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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

RANDY ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001150

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to grant a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), when Petitioner reasonably demonstrated to counsel that he was interested in appealing?

STATEMENT

In September of 2014, the Horry County Grand Jury indicted Petitioner, Randy Gale Robinson, for murder and obstruction of justice, indictments #2014-GS-26-3752, 3751. (App. pp. 82-85). On November 8, 2016, Petitioner appeared before the Honorable Steven H. John and pled guilty to voluntary manslaughter and obstruction of justice. L. Morgan Martin and Rosemary Parham represented Petitioner at the plea. The local Solicitor's office was recused and Solicitor Kevin S. Brackett prosecuted the case. (App. p. 4, line 25). Judge John accepted the guilty plea and sentencing was deferred to a later date.

On November 14, 2016, Petitioner again appeared before Judge John for sentencing. L. Morgan Martin and Rosemary Parham again represented Petitioner. Solicitor Kevin S. Brackett and Walter William Thompson, Sr. represented the State. Pursuant to negotiations with the State for a sentencing range of between twenty-five (25) and forty (40) years, Judge John sentenced Petitioner to thirty (30) years for voluntary manslaughter and ten (10) years consecutive for obstruction of justice, resulting in a forty (40) year sentence, the maximum sentence that could be imposed. (App. pp. 86-87).

On June 1, 2020, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 88-94). The State filed a return and partial motion to dismiss On March 4, 2021. (App. pp. 95-101). On May 31, 2022, an evidentiary hearing was held before the Honorable H. Steven DeBerry, IV. Tommy A. Thomas represented Petitioner at the PCR hearing. Chelsey F. Marto represented the State. In a written order filed August 10, 2022, Judge DeBerry denied relief and dismissed the application. (App. pp. 126-133). A timely notice of intent o appeal was served on August 15, 2022. This petition for writ of certiorari follows.

STATEMENT OF ISSUE ON APPEAL

Did the plea judge abuse his discretion in imposing the maximum consecutive sentence following the guilty plea?

ARGUMENT

The PCR judge erred in refusing to grant a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), when Petitioner reasonably demonstrated to counsel that he was interested in appealing.

Petitioner pled guilty to voluntary manslaughter and obstruction of justice and received a forty (40) year sentence, a maximum consecutive sentence. During the PCR hearing Petitioner testified that he assumed his lawyers would file the notice of intent to appeal. Petitioner testified that, "I spoke to Mr. Martin [one of Petitioner's lawyers] after the trial [sentencing] when we went into the little room here. I was actually under the assumption that I would be hearing from them. In fact, I think Ms. Parham [another of Petitioner's lawyers] had told me, you know, we'll see you soon. I said well – I just kind of left it at that." (App. p. 11, lines 14-18). When asked if Petitioner assumed his lawyers would file the notice of intent to appeal, Petitioner testified, "I said I want say assume because I thought that we would try to get something better." (App. p. 113, lines 5-6).

Plea counsel Martin did not recall any discussion about appealing the sentence but testified at the PCR hearing, "I do believe that had Randy directed me to appeal the sentence, even though I'm not sure what that would have accomplished, I would have done it." (App. p. 117, lines 18-22). Counsel Martin admitted they were hoping to receive a better sentence. (App. p. 117, lines 17-18). Counsel Parham also did not recall Petitioner specifically asking counsel to file an appeal. (App. p. 121, lines 7-9). Counsel Parham admitted that she was disappointed that Petitioner received a forty (40) year sentence and wanted to do anything they could to help. (App. p. 121, lines 20-21). The failure to file a motion to reconsider sentence was not discussed at the PCR hearing.

Petitioner reasonably demonstrated to counsel following sentencing to the maximum consecutive sentence that he was interested in appealing. Counsel was ineffective in failing to file a notice of intent to 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).

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)).

In Jones v. State, 382 S.C. 589, 596, 677 S.E.2d 20, 23–24 (2009), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the South Carolina Supreme Court wrote:

> "[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 (for example, because there are nonfrivolous grounds for 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, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).
>
> Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). "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." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). However, "[t]he bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Id. "Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal." Id.

Extraordinary circumstances exist in the present case such that counsel should have advised Petitioner of the right to appeal. Although the judge advised Petitioner of the right to appeal at the time of the plea (App. p. 24, lines 4-6), sentencing took place later. At the later sentencing Petitioner received the maximum consecutive sentence. Petitioner reasonably demonstrated to counsel, following sentencing to the maximum consecutive sentence, that he was interested in appealing. Counsel was ineffective in failing to file a notice of intent to 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).

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of March, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Randy Gale Robinson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge H. Steven DeBerry IV, which was held on May 31, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Randy Gale Robinson.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of March, 2023.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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