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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Colleton County
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2016-002385

DERRICK FISHBURNE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE..... 4

STANDARD OF REVIEW 7

ARGUMENT 9

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Bryson v. State, 328 S.C. 236, 493 S.E.2d 500 (1997) 12

Hadfield v. Oakland County Drain Commissioner, 430 Mich. 139, 422 N.W.2d 205 (1988) 14

In re Treatment & Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002)..... 7, 13, 14

Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017)..... 8

McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991) 11, 15

McCullough v. State, 320 S.C. 270, 464 S.E.2d 340 (1995)..... 12, 15

Potter v. Potter, 845 P.2d 272 (Ct. App. Utah, 1993). 14

Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992)..... 7, 9, 10, 11, 14

Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999)..... 12

Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016) 12, 15

State v. Smalls, --- S.C. ---, --- S.E.2d --- (2018) 13

Statutes

S.C. Code § 17-27-80..... 3, 7, 9, 10

GCR 1963, 517.1 14

Rules

Rule 52, SCRCP..... 7, 11, 12, 13, 14

Rule 59, SCRCP..... 12, 13, 14, 15

STATEMENT OF ISSUES ON APPEAL

- I. Should this case be remanded pursuant to *Pruitt v. State*, when the circuit court failed to make any findings of fact pursuant to S.C. Code § 17-27-80.

STATEMENT OF THE CASE

Petitioner was indicted by the Colleton County Grand Jury for the offenses of murder and possession of a firearm during a violent crime. App. 433-444. His case was called to trial on July 19, 2010 before the Honorable Perry M. Buckner. David Matthews represented Petitioner. Deputy Solicitor Sean Thornton represented the State.

On July 21, 2010 the jury found Petitioner guilty on both counts. App. 421, ll. 14-23. Judge Buckner sentenced Petitioner to forty years imprisonment for murder, and five-years imprisonment for possession of a weapon during a violent crime. App. 429, 11. 6-22.

Petitioner filed a timely notice of appeal. For the appeal, Petitioner was represented by Chief Appellate Defender Robert M. Dudek. Mr. Dudek filed an brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal on June 20, 2012. App. 450-451.

Petitioner filed a PCR application on October 16, 2012. App. 452-458. An evidentiary hearing was held on October 27, 2014 before the Honorable Edgar Dickson. App. 459.

At the hearing, Petitioner moved to amend the PCR to include a claim that Trial Counsel was ineffective for introducing prior bad acts and for arguing that Petitioner was the “usual suspect.” App. 464, ll. 2-8. Over the State’s objection, Judge Dickson allowed the new allegation. App. 464, ll. 14-23. The exchange went as follows:

MR. SHAFFER: Thank you, your Honor . First, there's failure to properly investigate . Then, ineffective assistance of Counsel for failure to - - or for introducing prior bad acts, essentially, into this trial; and also, for characterizing him as one of the usual suspects.

THE COURT: Okay. Alright.

MS. WILSON: Your Honor, the State would like to object, because Mr. Fishburne didn't enumerate these allegations with specificity in his application , and he solely alleged ineffective assistance of counsel.

THE COURT: The only one I saw was illegal sentence enhancement . So, unless there was an appeal.

MR . SHAFFER : Your Honor , I actually - - this has been called several times previously . This is the third time we 've been here. I emailed Ms. Wilson , probably, in February, concerning this . February of last year, I believe. Maybe not. Was it February of last year? Judge Cooper?

MS. WILSON: Yeah.

MR. SHAFFER: When Judge Cooper was on the Bench , I believe it was February of last year , I emailed Ms. Wilson . I told her about the allegation involving the raising the bad acts and the fact that he was called the usual suspect. That was the third email correspondence.

I could probably pull it up, if your Honor would give me a second.

THE COURT: That' s okay. That's okay.

MR. SHAFFER: And your Honor, and the failure to investigate, I also informed her of previously.

THE COURT: Okay. All right. Ms. Wilson, you have Mr. Matthews here, right?

MS. WILSON: Yes, your Honor. And I'd just like to note for the record that we're just noting his objection.

THE COURT: Okay.

MS. WILSON: Because he didn't fail - - he didn't formally file an amended application to make these a part of the record. Thank you.

THE COURT: Okay. Well, I'll note that it wasn't done formally, but I'm letting him go forward on it. Okay.

App. 463, l. 7 – 464, l. 23.

On December 21, 2015, the PCR Court denied Petitioner's Application. App. 485-489.

The findings of fact and conclusions of law states the following:

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

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, Id.* The Applicant must overcome this

presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that 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.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility.

The Court finds that Applicant has failed to meet his burden of proof in establishing ineffective assistance of counsel. Applicant did not provide his alleged alibi witnesses at the evidentiary hearing nor did he locate and/or interview those witnesses within 30 days from the evidentiary hearing as ordered by Judge Dickson. *See Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (An 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). Therefore, this application for post-conviction relief is denied.

App. 486-488.

This appeal follows.

STANDARD OF REVIEW

The South Carolina Rules of Civil Procedure state the following:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. **Requests for findings are not necessary for purposes of review.** The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 52(a), SCRPC (emphasis added); *cf.* S.C. Code § 17-27-80 (“All rules and statutes applicable in civil proceedings are available to the parties.”).

When an “order below provides no findings of fact to support its ultimate legal conclusion” the appellate court should remand the case rather than “speculat[ing] how the lower court viewed the ultimate facts. *See In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 134, 568 S.E.2d 338, 343 (2002); *see also, Pruitt v. State*, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992) (“Accordingly, we find it necessary to vacate ... and remand this matter to the circuit court to hold a new hearing.”).

In cases where the lower court order adequately addresses the findings of the court below, this Court has adopted the following Standard of Review:

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. We do not defer to a PCR court's rulings on questions of law. Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law. On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard.

Mangal v. State, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017) (*internal citations omitted*).

ARGUMENT

- I. This case should be remanded pursuant to *Pruitt v. State* when the circuit court failed to make any findings of fact pursuant to S.C. Code § 17-27-80.

Relevant Facts

Prior to the hearing, Petitioner argued that Trial Counsel was ineffective for referring to him as the “usual suspect” and for allowing evidence of his prior criminal difficulties to be admitted before the jury. Court App. 463, 1. 7 – 464, 1. 23. Petitioner questioned Trial Counsel about this issue during the following exchange:

Q Okay. Now, he had other charges pending at this time, correct?

A Yes.

Q Okay. What other charges? Do you recall?

A I don't. I know that he had a couple others, and we were probably looking at probation on those.

Q Okay. Now, at one point, he even -- even in front of the jury, you had mentioned the fact that he had roll call the next day. Is that correct? Do you recall that?

A If you say so.

Q Okay. You characterize him, at one point, as the usual suspect. Okay?

A I believe he --

Q Tell us about that and why you did that.

A Well, I had to - - I tried to find a way to explain why he lied to the police. You know, you've got somebody that has you leaving the scene before this happens, so why would you deny that you're there? And you know, you don't need to do that; and it's a lie, and it's an unnecessary lie. And so, how do you explain that? You've got to give the jury -- in my -- my strategy, you've got to give the - - you can't juries don't like lies, whether the police tell them or whether the defendants tell them or whether witnesses tell them, and you've got to explain it, somehow. And that was my way to explain why he would lie about being in the club.

Q Okay. It's safe to say that that's sort of a double-edged sword. Is that

A Yes, it's a risk.

Q Okay.

A There's no doubt. I mean, you -- you want to present some evidence that, you know, somebody doesn't trust the police, then you have to show prior involvement with the police, which, normally, you work to try not to do. But, yeah, it's a risk. But I don't know how -- but you've got to explain a lie.

App. 469, l. 15—470, l. 15.

Additionally, this was part of the transcript which was reviewed by the Court. App. 285, ll. 6-19; App. 374, l. 24—375, l. 5; App. 382, l. 20; App. 487. However, the Order of Dismissal was devoid of any finding concerning the “usual suspect” characterization issue or any other issue. App.485-489.

Argument

Petitioner is entitled to a ruling including findings of fact and conclusions of law. *See* S.C. Code § 17-27-80. In *Pruitt*, this court found it necessary to vacate and remand a PCR order when failed to “address the merits of the issues raised by the applicant.” *Pruitt v. State*, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992). The Court noted the following:

We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. Not only does this deprive the parties of rulings on the issues raised, but it makes review by the appellate court more difficult and ultimately increases the work load of all involved where, as in this case, **a new hearing is required** to secure the rulings which should have been made initially

Id., 310 S.C. at 255-56, 423 S.E.2d at 128 (emphasis added).

Similarly, this Court has repeatedly remanded other PCR cases when the circuit court failed to make any sufficient findings. *See e.g. McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241 (1991) (“The PCR court's conclusions regarding ineffective assistance are insufficient for appellate review and fail to meet the standard set forth in the statute. Accordingly, we reverse the

order denying McCray relief and remand for a new PCR hearing.”); *McCullough v. State*, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) (“We admonish all those involved in future PCR matters to be meticulous in preparing and reviewing proposed orders so that the final order sets forth the required findings and reasons for those findings.”); *Bryson v. State*, 328 S.C. 236, 236-37, 493 S.E.2d 500 (1997) (“We hereby grant the petition for a writ of certiorari, dispense with further briefing, vacate the order of dismissal, and remand this matter to the post-conviction relief judge to make specific findings of fact and conclusions of law as to each issue raised by petitioner in his post-conviction relief application and at the hearing thereon.”); *Simmons v. State*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (“As noted, we believe the State is technically correct regarding issue preservation. However, as the State acknowledges, this Court has previously remanded cases such as this to the PCR court for findings of fact.”).

In the present case, the circuit court failed to make **any** findings. The Circuit Court laid out the history and addressed the legal standard but failed to make sufficient findings related to any issue much less the issue related to whether trial counsel was ineffective for characterizing his client as one of the “usual suspects.”

Therefore, the Order of Dismissal should be vacated and this matter should be remanded to give Petitioner his “one bite at the apple.” *Cf. Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“an applicant is entitled to a full adjudication on the merits of the original petition, or “one bite at the apple.”).

Consistent with this Court’s ruling in *Pruitt*, a Rule 59(e) Motion is not necessary for appellate review of the failure to comply with Rule 52(a).

In its Return to Petition for Writ of Certiorari, the State argues that Petitioner failed to preserve this issue by not filing a motion pursuant to Rule 59(e), SCRPC. Petitioner is cognizant

that when a particular issue is not addressed in a PCR order, the applicant **may** file a Rule 59(e) motion. However, the order in Petitioner's case does not involve a situation where the Court failed to address one issue on a PCR application; instead, the order is devoid of any factual findings. Therefore, Petitioner respectfully submits that a Rule 59(e) Motion was not necessary to preserve this matter for appellate review.

Rule 52(a) states the following:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. **Requests for findings are not necessary for purposes of review.** The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 52(a), SCRPC (emphasis added).

It does not appear that any South Carolina case has specifically addressed the **second sentence** of Rule 52(a), SCRPC. However, the plain language of the second sentence of Rule 52(a) supports the position that a party need not request a finding to have appellate review. To give the second sentence effect, this Court would have the authority to review any finding of the circuit court irrespective of whether the finding was raised to the circuit court. The second sentence would be equally applicable when the circuit court failed to make any finding. *Cf. State v. Smalls*, --- S.C. ---, --- S.E.2d --- (2018) (This Court made a finding concerning prejudice despite the fact that the circuit court “did not make specific findings”). Therefore, Rule 52(a)'s second sentence does not make a Rule 59(e) request for a finding a necessary prerequisite to appellate court of the failure to make a finding.

Other courts have found that provisions similar to second sentence of Rule 52(a), would allow appellate review of a trial court's failure to make a sufficient finding even when the finding was not specifically requested. In *Hadfield v. Oakland County Drain Commissioner*, the Supreme Court of Michigan considered Michigan's GCR 1963, 517.1 states in pertinent part the following:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.... **Requests for findings are not necessary for purposes of review.** No exception need be taken to any finding or decision.

GCR 1963, 517.1 (emphasis added). The *Hadfield* Court stated “[i]n sum, we hold that a prior review by the trial court is not necessary to preserve for appeal the question whether the trial court made findings of fact pursuant to GCR 1963, 517.1.” See *Hadfield v. Oakland County Drain Commissioner*, 430 Mich. 139, 422 N.W.2d 205, 229 (1988).

In *Potter v. Potter*, the Utah Court of Appeals used Rule 52(a) as authority for allowing appellate review of a ruling despite the fact that Mr. Potter's attorney did not request findings concerning a property distribution. *Potter v. Potter*, 845 P.2d 272 (Ct. App. Utah, 1993). In deciding to remand the case, the *Potter* Court noted, “[b]oth trial counsel and the trial court collectively share responsibility to ensure that legal requirements are satisfied by entry of adequate findings.” *Id.* at 274.

In the present case, the circuit court failed to make any findings. “The absence of factual findings makes [the appellate court's] task of reviewing the court order impossible because ‘the reasons underlying the decision [are] left to speculation.’” See *In re Treatment & Care of Luckabaugh.*, 351 S.C. at 133, 568 S.E.2d at 343. The trial court must “substantially compl[y]” with Rule 52(a). See *id.*, 351 S.C. at 131, 568 S.E.2d at 342. The plain language of Rule 52(a) relieves

Petitioner from having to request finding in the “extraordinary circumstance” when the circuit court fails to make any factual finding. *See e.g. Pruitt*, 310 S.C. at 255, 423 S.E.2d at 128 (footnote 2) (“The extraordinary action we take today is necessary only because our opinion in *McCray* is not being followed.”); *McCullough*, 320 S.C. at 272, 464 S.E.2d at 341 (“Although the error was not raised to and ruled on by the PCR judge, we find it necessary to vacate the order and remand this matter to the circuit court to issue an order addressing its decision to dismiss *McCullough*'s second application as successive.”); *Simmons*, 416 S.C. at 591, 788 S.E.2d at 224 (“[A]lthough the State is technically correct, we also believe dismissing the writ of certiorari would be fundamentally contrary to the interests of justice. As discussed below, our jurisprudence permits a remand under such extraordinary circumstances.”). Therefore, this matter should be remanded for further findings of fact.

CONCLUSION

Petitioner respectfully requests this Court remand this case to the circuit court for additional factual findings.

Respectfully submitted,



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