STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2018-001204

CHARLES GREEN, JR.,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON CERTIORARI

I.

Did the post-conviction relief judge somehow abuse his broad discretion by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Green's counsel as having arguable merit when he had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Green and his counsel and to prevent the introduction of matter that was not relevant to the identified claims?

II.

Did the post-conviction relief judge somehow err by determining Green failed to establish his ineffective assistance of appellate counsel claim when: (1) the constitutional speedy trial issue Green now contends appellate counsel was ineffective for not raising on appeal was itself neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review; (2) appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained he reviewed the portion of the record dealing with the denial of the dismissal motion that was actually raised by trial counsel and consciously elected not to raise that issue after researching the matter and determining it was not likely to be meritorious under the circumstances involved, which demonstrated the legitimate and strategic nature of his decision; and (3) Green suffered no prejudice from appellate counsel's decision not to raise any issues related to the denial of the dismissal motion because Green could not establish such an issue would have been successful on appeal if it had actually been raised?

STATEMENT OF THE CASE

In April of 2011, Petitioner Charles Green, Jr. was arrested following an investigation into a shooting that occurred a day earlier outside a grocery store in Beaufort, South Carolina. In May of 2011, the Beaufort County Grand Jury indicted Green for attempted murder, possession of a weapon during the commission of a violent crime, and possession of a firearm by a person convicted of a felony. On November 18, 2013, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable J. Ernest Kinard, Jr., circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Green of the lesser-included offense of assault and battery of a high and aggravated nature along with both weapon charges. Following the verdict, the trial judge sentenced Green to an aggregate term of imprisonment of fifteen years. Green then timely initiated an appeal.

On appeal, the Court of Appeals issued an unpublished opinion in which it unanimously affirmed Green's convictions following briefing by counsel. State v. Green, Op. No. 2015-UP-458 (S.C. Ct. App. filed Sept. 16, 2015). Thereafter, on October 27, 2015, remittitur was issued.

Subsequent to the issuance of the remittitur, Green timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing. Green then filed several pro se amendments to his PCR application. On January 29, 2018, an evidentiary hearing was conducted in the Beaufort County Court of Common Pleas with the Honorable R. Lawton McIntosh, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge orally denied several of the allegations raised in the application but requested briefing from the parties on some matters. Thereafter, following briefing, the PCR judge denied and dismissed Green's PCR application through an order filed on June 18, 2018. Green then timely filed a notice of appeal.

After initiating his appeal, Petitioner filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to this Court. Subsequently, on October 7, 2021, this Court granted the petition on two of the three issues raised.

STATEMENT OF THE FACTS

Summary of Green's Crimes and the Ensuing Investigation of Them

On the afternoon of April 6, 2011, Clifton Henry ("Victim") was brought to the hospital with multiple puncture wounds to his hip, thigh, and arm that were caused by pellets fired from a shotgun. (App'x p. 83; p. 85; pp. 90-91; p. 130; p. 132; p. 135). Because he was suffering from gunshot injuries, law enforcement was notified, and investigators from the Beaufort County Sheriff's Office headed to the hospital to find out what was going on. (App'x pp. 80-82; pp. 95-96; pp. 108-109; p. 135; pp. 152-153). Once there, Investigator Jeremiah Fraser spoke with Victim, and Victim reported he had just been shot by Green outside a Food Lion grocery store without provocation after Green sought the return of money Green had just given to him and his friend, Channon Preston. (App'x pp. 130-136; pp. 142-144; pp. 153-160). Investigator Fraser then obtained a photographic lineup containing Green's picture, and, when presented with the lineup, Victim immediately identified Green from it as the person who shot him. (App'x pp. 137-139; pp. 155-157). Meanwhile, other investigators interviewed Preston in the parking lot of the hospital, and Preston provided an account of the shooting consistent with Victim's account. (App'x pp. 96-97; pp. 108-109; p. 144; pp. 161-162).

Based on Victim's and Preston's statements, Investigator Fraser obtained an arrest warrant for Green, and officers immediately began searching for him. (App'x p. 162). However, he could not be located that day despite extensive efforts to find him. (App'x p. 162). Beyond the efforts to find Green, several investigators responded to the scene of the shooting, and they found blood droplets on the grounds in front of some propane tanks located outside the grocery store along with some shotgun wadding on the ground in the store's parking lot. (App'x pp. 97-101; p. 104; p. 109). Furthermore, surveillance footage was obtained from a nearby restaurant,

and the events depicted in that footage were consistent with what had been reported by Victim and Preston. (App'x p. 110; p. 119; pp. 161-162).

On the following day, Investigator Fraser received a tip Green was back at his residence, and the home was surrounded by officers. (App'x pp. 162-163). Eventually, Green was coaxed out of the home, surrendered, and was placed under arrest. (App'x p. 163). As Green was being taken into custody, his girlfriend, Ashley Thomas, excitedly shouted out Green did not start "it" and "they" shot at him first. (App'x p. 161; p. 163). After that, Investigator Fraser transported Green to his office, advised him of his rights, and attempted to speak with him about the incident. (App'x pp. 163-164). However, Green reported he did not know anything and declined to make any further statements. (App'x p. 164).

Thereafter, Investigator Fraser interviewed Thomas, and, during the interview, she provided an account of the events that allegedly preceded the shooting. (App'x p. 313). Specifically, Thomas reported she saw Victim and Preston take Green's money "off the ground," Green asked for the money back, and they declined to return it. (App'x p. 313). She claimed Victim then asked Preston to get a gun, Preston retrieved one and pointed it at Green, Victim took the gun from Preston and also pointed it at Green, and Preston took the gun back before firing two shots. (App'x p. 313). After the shots were purportedly fired, Thomas asserted Green walked away "shocked" while Victim and Preston began to walk off with Green's money. (App'x p. 313). At that point, Thomas claimed Green again asked for his money back, Victim and Preston laughed in response, and the two headed toward the grocery store on foot while waving the gun and insisting Green was not getting anything back. (App'x p. 313). Thomas then concluded her account without mentioning anything that occurred at the grocery store, including how or why Victim was shot there. (App'x p. 313).

Ultimately, at the conclusion of the investigation, Green was indicted for attempted murder along with several weapon charges. (App'x pp. 3-4; pp. 332-337). He then elected to proceed forward to trial. (App'x pp. 3-4).

Relevant Details from Green's Trial

Toward the outset of trial, Green's trial counsel indicated Green wanted her to move to dismiss the case at that time. (App'x pp. 41-42). As support for the motion, trial counsel asserted bond paperwork that had been signed by a circuit court judge ordered the State to try Green's case by a certain date in 2012, and she contended "an interpretation" of that order would be the State lost the ability to try the case by failing to try it by the specified date. (App'x p. 42). Based on that and that alone, trial counsel asserted Green's charges should be dismissed "per that order." (App'x p. 42). In rebuttal, the solicitor contended the appropriate remedy for the State's failure to try Green by the date specified in the order was for Green to be released from custody, and she noted he was, in fact, released. (App'x p. 42). Additionally, the solicitor indicated the circuit court judge's order contained nothing stating Green's charges should be dismissed if his case was not tried by the specified date, and she further contended she was unaware of any prejudice suffered by Green. (App'x p. 42). Upon considering the matter and reviewing the relevant order, the trial judge denied the motion to dismiss while confirming the circuit court judge's order did not address dismissal as a sanction for non-compliance, and trial counsel responded by indicating she did not have anything further on the matter. (App'x pp. 42-43).

Thereafter, the trial proceeded forward, and Victim—who still had shotgun pellets embedded in his body—testified about the circumstances of the shooting. (App'x pp. 129-151). Specifically, on the date of the incident, Victim asserted he was outside of Preston's home visiting with him when Green approached them and reported he had just spent $700. (App'x pp.

129-130). In response to the claim, Victim indicated Preston asked Green to share some of his money and Green reacted by throwing two $20 bills at them and telling them to take it because they were broke. (App'x p. 130; p. 144). After that, Victim stated he and Preston walked over to a nearby grocery store with the money, and, when they arrived, Green pulled up in his girlfriend's car. (App'x p. 132). Victim testified Green then approached them with tears in his eyes, claimed he was only joking about the money, and asked for it to be returned. (App'x p. 132; p. 148). In response, Victim asserted he and Preston returned the money to Green, and Green returned to his car. (App'x p. 132; p. 145). At that point, Victim stated Green suddenly pulled out a sawed-off shotgun, fired it at them, and told them to "laugh at that" before fleeing from the area in the vehicle. (App'x pp. 132-135). Victim further noted he was unarmed at the time he was shot, did nothing to provoke the shooting, and had not engaged in any altercations with Green prior to it. (App'x pp. 135-136; pp. 140-141).

In addition to that testimony, Investigator Fraser and the other law enforcement officers involved in the response to the shooting recounted the details of their investigation that culminated in Green's arrest. (App'x pp. 95-119; pp. 152-172). Notably, during his testimony, Investigator Fraser confirmed—in response to questions from both the solicitor and trial counsel—Thomas excitedly shouted out Green did not start "it" and "they" shot at him first when Green was being arrested.[1] (App'x p. 163; p. 168). However, Investigator Fraser was not asked by either party to recount the statements Thomas made during her subsequent interview, which would have clearly constituted inadmissible hearsay. (App'x pp. 152-172).

[1] Prior to the evidentiary phase of trial, the solicitor advised the trial judge she intended to elicit Thomas's unprompted statements at the time of Green's arrest as excited utterances, and trial counsel asserted she had no objection to those statements—and those statements only—being elicited. (App'x p. 41).

Thereafter, at the conclusion of the State's case, Green elected not to testify on his own behalf, and trial counsel did not call any defense witnesses. (App'x pp. 174; pp. 181-182). The defense then rested, and trial counsel asked the trial judge to instruct the jury on self-defense as part of jury charge. (App'x p. 182; p. 186). However, the trial judge declined to do so based on the absence of any actual evidence of self-defense. (App'x p. 182).

Subsequently, at the conclusion of trial, the jury convicted Green of assault and battery of a high and aggravated nature along with the indicted weapon charges. (App'x pp. 233-234). The trial judge then sentenced Green to an aggregate fifteen-year term of imprisonment. (App'x p. 243).

Summary of the Post-Conviction Relief Proceedings

Following an unsuccessful appeal in which Green's appellate counsel challenged the trial judge's decision not to instruct the jury on self-defense, Green sought relief—through his initial PCR application and several subsequent pro se amendments to that application—on a number of grounds, including on the basis his speedy trial rights were violated, trial counsel was ineffective for a variety of different articulated and unarticulated reasons, appellate counsel was ineffective for not raising an unidentified reversible error, prosecutorial misconduct occurred, some unspecified false evidence was presented, his rights pursuant to a wide variety of constitutional amendments were violated, and "miscellaneous." (App'x pp. 245-249; pp. 252-254). In response, the State filed a return requesting an evidentiary hearing while further noting some of Green's claims were simply too vague to comply with the requirements of the Uniform Post-Conviction Procedures Act. (App'x pp. 256-260).

At the outset of the ensuing hearing, the PCR judge indicated he was not sure what grounds Green was actually asserting and—while referencing Rule 11 of the South Carolina

Rules of Civil Procedure *and* "other grounds"—asked PCR counsel sua sponte to definitively identify the precise grounds that were being raised. (App'x pp. 267-268; pp. 281-282). The PCR judge further cautioned he was not going to permit Green to simply "throw out anything and see if it sticks" during the hearing. (App'x pp. 267-268). Based on the PCR judge's directives, PCR counsel ultimately indicated he believed there was a basis to proceed forward on claims of ineffective assistance of trial counsel for failing to object to prejudicial hearsay and ineffective assistance of trial counsel for failing to call Thomas as a witness. (App'x pp. 268-269; p. 278). PCR counsel further appeared to raise a claim of ineffective assistance of appellate counsel for failing to raise a speedy trial issue on appeal. (App'x pp. 290-291).

As the evidentiary hearing proceeded forward, trial counsel testified about several instances in which alleged hearsay was admitted without objection, including Thomas's statements at the time of Green's arrest. (App'x pp. 273-277). Likewise, trial counsel confirmed she attempted to subpoena Thomas—unsuccessfully—because she believed Thomas's testimony could have potentially been beneficial to Green. (App'x pp. 278-279). However, due to her personal knowledge of Thomas, trial counsel further indicated she was concerned about Thomas's credibility, about whether Thomas would have actually testified in a manner consistent with her earlier written statement, and about whether Thomas's testimony "could have done more harm than good." (App'x pp. 279-280). In light of those concerns, trial counsel stated she did not seek a continuance due to Thomas's absence. (App'x p. 280). Trial counsel further confirmed she believed Green was better served through the admission of the limited statements from Thomas that were elicited during Investigator Fraser's testimony. (App'x p. 280).

Beyond trial counsel's testimony, Green testified on his own behalf solely as to the issues identified following the PCR judge's demand for a more definite statement of the claims being

raised. (App'x pp. 281-282; pp. 287-295). In support of the ineffective assistance of trial counsel claim, Green asserted trial counsel should have subpoenaed Thomas—who, significantly, did not testify during the PCR hearing—because she purportedly would have told the jury "the dudes" robbed him. (App'x p. 278; pp. 287-288). Similarly, while claiming he was being "real true," Green disclosed—for the first time—he observed Thomas in the lobby of the courthouse during the course of trial when he took a bathroom break. (App'x pp. 288-289). However, he conceded he did not talk with trial counsel about Thomas testifying. (App'x p. 295). Furthermore, Green testified—as support for his claim of a violation of his right to a speedy trial—he had trial counsel file a speedy trial motion in his case in an effort to get out of jail, was not tried by the date set in the bond order subsequently issued by a circuit court judge, and was released from jail as a result. (App'x p. 293).

Following Green's testimony, appellate counsel testified about his representation of Green on appeal and indicated he elected to raise an issue with the trial judge's failure to instruct the jury on self-defense after reviewing the record from trial. (App'x pp. 302-304). He further explained he was aware trial counsel had filed a motion to dismiss toward the beginning of Green's trial based on the State's failure to comply with a scheduling order. (App'x pp. 302-304). However, he indicated he reviewed that issue, considered it, and elected not to raise it out of a belief it would not have proved to be meritorious on appeal due to the fact he did not think dismissal was warranted under the circumstances because "[i]t would take something in addition to have a charge thrown out besides a mere failure to meet a deadline." (App'x pp. 304-307).

Thereafter, once all the testimony and evidence had been introduced, the PCR judge denied relief on the claim of ineffective assistance of trial counsel based on the failure to object to hearsay testimony. (App'x p. 308). Furthermore, the PCR judge determined Green failed to

meet his burden of proof in regard to his speedy trial claim and specifically found any delays that occurred did not cause the loss of Thomas's testimony. (App'x p. 309). However, the PCR judge expressed concern over trial counsel's failure to present Thomas as a witness, and, based on that, he requested briefing from the parties as to whether Green could meet his burden of proof solely by relying on Thomas's written statement along with as to whether trial counsel was, in fact, ineffective for failing to call Thomas as a witness. (App'x pp. 309-310). He then denied relief on the remaining allegations and took the matter under advisement. (App'x p. 310).

Subsequently, upon considering the matter along with the briefs submitted by the parties, the PCR judge issued an order formally denying Green's PCR application. (App'x pp. 317-331; pp. 338-345). In denying relief, the PCR judge again rejected the hearsay-based claim and specifically determined Green's allegation in regard to trial counsel's failure to present Thomas's testimony also failed due to the fact Green solely presented a written statement from Thomas that constituted inadmissible hearsay instead of offering her testimony at the evidentiary hearing. (App'x pp. 324-326). Additionally, the PCR judge concluded Green failed to prove prejudice in regard to the failure to call Thomas as a witness because trial counsel identified a valid trial strategy for not calling her and also attempted to locate and subpoena her. (App'x pp. 326-327). Moreover, the PCR judge found Thomas's statement—even if true—did not establish Green was acting in self-defense. (App'x pp. 327-329). Finally, the PCR judge found Green failed to establish either deficiency or prejudice in regard to his claim of ineffective assistance of appellate counsel. (App'x pp. 329-330).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Furthermore, when reviewing "a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure," the appellate court will analyze the matter solely to determine whether an abuse of discretion occurred. Mangal v. State, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017); Sweet v. State, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (applying an abuse of discretion standard when reviewing a procedural ruling in a post-conviction relief matter). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I.

The post-conviction relief judge did not abuse his broad discretion by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Green's counsel as having arguable merit because he had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Green and his counsel and to prevent the introduction of matter that was not relevant to the identified claims.

Green contends the PCR judge erred by limiting the testimony presented and questioning conducted during the evidentiary hearing solely to matters related to the grounds identified by PCR counsel as having arguable merit. In support of that contention, Green maintains the PCR judge committed an error of law by relying on Rule 11 of the South Carolina Rules of Civil Procedure to place limitations on the claims permitted to be addressed during the hearing. To the contrary, the PCR judge properly exercised his authority pursuant to the provisions of the Uniform Post-Conviction Procedure Act, our civil procedure rules, and our evidentiary rules to require Green and his PCR counsel to specifically identify the grounds upon which there was a legitimate basis to proceed forward and to the limit the evidence and testimony subsequently introduced solely to matter relevant to the specified grounds. As a result, the PCR judge's discretionary decision to place proper limits on the matter raised and discussed during the evidentiary hearing did not constitute either an abuse of discretion or error of law. The PCR judge's order denying relief to Green should be affirmed.

When seeking relief, every PCR applicant is entitled to a full and fair opportunity to present claims in a single application. Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Importantly though, pursuant to the requirements of the Uniform Post-Conviction Procedure Act, the applicant must set forth any claims being raised with *specificity*. See S.C.

Code Ann. § 17-27-50 ("The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, *specifically set forth the grounds upon which the application is based*, and clearly state the relief desired." (emphasis added)); see also Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974) ("[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of adequate and effective assistance of counsel is insufficient."). If the applicant's claims are not set forth with sufficient specificity and clarity, it is incumbent on appointed counsel—when counsel has been appointed—to ensure the application complies with the necessary requirements. See Rule 71.1(d), SCRCP ("Counsel shall insure that all available grounds for relief are included in the application and *shall amend the application if necessary*." (emphasis added)). Beyond that, the PCR judge is also vested with authority to require the applicant or appointed counsel to amend the application to conform to the requirements of the Uniform Post-Conviction Procedure Act when necessary. See S.C. Code Ann. § 17-27-70(a) ("At any time prior to entry of judgment the court may, when appropriate, *issue orders for amendment of the application or any pleading or motion*, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading." (emphasis added)); see also Rule 12(e), SCRCP (permitting a circuit court judge to require a more definite statement when vague or ambiguous pleadings are filed).

In the case sub judice, Green filed a PCR application along with a number of pro se amendments to it raising a wide variety of vague and unspecific claims, including a claim of simply "miscellaneous." See Coardes, 262 S.C. at 497, 206 S.E.2d at 265 (instructing bare assertions of ineffective assistance are not sufficient to constitute valid PCR claims). Based on

the vague and unspecific nature of Green's claims, the PCR judge was unclear as to what claims were actually being raised and, therefore, sensibly asked PCR counsel to specifically identify the supportable claims that were going to be pursued during the hearing, and his decision to do so was wholly permissible, reasonable, and proper under the circumstances. See S.C. Code Ann. § 17-27-70(a) (authorizing the PCR judge to require a PCR application to be amended when necessary). At that point, PCR counsel specifically identified the claims that could legitimately be raised as he was required to do by both our civil procedure rules and his ethical responsibilities, and the hearing proceeded forward solely on those claims as was proper. See Rule 3.1, RPC, Rule 407, SCACR ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); Rule 71.1(d), SCRCP (mandating PCR counsel amend a PCR application when necessary); see also Jones v. Barnes, 463 U.S. 745, 751 (1983) (explaining no authority suggests an "indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points"). Thereafter, during the course of the hearing, Green was permitted to present all the evidence and testimony he wished in support of the claims that had been validly identified to the PCR judge, and the PCR judge solely placed limitations on the questioning and testimony as needed to ensure relevant evidence, which was the only type of evidence that could properly be introduced, alone was admitted. See Rule 402, SCRE ("Evidence which is not relevant is not admissible."); State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) ("*Only* relevant evidence is admissible." (emphasis added)).

Because the limits placed on the testimony presented and questioning conducted were entirely proper and supported by a multitude of provisions of South Carolina law, the PCR judge neither abused his discretion nor committed an error of law by imposing the reasonable limits imposed.[2] Cf. Sweet, 255 S.C. at 296, 178 S.E.2d at 658 (finding no abuse of discretion occurred by the circuit court judge's discretionary decision to decide a post-conviction relief issue without hearing testimony from a witness who was not present when nothing was presented to establish the witness's testimony would have been relevant or material to the issue raised). The PCR judge's order denying relief to Green should be affirmed.

[2] Since the PCR judge's discretionary decision to impose reasonable limitations was authorized by various provisions of South Carolina law, the fact the PCR judge—who did not impose any sanctions on Green or PCR counsel—referenced Rule 11 of the South Carolina Rules of Civil Procedure was irrelevant to the propriety of his ruling even assuming that rule had not been applicable under the circumstances. See Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) ("[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." (citations and internal quotations omitted)); Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 517, 435 S.E.2d 865, 868 (1993) ("A correct decision of the trial court on the wrong ground will be affirmed on appeal."); see also Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494-495 (2009) ("[W]e hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.").

II.

The post-conviction relief judge correctly determined Green failed to establish his ineffective assistance of appellate counsel claim because: (1) the constitutional speedy trial issue Green now contends appellate counsel was ineffective for not raising on appeal was itself neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review; (2) appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained he reviewed the portion of the record dealing with the denial of the dismissal motion that was actually raised by trial counsel and consciously elected not to raise that issue after researching the matter and determining it was not likely to be meritorious under the circumstances involved, which demonstrated the legitimate and strategic nature of his decision; and (3) Green suffered no prejudice from appellate counsel's decision not to raise any issues related to the denial of the dismissal motion because Green could not establish such an issue would have been successful on appeal if it had actually been raised.

Green contends the PCR judge erred by finding appellate counsel was not constitutionally ineffective. In support of that contention, Green maintains appellate counsel should have raised a constitutional speedy trial issue on appeal that was purportedly preserved and meritorious. To the contrary, Green's appellate counsel was not constitutionally ineffective for failing to raise any speedy trial issues on appeal for several different reasons. Initially, no constitutional speedy trial issue was actually raised to or ruled upon by the trial judge during trial, and, thus, such an issue could not properly be raised or addressed for the first time on appeal, which meant appellate counsel could not have been ineffective for failing to raise one. Additionally, regarding any issues related to the limited non-constitutional-speedy-trial-based dismissal motion that was actually raised and ruled upon during Green's trial, appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained during the evidentiary hearing he reviewed the record, was aware of and researched the issue related to trial counsel's actual dismissal motion, and consciously elected not to raise that particular issue based on his view it was lacking in merit, which demonstrated the legitimate and strategic nature of his decision. Furthermore and finally, even assuming appellate counsel had somehow been

ineffective for failing to raise an issue related to the denial of the dismissal motion, Green suffered no prejudice as a result of that decision because he could not establish such an issue would have been successful on appeal if raised. Under such circumstances, the PCR judge correctly determined appellate counsel was not constitutionally ineffective for simply choosing as a matter of professional judgment to raise a different issue in place of the one Green now contends should have been raised on appeal. The PCR judge's order denying relief to Green should be affirmed.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1910 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms.

Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

Beyond the right to effective assistance of counsel at trial, a criminal defendant in South Carolina has a right to effective assistance of appellate counsel on direct appeal. Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990); see McMann, 397 U.S. at 771 ("[T]he right to counsel is the right to the effective assistance of counsel."); see also Evitts v. Lucey, 469 U.S. 387, 393-394 (1985) (recognizing "a State that afforded a right of appeal" must "make that appeal more than a 'meaningless ritual' by supplying an indigent appellant in a criminal case with an attorney." (citation omitted)). Importantly though, appellate counsel is *not* required to raise every nonfrivolous issue present in the record in order to provide effective assistance on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004); see Evitts, 469 U.S. at 394 ("[T]he attorney need not advance *every* argument, regardless of merit, urged by the appellant[.]"). In fact, appellate counsel may provide the most effective assistance by focusing on a single strong issue instead of raising every conceivable issue that could possibly be raised. See Barnes, 463 U.S. at 751-752 ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on *one* central issue if possible, or at most on a few key issues." (emphasis added)).

In order to prevail on a claim of ineffective assistance of appellate counsel, a PCR applicant has the burden of overcoming the strong presumption appellate counsel provided

adequate representation and, to do so, must establish both deficiency and prejudice. Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); see Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 ("The burden of proof is on [the applicant] to show that counsel's performance was deficient as measured by prevailing professional norms, and that [the applicant] was prejudiced by this deficiency."); Thrift, 302 S.C. at 537, 397 S.E.2d at 525 ("The burden is on the applicant in post-conviction proceedings to prove the allegations in his application."); see also Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment"). To establish deficiency, the applicant must demonstrate appellate counsel's performance objectively amounted to incompetence under prevailing professional norms and did *not* simply deviate "from best practices or most common custom." Richter, 562 U.S. at 105; see Dunn v. Reeves, __ U.S. __, 141 S. Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that *no* competent lawyer would have chosen." (emphasis added and citation, internal quotations, and brackets in original omitted)). Meanwhile, to establish prejudice, "the applicant must show that, but for [appellate] counsel's errors, there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003); see Hill v. State, 415 S.C. 421, 433, 782 S.E.2d 414, 420 (Ct. App. 2016) (affirming the denial of Hill's claim appellate counsel was ineffective for failing to raise a directed verdict issue on appeal because Hill would not have been entitled to reversal on appeal had the issue been raised and, thus, Hill could not meet his burden of establishing "a reasonable probability of a different outcome" existed); see also Richter, 562 U.S. at 112 ("The likelihood of a different result must be *substantial*, not just conceivable." (emphasis added)).

Significantly, meeting the requisite burden of establishing both deficiency and prejudice is generally "difficult" for an applicant raising an ineffective assistance of appellate counsel claim. Smith v. Robbins, 528 U.S. 259, 288 (2000).

In the case at bar, Green contends the PCR judge erred by failing to find appellate counsel was constitutionally ineffective. (Pet. Br. pp. 9-13). More specifically, Green maintains appellate counsel provided ineffective assistance because he failed to raise a *preserved* and *meritorious* constitutional speedy trial issue on appeal. (Pet. Br. p. 9-13). In making that particular claim, Green alleges trial counsel moved to dismiss his charges toward the outset of trial purportedly "for failure to comply with a previously filed speedy trial motion" but the motion was denied. (Pet. Br. p. 9). Green then points to the speedy trial factors articulated by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972), and asserts this Court "*may*" have granted appellate relief following an analysis of those factors had a constitutional speedy trial issue been raised on appeal. (Pet. Br. pp. 11-13) (emphasis added). However, Green also concedes the trial judge did not analyze or weigh the relevant speedy trial factors during trial when ruling on trial counsel's dismissal motion, and he appears to further concede there is nothing appearing in the record that provides any explanations as to the reasons for the delays involved in his case.[3] (Pet. Br. pp. 11-12).

[3] Although Green appears to concede there is nothing in the record identifying the cause of the delays involved, Green seems to fault the State for the record's lack of such information by stating "the state did not suggest that the reasons for the delay could be attributed to [him]." (Pet. Br. p. 12). By seemingly faulting the State in such a manner, Green ignores the fact he bore the burden—for both appellate and PCR purposes—to establish the merits of his claims. See Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application."); State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) ("The burden is upon the appellant to satisfy [the appellate] court that there has been prejudicial error.").

Significantly, the reason why the trial judge did not rule on the factors relevant to a constitutional speedy trial analysis is because a constitutional speedy trial issue was *not* actually raised during Green's trial. Instead, toward the beginning of trial, trial counsel simply moved for the trial judge to dismiss Green's case based on the State's failure to try the matter by a date contained in a previously-issued order that directed the case to be tried before the end of an earlier term of court, and, in doing so, trial counsel made clear her dismissal motion was based on the violation of "that order" alone without ever asserting Green's constitutional speedy trial rights had been infringed. (App'x p. 42). Meanwhile, trial counsel never asked the trial judge to analyze the relevant speedy trial factors, never argued an analysis of those factors would or could support a conclusion Green's speedy trial rights had been violated, and never presented anything to establish a speedy trial violation had occurred. (App'x pp. 42-43). In fact, trial counsel never used the words "speedy trial" during Green's trial, and those words do not appear at any point in the entirety of the trial transcript. (App'x pp. 1-244).

Because no constitutional speedy trial issue was ever raised to or ruled upon by the trial judge during trial, the constitutional speedy trial issue Green now contends should have been raised by appellate counsel was simply not properly preserved for appellate review. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (explaining a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]"); In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others,

must be raised to and ruled upon by the trial court to be preserved for appeal."); State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (citation and internal quotations omitted)); cf. State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) ("Because Appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review. . . . *If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call*." (emphasis added)); Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970) ("We have searched the record and agree that the trial judge was not given an opportunity to rule upon this issue, and accordingly, the question is not properly before us. This is a court of review."). As a result, appellate counsel could *not* have been ineffective for failing to raise that particular issue on appeal since it was procedurally barred pursuant to South Carolina's long-standing issue preservation rules. See Gilchrist, 364 S.C. at 178, 612 S.E.2d at 705 ("[A]ppellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review."); cf. Legge v. State, 349 S.C. 222, 225, 562 S.E.2d 618, 620 (2002) ("At trial, trial counsel objected to Detective McPherson's testimony on the ground that he was not competent to give testimony on petitioner's demeanor and on Miranda grounds. However, at the PCR hearing, petitioner stated he wanted appellate counsel to argue on appeal that the testimony should have been objected to because the testimony was an attempt to show petitioner lacked remorse. Because the issue would not have been preserved for appeal, appellate counsel cannot be ineffective for failing to raise the issue." (footnotes omitted)).

Additionally, regarding appellate counsel's decision not to raise any issue related to the limited non-constitutional-speedy-trial-based dismissal motion that was actually presented and ruled upon during trial, appellate counsel explained during the evidentiary hearing he reviewed trial counsel's dismissal motion and consciously elected to instead raise an unrelated issue after researching the matter and determining Green was unlikely to prevail on appeal by raising an issue related to that motion. See Thrift, 302 S.C. at 539-540, 397 S.E.2d at 526 ("[A]ppellate counsel is not required to raise every nonfrivolous issue that is presented by the record. . . . The testimony of petitioner's appellate attorney that she reviewed the requested charge and the charge as given and consciously decided not to brief the issue, clearly supports the PCR judge's finding that appellate counsel was not ineffective."). As appellate counsel had no duty to raise every possible nonfrivolous claim on appeal, appellate counsel's judgment-based decision to raise an issue other than the dismissal motion issue was a valid and reasonable one, and, under the circumstances involved, it certainly did not objectively constitute incompetence as would be necessary for appellate counsel's representation to be deemed constitutionally deficient. See Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985) ("Given that this was a strategic decision on appellate counsel's part based on what we consider to be reasonable professional judgment, it is not proper for us to second-guess the judgment of appellate counsel so as to impose a duty to raise every colorable claim."); see also Robbins, 528 U.S. at 288 ("[I]t is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was imcompetent."); Barnes, 463 U.S. at 751-752 (recognizing the legitimacy and importance of focusing on a single issue on appeal whenever possible); cf. Smith v. Murray, 477 U.S. 527, 536 (1986) (instructing a decision to focus on the arguments most likely to prevail on appeal while winnowing out the weaker ones "is the hallmark of effective

appellate advocacy" and concluding counsel's decision not to raise a particular issue on appeal "fell well within the 'wide range of professionally competent assistance' required under the Sixth Amendment to the Federal Constitution" (citation omitted); Smith v. Comm'r of Correction, 85 A.3d 1199, 1210 (Conn. App. Ct. 2014) (affirming the determination appellate counsel provided effective representation because she "did precisely what the law requires of her" in light of the fact she "reviewed the pleadings and transcript, identified the possible issues and then strategically determined which issues had the best chance of winning").

Furthermore, even if deficiency could somehow be established based on appellate counsel's failure not to raise an unpreserved issue on appeal, Green could not have been prejudiced by such a deficiency because the trial judge did not abuse his discretion by declining to dismiss the charges in Green's case. That is true because, just as the trial judge—and appellate counsel—recognized, the dismissal motion actually raised by trial counsel was based purely on a violation of an order that did *not* specify as a remedy Green's charges were to be dismissed if its terms were violated. (App'x pp. 41-43; pp. 304-306; p. 315). Instead, the consequence for non-compliance with the order was for Green to be released from pre-trial custody, which did occur in his case once he was not tried by the date specified in the order. (App'x p. 42; p. 293). As a result, the trial judge did not abuse his discretion by refusing to impose the extreme sanction of dismissal of the charges for a violation of the scheduling order. See United States v. Loud Hawk, 474 U.S. 302, 312 (1986) ("[T]he Speedy Trial Clause's core concern is impairment of liberty[.]"); cf. State v. Campbell, 277 S.C. 408, 409, 288 S.E.2d 395, 395 (1982) ("Appellant argues the indictment should be dismissed because he was not afforded a speedy trial pursuant to South Carolina Code of Laws § 17-23-90 (1976). We find no need to determine the speedy trial issue, as the relief requested is not the relief provided by the statute.

Section 17-23-90 provides for discharge from imprisonment when a person is committed for a felony, demands to be brought to trial, and is not indicted or tried by the second term following his commitment. . . . This phrase merely indicates the prisoner should be released without bail, not discharged from further prosecution."). Likewise, to the extent Green contends his constitutional speedy trial rights were violated, nothing appearing in the record demonstrates an actual speedy trial violation occurred as—just as Green appears to concede and recognize—there was nothing presented demonstrating the roughly-thirty-one-month period of delays that elapsed between Green's arrest and subsequent trial resulted from any willfulness or neglect on the part of the State, which was necessary for a viable claim of a constitutional speedy trial violation to exist. See State v. Dukes, 256 S.C. 218, 223, 182 S.E.2d 286, 288 (1971) ("The delay must be attributable to the State before the appellants can complain."); State v. Smith, 307 S.C. 376, 380, 415 S.E.2d 409, 411 (Ct. App. 1992) (explaining the defendant bears the burden of showing a speedy trial delay was due to the neglect and willfulness of the State's prosecution); see also State v. Langford, 400 S.C. 421, 445, n. 10, 735 S.E.2d 471, 484, n. 10 (2012) (noting a twenty-three-month period of delay between arrest and trial had not "crossed that threshold" of constituting an "extreme" delay); State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) (explaining a speedy trial determination "is not based on the passage of a specific period of time" and delay alone is not singularly dispositive); State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997) (recognizing "delay alone is not dispositive" when analyzing a speedy trial issue). Therefore, Green could not have suffered any prejudice as a result of appellate counsel's decision not to raise an issue related to the denial of trial counsel's dismissal motion because such an issue would not and could not have led to reversal on appeal. See Anderson, 354 S.C. at 436, 581 S.E.2d at 836 (concluding Anderson could not establish the required prejudice

necessary to establish his ineffective assistance of counsel claim because he could not prove he would have prevailed on appeal to the Supreme Court); see also State v. Reaves, 414 S.C. 118, 132, 777 S.E.2d 213, 220 (2015) ("[A] trial court's decision as to whether to dismiss an indictment based on speedy trial grounds is reviewed for an abuse of discretion."); cf. State v. Evans, 386 S.C. 418, 425-426, 688 S.E.2d 583, 587 (Ct. App. 2009) (finding no error in the denial of a motion to dismiss based on an alleged speedy trial violation where the delay prior to trial was approximately twelve years); State v. Cooper, 386 S.C. 210, 217-218, 687 S.E.2d 62, 66-67 (Ct. App. 2009) (affirming the denial of Cooper's speedy trial motion where the delay in bringing the case to trial was at least forty-four months).

Accordingly, for all those reasons, Green failed to meet his burden of establishing appellate counsel's representation was constitutionally ineffective, and the PCR judge properly rejected Green's application for post-conviction relief. See Robbins, 528 U.S. at 288 (recognizing "it is difficult to demonstrate that counsel was incompetent" for failing to raise a particular claim on appeal); cf. Dobbins v. State, 788 N.W.2d 719, 730 (Minn. 2010) (rejecting Dobbins's claim his appellate counsel's failure to raise a speedy trial issue on appeal constituted ineffective assistance of counsel because: (1) appellate counsel did not have a duty to raise all possible issues on appeal or to raise meritless claims; and (2) it appeared Dobbins was not denied his right to a speedy trial under the circumstances involved). The PCR judge's order denying relief to Green should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

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December 17, 2021