

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Robert J. Bonds, Circuit Court Judge

TAMMY G. HARRIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001096

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUES PRESENTED

I. Whether the PCR court erred in denying relief where Petitioner's guilty plea was induced by plea counsel, who Petitioner believed was not prepared to go to trial, and where Petitioner felt forced to avoid a higher potential sentence by pleading guilty?

II. Whether the PCR court erred in denying Petitioner a belated appeal pursuant to White v. State where the evidence showed Petitioner, through her husband, spoke with counsel about a direct appeal?

STATEMENT

On September 3, 2015, a Dorchester County grand jury indicted Petitioner for felony driving under the influence resulting in death. App. 223. Represented by David Aylor, she pled guilty before the Honorable Diane Goodstein on March 14, 2017. App. 48. Warren Giese appeared on behalf of the state.

The facts as alleged by the state were that Petitioner drove her vehicle into another on April 22, 2015 in Summerville. App. 68 l. 17 – App. 69 l. 24. A breathalyzer test reflected a .14 BAC. Id. She was determined to be the at-fault driver. Id. Tragically, the victim passed away as a result of injuries sustained from the accident. Id.

Judge Goodstein found a factual basis existed for the plea. App. 73 ll. 24 – 25. She concluded that the plea was entered into freely, voluntarily, knowingly, and voluntarily. App. 73 l. 25 – App. 74 l. 4. As a result, she accepted the plea. Id. Petitioner was sentenced to twelve years' incarceration. App. 105 ll. 11 – 18.

On February 23, 2018, Petitioner filed an application for post-conviction relief. App. 107. It contained allegations of ineffective assistance of counsel and involuntary guilty plea. App. 109. The state made its return on May 30, 2018. App. 120. Through counsel, an amendment was filed on February 24, 2020. App. 114. A second amendment was filed on August 27, 2021. App. 117.

An evidentiary hearing occurred on May 17, 2022 before the Honorable Robert Bonds. App. 128. Tommy Thomas represented Petitioner, and Samantha Weidauer appeared on behalf of the state. Petitioner and Counsel Aylor testified at the hearing.

At the conclusion of the hearing, Judge Bonds denied relief. App. 219 ll. 10 – 12. An Order of Dismissal was signed on July 29, 2022. App. 223. This petition follows.

ARGUMENT

I. The PCR court erred in denying relief where Petitioner's guilty plea was induced by plea counsel, who Petitioner believed was not prepared to go to trial, and where Petitioner felt forced to avoid a higher potential sentence by pleading guilty.

Relevant facts

Petitioner retained counsel approximately fourteen months after the accident that gave rise to her arrest. App. 136 ll. 7 – 11. She hired him for the sole purpose of going to trial. App. 136 ll. 23 – 25. For reasons unknown, he failed to communicate to Petitioner about her case. App. 137 ll. 1 – 6. They never reviewed the discovery in her case together. App. 139 ll. 5 – 10. Petitioner testified that counsel never visited the scene of the accident. App. 141 ll. 22 – 25.

When Petitioner arrived at court in March 2017, she was unaware that it was for a guilty plea. App. 143 ll. 8 – 23; App. 146 l. 16 – App. 147 l. 10. She was unprepared for the plea colloquy. App. 118 ll. 19 – 25. As a result, she answered the questions in a way that would allow the plea to continue. App. 152 ll. 6 – 13. Counsel informed her that if she did not take the plea, her sentencing exposure was likely increased by ten years. App. 149 ll. 1 – 9.

An affidavit signed by Petitioner was made an exhibit at the PCR hearing. App. 221 – 222. Petitioner testified at the evidentiary hearing that she signed it without reading it, based on her trust of counsel. App. 149 ll. 10 – 22.

All of the above resulted in a plea that was neither freely nor voluntarily made, testified Petitioner. App. 153 ll. 23 – 25. At that point, Petitioner no longer had any confidence in counsel. App. 154 ll. 1 – 6. Notably, she testified that she only pled because she was scared. Id. She did not feel as if she had a choice:

I hired him to go to trial, and I feel like I was tricked into giving him a lot of money to go to trial, and he didn't do what he was supposed to do, and then he took the money and basically ran. He didn't do his end of the deal. And I feel like I did my part, and he didn't do his part.

App. 155 ll. 9 – 14.

She later reiterated that she felt like she was abandoned. App. 174 ll. 22 – 23. The PCR court found her testimony non-credible and ruled that counsel was effective. App. 224 ll. 2 – 3.

The Order of Dismissal contained a conclusion that “[Petitioner’s] testimony at the evidentiary hearing [was] not credible and wholly self-serving. App. 215. The PCR court denied relief as to this issue:

This Court finds the plea transcript reflects Applicant understood the proceedings, interacted intelligently with the plea court, and entered his [sic] guilty plea knowingly and voluntarily.

...

Based on the foregoing, the record contradicts Applicant’s assertion her plea was involuntary as a result of ineffective assistance of counsel. Thus, based on the evidence presented at the PCR hearing and the record of the plea proceeding, this Court finds Applicant’s plea was freely, knowingly, and voluntarily entered into. According, Applicant’s request for relief by way of this allegation is denied.

App. 249 – 250.

Discussion

“An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.” Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). “To establish deficient performance, a petitioner must demonstrate that counsel's representation ‘fell below an objective standard of reasonableness.’” Id. (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). “[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different.” Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts “reweigh the evidence in aggravation against the totality of available mitigating evidence.” Id. Prejudice is established where “there is a reasonable probability that at least one juror would have struck a different balance.” Id. at 537, 123 S.Ct. 2527 (citation omitted). A “reasonable probability” is less than a preponderance of the evidence but still “a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 208-09 (1985). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, supra. However, the appellate court will not uphold the findings of the PCR court if there is no probative evidence to support those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

Petitioner did not feel comfortable going to trial with counsel, especially considering the sentencing range she was facing. As a result, she felt coerced to plead guilty. The resulting plea was involuntarily made, and this Court should reverse.

II. The PCR court erred in denying Petitioner a belated appeal pursuant to White v. State where the evidence showed Petitioner, through her husband, spoke with counsel about a direct appeal.

Relevant facts

Petitioner admitted she never spoke with counsel about a direct appeal. App. 154 ll. 7 – 20. However, her husband, Craig, called counsel and asked about an appeal. Id. Craig did not testify at the PCR evidentiary hearing.¹

Interestingly, counsel confirmed Petitioner’s testimony. App. 209 ll. 14 – 20. According to counsel, Petitioner never contacted him about an appeal, *but her husband did.* Id.

The PCR court denied relief as to this issue. The Order of Dismissal contained the following finding:

At the evidentiary hearing, Counsel credibly testified Applicant had not requested he file an appeal. Counsel testified Applicant had requested a copy of her defense file. However, Counsel specifically testified Applicant did not contact him regarding an appeal. Additionally, even if Counsel did not inform Applicant of the right to appeal, Applicant has failed to show that there was an appealable basis in this case or that extraordinary circumstances warranting an appeal existed. Thus, this Court finds Applicant is not entitled to relief on this basis and this allegation is denied.

App. 245.

Discussion

This petition has been prepared in accordance with the South Carolina Appellate Court Rules. According to Rule 243(i)(2), SCACR:

When the post-conviction relief judge has found that the applicant is not entitled to a White v. State review, the petition shall raise the question of waiver of the

¹ According to PCR counsel, Craig was “noticed” to be at the evidentiary hearing, suggesting he was sent a subpoena. However, he never testified. App. 146 ll. 21 – 23.

right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a White v. State review is granted; this statement of issues shall comply with the requirements of Rule 208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [Anders]." Id. (quoting Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). Following a guilty plea, when there is reason to think a defendant would want to appeal or when the defendant reasonably demonstrated an interest in appealing, there is a constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995).

"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). In White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) this Court held that a defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. Since then, this Court has announced two distinct standards for evaluating ineffective assistance of counsel claims for failure to file an appeal. For convictions following a trial this Court has held that "[i]n the absence of 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 (1967).” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). For guilty pleas, this Court has held 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.” Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

“The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief.” Weathers, 319 S.C. at 61, 459 S.E.2d at 839. In Turner v. State, 380 S.C. 223, 224; 670 S.E.2d 373, 374 (2008) this Court clarified that the standards articulated in Roe v. Flores-Ortega, *supra*, were examples of extraordinary circumstances that triggered counsel’s duty to consult with a defendant about his direct appeal rights. In Roe v. Flores-Ortega, *supra*, the United States Supreme Court defined “consult” to mean that counsel advised “the defendant about the advantages and disadvantages of taking an appeal” and made a “reasonable effort to discover the defendant’s wishes.” The Court noted that if counsel had not consulted with the defendant at all then “the court must ask whether that failure itself constitutes deficient performance.” Roe v. Flores-Ortega, 528 U.S. at 471.

In Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010), this Court found the PCR court erred in denying Simuel a belated appeal following his trial. At the PCR hearing counsel testified that he “normally discusses an appeal with defendants after trials but was not sure whether he did so with Petitioner.” Id. at 270, 701 S.E.2d at 739. He further testified that Simuel never asked him to file an appeal. Id. at 269, 701 S.E.2d at 739. Much like the matter at hand, the PCR court found counsel’s testimony credible and Simuel’s testimony not credible. The court found that based on the testimony of counsel, Simuel was not entitled to a belated appeal because he did not request counsel file an appeal on his behalf. Id. This Court reversed

the decision of the PCR court and granted Simuel a belated appeal. Id. Footnote 1 reiterated the above dichotomy regarding an attorney's obligations following a plea versus a trial. Id.

Through her husband, Petitioner demonstrated an interest in appealing. Furthermore, extraordinary circumstances should have caused plea counsel to file a notice of appeal. Although there were no objections or motions at the plea, counsel should have filed a notice of appeal to preserve any issues his client wished to raise on direct appeal. The PCR judge erred, because Petitioner evidenced an interest in appealing and because extraordinary circumstances were present such that counsel should have known to file a notice of appeal.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing on the issues raised herein.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of January, 2023.

STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in accepting a copy of the officer's dashcam video, where the best evidence rule should have been applied to prevent use of a copy?

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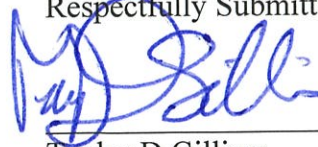
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tammy G. Harris states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Robert J. Bonds, which was held on May 17, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Tammy G. Harris.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of January, 2023.

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Jan 25 2023

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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This 25th day of January, 2023.