STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Edgar W. Dickson, Circuit Court Judge

RECEIVED

Aug 27 2020

S.C. SUPREME COURT

RODNEY C. BRYAN,

PETITIONER/RESPONDENT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2019-001887

RETURN TO CROSS PETITION FOR WRIT OF CERTIORARI

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RESPONDENT/PETITIONER'S QUESTION PRESENTED

Whether the PCR court erred in granting Bryan a belated appeal pursuant to White v. State,[1] and finding ineffective assistance of appellate counsel for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial where: (1) the relief granted is not the appropriate remedy for ineffective assistance of appellate counsel; (2) Bryan never asserted ineffective assistance of appellate counsel for failing to argue he unknowingly and involuntarily waived his right to testify; (3) the PCR court failed to acknowledge the deferential standard when assessing appellate counsel's performance as appellate counsel reasonably did not brief the waiver issue because nothing in the record indicated Bryan did not knowingly and voluntarily waive his right to testify and the issue was unpreserved; and (4) the PCR court erred by failing to conduct a prejudice analysis as Bryan cannot show prejudice because the waiver issue was unpreserved, and the trial court's colloquy shows Bryan knowingly and voluntarily waived his right to testify?

PETITIONER/RESPONDENT'S COUNTER-QUESTION PRESENTED

Did the PCR court correctly grant Petitioner a belated direct appeal where appellate counsel provided ineffective assistance by failing to raise on appeal that Petitioner's failure to testify was not the product of a knowing, intelligent, and voluntary waiver?

[1] 263 S.C. 110, 208 S.E.2d 35 (1974).

STATEMENT OF THE CASE

On October 29, 2007, a Lexington County grand jury indicted Petitioner/Respondent (hereinafter Petitioner) for criminal domestic violence of a high and aggravated nature (CDVHAN), violation of an order of protection, kidnapping, and two counts of spousal sexual battery. App. 807-808; App. 810-811; App. 813-814; App. 816-819. On July 14-16, 2008, the state, represented by Shawn Graham and Emily Howard, called Petitioner to trial before the Honorable R. Knox McMahon and a jury. App. 1. Theo Williams represented Petitioner. App. 1. Ultimately, the jury found Petitioner guilty of CDVHAN, violation of an order of protection, kidnapping, and one count of spousal sexual battery. App. 434, ll. 1-15. On the second count of spousal sexual battery, the jury found Petitioner not guilty. App. 434, ll. 16-18; App. 816-817. Judge McMahon sentenced Petitioner to imprisonment for ten years for spousal sexual battery, ten years for CDVHAN, thirty days for violation of an order of protection, and twenty-five years for kidnapping. App. 448, l. 21-App. 449, l. 8; App. 809; App. 812; App. 815; App. 820. He ordered the sentences to be served concurrently. App. 449, l. 9.

Thereafter, Petitioner filed a notice of appeal. Robert Pachak represented Petitioner on appeal. App. 451. Pachak filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 451-460. In the brief, Pachak challenged the trial court's exclusion of Petitioner from the courtroom during the testimony of his two children. App. 451-460. On February 22, 2010, the Court of Appeals dismissed the appeal. App. 480-481; State v. Bryan, 2010-UP-136 (S.C. Ct. App. filed Feb. 22, 2010). In light of appellate counsel being relieved, Petitioner filed a pro se petition for rehearing. App. 482-483. On April 23, 2010, the Court of Appeals denied the petition for rehearing. App. 497-498. Thereafter, Petitioner filed a petition for writ of certiorari. App. 499-511. The South Carolina Supreme Court dismissed the petition. App. 513-514.

Remittitur was issued on May 28, 2010. App. 515. Petitioner then sought review in the United States Supreme Court. App. 516-528. The Court denied review on January 10, 2011. App. 569.

Petitioner filed for post-conviction relief (PCR) on February 17, 2011. App. 570-583. On August 15, 2013, the Honorable Edgar W. Dickson presided over a hearing concerning Petitioner's request for relief. App. 610. J. Walt Whitmire represented the state, and Petitioner represented himself. App. 610. Pursuant to the state's motion to reconvene, Judge Dickson presided over a second hearing on November 13, 2014. App. 697; App. 699, ll. 4-6. Thereafter, on October 8, 2015, Judge Dickson wrote to the parties, expressing his ruling. App. 739-740. He indicated he was denying relief to Petitioner except to the extent that Petitioner was entitled to a belated appeal. App. 739-740. Judge Dickson requested the state prepare the order. App. 739-740. By a formal order filed February 2, 2018, Judge Dickson found Petitioner was "entitled to a new appeal as a result of appellate counsel's deficient performance regarding his right to testify," but denied relief on all other grounds. App. 741-753. The state filed its motion to alter or amend judgment on February 12, 2018. App. 754-765. On October 19, 2019, Judge Dickson denied the state's motion. App. 804-805.

On November 6, 2019, Petitioner served his notice of Appeal. Then on November 13, 2019, the state served its notice of cross-appeal. On July 13, 2020, Petitioner filed his petition for writ of certiorari and brief pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). On August 17, 2020, the state filed its cross petition for writ of certiorari. Petitioner now files this return.

ARGUMENT

The PCR court correctly granted Petitioner a belated direct appeal where appellate counsel provided ineffective assistance by failing to raise on appeal that Petitioner's failure to testify was not the product of a knowing, intelligent, and voluntary waiver.

Standard of review

"The appropriate scope of review" on appeal in PCR proceedings is whether "'any evidence of probative value is sufficient to uphold the PCR judge's findings." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). All criminal defendants are entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Courts review claims of ineffective assistance of appellate counsel using the test announced in Strickland v. Washington, 466 U.S. 668 (1984). See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, the reviewing court asks whether appellate counsel's performance was deficient and whether the applicant was prejudiced by the deficient performance. Id. Even where appellate counsel filed an Anders brief, a reviewing court applies the Strickland test to claims of ineffective assistance of appellate counsel. Smith v. Robbins, 528 U.S. 259, 284 (2000); Bennett v. State, 383 S.C. 303, 309 n.6, 680 S.E.2d 273, 276 n.6 (2009).

Error Preservation

In its petition for writ of certiorari, the state requested this Court grant certiorari and reverse the portion of the PCR order granting Petitioner a belated direct appeal. To support its request for reversal, the state listed

> four reasons: (1) the relief granted is not the appropriate remedy for ineffective assistance of appellate counsel; (2) [Petitioner] never asserted ineffective assistance of appellate counsel for failing to argue he unknowingly and involuntarily waived his right to testify; (3) the PCR court failed to recognize the deferential standard when assessing appellate counsel's performance as appellate counsel reasonably did not brief the waiver issue because nothing in the record indicated [Petitioner] did not

> knowingly and voluntarily waive his right to testify, and the issue was not preserved, and (4) the PCR court failed to conduct a prejudice analysis; [Petitioner] cannot show prejudice because the waiver issue was unpreserved, and the record shows [Petitioner] knowingly and voluntarily waived his right to testify.

Cross Pet. at 8.

Further, in its motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, the state requested the PCR court's order "should be altered or amended and relief denied as: 1) there was no claim of ineffective assistance of appellate counsel regarding the waiver issue before the court; 2) an on the record waiver is not the only method to show a sufficient waiver; and 3) the factual finding 'the record is unclear as to whether [Petitioner] knowingly and intelligently waived his right to testify,' lacks [evidentiary] support." App. 754-755.

Consequently, the only matter preserved for appellate review is the state's argument that appellant did not raise an ineffective assistance of appellate counsel claim. The remaining matters were not presented to the PCR court, and as a result, are not preserved for review on appeal.

In order for an issue to be preserved for appellate review, it must be raised to the lower court with sufficient specificity and ruled upon by the lower court. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007). Counsel must state clearly the reasons for the objection. State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). In other words, the objection must be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005). "When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion." Chastain v. Hiltabidle, 381 S.C. 508, 514-515, 673 S.E.2d 826, 829 (Ct. App. 2009). See also Fishburne v. State, 427 S.C. 505, 517-518, 832 S.E.2d 584, 590 (2019) (Hearn, J., concurring) (explaining that the Court's decision to remand the case to the PCR court for specific findings of fact and

conclusions of law on an issue not appearing in the order denying relief, the Court was not "relaxing" the requirement of filing a Rule 59(e) motion in order to preserve an issue for appellate review).

In light of the state's failure to present the PCR court with its challenges to (1) type of relief granted, (2) the alleged failure of the PCR court to recognize the deferential standard when assessing appellate counsel's performance, and (3) the alleged failure of the PCR court to conduct a prejudice analysis, these matters are not preserved for appellate review.

Discussion

The only issue preserved for review is whether the PCR court erred in granting belated direct review based upon appellate counsel's ineffectiveness where, according to the state, Petitioner never asserted ineffective assistance of appellate counsel for failing to brief the unknowing and involuntary waiver of the right to testify issue. Petitioner concedes his PCR application did not include the precise issue ruled upon by the PCR judge. Importantly, however, in his PCR application, Petitioner alleged trial counsel erred by informing the trial judge that there was no need to interview Petitioner personally on his right to testify. App. 580. Petitioner explained the trial judge failed to conduct an "on-the-record colloquy" to ensure Petitioner understood his right and the consequences of exercising the right, and the trial judge failed to obtain a knowing and voluntary waiver of Petitioner's right to testify. App. 580. And, although Petitioner did not present the precise issue of ineffective assistance of appellate counsel that was decided by the PCR judge, Petitioner did allege ineffective assistance of appellate counsel. App. 580. Nevertheless, an examination of the PCR application alone does not end the inquiry.

During the PCR hearing, Petitioner presented evidence on his claim that appellate counsel provided ineffective assistance by failing to submit a merits brief on the trial judge's refusal to direct

a verdict on the kidnapping indictment. App. 631, ll. 15-21. Further, Petitioner alleged appellate counsel was ineffective for presenting the issue that was raised on appeal, which concerned Petitioner's removal from the courtroom while his children testified, in a no merits brief. App. 635, l. 4 – App. 637, l. 14. Immediately after Petitioner's discussion of his claims about appellate counsel, Petitioner explained he had an issue about his "right to testify." App. 638, l. 21. Petitioner explained the transcript did not show an on-the-record waiver of his right to testify. App. 639, l. 3 - App. 642, l. 17.

Petitioner informed the judge that he was challenging the issue "as ineffective assistance of counsel and under the constitutional structural error." App. 642, ll. 19-21. When the state cross-examined Petitioner, the state specifically asked him about his issue regarding the trial judge's failure to obtain an on-the-record waiver of the right to testify directly from Petitioner. App. 668, ll. 3-14.

Thereafter, the state called trial counsel as a witness. App. 672, l. 8. The state asked no questions of trial counsel about Petitioner's claim that he did not knowingly and voluntarily waive his right to testify. However, Petitioner questioned trial counsel on the procedure used in his case where the trial judge did not address Petitioner personally. App. 681, l. 11 – App. 682, l. 1. Later, the state moved to reconvene in order to "collect some testimony" from trial counsel concerning Petitioner's right to testify. App. 699, ll. 4-10. Thereafter, trial counsel claimed he spoke to Petitioner about his right to testify and advised him against testify. App. 700, ll. 11-22. Trial counsel "thought [Petitioner] would get himself in to trouble" if he testified. App. 700, l. 25 – App. 701, l. 8. Trial counsel claimed he would have "allowed" Petitioner to testify if he had wanted to do so. App. 701, ll. 16-18. On cross-examination, trial counsel deferred to "the record" when asked whether Petitioner knowingly and voluntarily waived his right to testify. App. 719, ll. 15-25. He

reiterated that he spoke to Petitioner regarding this matter, but he asserted the "record speaks for itself" regarding what transpired during the trial. App. 719, ll. 17-25. According to trial counsel, although some judges did not obtain on-the-record waivers, it was "a better practice" to do so. App. 720, ll. 6-25. Trial counsel denied waiving the right for Petitioner. App. 721, ll. 1-4.

At the conclusion of the hearing, Petitioner requested to amend the pleadings to conform to the evidence. App. 723, ll. 11-15. The state posed no objection to this request, and the judge granted it. App. 723, ll. 16-20.

Pursuant to Rule 15(b), SCRCP, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Further, "[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these isues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues." Rule 15(b), SCRCRP. In light of judge's granting of Petitioner's motion to conform the pleadings to the evidence and the state's failure to object to the motion, the issue presented in the case sub judice was before the PCR court. See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 707-708 (2006); Mangal v. State, 421 S.C. 85, 94-95, 805 S.E.2d 568, 573 (2017).

From the pleadings, the state was well aware that Petitioner was challenging the trial judge's failure to obtain an on-the-record waiver of his right to testify. From the evidence presented during the first PCR hearing, the state was well aware that Petitioner was challenging the trial judge's failure to obtain an on-the-record waiver of his right to testify. Petitioner explained that he was raising his claim that he did not waive his right to testify as both a claim of ineffective assistance of counsel and as one of "structural error." Petitioner's reference to "structural error" and State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), a case in which the appellate court explained there

was no absolute rule as to whether a denial of the right to testify is properly analyzed as a constitutional error on direct appeal or as an ineffective assistance of counsel claim in the PCR context, put the state on notice of Petitioner's intent to proceed with a claim of ineffective assistance of appellate counsel related to the trial judge's failure to obtain an on-the-record waiver of his right to testify personally from Petitioner. The state's cognizance of this issue and its mindfulness of the importance of the issue to Petitioner and the PCR judge was apparent from the state's request to reconvene the evidentiary hearing in order to obtain additional testimony on the subject.

To the extent this Court considers the state's remaining issues by forgiving the state's failure to preserve the issues for review, this Court must reject them on the merits. Petitioner will address each issue in turn.

The state argued the relief granted – a belated appeal – was not the appropriate remedy for ineffective assistance of appellate counsel. In support of this contention, the state presented two arguments. The first was that a belated appeal is the proper remedy only when a person is denied a direct appeal altogether. Second, the state argued that if appellant's appellate counsel were ineffective, then the remedy was a new trial, not a belated appeal. Both contentions must be rejected.

The remedy for a constitutional violation "must closely fit the constitutional violation." United States v. Virginia, 518 U.S. 515, 547 (1996). The remedy must be designed to restore the victim to the position he or she would have occupied absent the constitutional violation. Milliken v. Bradley, 418 U.S. 717, 746 (1974). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." United States v. Morrison, 449 U.S. 361, 364 (1981). See Davie v. State, 381 S.C. 601, 616, 675 S.E.2d 416, 424 (2009) (tailoring the remedy of a new sentencing hearing to a violation of

a defendant's right to the effective assistance of counsel in the plea-bargaining process). When ineffective assistance of counsel happens at a stage other than trial, courts order a remedy tailored to cure the violation. Rompilla v. Beard, 545 U.S. 374, 393 (2005) (ordering a new sentencing proceeding where counsel provided ineffective assistance during sentencing); Custodio v. State, 373 S.C. 4, 13, 644 S.E.2d 36, 40 (2007) (concluding the correct remedy for ineffective assistance of counsel for failing to have a plea agreement enforced was specific performance of the plea agreement); Sprouse v. State, 355 S.C. 355, 340, 585 S.E.2d 278, 281 (2003) (holding counsel provided ineffective assistance by failing to ensure the state adhered to the original plea agreement and ordering specific performance of the plea agreement).

Here, the PCR judge tailored the remedy to the violation. As the PCR judge determined, appellate counsel provided ineffective assistance by failing to raise on appeal that Petitioner did not knowingly, intelligently, and voluntarily waive his right to testify. Therefore, the remedy is a new direct appeal, which accords with what other courts have done. See e.g., Mapes v. Tate, 388 F.3d 187, 195 (6th Cir. 2004) (granting Mapes a new direct of appeal where appellate counsel provided ineffective assistance because such relief "neutralized the constitutional deprivation suffered by Mapes); In re Alexandria G., 834 N.W.2d 432, 437 (Wis. Ct. App. 2013) (granting relief "suited to the scope of the violation," the Court granted a belated appeal to an individual whose parental rights were terminated and counsel failed to timely file a notice of appeal).

Petitioner will address the state's remaining two issues together as the two are related. The state alleged the PCR court failed to recognize the deferential standard when assessing appellate counsel's performance as appellate counsel reasonably did not brief the waiver issue because nothing in the record indicated Petitioner did not knowingly and voluntarily waive his right to testify, and the issue is not preserved. Additionally, the state alleged the PCR court failed to

conduct a prejudice analysis and that Petitioner cannot show prejudice because the waiver issue was unpreserved, and the record showed Petitioner knowingly and voluntarily waived his right to testify.

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." Rock v. Arkansas, 483 U.S. 44, 51 (1987). Not only is the right to testify in one's defense essential to due process of law, but it is a found in one's right to call witnesses in his favor, the right to personally make his defense, and as a companion to the protection against being forced to testify against oneself. Id. at 51-52. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). In South Carolina, the preferred method of advising a defendant of this right and determining whether the defendant makes a knowing and voluntary decision is an on-the-record discussion with the trial judge. See e.g., Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994); State v. Orr, 304 S.C. 185, 188, 403 S.E.2d 623, 624-625 (1991).

Ample evidence supports the PCR court's determination that appellate counsel provided ineffective assistance by failing to brief this meritorious issue. The trial transcript showed Petitioner did not knowingly, intelligently, and voluntarily waive his right to testify. The brief exchange on the matter occurred exclusively between the judge and trial counsel. The judge asked trial counsel if he, the trial judge, needed to "interview" Petitioner about his right to testify. App. 373, l. 25 – App. 374, l. 23. Trial counsel claimed that the judge did not need to interview Petitioner and that Petitioner would not testify. App. 374, ll. 5-7. No additional inquiry was made by the trial judge.

Yet, appellate counsel failed to raise this issue on appeal.[2] As the PCR judge found, no reason for appellate counsel's failure to do so was provided.

Additionally, the PCR court's order showed no error of law in failing to accord due deference to appellate counsel. In his order, the PCR judge explained that in examining the issue before him, he was cognizant of the fact that "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." App. 748 (internal citation omitted). The order explained that appellate counsel "has a professional duty to chose among potential issues according to their merit" and that if a failure to appeal an error is the result of a strategic decision, then appellate counsel has not rendered ineffective assistance. App. 748. Finally, the order demonstrated the PCR judge was well aware of the deference afford appellate counsel and that the judge applied such deference in analyzing the issue before him where the order explained "the presumption of effective assistance of appellate counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal." App. 748. Thus, the judge

The PCR judge recognized the quandary of requiring a PCR applicant to prove prejudice where there is no evidence that the applicant's failure to testify was the result of a knowing and voluntary waiver. App. 751. In the PCR judge's view, a court "engages in speculation" when trying to determine if a PCR applicant "would have fared better had he exercised the right he did not know he possessed." See App. 751-752 (citing Brown, 340 S.C. at 596-597, 533 S.E.2d at 311 (Finney, C.J., dissenting)). Although the PCR judge agreed that the remedy for the violation of Petitioner's constitutionally protected right was a new trial, the judge granted Petitioner a belated

[2] Petitioner acknowledges trial counsel did not object, which is ordinarily required to preserve this issue for review. See Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). However, the Supreme Court previously reviewed a denial of the right to testify when counsel posed no objection. State v. Rivera, 402 S.C. 225, 239-240, 741 S.E.2d 694, 701-72 (2013). Here, appellate counsel was ineffective for failing to raise the issue.

direct appeal due to the Supreme Court's requirement that a PCR applicant show prejudice resulting from the lack of record evidence that a waiver of the right was knowing and voluntary. App. 751 (discussing Brown v. State, 340 S.C. 590, 596-597, 533 S.E.2d 308, 311 (2000)). Due to the Supreme Court's determination in State v. Rivera, 402 S.C. 225, 247-248, 741 S.E.2d 694, 706 (2013) that a violation of a defendant's right to testify is structural error not subject to harmless error analysis, the PCR judge's apprehension in following the strictures of the prejudice analysis was quite sensible. But see Weaver v. Massachusetts, 137 S.Ct. 1899, 1911 (2017) (requiring a showing of prejudice for some public-trial violations raised on collateral review despite the violations being structural error on direct review).

In summary, Petitioner's claim that appellate counsel was ineffective for failing to raise on appeal that he was denied his right to testify where no on-the-record waiver by Petitioner existed was properly presented to the PCR court. The state's remaining issues are unpreserved for appellate review. To the extent this Court forgives the state's procedural defaults, the PCR court properly tailored the remedy to the constitutional violation at issue, applied the correct deferential standard to appellate counsel's performance, and avoided a prejudice analysis due to the lack of clarity in the law of the necessity of such analysis given the circumstances, especially in light of the remedy afforded Petitioner.

CONCLUSION

Petitioner respectfully requests this Court deny the state's petition for writ of certiorari.

s/*Susan B. Hackett*
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Appellate Defender

ATTORNEY FOR
PETITIONER/RESPONDENT

This 27th day of August, 2020.