

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO KERSHAW COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2005-CP-45-0429
Appellate Case No. 2010-155115

Sandra Richardson,Respondent,

v.

State of South Carolina,Petitioner.

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

DANIEL GOURLEY
SC Bar # 100934
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

RECEIVED

JUL 05 2013

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT

 I. No probative evidence exists to support the PCR court’s finding that Appellate counsel was ineffective where Respondent never testified that she relied on Appellate counsel’s advice when withdrawing her appeal and Respondent desired to withdraw her appeal.....4

 II. Respondent knowingly, intelligently, and voluntarily withdrew her appeal, thereby waiving her right to appeal.....7

 III. The proper remedy for an applicant claiming to have been deprived of appellate review because of ineffective assistance of counsel is an appeal pursuant to White v. State review.....8

CONCLUSION.....9

TABLE OF AUTHORITIES

Cases:

<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985)	3
<u>Cherry v. State</u> , 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)	3
<u>Clinkscales v. North Carolina Mut. Life Ins. Co.</u> , 201 S.C. 375, 23 S.E.2d 1, 3 (1942).....	8
<u>Davis v. State</u> , 288 S.C. 290, S.E.2d 60 (1986)	7
<u>Ezell v. State</u> , 345 S.C. 312, 548 S.E.2d 852 (2001).....	8
<u>Holland v. State</u> , 322 S.C. 111, 470 S.E.2d 378 (1996).....	8
<u>Poston v. State</u> , 339 S.C. 37, 528 S.E.2d 422 (2000).....	7
<u>Regions Bank v. Smauch</u> , 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)	8
<u>State v. Jacobs</u> , 393 S.C. 584, 713 S.E.2d 621 (2011).....	6,7,8
<u>State v. Thomas</u> , 372 S.C. 466, 642 S.E.2d 724 (2007)	6
<u>White v. State</u> , 263 S.C. 110, 208 S.E.2d 35 (1974).....	7,8

STATEMENT OF ISSUES ON APPEAL

- I. No probative evidence exists to support the PCR court's finding that Appellate counsel was ineffective where Respondent never testified that she relied on Appellate counsel's advice when withdrawing her appeal and Respondent desired to withdraw her appeal.
- II. Respondent knowingly, intelligently, and voluntarily withdrew her appeal, thereby waiving her right to appeal.
- III. The proper remedy for an applicant claiming to have been deprived of appellate review because of ineffective assistance of counsel is an appeal pursuant to White v. State review.

STATEMENT OF THE CASE

On May 5, 2005 Respondent pled guilty to Homicide by Child Abuse, subject to a plea agreement in which one indictment against her was dismissed, and the State made a sentencing recommendation for between twenty and twenty five years. She was sentenced by the Honorable L. Casey Manning to confinement for twenty-two years. A hearing was convened on the Respondent's motion for reconsideration on September 19, 2006. The Honorable L. Casey Manning reduced the sentence at that time to twenty years. Respondent then filed a timely notice of appeal, but withdrew her appeal. The South Carolina Court of Appeals dismissed the appeal and issued a remittitur on April 3, 2007.

Respondent then brought this action seeking post-conviction relief filed August 3, 2007. Petitioner made its return on or about February 13, 2008. An evidentiary hearing was convened before the Honorable G. Thomas Cooper on August 12, 2009, at which Respondent alleged her right to a direct appeal was not knowingly and voluntarily waived. The circuit court granted the application by written order filed January 25, 2010,¹ and ordered that Respondent be granted a new sentencing hearing. A timely notice of intent to appeal was filed on January 27, 2010. Petitioner filed a Petition for Writ of Certiorari on July 15, 2010. Respondent filed a Return to Petition for Writ of Certiorari on December 30, 2010. By Order dated January 12, 2013 and filed on March 7, 2013, the South Carolina Court of Appeals granted Writ of Certiorari. This Brief of Petitioner follows.

¹ The Order was improperly dated January 19, 2009, rather than January 19, 2010.

STANDARD OF REVIEW

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will not be upheld when they are not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 626 (1989).

ARGUMENT

- I. **No probative evidence exist's to support the PCR court's finding that Appellate counsel was ineffective where Respondent never testified that she relied on Appellate counsel's advice when withdrawing her appeal and Respondent desired to withdraw her appeal.**

In the instant case, Respondent argues Appellate Counsel was ineffective for advising Respondent to withdraw her appeal. However, this allegation is without merit as no probative evidence exist's to support this allegation.

In the instant case, the record is devoid of any evidence that Appellate Counsel advised Respondent to withdraw her appeal. The trial court's finding that "[Respondent] completely relied on appellate counsel's belief when she made her decision to withdraw her direct appeal" (App. p. 127) was completely unsupported where Respondent, in her own testimony, never stated that she relied on Appellate Counsel's belief or advice in making her decision to withdraw her appeal, but in fact, alleged the opposite. (App. p. 73 lines 10-11, p. 74. lines 15-17).

Appellate Counsel testified she did not have any specific recollection of Respondent's case. (App. p. 83 lines 10-13, p. 87 lines 14-15). She explained the office she worked with when she was assigned Respondent's case gave her the option of sending a letter advising the client there were no meritorious issues, if none were found, after reading the transcript. (App. pp. 81-82). Appellate Counsel further testified that while she had no independent recollection of reviewing the guilty plea transcript and reconsideration transcript, in keeping with her testimony that she had no independent recollection of this case, she would have encouraged the Respondent to proceed with an appeal even if she wanted to drop the appeal. (App. p. 82 line 8-16). Respondent then introduced, and Counsel identified, the signed form affidavit used by Counsel's office to document a *client's* desire to withdraw a direct appeal from a guilty plea. (App. p. 83).

There is no evidence to suggest that such an affidavit was used exclusively when Counsel advised a client to withdraw an appeal.

Respondent testified she did not get advice from Counsel regarding this case, (App. p. 74 lines 15-17), she did not know she had an appeal, (App. p. 79 lines 15-16), and that she did not know her appeal had been dismissed. (App. P. 79 lines 15-16). Confusingly, Respondent testified she read the front page of the affidavit indicating she wished to withdraw her appeal and then signed it, (App. p. 75 lines 18-21), and she hadn't read anything else in regards to this case. On cross-examination, Respondent testified she told Plea Counsel to file an appeal (App. p. 79 lines 17-18), and she did not know if she had requested that Plea Counsel file an appeal. (App. p. 79 line 25—p.80 line 2). The Respondent never alleged in her testimony that she was given incorrect advice regarding her direct appeal. It was repeatedly Respondent's testimony that no one had advised her at all regarding her direct appeal. (App. p. 73 lines 10-11, p. 74 lines 15-17).

Additionally, Plea Counsel testified he explained to Respondent that her case had meritorious issues and she instructed him to file the appeal based on that explanation from him. (App. p. 96 lines 3-9). He further testified he explained to Respondent that the particular type of issue she had in her appeal had to be appealed in order to be reviewed. (App. p. 97, lines 2-8).

The record is devoid of any evidence that Respondent was ever told her appeal lacked merit and Respondent should withdraw her appeal. No proof was submitted that Appellate Counsel advised Respondent to withdraw her appeal or that a letter like those described by Appellate Counsel (App. pp. 81-82), and cited in the Order (App. p. 126), was ever sent to or received by Respondent. Further Respondent did *not* claim anywhere in her testimony that she had received a letter advising her to withdraw her appeal. (App pp. 72-80).

In fact, the only evidence in the record indicates that Respondent was advised that her appeal did have merit. Further, Respondent did not claim that she had been misadvised by Appellate Counsel, but that Counsel never advised her at all regarding her direct appeal. (App. p. 73 lines 10-11, p. 74 lines 15-17). Accordingly, no probative evidence exists to indicate Appellate Counsel misadvised Respondent regarding her direct appeal and therefore provided ineffective assistance.

Further, Respondent cannot show any prejudice as a result of her appeal being withdrawn. The central issue on appeal would be whether the Honorable R. Ferrell Cothran, Jr., (Plea Judge) had the authority to suspend Respondent's sentence (App. p. 68 line 23—p. 68 line 8) when Respondent was facing twenty years to life. (App. p. 9 lines 5-7). The PCR court found Appellate Counsel was ineffective for allegedly advising Respondent to withdraw her appeal. The PCR court relying on State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007) holding that Thomas “stands for the proposition that a sentence can be suspended unless the statute contains limiting language prohibiting suspension of the sentences.” (App. p. 128). The PCR court found in support of its ruling, “[A]ppellate counsel should have reconsidered her advice to [Respondent] to withdraw her guilty plea and advise her that she had a potentially meritorious appellate issue” based on the court's ruling in Thomas. (App. p. 129) The PCR court further held, “[g]iven the Supreme Court's decision in Thomas, it is clear that the [Respondent] possessed a potentially meritorious issue for appeal.” (App. p. 128).

However, in State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) the South Carolina Supreme Court distinguished Thomas. The Court found the “sentence imposed for the criminal conviction in Thomas was not punishable by death or *life imprisonment*, and therefore, did not

fall with the exception of section 24-21-410². Jacobs, 713 S.E.2d at 623. (emphasis added). The Court held “section 24-21-410 of the South Carolina code *does not* give courts the authority to suspend sentences for crimes punishable by death or *life imprisonment*...” Jacobs, 713 S.E.2d at 624. (emphasis added).

In the instant case, Respondent was facing a minimum sentence of twenty years to *life imprisonment*. (App. p. 9 lines 5-7). The court did not have the authority to suspend Respondent’s sentence as Respondent was facing up to life in prison. Therefore, the PCR court erred in finding Appellant counsel was ineffective for failing to advise Respondent of the alleged meritorious issue regarding the possibility of a suspended sentence.

II. Respondent knowingly, intelligently, and voluntarily withdrew her appeal, thereby waiving her right to appeal.

A waiver of right to an appeal, by failure to file for appeal, or withdrawal, must be knowingly and intelligently entered. See White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Davis v. State, 288 S.C. 290 S.E.2d 60 (1986); Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000) (overruled on other grounds). The right to a direct appeal is waived by withdrawing a Petition for Writ of Certiorari. Poston, at 40, 528 S.E.2d at 424 (“Petitioner/respondent forever waived that issue when he withdrew his petition for writ of certiorari.”). Here, Respondent had a direct appeal following her plea and motion to reconsider, and voluntarily withdrew her direct appeal. The Court of Appeals found the withdrawal to be knowingly and intelligently entered, finding that the Respondent wished to withdraw her appeal “with full understanding of all possible consequences of this action.” (App. p. 50). Respondent admitted at the PCR hearing to having read the front page before she signed, (App. p. 75 lines 18-21), stating that she was aware

² Section 24-21-410 grants the court the power to suspend sentence and impose probation except for crimes punishable by death or *life imprisonment*. S.C. Code Ann. § 24-21-410 (Supp. 2010) (emphasis added).

of the risks associated with withdrawing her appeal, and that she did still wish to do so. See Regions Bank v. Smauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (“A person signing a document is responsible for reading the document and making sure of its content.”) See also Clinkscales v. North Carolina Mut. Life Ins. Co., 201 S.C. 375, 23 S.E.2d 1, 3 (1942) (“It is quite true as a general proposition that responsibility for statements contained in a writing duly signed cannot be avoided or evaded by failure of the signer to read the same”). If Respondent had thought the Court of Appeals was wrong, a motion for re-hearing could have properly been made at that time. Instead, for whatever personal reason, Respondent chose to withdraw her direct appeal and filed an application for Post-Conviction Relief four months after the resulting dismissal of her direct appeal.

III. The proper remedy for an applicant claiming to have been deprived of appellate review because of ineffective assistance of counsel is an appeal pursuant to White v. State review.

Petitioner submits that Respondent’s issue on Appeal is without merit under State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011). As such, Petitioner submits that an appeal pursuant to White v. State review would be without merit. The issue of the proper remedy when an appellants withdrawal of a direct appeal is not freely and voluntarily given does not need to be reached in the instant case. But see generally Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001).

CONCLUSION

For the reasons stated above, this Court should reverse the post-conviction relief court's grant of post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
Bar No. 100934

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
ATTORNEYS FOR THE RESPONDENT

July 3, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUL 05 2013
SC Court of Appeals

Certiorari to Kershaw County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Case No. 2005-CP-45-0429
Appellate Case No. 2010-155115

SANDRA RICHARDSON,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

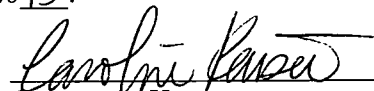
PROOF OF SERVICE

I, Caroline Kaiser, certify that I have served the within **Brief of Petitioner** on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 5th day of July, 2013.



CAROLINE KAISER
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737