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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for a Writ of Certiorari to Florence County

D. Craig Brown, Post-Conviction Relief Judge
Thomas A. Russo, Trial Judge

Appellate Case No. 2019-001494

ROGER BRUCE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

STATEMENTS OF ISSUE PRESENTED ON CERTIORARI..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW..... 4

ARGUMENT..... 4

I. The PCR court correctly declined to address ineffective assistance of appellate counsel because: (1) the issue was not duly raised to the PCR court because Petitioner raised the issue for the first time in a Rule 15(b), SCRCP, motion after the conclusion of the evidentiary hearing; the issue was not tried by consent; and the PCR court stated the issues it found to be properly before it in its order; and (2) Petitioner made a Rule 59(e), SCRCP, motion to alter or amend but did not ask the PCR court to consider his ineffective assistance of appellate counsel claim..... 4

 1. The issue was not duly raised to the PCR court because Petitioner raised the issue for the first time in a Rule 15(b), SCRCP, motion after the conclusion of the evidentiary hearing; the issue was not tried by consent; and the PCR court stated the issues it found to be properly before it in its order..... 6

 2. Petitioner made a Rule 59(e), SCRCP, motion to alter or amend but did not ask the PCR court to consider his claim of ineffective assistance of appellate counsel..... 8

CONCLUSION..... 10

STATEMENTS OF ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue Presented

Whether this case should be remanded for a new PCR hearing or in the alternative, findings of fact and conclusions of law on whether appellate counsel was ineffective for failing to raise Petitioner's extremely meritorious objection to the admissibility of statements Petitioner made to law enforcement while in their custody, and before they read him his *Miranda* rights, since trial counsel had properly preserved that objection for appellate review and appellate counsel did not raise that issue in Petitioner's direct appeal?

Respondent's Counter-Statement of Issues Presented

Whether the PCR court correctly declined to address ineffective assistance of appellate counsel where: (1) the issue was not duly raised to the PCR court because Petitioner raised the issue for the first time in a Rule 15(b), SCRCP, motion after the conclusion of the evidentiary hearing; the issue was not tried by consent; and the PCR court stated the issues it found to be properly before it in its order; and (2) Petitioner made a Rule 59(e), SCRCP, motion to alter or amend but did not ask the PCR court to consider his ineffective assistance of appellate counsel claim?

STATEMENT OF THE CASE

Roger Bruce (Petitioner) was indicted for murder in April 2010. App. 896–97. On October 12, 2009, law enforcement performed a welfare check at a residence occupied by Laura Creel and her boyfriend, Petitioner. During the welfare check, law enforcement discovered Creel’s body stuffed in the trunk of her car. App. 145–46, 152–53, 163. Petitioner was arrested for murdering Creel. App. 441. Petitioner was represented by Jack W. Lawson and Scott P. Floyd of the Twelfth Circuit Public Defender’s Office. Solicitor Edgar L. Clements, III, prosecuted the case. App. 1. Petitioner proceeded to a jury trial on August 8–11, 2011, before Judge Thomas A. Russo. App. 1–595. The jury convicted Petitioner as indicted, and the trial court sentenced him to serve life-imprisonment. App. 898. Petitioner appealed.

Appellate Defender Robert M. Pachak represented Petitioner on appeal, and briefed the following issue to the Court of Appeals:

Whether the trial court erred in refusing to suppress evidence seized from [Petitioner’s] residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant?

App. 529. On April 3, 2013, the Court of Appeals found the trial record was incomplete for appellate review and remanded the case to the circuit court. App. 558; *State v. Bruce*, 402 S.C. 621, 741 S.E.2d 590 (Ct. App. 2013). However, both Petitioner and the State petitioned our Supreme Court for a writ of certiorari, and both petitions were granted. App. 657. On May 27, 2015, our Supreme Court reversed the Court of Appeals’ decision and affirmed Petitioner’s conviction. App. 727–35; *State v. Bruce*, 412 S.C. 504, 772 S.E.2d 753 (2015). The case was remitted back to the circuit court on June 12, 2015.

Petitioner then petitioned the United States Supreme Court for a writ of certiorari; however, Petitioner’s petition was denied on October 5, 2015. App. 736–56.

Petitioner timely commenced the underlying PCR action on September 19, 2016. Petitioner alleged he was unlawfully in custody due to:

1. Ineffective Assistance of Counsel:
 - a. Contacted no exculpatory witnesses;
 - b. Did not do anything to refute expert testimony;
 - c. Failed to properly prepare for trial, investigate all the elements of the alleged crime, crime scene, and challenge the sufficiency of the indictment; and
 - d. Defense counsel failed to: Present a defense; Move to quash the indictment, Question members of the jury on their impartiality.
2. Expert Witness Violation:
 - a. Failed to move for court appointed expert assistance to help [counsel] prepare a meaningful defense.
3. Indictment Violation:
 - a. Trial counsel did not investigate the indictment for murder, which did not have true billed stamped on its face....;
 - b. There were no Grand jurors of Florence county convened on April 1, 2010; and
 - c. [T]he indictment does not satisfy the notice requirements of subject matter jurisdiction set forth in the South Carolina constitution and statutes.
4. Due Process:
 - a. Jury Tainted Violation;
 - b. *Miranda* violation;
 - c. Under the influence violation;
 - d. Suppressed statement violation; and
 - e. Fourth Amendment violation.

App. 757–830.

The State submitted its return and requested an evidentiary hearing on February 6, 2017. App. 831–37. An evidentiary hearing into the matter convened on November 6, 2018, before Judge D. Craig Brown. Petitioner was present and represented by Jonathan D. Waller. Assistant Attorney General Samuel L. Key represented the State. App. 839. Petitioner, Scott Floyd, and Ronald Smith testified at the PCR hearing. App. 839–68. On May 23, 2019, the PCR court denied relief on all allegations and dismissed the action with prejudice. App. 870–86. Thereafter, Petitioner filed a Rule 59(e), SCRCPC, motion to alter or amend on June 10, 2019. App. 887–88. On September 3, 2019, the PCR court denied Petitioner’s motion. App. 889–92. Applicant appealed. App. 893.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give great deference to a PCR court's credibility findings because appellate court's lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The PCR court correctly declined to address ineffective assistance of appellate counsel because: (1) the issue was not duly raised to the PCR court because Petitioner raised the issue for the first time in a Rule 15(b), SCRPC, motion after the conclusion of the evidentiary hearing; the issue was not tried by consent; and the PCR court stated the issues it found to be properly before it in its order; and (2) Petitioner made a Rule 59(e), SCRPC, motion to alter or amend but did not ask the PCR court to consider his ineffective assistance of appellate counsel claim

Petitioner, relying on *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019), asks this Court to remand his case for a new PCR hearing or remand for the PCR court to make findings of fact and conclusions of law on his allegation of ineffective assistance of appellate counsel. However, this case is clearly distinguishable from *Fishburne* for two reasons. First, Petitioner's ineffective assistance of appellate counsel claim was not duly raised because Petitioner raised the issue for the first time in a Rule 15(b), SCRPC, motion to amend his allegations to conform to the evidence during closing arguments of the PCR hearing; the issue was not tried by consent; and the PCR court stated the issues it found were properly before it in its order. Second, Petitioner, through PCR counsel, moved to alter or amend the PCR court's order pursuant to Rule 59(e), SCRPC, but did not ask the PCR court to address his ineffective assistance of appellate counsel claim.

Therefore, the PCR court did not err in declining to address Petitioner’s ineffective assistance of appellate counsel claim. Accordingly, this Court should deny certiorari and affirm the PCR court’s order.

It is well settled for an issue to be preserved, the issue must have been raised to and ruled on by the trial court. *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Further, “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *Id.* “Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; *they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.*” *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (emphasis added).

“It is axiomatic that an issue cannot be raised for the first time in a post-trial motion.” *Bank of New York v. Sumter County*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010). “Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the [appellate court] with a platform for meaningful appellate review.” *Sevens & Wilkinson of S.C., Inc. v. Cty. Of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

However, in *Fishburne v. State*, this Court recognized, “Over the years, [it] has issued numerous opinions addressing a PCR court’s failure to make adequate findings of fact and conclusions of law regarding *duly raised issues.*” 427 S.C. at 512, 832 S.E.2d at 587 (emphasis added). The reasoning for remanding insufficient PCR orders is for the PCR court to comply with section 17-27-80 of the South Carolina Code (2014), and Rule 52(a), SCRCF. *Id.* at 512–15, 832 S.E.2d at 587–89. The Court “acknowledge[d] [its] prior decisions have been somewhat inconsistent as to whether a Rule 59(e) motion is required to preserve an applicant’s request to

remand to the PCR court for the consideration of particular issues in which the PCR court failed to make sufficient findings of fact and conclusions of law.” *Id.* at 515, 832 S.E.2d at 589. The Court held, “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 the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court’s order does not comply with section 17-27-80.” *Id.* at 516, 832 S.E.2d at 589.

For the reasons discussed below, the instant case is distinguishable from *Fishburne* and should not be remanded back to the PCR court.

- 1. The issue was not duly raised to the PCR court because Petitioner raised the issue for the first time in a Rule 15(b), SCRPC, motion after the conclusion of the evidentiary hearing; the issue was not tried by consent; and the PCR court stated the issues it found to be properly before it in its order**

The instant case is distinguishable from *Fishburne* because the issue Petitioner asks to be remanded, ineffective assistance of appellate counsel, was not properly before the PCR court.

In *Fishburne v. State*, at the outset of the PCR hearing, the applicant moved to amend and specified his allegations of ineffective assistance of trial counsel for: (1) failure to properly investigate potential alibi witnesses; and (2) introducing other bad act evidence into the trial and characterizing the applicant as one of the “usual suspects.” 427 S.C. at 510, 832 S.E.2d at 586. The PCR court allowed the applicant to amend his allegations because the State had been put on notice of the amendment over a year prior to the commencement of the hearing. *Id.* Ultimately, the PCR court denied relief addressing Applicant’s allegation trial counsel failed to properly investigate potential alibi witnesses; however, the PCR court failed to address the applicant’s claim of trial counsel introducing other bad act evidence and referring to the applicant as a “usual suspect.” *Id.*

at 511–12, 832 S.E.2d at 587. It was uncontested the omitted issue was duly raised to the PCR court.

Here, at the outset of the PCR hearing, Petitioner, through PCR counsel, specified the three allegations he was proceeding on were ineffective assistance of trial counsel for: (1) failure to preserve issues related to the search of the victim’s car; (2) failure to challenge and preserve issues regarding Petitioner’s statements to law enforcement; and (3) failure to object to the officer’s testimony regarding Petitioner’s prior bad acts. App. 844–46; 877. After PCR counsel placed these allegations on the record, the PCR court asked, “So those three?” and PCR counsel responded, “Yes, sir, Your Honor.” App. 846. Petitioner’s *seventy-two* page PCR application never mentioned ineffective assistance of appellate counsel, and Petitioner never filed an amendment to his application. App. 757–829. Further, Petitioner informed the PCR court his issue regarding his statement was “[Trial counsel] was ineffective for failure to properly challenge the statement that [Petitioner] gave and failure to preserve . . . that issue.” App. 845.

During the PCR hearing, Petitioner, over the State’s objection, testified he did not talk to any of the lawyers about his appeal. App. 54. Thereafter, Petitioner attempted to raise ineffective assistance of appellate counsel for the first time during closing arguments in a Rule 15(b), SCRC, motion to amend his allegations to conform to the evidence. App. 864. Petitioner’s counsel stated:

[B]ased on the testimony of [Petitioner] regarding any issues involving his appeal and the fact that he wasn’t, he never talked to the lawyer that handled his appeal about it, I would make a motion to Rule 15(b)(2) to amend his application to conform with the evidence to raise an allegation of ineffective assistance of appellate counsel regarding the statement that was made.

App. 864. Petitioner’s specified allegation regarding this issue was trial counsel was ineffective for failing to properly challenge and preserve the issue; however, in closing arguments Petitioner completely changed his argument, arguing:

[Trial counsel] I think did an admirable job of challenging that statement, it was made – his motion begins on page 40 of the transcript. . . . [Trial counsel], throughout the course of the trial . . . did a very good job of questioning both his detention and whether he was free to leave as well as how he was questioned and the type of questioning. . . . [The trial court] ultimately determined that the statement could come in and Your Honor that wasn't brought up on appeal. I believe that, that is a more meritorious issue than was raised on appeal which was the search of the residence then, ultimately, the vehicle.

The State responded, “[Petitioner] had the opportunity to amend his application and the . . . ineffective assistance of appellate counsel issue did not come forward until the hearing. I objected to that question.” App. 867. The State also argued it would rest on the record and “emphasize[d] that we would need appellate counsel here to be questioned to find any ineffective assistance of appellate counsel. And if [the PCR court was] going to grant [Petitioner’s] motion on that [it would] ask to leave the record open to get that testimony from appellate counsel.” App. 868.

Rule 15(b), SCRCP, provides in pertinent part:

When 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. . . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Here, ineffective assistance of appellate counsel was not raised in the pleadings and was not tried by express or implied consent of the parties. Notably, the State objected to Petitioner testifying about whether he ever talked to any of his lawyers about his appeal. App. 854. The State placed its objection to the amendment on the record in closing argument, stating the issue had not been previously raised. App. 867.

Further, the State argued it would need to question appellate counsel to defend the allegation and asked the PCR court to leave the record open to get appellate counsel's testimony if the PCR court were to grant Petitioner's motion to amend. App. 868; *see also Love v. State*, 428 S.C. 231, 245, 834 S.E.2d 196, 203 (2019) (Kittredge, J., dissent) ("If, however, the proposed amendment is complicated (factually or legally) and would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments."). The State clearly showed it was prejudiced by Petitioner specifying his issue with the statement, pre-hearing, was trial counsel's alleged error in failing to preserve the statement, then, in closing argument stating trial counsel did an "admirable" job, but appellate counsel was ineffective for failing to brief the issue. Further, the State requested Justice Kittredge's solution, well before *Love* was published, if the PCR court was to grant Petitioner's amendment. Therefore, the attempted amendment did not meet the requirements of Rule 15 (b), SCRPC, because the issue was not tried by consent, and the State showed the amendment would prejudice its defense to the allegation because the State needed appellate counsel's testimony to properly defend any allegations regarding appellate counsel's representation.

Finally, in its order, the PCR court stated the only issues properly before it were the issues specified at the outset of the PCR hearing—ineffective assistance of trial counsel for: (1) failure to preserve issues related to the search of the victim's car; (2) failure to challenge and preserve issues regarding Petitioner's statements to law enforcement; and (3) failure to object to the officer's testimony regarding Petitioner's prior bad acts. App. 877. Importantly, the PCR court's order in this case fully addressed the three issues it found to be properly before it, and the PCR court fully addressed the issues Petitioner raised in his 59(e) motion. App. 870–86; 889–92. The PCR court did not "misapprehend" the issue as suggested by Petitioner on appeal. Rather, the PCR

court ruled on the issues it found were properly before the court—the issues Petitioner specifically stated he was going forward on at the beginning of the PCR hearing. This case is distinguishable from *Fishburne* because in *Fishburne*, the unaddressed issue was clearly before the PCR court. Here, the PCR court, by implication, found Petitioner’s allegation of ineffective assistance of appellate counsel was not properly before it. The PCR court cannot have erred in failing to address an issue that was not properly before it. Accordingly, the PCR court did not err in failing to address ineffective assistance of appellate counsel, certiorari should be denied, and the PCR court should be affirmed.

2. Petitioner made a Rule 59(e), SCRCP, motion to alter or amend but did not ask the PCR court to consider his claim of ineffective assistance of appellate counsel

The instant case is also distinguishable from *Fishburne* because, unlike in *Fishburne*, Petitioner actually moved pursuant to Rule 59(e), SCRCP to alter or amend the PCR court’s order.

As noted above, in *Fishburne*, the PCR court failed to address a duly raised issue, and the applicant failed to file a Rule 59(e) motion to preserve that issue for appeal. 427 S.C. at 511–12, 832 S.E.2d at 587. Our Supreme Court remanded the case back to the PCR court, stating, “[B]ecause 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 the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court’s order does not comply with section 17-27-80.” *Id.* at 516, 832 S.E.2d at 589.

In contrast, in Petitioner’s case ineffective assistance of appellate counsel was not duly raised or properly before the PCR court, and Petitioner filed a Rule 59(e) motion to alter or amend. Importantly, Petitioner raised issues with the PCR court’s order, but failed to request the PCR court consider Petitioner’s attempted amendment to add an allegation of ineffective assistance of

appellate counsel. App. 887–88. It would be illogical to find ineffective assistance of appellate counsel was properly before the PCR court where Petitioner failed to raise the issue in his Rule 59(e) motion because, arguably, Petitioner did not believe the issue was properly before the PCR court. Based on the facts and circumstances of this case, the PCR court did not err in failing to address ineffective assistance of appellate counsel.

This case is distinguishable from *Fishburne* because, unlike the applicant in *Fishburne*, Petitioner filed a Rule 59(e) motion. Here, there was no procedural shortcoming. Instead of preserving an issue that was properly before the PCR court, Petitioner never properly raised the issue to the PCR court; therefore, the PCR court did not err in failing to rule on an issue not before it. Based on the foregoing, certiorari should be denied and the PCR court’s order should be affirmed.¹

CONCLUSION

Based on all the foregoing, this case should not be remanded back to the PCR court to make finds of fact and conclusions of law on an issue that was never properly raised. The PCR Court did not err in failing to address ineffective assistance of appellate counsel because the issue was not properly raised, it was not tried by consent, and the State showed it would be sufficiently prejudiced in having to defend the allegation without having the opportunity to call appellate counsel as a witness. Further, the PCR court stated the issues it believed were properly before it and fully addressed those issues according to law. Finally, Petitioner filed a Rule 59(e) motion in this case, but did not ask the PCR court to address ineffective assistance of appellate counsel,

¹ The State declines to address the merits of Petitioner’s ineffective assistance of appellate counsel claim because, as Petitioner recognizes, this issue is not properly before the Court.

arguably, because Petitioner did not believe the issue was properly before the PCR court. Therefore, certiorari should be denied and the PCR court's order should be affirmed.

Respectfully submitted,

s/Samuel L. Key

SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

Post Office Box 11549
Columbia, S.C 29211
(803) 734-3737

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ATTORNEY FOR RESPONDENT