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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Horry County
Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2024-002166

JOHN KEHBORN, JR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General
S.C. Bar No: 105228

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF QUESTIONS

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)?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS

Whether the post-conviction relief court correctly found Petitioner knowingly and voluntarily waived his right to a direct appeal, where Counsel credibly testified that after trial, she advised Petitioner of his right to an appeal and told Petitioner to contact her if he desired an appeal, and after being advised, Petitioner failed to contact Counsel?

STATEMENT OF THE CASE

In August 2020, the Horry County Grand Jury indicted John Kehborn, Jr., ("Petitioner") for criminal sexual conduct ("CSC") with a minor – second degree (victim aged 11 to 14 years) (2020-GS—26-02911). On February 14-16, 2022, Petitioner proceeded to a jury trial before the Honorable Steven H. John. Assistant Solicitors George H. Martin, III, and Leigh A. Walker prosecuted the case. Kia T. Wilson, Esquire, represented Petitioner. Petitioner failed to appear for trial and was tried *in absentia*. The jury convicted Petitioner, and the trial court sealed the sentence. On June 15, 2022, the trial court unsealed the sentence and issued a twenty-two (22) year sentence. Petitioner did not appeal.

On June 20, 2023, Petitioner filed an application for post-conviction relief, alleging that he did not knowingly and voluntarily waive his right to a direct appeal and requesting a belated appeal. On April 25, 2024, the State filed its Return and moved to dismiss the application for failure to comply with the statute of limitations, but requested a hearing on the belated appeal issue since it is not barred by the statute of limitations.

On July 31, 2024, an evidentiary hearing was convened before the Honorable Deadra L. Jefferson. Petitioner was present and represented by Steven W. Fowler, Esquire. Assistant Attorney General Bryan T. Hall represented the State. Judge Jefferson denied Petitioner post-conviction relief, determining he failed to meet his burden.

This petition follows.

STATEMENT OF THE FACTS

On May 26, 2020, the minor victim ("Victim"), who was thirteen (13) at the time, was home with Petitioner, her stepfather. Petitioner went into Victim's room (at approximately 4:00 AM), turned her on her stomach, and had sexual intercourse with her. Afterwards, Victim went into the bathroom and texted her brother about what happened. Victim and her brother called Victim's mother, who called law enforcement. Victim was taken to the Medical University of South Carolina ("MUSC"), where DNA was collected. DNA analysis processed at the South Carolina Law Enforcement Division ("SLED") determined Petitioner's DNA was located in the crotch area of Victim's underwear. (App'x pp. 516-17).

At the post-conviction relief hearing, Counsel testified that she spoke to Petitioner "about what was going to happen" before the sentence was unsealed. (App'x p. 492). Counsel testified that after the trial and before the sentencing hearing, it was the first time she had seen Petitioner since the trial because Petitioner had fled. (App'x p. 492). Counsel testified that she advised Petitioner that the deadline to file an appeal was ten (10) days. (App'x p. 494). Counsel testified that Petitioner did not contact her and that she did not recall speaking to Petitioner after the sentencing hearing. (App'x p. 492). Counsel further testified that at no time did Petitioner indicate to her that he wanted an appeal until February 28, 2023, approximately eight (8) months after the sentencing hearing, when she received a call from Petitioner's brother stating that Petitioner wanted an appeal. (App'x pp. 492-93).

Counsel further testified that it is her typical practice to advise her clients of their right to appeal and that, if a client wishes to appeal, Counsel will file a notice of appeal. (App'x p. 505). Counsel testified that she has a policy of telling clients to call the public defender's office and tell

the front desk that they want an appeal, and it will get filed. (App'x p. 506). The post-conviction relief court found Counsel's testimony credible. (App'x pp. 522-23).

STANDARD OF REVIEW

Appellate courts give great deference to the post-conviction relief court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the post-conviction relief court's conclusions of law *de novo* and will reverse if the post-conviction relief court's decisions are controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the post-conviction relief applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial, and "every effort be made to eliminate the distorting effects of hindsight." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 689).

ARGUMENT

The post-conviction relief court correctly found Petitioner knowingly and voluntarily waived his right to a direct appeal, where Counsel credibly testified that after trial, she advised Petitioner of his right to an appeal and told Petitioner to contact her if he desired an appeal, and after being advised, Petitioner failed to contact Counsel.

The post-conviction relief court correctly denied Petitioner a belated appeal, determining he knowingly and voluntarily waived his right to a direct appeal. *Following a trial*, counsel is required to inform a defendant of their right to an appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) (emphasis added). Absent an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedures of Anders v. California, 386 U.S. 738 (1967). Turner v. State, 380 S.C. 223, 670 S.E.2d 373 (2008). Where the post-conviction relief judge determines that Applicant did not knowingly and voluntarily waive his right to a direct appeal from his trial, Applicant may be allowed a belated appeal of trial errors. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

In Clark, the Court of Appeals held that an applicant did not knowingly and voluntarily waive his right to a direct appeal because, after trial, his lawyer did not advise him of his right to appeal and did not speak to him. Clark v. State, 396 S.C. 164, 719 S.E.2d 708 (Ct. App. 2011). The lawyer admitted to informing the applicant about the appeals process *before trial*, but did not advise him of his appellate rights *after trial*. Id. at 167-68, 719 S.E.2d at 710. The lawyer also acknowledged that he did not speak to the applicant after the trial, which the Court reasoned the lawyer could not have ascertained whether the applicant wanted to appeal. Id. at 169, 719 S.E.2d at 710. Further, Counsel testified that he had no reason to doubt that the applicant wanted an appeal. Id. The court determined that the applicant was entitled to a belated appeal because there was no probative evidence that he knowingly waived his right to appeal. Id. at 169, 719 S.E.2d at 711.

Petitioner cites Clark, but Petitioner's case is distinguished from Clark for several reasons. Unlike in Clark, there is probative evidence from Counsel's credible testimony that she advised Petitioner of his right to appeal *after trial*. Counsel testified that [*after Petitioner's trial*] before Petitioner's sentencing hearing, she advised him of his right to an appeal and the ten (10) day filing deadline. (App'x pp. 492; 494:4-9). Counsel advised Petitioner of his right to appeal *after trial*, fulfilling her duty. Clark, 396 S.C. at 169, 719 S.E.2d at 710 ("*Following a trial*, counsel is required to make certain the defendant is made fully aware of the right to appeal.") (emphasis original) (citing Turner, 380 S.C. at 224, 670 S.E.2d at 374).

In stark contrast to Clark, Counsel had the distinct advantage of being able to determine Petitioner's intention to appeal following the trial, as she engaged with Petitioner after the trial and prior to his sentencing hearing. Counsel's testimony, which the post-conviction relief court found credible and compelling, clearly indicated that after the sentencing, Petitioner did not request that she file an appeal. (App'x p. 492:4-6). Additionally, Counsel stated unequivocally that "at no point" did Petitioner reach out to her regarding an appeal or communicate any desire to pursue one until a significant eight (8) months had elapsed following the sentencing hearing. (App'x pp. 492:11-13; 492:15-16; 493-94). Unlike the applicant in Clark, Petitioner failed to express an intention to appeal until well after the appeal deadline had lapsed.

The post-conviction relief court determined Petitioner's omission in failing to inform Counsel that he desired an appeal after being advised by Counsel of his appellate rights following trial constituted a knowing and voluntary waiver of his right to appeal. Unlike in Clark, the post-conviction relief court's ruling is supported by the probative evidence from Counsel's testimony.

Additionally, Petitioner failed to present evidence to substantiate his claim that he informed Counsel of his desire to appeal before the deadline to appeal passed.

Petitioner testified that he informed Counsel that he wished to appeal at the sentencing hearing. However, the post-conviction relief court did not find Petitioner's testimony credible. As the post-conviction relief court found, the call records from the Horry County Public Defender's office did not reflect that Petitioner contacted Counsel about an appeal after sentencing. Therefore, there is probative evidence in the record to support the post-conviction relief court's ruling that Petitioner knowingly and voluntarily waived his right to a direct appeal after being advised of the right after trial. See Sellner, supra ("This Court gives great deference to the factual findings of the [post-conviction relief] court and will uphold them if there is any evidence of probative value to support them."). The post-conviction relief court correctly denied relief.

Accordingly, this Court should deny certiorari.

CONCLUSION


Based on the foregoing argument, the post-conviction relief court correctly found Petitioner failed to meet his burden. Accordingly, the State respectfully requests that this Court affirm the post-conviction relief court's rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General
S.C. Bar No. 105228

BY:  Esq.

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

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