

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Apr 28 2023

S.C. SUPREME COURT

Certiorari to Williamsburg County

Honorable Diane Schafer Goodstein, Circuit Court Judge

ROY MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000629

JOHNSON PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err in denying petitioner a belated appeal pursuant to White v. State,
263 S.C. 110, 208 S.E.2d 35 (1974)?

STATEMENT

On February 22, 2018, a Williamsburg County grand jury indicted petitioner for second-degree burglary and attempted second-degree burglary. App. 168. On February 26, 2018, petitioner was tried before the Honorable R. Ferrell Cothran, Jr. and a jury. App. 1. Warren S. Anderson represented the State and Charles D. Barr represented petitioner. App. 1. The jury convicted petitioner. App. 108, l. 14 – 21. Judge Cothran sentenced petitioner to concurrent seven-year terms of imprisonment on both charges. R. 118, l. 3 – 11. No appeal was filed.

Petitioner filed a PCR application and on November 17, 2021, a hearing was held before the Honorable Diane S. Goodstein. App. 139. James K. Falk represented petitioner and Michael J. Neubauer represented the State. App. 139. On February 10, 2022, Judge Goodstein denied relief. App. 154. This petition follows.

STANDARD REVIEW

The appellate court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

ARGUMENT

The PCR Court erred in denying petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Petitioner unequivocally testified that he wanted an appeal. App. 148, l. 14 – 149, l. 6. He did not want trial counsel to handle the appeal. App. 148, l. 14 – 149, l. 6. Petitioner was unsure of how trial counsel came to represent him in the first place. App. 147, l. 17 – 21. He hired trial counsel to represent him on another case. App. 147, l. 17 – 21. Out of the blue, petitioner got a call from trial counsel telling him to come to court. App. 147, l. 17 – 21. The next day, petitioner was tried. App. 147, l. 22 – 148, l. 13.

After petitioner was convicted, trial counsel asked petitioner if he wanted him to file an appeal. App. 148, l. 18 – 22. Petitioner told him he never hired him to represent him at all on this case. App. 148, l. 14 – 23. “And he kept asking me about an appeal and I kept telling him I never hired him to represent me on the case.” App. 148, l. 14 – 23.

On cross-examination, petitioner agreed with the Attorney General that he did not tell trial counsel he wanted him to file an appeal. App. 150, l. 21 – 23. On re-direct, petitioner said, “I wanted an appeal, but I didn’t want [trial counsel] to represent me on the case on the appeal. . . .” App. 151, l. 3 – 7. The Attorney General asked one last question: “So you were specifically asked whether or not you wanted [trial counsel] to file a notice of appeal and you told him no, I do not want you to file a notice of appeal for me?” App. 151, l. 12 – 14. Petitioner replied, “Yes, sir.” App. 151, l. 15.

Trial counsel testified petitioner retained him on this case. App. 143, l. 18 – 20. Trial counsel had no specific memory of discussing petitioner’s right to appeal, but said that such

discussions were his routine practice. App. 141, l. 9 – 15. He also said that he did not encourage defendants who lose at trial to file appeals. App. 142, l. 17 – 25.

The PCR court denied petitioner's request for a belated appeal. App. 158-61. The judge erroneously seized on petitioner's response to the Attorney General's final question about telling trial counsel not to file a notice of appeal. App. 160. Despite petitioner's clear insistence that he wanted an appeal, the court denied relief based on a layman's response to a technical question. App. 160.

The PCR court erred in denying petitioner a belated appeal. See White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "Any party aggrieved may appeal. . . ." S.C. Code Ann. § 18-1-30. "Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b), SCACR. "Appeal may be taken, as provided by law, from any final judgment, appealable order or decision." Rule 201(a), SCACR. "After a plea or trial resulting in conviction . . . a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed." Rule 203(b)(2), SCACR.

"Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "In 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)." Id. (internal quotations and citations omitted). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (citation omitted).

"A defendant has the procedural right to one fair bite at the apple." Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002). "That is, every defendant has a right to file a direct

appeal and one PCR application.” Id. In Wilson, the PCR applicant filed his application almost two years after his conviction. Id. at 216-17, 559 S.E.2d at 582. The PCR court granted the State’s motion to dismiss based on the statute of limitations. Id. Wilson’s lawyer failed to file an appeal and viewing the evidence in the light most favorable to Wilson, the Court found that he “did not voluntarily waive his direct appeal.” Id. The Court then concluded that the PCR statute of limitations did not apply because Wilson did not have his direct appeal. Id.

Filing the notice of appeal is a ministerial act and trial lawyers should file the notice to protect the rights of their clients. Trial counsel said all he had to do to file a notice of appeal was to “just push a button.” App. 144, l. 4 – 5. Because criminal defendants only have ten days to file a notice of appeal, trial counsel needed to “push the button” to ensure petitioner got his “one bite at the apple. The PCR court erred by not considering this important point. When the record as a whole is examined, nothing except petitioner’s response to the Attorney General’s technical question supports a finding that petitioner knowingly and voluntarily waived his right to appeal. This Court should grant certiorari and allow petitioner a belated appeal.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and allow petitioner a belated appeal.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2023.

STATEMENT OF ISSUES ON APPEAL

1.

Did the trial court err in refusing to grant a directed verdict on the attempted burglary charge where the State improperly charged appellant with two counts arising from a single attempt to burgle two sheds located on the same piece of property?

2.

Did the trial court err in denying appellant's motion under Rule 403, SCRE, to exclude evidence of petitioner's prior burglaries where it was uncontested that the crimes happened at night and the State did not need the prejudicial character evidence to prove guilt?

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roy Moore 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 Diane Schafer Goodstein, which was held on November 17, 2021, 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 Roy Moore.

Respectfully Submitted,

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2023.

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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 28th day of April, 2023.