ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

SANDRA RICHARDSON,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

Appellate Case No. 2010-151193

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

I. The PCR court correctly found appellate counsel, in violation of Respondent's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, provided ineffective assistance by advising Respondent to withdraw her appeal where the record contained a meritorious issue concerning the plea judge's ability to suspend the sentence imposed.

II. The PCR court correctly found Respondent's withdrawal of her notice of appeal and waiver of her right to a direct appeal was unknowing, unintelligent and involuntary based upon the erroneous advice of appellate counsel concerning the merit of Respondent's appeal, where the record contained a meritorious issue concerning the plea judge's ability to suspend the sentence imposed.

III. The PCR court tailored a remedy – resentencing – appropriate for the error caused by appellate counsel's ineffective assistance, and any error is not preserved for review because Petitioner did not argue this before the lower court or present the matter for ruling.

STATEMENT OF THE CASE

On June 23 2004, Respondent was indicted for homicide by child abuse by the Kershaw County Grand Jury. App. 134-135. On May 5, 2005, Respondent pled guilty to the charge before the Honorable L. Casey Manning. Respondent was represented by James Shadd. The state was represented by Ronald Moak. App. 1. Respondent was sentenced to twenty-two years in prison. App. 39, l. 1. Respondent's plea counsel moved for the court to reconsider the sentence. App. 43, ll. 5-16. A hearing on the motion for reconsideration was held on September 19, 2006. App. 41. Judge Manning reasoned that because the mandatory minimum sentence for homicide by child abuse was twenty years, he could only reduce Respondent's sentence to twenty years' imprisonment; he could not suspend the sentence. App. 46, ll. 20-23. As a result, Judge Manning reduced the sentence to twenty years' imprisonment, but declined to suspend the sentence. App. 47, ll.15-22.

Respondent filed a timely notice of appeal. For her direct appeal, Respondent was represented by Eleanor Cleary. On April 2, 2007, Respondent filed an affidavit requesting to withdraw her appeal. App. 111. On April 3, 2007, Respondent's appeal was dismissed by this Court. App. 50.

Respondent filed an application for post-conviction relief (PCR). App. 51-57. The PCR action was heard before the Honorable G. Thomas Cooper on August 12, 2009. App. 63. Respondent was represented by Tara Shurling. App. 63. The state was represented by Brian Petrano. App. 63. The PCR Court found that appellate counsel rendered ineffective assistance and that Respondent did not knowingly and intelligently waive her appeal. App. 129. The PCR granted Respondent another resentencing hearing. App. 131. The state filed a petition for writ of certiorari, and Respondent, represented by Tristan Shaffer, filed a

return. On March 7, 2013, Chief Judge Few, Judge Williams, and Judge Pieper granted the petition. The state, represented by Daniel Gourley, filed the brief of petitioner on July 5, 2013. Respondent now files her brief.

STATEMENT OF FACTS

On May 5, 2005, Respondent pled guilty to homicide by child abuse and was sentenced to twenty-two years in prison. Thereafter, Respondent moved for reconsideration of her sentence. At the hearing concerning Respondent's motion, plea counsel argued that the court had the discretion to suspend the mandatory minimum sentence. Specifically, plea counsel asked the court to impose the minimum twenty-year sentence, suspend the sentence, and impose a sentence of ten years' imprisonment. App. 38, ll. 13-19; App. 45, ll. 4-8; App. 45, l. 11- App. 46, l. 1. The court disagreed, stating "as far as I am concerned legally, that the only thing I can do today . . . is reduce [the sentence] to [twenty] years." App. 46, ll. 20-23.

Petitioner filed a timely notice of appeal, and Eleanor Cleary with the Office of Appellate Defense was appointed. Cleary testified during the PCR hearing that when she received an appeal from a guilty plea, she would review the file and if she found no meritorious issue, she would send her client a letter stating that the appeal did not have merit and advising the client to voluntarily dismiss the appeal. App. 81, l. 25 – App. 82, l. 7. In addition to the letter advising the client to dismiss the appeal, Cleary would provide the client with a form affidavit. The client was to sign the affidavit requesting the appellate court dismiss the appeal. App. 83, ll. 6-18. Cleary sent one of those letters and affidavits to Respondent, but never spoke to Respondent. App. 74, ll. 11-17; App. 83, ll. 6-20; App. 111. Respondent signed the affidavit, but lacked a clear understanding of the consequences. App. 75, ll. 20-25. Cleary then submitted Respondent's affidavit requesting withdrawing her appeal sometime after March 28, 2007. App. 111. This Court then dismissed Respondent's notice of appeal on April 3, 2007. App. 50.

Although Cleary testified that she had no independent recollection of representing Respondent, she did not dispute the fact that she represented Respondent nor did she dispute that she advised Respondent that her appeal had no merit. App. 83, ll. 10-13. Cleary recognized the affidavit as the type she would have sent to Respondent if she found that the appeal of her guilty plea had no merit. App. 83, ll. 3-18. Cleary had read the transcript in preparing for the PCR hearing and recognized that the issue presented was meritorious and should have been raised to the appellate court. App. 85, l. 25 – App. 86, l. 4; App. 85, ll. 12-20. Cleary testified that she must have missed the issue when she originally reviewed Respondent's guilty plea. App. 87, ll. 9-21. Based on this testimony, the PCR court found that appellate counsel was ineffective in advising Respondent to withdraw her appeal, and that Respondent did not knowingly, intelligently, and voluntarily withdraw her guilty plea. App. 129. The PCR Court then granted a re-sentencing hearing. App. 130.

ARGUMENT

I. The PCR court correctly found appellate counsel, in violation of Respondent's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, provided ineffective assistance by advising Respondent to withdraw her appeal where the record contained a meritorious issue concerning the plea judge's ability to suspend the sentence imposed.

The proper standard for appellate review of a PCR order is whether "any evidence of probative value" exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If any probative evidence exists to support the PCR Court's decisions, the ruling must be upheld. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997).

All criminal defendants are entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Courts review claims of ineffective assistance of appellate counsel using the test announced in Strickland v. Washington, 466 U.S. 668 (1984). See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, the reviewing court asks whether appellate counsel's performance was deficient and whether the defendant was prejudiced by the deficient performance. Id. Appellate counsel is not required to raise all non-frivolous claims, but may exercise sound professional judgment in selecting the appropriate grounds for a direct appeal in order to maximize the likelihood of a favorable result. Smith v. Robbins, 528 U.S. 259, 288 (2000). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688. A reasonable probability is a

probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The PCR court's finding that appellate counsel provided ineffective assistance is supported by an abundance of evidence in the record. Appellate counsel testified that she was familiar with the Supreme Court's opinion in State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007), which was issued on March 5, 2007. She explained this was the precise issued presented and preserved in the transcripts of the guilty plea and motion for reconsideration proceedings. App. 85, ll. 6-20. Upon further questioning, appellate counsel explained that "when a judge has discretion and he thinks he doesn't that that's reversible error." App. 87, ll. 9-19. She failed to raise the issue and advise Respondent properly because she "must have missed that when [she] read the guilty plea transcript." App. 87, ll. 19-21. Appellate counsel elaborated that her opinion that the issue was meritorious was not based solely on the Thomas, supra, case. She explained that she had made the argument successfully in other cases that "if a judge has discretion, does not realize that he has discretion and, therefore, refuses to exercise it that that's reversible error prior to the Thomas case." App. 88, ll. 6-22.

Petitioner argued "the record is devoid of any evidence that Appellate Counsel advised Respondent to withdraw her appeal." BOP at 4. However, this Court's order of dismissal and remittitur provided that appellate counsel was in agreement with the decision to withdraw the notice of appeal. App. 50 ("It appears that [Respondent], with full understanding of all possible consequences of this action and with agreement of counsel, wishes to withdraw the appeal."). Certainly, this Court's order, which indicated that appellate counsel supported and agreed with the decision to withdraw, provided evidence

that appellate counsel advised Respondent to withdraw. At a minimum, appellate counsel reviewed the record and agreed with Respondent's decision based upon a determination that the record lacked any issue of merit. Further, appellate counsel testified that she missed the meritorious issue concerning the plea judge's ability to exercise his discretion and suspend her sentence. Her testimony was that she would send a letter to a client advising the client that the appeal lacked merit and ask the client to sign the affidavit to withdraw the appeal. She identified the affidavit signed by Respondent as one that would have been used in such a case.

On March 5, 2007, prior to appellate counsel submitting the affidavit to withdraw the notice of appeal and notifying this Court of her agreement with such a decision, the Supreme Court decided State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007). Relying upon a statutory provision from 1989 and case law dating back to 1996, the Court held that a trial judge has the general power to suspend sentences and impose probation unless the legislature specifically mandated that no part of a sentence may be suspended and probation imposed. Id. at 468, 642 S.E.2d at 725. Where a statute failed specifically to prohibit suspension of a sentence, then the court had the authority to suspend the sentence even where the statute required a minimum sentence be imposed. Id. The Court reversed and remanded for resentencing. Id. at 470, 642 S.E.2d at 726.

In his brief, Petitioner relied upon State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) to argue that Respondent's suffered no prejudice due to appellate counsel's deficient performance because her sentence could not have been suspended as a life sentence was a possibility under the statute. In Jacobs, the Supreme Court of South Carolina held a circuit court judge could not suspend the minimum sentence for burglary

in the first degree and order probation because the statute permitted a life sentence for burglary. Id. at 588, 713 S.E.2d at 623. The Jacobs Court concluded that a court could not suspend a sentence of imprisonment and place a defendant on probation for burglary in the first degree because life imprisonment was a possible sentence. The Court held that the authority to suspend a sentence and impose probation derived from S.C Code Ann. § 24-21-410 (Supp. 2010). The statutory provision provided that a judge may suspend a sentence and place a defendant on probation for any offense, except a crime punishable by death or life imprisonment. Id. at 587-588, 713 S.E.2d at 623. The Court found "the sentence for a conviction of first degree burglary [fell] squarely within the exception provided in section 24-21-410 because first degree burglary [was] a felony 'punishable by life imprisonment.'" Id. at 588, 713 S.E.2d at 623. The Court held that the

> legislature made clear its intention to give judges the discretion to suspend criminal sentences in favor of probation, unless the seriousness of a crime warrants the severe penalties of death or life imprisonment. In those cases, the legislature chose to restrict a court's authority to suspend sentences below the statutorily-mandated sentencing range.

Id.

At the time of Respondent's alleged offense, South Carolina's statutory law provided:

> After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation.

S.C. Code Ann. § 24-21-410 (1996). This statutory provision provided for a judge to suspend a sentence and impose probation unless an exception applied. However, the

statutory provision spoke only to suspending a sentence and imposing probation. The statute was silent concerning suspending a sentence and imposing a lesser sentence of imprisonment, which was what Respondent's counsel requested. Respondent's plea counsel never requested the plea court impose a sentence of probation; therefore, the statutory exception and Jacobs were inapplicable to Petitioner's case.

Therefore, the plea judge erred in concluding he lacked the ability to suspend Respondent's mandatory minimum sentence and impose a lesser sentence of imprisonment. Appellate counsel's advice to Respondent to dismiss her notice of appeal was deficient performance prejudicing Respondent where Respondent's case presented a meritorious issue preserved for review.

II. The PCR court correctly found Respondent's withdrawal of her notice of appeal and waiver of her right to a direct appeal was unknowing, unintelligent and involuntary based upon the erroneous advice of appellate counsel concerning the merit of Respondent's appeal, where the record contained a meritorious issue concerning the plea judge's ability to suspend the sentence imposed.

A waiver of the right to a direct appeal is effective only if it is knowingly, intelligently, and voluntarily made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The Sixth Amendment right to the effective assistance of counsel extends to the effective assistance of appellate counsel. Evitts, supra. Therefore, appellate counsel must provide competent advice to an appellant, including advice concerning whether to withdraw the notice of appeal. Appellate counsel's advice to Respondent to dismiss her notice of appeal was constitutionally deficient and rendered Respondent's decision to withdraw as unknowing, unintelligent, and involuntary. Respondent's decision to withdraw was based upon appellate counsel's erroneous advice. In light of the meritorious issue presented in the record, counsel's deficient advice prejudiced Respondent

Respondent incorporates by reference the arguments presented in Issue I, supra. Appellate counsel admitted she "missed" the meritorious issue presented in the record, and that had she been aware of the issue, she would not have counseled Respondent to withdraw her notice of appeal. Appellate counsel's advice to Respondent that her appeal lacked merit and she should withdraw was based upon appellate counsel's "missing" a meritorious issue in her review of the record. Due to counsel's erroneous advice, Respondent's decision to withdraw her appeal was not made knowingly, intelligently, and voluntarily.

III. The PCR court tailored a remedy – resentencing – appropriate for the error caused by appellate counsel's ineffective assistance, and any alleged error is not preserved for review because Petitioner did not object to the remedy imposed in the PCR court or present the matter for ruling.

In the petition for writ of certiorari, Petitioner argued the remedy imposed by the PCR court was improper and that the proper remedy was a belated direct appeal pursuant to White, supra. Cert. Pet. at 7. In his brief, Petitioner argued that the issue of the proper remedy need not be reached in Respondent's case because Petitioner contended the issue that would have been presented on direct appeal was without merit. BOP at 8. Petitioner's claim that the PCR court erred concerning the remedy is not preserved for review. Additionally, the PCR court's remedy was proper.

Generally, "issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review." Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (citing Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992)). When a form of relief is first raised in a PCR Court's order, the aggrieved party must challenge that form of relief with a *Rule* 59(e) SCRCP motion. See In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998); see also, Marlar, 375 S.C. at 410, 653 S.E.2d 266 at (holding grounds for relief that the a PCR court did not rule upon are not preserved for appellate review unless the applicant challenged the PCR Court's order with a Rule 59(e), SCRCP motion).

By failing to file a Rule 59(e) motion, the State waived its argument that the PCR court should have granted a White v. State review. At no point during the PCR hearing did Petitioner argue that a White v. State review was the appropriate remedy. To the

contrary, in Petitioner's proposed order, Petitioner argued that Respondent was not entitled to a White v. State review because she waived her initial appeal App. 117-118. In his petition for writ of certiorari, Petitioner argued that a resentencing hearing was not proper because the PCR Court should have granted a White v. State review. This is a new argument that was never presented to the PCR court; therefore it is not preserved for appellate review. See State v. Bailey, 298 S.C. 1, 5-6, 337 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in a trial and alternative ground on appeal.") (citing Easterlin v. Green, 248 S.C. 389, 150 S.E.2d 473 (1966)). Because Petitioner never presented this new argument to the PCR court in a Rule 59(e) motion, Petitioner waived its right to argue it now on appeal. See Marlar, 375 S.C. 410, 653 S.E.2d 267. In sum, Petitioner changed positions on whether a White v. State review should have been granted. Petitioner's argument was not fairly before the PCR court, and therefore should be procedurally barred.

Additionally, the relief granted by the PCR judge was proper as it was narrowly tailored to address the error. The remedy for a constitutional violation "must closely fit the constitutional violation." United States v. Virginia, 518 U.S. 515, 547 (1996). The remedy must be designed to restore the victim to the position he or she would have occupied absent the constitutional violation. Milliken v. Bradley, 418 U.S. 717, 746 (1974). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." United States v. Morrison, 449 U.S. 361, 364 (1981). When ineffective assistance of counsel happens at a stage other than trial, courts order a remedy tailored to cure the violation. For example, if

the violation occurs during sentencing, then a new sentencing hearing is ordered. Rompilla v. Beard, 545 U.S. 374, 393 (2005).

The South Carolina Supreme Court developed a remedy where counsel failed to convey a plea offer to the defendant. In Davie v. State, 381 S.C. 601, 616, 675 S.E.2d 416, 423-424 (2009), the Court held "[b]ecause there [was] no evidence in the record that [the defendant] expressed a desire to proceed to trial rather than plead guilty, we find a remand for a new trial is not the appropriate remedy." Additionally, the Court recognized that specific performance would not be an appropriate remedy where the defendant was never apprised of the plea offer and did not rely to his detriment upon the offer. Davie, 381 S.C. at 615-616, 675 S.E.2d at 424. Ultimately, the Court held the appropriate remedy for Davie was a re-sentencing hearing. Specifically, this Court held: "Given that we cannot compel the state to reinstate or the circuit court judge to accept the original, fifteen-year plea offer, we remand the case for a new sentencing hearing with the limitation that [the defendant]'s sentence should not exceed the original sentence." Id. at 616, 675 S.E.2d 424. The Court vacated the sentence, remanded for re-sentencing, and ordered the circuit court judge to take into consideration the prior fifteen-year offer and limited the maximum to the original sentence imposed. Id. at 617, 675 S.E.2d at 424.

Similarly, in Rolen v. State, 384 S.C. 409, 413-414, 683 S.E.2d 471, 474 (2009), the Supreme Court held that plea counsel erred in failing to move to withdraw Rolen's guilty plea when Rolen asserted his innocence during the plea hearing before the plea judgment sentenced him and the proper remedy was to "remand the case to the point in the guilty plea proceeding in which counsel should have sought to withdraw the plea." This tailored the relief to remedy the precise prejudice resulting from plea counsel's deficient performance.

Id. at 414, 683 S.E.2d at 475. The Court explained that "[o]nce the plea judge found that [Rolen]'s plea was voluntary and supported by a factual basis and formally accepted the plea of guilt, [Rolen] forfeited his ability to withdraw the plea as a matter of right." Id

Where the error concerned sentencing only, the Supreme Court ordered re-sentencing. In Boan v. State, 388 S.C. 272, 275, 695 S.E.2d 850, 851 (2010), the Court found trial counsel provided ineffective assistance by failing to file a motion to clarify the sentence where there was a discrepancy of ten years between the oral pronouncement and the written sentencing order. In Dervin v. State, 386 S.C. 164, 687 S.E.2d 712 (2009), the Supreme Court granted a writ of certiorari to perform an Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) review of the denial of Dervin's PCR application. Dervin was indicted for trafficking cocaine between 200 and 400 grams. During her trial, the court instructed the jury that Dervin could be convicted of trafficking if she was in actual or constructive possession of ten grams or more of cocaine. The jury found Dervin guilty. Id. at 166, 687 S.E.2d at 712. Dervin was sentenced for trafficking between 200 and 400 grams of cocaine. The Court found trial counsel was ineffective for failing to object to the sentence because the jury was only required to determine she trafficked ten or more grams of cocaine and did not necessarily determine she possessed over 200 grams. Id. at 167, 687 S.E.2d at 713. Therefore, the maximum possible sentence Dervin could receive was controlled by statute governing trafficking between ten and twenty-grams of cocaine. In light of the error, the Court reversed the denial of PCR and remanded for resentencing. Id. at 169, 687 S.E.2d at 714.

The remedy must be tailor to correct the error. Here, the error was the plea judge's incorrect reasoning that he lacked the ability to suspend the sentence and impose a lesser sentence when Respondent entered a guilty plea to homicide by child abuse. Therefore, the specifically tailored remedy is to remand the matter for re-sentencing with a judge's acknowledgement that the sentence may be suspended and a lesser term of imprisonment imposed.

CONCLUSION

Respondent respectfully requests this Court affirm the decision of the PCR court and order re-sentencing. In the alternative, Respondent respectfully requests this Court dismiss the matter as improvidently granted.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 26th day of August, 2013.

STATE OF SOUTH CAROLINA

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Appeal from Kershaw County

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SANDRA RICHARDSON,

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V.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Daniel Gourley, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Sandra Richardson at Graham Correctional Institution this 26th day of August, 2013.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 26th day of August, 2013.

Shawn A. Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2022