the jury and did not believe they were related to anyone on the jury. (App. p. 709-10, 713). Mr. Davis also testified that he did not know of a Chandra Davis who attended Lower Richland. (App. p. 706-07). This testimony was found credible and persuasive by the PCR court. (App. p. 773). Therefore, there is evidence to support the PCR court's denial of relief, particularly the testimony from Mr. and Mrs. Davis.

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,

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BY: 

ATTORNEYS FOR RESPONDENT

November 10, 2016

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Trey Levar Garner, #248321,

Petitioner,

v.

State of South Carolina,


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

**John Harrison Strom, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201**

This 10th day of November, 2016



FELICIA V. HAYES
Legal Assistant For Respondent



ALAN WILSON
ATTORNEY GENERAL

November 10, 2016

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S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Trey Levar Garner, #248321 v. State of South Carolina
Appellate Case No. 2015-001688
Lower Court Case No: 2014-CP-40-05098

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
SC Bar No. 101443

JCM/fvh
Enclosures

cc: John Harrison Strom, Esquire
Victim Services