

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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AUG 15 2019

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Colleton County
Edgar W. Dickson, Post-Conviction Relief Judge
Appellate Case Number 2016-002385
Op. No. 27911 (Filed Jul 31, 2019)

DERRICK FISHBURNE,

Petitioner,

v.

THE STATE,

Respondent.

PETITION FOR REHEARING

Through its opinion issued on July 31, 2019, this Court remanded this matter back to the post-conviction relief court for the court to issue an order setting forth adequate findings of facts and conclusions of law regarding Fishburne's unaddressed post-conviction relief claim. Importantly, in doing so, this Court overlooked its own well-established precedent concerning the importance and necessity of issue preservation. As a result, this Court should grant rehearing pursuant to Rule 221(a), SCACR, find the issue was not properly preserved for appellate review, and affirm all of Fishburne's convictions and sentences as Fishburne did not raise any preserved issues on appeal.

Looking to what occurred in the case, Petitioner filed a post-conviction relief application and an evidentiary hearing was held before the Honorable Edgar Dickson. At that hearing,

Petitioner moved to amend the post-conviction relief allegations to include a claim that trial counsel was ineffective for introducing prior bad acts and for arguing that Petitioner was the “usual suspect.” Over the State’s objection, Judge Dickson allowed Petitioner to proceed on the amended allegation. Thereafter, the post-conviction relief court denied Petitioner’s application but failed to address the amended allegation. After that, post-conviction relief counsel who is the same counsel that filed this appeal, completely neglected to file a Rule 59 (e) motion to get a ruling on the issue and, instead, elected to raise it for the first time as the sole issue raised in this appeal.

Despite the fact this Court, in remanding Fishburne’s case, explicitly overlooked this its own well-established and basic issue preservation requirements, precedent. This Court addressed this issue specifically in *Marlar v. State*:

The cases this Court remanded for specific findings were unique cases in which the Court attempted to remind the circuit court judges and parties that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59 (e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Although the cases apparently have not accomplished the Court’s goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal.

Id. at 410, 653 S.E.2d at 267. Further elaborating on this decision, this Court held that “because the applicant failed to make a Rule 59 (e) motion asking the PCR court to make specific findings of fact and conclusions of law on his allegations, the issues were unpreserved, and the court of appeals erred by addressing the merits of the issues and remanding the case to the PCR court. *Id.* However, this Court is now making the same error, remanding a case for further findings of facts and conclusions of law where those issues were not properly preserved for appellate review.

Further, this Court went on to cite *Simmons v. State*, in which the Court remanded the case for a new hearing where the PCR court dismissed all of the remaining claims as being “without merit.” 416 S.C. 584, 591, 788 S.E.2d 220, 224 (2016). In *Simmons*, this Court noted the State’s argument that the issue was not preserved was “technically correct,” that remands of this nature should be granted “sparingly,” and that such remands should be “reserved for the rarest of cases.” *Id.* at 593, 788 S.E.2d at 225. Critically, nothing about Petitioner’s makes it particularly rare or unique as would trigger the need for remand, especially when the remand would require ruling against precedent and further alleviating the need for issues to be properly preserved to be considered on appeal.

This Court further acknowledged the validity of the State’s preservation argument and stated that “if this were generic civil action, we would likely be quick to accept the State’s preservation.” This Court went on to say; “However, because the United States Constitution’s Sixth Amendment guarantee to a defendant’s right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party’s procedural shortcoming – such as a failure to file a Rule 59 (e) motion – to prevent this Court from remanding claims of ineffective assistance of counsel...” By reaching that particular conclusion again, this Court is again ruling against precedent by failing to apply basic preservation rules simply because a constitutional right is invoked. The Court of Appeals, in *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005), held that the requirements of issue preservation apply with equal force to assertions of constitutional violations. Again in *In re Care and Treatment of Corley*, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) the Court of Appeals held that if an allegation of a constitutional violation is not raised to the trial court, the issue is not preserved for review on appeal. By ruling in the matter it has, this Court is ignoring its own precedent as an ends to a

mean in this case despite the fact this case does not present the element of “rarity” per *Simmons* nor does the implication of a constitutional issue automatically preclude the necessity of appellate preservation based on our well-established precedent. Generally speaking, this Court has consistently held that issues must be properly preserved to be reviewed on appeal, except in the rarest of circumstances. Petitioner in this case has failed to show any “extraordinary circumstance” that would warrant the Court to ignore and effectively reverse precedent in such a manner.

Finally, as highlighted in Justice Hearn’s concurrence, the decision to remand this matter for an issue that was not properly preserved with a motion to alter or amend raises significant policy concerns and sets a problematic precedent for future post-conviction relief cases. Functionally, this Court is greatly negating the need for applicant’s counsel to file a 59 (e) motion to properly preserve issues for appellate review. The Court reasons that remanding cases without requiring a 59 (e) motion be filed is to further the goal of better written post-conviction relief orders. However, this opinion provides an avenue for the opposite to occur. This decision provides incentive for opposing counsel to allow sub-standard orders to be signed by the circuit court in an effort to have all issues, whether properly presented or preserved, be reviewed by this Court. This Court, by alleviating the need to properly preserve issues for appeal by filing a 59 (e) motion, will unnecessarily cause further uncertainty for Circuit Court judges, Applicant’s counsel, and the State. Based on these policy concerns, this Court should reconsider its decision, which will undermine well-established and important procedural requirements.

Conclusion

For all the foregoing reasons, it is respectfully submitted that this Court reconsider remanding this case to the Circuit Court for further findings of facts and conclusions of law, despite Petitioner's counsel's failure to comply with the basic requirements of our state's civil procedure and issue preservation rules.

Respectfully submitted,

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August 15, 2019

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Rehearing** has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

**Tristan Michael Shaffer, Esquire
Shaffer Law Firm
Post Office Box 1027
Chapin, SC 29036**

This 15th day of August 2019.



Jennifer A. Jennison

Administrative Coordinator for Petitioner



ALAN WILSON
ATTORNEY GENERAL

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S.C. SUPREME COURT

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

RE: Derrick Fishburne v. State of South Carolina
Appellate Case No.: 2016-002385

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Petition for Rehearing, in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this motion today.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General

BHL/jaj
Enclosures

cc: Tristan M. Shaffer, Esquire (w/enclosure)