STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Colleton County

Honorable Kristi F. Curtis, Circuit Court Judge

NATHANIEL HAMPLETON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001159

PETITION FOR WRIT OF CERTIORARI

BREEN RICHARD STEVENS
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ISSUE PRESENTED

Whether Counsel provided ineffective assistance by failing to file a direct appeal where a motion to reconsider sentence was filed after Petitioner pled guilty, where the hearing to reconsider sentencing was held over a year later, yet where Counsel failed to counsel Petitioner regarding an appeal after the hearing or file a notice of appeal on Petitioner's behalf?

STATEMENT

Petitioner Nathaniel Hampleton was indicted in 2015 by the Colleton County grand jury for three counts of attempted murder. The charges stemmed from Petitioner's alleged conduct on November 16, 2014. App. 140—App. 142; App. 144— App. 145; App. 147— App. 148.

On July 27, 2015, Petitioner's case proceeded to a guilty plea hearing before the Honorable Perry M. Buckner. Petitioner was represented by David Mathews (Counsel), while the State was represented by Steven Knight. App. 1. Petitioner pled guilty to the following lesser-included offenses: one count of assault and battery of a high and aggravated nature (ABHAN); and two counts of assault and battery in the first degree (A&B 1st). App. 6, ln. 22— App. 11, ln. 3; App. 14, ln. 17— App. 15, ln. 4. The Plea Court accepted Petitioner's guilty plea and imposed the following concurrent sentences: fifteen (15) years for ABHAN; and ten (10) years for each count of A&B 1st. App. 17, ll. 18-24; App. 29, ll. 7-22.

On July 29, 2015, Counsel filed a motion to reconsider Petitioner's sentence. A hearing was held before the Plea Court on October 26, 2016, where Petitioner was still represented by Counsel. App. 31; App. 35, ll. 3-10. At the hearing, Counsel asked that the Plea Court reconsider its sentence of Petitioner on two main bases: first, that the initial offer by the State to Petitioner in the case was for a recommended sentence of six (6) years; second, that Petitioner's conduct since his incarceration had been exemplary as evinced by his inmate detail report. Accordingly, Counsel asked the court to reconsider Petitioner's sentence, and impose a sentence of six years. App. 36, ll. 3— App. 37, ll. 7; App. 41. The Plea Court indicated that Petitioner's prior plea offer was "not admissible," and that it "wanted to be fair to both the victim and to [Petitioner] in reaching [its] sentence." Thus, "in considering [Petitioner's] record and the facts

and circumstances of the case," the Plea Court denied the motion to reconsider. App. 39, ll. 1-14. No appeal was filed.

Petitioner filed an application for post-conviction relief (PCR) on October 14, 2019. App. 43. Petitioner asserted, *inter alia* that he mailed a prior PCR application on July 19, 2016, but that it was apparently never received by the Colleton County Clerk of Court. App. 45—App. 46. He also claimed that Counsel failed to file an appeal on Petitioner's behalf, but advised him to file a PCR. App. 44. The State filed its return on July 8, 2020. R. 49.

On July 20, 2022, Petitioner's matter proceeded to a hearing before the Honorable Kristi F. Curtis. James Falk represented Petitioner, while Lauren Mims represented the State. App. 59. At the outset, the State moved to dismiss all PCR issues except for Petitioner's belated direct appeal due to the application being filed beyond the one-year statutory limitation. PCR Counsel responded that equitable tolling should apply. App. 64, ln. 15—App. 65, ln. 12; App. 71, ln. 23—App. 72, ln. 20; App. 109, ll. 6-22.

Two witnesses were called at the hearing: Petitioner, and Counsel. App. 60. Petitioner testified to his recollection of facts regarding his prior PCR application filing, as well as to other issues germane to his current PCR action. App. 66, ln. 14—App. 71, ln. 21. However, it was Counsel's testimony that touched upon the issue Petitioner's direct appeal from his guilty plea and sentence. Specifically, Counsel acknowledged no direct appeal was filed in Petitioner's case, and he did not recall discussing the matter with Petitioner after the guilty plea; however, he did file the motion to reconsider the sentence afterward. Furthermore, even after the motion to reconsider was denied over a year later, Counsel did not recall discussing the matter of filing a notice of appeal with Petitioner then either. App. 106, ln. 10—App. 107, ln. 14. Despite the fact that he had filed and argued a motion to reconsider in Petitioner's case, Counsel did not think

any extenuating circumstances warranted an appeal. App. 107, ll. 15-21. Additionally, Counsel acknowledged that "it would be very much in [his] practice to tell somebody to go ahead and file a PCR." App. 108, ll. 5-16.

The PCR Court dismissed Petitioner's PCR application in an order filed June 15, 2023. App. 121. The court granted the State's motion to dismiss Petitioner's PCR claims[1] "except for the request for a belated appeal." App. 129—App. 130. The PCR Court then denied relief as to the issue of failing to appeal Petitioner's guilty plea and sentence. The Court determined that Counsel did "not recall [Petitioner] requesting an appeal in this matter, and that there were no extenuating circumstances that existed" meriting an appeal. App. 138. Thus, because the court found no extraordinary circumstances existed, it likewise found that Counsel was not required to file an appeal. App. 138.

This petition for writ of certiorari follows.

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1 Due to the passing of PCR Counsel, interim counsel Hervery B. O. Young subsequently filed the requisite PCR Explanation pursuant to Rule 243(c), SCACR. On September 28, 2023, the South Carolina Supreme Court issued an Order holding no arguable basis was shown for asserting the partial dismissal was improper, and that "the only issue that may be raised in this matter is the PCR Court's denial of Petitioner's request for belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974)." App. 140.

ARGUMENT

Counsel provided ineffective assistance by failing to file a direct appeal where a motion to reconsider sentence was filed after Petitioner pled guilty, where the hearing to reconsider sentencing was held over a year later, yet where Counsel failed to counsel Petitioner regarding his appeal after the hearing or file a notice of appeal on Petitioner's behalf.

"[C]riminal defendants have a Sixth Amendment right to 'reasonably effective' legal assistance." Roe v. Flores-Ortega, 528 U.S. 470, 476, 120 S.Ct. 1029, 1034, 145 L.Ed.2d 985 (2000) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Under the Strickland standard, "[a] defendant claiming ineffective assistance must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant." Id. 528 U.S. at 476-77, 120 S.Ct. at 1034, 145 L.Ed.2d 985 (internal citations and quotation marks omitted). The same test applies to claims "that counsel was constitutionally deficient for failing to file a notice of appeal." Id. 528 U.S. at 477, 120 S.Ct. at 1034, 145 L.Ed.2d 985.

Under White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974), a criminal defense attorney must make certain that his client is fully aware of his right to appeal and, in the absence of an intelligent waiver by the client, must either pursue an appeal or file a brief under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). "In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken," the first question to be asked is "whether counsel in fact consulted with the defendant about an appeal." Flores-Ortega, 528 U.S. at 478, 120 S.Ct. at 1035, 145 L.Ed.2d 985. Under such circumstances, counsel must consult with a 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." Flores-Ortega, 528 U.S. at 480, 120 S.Ct. at 1036, 145 L.Ed.2d 985.[2]

In the present case, the record contains no evidence that Petitioner made a knowing and voluntary waiver of his right to direct appeal. Further, Plea Counsel acknowledged that no direct appeal was filed in Petitioner's case, and he did not recall discussing the matter with Petitioner after the guilty plea. However, he did file the motion to reconsider the sentence afterward. Yet even after the motion to reconsider was denied over a year later, Counsel did not recall discussing the matter of filing a notice of appeal with Petitioner then either. App. 106, ln. 10—App. 107, ln. 14.

Additionally, circumstances existed both that a rational defendant would want to appeal, and that Petitioner reasonably demonstrated his interest in appealing his sentence. Specifically, Counsel filed a motion to reconsider Petitioner's sentence the day after Petitioner's guilty plea. Such a

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[2] Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995) was relied upon by the PCR Court in its order, and previously addressed the standard set for such claims under South Carolina common law as follows:

> The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal. One extraordinary circumstances 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.

Id. 319 S.C. at 61, 459 S.E.2d at 839 (internal citation omitted). However, the standard announced by the United States Supreme Court in in Flores-Ortega occurred five years after Weathers. Accordingly, to the extent that Weathers may have been more stringent, the standard governing Petitioner's Sixth Amendment Constitutional right under a claim of failure of Counsel to file an appeal necessarily requires South Carolina common law to be read in harmony with that of Flores-Ortega. Furthermore, to the extent the PCR Court applied a stricter standard under Weathers rather than that mandated by Flores-Ortega, the ruling amounted to an error of law.

motion would not have been filed unless Petitioner asked Counsel to seek a reduction in his sentence.

Moreover, Counsel's own words in the hearing for sentence reconsideration addressing how well Petitioner had behaved in prison readily indicate one of the bases cited was "extraordinary" to him:

> Your honor, I would ask the Court to look again and ask the Court to consider a six-year sentence. [Petitioner] pled and he has taken responsibility for what he has done. I would ask the Court to consider also that he has done very well as somebody can do under that. I can't tell you the number of people that I've represented that don't do so well. I see pages of disciplinary actions. *To see none is extraordinary.* Obviously, that could not have been before the Court."

App. 46, ll. 15-23. Furthermore, Petitioner's initial sentence maximizing both A&B 1st convictions, and seventy-five percent of his ABHAN conviction were incongruous with how the State initially assessed the matter in its plea offer. Such information would have provided the Plea Court with a more complete picture of facts material to imposing a just sentence in the matter, yet the Court refused to consider it. See, e.g., ." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

Under such circumstances where Counsel filed a post-plea motion to reconsider Petitioner's sentence, where Counsel himself admitted the extraordinary dimensions of at least one of his bases, and where the Plea Court committed an error of law in what it deemed permissible to consider in the matter, it is readily apparent that Petitioner would have wanted to appeal the Plea Court's denial of his motion to reconsider his sentence, and that a rational defendant would have wanted the same. Therefore, Counsel's performance was constitutionally deficient, and the PCR Court erred in denying Petitioner relief. Accordingly, Petitioner is entitled to belated review of his conviction and sentence pursuant to White.

CONCLUSION

For the foregoing reasons, Petitioner Nathaniel Hampleton respectfully requests reversal of the PCR Court's denial of belated review of Petitioner's direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2024.

STATEMENT OF ISSUE ON APPEAL PURSUANT TO WHITE V. STATE[3]

Whether the Plea Court erred as a matter of law at Petitioner's hearing to reduce his sentence where the Court stated the prior offer by the State in the case was "not admissible," yet where Rule 410, SCRE merely prohibits admissibility of plea negotiations if offered *against* a defendant, and where common law[4] regarding sentencing hearings permits "an inquiry broad in scope, largely unlimited either as to the kind of information [the Court] may consider or the source from which it may come"?

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3 This Statement of Issue on Appeal is provided pursuant to Rule 243(i)(2), which provides as follows:

> 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 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).

Rule 243(i)(2), SCACR.

4 State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).