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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition of _____
Court of Common Pleas
The Honorable Edgar W. Dickson, Post-Conviction Relief Judge
The Honorable Maite Murphy, Plea Judge

Appellate Case No. 2020-000788

ADRIENNE RANDOLPH, #366491,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Whether the PCR judge erred in signing the order of dismissal that made findings of fact, conclusions of law, and credibility determinations where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRCP, prior to signing the order?

RESPONDENT'S ISSUES PRESENTED

- I. Petitioner's argument that the circuit court judge erred by signing an order of dismissal, which he initialed on each page and which states he reviewed the testimony presented at the PCR evidentiary hearing prior to signing the order, is waived and wholly unpreserved for appellate review because Petitioner never presented any of his arguments to the circuit court judge he now accuses of improper conduct, thereby depriving Respondent of an opportunity to respond and the judge of an opportunity to rule on the issue, and there are no "extraordinary circumstances" to excuse the procedural default in this case.
- II. The post-conviction relief judge properly signed the order of dismissal making findings of fact and conclusions of law where the successor judge properly certified the record was before him, Petitioner did not object or request that witnesses be recalled pursuant to Rule 63, SCRCP, and where the credibility of the witnesses was not dispositive to the allegation raised

STATEMENT OF THE CASE

In January 2014, the Orangeburg County Grand Jury indicted Petitioner for murder (2014-GS-38-0011). Assistant Solicitor Harrison Bell of the First Circuit Solicitor's Office prosecuted the case. Petitioner was represented by Carl B. Grant, Esquire. On December 16, 2015, Petitioner elected to forgo her trial in progress and enter a guilty plea to the lesser-included offense of voluntary manslaughter before the Honorable Maite Murphy. Pursuant to negotiations entered into between Petitioner and the State, Judge Murphy sentenced Petitioner to imprisonment for eighteen years and six months.

Petitioner filed a timely notice of appeal. On March 10, 2016, the South Carolina Court of Appeals dismissed Petitioner's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, for Petitioner's failure to provide a sufficient explanation for appealing. State v. Randolph, Appellate Case No. 2015-002630 (S.C. Ct. App. filed March 10, 2016). The remittitur returned to the circuit court on April 1, 2016.

Petitioner filed an application for post-conviction relief on December 15, 2016. Petitioner alleged three grounds in the application: "it was self-defense," "weapon registered," and "My family also told me the same thing, for me to take the plea because if not, I could get 30 years to life in prison." Ultimately, Petitioner proceeded on the sole allegation that her guilty plea was entered involuntarily.

An evidentiary hearing convened on December 12, 2017, at the Dorchester County Courthouse before the Honorable Kristi Harrington, then-circuit court judge. Petitioner was present at the hearing and represented by Arthur Aiken, Esquire. Petitioner and plea counsel both testified. At the conclusion of the hearing, Judge Harrington took the matter under advisement. After the hearing, but prior to issuing a ruling, Judge Harrington retired from the circuit court bench. The evidentiary hearing transcript was then sent to Judge Dickson, Chief Administrative

Judge for the First Judicial Circuit, for his review and to make a ruling on Petitioner's application. Judge Dickson reviewed the PCR transcript and signed an Order of Dismissal on April 2, 2020, which was filed April 23, 2020. Petitioner did not file a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP.

Petitioner timely filed a notice of appeal of the denial of post-conviction relief on May 13, 2020. Petitioner then filed a petition for writ of certiorari and appendix on November 23, 2020. On March 31, 2020, prior to Respondent filing a return, Petitioner moved to withdraw the original petition and appendix upon the discovery of an email in Respondent's possession which was germane to the issue raised in the petition. Respondent consented, and this Court granted the motion via order filed April 1, 2021. Petitioner filed an amended petition and appendix on April 12, 2021.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. **Petitioner’s argument that the circuit court judge erred by signing an order of dismissal, which he initialed on each page and which states he reviewed the testimony presented at the PCR evidentiary hearing prior to signing the order, is waived and wholly unpreserved for appellate review because Petitioner never presented any of his arguments to the circuit court judge he now accuses of improper conduct, thereby depriving Respondent of an opportunity to respond and the judge of an opportunity to rule on the issue, and there are no “extraordinary circumstances” to excuse the procedural default in this case.**

In this appeal Petitioner alleges for the first time that the successor PCR judge erred in signing the order of dismissal that made findings of fact, conclusions of law, and credibility determinations because the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRPC, prior to signing the order. However, this objection was *never* raised to nor ruled upon by the successor post-conviction relief court, and Petitioner did not object to the submission of the order to the successor judge or the substantive contents of the order, nor did Petitioner file a motion pursuant to Rule 59(e), SCRPC, once the order was signed and filed. Therefore, this issue is not properly before this Court because it was not preserved for appellate review, and this Court should deny certiorari.

Petitioner failed to raise the Rule 63, SCRPC, argument to the PCR court in order to preserve this issue for appeal, either before or after the judge signed the order of dismissal. The pleading and issue-preservation requirements that apply in all civil cases apply to post-conviction relief. Mangal v. State, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974). An issue cannot be raised for the first time on appeal. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Only a matter which has been ruled on below can be reviewed; otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. at 379, 204 S.E.2d at 729.

Moreover, 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). While this Court has relaxed Marlar's strict preservation requirement in recent years, it has done so mainly in cases in which the issue in question was raised in some fashion to the PCR court, but the PCR court failed to make appropriate findings in its order. For example, in Fishburne v. State, this Court excused Petitioner's procedural default and remanded the case back to the PCR court to make findings of fact and conclusions of law on an issue *duly raised to*, but not ruled on by the PCR court. 427 S.C. 505, 832 S.E.2d 584 (2019) (emphasis added). In Fishburne, one of the applicant's primary PCR claims was not addressed in the PCR court's order of dismissal, despite the fact that Fishburne raised the issue in both his application *and* at the evidentiary hearing. 427 S. C. at 510, 832 S.E.2d at 586. Although Fishburne failed to make a Rule 59(e), SCRPC, motion requesting the issue be ruled upon by the PCR court, this Court overlooked Fishburne's procedural default and remanded the case because the PCR court's order contained no findings of fact or conclusions of law on an issue which was *raised to it and heard at the evidentiary hearing*. 427 S. C. at 508, 832 S.E.2d at 585 (emphasis added).

In Mangal, this Court discussed in great detail circumstances in which this Court would consider excusing a procedural default and allowing review of a post-conviction relief claim. It noted: "There have been rare cases in which we have excused PCR applicants from procedural failures" 421 S.C. at 96, 805 S.E.2d at 573. This Court noted the excusal of a procedural default is an "extraordinary action." Id. at 96, 805 S.E.2d at 574. Significantly, Mangal is one of many cases in which the "extraordinary action" was *not* taken even though the issue was minimally addressed at the PCR hearing. This Court found the evidence presented by Mangal in support of excusing the procedural default did not justify the extraordinary relief. Id. at 101, 805 S.E.2d 576.

Like Mangal, Petitioner's case presents no extraordinary circumstance, and it is clearly distinguishable from Fishburne because the issue Petitioner raises on certiorari was never raised to the PCR court. Counsel for Petitioner was copied on the email communication with the judge's chambers sending the evidentiary hearing transcript and proposed order of dismissal to the successor judge. Am. App. p. 53. Petitioner's counsel never raised concerns about compliance with Rule 63, SCRPC, nor did he object to the successor judge making a ruling on the merits of Petitioner's allegation. Further, counsel for Petitioner was served with a copy of the filed Order of Dismissal and failed to move to alter or amend the Order of Dismissal pursuant to Rule 59(e), SCRCP, to address the issue now raised on appeal.

Petitioner was given ample opportunity to request witnesses be recalled or object to the manner in which the successor court was making its decision; however, Petitioner essentially consented to the procedure followed by the successor judge by failing to raise any objection to the Order of Dismissal either before or after it was filed. Thus, unlike the extraordinary circumstances in Fishburne—where Fishburne duly raised the issue in his PCR application and presented testimony at his evidentiary hearing, but the PCR court never ruled upon the issue—Petitioner has *never* raised this issue to the PCR court, and therefore deprived it of an opportunity to respond and rule.

While this Court has been flexible with procedural requirements to reach the merits of substantial claims, Petitioner needed to, at a minimum, ask the PCR court to consider his claim. Having failed to raise the issue at all, Petitioner cannot now ask this Court to grant her relief on a new issue. See Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 144, 634 S.E.2d 650, 661 (2006) (“Arguments not presented to nor ruled upon by trial court are not preserved for

appellate review.”). This is not a case justifying “extraordinary action.” Accordingly, this Court should not excuse the clear procedural default in this case and should deny certiorari.

II. The post-conviction relief judge properly signed the order of dismissal making findings of fact and conclusions of law where the successor judge properly certified the record was before him, Petitioner did not object or request that witnesses be recalled pursuant to Rule 63, SCRCP, and where the credibility of the witnesses was not dispositive to the allegation raised.

Petitioner alleges the PCR judge erred in signing the order of dismissal that made findings of fact, conclusions of law, and credibility determinations where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRCP, prior to signing the order. However, the successor PCR judge properly signed the order of dismissal making findings of fact and conclusions of law where he properly certified the record was before him, Petitioner did not request that the witnesses be recalled pursuant to Rule 63, SCRCP, in order to make credibility findings. Thus, Petitioner is not entitled to a new PCR hearing, and this Court should deny certiorari.

Judge Harrington presided over Petitioner’s evidentiary hearing and took the matter under advisement. Am. App. p. 51. Within a year after the hearing, Judge Harrington retired from the Circuit Court bench without issuing a ruling. Am. App. p. 53. Judge Dickson, Chief Administrative Judge for the First Circuit, subsequently reviewed the PCR transcript and the record. Am. App. pp. 53, 58. Judge Dickson signed an Order of Dismissal certifying that he reviewed the record and finding Petitioner’s request for relief should be denied. App. pp. 54-60. Counsel for Petitioner was copied on the email sending the PCR transcript to Judge Dickson for review, made no objections to Judge Dickson making a ruling based on the PCR transcript, and did not request that any witnesses be recalled. Am. App. p. 53.

First, Petitioner argues that the PCR court did not properly follow the requirements of Rule 63, SCRCP, by failing to certify familiarity with the record. However, this argument is directly refuted by the record. As specifically noted in the Order of Dismissal, the successor judge ruled after “[h]aving reviewed the pleadings, considered the applicable law, and reflected upon the plea transcript and testimony provided at the evidentiary hearing...” Am. App. p. 57. This language from the Order of Dismissal clearly indicates Judge Dickson was familiar with the record and reviewed it in making his decision on this matter. Although there was no specific language stating “familiarity with the record,” the above citation clearly shows the successor judge was familiar with the record in this matter.

Second, Petitioner argues that the successor PCR court did not follow the requirements of Rule 63, SCRCP, by failing to recall witnesses. However, the successor court did not need to recall witnesses where the court was able to review a copy of the PCR transcript and no request to recall witnesses was made by Petitioner’s counsel. Rule 63, SCRCP, states:

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

Rule 63, SCRCP.

Per the plain language of the rule, in a hearing without a jury the successor judge shall recall witnesses whose testimony is material *if a party makes the request to do so*. Counsel for Petitioner was copied on the email communication with the judge’s chambers where the evidentiary hearing transcript and the proposed Order of Dismissal was sent. Am. App. p. 53. Petitioner’s counsel made no request at that time for any witnesses to be recalled, nor did he make

any objection to the successor judge making a ruling on the merits of Petitioner's allegation on this basis. Am. App. p. 53. Further, counsel for Petitioner did not file any motion pursuant to Rule 59(e), SCRPC, challenging the ruling of the successor court. Petitioner was given ample opportunity to request witnesses be recalled or object to the manner in which the successor court was making its decision, and Petitioner failed to make any such objection or offer any reason as to why a request to recall witnesses could not have been made at the time.

Third, Petitioner argues the successor court made credibility findings where it should not have, without consent of the parties, and without having been present for the testimony at the evidentiary hearing. Petitioner's credibility argument relies on federal jurisprudence and South Carolina precedent predating the current version of Rule 63 in support of the contention that a new hearing should be held in order to make credibility findings. Petitioner cites to Henry A. Knott, Co v. Chesapeake & Potomac Telephone Co. of West Virginia, which held that

a successor judge simply cannot make credibility determinations based upon the record. A hearing *de novo* before a new successor master or before the district court must be conducted if the case requires the trier of fact to make credibility determinations concerning the testimony of witnesses; otherwise the parties' right to a full due process hearing would be severely undercut.

772 F.2d. 78, 85 (4th Cir. 1985).

Respondent agrees the language used by the successor judge was not ideal. However, Petitioner has failed to cite to any case law which requires a PCR judge to make credibility determinations in support of its ruling. Credibility determinations in PCR matters simply aid in strengthening a holding, but are in no way required for a court to come to a decision. Moreover, credibility determinations made by judges before whom the witnesses did not directly appear are not given deference on appeal, and the decision by the successor PCR court's decision denying relief is supported by the record even if the credibility determinations are completely removed

from consideration. See Cherry, 300 S.C. at 120, 386 S.E.2d at 626 (the PCR judge’s findings should be upheld if supported by any probative evidence); Foye v. State, 335 S.C. 586, 592, 518 S.E.2d 265, 269 (1999) (“The PCR court reviewing the *trial* transcript is in no better position than we are to determine the credibility of trial witnesses or otherwise assess the strength of the State’s case; consequently, we give no deference to the PCR court’s credibility findings when we review the testimony of such witnesses. (emphasis added)).

The successor PCR court did not base its decision entirely on the credibility, or lack thereof, of the witnesses. In fact, although the successor judge found Counsel’s testimony credible, the ultimate finding regarding the voluntariness of the guilty plea rests primarily upon the record of the plea hearing and *Petitioner’s* testimony. Am. App. pp. 56-59. The successor judge found that *Petitioner* admitted she could have continued with the trial if desired after discussion with Counsel and her family; that Counsel made an appropriate recommendation to plead guilty based on the weight of the evidence against *Petitioner*; and *Petitioner* testified her will was not overborne by Counsel’s recommendation or the discussions with her family. App. pp. 49-50, 57-58.

Additionally, the successor judge relied upon the record of the guilty plea, stating, “the transcript reflects the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea.” Am. App. p. 57. *Petitioner* was under oath during her plea colloquy and told the plea court that she wanted to plead guilty; she understood she was waiving her right to a jury trial and all other rights associated with a jury trial; no one had threatened or coerced her into pleading guilty and she was pleading guilty of her own free-will; and she had enough time to make up her mind whether or not she wanted to plead guilty. Am. App. pp. 6-7, 9-11. Thus, the successor court’s finding that *Petitioner’s* plea was voluntarily given

is supported by the plea transcript and Petitioner's own testimony at the PCR hearing, and the decision to deny relief has evidentiary support independent of the improper credibility finding.

Accordingly, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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