

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

Doyet A. Early, III, Circuit Court Judge

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S.C. Supreme Court

KENNY JACKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000769

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in finding that petitioner was not entitled to a belated direct appeal pursuant to White v. State?

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in imposing the twenty three year sentence and failing to consider in mitigation the fact that Appellant waived his right to a jury trial and pled guilty?

STATEMENT

In March of 2012, the Aiken County Grand Jury indicted Petitioner for two counts of causing death by operating a vehicle under the influence of drugs or alcohol, indictments #2012-GS-02-446, 447. On March 14, 2012, Petitioner appeared before the Honorable George C. James, Jr. and pled guilty to both counts. Attorney Charles H.S. Lyons, III represented Petitioner at the guilty plea. The case was prosecuted by attorney Samuel B. Grimes. Judge James sentenced Petitioner to 23 years concurrent for each count with a fine of twenty five thousand and one hundred dollars (\$25,100.00) for each count. Petitioner did not appeal his sentence or conviction.

On June 6, 2012, Petitioner filed an application for post conviction relief. The State filed a return on September 11, 2012. On January 23, 2013, an evidentiary hearing was held before the Honorable Doyet A. Early, III. Attorney Ziva P. Buckner represented Petitioner at the PCR hearing. Attorney Megan E. Harrigan was present for the State. In a written order signed March 6, 2013, Judge Early denied relief and dismissed the application. A timely notice of intent to appeal was served on April 10, 2013. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that petitioner was not entitled to a belated direct appeal pursuant to White v. State?

In his application for post conviction relief Petitioner specifically requests a belated appeal. (App. p. 50). The plea judge specifically advised Petitioner that he had ten days to appeal the pleas and sentences. (App. p. 13, lines 18-23). During the PCR hearing Petitioner testified that after the guilty pleas and sentencing he asked plea counsel to file an appeal but counsel did not. (App. p. 78, lines 2-25). Plea counsel denied being asked to file an appeal following the guilty pleas. (App. p. 86, lines 8-21). Plea counsel was asked, “You mentioned that he never directly asked you to appeal the sentence within the 10 days; is that correct?” (App. p. 88, lines 10-12). Plea counsel answered, ‘I think we talked about it.’ (App. p. 88, line 12).

In the order of dismissal the PCR judge wrote:

After careful review based on the standard discussed above, this Court finds that the Applicant has failed to carry his burden in this action. Counsel testified that he never received any requests from Applicant, or any member of Applicant’s family, to file an appeal on his behalf and had no reason to believe Applicant wished to file an appeal. Counsel testified that he reviewed Applicant’s right to appeal with him prior to his guilty plea and that the plea court also reviewed these rights during the guilty plea. This Court finds that Counsel’s performance was reasonable and effective. Therefore, this court finds that this allegation must be denied and dismissed.

The PCR judge erred.

In Weathers v. State, 319 S.C. 59, 61-62, 459 S.E.2d 838, 839 (1995), the South Carolina

Supreme Court wrote:

We now adopt the holding of the majority of courts that, absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. See Laycock v. New Mexico, 880 F.2d 1184 (10th Cir.1989); Marrow v. United States, 772 F.2d 525 (9th Cir.1985); Davis v. Wainwright, 462 F.2d 1354 (5th

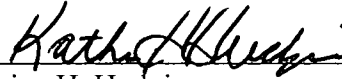
Cir.1972); Carey v. Leverette, 605 F.2d 745 (4th Cir.), *cert. denied*, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979); Farrington v. North Carolina, 391 F.Supp. 714 (M.D.N.C.1975); Younger v. Cox, 323 F.Supp. 412 (W.D.Va.1971). The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal. Younger v. Cox, *supra*. One extraordinary circumstances 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. Laycock v. New Mexico, *supra*; Marrow v. United States, *supra*.

Petitioner testified that he asked counsel to file an appeal. Counsel admits that he and Petitioner talked about filing the appeal within 10 days. (App. p. 88, lines 10-12). This is an inquiry about an appeal constituting an extraordinary circumstance requiring counsel to specifically inquire about Petitioner's desire to file an appeal. While counsel testified that he advised Petitioner of his right to appeal, (App. p. 85, line 23 – p. 86, lines 1-4), counsel never obtained a written waiver of those rights. (App. p. 88, lines 13-20). The PCR judge erred in finding that petitioner was not entitled to a belated appeal.

CONCLUSION

Based on the above argument the petition for writ of certiorari should be granted to allow for further briefing.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2013.

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IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY
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KENNY JACKSON,

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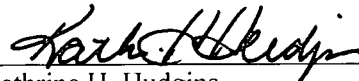
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenny Jackson states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on January 23, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Kenny Jackson.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of November, 2013

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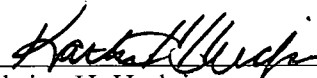
STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

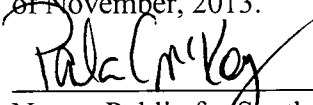
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Kenny Jackson, #350150, at Lieber Correctional Institution this 13th day of November, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of November, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.