

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT - 9 2013

Certiorari to Dorchester County
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2013-000235

PETER J. GRANT,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ISSUE PRESENTED

Is there evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for not filing an appeal on Petitioner's behalf?

STATEMENT OF THE CASE

Petitioner was true bill indicted during the June 2009 term of the Dorchester County Grand Jury for Murder (2009-GS-18-0470). Petitioner was represented Mary LeMatty, Esquire (hereafter "Counsel"). On April 5, 2010, Petitioner appeared before the Honorable Diane S. Goodstein and pled guilty to the lesser included offense of Voluntary Manslaughter, without any negotiation or recommendation from the State. Judge Goodstein sentenced Petitioner to fifteen years imprisonment. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed an application for post-conviction relief on March 22, 2011, alleging that he was being held in custody unlawfully based on the allegations of ineffective assistance of counsel for failing to inform him that he could request a self-defense charge if the matter proceeded to a jury trial and that his guilty plea was not voluntarily or intelligently entered. Respondent made its Return on November 14, 2011 and requested an evidentiary hearing be held. An evidentiary hearing was convened on November 2, 2012, at the Dorchester County Courthouse before the Honorable Carmen T. Mullen. Petitioner was present and represented by Jessica L. Means, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. Counsel was also present and testified at the hearing. At the start of the hearing, Petitioner orally moved to amend his allegation to include the ground that Counsel was ineffective for failing to file an appeal on his behalf; the court granted Petitioner's motion to amend over Respondent's objection. Petitioner expressly abandoned and waived all other allegations regarding Counsel's performance or the voluntariness of his guilty plea and elected to proceed forward on the sole allegation that Counsel was ineffective for neglecting to file an appeal from his guilty plea. By Order dated

November 29, 2012 and filed December 7, 2012, Judge Mullen denied and dismissed the application with prejudice. Thereafter, on December 19, 2012, Petitioner filed a Motion to Reconsider this Order of Dismissal. The Court denied this Motion on January 16, 2013.

Petitioner filed a Petition for Writ of Certiorari on September 3, 2013. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘*any evidence*’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added).

In a post-conviction relief proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “In the context of a guilty plea, the court must determine whether: (1) counsel's advice was within the range of competence demanded of attorneys in criminal cases-i.e. was counsel's performance deficient, and (2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58 (1985)).

“[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 (for example, because there are non-frivolous grounds for 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 (2000). “Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights.” Id. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). “One extraordinary circumstance 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.” Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

ARGUMENT

There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for not filing an appeal on Petitioner's behalf, where Counsel's credible testimony reveals that she did not receive any communication requesting an appeal from Petitioner.

Petitioner asserts that the post-conviction relief court erred in determining that he was not entitled to an appellate review of his guilty plea pursuant to White v. State¹, arguing that he requested Counsel file an appeal by undated letter following his guilty plea. The post-conviction relief court correctly determined Petitioner was not entitled to a belated appeal of his guilty plea, as there is evidence of probative value in the record to support this finding.

In Petitioner's application for post-conviction relief, Petitioner stated that his reason for not appealing his guilty plea was that he "was not aware that [he] could appeal a guilty plea" and "really there was no grounds for an appeal." (App. p. 43). However, at the start of the evidentiary hearing, Petitioner orally moved to amend his application and elected to proceed forward on the claim that Counsel was ineffective for failing to file an appeal on his behalf.

At the post-conviction relief evidentiary hearing, Petitioner testified that he understood his plea was to a lesser included offense that reduced his sentence exposure from a mandatory minimum of thirty years up to life imprisonment to a possible sentence of two to thirty years and that he understood it was without any negotiation or recommendation from the State. (App. p. 78). Petitioner testified that this significant reduction in exposure weighed into his decision to plead guilty. (App. p. 78 lines 18-24). Petitioner testified that Counsel never reviewed his appellate rights with him prior to his guilty plea. (App. p. 80 lines 4-7). However, he testified that the plea court did review these rights with him during his guilty plea and that he was aware

¹ 263 S.C. 110, 208 S.E.2d 35 (1975).

he only had ten days to file an appeal following his guilty plea. (App. pp. 80-81). Petitioner testified that following his guilty plea, he wrote Counsel requesting that Counsel “file for [him] to come back and lesser time.” (App. p. 74 lines 20-22; App. p. 84).² While the letter is undated, Petitioner testified that he wrote the letter immediately following his guilty plea. (App. p. 81 lines 1-3). He testified that he did not follow up with Counsel following this undated letter. (App. p. 81 lines 7-9). After observing Petitioner as he testified and reviewing the undated letter, the post-conviction court found that his testimony was not credible. (App. pp. 49).

Counsel testified that she reviewed Petitioner’s appellate rights with him prior to his guilty plea. (App. p. 71 lines 16-19). Counsel testified that the plea court informed Petitioner of his right to appeal within ten days of his guilty plea. (App. pp. 71 lines 20-24). Counsel testified that she does not recall receiving any correspondence or calls from Petitioner following his guilty plea inquiring about an appeal. (App. p. 71 line 25 – p. 72 line 5). Counsel testified that she reviewed her file prior to testifying and that there is no record of Applicant ever contacting her following his guilty plea. (App. p. 64 line 11 – p. 65 line 16).

The post-conviction relief court determined that Counsel’s testimony was credible and declined to grant Petitioner an appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The record contains evidence of probative value to support the post-conviction relief court’s findings. This Petition should be denied.

² This letter, which was introduced into evidence as Petitioner’s Exhibit 1, does not reference an appeal and merely states that Petitioner is seeking a sentence reduction; this letter is more logically interpreted as a request for Counsel to file a motion for reconsideration – not an appeal of his guilty plea.

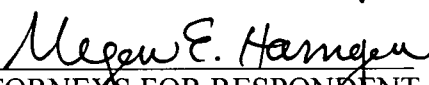
CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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October 9, 2013

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RESPONDENT.

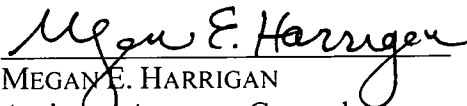
PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

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

This 9th day of October, 2013.


MEGAN E. HARRIGAN
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ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

October 9, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Peter J. Grant, #340019 v. State of South Carolina
Appellate Case No. 2013-000235
Lower Court Case No. 2011-CP-18-0640

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services