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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari
to Jasper County
J. Ernest Kinard, Plea Judge
Deadra L. Jefferson, First PCR Judge
Bentley Price, Second PCR Judge

Appellate Case No. 2022-001654

BREON ALEXANDRE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION
FOR A WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

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QUESTIONS PRESENTED

Whether the PCR court properly granted Petitioner a belated appeal from the denial of his application for post-conviction relief (hearing date August 27, 2013) pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner wanted to appeal but PCR counsel did not timely serve notice of intent to appeal, and where the State agreed Petitioner was entitled to belated appellate review?

Whether the PCR court incorrectly ruled Petitioner was not entitled to a belated appeal from his guilty plea (hearing date April 12, 2010) pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974), where Petitioner wanted to appeal but plea counsel did not serve notice of intent to appeal?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the second PCR court properly find Petitioner was entitled to a belated appeal of his first PCR application when he filed a pro se notice of appeal, indicating his intent to appeal?

2. Does probative evidence support the first PCR court's finding that Petitioner is not entitled to a belated review of his guilty plea when plea counsel testified Petitioner did not request an appeal, counsel would have filed an appeal had Petitioner requested it, and counsel did not see any meritorious issues to appeal from this guilty plea?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving an aggregate forty-year sentence. In October 2009, the Jasper County Grand Jury indicted Petitioner for murder (2009-GS-27-494), armed robbery (2009-GS-27-492), and burglary (2009-GS-27-493). On April 12, 2010, Petitioner appeared before the Honorable J. Ernest Kinard and pled guilty as indicted. Public Defender Stephen Plexico represented Petitioner, and Solicitor Duffie Stone prosecuted the case. Judge Kinard imposed concurrent sentences of forty years each for murder and burglary, and thirty years for armed robbery. Petitioner did not appeal.

On March 29, 2012, Petitioner filed an application for post-conviction relief (PCR) alleging counsel was ineffective for not filing a notice of appeal from his guilty plea. The State filed a return and partial motion to dismiss, asserting all claims were barred by the statute of limitations other than Petitioner's claim related to a late appeal. On August 27, 2013, an evidentiary hearing convened before the Honorable Deadra L. Jefferson. Petitioner was present and represented by Gerald A. Kelly, Esquire. Assistant Attorney General Ashleigh R. Wilson represented the State. On October 31, 2013, Judge Jefferson issued an order dismissing Petitioner's application. Pertinently, Judge Jefferson found credible plea counsel's PCR testimony that he advised Petitioner of his right to appeal, Petitioner never indicated he wanted an appeal, and there were no meritorious issues for appeal. Judge Jefferson dismissed the remaining claims based on the statute of limitations.

On November 20, 2013, Petitioner filed a pro se notice of appeal from Judge Jefferson's order (2013-002567). On January 3, 2014, the Supreme Court of South Carolina dismissed the appeal, finding Petitioner failed to provide proof of service showing the notice of appeal had been

timely served on opposing counsel. The remittitur was sent January 22, 2014.

On September 10, 2014, Petitioner filed this current PCR application seeking *inter alia* a belated review of the denial of his first PCR application. The State filed a return and motion to dismiss all claims other than the Austin claim. On October 20, 2015, a hearing convened before the Honorable Roger L. Couch. James K. Falk, Esquire, represented Petitioner and Assistant Attorney General Alicia A. Olive represented the State. The State did not oppose Petitioner's request for a late appeal of the denial of his first PCR application. On October 14, 2022, Chief Administrative Judge Bentley Price¹ issued a Consent Order granting Petitioner a belated appeal of his first PCR action pursuant to Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991).

Petitioner filed a timely notice of appeal from Judge Price's order. Thereafter, pursuant to Petitioner's motion, the case was remanded to Judge Jefferson to reconstruct the record of the first PCR hearing. On August 8, 2023, a reconstruction hearing convened before Judge Jefferson via WebEx. Appellate Defender Joanna K. Delaney represented Petitioner, and Assistant Attorney General Danielle Dixon represented the State. After hearing testimony, Judge Jefferson determined the record was reconstructed.

¹ Judge Couch retired before an order was filed.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

1. The State has conceded Petitioner is entitled to a belated review of the order denying Petitioner's first PCR application.

Petitioner asserts the second PCR court properly found he was entitled to a belated appeal from the denial of his first PCR application. Specifically, he contends his attempt to file a pro se notice of appeal demonstrated his desire to appeal the denial of his first PCR application. (Pet. 6). The State conceded this issue during the second PCR hearing. (App. 87-88). Likewise, the consent order issued by the second PCR court found both Petitioner and the State agreed that Petitioner did not voluntarily waive his right to appeal the order dismissing his first PCR application. (App. 90-94). See Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (finding “allegation that counsel failed to seek review [of denial of PCR] sufficiently states a claim of ineffective assistance” and “remand[ing] for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review”). Respondent thus concedes Petitioner is entitled to a belated review of the denial of his first PCR application.

2. Probative evidence supports the first PCR court's finding that Petitioner is not entitled to a belated review of his guilty plea when plea counsel testified Petitioner did not request an appeal, counsel would have filed an appeal had Petitioner requested it, and counsel did not see any meritorious issues to appeal from this guilty plea.

Probative evidence supports the first PCR court's finding that Petitioner was not entitled to a belated appeal from his guilty plea. “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). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002). “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).” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). Where an accused establishes in a PCR hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the PCR decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal had been perfected. White v. State, 263 S.C. 110, 119, 108 S.E.2d 35, 39-40 (1974).

However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

Turner, 380 S.C. at 224, 670 S.E.2d at 374. (emphasis added). Thus, in Turner, the Supreme Court of South Carolina determined the PCR court erred in granting the petitioner a belated appeal of his guilty plea when “there was no evidence of extraordinary circumstances which would require counsel to advise petitioner of his right to a direct appeal.” Id. at 225, 670 S.E.2d at 374. Likewise, in Jones v. State, 392 S.C. 589, 577 S.E.2d 20 (2009) (abrogated on other ground by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)), the Supreme Court of South Carolina found the PCR court erred in granting the petitioner a belated appeal of his guilty plea when (1) there were no meritorious issues for appeal and thus no evidence a rational defendant would want to appeal and (2) the petitioner did not ask plea counsel to file a belated appeal.

Here, probative evidence supports the first PCR court’s finding that Petitioner was not entitled to a belated appeal from his guilty plea. Initially, plea counsel testified Petitioner did not request an appeal, but he would have filed an appeal if Petitioner had requested one. (App. 117-19). Although Petitioner testified he *did* request an appeal, the PCR court found plea counsel’s

testimony on this issue credible, and this Court should defer to that finding. (App. 6-7). See Thompson, 423 S.C. at 247, 814 S.E.2d at 493 (providing appellate courts “defer to the PCR court's credibility findings as to witnesses who testified before the PCR court”); Foye, 335 S.C. at 589, 518 S.E.2d at 267 (“Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses.”).

Additionally, counsel testified he did not see any meritorious issues for appeal. (App. 118). Critically, a review of the plea transcript itself shows there were no preserved issues for appeal. (App. 1-29). Thus, no evidence supports a finding of extraordinary circumstances such that a rational defendant would want to appeal. Based on the foregoing, the PCR court properly found Petitioner failed to prove he was entitled to a belated appeal of his guilty plea.

CONCLUSION

Based on the foregoing, this Court should grant certiorari on the first question, dispense with further briefing, and deny certiorari on the second question.

Respectfully Submitted,

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This 3rd day of June, 2024