

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No. 2009-CP-42-6225

Kandia Crate, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the PCR Court properly summarily dismiss the application based on Applicant's failure to file within the statute of limitations when Petitioner had more than three years to determine if an appeal had been filed on his behalf and if so, if the appeal was pending?

Did the PCR Court properly find that Petitioner was not entitled to a belated direct appeal pursuant to White v. State, when Counsel credibly testified that he was never asked by Petitioner to appeal the guilty plea and Counsel did not believe there were any appealable issues?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Petitioner was indicted at the August 2005 term of the Spartanburg County Grand Jury for one (1) count of unlawful conduct toward a child (05-GS-42-3870), one (1) count of failure to stop motor vehicle when signaled by officer (05-GS-42-3871), and one (1) count of trafficking in cocaine greater than twenty-eight (28) grams – 3rd offense (05-GS-42-3872). Petitioner was then indicted at the October 2005 term of the Spartanburg County Grand Jury for trafficking in cocaine base and/or crack cocaine greater than ten (10) grams – 3rd offense (05-GS-42-4572). He was represented at the time of his plea by Richard Warder, Esquire. On April 6, 2006, the Petitioner pled guilty to both drug charges as indicted and pled pursuant to N.C. v. Alford to the other remaining charges. He was sentenced by the Honorable John C. Few to confinement for a period of twenty five (25) years each for each trafficking charge, ten (10) years for unlawful conduct toward a child (05-GS-42-3870), and three (3) years for failure to stop motor vehicle when signaled by officer (05-GS-42-3871), to be served concurrently. The Petitioner did not appeal his conviction or sentence.

Petitioner then filed an Application for Post-Conviction Relief on November 13, 2009. The State filed its Return and Motion to Dismiss on May 5, 2010. A Conditional Order of Dismissal was signed by the Honorable J. Derham Cole on March 26, 2010. Following a response to the Conditional Order of Dismissal by Applicant, an evidentiary hearing was set. The evidentiary hearing into the matter was convened on September 13, 2010, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by John R. Holland, Esquire. Suzanne H. White of the South Carolina Attorney General's Office

represented the Respondent. At the hearing, the Petitioner testified on his own behalf. Ms. Sonia Nash also testified on behalf of Applicant. Richard D. Warder, Esquire testified on behalf of the State. On November 24, 2010, the Honorable Roger L. Couch issued a written order denying and dismissing Petitioner's application for post-conviction relief. All claims other than Petitioner's claim for a belated direct appeal were summarily dismissed for failure to file within the statute of limitations. Judge Couch dismissed Petitioner's claim for a belated direct appeal based upon his failure to meet his burden of proof.

Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR Court properly summarily dismissed the application based on Applicant’s failure to file within the statute of limitations when Petitioner had more than three years to determine if an appeal had been filed on his behalf and if so, if the appeal was pending.

Petitioner pled guilty to trafficking in crack cocaine greater than ten grams – 3rd offense, trafficking in cocaine greater than twenty-eight grams – 3rd offense, unlawful conduct towards a child, and failure to stop motor vehicle when signaled by an officer, on April 6, 2006. (App. p. 48-51). In exchange for Petitioner’s plea, the State also dismissed an additional trafficking charge Petitioner faced in Cherokee County and an escape charge as a result of fleeing when the case was first called to trial. (App. p. 34). Petitioner then filed his application for post-conviction relief in the Spartanburg County Clerk of Court’s office on November 13, 2009. (App. p. 52-8). In his application, Petitioner alleged that he was being held in custody unlawfully because of claims of ineffective assistance of counsel and an involuntary guilty plea. (App. p. 53-4). The State then filed its Return and Motion to Dismiss for Petitioner’s failure to file his application within the one year statute of limitations. (App. p. 59-63). Petitioner’s application was conditionally dismissed by the Honorable J. Derham Cole by written Order filed March 26, 2010. (App. p. 62-67). Petitioner then filed a response to the Conditional Order of

Dismissal, alleging that for the first time that he had requested that Counsel file an appeal following his conviction because Petitioner believed that he should not have been sentenced to third offenses, but second offenses. (App. p. 69-70). Petitioner also alleged that he wrote several letters to Counsel over the three years asking for information on the status of his appeal, to which he never received any response. (App. p. 70). Petitioner then alleged that he finally contacted the Spartanburg County Clerk's Office in October 2009 to ask about the status of his appeal, which was when he was informed that no appeal had ever been filed in his case. (App. p. 70).

The Respondent submits that a PCR application must ordinarily "be filed within one year after the entry of a judgment of conviction or within one year after the sending of the Remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45(A) (2003). Therefore, the Petitioner was obligated to file his application by April 6, 2007; however, he did not file the application until more than two years later. Respondent submits that the Petitioner was no stranger to the justice system and had previous convictions, including two prior charges of possession of crack cocaine and a previous distribution of crack cocaine charge, which led to Petitioner being charged with 3rd offenses. (App. p. 34). Petitioner

At the PCR hearing, the Respondent argued that the Petitioner only raised the claim that Counsel had failed to file a direct appeal on Petitioner's behalf in his response to the Conditional Order of Dismissal in an effort to bypass the issue of applications barred by the statute of limitations. (App. p. 80). In fact, Petitioner, at the end of his testimony, began to assert that he "felt like that I could, I could have had filled out my PCR application at one time due to the fact . . .," but his PCR Counsel interrupted him and Petitioner never finished his comment. (App. p.

89). Respondent submits that the Petitioner's comment acknowledges the fact that he was aware of and could have completed and filed a PCR application prior to November 2009.

Just as this Court has held that "incarceration in another state does not toll the statute of limitations," Respondent would submit that Petitioner's lack of diligence in filing his application when as he alleges, he received no response initially from Counsel regarding the status of his appeal, should also not toll the statute of limitations in his matter. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005). Furthermore, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the PCR Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Here, Respondent submits that there was no genuine issue of material fact and the court properly dismissed Petitioner's claims of ineffective assistance of counsel and involuntary guilty plea by summarily dismissal.

II. The PCR Court properly found that Petitioner was not entitled to a belated direct appeal pursuant to White v. State, when Counsel credibly testified that he was never asked by Petitioner to appeal the guilty plea and Counsel did not believe there were any appealable issues.

The Petitioner testified at the hearing that after he pled guilty to the two drug charges and pled pursuant to Alford to the child endangerment charge, he asked Counsel to file an appeal on his behalf. (App. p. 81). Petitioner testified that he did not ask Counsel to file the appeal while they were in court, but when they went for Petitioner to sign his sentencing sheets. (App. p. 86). Petitioner testified that at that time Counsel asked why Petitioner wanted an appeal and Petitioner informed Counsel it was because he did not believe he should have received that much time and should not have been sentenced for a third offense. (App. p. 86). Petitioner testified

that he wrote letters to Counsel from time to time to check on the appeal, but he never received any response. (App. p. 84). Petitioner testified that he then had Sonia Nash and his sister contact Counsel's office by phone and stop by in person, but neither was able to contact Counsel personally. (App. p. 84). Ms. Nash testified that she called Counsel's office regarding Petitioner's appeal and never spoke with Counsel personally, but spoke with his paralegal Tina, who could never give her any information. Nash also testified that she called over 50 times during the period of a couple of years off and on. (App. p. 92).

Counsel testified he has been practicing law in South Carolina since 1974 and has handled exclusively criminal cases for the last ten years. (App. p. 95). Counsel testified that he never discussed filing an appeal on Petitioner's behalf with Petitioner following the guilty plea. (App. p. 93). Counsel also testified that he never suggested to Petitioner that there were any appealable issues either. (App. p. 93). Furthermore, Counsel testified that he never received any communication from Petitioner, his sister, or Ms. Nash regarding an appeal, following Petitioner's guilty plea. (App. p. 94). Counsel testified that he has a procedure with cases in regards to filing an appeal and will file a notice of appeal and send the affidavit of indigency to Appellate Defense. (App. p. 94). Counsel also testified that he would have noted on the file that he wanted to file an appeal and then place it on his secretary's desk for her to file the notice. (App. p. 95). Counsel testified that he felt confident that had Petitioner requested that he file an appeal, because of Counsel's standard procedure, Counsel would have filed an appeal in this case. (App. p. 98).

The lower court found Counsel's testimony to be far more credible than either the Petitioner or Ms. Nash's testimonies. (App. p. 106). The lower court also found that Counsel was not informed by the Applicant of a desire to appeal the case within the 10 days required by the

rule and that the Petitioner failed to demonstrate that the facts of the plea would have lead Counsel to believe that an appeal would be necessary or that Petitioner was interested in an appeal. (App. p. 106-7).

Counsel has a constitutionally imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986)¹.

Respondent submits that although Petitioner claimed that he asked Counsel to file an appeal, the lower court makes its findings based on the record and testimony presented at the hearing, including the credibility of each of the witnesses. The decisions are made in part by viewing each of the witnesses at the hearing and their demeanor on the stand. In this matter, the lower court found that the Petitioner failed to meet his burden of proof that he was denied his right to pursue a direct appeal from his guilty plea because of ineffective assistance of counsel. It is clear that “evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Clearly, Petitioner has failed to meet his burden of proof as to this argument.

¹ “Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, **the applicant must petition this Court for a White v. State review.**” [Emphasis added]. Davis, 288 S.C. at 291, n. 1, 342 S.E.2d at 60.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

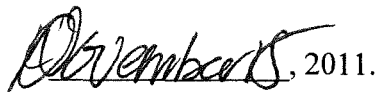
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By: 
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KANDIA CRATE,

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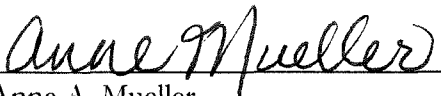
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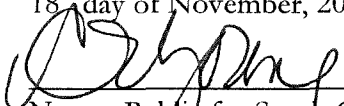
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 18th day of November, 2011.



Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
18th day of November, 2011.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 10/28/2014