STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Post-Conviction Relief Judge

Appellate Case No. 2015-002302

HOWARD LEE SIMS, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Is Petitioner's argument that Counsel was ineffective for not objecting to the in-court identification of Petitioner preserved for this Court's review?

II. Did Petitioner fail to satisfy his burden of proving Counsel was ineffective for not objecting to the in-court identification?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. He was indicted at the November 2007 term of the Spartanburg County Grand Jury for murder (2007-GS-42-5920) and at the July 2008 term for first-degree burglary (2008-GS-42-3750). He was represented by Kathleen Hodges, Esquire.

After the State called the case to trial, Petitioner was found guilty. On July 17, 2008, the Applicant was sentenced by the Honorable J. Derham Cole to concurrent sentences of life imprisonment for murder and life imprisonment for first-degree burglary.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders[1] brief. The Court of Appeals dismissed the appeal. State v. Sims, Op. No. 2012-UP-256 (S.C. Ct. App. filed May 2, 2012). The Remittitur was sent on May 18, 2012.

Petitioner filed an application for post-conviction relief ("PCR") on October 2, 2012. Respondent made its Return on January 8, 2014. An evidentiary hearing was convened on March 23, 2015, before the Honorable Roger L. Couch. J. Brandt Rucker, Esquire, represented Petitioner, and Suzanne H. White, Esquire, represented Respondent.

Petitioner and Kathleen Hodges, Esquire, ("Counsel"), testified at the PCR hearing. Following the hearing, Judge Couch denied and dismissed Petitioner's PCR by written Order dated October 6, 2015.

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[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)). Further, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)).

ARGUMENT

I. Petitioner's argument that Counsel was ineffective for not objecting to the in-court identification of Petitioner is not preserved for this Court's review.

This argument is not preserved for review because the PCR judge did not rule on this issue and Petitioner did not file a motion pursuant to Rule 59(e), SCRCP, to preserve the issue. 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). Though an applicant is permitted to "amend his PCR application to conform to the evidence presented [at the PCR hearing]," Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992), issues that were not covered in either the application or at the hearing cannot be raised for the first time on appeal. Id. ("Amendments under [Rule] 15(b) are allowed *not to assert new claims*, but rather to conform the pleadings to the evidence presented at trial.") (emphasis added). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 739 S.E.2d 282, 285 (2012) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)).

Here, the PCR judge ruled that Petitioner failed to meet his burden of proving trial counsel should have objected to the photographic lineup. The PCR judge did not rule on the

issue of whether Counsel was ineffective for not objecting to the in-court identification of Petitioner. In fact, the Court found "the admission of the lineup was not prejudicial in light of the in-court identifications." (App. p. 557). Petitioner did not allege in his PCR application that Counsel was ineffective for failing to object to the in-court identification of Petitioner. Petitioner did not file a motion to alter or amend the order of dismissal to request that the Court make a specific ruling on the issue of whether Counsel was ineffective for not objecting to the in-court identification of Petitioner. Therefore, Respondent submits the issue is not preserved for this Court's review.

II. Petitioner failed to satisfy his burden of proving Counsel was ineffective for not objecting to the in-court identification.

To the extent this Court finds the issue of whether Counsel was ineffective for not objecting to the in-court identification of Petitioner was preserved, Respondent submits Petitioner failed to satisfy his burden of proving Counsel was ineffective in this regard.

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting

Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Petitioner failed to prove that trial counsel was not acting within reasonable professional norms when she declined to object to the out of court identification evidence. An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012); State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Biggers, 409 U.S. at 198-99; Liverman, 398 S.C. at 138, 727 S.E.2d at 426. If the court finds the identification did not result from impermissibly suggestive police procedures, the

inquiry ends there and the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was impermissibly suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426. The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007); Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36. When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Turner, 373 S.C. at 127, 644 S.E.2d at 697; Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36.

Here, Counsel challenged the identification of Petitioner through a photographic lineup in a pretrial Neil v. Biggers[2] (App. pp. 42-89). In the Biggers hearing, investigator John Burgess testified that David gave him a description of Petitioner prior to showing him the lineup. (App. p. 48). David described Petitioner as being 6'1" 6'2," 200-215 pounds, short hair, bulging eyes, and

[2] 409 U.S. 188 (1972).

a blue or light-pocked t-shirt. (App. p. 48). Burgess testified Petitioner was the only individual in the line-up wearing a gray t-shirt and the others were wearing white t-shirts. (App. pp. 51-56). He also testified that was not done intentionally, that he did not suggest anybody in the lineup (App. pp. 56-57) and that David selected Petitioner without hesitation. (App. p. 54).

The trial judge ruled that the photographic lineup was admissible and that the witnesses would be permitted to make an in-court identification of Petitioner. (App. p. 90). At trial, the deceased victim's brother (David) identified Petitioner as the man who attacked the victim. (App. p. 176). David testified that he was really close to the assailant during the attack, that they were face to face, and that there was light coming from the computer monitor and a big screen TV. (App. p. 176). David testified he could see the attacker, and then identified him in court. (App. p. 176). When the State moved to admit the lineup, Counsel renewed her objection. (App. p. 197).

The PCR Court found that the Petitioner failed to meet his burden of proving trial counsel should have objected to the photographic lineup where Counsel did object to the lineup and then renewed her objection. Petitioner alleged only that the lineup was unduly suggestive because he wore a gray shirt in the photo and the others wore white shirts. Petitioner stated David was only 50% sure the Petitioner was the perpetrator. Counsel testified her strategy at trial was to attack the identifications. The PCR Court noted testimony about both the white versus gray shirts and the victim's brother being "50% sure" was given. Three other individuals identified the Petitioner as a stranger in the neighborhood (and in the vicinity of the victim's home) and riding a light green girl's bicycle. (App. pp.242-43; p.254; pp.258-59). The trial judge found the photographic lineup was admissible and that "the witnesses will be permitted to make an in-court identification of the [Petitioner]." (App. p. 90). The PCR court found the Petitioner failed to demonstrate what other argument trial counsel could have made to have the photographic lineup excluded. The

PCR court also noted that, contrary to the Petitioner's assertions, trial counsel did renew her objection to the admission of the lineup. (App. p. 197; p. 557).

Petitioner likewise failed to satisfy his burden of proving he was prejudiced by the alleged deficiency of Counsel. To prove prejudice, Petitioner would have to prove that but for the alleged deficiency of Counsel, the outcome would have been different. Here, the trial judge had already ruled on the admissibility of the lineup. Counsel renewed her objection and the trial judge still admitted the lineup. Further, David testified as to the reliability of his identification of Petitioner. Specifically, he testified that he was really close to the assailant during the attack, that they were face to face, and that there was light coming from the computer monitor and a big screen TV, and that he could see the attacker. David also gave a detailed description of Petitioner—including height, weight, race, and a particular facial feature—before he ever saw the lineup photograph. In addition, although Petitioner was wearing a different colored t-shirt than the rest of the people in the photographs, the t-shirt was not the shirt he was wearing on the night of the incident, and Burgess testified the clothing was unintentional. Furthermore, multiple witnesses—not just the victim's brother—identified Petitioner. Moreover, Petitioner had the victim's DNA on his clothing. (App. pp. 368-71; p. 385). Specifically, the victim's DNA profile matched blood found on Petitioner's shoes, socks, and jeans. (App. p. 385). Accordingly, Petitioner has failed to show that but for Counsel's failure to object to David's in-court identification of Petitioner, the result of the proceeding would have been different.

Additionally, though Petitioner's argument centers around Counsel's alleged failure to preserve her objection for appellate review, Petitioner has failed to show that but for the alleged deficiency, his conviction would have been reversed on appeal. See State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg,

363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."))). A circuit court's decision to allow the in-court identification of an accused will not be disturbed on appeal absent an abuse of discretion or prejudicial legal error. State v. Simmons, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct. App. 2009); State v. Govan, 373 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007). In light of this standard, Petitioner has failed to prove he was prejudiced by the alleged deficiency.

CONCLUSION

For the foregoing reasons, Respondent submits the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues.

Respectfully submitted,

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September 6, 2016

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The Honorable Roger L. Couch, Circuit Court Judge

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v.

STATE OF SOUTH CAROLINA, RESPONDENT

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:

David Alexander, Esquire
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This 6th day of September, 2016

Ashley Haworth
ASHLEY HAWORTH
LEGAL ASSISTANT