

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Anderson County

S.C. Supreme Court

Alexander S. Macaulay, Circuit Court Judge

JAMES E. KENNEDY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212909

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to grant a belated direct appeal pursuant to White v. State when Petitioner did not knowingly and intelligently waive the right to direct appeal?
2. Did the PCR judge err in dismissing the other claims presented in the post conviction relief application for failure to file within the one year statute of limitations when the delay in filing was due to petitioner's lack of education and limited ability to read and write?
3. Was the guilty plea rendered involuntary by the fact that Petitioner did not understand that the judge was not bound by the sentence recommendation from the State?

STATEMENT OF ISSUE ON APPEAL

Did the judge err in refusing to accept the recommendation of the State for a 30 year sentence?

STATEMENT

In April of 2007, the Anderson County Grand Jury indicted Kennedy for three counts of criminal sexual conduct with a minor second degree, three counts of lewd act upon a minor, one count of criminal sexual conduct with a minor first degree and one count of carnal knowledge of a woman child, indictments #2007-GS-04-1283, 1289, 1290, 1292, 1293, 1295, 1296, 1297. On February 6, 2009, Kennedy appeared before the Honorable J.C. Nicholson, Jr. and pled guilty. Attorney Andrew Potter represented Kennedy at the plea. Attorney Kristen Reeves was present on behalf of the State. On February 9, 2009, Kennedy appeared before Judge Nicholson for sentencing. Attorney Jennifer Johnson represented Kennedy at sentencing. Attorney Kristen Reeves was again present on behalf of the State. Judge Nicholson imposed concurrent 10 year sentences for the lewd act charges and concurrent 20 year sentences for two of the criminal sexual conduct with a minor second degree charges. The judge imposed a 25 year sentence for criminal sexual conduct with a minor first degree and a 20 year sentence¹ for the remaining criminal sexual conduct with a minor second degree, indictment #2007-GS-04-1296, with these two sentences to be served consecutive to one another. Judge Nicholson imposed a 30 year concurrent sentence for carnal knowledge of a woman child. A notice of intent to appeal was not filed.

On April 5, 2011, Kennedy filed an application for post conviction relief. The State filed a return and partial motion to dismiss on October 26, 2011. On June 5, 2012, an evidentiary hearing was held before the Honorable Alexander S. Macaulay. Attorney Hugh Welborn represented Kennedy at the PCR hearing. Attorney Kaelon E. May was present for the State. In a written order filed August 29, 2012, Judge Macaulay denied relief and dismissed the application. A timely notice of intent to appeal was served on September 4, 2012. This petition for writ of certiorari follows.

¹ (App. p. 53). The sentencing sheet, however, reflects a 15 year sentence.

ARGUMENTS

1. The PCR judge erred in refusing to grant a belated direct appeal pursuant to White v. State when petitioner did not knowingly and intelligently waive the right to direct appeal.

During the PCR hearing, Kennedy testified that at the time of his plea he did not understand his appellate rights. (App. pp. 97-99). During the plea Kennedy told the judge that he only had a seventh grade education and had trouble reading and writing. (App. p. 6, lines 1-25). Plea counsel testified at the PCR hearing that the plea judge advised Kennedy of his right to appeal, Kennedy did not ask her to file a notice of intent to appeal and she was unaware of any grounds for an appeal. (App. p. 118, line 9 – p. 119, lines 1-5). In the order of dismissal the PCR judge wrote:

Applicant asserts that counsel was ineffective for failing to file an appeal. This Court does not find the Applicant credible concerning his testimony regarding requesting an appeal be filed and that he did not understand what an appeal was. Applicant's right to appeal was discussed extensively by the plea judge at Applicant's guilty plea hearing. (Tr. p. 20-22). The Applicant has not proven that he instructed plea counsel to appeal from his guilty plea. Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). This Court finds that plea counsel testified credibly that she informed Applicant about his right to appeal and that counsel was not told to file an appeal.

(App. p. 131). The PCR judge erred. The record does not support the PCR judge's finding that counsel informed Kennedy about his appellate rights. Counsel testified that the judge, not counsel, advised Kennedy of his appellate rights. (App. p. 118, lines 9-12).

In Weathers v. State, 319 S.C. 59, 61-62, 459 S.E.2d 838, 839 (1995) the South Carolina Supreme Court wrote:

We now adopt the holding of the majority of courts that, absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. See Laycock v. New Mexico, 880 F.2d 1184 (10th Cir.1989); Marrow v. United States, 772 F.2d 525 (9th Cir.1985); Davis v. Wainwright, 462 F.2d 1354 (5th Cir.1972); Carey v. Leverette, 605 F.2d 745 (4th Cir.), *cert. denied*, 444 U.S.

983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979); Farrington v. North Carolina, 391 F.Supp. 714 (M.D.N.C.1975); Younger v. Cox, 323 F.Supp. 412 (W.D.Va.1971). The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal. Younger v. Cox, *supra*. One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal. Laycock v. New Mexico, *supra*; Marrow v. United States, *supra*.

Plea counsel should have explained the right to appeal to Kennedy. Kennedy had a seventh grade education and had trouble reading and writing. The record of both the plea hearing, and the PCR hearing, reflect that Kennedy had difficulty understanding the judicial process. Counsel admitted during the PCR hearing that Kennedy had difficulty understanding concepts involved with the legal proceedings. (App. p. 120, line 1 – p. 121, lines 1-12). Kennedy's lack of education and difficulty understanding concepts constitute an extraordinary circumstance requiring counsel to fully explain the right to appeal. Under the circumstances of the case, the plea judge's explanation of appellate rights was not sufficient. Counsel was ineffective in failing to fully advise Kennedy of his appellate rights.

Because extraordinary circumstances existed that required counsel to make certain that Kennedy was made fully aware of the right to appeal, the analysis should be the same as the analysis used after conviction at trial. In Clark v. State, 396 S.C. 164, 168-169, 719 S.E.2d 708, 710 (Ct.App. 2011) the South Carolina Court of Appeals wrote:

“Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal.” 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (emphasis added). Absent an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *Id.* “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Simuel, 390 S.C.

at 271, 701 S.E.2d at 739–40 (quoting Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

Counsel was ineffective in failing to make Kennedy fully aware of his right to appeal. As a result, Kennedy did not knowingly and intelligently waive his right to direct appeal. The PCR judge erred in refusing to grant a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

2. The PCR judge erred in dismissing the other claims presented in the post conviction relief application for failure to file within the one year statute of limitations when the delay in filing was due to petitioner’s lack of education and limited ability to read and write.

Petitioner filed his application for post conviction relief outside of the one year statute of limitations provided by S.C. Code §17-27-45. The State moved to dismiss all claims except for the belated appeal claim as being filed outside of the statute of limitations. (App. pp. 86-89; p. 93, lines 7-12). The judge reserved judgment on the motion to dismiss and heard testimony. (App. p. 94, lines 11-19). At the close of the evidentiary hearing, counsel for Petitioner argued that the State’s motion to dismiss should be denied due to Petitioner’s “limited intellectual abilities in being able to file this timely . . .” (App. p. 122, lines 6-9). In the order of dismissal the PCR judge wrote, “This Court grants Respondent’s motion to dismiss Applicant’s claims, excluding Applicant’s claim of a belated appeal, for failure to comply with the filing procedures of the Uniform Post-Conviction Relief Act.” (App. p. 131). The PCR judge erred.

In Ferguson v. State, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009), the South Carolina Supreme Court wrote:

Although we have not specifically addressed tolling the statute of limitations in the context of mentally incompetent PCR applicants, case law warrants a holding that, in circumstances in which an applicant demonstrates the failure to timely file for PCR was due

to mental incompetency, the statute should be tolled. (footnotes omitted).

Pursuant to the reasoning in Ferguson, Kennedy's application for post conviction relief should not be dismissed for failure to comply with the one year statute of limitations. As discussed above, Kennedy had a seventh grade education, had difficulty reading, writing and understanding concepts. Kennedy was denied the right to direct appeal, a procedural stage in which an appellate lawyer could have advised about timely filing the post conviction relief application. Kennedy was not given one bite at the PCR apple due to his lack of education and low intellectual functioning. The case should be remanded for a ruling on the merits of Kennedy's post conviction relief claims.

3. The guilty plea was rendered involuntary by the fact that Petitioner did not understand that the judge was not bound by the sentence recommendation from the State.

Petitioner did not understand that the judge was not bound by the sentence recommended by the State. During the sentencing hearing the judge stated, "As I explained to him on Friday - - I understand Mr. Potter was here and you were not. As I explained to him Friday, a recommendation is a recommendation. The Court can accept it or reject it." (App. p. 44, lines 21-24). During the guilty plea, Kennedy told the judge he did not understand the term recommendation. (App. p. 25, lines 19-21). The judge told Kennedy, "All right. Recommendation, let me see if I can explain it to you this way. Monday morning the State is going to stand up and say, Judge, I want you to give this man 30 years. I want you to give this man 20 years. They are going to tell me what they want me to do. Do you understand?" (App. p. 26, lines 3-8). Kennedy responded, "Oh, Okay." Kennedy then said he understood what a recommendation is. (App. p. 26, lines 9-12). The judge then said, "Now they have promised that they are going to tell me that, to your attorney and to you. All right.

Other than that promise has anybody promised you anything?" (App. p. 26, lines 13-16). In explaining a recommendation the judge did not clearly inform Kennedy that the judge was free to accept or reject the sentence recommendation by the State. Additionally, based on this exchange, it is difficult to determine what sentence the State was recommending.

During the PCR hearing plea counsel testified that she explained the recommendation to Kennedy. When asked, "And he understood that he wasn't necessarily going to get what the recommendation was?" counsel replied, "I believe so." The record does not support that Kennedy understood the meaning of a sentence recommendation.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

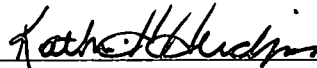
Counsel was ineffective in failing to fully explain that the judge was not bound by the sentencing recommendation made by the State. The guilty plea was rendered involuntary by the

fact that Kennedy did not understand the nature of a recommended sentence. There is a reasonable probability that if Kennedy knew he could receive a consecutive sentence in excess of 30 years, he would not have pled guilty and would have insisted on going to trial.

CONCLUSION

Based on arguments two and three, Kennedy's conviction and sentence should be reversed and the case remanded for new trial. Alternatively, based on argument one, the Court should grant a belated appeal.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
ALEXANDER S. MACAULAY, CIRCUIT COURT JUDGE

JAMES E. KENNEDY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2012-212909

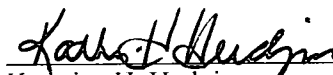
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James E. Kennedy states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 5, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for James E. Kennedy.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 21st day of May, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

JAMES E. KENNEDY,

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RESPONDENT

APPELLATE CASE NO. 2012-212909

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon James E. Kennedy, # 185195 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899 this 21st day of May, 2013.

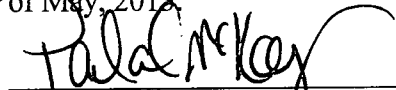


Kathrine H. Hudgins

Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of May, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.