STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Oconee County
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-001358

DAVID LEE COWARD,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY MCCALLISTER
Assistant Attorney General
SC Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Is there any probative evidence in the record to support the PCR court's decision to deny Petitioner's request to relieve his appointed PCR counsel where Petitioner claims PCR counsel did not adequately confer with Petitioner or investigate Petitioner's PCR allegations?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. In December 2007, the Oconee County Grand Jury indicted Petitioner for burglary – first degree (2007-GS-37-1835) and petit larceny (2007-GS-37-1836). App. pp. 282-285. Dallas Ball, Esquire, and Richard Warder, Esquire, represented Petitioner. App. p. 1. Assistant Solicitor David Wagner, Esquire, prosecuted the case. Id. On January 26-27, 2009, Petitioner proceeded to trial before the Honorable Alexander S. Macaulay. Id. The jury found Petitioner guilty as indicted. App. p. 170. Judge Macaulay sentenced Petitioner to imprisonment for concurrent terms of fifteen years for burglary – first degree and thirty days for petit larceny. App. pp. 180-181.

Petitioner filed a timely notice of appeal. Elizabeth Franklin-Best, Esquire, of the Office of Appellate Defense perfected the appeal. App. p. 183. The South Carolina Court of Appeals affirmed Petitioner's conviction on December 21, 2011. State v. Coward, Op. No. 2011-UP-583 (S.C. Ct. App. filed December 21, 2011). App. p. 207. Petitioner filed a timely petition for rehearing on January 4, 2012, which was denied on January 27, 2012. App. pp. 208, 212. Petitioner then filed a petition for writ of certiorari on February 27, 2012, which the South Carolina Supreme Court denied on June 20, 2013. App. pp. 214, 232. The remittitur was returned to the circuit court on June 25, 2013. App. p. 275.

Petitioner filed his application for PCR on May 2, 2012, claiming constitutional violations of due process and equal protection. App. p. 233-235. Respondent filed its return on August 3, 2015. App. p. 241. An evidentiary hearing into the matter was convened on February 10, 2016, at the Anderson County Courthouse before the Honorable Brooks P. Goldsmith. App. p. 246. Petitioner was present at the hearing and was represented by Hugh W. Welborn, Esquire.

Id. Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Id. On June 12, 2016, Judge Goldsmith, filed the order of dismissal denying Petitioner's application for post-conviction relief. App. p. 274. Petitioner appealed and filed a Petition for Writ of Certiorari on February 22, 2017.

STATEMENT OF THE FACTS

On or between April 26 and 27, 2007, Petitioner and two other men broke into the home of Debra Miller, who is the mother of their friend, Jeremy Miller. App. pp. 283-285. When Mrs. Miller arrived at her house, she noticed the break in and called the police. App. pp. 47-72. Mrs. Miller initially reported nothing missing, and then later reported that an Xbox, several Xbox games, and two guns were taken from her house. Id. In addition, Mrs. Miller's dog was shot and killed. Id. Mrs. Miller testified that her front door was damaged and several plants near a window had been knocked over. Id. Russell Rogers, who was charged along with Petitioner, testified the burglary was Petitioner's idea, and Petitioner was the one who shot the dog. App. pp. 73-82. Investigator Scott Arnold testified regarding his investigation, and Petitioner's signed statement confessing his involvement in the crime. Petitioner was ultimately found guilty of burglary – first degree and petit larceny. App. p. 170.

After Petitioner's direct appeal was concluded, Petitioner filed a PCR application. Hugh Welborn, Esquire, was appointed to represent Petitioner. At the beginning of the PCR hearing, PCR counsel informed the court Petitioner wanted to relieve him as counsel. App. p. 248. Petitioner explained he had previously retained an attorney, Tommy Thomas, but Petitioner lacked the financial means to continue with Thomas's representation. App. p. 249, ll. 2-8. Petitioner stated Welborn told him that he did not have any issues to argue, and Welborn only talked to him for five minutes on the phone. App. p. 249, ll. 8-11, p. 253, ll. 15-16. Petitioner stated he felt Welborn did not care and just wanted to get through the case. App. p. 249, ll. 11-15. Petitioner also stated he wanted a different lawyer and a postponement so he could "study the issues." App. p. 252, ll. 14-22. Welborn responded he was prepared to go forward with

Petitioner's case, he had read Petitioner's file, and disputed Petitioner's claim that they had only spoken about the case for five minutes. App. p. 252, l. 6, p. 253, ll. 17-20.

Judge Goldsmith asked for the State's position on Petitioner's motion to be appointed a new lawyer and to have the case postponed. App. p. 254, ll. 14-18. The State responded Petitioner has a statutory right to counsel, not a constitutional right, and therefore, Petitioner has a "right to appointed counsel, not appointed counsel of choice." App. p. 253, ll. 19-25 – p. 254, l. 1. The State objected to new counsel being appointed in light of Mr. Welborn's assertions he was prepared to go forward and had discussed the case with Petitioner. App. p. 255, ll. 1-4. The State also noted the case was three years old, which gave Petitioner more than enough time to speak to his attorney and amend his application. App. p. 255, ll. 5-8. Judge Goldsmith then denied Petitioner's motion to be appointed new counsel.

PCR counsel called Petitioner to the stand and asked him to tell the court what the inadmissible hearsay statements were that he referred to in his PCR application. App. p. 257, l. 21 – p. 258, l. 4. Petitioner stated he was not sure. App. p. 258, ll. 5-9. PCR counsel showed Petitioner three instances in the trial transcript where his trial attorney objected to hearsay and showed Petitioner that two of the three were sustained by the trial judge. App. p. 260-262. Petitioner also alleged his sentence was disproportionate to the sentences of his codefendants, and they had lied about not receiving anything in exchange for their testimony. App. p. 264, l. 16 – p. 265, l. 16. Petitioner further alleged his trial counsel failed to inquire as to codefendant Russell Rogers's other criminal charges. App. p. 265, l. 16 – 266, l. 18; App. p. 268, ll. 11-24. Additionally, Petitioner stated his best plea offer was twenty years, but trial counsel told him he would get less at trial. App. p. 267, ll. 5-22. Petitioner acknowledged he received five years less than the plea offer by going to trial. App. p. 268, l. 3-4. On cross examination, the State pointed

out where the solicitor asked Russell Rogers at trial about his prior convictions. App. p. 269, l. 7 – p. 270, l. 6. The State did not call any witnesses. App. 270, ll. 20-22. Judge Goldsmith denied Petitioner's application. App. p. 271, ll. 20-21.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action 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). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

ARGUMENT

Notwithstanding any preservation concerns, the post-conviction relief (PCR) court was within its discretion in denying Petitioner's request to relieve his appointed counsel where Petitioner did not show satisfactory cause for the court to dismiss Petitioner's appointed counsel. Additionally, Petitioner's argument that PCR counsel would have discovered trial counsel's failure to object to additional hearsay had he properly reviewed Petitioner's trial transcript is not preserved for appellate review, where the issue was not raised in Petitioner's application for PCR and was not ruled upon by the PCR court in its order of dismissal.

Petitioner argues the PCR court erred in denying his motion to dismiss PCR counsel. Specifically, Petitioner alleges his PCR counsel's preparation for the case was inadequate in that it included only a limited review of his PCR application and trial transcript, thereby failing to fulfill Petitioner's statutory right to PCR counsel. PWC p. 9.

In a post-conviction relief action, there is no constitutional obligation for the State to appoint PCR counsel. Richardson v. State, 377 S.C. 103, 105, 659 S.E.2d 492, 494 (2008) (citing S.C. Code Ann § 17-27-60 (2003)). However, when a PCR application raises questions of law or fact that require a hearing, and the applicant is indigent, counsel must be appointed unless the applicant knowingly and intelligently waives the right to counsel. Id., 377 S.C. at 105-06, 659 S.E.2d at 494-95. When counsel is appointed, "counsel shall be given a reasonable time to confer with the applicant." Rule 71.1(d), SCRCP. Additionally, applicants for PCR are "not entitled to appointed counsel of choice." Richardson, 377 S.C. at 105-06, 659 S.E.2d at 494-95.

This Court held "an applicant *may* have the right to reject or discharge court-appointed counsel and proceed *pro se* or retain his own counsel," but that this right is contingent on the applicant showing satisfactory cause for counsel to be relieved. Id. (emphasis original). However, PCR counsel should not be relieved where an applicant does not agree with counsel when counsel legitimately refuses to pursue meritless or inappropriate allegations. Id.

"A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001). "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016) (citing Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009)). The request for the trial court to relieve PCR counsel "should be explored and the PCR judge should exercise discretion in determining whether the basis for the complaint constitutes sufficient cause to relieve counsel." Richardson, 377 S.C. at 107, 659 S.E.2d at 495. Additionally, the applicant has the burden of proof to show that there is sufficient cause for removal and must make more than "conclusory arguments." Graddick, 345 S.C. at 385-86, 548 S.E.2d at 21.

In Richardson, this Court addressed the issue of PCR applicants requesting to have their appointed counsel relieved repeatedly and without sufficient cause. 377 S.C. 103, 105, 659 S.E.2d 493, 494. There were as many as nine motions in Richardson to relieve PCR counsel or to be relieved as PCR counsel. Id. This Court recognized the abuse of judicial process caused by the delays from these motions and held such abuses are not to be tolerated. Id. This Court noted disagreement between an application and his or her attorney concerning how to proceed with the PCR application is not sufficient cause to replace appointed counsel. Id., at 106, 659 S.E.2d at 495. Additionally, this Court noted often the applicant is not familiar with the PCR process, and PCR counsel can refuse to argue for improper or meritless allegations, which may result in disagreements between attorney and applicant. Id.

In the present case, while Petitioner only made one attempt to have PCR counsel relieved, he was not asking to proceed *pro se*, but rather, he requested a continuance so his appointed counsel could be replaced with different counsel. App. p. 252, ll. 14-22. To have his appointed counsel replaced, Petitioner needed to show satisfactory cause. Richardson, 377 S.C. at 106, 659 S.E.2d at 495. The PCR court explored the basis for the motion by allowing Petitioner to explain why he thought he should be granted new appointed counsel, and Petitioner cited essentially the same reasons the defendant unsuccessfully argued in Graddick – that in Petitioner's opinion, PCR counsel "[didn't] really care" about his case, and Petitioner objected to PCR counsel's assessment that there were no meritorious PCR issues to pursue. 345 S.C. at 386, 548 S.E.2d at 211; App. pp. 249-251. PCR counsel responded that based on his review of Petitioner's case, he did not think Petitioner had any grounds for relief, but stated he was ready to proceed after discussing the case with Petitioner over the phone and prior to the hearing that morning. App. pp. 251-52. Additionally, the State noted Petitioner's case was over three years old, so Petitioner had ample time to obtain and confer with counsel and file amendments as needed.[1] App. 255.

Petitioner contends PCR counsel did not properly review Petitioner's trial transcript or adequately prepare for the evidentiary hearing, thereby depriving Petitioner of meaningful collateral review. Specifically, Petitioner alleges PCR counsel should have raised additional instances of hearsay admitted at trial, investigated the sentences received by Petitioner's codefendants, and ascertained whether there were any additional meritorious issues to be raised. PWC p.12. This is essentially an ineffective assistance of PCR counsel argument, which is not a ground upon which PCR can be sought or relief granted in South Carolina. See Kelly v. State,

[1] Petitioner filed his PCR application in 2012, while his direct appeal was still pending. PCR counsel was appointed in July 2015, and the PCR hearing was held in February 2016.

404 S.C. 365, 745, S.E.2d 377 (holding Martinez v. Ryan[2] is "limited to federal habeas corpus review and is not applicable to state post-conviction relief actions"); Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991) (holding allegation of ineffective assistance of prior PCR counsel is not *per se* sufficient reason to permit a successive application). In Aice, this Court explained the PCR statute "forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly. . . . As long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. . . . We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not." Id. Aice stands for the proposition that a criminal inmate is entitled to "one bite at the apple" in that he or she is entitled to a direct appeal and, if the procedural requirements are met, one application for post-conviction relief and appellate review of that decision. Id. at 452, 409 S.E.2d 395. Petitioner has been afforded his full bite at the apple – he obtained a direct appeal of his convictions on the merits, he filed an application for post-conviction relief, was appointed a competent attorney, was granted an evidentiary hearing on his application, and is receiving appellate review of the PCR court's decision. Simply because Petitioner does not like the advice he was given by PCR counsel regarding the merits of his case does not entitle him to another chance at review of the ruling against him.

Moreover, the specific issues Petitioner claims PCR counsel should have investigated or presented to the court are not preserved for appellate review as those allegations were never raised to nor ruled upon by the post-conviction relief court. It is well settled that an issue that has

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[2] 566 U.S. 1 (2012) (held where, under state law, ineffective-assistance-of-trial-counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar **a federal habeas court** from hearing those claims if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective) (emphasis added).

not been presented to or passed upon by 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 appellate review. 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. The same standard applies in post-conviction relief actions – for an issue to be properly before an appellate court on post-conviction relief review, it must have been presented to and ruled upon by the post-conviction relief court. Winkler v. State, 418 S.C. 643, 662, 795 S.E.2d 686, 697 (2016).

In the present case, Petitioner failed to raise these specific issues in his application for post-conviction relief or in specific testimony at the evidentiary hearing. While the issue of hearsay was brought up during the testimony presented at the evidentiary hearing, these specific issues were never ruled upon by the post-conviction relief court. App. pp. 274-281. In its Order of Dismissal, the post-conviction relief court makes no findings of fact or conclusions or law as to the merits of Petitioner's claims regarding trial counsel's alleged failure to object to hearsay, failure to investigate the sentence received by Petitioner's codefendant, or counsel's alleged ineffectiveness in challenging the admissibility of Petitioner's statement. Moreover, Petitioner did not file a motion pursuant to Rule 59(e), SCRCP, requesting the PCR court rule on the merits of these specific allegations. When a party fails to file a motion pursuant to Rule 59(e), SCRCP, asking the post-conviction relief court "to make specific finds of fact and conclusions of law," the issue on appeal is not preserved for review. Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (2013). Therefore, this issue is not preserved for this Court's review.

Notwithstanding the objections outlined above, the additional claims Petitioner alleges PCR counsel should have raised regarding trial counsel's ineffectiveness are meritless. First,

Petitioner contends trial counsel failed to object to Russell Rogers' testimony that Petitioner's mother called the victim and told the victim the stolen guns were hidden under Petitioner's mother's house. PWC p. 12. However, this information had already been admitted, over trial counsel's objection, during the victim's testimony. App. pp. 55-56. Additionally, Petitioner alleges trial counsel was ineffective for eliciting testimony that Petitioner supplied alcohol to his underage friends. PWC p. 12. Trial counsel, however, asked the witness whether the victim supplied the alcohol, not whether his client did, and the witness's response was that Petitioner's friends purchased the alcohol, not Petitioner himself. App. pp. 81. Even if this inadvertent elicitation constitutes deficient performance, it is harmless error in light of the overwhelming evidence against Petitioner, namely Rogers's testimony and Petitioner's own confession. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial).

Additionally, Petitioner argues trial counsel was ineffective for failing to move to strike after successfully objecting to the investigator's testimony as to what Petitioner's mother told the victim regarding the robbery. PWC p. 12; App. 121. However, the trial court actually overruled trial counsel's objection on this issue, as the investigator was testifying about the steps he undertook in his investigation leading to the identification of Petitioner, which is not hearsay as it was not offered to prove the truth of the matter asserted. See Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 ("An out-of-court statement is no hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken."); App. pp. 121. Regardless, the challenged testimony, that Petitioner's mother called the victim to say her son was involved in the robbery, was cumulative as it had already been admitted through the victim

herself. App. pp. 55-56. Therefore, counsel's failure to move to strike, assuming the trial court did sustain the objection, cannot have prejudiced Petitioner because the same facts had already been admitted into evidence.

Petitioner further alleges PCR counsel should have investigated codefendant Russell Rogers's "unlikely averment" during trial that he was not offered any deal in exchange for his testimony. PWC p. 12. Petitioner, however, offers nothing but speculation Rogers was not telling the truth. Petitioner has presented no evidence Rogers was offered any incentive to testify or that the sentence he ultimately received was conditioned on his testimony at trial. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("The applicant's mere speculation as to what [a witness's] testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.") (quoting Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)). Furthermore, trial counsel asked Rogers about his pending charges, as did the solicitor, and the solicitor expressly asked Rogers if he had received anything in exchange for his testimony. App. pp. 78-79, 81. Disparate sentences between codefendants are not *per se* improper. State v. Dozier, 263 S.C. 267, 210 S.E.2d 225 (1974). Finally, when Petitioner was asked if there were any additional issues were he wished to raise, the only issue he named was the voluntariness of his statement to police. As the State pointed out at the PCR hearing, this issue was addressed at trial through a Jackson v. Denno[3] hearing, at which Petitioner himself testified, and trial counsel contested the issue of whether Petitioner's statement was coerced by the officer's alleged threat to arrest Petitioner's mother. App. pp. 87-107. Furthermore, the voluntariness of Petitioner's statement was fully briefed on direct appeal, and the Court of Appeals issued an opinion on the merits. App. pp. 183-207.

[3] 378 U.S. 368 (1964).

CONCLUSION

Therefore, this Court should deny the Petitioner's Petition for Writ of Certiorari because the PCR court was within its discretion to deny Petitioner's motion to relieve counsel where the basis for said motion was Petitioner's disagreement with PCR counsel over PCR counsel's assessment of the merits of Petitioner's case, and PCR counsel's failure to raise additional claims did not prejudice Petitioner in any event, because trial counsel was not deficient nor did any alleged deficiencies at trial prejudice Petitioner in light of the overwhelming evidence against him. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar No. 79054

By: _____
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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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:

Laura Ruth Baer, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 21th day of July, 2017

DEONNA ROGERS
LEGAL ASSISTANT