STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2016-002385

DERRICK FISHBURNE, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

BRIEF OF RESPONDENT

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RESPONDENT'S ISSUE PRESENTED

Should this case be remanded where the PCR judge did make a specific finding of fact that Petitioner failed to satisfy his burden of proving his allegation, and where if the PCR judge had not, this would not excuse Petitioner's failure to file a Rule 59(e), SCRCP motion required to preserve this issue for appellate review?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. During the June 2009 term, the Colleton County Grand Jury indicted Petitioner for murder (2009-GS-15-0256) and possession of a weapon during a violent crime (2009-GS-15-0255). David S. Matthews, Esquire ("Trial Counsel"), of the Colleton County Public Defender's Office, represented Petitioner at trial. Deputy Solicitor Sean Thornton, Esquire, prosecuted the case. On July 19, 2010, Petitioner proceeded to trial before the Honorable Perry M. Buckner, III. The jury found Petitioner guilty as indicted. On July 21, 2010, Judge Buckner sentenced Petitioner to imprisonment for forty years for murder and five years for possession of a weapon during a violent crime, to be served concurrently.

Petitioner subsequently filed a timely notice of appeal. Chief Appellate Defender Robert M. Dudek, Esquire, perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal and granted counsel's motion to be relieved in an unpublished opinion filed June 20, 2012. State v. Fishburne, Op. No. 2012-UP-363 (Ct. App. 2012). The remittitur was issued on July 6, 2012.

Petitioner filed an application for post-conviction relief on October 16, 2012. The State made its return on July 15, 2013. An evidentiary hearing into the matter was convened on October 27, 2014, before the Honorable Edgar W. Dickson at the Beaufort County Courthouse. Petitioner was present at the hearing and represented by Tristan M. Shaffer, Esquire ("PCR Counsel"). Assistant Attorney General Ashleigh R. Wilson, Esquire, represented the State. Judge Dickson denied and dismissed the application with prejudice by order of dismissal signed December 15, 2015, and filed December 21, 2015. Petitioner did not file a Rule 59(e), SCRCP motion to alter or

amend or include specific findings regarding any of his allegations. Petitioner filed a notice of appeal on November 22, 2016. Petitioner subsequently filed a petition for writ of certiorari on October 19, 2017. This return follows.

Statement of the Facts

Petitioner's convictions resulted from an April 2009 incident in which he killed Donald Green ("Victim") by shooting him multiple times outside the Spirits Lounge in Colleton County. (App. p. 421, ll. 14-24). That night and early morning, officers from the Colleton County Sheriff's Office responded to a shooting call at the Spirits Lounge and found a black male lying in blood beside a vehicle. (App. p. 140, ll. 13 – 25 – p. 141, ll. 1-2). As Officer Buchanan testified at trial, there were approximately two hundred and fifty to three hundred people there when he arrived, and he had to wait for backup as the crowd tried to attack him. (App. p. 141, ll. 2-12). When officers arrived to aid Victim, he had "brain matter" and blood coming from his gunshot wounds to the head and also bleeding profusely from his chest. (App. p. 148, ll. 1-8; p. 157, ll. 3-6).

Petitioner initially denied being present at Spirits Lounge when the shooting occurred, but rather at his girlfriend's house. (App. p. 64, ll. 7-21). However, Petitioner's girlfriend herself testified Petitioner left the house from around 12:45am to 3:00am the night/early morning of the incident, which was the timeframe in which the murder occurred. (App. p. 311, ll. 22-25 – p. 312, ll. 1-4). Moreover, multiple eyewitnesses identified Petitioner as the shooter and indicated Petitioner shot Victim to the ground and continued to stand over him and shoot him after he had fallen to the ground. (App. p. 186, ll. 5-25 – p. 187, ll. 1-23; p. 207, ll. 18 – 25 – p. 208, ll. 1-14). One of the eyewitnesses had given a statement to police implicating Petitioner but later recanted. However, this eyewitness explained at trial her original statement was the truth and she had only recanted after she had problems with Petitioner's family calling her. (App. p. 232, ll. 1-20).

PCR Hearing

At the PCR hearing held on October 27, 2014, the State asked PCR Counsel to enumerate Petitioner's allegations for post-conviction relief. (App. p. 463, ll. 4-5). PCR Counsel enumerated ineffective assistance of counsel for failure to investigate as well as for introducing bad acts by characterizing Petitioner as "one of the usual suspects." (App. p. 463, ll. 7-12). The State objected because Petitioner had not enumerated these allegations with specificity in his application and had not formally amended the application. (App. p. 464, ll. 4-20). The PCR judge noted the amendment was not done formally, but allowed Petitioner to proceed on these allegations. (App. p. 464, ll. 21-23).

Trial Counsel testified Petitioner's initial denial of being at the club presented a problem. Trial Counsel recalled discussing this at some length with Petitioner, and Petitioner indicated he did not trust the police because they had arrested him in the past. (App. p. 468, ll. 19-25 – p. 469, ll. 1-10). When asked why he had described Petitioner as a "usual suspect," Trial Counsel explained he tried to find a way to explain why Petitioner lied to the police. (App. p. 470, ll. 1-6). Trial Counsel testified it was his way of explaining why Petitioner would lie about being in the club and explained, "in my strategy, you've got to give the - - you can't - - juries don't like lies, whether the police tell them or the defendants tell them or whether witnesses tell them, and you've got to explain it somehow." (App. p. 470, ll. 7-12). Trial Counsel acknowledged it was a risk, but he had to explain the lie. (App. p. 470, ll. 21-22). Furthermore, Trial Counsel testified he had no other way to explain Petitioner's lie. (App. p. 475, ll. 15-20).

STANDARD OF REVIEW

Issues must be raised to the PCR judge and ruled on by the PCR judge to be preserved for appellate review. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007); See also Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. S.C. Code § 17-27-80. Only final judgments or decisions may be reviewed by this Court in PCR actions. S.C. Code § 17-27-100; Rule 71.1(f), SCRCP. In the event the PCR judge fails to make specific findings of fact and conclusions of law regarding an issue, it is incumbent upon a party to file a Rule 59(e), SCRCP motion to properly preserve an issue for appellate review. Burgess v. State, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013) (citing Marlar, 375 S.C. at 410, 653 S.E.2d at 267 (finding issues not preserved for appellate review because the PCR applicant did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations)).

ARGUMENT

This case should not be remanded where the PCR judge did make a specific finding of fact that Petitioner failed to satisfy his burden of proving his allegation, and where if the PCR judge had not, this would not excuse Petitioner's failure to file a Rule 59(e), SCRCP motion required to preserve this issue for appellate review.

Petitioner alleges the PCR judge failed to make "any findings of fact pursuant to S.C. Code § 17-27-80," regarding his allegation of ineffective assistance of counsel for introducing Petitioner's prior bad acts at trial and urges this Court to remand the matter back to the PCR court for specific findings of fact. Petitioner concedes this allegation is not preserved for appellate review because Petitioner did not file a motion pursuant to Rule 59(e), SCRCP, in response to the PCR judge's order of dismissal, but nevertheless argues he should be excused from filing a Rule 59(e) motion because "the order is devoid of any factual findings." The record refutes this allegation as the PCR judge expressly made a finding that Petitioner failed to meet his burden of proof regarding his allegations. Notwithstanding, Petitioner has failed to establish any valid reason why his failure to file a Rule 59(e) motion should be excused, and therefore this matter should not be remanded.

At the PCR hearing, Petitioner orally amended his application to allege ineffective assistance of counsel for failure allowing evidence of Petitioner's criminal history to be admitted before the jury. The Order of Dismissal demonstrates the PCR judge properly applied the controlling law and made a specific finding of fact regarding Petitioner's allegations in the Order of Dismissal. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its

"reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). Second, the applicant must prove counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. In the Order of Dismissal, the PCR judge applied this necessary legal analysis to Petitioner's allegations of ineffective assistance of counsel and made the specific finding of fact and conclusion of law that Petitioner failed to meet his burden of proof in establishing ineffective assistance of counsel. (App. p. 487). Therefore, the PCR judge did in fact make the necessary findings of fact pursuant to S.C. Code § 17-27-80, and this case should not be remanded.

Even if the PCR judge had failed to make a specific finding of fact regarding Petitioner's allegations, this would not excuse Petitioner from filing a Rule 59(e) motion to alter or amend or include specific findings regarding any of his allegations in order to preserve this issue for appeal. If issues are not adequately addressed in an order, a Rule 59(e) motion must be filed in order to preserve the issues for appellate review. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007). This Court in Marlar held the Court of Appeals erred in remanding a PCR matter when the PCR judge's order of dismissal failed to make a sufficient ruling on the issues because the applicant did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law, and therefore the issues were not preserved for appellate review. 375 S.C. at 410, 653 S.E.2d at 267. Notably, in Marlar, the order of dismissal was more problematic than the present case as the order in Marlar merely addressed the allegations with the following "boilerplate" language:

> As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all

> allegations not specifically addressed in this Order are hereby denied and dismissed. 375 S.C. at 409, 653 S.E.2d at 266.

In this case, the PCR judge expressly found Petitioner failed to meet his burden of proof regarding his allegations of ineffective assistance of counsel, as opposed to Marlar where the PCR judge imprecisely disposed of "any allegations raised ... or not specifically addressed." Notwithstanding, this Court's instruction in Marlar controls in this case, as Petitioner has likewise waived his opportunity for a remand by failing to file the necessary Rule 59(e) motion.

This issue was also recently addressed in Burgess v. State, 402 S.C. 92, 738 S.C. 264 (Ct. App. 2013). In Burgess, the State petitioned for writ of certiorari after a grant of Burgess's application for post-conviction relief and alleged the PCR judge erred in failing to make a finding as to whether Burgess was prejudiced by his counsel's failure to request a jury charge. 402 S.C. at 93. In that case, the PCR judge failed to make a finding regarding the second prong of Strickland. The court in Burgess noted the PCR judge's findings lacked sufficient findings of fact and conclusions of law, but nevertheless held, "Because the State failed to file a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law regarding the prejudice prong, we find the issue on appeal is not preserved for our review." Id. at 95. Moreover, the court in Burgess also referenced Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001) in which this Court found the petitioner's claim of ineffective assistance of counsel for allowing the trial to proceed while the petitioner was shackled and wearing an identification bracelet was not preserved for appeal because the petitioner did not file a Rule 59(e) motion requesting a finding on the issue.

Petitioner's reliance on Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) is misplaced. In Pruitt, this Court remanded the case when the PCR judge's order of dismissal did not address the questions raised in the application and presented at the evidentiary hearing. Id. at 255. This

Court in Pruitt noted this was an "extraordinary action" taken because the opinion in McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991) was not being followed, and the opinion was not an abandonment of the general rule that issues must be raised to, and be ruled on by, the PCR judge to be preserved for appellate review. Pruitt v. State, 310 S.C. at 255, 423 S.E.2d at 128. Furthermore, this Court instructed, "Even after an order is filed, counsel has an *obligation* to review the order and file a Rule 59(e), SCRCP, 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), SCRCP." Id. at 256 (emphasis added). In fact, this Court in Marlar, approximately fifteen years after Pruitt, addressed essentially the same issue and held the Court of Appeals should not have remanded to the circuit court because the applicant failed to file a Rule 59(e), SCRCP motion, and also noted the Court in Pruitt took extraordinary action. Marlar, 375 S.C. at 410, 653 S.E.2d at 267. In this case, the PCR judge's order of dismissal did in fact address the allegations raised, and Petitioner failed to file a Rule 59(e) motion. Therefore, this case certainly does not require the "extraordinary action" taken in Pruitt, and Petitioner failed to file a Rule 59(e), SCRCP, motion necessary to preserve for appellate review as instructed by this Court.

Therefore, this case should not be remanded when the PCR judge's Order of Dismissal contained the adequate specific findings of fact and conclusions of law pursuant to S.C. Code § 17-27-80, and the matter is not preserved because Petitioner's failure to file the necessary Rule 59(e) motion to preserve the issue for appellate review is not excused.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari, and this case should not be remanded.

Respectfully submitted,

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3/6, 2019

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PROOF OF SERVICE

I, Benjamin Limbaugh, certify that I have served the within **Brief of Respondent** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tristan M. Shaffer, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 6th day of March, 2019.

Benjamin Limbaugh

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RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 6th day of March, 2019

Tamieka Russell-Brown
LEGAL ASSISTANT