

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

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S.C. Supreme Court

JAMES WEST,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212845

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in finding that Petitioner freely and voluntarily waived his right to appeal following his jury trial when Petitioner testified that trial counsel did not explain his appellate rights and the record reflects that the trial judge did not discuss appellate rights?

STATEMENT

In August of 2009, the Dorchester County Grand Jury indicted Petitioner West for assault and battery of a high and aggravated nature [ABHAN], indictment #2009-GS-18-1000. On February 2, 2010, West proceeded to jury trial before the Honorable Diane Schafer Goodstein. Attorney J. Scott Bischoff, II represented West at trial. Attorney B. Harrison Bell, Jr. prosecuted the case on behalf of the State. On February 5, 2010, the jury returned with a verdict of guilty. Judge Goodstein sentenced West to eight years. A notice of intent to appeal was not filed.

On October 7, 2010, West filed an application for post conviction relief, 2010-CP-18-2806. The State filed a return on July 7, 2011. On May 24, 2012, an evidentiary hearing was held before the Honorable DeAndrea G. Benjamin. Attorney Charles Brooks represented West at the PCR hearing. Attorney Sally Elliot was present on behalf of the State. In a written order signed August 15, 2012, Judge Benjamin denied relief and dismissed the application. A timely notice of intent to appeal was served on August 23, 2012. This petition for writ of certiorari follows.

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal?

ARGUMENT

The PCR judge erred in finding that Petitioner freely and voluntarily waived his right to appeal following his jury trial when Petitioner testified that trial counsel did not explain his appellate rights and the record reflects that the trial judge did not discuss appellate rights.

In his PCR application, Petitioner West states that he did not appeal his conviction because he did not understand and was not instructed that he could do so. (App. p. 354). During the PCR hearing West testified that trial counsel did not explain the right to appeal. (App. p. 372, lines 6-24). West testified, ‘When we got downstairs, I shook his hand. I said we rolled the dice, we lost.’ (App. p. 372, lines 12-13). According to trial counsel, West was informed of his right to appeal but was not interested in an appeal. During the PCR hearing trial counsel testified, “I met with him at the lower level of the Dorchester County Courthouse and explained to him that he’s got a right to appeal within 10 days. That if he wants to appeal he should tell me and I’ll follow through with that appeal. But we did. I remember shaking hands with him through the small cut-out and he said, no, we gave it a good run. I’m not interested in an appeal.” (App. p. 391, lines 17-23). There was, however, no written waiver of the right to appeal following trial and no testimony that trial counsel explained the nature of an appeal. The trial transcript reflects that the trial judge did not inform West of the right to appeal.

In the order of dismissal the PCR judge wrote: “However, based upon the testimony before it, this court finds that applicant was advised of and understood the right to appeal and the time frame within which appeal must be taken but knowingly and voluntarily relinquished the right to appeal.” (App. p. 400). The PCR judge erred.

In Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (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).

While counsel testified that he told West he had the right to appeal within ten days, there is nothing in the record to support that counsel explained the nature of that appeal right in such a way that any alleged waiver of the right to appeal could be deemed to have been intelligently made. “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). The record in this case does not support that West knowingly and intelligently waived his right to direct appeal. The PCR judge erred in finding that West waived his right to a direct appeal and in refusing to grant 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 order a belated appeal pursuant to White v. State.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
E-Mail: khudgins@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1343

ATTORNEY FOR PETITIONER

This 12th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
DEANDREA G. BENJAMIN, CIRCUIT COURT JUDGE

JAMES WEST,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212845

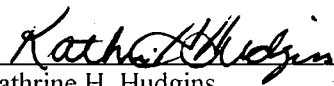
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James West 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 May 24, 2012. 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 James West.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of March, 2014

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JAMES WEST,

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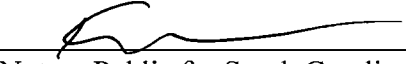
CERTIFICATE OF SERVICE

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 James West, at 121 George Keen, Summerville, SC 29483 this 12th day of March, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of March, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.