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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM CHARLESTON COUNTY
The Honorable Jennifer B. McCoy, Circuit Court Judge

Opinion No. 2021-UP-395 (S.C. Ct. App. filed November 10, 2021)

THE STATE……RESPONDENT

v.

BYRON LABRON RIVERS,……PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI
Appellate Case No. 2019-001253

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PETITIONER'S QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the challenge to the admission of testimony that the co-defendant tested negative for gunshot residue test from a detective, who did not conduct the test, as a violation of Petitioner's Sixth Amendment right to confront witnesses was not preserved for review?

2. Did the Court of Appeals err in finding that, if preserved the trial judge correctly found that defense counsel opened the door to allowing a detective, who did not conduct the gunshot residue test, to testify about the results of the gunshot residue test from the co-defendant in violation of Petitioner's right to confront witnesses?

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the Petitioner failed to preserve an issue for appeal due to the fact the Petitioner failed to argue before the trial court that allowing a witness that did not perform the gunshot residue test to testify as to the results, a violation of the confrontation clause?

2. Did the Court of Appeals err in finding that if the issue was preserved they would have found the trial judge committed no error in ruling that the Petitioner opened the door to the detective's testimony of the results of the gunshot residue tests?

STATEMENT OF THE CASE

On June 10, 2019, Petitioner's case was called for trial for the offenses of murder, two counts of attempted murder, burglary in the first degree (burglary 1st), five counts of armed robbery, and possession of a firearm during the commission of a violent crime. Representing the State of South Carolina were Assistant Solicitors Christopher Lietzow, and David Osborne of the Ninth Circuit Solicitor's Office, representing the Petitioner were attorneys Benjamin Andrew Mack and Teresa Norris.

Several pretrial motions were presented to the trial court. These motions included, motions to exclude the mention of drugs and the bodycam and dashcam videos. Petitioner also filed motions to suppress reference to any gang affiliation, the DNA evidence found on the murder weapon, any jail calls made by the Petitioner, and any of the Petitioner's prior convictions or bad acts. The Petitioner also moved to impeach the witnesses on their prior bad acts. Hearings were held on each of these motions. After the trial court made a decision on all these motions, the case began with the selection of the jury and opening arguments.

After four days of testimony, a jury of his peers found Petitioner guilty of murder, four counts of armed robbery, burglary 1st, two counts of attempted murder, and possession of a weapon during the commission of a violent crime. (R. p. 587 line 5 – p. 588 line 20). Petitioner was sentenced to a term of imprisonment for the remainder of his natural life for the offenses of murder and burglary 1st, thirty years for each count of armed robbery, thirty years for each count of attempted murder, and five years for possession of a weapon during the commission of a violent crime. The trial court ordered that each of these offenses were to be served concurrently. (R. p. 590 line 24 – p. 591 line 24). While serving his sentence Petitioner filed a timely notice of appeal before the South Carolina Court of Appeals.

The Court of Appeals decided this case without oral arguments. On November 19, 2021 the Court of Appeals issued an unpublished opinion regarding this case. *State v. Rivers,* WL 5232315 (2021). Within this opinion Judges Aphrodite Konduros, D. Garrison Hill, and Blake A. Hewitt decided that the Petitioner failed to preserve the issue due to his trial counsel failing to argue a violation of the confrontation clause to the attention of the trial court. Petitioner only argued that the witness was "not an expert in the actual testing of GSR kits." *Id.* In a footnote the Court of Appeals also ruled that even if preserved Petitioner opened the door to this testimony because he asked the witness whether his co-defendant was tested for GSR. *Id.* n1.

Petitioner now requests a writ of certiorari seeking review from this Court. Respondent will argue that the decision of the lower court does not fall within any of the parameters found in South Carolina Appellate Rule 242, this petition should be subject to dismissal. The return of the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

The Supreme Court reviews the Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v. State,* 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2000). Pursuant to rule 242 of the South Carolina rules of the Appellant Court, "a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered:

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

Rule 242 SCACR.

In reviewing each of these criteria the present case does not apply. The Court of Appeals properly and unanimously affirmed the decision of the trial court. There have been numerous United States and South Carolina decisions pertaining to a failure to preserve an issue for appeal, and the defense "opening the door" regarding information that would otherwise not be lawfully allowed. A novel question of law does not exist. The trial court determines what should be allowed into evidence. The Petitioner did not object to the GSR testimony, and even inquired about it during cross examination. Petitioner raised an objection regarding the witness not being an expert in this field; however, never raised an argument regarding a violation of the confrontation clause. If an

issue was not raised before the lower court it cannot be raised for the first time on appeal. This issue was not preserved, it was a matter not subject to review by the Court of Appeals.

The Constitutional question was not preserved for appeal; there was no dissenting opinion; this decision is not in conflict with any prior decisions made by this court; and, there was no federal question included within this opinion that conflicted with a prior decision made by the United States Supreme Court. The Court of Appeals decision was lawful, so this decision should not be subject to review, this petition should be denied.

STATEMENT OF FACTS

On July 15, 2016, victims Sanquan, Kirby, Antonio, and Theodore Fyall, along with Johnell Watson, Mr. Watson's girlfriend, Eleanor Pelesline, and Frederick "Cam" Smalls were at Sanquan's apartment in North Charleston, South Carolina. While inside they were smoking marijuana and playing video games. (R. p. 55 lines 4-5)

Antonio testified that there was a knock on the door. He immediately answered the door because he thought it was this guy named Percy returning from the store. (R. p. 288 lines 6-17) When Antonio answered he was shot by the Petitioner. (R. p. 287 lines 9-16). The Petitioner and his co-defendant Stacy Green rushed inside the apartment. (R. p. 124, lines 16-19). Antonio bleeding from his gunshot wound was still able to kick out a kitchen window and escape. (R. p. 287 line 16 – p. line 1)

Inside the apartment the Petitioner and his Co-defendant ordered everyone to remove their pants. (R. p. 124 line 20). The Petitioner stood by the door as his co-defendant searched the apartment. While searching, Petitioner told his co-defendant to lift up a couch. Hiding behind the couch was Kirby who pushed the couch on them. The Petitioner then shot and killed Kirby, Johnell was also shot but it was not fatal. (R. p. 109 lines 10-15; R. p. 110 lines 22-25).

While the robbery was occurring, Antonio ran to his friend Antonio Cummings' (Cummings) apartment. (R. p. 287 line 16 – p. 288 line 1; p. 289 lines 8-15; p. 209 lines 6-17). Cummings and Percy went to the apartment and knocked. They heard gunshots, and then saw the co-defendant coming out with the Petitioner on his back carrying a pillow case. (R. p. 90 lines 16-25). Cummings and Percy tried to prevent the defendants from escaping by blocking their access to a getaway vehicle. (R. p. 91 line 7 – p. 92 line 1-20). After the getaway vehicle sped off the defendants started down the street, followed by Cummings and Percy. (R. p. 92 lines 19-21). The

co-defendant then put the Petitioner and pillow case down on the street, threw the gun, and ran. Cummings chased him with a baseball bat. (R. p. 92 line 22- p. 93 line 22).

Officer Sara Fortier of the North Charleston Police Department arrived at the scene. She saw Cummings and Green in a ditch, and she arrested Green. (R. p. 72 line 17 – p. 73 line 20). Office James Greenawalt also arrived at the scene and found a Walther .40 caliber Smith & Wesson on the ground about eight yards from the Petitioner. (R. p. 187 lines 12-22). Petitioner was treated at the scene by EMS for gunshot wounds to both legs, a fractured femur, and unstable pelvis. (R. p. 313 lines 18-22). He was later transported to the hospital.

The next day Detective Robert Bailey received a bag from Ricky Fyall, Antonio's uncle. (R. p. 346 line 2 – p. 347, 348 lines 1-22). In the bag was a hi-point 9mm silver and black handgun, three pairs of pants, and a TWIC card belonging to Fredrick Smalls. (R. p. 348 lines 15-22). Ricky went to the apartment the night of the shooting and was given the bag from a women named Nashishi Walker. (R. p. 374 lines 1-8).

During trial, ballistics expert Chad Smith, of the South Carolina Law Enforcement Division (SLED), testified that all of the shell casings found at the scene were fired from a 9mm. The bullets were of a .380 caliber weapon but it could be shot from a 9mm. (R. p. 433 lines 19-21). Each witness testified that only one of the defendant's fired their weapon. Sara Goodman, a forensic scientist at SLED also testified. She tested the trigger grip for DNA. Her results were that the DNA was a mixture of individuals, however, Petitioner was a major contributor. She testified that the DNA match with the Petitioner was approximately 1 in 32 billion. (R. p. 479 line 11).

ARGUMENTS

1. **Court of Appeals did not err in finding that Petitioner failed to preserve their argument since they never argued before the trial court that allowing Detective Bailey to testify as to the GSR results violated the confrontation clause.**

Detective Robert Bailey testified as to statements given by the victims in this case, and he was asked about if any gunshot residue (GSR) tests were done on individuals involved in this case. During his testimony Detective Bailey explained why GSR's tests are done, and that there is a six hour window to complete these tests. (R. p. 344 lines 17-22). He also testified that he was unaware if one was done on the Petitioner. (R. p. 345 lines 13-16). During this testimony Petitioner's counsel never raised any objection regarding the lack of expertise, or him not being introduced as an expert in this field. The Petitioner allowed this testimony to continue and also asked questions relating to GSR testing on cross-examination.

During re-direct examination, Solicitor decided to inquire about the results of the GSR on the co-defendant. (R. p. 369 lines 22-24). At that time the Petitioner objected due to the fact Detective Bailey was never introduced as an expert on gunshot residue tests. (R. p. 370 lines 4-5). The trial court allowed Detective Bailey to answer the question due to the Petitioner opening the door on this line of questioning. (R. p. 394 lines 20-25).

The Court of Appeals issued an opinion deciding that the Petitioner failed to preserve this argument for appeal. During the appeal the Petitioner argued that he was denied the ability to confront the witness that actually performed the test. They argued that allowing Detective Bailey to testify to these results was a violation of the confrontation clause. The Court of Appeals decided that the argument during trial was regarding the expertise of Detective Bailey and not the ability to confront a witness. Since a different issue was argued during trial, the issue raised on appeal was not preserved. The Court of Appeals ruled affirming the decision of the trial court.

Standard of Review

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is a matter addressed to the sound discretion of the circuit court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probably prejudice. *State v Douglas,* 369 S.C. 424, 429, 632 S.E.2d 845, 847 (2006). It is axiomatic that an issue cannot be raised for the first time on appeal. *State v. Cope,* 405 S.C. 317, 338, 748 S.E.2d 194, 205 (2013). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. *State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003).

Analysis

The Petitioner wishes this court to analyze the decision made by the Court of Appeals regarding the failure of Petitioner's trial counsel in preserving an issue for appeal. During their appeal the Petitioner argued that the trial court erred in allowing Detective Bailey to testify as to the results of the GSR tests in violation of the confrontation clause. This argument was never raised by Petitioner's counsel during the trial. An argument cannot be raised for the first time during an appeal. This is because the circuit court should have an opportunity to hear an argument and make a ruling. To reverse a circuit court judge on an issue they did not have an opportunity to rule on would be unfair to that court. Prohibiting an appellant from raising an issue for the first time on appeal ensures that the trial court is able "to rule properly after it has considered all of the relevant facts and arguments." *Cope,* 405 S.C. at 339, *quoting, Herron v. Century BMW,* 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012).

Within his petition the Petitioner relies on the United States Supreme Court decision *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527 (2009)(certificates of state lab analysis being introduced within testimony of the lab operator violated the confrontation clause.) However, this case is distinguished from *Melendez-Diaz* due to the fact during trial the Appellant's counsel objected, "asserting that *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, required the analysis to testify in person." *Melendez-Diaz* 129 S.Ct. at 2529. Petitioner's counsel never made an objection arguing that the decision of the trial court violates the confrontation clause. So the Court of Appeals is correct, this issue was never preserved for review. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Dunbar,* 356 S.C. at 142, 587 S.E.2d at 694 (2003). It is clear in the record the Petitioner's counsel never argued that this was a violation of the confrontation clause. Instead he argued that Detective Bailey did not have the expertise to give testimony regarding the GSR test results. The confrontation clause was only raised by Appellant counsel, never before the trial judge. A party may not argue one ground at trial and an alternate ground on appeal. *State v. Prioleau,* 345 S.C. 404, 548 S.E.2d 213 (2001). In order to request that the Appellant court find that a trial judge ruling was in error, that judge must have had an opportunity to actually make a ruling on that particular issue. An issue neither raised nor ruled upon by trial court will not be considered on appeal. *United Student Aid Funds, Inc. v. South Carolina Dept. of Health and Environmental Control,* 356 S.C. 266, 273, 588 S.E.2d 599, 602 (2003).

The Court of Appeals was correct in finding that this issue was not preserved for appeal. There are numerous cases that this Court ruled upon where an issue cannot be raised for the first

time on appeal. This is not a novel issue and should not be addressed by this Court. This petition should be subject to dismissal.

2. **The Court of Appeals correctly decided that if the issue was preserved the trial judge correctly found that Petitioner opened the door to the testimony, allowing the detective to testify regarding the gunshot residue test results although he himself did not perform the actual test.**

Detective Bailey was asked on cross-examination about the ability to recover GSR from clothing and whether any test was performed on the Petitioner, or co-defendant's clothing. (R. p. 361 lines 12-15). The solicitor then decided to offer re-direct examination. During his re-direct solicitor decided to inquire about the results of the GSR test done on Mr. Green. Petitioner objected arguing that Detective Bailey was never introduced as an expert on gunshot residue test. (R. p. 369 line 22 – p. 370 line 11). The trial court allowed his testimony because he felt Petitioner opened the door due to their questioning of Detective Bailey on cross-examination.

Standard of review

A litigant cannot complain of prejudice by reasons of an issue he has placed before the court. *Frazier v. Badger,* 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004). "Once the defendant opens the door, the solicitor's invited response is appropriate so long as it…does not unfairly prejudice the defendant." *State v. Simmons,* 430 S.C. 1, 14, 841 S.E.2d 845, 852, *quoting, Ellenburg v. State,* 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006).

Analysis

In a footnote within the opinion the Court of Appeals made this determination,

> "Even if the issue were preserved, the trial court did not err in finding Rivers opened the door to the testimony because he asked the witness whether his codefendant was tested for GSR. *See, State v. Page,* 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008)(Whether a person opens to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the

> sound discretion of the trial court.); *State v. Douglas,* 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006)('An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support of are controlled by an error of law.'); *State v. Beam,* 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999)('[A defendant] cannot complain about the admission of evidence where he opened the door to the evidence.'); *State v. Stroman,* 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)('Where one party introduces evidence as to a particular fact or transaction the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.' (alteration in original)(quoting *State v. Albert,* 277 S.E.2d 439, 441 (N.C. 1981))"

Rivers, 2021 WL 5232315, n.1

It was clear by the questioning of the Petitioner's counsel that they opened the door as to any results of the GSR test. The Petitioner questioned Detective Bailey regarding the GSR test done on the co-defendant and victims as well as the clothing of the Petitioner and co-defendant. (R. p. 360 line 25 – p. 361 line 15). So it is only fair for the trial court to allow the Solicitor to question Detective Bailey as to the results since the Petitioner questioned him in such depth regarding the GSR tests. Not allowing the results into evidence would just have left the jury wondering about the results. Where defense counsel purposefully and explicitly opens the door on a particular line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on the same topic. *U.S. v. Lopez-Medina,* 596 F.3d 716, 731 (10th Cir. 2010).

During trial Petitioner argued that Detective Bailey was never introduced as an expert in GSR so he should not be allowed to testify concerning the results of these tests. Petitioner inquired who the test was performed on, how these tests were conducted, and if they were done on the clothing of the co-defendant and Petitioner. Petitioner should not be allowed to introduce that tests were completed, and then claim the results of said test cannot be mentioned. Allowing this evidence was in the sound discretion of the trial judge. When a party opens the door to a topic, the

admission of rebuttal evidence on that topic becomes permissible, however, permissible does not mean mandatory, the decision to admit or exclude rebuttal testimony remains within the trial court's sound discretion. *Tanburg v. Sholtis,* 401 F.3d 1151, 1166 (10th Cir. 2005). The sole reason the trial court allowed the results of the GSR tests into evidence was due to the fact the door was opened by the Petitioner.

The introduction of the fact that GSR was done on the victim and co-defendant was never objected to by the Petitioner. On cross-examination the Petitioner inquired about how the test was done, and whether it was done on the Petitioner himself. That led to the Solicitor rightfully inquiring about the results of the tests on the co-defendant. If the Petitioner had not followed the line of questioning regarding these test the solicitor would not have been allowed to inquire about the results. But since the Petitioner went in-depth regarding these GSR tests the door was opened. The ruling of the Court of Appeals was correct and should not be subject to review.

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the question presented warrants certiorari review. This Court should deny this petition and let stand the decision of the Court of Appeals.

Respectfully submitted,

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