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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-002178

FARON M. CLEMENTS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

RESPONDENT'S ISSUE PRESENTED

I. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to consult with Petitioner about stipulating to continuing the trial with eleven jurors after one juror fell ill.

II. Whether the issue of a potential structural error by Trial Counsel is preserved for appellate review, and regardless, whether there was structural error where the record shows Petitioner gave a knowing and valid waiver of his right to a full twelve-member jury at trial.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Williamsburg County. Petitioner was indicted by the October 2014 term of the Grand Jury for Williamsburg County for two counts of second-degree criminal sexual conduct with a minor (2013-GS-45-0247). Petitioner was represented at trial by M. Amanda Shuler, Esquire. Petitioner was convicted on both counts and was sentenced on October 16, 2014 by the Honorable Clifton Newman to eleven years' imprisonment for both counts, to be served concurrently.

Petitioner filed a timely notice of appeal. An Anders[1] brief was submitted, and the South Carolina Court of Appeals affirmed Petitioner's conviction in an opinion filed March 30, 2016. State v. Clements, Op. No. 2016-UP-145 (S.C. Ct. App. 2016). The remittitur was issued on April 29, 2016.

Petitioner filed a timely application for post-conviction relief on June 22, 2016, alleging that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
   a. "Counsel failed to pursue and use key testimony of witnesses who were subpoena[ed]."
   b. "Counsel without explaining to me what stipulate to deliberate with eleven jurors meant, she chose to go forward."[2]

2. Prosecutorial Misconduct
   a. "Prosecutor violated 5th and 14th Amendments and doctrine of Brady."

Respondent submitted its Return on February 28, 2017. An evidentiary hearing was convened on March 31, 2017, at the Sumter County Courthouse before the Honorable D. Craig

[1] Anders v. California, 386 U.S. 738 (1967).
[2] Respondent interpreted this to be a claim of ineffective assistance of counsel, though Petitioner labeled this allegation as "Tainted, contaminated, and prejudice jury or jurors" in his application.

Brown. Petitioner was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Petitioner testified on his own behalf at the evidentiary hearing. Petitioner's trial attorney, M. Amanda Shuler, Esquire, and Solicitor Kimberly Barr also testified. The Court had before it a copy of the trial transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Petitioner's records from the South Carolina Department of Corrections, and the pleadings.

Judge Brown denied and dismissed the application in an Order signed June 21, 2017, and filed July 17, 2017. Petitioner filed a timely Notice of Appeal on October 19, 2017. Petitioner's Petition for Writ of Certiorari and Appendix were filed on February 12, 2018. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo without deference to the lower court. Id. 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 his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

ARGUMENT

I. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to consult with Petitioner about stipulating to continuing the trial with eleven jurors after one juror fell ill.

Petitioner argues the PCR court erred in failing to find Trial Counsel ineffective for stipulating to deliberation by eleven jurors when there is no record that Petitioner consented to the stipulation. However, this issue is meritless, as probative evidence supports the PCR court's ruling that Trial Counsel consulted with Petitioner about the stipulation during the trial. Accordingly, Trial Counsel cannot be ineffective, and this Court should affirm the PCR court's denial of post-conviction relief.

Trial

At trial, twelve jurors and two alternates were chosen to serve. When the jury was sent out to deliberate at the close of the case, both alternate jurors were released from their duty. App. 201. During deliberations, one of the jurors, Ms. Green, fell ill and complained of flu-like symptoms. App. 205. After a discussion on the record between the trial judge, the solicitor, and Trial Counsel about how to proceed, Trial Counsel indicated to the trial court that Petitioner was willing to stipulate to deliberations continuing with eleven jurors. App. 205-209. The record does not indicate that Petitioner was not present for these discussions. The jury was removed from the courtroom and told to decide if they wanted to continue deliberating that evening or to go home and deliberate in the morning. App. 210. At this point, Trial Counsel explained:

> The Court: At this point we have eleven jurors and Ms. Shuler, with regard to the defendant agreeing to have the jury deliberate with eleven jurors rendering a unanimous verdict being the decision in this case, what's the Defendant's position?

Ms. Shuler: Your Honor, he indicated to me that he will stipulate to eleven jurors so long as they continue to deliberate this evening. This is a qualified stipulation.

The Court: Well, what if they send out a note saying they want to go home?

Ms. Shuler: Then he would like one of the alternates to come in or either Ms. Green to come back tomorrow.

App. 210, line 17 – 211, line 6. The jury then sent in a note stating that they wanted to go home and return in the morning. App. 211. The record continues:

The Court: We have a note from the jury that says that, Judge, we need to come back tomorrow morning. That's what they say. Under Rule 14 of the rules of criminal procedure says a jury shall be composed of 12 members; but at any time before verdict parties may agree in writing with the approval of the Court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the jury, should the Court find it necessary to excuse one or more jurors for any just cause after trial commences. So before I bring these people out what is the stipulation, if any, by the parties?

Ms. Barr: The State was, is prepared to have the 11 jurors to continue to deliberate in the case. My understanding from Defense counsel earlier was that should the jury elect not to continue deliberations this evening, that they would insist upon the alternates coming back. With that being said, if that's still their position, then we would ask that the clerk contact the alternates and have them to report in the morning. I believe that Your Honor has already instructed the sick juror to come back tomorrow if she's capable of doing so.

The Court: All right. Ms. Shuler.

(Ms. Shuler confers with her client.)

...

Ms. Shuler: Judge, we would like to have the fifth alternate come back, or both alternates come back, whatever you choose. We would like to have 12.

App. 211, line 18 - 213, line 6 (emphasis added). The name of an alternate was selected, and the court instructed the clerk to contact the chosen alternate and have her report in the morning for deliberations. App. 213.

However, before the evening concluded, the jury reached a verdict with eleven jurors. After sending the initial note that they wanted to go home, the jury sent the trial court a second note asking a question about the elements of the crime. App. 214. By the time the parties had discussed and decided how the trial court should respond to the question, the jury had finished their deliberations. App. 223. The transcript indicates that a bailiff was sent to bring the jury into the courtroom, but he relayed to the trial judge that they were "taking a quick vote." App. 223, line 20-24. The bailiff then relayed that the jury had reached a verdict. App. 224. Trial Counsel did not object to receiving the verdict, presumably because the jury had deliberated that evening, which was the qualification of her client's stipulation to continue with eleven jurors.

At the conclusion of the trial, Court's Exhibit Number 3 was marked and made part of the record. App. 267. This exhibit was a written consent form showing both the solicitor and Petitioner, through Trial Counsel, consented to allowing less than twelve jurors to deliberate. App. 269.

PCR Hearing

In his post-conviction relief application, Petitioner alleged "Counsel without explaining to me what stipulate to deliberate with eleven jurors meant, she chose to go forward." App. 272. Respondent interpreted this claim as an allegation of ineffective assistance of counsel. App. 279, fn. 1. Petitioner testified at the evidentiary hearing that he did not discuss this stipulation with Trial Counsel at the time. App. 303. He testified that he did not want to stipulate to having eleven jurors, but he wanted a mistrial. App. 304. He stated that he mentioned to Trial Counsel

that he wanted a mistrial, but nothing happened. App. 304. The PCR court found Petitioner's testimony and assertions to be not credible in its Order of Dismissal. App. 341.

Trial Counsel testified at the evidentiary hearing that it was not her choice to stipulate to continuing with eleven jurors, but Petitioner made that choice. App. 316, line 6-11. She testified that she discussed the decision with him during the trial as it was happening:

> A: We had an extensive conversation about it that occurred during the break. I discussed with him the implication of the jury deliberating with only 11 people, that there was one less person that the State had to convince. We discussed all of that, and he ultimately made the decision to allow the case to continue with 11 jurors.
>
> Q: Did you see any reason to request a mistrial at that point in the trial?
>
> A: Mr. Clements and I discussed that, and I let him make the decision.

App. 316, line 13-23. She continued on cross-examination:

> Q: Do you recall having any discussion with Mr. Clements about you could make a motion for mistrial?
>
> A: Yes.
>
> Q: Do you recall the specifics of that discussion?
>
> A: I know we discussed our options, and an option that we had at that time was a mistrial, moving for a mistrial.
>
> Q: In moving for a mistrial, you obviously didn't have your one witness there, Mr. Morris. Would that have allowed y'all – if you did make a motion and if it were granted, that would allow you a little more time to possibly get Mr. Morris there?
>
> A: Yes, it would have. But also keep in mind that Mr. Morris was under subpoena one other time and also failed to show. Well, he was unable to show at that other time because of his health.

App. 323, line 23 – 324, line 14. The PCR court found Trial Counsel's testimony to be credible and persuasive. App. 341.

PCR Court's Order of Dismissal

In its Order of Dismissal, the PCR court denied this allegation, holding that:

> The trial transcript indicates that Trial Counsel consulted with [Petitioner] over the decision to stipulate to an eleven member jury. Trial Counsel credibly testified that she discussed this decision and all the possible outcomes he could choose during the trial, and it was his decision to proceed with only eleven jurors. This Court finds that Trial Counsel was not ineffective in this manner, and this allegation is denied and dismissed with prejudice.

App. 343.

Discussion

First, it should be noted that the PCR court found Trial Counsel's testimony credible and Petitioner's testimony and assertions not credible. 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)). Furthermore, this Court will uphold the post-conviction relief court's findings of fact and if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 174, 810 S.E.2d 836, 839 (2018).

Although Petitioner asserts that there is no "evidence in the record trial counsel conferred with Petitioner or that Petitioner waived his right to be tried by a full jury complement," and that Trial Counsel "unilaterally consented to proceed with eleven jurors," PWC 5; PWC 6, this is a misrepresentation of the record and ignores the credible testimony presented at the evidentiary hearing. Petitioner relies only on his testimony from the evidentiary hearing, which was found not credible, that there was no discussion and he did not wish to enter into this stipulation.

The record before the Court consists of Trial Counsel's credible testimony that she had an extensive discussion about the stipulation with Petitioner during the trial, and it was Petitioner's decision to proceed to deliberations with only eleven jurors. Trial Counsel signed a consent form

on Petitioner's behalf explaining in writing that he waived his right to a full jury, and the form was made a court's exhibit at the conclusion of the trial. App. 269. The trial transcript even specifically indicates that Trial Counsel consulted with her client during their discussions about how to proceed with the jury issue, and immediately informed the trial court how Petitioner wished to go forward. App. 212.

This evidence is clearly probative evidence supporting the PCR court's findings that Trial Counsel was not ineffective in this regard. Accordingly, because the PCR court's ruling is supported by probative evidence in the record, this Court must uphold the findings, and certiorari should be denied.

II. The issue of a potential structural error by Trial Counsel is not preserved for appellate review. Regardless, there was no structural error here, as the record shows Petitioner gave a knowing and valid waiver of his right to a full twelve-member jury at trial.

Petitioner asserts the PCR court erred by applying the Strickland test to Trial Counsel's stipulation to deliberation by eleven jurors because this was a structural error, so he need not prove any resulting prejudice. However, this assertion is unpreserved for appellate review, and regardless, the record before the Court shows Petitioner gave a knowing and valid waiver of his right to a full twelve-member jury at trial.

Preservation

The issue Petitioner presents to this Court is unpreserved for appellate review, as it was never raised to or ruled upon by the PCR 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 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.

In his original post-conviction relief application, Petitioner alleged "Tainted, Contaminated, and Prejudice jury or jurors'." To support this allegation, Petitioner explained, "Counsel without explaining to me what stipulate to deliberate with 11 jurors meant, she chose to go forward." App. 272. In its Return, Respondent interpreted and responded to this allegation as one of ineffective assistance of counsel, noting in a footnote: "Respondent interprets this to be a claim of ineffective assistance of counsel, though [Petitioner] labeled this allegations as 'Tainted, contaminated, and prejudice jury or jurors' in his application. Eleven jurors deliberated at

[Petitioner's] trial after one fell ill and could no longer participate. All parties consented to allowing the eleven jurors to continue deliberating." Petitioner did not object to Respondent's interpretation of the allegation as one of ineffective assistance of counsel, nor did he file an amended application to clarify the issue or reframe it to raise it as an allegation of structural error or a due process violation.

The PCR court issued its Order of Dismissal, which denied Petitioner's claim after analyzing it as a claim of ineffective assistance of counsel and finding Petitioner failed to meet his burden of proving either prong of the Strickland test. Petitioner did not file a 59(e), SCRCP, motion to ask the court to reconsider the issue or raise the issue of structural error, as required for appellate preservation by Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (holding that when a PCR court fails to make specific findings as to an issue, a Rule 59(e) motion is necessary to preserve the issue for appeal). Accordingly, because the allegation was never presented as a claim of structural error or the denial of due process, this Court should not consider the issue for the first time on appeal.

Furthermore, Petitioner should have raised this claim in his direct appeal, and the allegation is not proper for post-conviction relief. Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Petitioner could have raised this issue on appeal from his trial, and his failure to do so has waived this allegation as a ground for relief.

Merits

Regardless, even if the issue were preserved for appellate review and appropriate for post-conviction relief, this allegation of structural error is meritless. Structural errors are errors

"affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1991). "Essentially, an error is structural if it is 'the type of error which transcends the criminal process.'" State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) (citing Fulminante at 311). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017). Structural errors are typically not analyzed by harmless-error standards, and are subject to automatic reversal. Id.; Rivera at 247, 741 S.E.2d at 705.

Rivera notes the United States Supreme Court has found "an error to be 'structural,' and thus subject to automatic reversal only in a very limited class of cases." Neder v. United States, 527 U.S. 1, 8 (1999) (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)); see also United States v. Gonzalez–Lopez, 548 U.S. 140, 150 (2006) (erroneous disqualification of counsel of choice); Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge).

Petitioner concedes there is no South Carolina case which states a violation of a defendant's right to a full jury complement constitutes structural error. PWC 8. Respondent does not concede that this violation is a structural error and asserts that it is not. However, even if this were a structural error under the law, the PCR court properly analyzed the claim with a Strickland prejudice analysis because the claim was framed as one of ineffective assistance of counsel. "[I]n the case of a structural error where there is an objection at trial and the issue is

raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" Weaver, at 1910 (citing Neder v. United States, 527 U.S. 1, 7 (1999)). But when a structural error is not raised at trial or preserved for direct appellate review and is raised later in the context of ineffective assistance of counsel, a Strickland analysis is appropriate. Weaver, at 1911.

"[W]hen a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or...to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." Weaver, at 1911 (2017). Because Petitioner did not preserve this argument at trial or raise it on direct review of his conviction, and because the allegation was framed, without Petitioner's objection, as an assertion of ineffective assistance of counsel, Weaver specifically holds that a Strickland prejudice analysis is proper.

Finally, even assuming *arguendo* that a violation of a defendant's right to a full jury is a structural error, there was no such violation in this case because Petitioner gave a valid waiver of his right to proceed to trial with twelve jurors. Rule 14(a) – (c) of the South Carolina Rules of Criminal Procedure sets the standard under South Carolina law with regards to the number of jurors for a trial:

> (a) **Number of Jurors.** A jury shall be composed of twelve members, but at any time before verdict, the parties may agree in writing with the approval of the court that the jury shall consist of any number less than twelve or that a valid verdict may be returned by a jury of less than twelve should the court find it necessary to excuse one or more jurors for any just cause after trial commences.
> (b) **Waiver.** A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.

(c) **Protection of Right.** In all cases, the trial judge shall ensure that the defendant's rights under the state and federal constitutions to a trial by jury are preserved.

In this case, the parties agreed in writing with the trial court's approval that the jury shall consist of eleven members during deliberations. App. 269. The trial transcript indicates that Trial Counsel conferred with her client about the decision, App. 212, and Trial Counsel credibly testified at the evidentiary hearing that she had an extensive discussion with Petitioner about the decision to waive his right to a full jury. App. 323-324. After their discussions, Petitioner made the decision to waive his right to a full jury and proceed into jury deliberations with eleven jurors. Petitioner's decision was approved by the solicitor and the trial judge, as required for a valid waiver by Rule 14(b), SCRCrim.P.

Accordingly, because the evidence in the record shows Petitioner knowingly and validly waived his right to a full twelve-member jury during deliberations, there was no structural error committed, and Petitioner cannot be entitled to a new trial. This Court should deny certiorari.

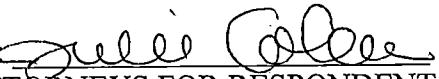
CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
S.C. Bar No. 102214

By: 
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June 28, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County

The Honorable D. Craig Brown, Circuit Court Judge

FARON M. CLEMENTS, #298789

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. SQUIREWELL, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Victor R. Seeger, Esquire
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 28TH day of June 2018.

CHANDRA E. SQUIREWELL
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 28 2018
S.C. SUPREME COURT

June 28, 2018

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

RE: **Faron M. Clements v. State of South Carolina**
Appellate Case No. 2017-002178
Lower Court Case No. 2016-CP-45-0266

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:ces
Enclosures

cc: Victor R. Seeger, Esquire
Trisha Allen, Victim Services (letter only)