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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO DARLINGTON COUNTY
Court Of Common Pleas

The Honorable Roger E. Henderson, Resentencing Judge
The Honorable George M. McFaddin, Jr., Post-Conviction Relief Judge

Appellate Case No. 2024-000550

ANGELO HAM, #315014,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

The PCR judge ruled properly in granting petitioner's request for a belated direct appeal per White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Respondent's Counterstatement of Issue on Certiorari

The post-conviction relief ruled properly in granting Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

STATEMENT OF THE CASE

On September 14, 2004, the State submitted juvenile petitions accusing Appellant of murder, armed robbery, and possession of a weapon during the commission of a violent crime for events that took place on September 9, 2004, when Appellant was fifteen years old. (App. p. 1). That same day, the state filed a motion requesting that the petitions be transferred to the Court of General Sessions. (App. p. 1). On July 18, 2005, a hearing was held before the Honorable Roger E. Henderson to determine whether jurisdiction should be transferred to the Court of General Sessions. (App. p. 2). Henry "Hank" Anderson Jr., Esquire, represented Appellant, and then Assistant Solicitor Kenard Redmond represented the State. (App. p. 2). By order dated August 3, 2005, and filed August 10, 2005, Judge Henderson waived Appellant up to the Court of General Sessions. (App. pp. 50-51).

During its October 2005 term, the Darlington County Grand Jury indicted Appellant for murder (2005-GS-16-1969), armed robbery (2005-GS-16-1970), and criminal conspiracy (2005-GS-16-1971). (App. pp. 590-595). On April 17, 2006, Appellant pled guilty to all three charges before the Honorable John M. Milling. (App. p. 52). On April 17, 2006, Judge Milling sentenced Appellant to five years imprisonment for conspiracy. (App p. 80, II. 9-24). Judge Milling deferred sentencing on the murder and armed robbery offenses. On September 14, 2007, Judge Milling a sentencing hearing was held before Judge Milling, and Appellant was sentenced to life without parole for murder and twenty-five years for armed robbery. (App. p. 122).

Appellant filed a timely notice of appeal. On June 2, 2008, by filed affidavit, Appellant withdrew his direct appeal. By order filed June 9, 2008, the Court of Appeals dismissed Appellant's appeal and remitted the case back to the Darlington County Clerk of Court. (App. pp. 125-128).

On September 11, 2007, Appellant filed his first post-conviction relief action (2007-CP-16-00811).¹ (App. pp. 129-133). The State filed its Return and Partial Motion to Dismiss on November 2, 2007. (App. pp. 134-138). On April 23, 2008, Appellant, through counsel, Charles T. Brooks, III, Esquire, filed a motion to amend the application. (App. p. 139). On June 5, 2008, Appellant, through counsel, filed a second amended post-conviction relief application. (App. p. 140). On December 15, 2008, by filed order, the post-conviction relief court issued its Order of Dismissal with Prejudice.² (App. pp. 142-143).

On November 21, 2008, Appellant filed an application for post-conviction relief challenging his convictions and sentences for murder and armed robbery. (App. 145-149). The State filed its Return on March 2, 2009. (App. pp. 150-154). On September 13, 2010, an evidentiary hearing was convened before the Honorable Thomas A. Russo. Then, Assistant Attorney General Karen C. Ratigan represented the State, and Gary I. Finklea, Esquire, represented Appellant. On December 10, 2010, by filed order, Judge Russo denied Appellant's post-conviction relief application with prejudice. (App. pp. 156-167).

Appellant filed a timely notice of appeal. Appellant's appeal was perfected by Appellate Defender Robert M. Pachak, Esquire, by filing a Johnson³ petition. On March 11, 2014, the South Carolina Court of Appeals denied Appellant's petition. (App. pp. 168-169).

On March 20, 2013, Appellant filed a successive application for post-conviction relief (2013-CP-16-00248) asserting he was being held in custody illegally for the following reasons:

- I. [Appellant's] sentence of life without parole, imposed for a crime he committed when he was a juvenile, violates the Eighth Amendment to the

¹ Appellant only challenged the conspiracy conviction in this post-conviction relief action.

² Appellant voluntarily withdrew his post-conviction relief application.

³ Johnson v. State, 294 S.C. 310 S.E.2d 201 (1988).

United States Constitution and Article I, § 15 of the South Carolina Constitution.

- II. Applicant's sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution as an excessive and cruel and unusual punishment because he was both a juvenile and a person who did not kill or intend to kill the victim.
- III. Applicant's sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution, because the proceedings which led to its imposition were both procedurally and substantively inadequate.
- IV. Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, because Applicant's counsel failed to develop and present mitigating evidence which would have warranted a sentence of less than life without parole.

(App. pp. 171-181). On the same day Appellant filed his post-conviction relief application, he filed a motion to stay the proceedings until the South Carolina Supreme Court's resolution of Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). (App. pp. 182-185).

On or about May 14, 2013, the State filed its Return and Motion to Dismiss. (App. pp. 186-192). On or about May 23, 2013, the Honorable J. Michael Baxley issued the Conditional Order of Dismissal. (App. pp. 194-198). On or about May 28, 2013, Appellant made his Response to AG's Return and Motion to Dismiss. (App. pp. 199-203). On or about August 16, 2013, the State made its Return to Applicant's "Response to AG's Response and Motion to Dismiss." (App. pp. 205-207). On or about March 10, 2016, the State made its Amended Return and Motion to Dismiss. (App. pp. 209-216). On or about March 16, 2016, the Honorable Roger E. Henderson issued an Amended Conditional Order of Dismissal. (App. pp. 218-225). By order filed March 16, 2017, Judge Henderson issued the Final Order of Dismissal in light of the South Carolina Supreme Court's holding in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). (App. pp. 226-228).

During the pendency of the 2013 post-conviction relief action, Appellant filed another post-conviction relief action (2014-CP-16-00202) on March 18, 2014. (App. pp. 230-236). On March 15, 2014, the State filed its Return and Motion to Dismiss. (App. pp. 237-244). On March 24, 2016, the Honorable Roger E. Henderson issued the Conditional Order of Dismissal. (App. pp. 246-253). On May 20, 2016, Appellant filed his response to the Conditional Order of Dismissal. (App. pp. 255-265). On February 15, 2017, Judge Henderson issued the Final Order of Dismissal. (App. pp. 266-269). On April 12, 2017, Appellant filed a Rule 59(e), SCRPC, motion to reconsider. (App. pp. 274-295). On April 17, 2017, the State filed its Return to Applicant's Motion Pursuant to Rule 59(e), SCRPC. (App. pp. 296-298). On April 28, 2017, Appellant filed his response to the State's return. (App. pp. 301-304). On May 8, 2017, Judge Henderson denied Appellant's Rule 59(e), SCRPC, motion by filed order. (App. pp. 305-306).

Appellant filed a timely notice of appeal. (App. pp. 307-308). On November 29, 2017, Appellant filed his Appendix. On December 4, 2017, Appellant filed his Petition for Writ of Certiorari. On January 18, 2018, the Court dismissed the appeal for failure to provide an explanation required by Rule 243(c), SCACR. (App. p. 429). On February 2, 2018, the Remittitur was returned to the Darlington County Clerk of Court. (App. p. 430).

On June 8, 2016, Appellant filed a motion for resentencing pursuant to Aiken v. Byars. (App. pp. 431-433). On March 3, 2022, a resentencing hearing was convened before the Honorable Roger E. Henderson. (App. p. 434). Deputy Solicitor Kenard Redmond represented the State, and Robert L. Gailliard, Esquire, represented Appellant. (App. p. 434). At the conclusion of the hearing, Judge Henderson resentenced Appellant to life without parole for murder. (App. p. 531).

While a timely notice of appeal was filed on Appellant's behalf, the South Carolina Court of Appeals dismissed Appellant's appeal because counsel for Appellant failed to timely serve the

notice of appeal on the State. (App. p. 560). The South Carolina Court of Appeals denied Appellant's subsequent motion to recall the remittitur. (App. pp. 572-573).

On April 26, 2022, Appellant filed an application for post-conviction relief seeking a belated direct appeal from his resentencing pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974). (App. 581-189). The State filed a return to this application on February 8, 2023. (App. pp. 581-589). On March 4, 2024, an evidentiary hearing was convened before the Honorable George McFadden, Jr. (App. p. 596). By order filed March 15, 2024, Judge McFadden granted Appellant a belated appeal. (App. pp. 606-611).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is any probative evidence in the record to support 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 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack 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 lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief 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

The post-conviction relief judge ruled properly in granting Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

On appeal, Petitioner argues the post-conviction relief court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed he desired a direct appeal, and where he never knowingly and voluntarily waived his right to a direct appeal, and where the State consented to allow a belated direct appeal for Petitioner. The State agrees with this argument. Accordingly, Petitioner is entitled to a belated appeal pursuant to White v. State.

During the post-conviction relief hearing held in the case, Counsel Gailliard testified that he failed to timely serve the notice of appeal on the Solicitor's Office, and the appeal was dismissed. After this testimony, Respondent conceded that Petitioner that counsel erred with respect to the improper filing of the notice of appeal documents and did not oppose Petitioner's request for a belated direct appeal.

Trial counsel has a duty to make sure a client is fully aware of the right to appeal and ascertain whether his client desires an appeal, and then to file an appeal if the client wishes to appeal. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991). If, after so advising, an indigent client wishes to appeal, then trial counsel must serve and file a notice of appeal. In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E. 483 (1991). Here, trial counsel did not properly perform his duty with respect to Petitioner's appellate rights. A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). Accordingly, Petitioner is entitled to a belated direct appeal pursuant to White v. State.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The post-conviction relief court's order correctly concluded that Petitioner "did not knowingly and intelligently waive his right to a direct appeal and, as such, he may petition the Supreme Court of South Carolina pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)." (App. p. 610). Accordingly, the post-conviction relief court found Petitioner was entitled to a for belated appellate review of his guilty plea under White v. State, *supra*. The evidence supports the post-conviction relief judge's conclusion.

