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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Colleton County

Honorable Thomas A. Russo, Circuit Court Judge

MACK WASHINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000182

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

In its Brief of Respondent, filed with the South Carolina Supreme Court on August 20, 2021, the state advances a one-page argument regarding preservation, incorporates a three-page section regarding the merits, and asks this Court to deny certiorari.¹

Regarding preservation, the state implicitly admits that the PCR court failed to comply with the Uniform Post-Conviction Relief Act. BOR at 8; S.C. Code Ann. § 17-27-10 *et seq.* Firstly, Mr. Washington’s application for post-conviction relief contained numerous allegations, including a generalized “ineffective assistance of counsel” claim. App. 552. The record does not contain a motion to make more definite or certain filed by the state as is seen in other cases. Furthermore, the state did not object to any testimony surrounding this allegation. Accordingly, although the state had the opportunity to narrow down the matters raised by Mr. Washington in his PCR action, it deliberately chose not to do so. As the state points out, Washington raised the Golden Rule allegation at the PCR hearing. BOR at 8; App. 574 ll. 7 – 10; App. 595 ll. 8 – 13.

Under South Carolina law, the PCR court is tasked with “mak[ing] specific findings of fact, and stat[ing] expressly its conclusions of law, relating to each issue presented.” S.C. Code Ann. § 17-27-80. Two years ago, the South Carolina Supreme Court issued an opinion in Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019). In its Brief, the state overlooks this important case and the opportunity that exists for an individual’s “one bite at the apple” to be fully adjudicated on appeal.

In Fishburne, the Supreme Court remanded the case to the PCR court “for the issuance of a supplemental order setting forth findings of fact and conclusions of law on the PCR ground that

¹ Certiorari was granted by this Court on April 21, 2021.

was not addressed in the original order.” Id. at 517, 832 S.E.2d at 590. The Court discussed the importance of an order of dismissal including findings of fact and conclusions of law in addition to listing many of the prior cases with similar holdings. See McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); McCullough v. State, 320 S.C. 270, 464 S.E.2d 340 (1995); Bryson v. State, 328 S.C. 236, 493 S.E.2d 500 (1997); Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016).

In the case at bar, the Golden Rule violation and accompanying failure to object were the subject of discussion at the PCR evidentiary hearing. App. 635 l. 2 – App. 637 l. 7. The PCR judge had the following things to say regarding this allegation:

I do have some things that if you want to look at regarding the closing arguments, and the issues - - the issue preservation on the things regarding that. And so for most of what was presented, I can dismiss. But that’s an issue that I think the Court needs to really look at. And so I’m going to take the opportunity so that I can read - - I’ve read bits and pieces, but until you read the transcript as a whole, it’s hard to put it in the proper context. And so I think that may be married to that issue, and I want to explore it further.

So I’m going to take the matter under advisement, and take the opportunity to thoroughly read the transcript as well as the appellate record. And then I’ll have a - - my answer for you. Okay.

App. 682 l. 16 – App. 683 l. 5.

This was not a throwaway issue; the PCR judge evidenced his intent to rule on the matter. The record is unclear who was tasked with drafting the proposed order or why this contention was omitted,² but the Golden Rule allegation was presented in accordance with S.C. Code Ann. § 17-27-80. PCR counsel elucidated on the matter during closing remarks. App. 675 ll. 11 – 21.

The state further misconstrues the matters raised on appeal. In its brief, the state curiously suggests the Golden Rule issue is “Washington’s sole issue on appeal,” seemingly

² There exist numerous similarities, including entire identical paragraphs, between the state’s return at the circuit court level and the Order of Dismissal.

conveniently ignoring the Issue Presented which references the “pattern of conduct” remarks from the closing argument.

Should this Court not be inclined to grant relief on the Golden Rule matter with the notable absence of that issue in the Order of Dismissal, Petitioner would request a remand in accordance with Fishburne in order to allow for meaningful appellate review of a complete Order of Dismissal.

The state posits “Washington’s claim that trial counsel failed to preserve the issue because he insisted on a mistrial rather than accepting a curative instruction is also incorrect,” apparently contradicting itself from its Return. BOR 10. In its Return filed with the South Carolina Supreme Court on January 22, 2019, counsel for Respondent noted “[t]rial counsel likely failed to preserve the issue, but he failed to do so because he did not contemporaneously object.” Return n. 2 at 3. In State v. Walker, this Court held that a failure to contemporaneously object to comments made by co-defendant’s counsel during closing argument precluded appellate review based on preservation. 366 S.C. 643, 660, 623 S.E.2d 122, 131 (Ct. App. 2005). Candidly, the state was correct in its original position; this matter was unpreserved for this Court’s review on direct appeal.

The state also relies on “overwhelming evidence” to suggest that trial counsel’s failures cannot result in a finding of prejudice. BOR at 11. In Smalls v. State, the South Carolina Supreme Court held, “[o]rdinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). The Court referenced Simmons v. State, 331 S.C. 33, 503 S.E.2d 164 (1998) wherein it found Simmons had proved prejudice despite “overwhelming” evidence of Simmons’ guilt. Id.

Simmons filed a PCR application alleging ineffective assistance of counsel for failure to object a move for a mistrial based on “improper and inflammatory jury arguments by the solicitor and the solicitor’s jury argument of matters outside the record.” Simmons, 331 S.C. 333, 336, 503 S.E.2d 164, 165. In that case, the PCR court found the statements “harmless when considered in the context of the whole trial because ‘there was enough evidence in the record to convict the [petitioner], thereby providing a reasonable probability that the jury verdict would not have been different absent the solicitor’s statements.’” Id. at 337, 503 S.E.2d at 166. The Supreme Court reversed:

The evidence of petitioner’s guilt is overwhelming. However, because the issue is whether the solicitor’s improper argument prevented the jury from fairly considering [its sentencing options], the overwhelming evidence of petitioner’s guilt does not eliminate the reasonable probability that the result of the trial would have been different had counsel objected to portions of the solicitor’s closing argument.

Id. at 340, 503 S.E.2d at 167 (footnote omitted).

The holding continued:

The solicitor’s improper comments prevented petitioner from having the jury fairly consider [sentencing options]. Further, the jury instructions failed to cure the prejudice caused by these comments. Thus, because the probability for prejudice is great, we grant petitioner a new trial on the burglary charge.

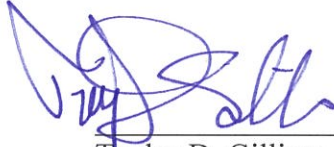
Id. at 341, 503 S.E.2d at 168.

The PCR court did not rely on “overwhelming evidence” in its Order of Dismissal in Mr. Washington’s case. App. 696 – 699. Although prior counsel for Respondent articulated this concept twice at the PCR evidentiary hearing, the PCR judge did not adopt such a reasoning in its final order. App. 678 ll. 9 – 11; ll. 24 – 25.

Trial counsel failed in numerous respects. Counsel failed to object to the improper Golden Rule remarks. Counsel admitted his mistrial motion following the state's closing argument did not include the Golden Rule violation. App. 647 ll. 21 – 24. Further, counsel failed to preserve an objection to the "pattern" comments. This Court should reverse the PCR court.

CONCLUSION

For these additional reasons, Petitioner respectfully requests that this Court reverse the PCR court's denial of relief and remand for a new trial.



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This 9th day of September, 2021.