

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County
Court of Common Pleas
The Honorable George C. James Jr., Circuit Court Judge

Appellate Case No. 2017-001437

ROBERT MATTHEW FULMER,

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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¹ 263 S.C. 110 (1974)

RESPONDENT'S QUESTIONS PRESENTED

- I. Is Petitioner entitled to belated appellate review of direct appeal issues pursuant to White v. State² where he did not knowingly and voluntarily waive his right to a direct appeal?

- II. Is Petitioner's appellate argument that trial counsel was constitutionally ineffective for failing to present an alibi defense after referencing such a defense in opening statement preserved for appellate review, where the post-conviction relief court did not rule on this issue and Petitioner failed to file a motion to reconsider, alter or amend pursuant to Rule 59(e), SCRPC? Notwithstanding preservation issue, has Petitioner established any constitutional ineffectiveness as to this allegation?

² 263 S.C. 110 (1974)

STATEMENT OF THE CASE

Petitioner is currently incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. Petitioner was indicted by the March 2013 term of the Pickens County Grand Jury for attempted murder (2013-GS-39-0716), first-degree burglary (2013-GS-39-0717), possession of a weapon during commission of a violent crime (2013-GS-39-0718), and petit larceny (2013-GS-39-0719). Scott D. Robinson, Esquire represented Petitioner. W. Douglas Richardson, Jr. Esquire represented the State. On August 25, 2014, Petitioner was tried before the Honorable Robin B. Stilwell, circuit court judge, and a jury. Petitioner was found guilty as indicted on all charges. On August 26, 2014, Judge Stilwell sentenced Petitioner to concurrent terms of thirty years for attempted murder, thirty years for first-degree burglary, five years for possession of a weapon during commission of a violent crime, and thirty days for petit larceny. Petitioner did not appeal his sentence or conviction.

On December 29, 2014, Petitioner filed a PCR application with the Pickens County Office of the Clerk of Court. Respondent served its return on May 29, 2015, requesting an evidentiary hearing be held. An evidentiary hearing was convened on June 13, 2016, at the Greenville County Courthouse before the Honorable George C. James Jr., then circuit court judge. Petitioner was present at the hearing and was represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. On May 19, 2017, Judge James signed an Order of Dismissal denying Petitioner's PCR application but granting Petitioner a belated review of direct appeal issues pursuant to White v. State³.

³ 263 S.C. 110 (1974)

Petitioner filed a timely notice of appeal and a Petition for Writ of Certiorari was filed on his behalf as well as an Anders⁴ Brief of Appellant pursuant to White v. State.⁵

⁴ 386 U.S. 738 (1967)

⁵ Respondent concedes Petitioner is entitled to belated appellate review of direct appeal issues pursuant to White v. State⁵ where he did not knowingly and voluntarily waive his right to a direct appeal

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the reviewing court. It will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In a PCR proceeding, the petitioner 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, 286 S.C. 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, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 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, 466 U.S. 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. Petitioner is entitled to belated appellate review of direct appeal issues pursuant to White v. State⁶ where he did not knowingly and voluntarily waive his right to a direct appeal

Respondent concedes that Petitioner is entitled to a belated review of direct appeal issues pursuant to White v. State where the record does not support that Petitioner knowingly and voluntarily waived his right to a direct appeal. Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. Respondent submits a relief of Petitioner's appeal issue is proper.

II. Petitioner's appellate argument that trial counsel was constitutionally ineffective for failing to present an alibi defense after referencing such a defense in opening statement is not preserved for appellate review, where the post-conviction relief court did not rule on this issue and Petitioner failed to file a motion to reconsider, alter or amend pursuant to Rule 59(e), SCRPC. Regardless of preservation concerns, Petitioner failed to establish any constitutional ineffectiveness as to this allegation.

A. Petitioner's argument is not preserved for appellate review

Petitioner alleges the PCR judge erred in refusing to find counsel ineffective for telling the jury in opening statement that they would hear testimony from alibi witnesses and then failing to call the alibi witnesses at trial. This issue is not preserved for appellate review as the PCR court did not make findings on this issue in its order of dismissal and Petitioner failed to file a motion for to reconsider, alter or amend pursuant to Rule 59(e), SCRPC.

⁶ 263 S.C. 110 (1974)

Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues. Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). In the present case, the PCR court did not specifically address whether trial counsel was ineffective for telling the jury in opening statement that they would hear testimony from alibi witnesses and then failing to call the alibi witnesses at trial. Accordingly, the issue is not preserved for this Court's review.

In Marlar v. State, this Court held the applicant's failure to file a Rule 59 (e), SCRPC, motion asking post-conviction relief judge to make specific findings of fact and conclusions of law as to rejected post-conviction challenges rendered those challenges waived for appellate review, precluding further review on the merits. Marlar v. State 375 S.C. 407, 653 S.E. 2d 266 (2007).

This Court in Marlar concluded by stating “[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRPC.” Marlar, at 410, 653 S.E. 2d at 267. In the current case appellant failed to make the proper motion under Rule 59. Accordingly, the issue is not preserved for appellate reviewed and should be dismissed.

The current case is similar to Marlar because Petitioner did not make a Rule 59(e) motion. Petitioner's argument to this Court is the PCR judge erred in refusing to find counsel ineffective for telling the jury in opening statement that they would hear testimony from alibi

witnesses and then failing to call the alibi witnesses at trial. While the PCR judge addressed the issue of whether trial counsel was ineffective for failing to call the two alibi witnesses to testify, nowhere in the order of dismissal or evidentiary hearing is there mention of trial counsel's opening statements to the jury. Additionally, Petitioner did not make a 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his current allegation he now raises for appellate review. Therefore, under Marlar's holding the current issue raise was not preserved for appellate review.

B. Regardless of preservation concerns, Petitioner failed to establish any constitutional ineffectiveness as to this allegation.

Notwithstanding any preservation concerns, Petitioner has still failed to meet his burden of proof regarding this allegation as he cannot prove prejudice. Petitioner alleges the PCR judge erred in refusing to find counsel ineffective for telling the jury in opening statement that they would hear testimony from alibi witnesses and then failing to call the alibi witnesses at trial.

At Petitioner's PCR hearing, neither alibi witness testified. When Petitioner attempted to testify as to what the two witness had said in a written statement regarding his whereabouts during the crime, the PCR court ruled it was hearsay. (App.p333). Later, the PCR court allowed Petitioner to proffer his testimony as to what he knew about the contents of the statements made by his alibi witness. (App.p.358). Petitioner testified he had never seen the statements himself but he knew that they pretty much would have said that he was with his alibi witnesses during the commission of the crime. (App.p.358).

At the PCR hearing Petitioner testified that he told trial counsel about these two witnesses during a phone conversation. (App.p.425). When the case was called and before jury selection, trial counsel advised the trial judge that these two witnesses were important and that he might not be able to secure their presence on such short notice. (App.p.425-426). Their trial appearance

was evidently procured through subpoena. (App.p.426). Petitioner testified that trial counsel told him that nothing these two witnesses could say would help him. (App.p.426)

Trial counsel testified that he talked to both witnesses and that he determined their testimony would have been very “wishy-washy”. (App.p.426) He testified that the witnesses appeared to be under the influence of some substance when he spoke to them during the trial and that neither witness could state with any certainty that Petitioner was indeed with them the entire night. (App.p.426) Trial Counsel testified they were reluctant and afraid to testify and they admitted writing statements but told him they could not say that Petitioner was at the tattoo house the entire night. (App.p.426) Trial counsel testified that alibi witnesses are very important if they are credible but that these two witnesses would not have been credible, and he was afraid their testimony would backfire. He testified the risks outweighed the benefits and that he, again, wanted to preserve the last argument. (App.p.426)

The PCR Court found trial counsel’s testimony on his reasons for not calling the alibi witnesses to be credible and concluded trial counsel’s decision to not call the witnesses was appropriate under the circumstance and determined trial counsel was not deficient.

Moreover, through an alibi, an accused attempts “to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime.” State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d Criminal Law § 136)). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses’ testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant’s mere speculation about what the witnesses’ testimony

would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id. Further, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); see, e.g., Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR. Porter v. State, 368 S.C. 378, 386–87, 629 S.E.2d 353, 358 (2006) (holding no evidence showed counsel's failure to interview a potential witness would have yielded a result different from that which defendant's counsel believed at the time of the plea; defendant pled guilty in light of the complete information that was available at that time). Here, neither of Petitioner's alibi witnesses testified at the PCR hearing. Further, their statements were proffered as evidence but would not have been allowed in to evidence in accordance with the rules of evidence as the statements were hearsay. As a result, Petitioner argument fails. Trial Counsel was not ineffective for telling the jury in opening statement that they would hear testimony from alibi witnesses and then failing to call the alibi witnesses at trial as the issue is unpreserved for appellate review and if preserved Petitioner has failed to prove prejudice.

CONCLUSION

For the foregoing reasons, Respondent does not challenge a belated review of direct appeal issues pursuant to White v. State. Further, Petitioner's second issue should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issue herein.

Respectfully submitted,

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By: 

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July 13, 2018

STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO PICKENS COUNTY
Court of Common Pleas
The Honorable George C. James, Jr., Circuit Court Judge

Appellate Case No. 2017-001437

Robert Matthew Fulmer, Respondent,

v.

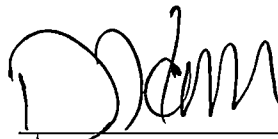
State of South Carolina,Petitioner.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Kathrine H. Hudgins, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served.
This 13th day of July, 2018.



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July 13, 2018

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S.C. SUPREME COURT

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

Re: Robert Matthew Fulmer v. State of South Carolina
Appellate Case No. 2017-001437
Lower Court Case No. 2014-CP-39-1550

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

DeShawn H. Mitchell
Assistant Attorney General
SC Bar #101813

DHM/jacc
Enclosures

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division (without enclosure)