

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

EDWARD KIRK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001823

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the State consented to allow a belated direct appeal for Petitioner?

STATEMENT OF THE CASE

In early 2015 Petitioner and three co-defendants were involved in the armed robberies of three delivery drivers for various local restaurants in Richland County. App. 77, l. 23-App. 80, l. 8. Petitioner was indicted for his part in the robberies during the August 2015 term of the Richland County grand jury. App. 22; App. 25; App. 28. In June 2016, the State called one of the armed robbery cases to trial before the Honorable Jocelyn Newman and a jury. The State was represented by April Sampson. Petitioner was represented by Anna Goode Browder. App. 73-74. After jury selection the parties conducted a pre-trial hearing to determine whether the State could use the facts of the other two robberies during Petitioner's trial. App. 75. After hearing arguments from the parties, Judge Newman ruled to allow the State to introduce the evidence of the other robberies against Petitioner during his trial. App. 92-99. Based on this ruling, Petitioner agreed to enter a guilty plea to one set of charges. App. 75, ll. 16-23.

Petitioner was originally sentenced to twenty years incarceration on one count of armed robbery and one count of kidnapping, and five years on a weapons charge, all sentences to run concurrently. App. 23; App. 26; App. 29; App. 87-88. The parties reconvened on August 11, 2016, on the defense motion to reconsider sentence. App. 88, ll. 10-12. During the reconsideration hearing, Counsel Browder informed the court that one of the more culpable defendants had received a twelve-year sentence. Counsel requested that the court sentence Petitioner in line with that defendant as he was less culpable and had no prior record. The court resentenced Petitioner to sixteen years incarceration on the armed robbery and kidnapping. App. 88, l. 12-App. 90, l. 11.

A notice of appeal was never filed. Petitioner filed an application for post-conviction relief on June 8, 2021, alleging he was denied a direct appeal. App. 1-App. 8. The State filed a

return and partial motion to dismiss dated August 18, 2021. App. 9-18. On December 16, 2022, the parties entered into a consent order granting belated appellate review pursuant to White v. State. App. 19-21. Due to the passage of time between the plea and the PCR application, the transcript of Petitioner's plea hearing could not be produced. Former Appellate Counsel Taylor Gilliam made a motion to remand the matter to the Court of General Sessions to reconstruct the record of the guilty plea. App. 31-68. This Court remanded the matter for reconstruction on April 21, 2023. App. 69-70.

A reconstruction hearing was held on December 15, 2023. The State was represented by April Sampson. Petitioner was represented by Appellate Counsel Jessica Saxon. App. 71. Also present was Petitioner's plea counsel, Anna Browder, and D. Russell Barlow for the Attorney General's Office. App. 73-74. At the conclusion of the hearing, Judge Newman ruled the record had been adequately reconstructed. App. 102.

This petition follows.

ARGUMENT

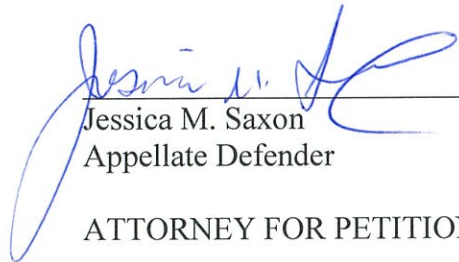
The PCR court correctly granted Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the State consented to allow a belated direct appeal for Petitioner.

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” *Simuel v. State*, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). *Clark v. State*, 396 S.C. 164, 719 S.E.2d 708 (2011). “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, 87 S.Ct. 1396, 18 L.E.2d 493 (1967).” *Simuel* at 270.

Although the State initially moved to dismiss Petitioner’s application, the parties eventually agreed to consent to a belated appeal. As there was no opposition by the State, it would have been illogical for the PCR judge to deny Petitioner a direct appeal. It was proper for the court to grant the consent order allowing Petitioner a direct appeal from his guilty plea.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
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ATTORNEY FOR PETITIONER

This 12th day of August, 2024.