

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-000102

Kendris R. Brown,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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RESPONDENT'S ISSUE PRESENTED

Whether Counsel was ineffective for failing to object to a life sentence for Petitioner's first-degree burglary conviction as in violation of the Eighth Amendment is not appropriately before this Court because the issue was not raised at the PCR evidentiary hearing by agreement of the parties, and because Petitioner's sentence is not ripe for review because Petitioner has a motion for resentencing currently pending in the Florence County Court of General Sessions, pursuant to this Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Petitioner was indicted at the September 2012 term of the Florence County Grand Jury for murder, burglary – first degree, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy (2012-GS-21-1250). App. 102-05. He was represented by Henry “Skip” Duffee, Jr., Esquire. App. 1. On April 5, 2013, Petitioner pleaded guilty before the Honorable Michael G. Nettles to murder and burglary – first degree. App. 1, 3. The remaining charges were dismissed in return for Petitioner’s plea. App. 3. Judge Nettles sentenced Petitioner to concurrent terms of life imprisonment without parole. App. 26-27. Petitioner did not appeal his plea or sentences. App. 36.

In his original Application for Post-Conviction Relief (PCR), filed January 10, 2014, Petitioner alleged his sentence of life without parole was unconstitutional because he was a minor at the time the crime was committed. App. 29, 33. Respondent filed a Return and Motion to Dismiss, along with a Conditional Order of Dismissal (COD), arguing Petitioner’s Miller claim was not proper for PCR.¹ App. 36-44. Petitioner then filed an Amended Application for Post-Conviction Relief on November 10, 2015, alleging plea counsel was ineffective in failing to advise him of possible sentences, evidence, and procedures of trial which led to Petitioner making an unintelligent and unknowing decision to enter a plea of guilt. App. 90-91. On July 6, 2016, pursuant to this Court’s decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), the Twelfth Circuit Public Defender’s Office also filed a motion for a resentencing on

¹ Respondent’s Motion to Dismiss and COD also asked for dismissal based on the expiration of the statute of limitations. This was an error, as Respondent mistakenly recorded the date of Petitioner’s plea as April 5, 2011, instead of April 5, 2013. Petitioner’s application was timely, and PCR counsel was appointed.

Petitioner's behalf, which was still pending at the time of the PCR hearing.² Supp. App. 5-6. This Court issued an order on July 11, 2016, granting the Honorable DeAndrea G. Benjamin exclusive jurisdiction over Petitioner's motion. Supp. App. 7.

An evidentiary hearing was convened on November 9, 2016, at the Florence County Courthouse. App. 49. Jonathan D. Waller, Esquire, represented Petitioner. App. 49. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. App. 49. At the hearing, Petitioner testified on his own behalf. App. 50. Henry "Skip" Duffee, Jr., Esquire, (Counsel) also testified. App. 50. The PCR court had before it a copy of the records of the Florence County Clerk of Court, Petitioner's records from the South Carolina Department of Corrections, the application and amended application, the State's Return, and the guilty plea transcript. App. 92. The parties agreed the claim in Petitioner's original application was not appropriate for PCR as his motion for resentencing was still pending at that time, and Petitioner's allegation regarding the constitutionality of his life sentence was not addressed at the PCR hearing. App. 52-53. The PCR court found Petitioner received effective assistance of counsel, and the plea was entered into freely and voluntarily and dismissed Petitioner's application. App. 92-101. Petitioner filed a Petition for a Writ of Certiorari to this Court on November 6, 2017. This Return to the Petition for a Writ of Certiorari follows.

² It appears PCR counsel also attempted to file a motion for resentencing on November 9, 2015, but the motion was never clocked by the Florence County Clerk of Court. Supp. App. 1-2. However, it was served on the Solicitor's Office. Supp. App. 3-4.

STATEMENT OF THE FACTS

On January 1, 2012, Petitioner and his friends were looking for money and decided to robbed the home of Michael Hawkins and Ashley Hawkins in Florence. App. 7-8. Mr. Hawkins ran a small convenience store out of his home, and Petitioner and his friends knew there to be cash, food, and alcohol inside the store. App. 8. Petitioner and one other codefendant both carried guns. App. 9. They knocked on the door of the Hawkins's home, and Ms. Hawkins answered. App. 9. Petitioner and his codefendants rushed in, forced Ms. Hawkins to the floor, and began grabbing items from inside. App. 9. While the codefendants stayed in the front room where the store was located, Petitioner kept going through the house to the back bedroom where Mr. Hawkins was counting money. App. 9, 12. Petitioner's codefendants then reported hearing several gunshots, so they grabbed as much cash and liquor as they could from the store and fled the scene. App. 9. Petitioner and his codefendants were identified by eyewitnesses who saw them leaving the house. App. 9. Ms. Hawkins also recognized and identified at least one of the codefendants. App. 9.

Later that night, Petitioner met up with the two witnesses who had seen him and his codefendants leaving the Hawkins house, and Petitioner admitted to them he had shot "Coach Mike." App. 10. Mr. Hawkins had been in the bedroom counting money at the time of the robbery, and according to Petitioner's statement to the witnesses, Petitioner "felt like he was in a movie, and he just started shooting." App. 10. Several codefendants later saw Petitioner with a large amount of money. App. 10. After the robbery, the group went to a motel and bought marijuana, which Petitioner paid for. App. 11.

Mr. Hawkins was shot multiple times, all in the back or the side. App. 12. Although investigators found a gun in the room with Mr. Hawkins, there was no evidence of a fight or that he had a weapon in his hands at the time he was shot. App. 12. Additionally, the codefendants

and the surviving victim, Ms. Hawkins, all gave statements indicating there was no discussion or argument between Petitioner and Mr. Hawkins in the bedroom, and it appeared Petitioner went straight into the room and shot. App. 13.

Petitioner was a juvenile at the time of the crime. App. 6. A hearing was held in the Family Court on August 21, 2012, after which the Family Court issued an order waiving the case up to General Sessions. App. 6.

ARGUMENT

Petitioner asserts Counsel was deficient in failing to object to Petitioner's life sentence for his first-degree burglary conviction on the ground that such a sentence violates the Eighth Amendment, as interpreted by Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).

The issue of whether Counsel was ineffective for failing to object to a life sentence for Petitioner's first-degree burglary conviction as in violation of the Eighth Amendment is not appropriately before this Court because the issue was not raised at the PCR evidentiary hearing by agreement of the parties, and because Petitioner's sentence is not ripe for review because Petitioner has a motion for resentencing currently pending in the Florence County Court of General Sessions, pursuant to this Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).

Petitioner filed his original PCR application alleging his life sentence was unconstitutional, and he was entitled to relief under Miller, because he was a juvenile at the time of the crime. App. 29, 33. However, in response to the State's Conditional Order of Dismissal, Petitioner, through his PCR counsel, filed an amended application alleging Petitioner's guilty plea was induced through Counsel's deficient advice, and therefore, involuntary. App. 90-91. PCR counsel also attempted to file a motion for resentencing, though it does not appear to have been clocked into the Clerk's Office. Supp. App. 1-4.

By the time of the PCR hearing, this Court had granted Judge DeAndrea G. Benjamin exclusive jurisdiction to preside over Petitioner's motion for resentencing, pursuant to this Court's decision in Aiken. Supp. App. 7. This Court's order of July 11, 2016, assigned Judge Benjamin to hear Petitioner's resentencing motion and directs "Judge Benjamin shall at all times be vested with concurrent jurisdiction in all circuits of the state to dispose of matters relating to this case, and shall decide all matters pertaining to the Petitioner's Motion. . . ." Supp. App. 7. On August 12, 2016, Judge Benjamin signed an order appointing the Florence County Public

Defender's Office to represent Petitioner in the resentencing action. Supp. App. 8. Because the resentencing action was still pending,³ there has been no final sentence in this case for either the PCR court or this Court to address. See Miller v. State, 289 S.C. 426, 346 S.E.2d 705 (1986) (finding defendant's appeal was premature where case was remanded from appellate review for resentencing, which had not yet occurred at the time the appeal was filed); Ex Parte Murray, 261 S.C. 255, 256, 199 S.E.2d 718, 718 (1973) ("The appellant has never been sentenced, and until he is sentenced, there is no final judgment.").

Furthermore, by agreement of the parties, the only issue Petitioner raised at the evidentiary hearing was the allegation involving the voluntariness of his guilty plea. App. 52-53. At the beginning of the evidentiary hearing, PCR counsel explained to the court as follows:

Mr. Waller: Your Honor, Mr. Brown originally filed his application raising an issue of the *Miller v. Alabama* case and then the *Aiken* –

Court: *Aiken v. Byers* (sic). Yeah.

Mr. Waller: -- *Byers* (sic). That application was amended to include a claim of ineffective assistance of counsel, but that's the **only thing** before the Court here – before the Court today, as **the *Aiken v. Byers* (sic) issue is a separate General Sessions issue.**

App. 53 (emphasis added). Accordingly, in the order denying and dismissing Petitioner's application, the PCR court denied and dismissed all allegations with prejudice, "with the exception of [Petitioner's] petition for resentencing pursuant to Aiken v. Byers, which is still pending." App. 100.

Petitioner contends this language in the order of dismissal "held the door open for the matter to be addressed on appeal," and argues a "gross miscarriage of justice" was committed

³ Upon information and belief, based on correspondence with the Twelfth Circuit Solicitor's Office and a check of the Florence County Public Index, the motion is still pending before Judge Benjamin at this time.

“when the PCR judge denied Petitioner’s claim for a new sentencing hearing” under Aiken. PWC 4-5. The PCR judge, however, did not deny Petitioner’s claim for a new sentencing hearing, but rather declined to rule on the issue, as Petitioner himself acknowledges. App. 100, PWC 4. Because Petitioner’s PCR counsel affirmatively took the position that this was not a PCR issue and should be dealt with in General Sessions, appellate counsel cannot take a different position now. See, e.g., State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal.”); McLeod v. Starnes, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012) (finding Respondent was precluded from arguing a different equal-protection classification on appeal than he did at trial).

The PCR judge specifically declined to rule on this issue in the order of dismissal, and Petitioner did not file a Rule 59(e) motion. App. 100. Therefore, this issue is not preserved for review in this appeal. See, e.g., Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 144, 634 S.E.2d 650, 661 (2006) (“Arguments not presented to nor ruled upon by trial court are not preserved for appellate review.”); Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (“Petitioner did not file a Rule 59(e), SCRCP, motion requesting a ruling on these issues. Accordingly, petitioner’s claims regarding counsel’s ineffectiveness. . . are not preserved for review.”) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992)).

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). Petitioner’s motion for resentencing is still currently pending before Judge Benjamin, and once she issues a ruling on that motion, Petitioner will have the opportunity to file both a direct appeal of the new sentence and a PCR action concerning his representation in the resentencing matter. It would be unfair to both the PCR court and Respondent to allow

Petitioner to raise this issue now, when Respondent has not had a chance to call witnesses or make arguments on the issue, nor has the PCR court had the opportunity to consider the facts and law and make a ruling.


CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not deficient and Petitioner's guilty plea was freely and voluntarily given. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

March 23, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-000102

KENDRIS R. BROWN,

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v.

STATE OF SOUTH CAROLINA,

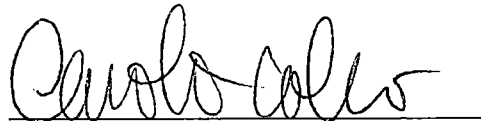
Respondent.

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
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 23rd day of March, 2018.



Caroline Collins
Administrative Coordinator



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MAR 28 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

March 23, 2018

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

Re: Kendris R. Brown v. State of South Carolina
Appellate Case No. 2017-000102
Lower Court Case No. 2014-CP-21-0075

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/cc
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)