

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marlboro County
Brooks P. Goldsmith, Circuit Court Judge

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DEC 20 2013

S.C. Supreme Court

CLARENCE KENDALL COOK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000366

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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ISSUE PRESENTED

Did the PCR judge err in finding that Petitioner was not seeking a belated direct appeal when Petitioner testified at the PCR hearing that he asked trial counsel to file an appeal, trial counsel advised Petitioner she would file an appeal but told Petitioner's mother that she would not file the appeal until she was paid in full, and when Petitioner learned that the notice of intent to appeal had not been filed, Petitioner filed a notice of intent to appeal but it was dismissed as out of time?

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter?

STATEMENT

In July of 2010, the Marlboro County Grand Jury indicted Cook for murder, indictment #2010-GS-34-0466. In February of 2011, the Marlboro County Grand Jury indicted Cook for unlawful possession of a pistol and possession of a weapon during the commission of a violent crime, indictments #2011-GS-34-91, 92. On April 18, 2011, Cook proceeded to jury trial before the Honorable J. Michael Baxley. Attorneys Myesha Brown and Rosalind Sellers represented cook at trial. Attorneys Mary-Thomas Johnson-Lee and Shipp Daniel prosecuted the case on behalf of the State. At the close of the State's case the State withdrew the unlawful possession of a pistol charge. The jury returned with a verdict of guilty of the lesser included charge of voluntary manslaughter and guilty of the remaining weapon charge. Judge Baxley sentenced Cook to twenty years for voluntary manslaughter and five years consecutive for the weapon charge. The direct appeal was not perfected.

On February 16, 2012, Cook filed an application for post conviction relief. On May 18, 2012, the State filed a return. On January 11, 2013, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. Attorney Mary P. Miles represented Cook at the PCR hearing. Attorney Tyson A. Johnson was present on behalf of the State. In a written order signed January 30, 2013, Judge Goldsmith denied relief and dismissed the application. On February 20, 2013, Cook filed a timely notice of intent to appeal. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that Petitioner was not seeking a belated direct appeal when Petitioner testified at the PCR hearing that he asked trial counsel to file an appeal, trial counsel advised Petitioner she would file an appeal but told Petitioner's mother that she would not file the appeal until she was paid in full, and when Petitioner learned that the notice of intent to appeal had not been filed, Petitioner filed a notice of intent to appeal but it was dismissed as out of time.

In the order of dismissal the PCR judge wrote, "Applicant testified that he 'wanted an appeal right away.' Counsel testified after the verdict she met with Mr. Cook and talked with him about the potential for appeal, but that she did not agree to represent him on his appeal. The Court notes that in this proceeding, Applicant is not seeking a belated appeal either in any of his filed pleadings or via testimony. Since he has waived his request for a belated appeal, applicant has not shown how this allegation prejudiced him in any way, therefore this allegation is denied." The PCR judge erred in finding that Petitioner waived his request for a belated direct appeal. the record supports the fact that Cook is seeking a belated appeal and the record fails to establish that he waived the right to direct appeal.

In his *pro se* application for post conviction relief Cook alleges a failure to file a timely notice of intent to appeal. (App. p. 663). During the PCR hearing Cook testified that he asked trial counsel to file an appeal, she advised him that she would file an appeal but then later told Cook's mother that if they did not pay her in full she was not going to file anything. (App. p. 703, line 19 – p. 704, lines 1-12). When Cook learned that an appeal had not been filed, he filed a notice of intent to appeal but the appeal was dismissed as being filed out of time. (App. p. 704, lines 13-25).

During cross examination Cook admitted signing a document presented to him by trial counsel but denied that the document, at the time he signed it, advised that the deadline

for filing the appeal was May 2, 2011. (App. pp. 724-728). Cook's mother, Arlene Cook, testified at the PCR hearing that on the day of sentencing trial counsel was aware that Cook wished to appeal but when the mother asked trial counsel about filing the appeal trial counsel told her she would not file the appeal until she was paid in full. (App. p. 801, lines 5-12).

Cook retained counsel, Myesha Brown, to represent him at trial. (App. p. 748, lines 18-23). Trial counsel testified at the PCR hearing that she discussed appellate issues with Cook after the verdict but Cook never asked her to file an appeal. (App. p. 769, line 12 – p. 770, lines 1-6). Trial counsel admitted that Cook was not happy about the outcome of his case but also admitted that she never specifically asked him if he wanted to appeal. (App. p. 772, lines 19-25). Counsel again testified that Cook did not ask her to file an appeal. (App. p. 773, lines 1-15). When asked what she thought Cook's position was regarding an appeal, trial counsel testified, "Mr. Cook never expressed to me any – he never really talked about whether he had wanted me to file an appeal, not file an appeal. he didn't talk about it. He was not happy with the verdict, of course and we sat down and talked about what issues may exist for an appeal." (App. p. 787. lines 13-17). Trial counsel was asked, "If he [Cook] had said, 'I'm not sure if I want to file an appeal or not and don't I have the money to pay you.' To protect his rights would you have filed notice of intent to appeal?" (App. p. 789, lines 9-12). Trial counsel responded, "I didn't believe I had an obligation to file the appeal at that time. So certainly I did not, and he didn't ask me to file the appeal for him. Clearly, I wanted to help Mr. Cook out as much as I could. I did everything I could to help Mr. Cook out." (App. p. 789, lines 13-17).

At the end of the hearing the PCR judge stated, “On the issue of the appeal or whether the appeal was requested or promised, the evidence is conflicting on that, but the Court is persuaded by the Defendant’s Number One. I do not find that the plaintiff – excuse me. The Applicant has proved that it was preponderance of the evidence that it was altered. And, therefore, the court is left with that document. And that document is inconsistent in the Court’s mind with a promise of an attorney to perfect an appeal or to file an appeal.” (App. p. 810, lines 6-16). The PCR judge erred. The document relied upon by the PCR judge simply providing a filing deadline and the amount of money due to trial counsel does not constitute a knowing and intelligent waiver of the right to a direct appeal.

In Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010) the South Carolina Supreme Court wrote:

Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (Turner I); see also Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (Turner II). “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, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).” Turner, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted)

To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (citation omitted).

In Simuel the South Carolina Supreme Court granted a belated appeal because “there is no probative evidence that: (1) Petitioner knowingly waived his right to a direct appeal, and (2) Thompson [trial counsel] made certain Petitioner was fully aware of his right to appeal.” 390 S.C. at 271, 701 S.E.2d at 740. In the present case the record fails

to reflect that trial counsel made certain that Cook was made fully aware of the right to appeal and the process that would take place if Cook could not afford to hire trial counsel to handle the appeal. Although counsel testified that she advised Cook about potential appellate issues and notified him of the filing deadline, this does not constitute a full advisement on the right to appeal after a jury trial, especially when trial counsel admitted that Cook was unhappy with the outcome of the trial. There is no evidence in the record that Cook made a knowing and intelligent decision not to pursue an appeal.

Trial counsel had a duty to determine if Cook wished to appeal. Trial counsel admitted that she did not ask Cook if he wished to appeal. (App. p. 772, lines 19-25). In Matter of Anonymous Member of the Bar, 303 S.C. 307, 307, 400 S.E.2d 483, 483 (1991), the South Carolina Supreme court wrote:

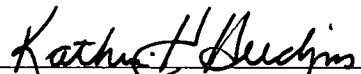
If the client wishes to appeal and is indigent or claims at the end of trial to be indigent, trial counsel (whether appointed or retained) must serve and file a Notice of Appeal as required by Rule 203, SCACR, and request a determination of indigency by the Office of Appellate Defense. If determined to be indigent, trial counsel is automatically relieved as counsel unless otherwise requested by the Office of Appellate Defense. Rule 602(E) (4), SCACR. If determined not to be indigent, counsel must continue to represent the client until relieved by the Court under Rule 235, SCACR. Id.

Trial counsel failed to determine if Cook wished to appeal. Based on the fact that trial counsel admitted that she knew Cook was unhappy with the outcome of the trial, counsel had a duty to file the notice of intent to appeal and request a determination of indigency. Trial counsel was ineffective in failing to file the notice of intent to appeal. Cook is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari and grant a belated appeal.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

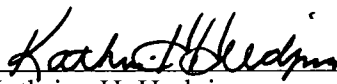
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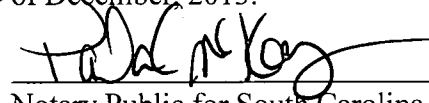
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. Clarence Kendall Cook #345807 Ridgeland Correctional Institution PO Box 2039 Ridgeland, SC 29936 this 20th day of December, 2013.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of December, 2013.


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