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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2016-001096

OCTAVIA DENISE BELL,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

On the morning of December 2, 2011, Petitioner, Octavia Denise Bell, and her cousin, Tameka Judge, entered the Kangaroo gas station on Sam Rittenburg Boulevard in Charleston County. (App. 9-11). Judge had recently been fired from the gas station and concocted a plan with Petitioner to rob it in revenge. (App. 10-11). Petitioner entered the gas station first, distracted the cashier, threatened her with a taser, and eventually forced her into a walk-in cooler where she duct taped her head, face, arms, and body. (App. 11). Petitioner then forced the cashier to lay on the floor strewn with beer bottles she had recently smashed. (App. 11). At this point, Judge entered the gas station and the two conspirators disabled all surveillance equipment throughout the store. (App. 11-12). Judge, who still had working keys, unlocked the safe, which was equipped with a ten-minute delay feature. (App. 12). While the two waited the requisite ten minutes for the safe to open, the store manager arrived; Petitioner threatened her with the taser and the manager was able to escape. (App. 12-13). When the safe eventually opened, Petitioner and Judge took all thirty-five hundred dollars, separated into distinct individual manila envelopes, and fled in the manager's car. (App. 13). Petitioner and Judge were apprehended nearby shortly thereafter in a car with the envelopes of money, the cashier's cellular phone, and duct tape. (App. 13-14). Both the cashier and manager identified Petitioner. (App. 14).

During its April 2012 term, the Charleston County Grand Jury indicted Petitioner for kidnapping¹ (2012-GS-10-2333). Beattie Butler, Esquire, of the Charleston County Public Defender's Office, represented Petitioner. Assistant Solicitor Chad Simpson prosecuted the case on behalf of the State. On June 26, 2013, Petitioner appeared before the Honorable R. Markley Dennis, Jr. and pled guilty to kidnapping; sentencing was deferred to a later date. (App. 1-21).

¹ A related armed robbery charge was not presented to the grand jury in exchange for Petitioner's guilty plea. (App. 2).

Subsequently, on July 30, 2013, Petitioner again appeared before Judge Dennis for a sentencing hearing. Following statements from the victims and mitigation from Petitioner, Judge Dennis sentenced Petitioner to eleven years' imprisonment. (App. 24-48). Petitioner did not appeal her guilty plea or sentence.

Thereafter, Petitioner filed an application for post-conviction relief on October 1, 2013. In her application, Petitioner alleged she was being held in custody unlawfully based on allegations of ineffective assistance of counsel, including failure to timely communicate with her; failure to seek a nolo contendere plea, failure to negotiate a plea to a lesser included offense, and failure to secure her a better plea offer. (App. 51-61). Respondent filed a return on February 10, 2014, requesting an evidentiary hearing. (App. 62-65).

An evidentiary hearing into the matter was convened on December 14, 2015, at the Charleston County Courthouse before the Honorable Deadra Jefferson. Petitioner was present at the hearing and was represented by Rodney Davis, Esquire. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on her own behalf and presented testimony from Assistant Solicitor Stephanie Linder and plea counsel Beattie Butler. (App. 67-127). At the conclusion of the hearing, Judge Jefferson denied relief from the bench. (App. 117-126). Judge Jefferson signed a written order denying relief on April 12, 2016, which was filed on April 13, 2016. (App. 133-142). Petitioner appealed this ruling.

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) (emphasis added). 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)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 “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, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an 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, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief.

Strickland, at 687. First, an applicant must prove that 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, at 688. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

ARGUMENT

Petitioner's appellate argument plea counsel was ineffective for thwarting the solicitor's office from speaking with her about her purported information regarding an unrelated murder investigation is not preserved for appellate review, where this issue was not raised in Petitioner's application for post-conviction relief and was not ruled upon by the post-conviction relief court in its order of dismissal. Notwithstanding any preservation concerns, plea counsel was not ineffective, where he spoke with Petitioner at length about the unrelated murder investigation and Petitioner informed him she did not want to cooperate and the prosecuting solicitor decided Petitioner would not be a helpful witness after speaking with her.

Petitioner argues plea counsel was ineffective for thwarting the solicitor's office's attempts to contact Petitioner regarding her purported knowledge about an unrelated murder case. Specifically, Petitioner alleges if plea counsel had facilitated discussions between her and Assistant Solicitor Stephanie Linder, who was prosecuting a murder case in which Petitioner alleged to have beneficial information, there "might possibly have [been] favorable plea and sentencing opportunities in her case." (PWC p. 3).

As an initial matter, this issue is not preserved for appellate review as it was never raised to nor ruled upon by the post-conviction relief court. It is well settled that an issue that has 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) (emphasis added). 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), reh'g denied (Feb. 9, 2017) (citing Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642

(2011) (stating issue preservation rules are “meant to enable the lower court to rule properly after it has considered all relevant facts, laws, and arguments” (quoting I’On, L.L.C. v. Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000))); In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (“In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court.” (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))).

In the present case, Petitioner failed to raise this issue in her application for post-conviction relief. While the issue was referenced² during the testimony presented at the evidentiary hearing, the issue was never **ruled upon** by the post-conviction relief court. 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 claim that plea counsel was ineffective for preventing her from speaking to the solicitor’s office regarding the unrelated murder investigation. Therefore, this issue is not preserved for this Court’s review.

Moreover, Petitioner did not file a Rule 59(e), SCRPC, motion requesting that the court rule on the merits of her claim that plea counsel thwarted her efforts to provide beneficial information to the State in exchange for a more lenient plea offer. When a party fails to file a Rule 59(e), SCRPC, motion 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).

“At minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.” Herron, 395 S.C. at 465, 719 S.E.2d at 642. “Either party must timely file a Rule

² Petitioner appears to acknowledge that this issue was not properly raised to the lower court, as she notes in her Petition that her counsel “raised by inference” this allegation at the evidentiary hearing. (PWC 3).

59(e), SCRCPP, motion to preserve for review any issues not ruled upon by the court in its order.” Al-Shabazz v. State, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (holding an issue must be raised to and ruled on by the post-conviction relief court in order to be preserved for review); Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (same)). As this issue was never raised to or ruled upon by the post-conviction relief court and Petitioner failed to file a Rule 59(e), SCRCPP, motion, requesting such a ruling, the issue is not preserved for this Court’s review.

Notwithstanding the lack of preservation, Petitioner failed to establish plea counsel was ineffective for preventing the solicitor’s office from speaking with her on an unrelated murder investigation that might have yielded a more favorable plea offer in the present case, where counsel spoke with Petitioner at length about the unrelated murder investigation and Petitioner informed him she did not want to cooperate and the prosecuting solicitor decided Petitioner would not be a helpful witness after speaking with her.

Petitioner speciously alleges she would have likely received a beneficial plea offer and a more lenient sentence if plea counsel had not prevented the solicitor’s office—specifically Assistant Solicitor Stephanie Linder—from speaking with her about Petitioner’s allegedly beneficial information regarding the investigation into an unrelated murder. However, this allegation is wholly unsupported by the record.

At the post-conviction relief hearing, plea counsel testified once he was contacted by Solicitor Linder about her possibly meeting with Petitioner to discuss the unrelated case, he and Petitioner had a lengthy discussion regarding the possibility. (App. 91-93, 99-100). Plea counsel testified he encouraged Petitioner to meet with Solicitor Linder, as it could potentially improve her situation if she were to have any valuable information regarding the unrelated murder

investigation. Id. Counsel testified Petitioner adamantly insisted she did not want to assist in the murder investigation and that she did not have any beneficial information to provide. (App. 91-93, 99-100). Even though he relayed to Petitioner that he did not believe she would be of any help to the solicitor, he still gave her the option to speak with Assistant Solicitor Linder. (App. 92).

Additionally, Assistant Solicitor Stephanie Linder, who had no connection whatsoever to Petitioner's case, testified at the post-conviction relief hearing that she spoke with Petitioner and would not have used her as witness in her unrelated murder case. Assistant Solicitor Linder testified during her preparation for a retrial of this unrelated murder case, she noticed Petitioner's name was in the police report. (App. 78, ll. 9-11). However, Solicitor Linder testified she never had any intention of calling Petitioner to testify because Petitioner had been dishonest with law enforcement in the initial police reports and gave a different account of what happened when Linder visited her. (App. 78). Solicitor Linder also testified she was never involved in Petitioner's case and never promised Petitioner, or suggested to plea counsel, anything beneficial regarding the case at issue in exchange her beneficial testimony in the unrelated murder case.

Moreover, even if Petitioner had spoken with Assistant Solicitor Linder prior to pleading guilty regarding her purported knowledge of the unrelated murder case, there is no certainty her testimony would have been sufficient to warrant the State offering her sentencing leniency. An applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Therefore, assuming contrary to everything in the record, that Petitioner had beneficial information and wanted to testify **and** that the State would have wanted to use her testimony, there is no guarantee it would have made any

difference in Petitioner's personal case. The record clearly reflects that the cases were at no time connected and there were never any promises given to Petitioner by the state regarding her sentencing.

The record supports the post-conviction relief court's finding Petitioner had no reasonable expectation she would receive sentencing leniency. (App. 121, ll. 10-21). During Petitioner's guilty plea hearing, the court explained to Petitioner that her plea was bifurcated and sentencing would be set for a later date; therefore, there were no guarantees as to sentencing. (App. 3, ll. 3-14). Additionally, Judge Dennis discussed the range of punishment with Petitioner, to which Petitioner responded she understood. (App. 3, ll. 15-19). Most importantly, Petitioner stated she was completely satisfied with her attorney. (App. 3, l. 15- 4, l. 4). Therefore, the record clearly reflects Petitioner was well aware of the possible punishment for the kidnapping conviction she was to plead to and was, by her own admission, completely satisfied with the services her attorney provided. At no time during the hearing did Petitioner raise any issues or points of concern with the court, despite ample opportunity to do so. As a result, the record supports the post-conviction relief court's finding that Petitioner's guilty plea was freely, voluntarily, and intelligently given.

Further, no evidence in the record suggests the outcome of Petitioner's case would be any different had she been asked to testify in the murder case. Therefore, no evidence exists to support a finding plea counsel was deficient in his performance. Even assuming plea counsel had actually prevent Solicitor Linder's attempts to speak with Petitioner, it would have made no difference in the outcome of the case, as the State did not have any intention of calling her to testify due to Petitioner's lack of reliability. As a result, Petitioner suffered no prejudice

stemming from plea counsel's alleged deficiency; therefore, Petitioner's allegation of ineffective assistance of counsel is without merit.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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The Honorable Deadra L. Jefferson, Circuit Court Judge

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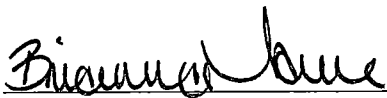
Respondent.

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
SC Commission on Indigent Defense
PO Box 11589
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This 26th day of May, 2017.


BRIANNA ARNONE
Legal Assistant for Respondent