

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Deadra L. Jefferson, Circuit Court Judge

JOHN KEHBORN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-002166

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in denying Petitioner's belated appeal claim where trial counsel failed to speak to him after sentencing and thus the issue is controlled by *Clark v. State*, 396 S.C. 164, 719 S.E.2d 708 (Ct. App. 2011)?

STATEMENT

Petitioner was indicted by the Horry County grand jury on August 12, 2020, for second degree criminal sexual conduct with a minor. App. 425. He was tried before Judge Steven John and a jury in February of 2022. App. 1. At trial he was represented by Kia Wilson, and George Martin and Leigh Waller prosecuted the case. App. 1. The trial proceeded in his absence. App. 77:7-79:8. He was ultimately convicted as charged, and the trial court issued a twenty-year sentence which was unsealed at a hearing with petitioner present on June 15, 2022. App. 413:17-22, 422:1-3, 427, 516.

Petitioner filed an application for post-conviction relief on June 20, 2023, alleging trial counsel was ineffective for failing to perfect an appeal on his behalf following sentencing. App. 439, 450-451. Judge Deadra Jefferson then held an evidentiary hearing on July 31, 2024, and petitioner proceeded solely on his claim seeking a belated appeal. App. 459, 463:5-15. He was represented at the hearing by Steven Fowler, and Bryan Hall represented the state. App. 459. The PCR court filed its order denying petitioner's claim on December 17, 2024. App. 515.

At the hearing petitioner testified he "immediately" asked trial counsel to file an appeal on the day of sentencing. App. 470:15-16, 471:1-15. He testified he told her to appeal "face to face," but then "she told me to call the office and reminder her." App. 470:15-18. Trial counsel testified to a different version of events: "After trial I don't recall us speaking after he was sentenced and taken to the back. I don't recall there being a communication after that. At no point in time after we finished in court that day and the sentence was read into the record did he contact our office." App. 492:9-13. She testified "before the unsealing of the sentence" she advised him of his right to appeal and that she "[did not] recall speaking to him after the unsealing of the sentence" App. 494:4-9, 506:9-12.

The PCR court found "Applicant did not communicate to Counsel any desire to file an appeal." App. 523. It found his testimony was not credible while trial counsel's testimony was. App. 522-523. The PCR court held petitioner's "failure to notify Counsel after being advised of his right to an appeal constituted an intelligent waiver of his right to an appeal." App. 523. It denied his application. App. 524.

This petition for a writ of certiorari follows.

ARGUMENT

In *Clark v. State*, 396 S.C. 164, 719 S.E.2d 708 (Ct. App. 2011), the Court of Appeals held that trial counsel *must* advise a defendant of his right to appeal following a trial regardless of the fact he was previously warned. 396 S.C. at 168-69, 719 S.E.2d at 710-11. In *Clark* trial counsel testified he "explained the PCR and appeals process to Petitioner 'before the trial ever started'" and that "he and Petitioner 'did not speak after sentencing.'" 396 S.C. at 168, 719 S.E.2d at 710. The PCR court found trial counsel's testimony was credible while Clark's was not, and so it denied his application. *Id.* The Court of Appeals reversed: "*Following a trial*, counsel is required to make certain the defendant is made fully aware of the right to appeal." *Id.* (emphasis in original) (quoting *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). Because trial counsel did not speak to Clark after trial, "there [was] no probative evidence trial counsel informed Petitioner of his *right to appeal* following Petitioner's trial." 396 S.C. at 169, 719 S.E.2d at 710 (emphasis in original). "Thus, even considering the PCR court's credibility findings, there [was] no probative evidence that [Clark] knowingly waived his right to direct appeal, or that trial counsel made certain [Clark] was fully aware of his right to appeal *following the trial.*" *Clark*, 396 S.C. at 169, 719 S.E.2d at 711 (emphasis added).

The reasoning in *Clark* is correct: trial counsel has an obligation to ensure defendants are aware of their right to appeal *at the time they can exercise that right and appeal.* See 67 Corpus Juris, *Waiver* § 5, at 302 (1934) ("If waiver is to be effected by the omission or failure of a party to assert in his behalf an existing right, such waiver must be preceded by notice."). Only after timely notice can a defendant then decide to deliberately and affirmatively waive the right. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (emphasis added) ("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*" (quoting *Turner*, 380 S.C. at 224, 670 S.E.2d at 374)). Inactivity based on untimely advice is not a valid waiver; the failure to call counsel from prison does not suffice. *Clark*, 396 S.C. at 169, 719 S.E.2d at 710.

Here, trial counsel was required to "ascertain[] whether Petitioner wanted to appeal his conviction" at the time for him to choose to do so. *Clark*, 396 S.C. at 169, 719 S.E.2d at 710; *see also Simuel*, 390 S.C. at 271, 701 S.E.2d at 740 (reversing PCR court's denial because there was no evidence trial counsel "made certain Petitioner was fully aware of his right to appeal"). As in *Clark*, trial counsel did not speak to petitioner after sentencing. Trial counsel also did not testify that petitioner ever affirmatively indicated he did not want to appeal. It was not enough to merely instruct him prior to sentencing that he must contact her later if he wants to appeal. His subsequent failure to call was not a deliberate waiver because after a trial and conviction, courts will not assume the defendant does not want to appeal. To hold otherwise would be to erroneously apply the standard for guilty pleas where counsel has no general obligation to advise defendants about the right to appeal. *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citations omitted) ("[T]he standard for a guilty plea differs. Absent extraordinary circumstances, . . . there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.").

It is not significant that this case was tried in petitioner's absence while in *Clark* the time to appeal arose immediately after trial. A defendant can intelligently waive the right to appeal only once he is aware of the sentence he faces. Imagine, for example, a defendant received a comparatively light sentence for a given charge. On his own, he may not be equipped to thoughtfully evaluate the circumstances and decide whether to waive his appeal. Only with the advice of counsel at the time he can exercise the right to appeal and with full knowledge of the

consequences he faces can a defendant knowingly and intelligently waive the right to appeal. *See Simuel*, 390 S.C. at 271, 701 S.E.2d at 739-40 ("To waive a direct appeal, a defendant must make a *knowing and intelligent* decision not to pursue the appeal." (emphasis added) (quoting *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004))).

Because "there is no probative evidence that Petitioner knowingly waived his right to direct appeal," the PCR court must be reversed. *Clark*, 396 S.C. at 169, 719 S.E.2d at 711.

STATEMENT OF BELATED APPEAL ISSUES

Pursuant to Rule 243(i)(2), SCACR, petitioner offers the following issues on appeal should the Court allow a belated appeal:

1. Whether the trial court erred by trying petitioner in his absence where the court did not know his absence was willful and voluntary?
2. Did the trial court unconstitutionally comment on the facts of the case by directing the jury how to evaluate a minor's testimony immediately prior to Minor's testimony in this case and then repeating those directions with the final jury instructions?
3. Did the trial court err by denying petitioner's motion for a mistrial after Minor's doctor testified about her medical history and stated Minor told her about "several occasions," clearly implying Minor said she had been assaulted previously?

CONCLUSION

For the reasons stated above, petitioner respectfully requests this court grant his petition and review the PCR court's decision.



Jordan Wayburn
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2025.