

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO FLORENCE COUNTY
COURT OF COMMON PLEAS

S.C. SUPREME COURT

The Honorable William H. Seals, Jr., Trial Judge
The Honorable D. Craig Brown, Post-Conviction Relief Judge

Appellate Case No. 2020-001491

JOHNNY N. GREGG, # 337041,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

- I. Did the PCR court correctly grant Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed he desired a direct appeal, and where he never knowingly and voluntarily waived his right to a direct appeal, and where the state consented to allow a belated direct appeal for Petitioner?
- II. Did the PCR court err in denying relief, where trial counsel failed to fully investigate Petitioner's case fully and prepare for trial, where counsel failed to put Petitioner on the stand for a hearing to determine the voluntariness of his statement?

Respondent's Counterstatement of Issues on Certiorari

- I. The PCR court properly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed he desired a direct appeal, and where he never knowingly and voluntarily waived his right to a direct appeal, and where the State consented to allow a belated direct appeal for Petitioner.
- II. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel for failing to adequately explain constructive possession to Petitioner where Counsel testified at the PCR hearing that he always explains to his clients what constructive possession is and Petitioner failed to show prejudice resulted from his misunderstanding of constructive possession. Additionally, Petitioner's appellate argument that Counsel was ineffective for failing to investigate and prepare for trial because Counsel failed to put Petitioner on the stand for a hearing to determine the voluntariness of Petitioner's statement; however, regardless of any preservation issues, Petitioner's argument fails on the merits as Petitioner admitted on direct examination that he was read his Miranda rights and he agreed to cooperate with law enforcement, rendering Counsel's decision to not put Petitioner on the stand reasonable under the circumstances.

STATEMENT OF THE CASE

On June 8, 2017, Petitioner was indicted by a Florence County grand jury on eight counts: possession of a weapon during the commission of a violent crime, possession of a stolen pistol, possession with intent to distribute Xanax, heroin trafficking, possession with intent to distribute heroin within proximity of a school, possession with intent to distribute cocaine base, possession with intent to distribute cocaine, and possession with intent to distribute marijuana. App. 452 – 453. He proceeded to trial before the Honorable William H. Seals, Jr., and a jury on April 16, 2018. App. 1. B. Scott Suggs represented Petitioner; John Jepertinger appeared on behalf of the State.

The State dismissed the possession of a stolen pistol and possession with intent to distribute cocaine charges. App. 99; App. 272; App. 329. After a three-day trial, the jury found Petitioner guilty of the remaining six offenses. App. 374–75. Judge Seals sentenced Petitioner to twenty-five years' incarceration on the heroin trafficking conviction, consecutive to five years on the possession with intent to distribute cocaine base. App. 378–380. The remaining sentences were concurrent, with Petitioner receiving ten years on the marijuana offense, three years on the Xanax offense, four years on the possession of a weapon charge, and eight years on the possession with intent to distribute heroin within the proximity of a school. *Id.* In sum, Petitioner received a thirty-year sentence.

Counsel did not file a notice of appeal. Petitioner filed an application for post-conviction relief on March 18, 2019. App. 382. It contained allegations of ineffective assistance of counsel, including contentions that counsel failed to pursue a direct appeal, failed to challenge subject matter jurisdiction, and failed to preserve issues. App. 385–86. An amendment to the PCR application was filed through counsel on December 18, 2019, which added “Counsel was

ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Petitioner thus rendering Petitioner's counsel unprepared to properly defend Petitioner at trial." App. 390. The State filed its return and partial motion to dismiss on July 5, 2019. App. 391.

An evidentiary hearing was held before the Honorable Craig Brown on December 19, 2019. Jonathan Waller represented Petitioner, and Samuel Key appeared on behalf of the State. Petitioner and Counsel testified at the hearing. Judge Brown granted belated appellate review under *White v. State*. By way of a written order signed October 23, 2020, Judge Brown denied post-conviction relief but granted belated review of Petitioner's direct appeal issue(s). App. 435. Petitioner appealed.

STATEMENT OF THE FACTS

Petitioner's charges stem from an incident that occurred on January 6, 2017. The Florence Police Department Narcotics and Gang Division executed a search warrant on a duplex, within a one-half mile radius of a school, where Petitioner was living at the time of the search. Tr. 88-92. Before entering the duplex, the Police announced themselves. App. 93. With no response, the investigators forced entry into the apartment and apprehended Petitioner. App. 96.

Once Petitioner was in custody, law enforcement conducted a search of the apartment and discovered large quantities of substances that appeared to be marijuana, cocaine, cocaine base, heroin, and Xanax. App. 111. Additionally, the officers found a scale, \$38,452, and three guns. App. 111. Petitioner admitted to owning a book bag with smaller quantities of cocaine, marijuana, synthetic heroin, another gun, and \$7,000 dollars in cash. App. 316. A razor and small storage bags were also found. App. 97. Due to these findings, the Florence County Grand Jury indicted Petitioner on multiple charges during the June 2017 term.

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is any probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180-81, 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)). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. 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. **The post-conviction relief court properly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed he desired a direct appeal, and where he never knowingly and voluntarily waived his right to a direct appeal, and where the State consented to allow a belated direct appeal for Petitioner.**

On appeal, Petitioner argues the PCR court correctly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed he desired a direct appeal, and where he never knowingly and voluntarily waived his right to a direct appeal, and where the State consented to allow a belated direct appeal for Petitioner. The State agrees with this argument. Accordingly, Petitioner is entitled to a belated appeal pursuant to *White v. State*.

Near the conclusion of Petitioner's trial, after the jury's verdict was read, counsel requested ten days to submit post-trial motions: I like to do that, Judge, because I don't do much in the way of [appellate] work and I think that extends out my -- my time to appeal. App. 376. The trial judge gave counsel the requested ten days. *Id.* On cross-examination at the PCR evidentiary hearing, Petitioner testified that he asked counsel to appeal the convictions. App. 416. During redirect, Petitioner indicated that he never signed a waiver of his right to his appeal. App. 417. Counsel was asked about the direct appeal matter as well. He did not recall Petitioner asking for an appeal but admitted that Petitioner's mother may have. App. 424. At the conclusion of the hearing, the State consented to belated appellate review of direct appeal issues. App. 432. The PCR court granted the request under *White v. State*. App. 433; App. 449.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Simuel v.*

State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [Anders].” *Id.* (quoting *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008

“The appropriate scope of review of this Court is that 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). The PCR court’s order correctly concluded that Petitioner is entitled to a belated appeal, where Petitioner’s mother asked counsel to file an appeal. App. 449. Accordingly, the PCR court found Petitioner was entitled for belated appellate review of his guilty plea under *White v. State, supra*.¹ The evidence supports the PCR judge’s conclusion.

II. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel for failing to adequately explain constructive possession to Petitioner where Counsel testified at the PCR hearing that he always explains to his clients what constructive possession is and Petitioner failed to show prejudice resulted from his misunderstanding of constructive possession. Additionally, Petitioner’s appellate argument that Counsel was ineffective for failing to investigate and prepare for trial because Counsel failed to put Petitioner on the stand for a hearing to determine the voluntariness of Petitioner’s statement; however, regardless of any preservation issues, Petitioner’s argument fails on the merits as Petitioner admitted on direct examination that he was read his *Miranda* rights and he agreed to cooperate with law enforcement, rendering Counsel’s decision to not put Petitioner on the stand reasonable under the circumstances

On appeal Petitioner alleges Counsel failed to prepare Petitioner for trial because Counsel failed to adequately explain constructive possession and failed to put Petitioner on the stand at a hearing on whether Petitioner’s statements were voluntary. However, the PCR court properly held that Petitioner failed to demonstrate any ineffectiveness or prejudice on the part of counsel for the

¹ Appellate counsel filed an *Anders* brief pursuant to *White*, and accordingly, the State is not responding with a substantive *White* brief.

remaining allegations of ineffective assistance of counsel. These findings are not controlled by an error of law and are supported by probative evidence in the record. Therefore, this Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel’s performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 669, 2056; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Judicial scrutiny of trial counsel’s performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Strickland*, 466 U.S. at 689.

Trial counsel is required during any trial to make split-second decisions on many subjects, including whether to object to testimony. *Stone v. State*, 419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017). Trial counsel may employ a strategy of not objecting—even when there is a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration. *Id. See Watson v. State*, 370 S.C. 68, 72-73, 634 S.E.2d 642, 644 (2006) (overruled on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836). Counsel’s strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *Stone*, 419 S.C. at 384, 798 S.E.2d at 569.

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Strickland*, 466 U.S. at 691-92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to deprive the defendant of a fair trial.” *Id.* at 687.

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Id.* at 696, at 2069. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697, at

2069. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*”

First, Petitioner alleges Counsel failed to prepare Petitioner for trial because Counsel failed to adequately explain constructive possession and failed to put Petitioner on the stand at a hearing on whether Petitioner’s statements were voluntary. However, the PCR court properly held that Petitioner failed to demonstrate any ineffectiveness or prejudice on the part of counsel. At the PCR hearing, Applicant recalled he never heard the term constructive possession until it came up during court. App. 413. However, in reference to the drugs found throughout the house, Applicant did recall telling Counsel he “ain’t never had nothing in [his] person.” App 412. Petitioner testified Counsel “was basically like saying it’s not your house so you don’t have to claim none of that stuff was yours” and that he “kind of understand it, but not really.” App. 412–13. Petitioner testified he wanted to take responsibility for the drugs and gun in his back pack; however, Petitioner did not want to claim the rest of the drugs in the house. App. 413. Counsel testified he could not recall specifically explaining constructive possession to Applicant, but testified he *always* explains the difference between actual and constructive possession to his clients in drug cases. App. 423. Counsel explained he uses something he has in his pocket at the time as an example to help him explain actual and constructive possession to his clients. App 423.

The PCR court properly found Petitioner failed to show Counsel was constitutionally deficient and how he was prejudiced in any way by Counsel’s alleged deficiency. These findings are not controlled by an error of law and are supported by probative evidence in the record.

Accordingly, the PCR court's finding that Counsel was not constitutionally ineffective should be upheld, and certiorari should be denied.

Second, Petitioner alleges Counsel was ineffective because Counsel failed to put Petitioner on the stand at the *Jackson v. Denno*² hearing in order to show that the on-scene confession was coerced and the product of an imposing law enforcement presence. Respondent submits this issue is not properly before this court as the issue was never raised to or ruled upon by the PCR court; however, regardless of preservation issues, on the merits, the claim fails as Petitioner testified at trial that he voluntarily chose to cooperate with law enforcement. Therefore, Petitioner cannot show any prejudice, as even had Counsel put Petitioner on the stand, the outcome of the trial would not have changed. Furthermore, Petitioner cannot show how Counsel was constitutionally deficient because Petitioner and Counsel's entire trial strategy was to have Petitioner testify on his own behalf to establish he was responsible for some, but not all, of the drugs found, which made Counsel's decision not to put Petitioner on the stand was reasonable under the circumstances. Accordingly, certiorari should be denied.

A. Issue Preservation

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). Where an allegation is not raised in the application or at the hearing, it is procedurally barred on appeal. *See Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (rejecting an allegation that counsel was ineffective for failing to object to the sentence as cruel and unusual where the allegation was "not raised in her application or at the hearing"); *Plyler v. State*, 309 S.C. 408, 409-10, 424 S.E.2d

² 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

477, 478 (1992) (rejecting an allegation that counsel was ineffective for failing to object to a burden-shifting malice charge where the issue “was neither raised at the PCR hearing nor ruled upon by the PCR court,” even where the charge was “diseased with burden-shifting presumptions”). 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” *Mangal v. State*, 421 S.C. 85, 96, 805 S.E.2d 568, 573 (2017) (emphasis added). This Court noted the excusal of a procedural default is an “extraordinary action.” 421 S.C. 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. The Court found the evidence presented by Mangal in support of excusing the procedural default did not justify the extraordinary relief. *See* 421 S.C. at 101, 805 S.E.2d 576.

In the *extraordinary* cases in which this Court has granted the action of excusing a procedural default, the issue was generally *presented* to the PCR court and a ruling was not obtained. 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*, but not ruled on by the PCR court. 427 S.C. 505, 832 S.E.2d 584 (2019) (emphasis added). In *Fishburne*, the applicant raised the issue argued on certiorari *both* in his application for PCR 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 one of Fishburne’s primary PCR claims, which was *raised and heard*. 427 S. C. at 508, 832 S.E.2d at 585 (emphasis

added); *see Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (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.).

The case at bar presents no extraordinary circumstance similar to *Fishburne* and it is clearly distinguishable. In contrast to *Fishburne*, the issue Petitioner raises on certiorari was *never* even raised to the PCR court. There was no testimony presented that Petitioner even wanted to take the stand during the *Denno* hearing, or that Counsel failed to ask Petitioner if he wanted to take the stand. 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 circuit court never ruled upon the issue— Petitioner *never* raised his issue to the circuit court, and therefore deprived the court an opportunity to respond and rule.

While the PCR court is encouraged to be flexible in the use of its discretion with procedural requirements to reach the merits of substantial claims, *Mangal*, 421 S.C. at 99-100, 805 S.E.2d at 575-76, Petitioner needed to, at a minimum, ask the PCR court to exercise that discretion. Having failed to raise the issue at all, Petitioner cannot now ask this Court to grant him relief on a new issue. *See Hyman*, 278 S.C. at 502, 299 S.E.2d at 331 (1983) (“This point was not raised in her application or at the hearing and is not properly before us.”). Accordingly, this Court should deny certiorari and not excuse the clear procedural default in this case. It is not one of the “rare cases” justifying “extraordinary action.”

B. Merits

Regardless of any preservation issues, even if Petitioner’s allegation—Counsel failed to put Petitioner on the stand at the *Denno* hearing in order to show that the on-scene confession was coerced and the product of an imposing law enforcement presence—had been raised and ruled upon, it is still without merit.

At trial, while on the stand in his own defense, Petitioner testified that initially, when police questioned him, they offered to help him with the case if he would agree to be a confidential informant. App. 305. Petitioner testified he told law enforcement, “No, take me to Effingham.” App. 305. Thereafter, Petitioner admitted that he was read his *Miranda* rights and he testified he agreed to cooperate with law enforcement by talking to them. App. 308. Specifically, Petitioner testified at trial to the following:

Q: Okay. And did the officers, did they read your *Miranda* warnings as they testified, you have the right to remain silent and that sort of thing?

A: Yes, sir.

Q: They did. So, you admit to that?

A: Yes, Sir.

Q: Okay. And you agreed to cooperate?

A: Cooperate by talking, yes, sir.

Q: Did you talk to them?

A: Yes, sir.

Q: Okay. And you did, didn't you?

A: Yes, sir.

Q: Okay. And you didn't put up any trouble with the police, did you?

A: No, sir.

App. 308.

Petitioner's testimony clearly established that his confession was completely voluntary. Petitioner's testimony on the stand is consistent with what officer's testified to: Petitioner was cooperative. Counsel and Petitioner's strategy was to put Petitioner on the stand to take responsibility for the drugs in his backpack, but refute that the other drugs were not his. Therefore,

Counsel would have had a good idea as to what Petitioner would testify to on the stand and whether or not Petitioner felt that his statement was involuntary. Additionally, because Petitioner testified he voluntarily agreed to cooperate with law enforcement, even had Counsel put Petitioner on the stand, that testimony would not have caused the outcome of the trial to change.

Accordingly, Counsel's choice to not challenge the voluntariness of Petitioner's statements to law enforcement was reasonable under the circumstances, and therefore, Counsel was not constitutionally deficient. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."). Furthermore, Petitioner cannot show prejudice, where he admitted on the stand that he was read his *Miranda* rights and he agreed to cooperate with law enforcement "by talking to them." App. 308. *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Therefore, even had this issue been preserved for appellate review, on the merits, Petitioner has failed to meet his burden as to either prong of *Strickland*, and certiorari should be denied.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant Certiorari, the State requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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