

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Orangeburg County

S.C. Supreme Court

DeAndrea G. Benjamin, Circuit Court Judge

LEVON MINTZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212935

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Petitioner's second PCR attorney erred in raising a frivolous claim of ineffective assistance of PCR appellate counsel as the only issue put forth at petitioner's second PCR hearing because an Anders¹ belated White v. State² direct appeal brief was filed on appeal in the case.

¹ Anders v. California, 386 U.S. 738 (1967).

² White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974).

STATEMENT

Petitioner Levon Mintz was convicted of murder per trial by jury held during the April 2005 term of the Orangeburg County General Sessions Court before Judge James C. Williams. Petitioner was sentenced to imprisonment for a period of fifty years. App. 1-338. Glenn Walters represented petitioner at trial. App. 1-338. Petitioner did not enjoy the benefit of a direct appeal of his trial court conviction or sentence.

On September 30, 2005, petitioner filed a PCR application with the Orangeburg County Office of the Clerk of Court. App. 339-364. The respondent filed a return dated May 17, 2006, requesting that a hearing be held in response to petitioner's PCR application filed in the case. App. 365-370.

A PCR hearing was convened on August 6, 2008, at the Orangeburg County Courthouse before Judge Perry M. Buckner. App. 371-447. Petitioner was present at the PCR hearing and represented by Robert E. Hood. On September 3, 2008, Judge Buckner issued an order that denied petitioner's allegations of ineffective assistance of trial counsel in the case, but granted petitioner's request for a belated direct appeal. App. 448-457. On September 24, 2008, petitioner filed a Rule 59 (e), SCRCF, motion in the case. App. 461-462. On October 6, 2008, Judge Buckner issued an order dismissing petitioner's Rule 59 (e), SCRCF, motion filed in the case. App. 463

Petitioner's appeal of his first PCR action resulted in the filing of a Petition for a Writ of Certiorari and an Anders belated White v. State direct appeal brief in the appellate court. App. 465-482. Katherine H. Hudgins represented petitioner on his PCR appeal. Ultimately, petitioner's belated direct appeal that arose from his PCR appeal was dismissed. See Supp. App. pages 1-2.

On November 4, 2010, petitioner filed a second PCR application with the Orangeburg County Office of the Clerk of Court. Supp. App. 3-20. Petitioner's chief allegation raised was

ineffective assistance of PCR appellate counsel in the handling of his belated direct appeal brief. The respondent filed a return and motion to dismiss on May 17, 2011, alleging that petitioner's second PCR action was successive and untimely filed. Supp. App. 21-25.

Nonetheless, a second PCR hearing was held in the case on May 21, 2012, at the Orangeburg County Courthouse before Judge Deandrea G. Benjamin. App. 483-530. Petitioner was present at the second PCR hearing and represented by Jeremy Thompson. On July 24, 2012, Judge Benjamin issued an order denying relief on petitioner's second PCR action. App. 531-537.

Petitioner appealed Judge Benjamin's order of dismissal in the case. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's second PCR attorney erred in raising a frivolous claim of ineffective assistance of PCR appellate counsel as the only issue put forth at the second PCR hearing because an Anders³ belated White v. State⁴ direct appeal brief was filed by PCR appellate counsel on appeal in the case.

At trial, Richard Terrell testified that on the night of December 8, 2002, he stopped by the Pub night club in Orangeburg County to party. Terrell stated that he saw Alfredo Lewis at the club on that night. Terrell added that at some point on that night, Andre and Guinyard were arguing in the bathroom of the club and Andre pointed at Alfredo Lewis, who was also in the bathroom then Terrell went on to explain that he and Lewis left the club later on and that he (Terrell) was driving Lewis' car. Before they could leave, Andre approached and started arguing with Lewis who, had already made exited from the car. Terrell stated that petitioner then appeared armed with a pistol, and that petitioner shot Lewis twice. Lewis died shortly thereafter. App. 79, l. 1 – p. 94, l. 7.

³ Anders v. California, 386 U.S. 738 (1967).

⁴ White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974).

During the second PCR hearing held in this case, petitioner's second PCR attorney argued that petitioner's PCR appellate attorney, who was assigned to petitioner's case after he appealed his first PCR action, rendered ineffective assistance of appellate counsel because an Anders belated White v. State brief was filed on appeal. App. 465 – 482.

PCR appellate counsel testified at the second PCR hearing and explained in effect that she filed an Anders brief in the belated White v. State direct appeal because there were no meritorious appellate issues to appeal in the case. App. 495, line 7- p. 496, line 18. PCR appellate counsel stated that she briefed the question of whether the trial judge erred in failing to charge the jury on the law of voluntary manslaughter in the belated direct appeal brief, and added further that she couched this issue in the form of an Anders brief believing that the issue was not preserved for appellate review since trial counsel did not renew his request for a voluntary manslaughter charge at trial. Counsel admitted that she learned subsequently that counsel was not required to have renewed the request for a voluntary manslaughter charge at trial, and that had she known this prior to filing the brief, then she would have filed a merit (non-Anders) direct appeal brief on appeal. App. 496, line 19-p. 497, line 25. Furthermore, counsel admitted that she did not present in her appellate brief the question of whether the solicitor erred in commenting on petitioner's right to remain silent during his closing argument. App. 449, lines 6-25.

Petitioner testified at the second PCR hearing and stated that he filed a pro se brief in the case arguing error in the solicitor's closing remarks about his right to remain silent. App. 509, lines 4-22. Regarding his allegation against PCR appellate counsel, petitioner added the following:

Mr. Thompson: and you understand that under South Carolina you can't. Our Supreme Court held that you cannot raise ineffective assistance of PCR counsel.

Defendant: Yes, sir.

Mr. Thompson: That's your understanding?

Defendant: Yes, sir. App. 515, lines 9-14.

If a client requests an appeal, appellate counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). In Anders v. California, supra, the United States Supreme Court held that if a state appellate attorney finds the defendant's appeal to be without merit, then counsel should advise the appellate court of this fact, request permission to withdraw, supply a brief (Anders brief) on an issue that might arguably support an appeal, call on the defendant to raise any points he so chooses, and await the appellate court's agreement that the appeal is meritless and accept permission by the court to withdraw from the case. Note that per the Anders procedure, the appellate court would review the entire record of the defendant's case independently and either grant counsel's motion to withdraw because the case lacks merit, or direct a merit appeal to be filed by an attorney on an issue of merit if an issue of merit is found in the appeal. See Anders v. California, 386 U.S. at 741.

In the case at bar, PCR appellate counsel filed an Anders belated direct appeal brief pursuant to White v. State on petitioner's behalf. In response, the appellate court conducted its own independent appellate review and concurred that there was no merit to petitioner's appeal, and ultimately dismissed the belated direct appeal. Surely, petitioner's second PCR counsel was aware of the fact that an Anders brief was filed and the appellate court's dismissal of the appeal that followed, which in turn meant there was no ineffective assistance of PCR appellate counsel rendered in the case. See Jones v. Barnes, 463 U.S. 745 (1983) and Evitts v. Lucy, 469 U.S. 387 (1985). The claim that PCR appellate counsel's assistance was deficient was a frivolous claim, which meant that petitioner's second PCR attorney rendered ineffective assistance of counsel at petitioner's second PCR hearing by raising said frivolous claim. Although the only recognized exception to the rule barring a claim of ineffective assistance of post-conviction relief counsel is when PCR counsel fails to appeal a PCR order dismissing the case, (See Austin v. State, 305 S.C.

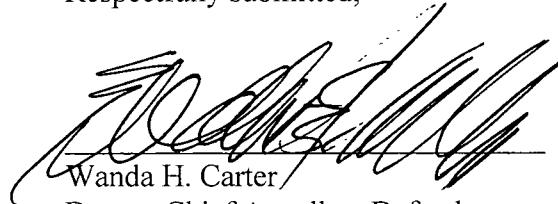
453, 409 S.E.2d 395 (1991)); nonetheless, such a claim of ineffective assistance of PCR counsel may be viable per Martinez v. Ryan, ___ U.S. ___, 132 S. Ct. 1309 (2012). In Martinez, the United States Supreme Court held that a procedural default will not bar a federal habeas corpus court from hearing a substantial claim of ineffective assistance of trial counsel if the collateral attorney was ineffective in raising that issue at the initial collateral proceeding.

Here, the PCR attorney erred in allowing the frivolous claim in question to go forth rather than advancing meritorious collateral allegations since petitioner was fortunate enough to get a second “bite of the apple.”⁵ Petitioner’s second PCR attorney erred in raising the issue of ineffective assistance of PCR appellate counsel based on the filing of an Anders belated White v. State direct appeal brief in the case because such a claim was wholly frivolous.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of June, 2013.

⁵ Gamble v. State, 298 S.C. 176, 379 S.E. 2d 118 (1989).

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
DEANDREA G. BENJAMIN, CIRCUIT COURT JUDGE

LEVON MINTZ,

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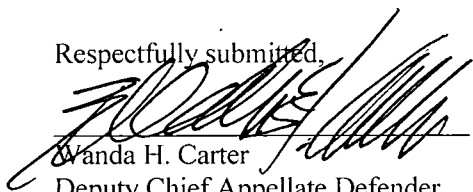
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Levon Mintz states:

1. She is Deputy Chief 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 May 21, 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 Levon Mintz.

Respectfully submitted,


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of June, 2013

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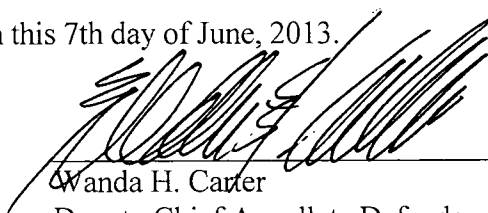
V.

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Levon Mintz, #303362, at Lieber Correctional Institution this 7th day of June, 2013.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of June, 2013.


Notary Public for South Carolina

My Commission Expires: November 16, 2022.