

2010-180250

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

KANDIA CRATE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

INDEX

INDEX 1

ISSUES PRESENTED 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT 4

ARGUMENT 5

CONCLUSION 11

ISSUES PRESENTED

1. Did the PCR judge err in dismissing the application on the issues of ineffective assistance of counsel and involuntary guilty plea based on the failure to timely file the application within the one year statute of limitations when petitioner testified that he did not file the PCR application in a timely manner because he believed his direct appeal was still pending?
2. Did the PCR judge err in finding that petitioner was not entitled to a belated direct appeal pursuant to White v. State, when there was no evidence the plea judge informed petitioner of his right to appeal and petitioner testified that he asked his attorney to file a notice of intent to appeal?

STATEMENT OF ISSUE ON APPEAL

1. Did the trial judge err in refusing to relieve counsel and grant a continuance to allow petitioner to hire a different retained attorney?

STATEMENT

In September of 2005, the Spartanburg County Grand Jury indicted Crate for unlawful conduct toward a child, failure to stop when signaled by officer and trafficking in cocaine over 28 grams, indictments #05-GS-42-3870, 71, 72. In October of 2005, the Spartanburg County Grand Jury indicted Crate for trafficking in cocaine base more than 10 grams, indictment #05-GS-42-4572. On April 6, 2006, Crate appeared before the Honorable John C. Few and pled guilty to the drug charges and pled pursuant to North Carolina v. Alford to the unlawful conduct and failure to stop charges. Attorney Richard Warder represented Crate at the plea. Judge Few sentenced Crate to 25 years concurrent for each of the drug charges, 10 years concurrent for the unlawful conduct charge and 3 years concurrent for the failure to stop charge. The notice of intent to appeal was not filed.

On November 13, 2009, Crate filed an application for post conviction relief, 2009-CP-42-6225. The State filed a return and motion to dismiss on February 4, 2010. An evidentiary hearing was held on September 13, 2010, before the Honorable Roger L. Couch. In a written order filed November 24, 2010, Judge Couch denied relief and dismissed the application. A timely notice of intent to appeal was filed on December 9, 2010. This petition for writ of certiorari follows.

ARGUMENT

1. The PCR judge erred in dismissing the application on the issues of ineffective assistance of counsel and involuntary guilty plea based on the failure to timely file the application within the one year statute of limitations when petitioner testified that he did not file the PCR application in a timely manner because he believed his direct appeal was still pending

Petitioner Crate entered guilty pleas on April 6, 2006. Petitioner filed his PCR application on November 13, 2009. The State moved to dismiss the application based on the failure to file within the one year statute of limitations. (App. pp. 59 – 61). Petitioner filed a *pro se* return to a conditional order of dismissal, arguing that he was entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). (App. pp. 68-73). At the evidentiary hearing, the State again moved to dismiss the ineffective assistance of counsel and involuntary guilty plea allegations and only address the issue in regard to the belated appeal. (App. p. 77, lines 4-23). The PCR judge granted the State’s motion to dismiss the allegations of ineffective assistance of counsel, apart from the belated appeal, and involuntary guilty plea. (App. p. 80, lines 22-24; p. 106). The judge erred.

In the return to the conditional order of dismissal, Crate asserts that he first learned that the notice of intent to appeal had not been filed, despite his requests to plea counsel to file the notice of intent to appeal, in October of 2009, when he wrote to the clerk of court. (App. p. 70). Crate filed his PCR application on November 13, 2009, the following month after learning that a direct appeal was not pending. Crate testified at the PCR hearing that from the time he entered his guilty plea on April 6, 2006, to October of 2009, the time he learned from the clerk’s office that the notice of intent to appeal had not been filed, Crate believed his direct appeal was still pending. (App. p. 84, lines 7-20; p. 90, lines 3-9) .

In Pelzer v. State, 378 S.C. 516, 519, 662 S.E.2d 618, 619 (Ct.App. 2008), the South Carolina

Court of Appeals wrote:

Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. S.C.Code Ann. § 17-27-70(b)-(c) (2003); Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005). “When considering the State's motion for summary dismissal of an application for PCR, a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000)). Likewise, this court must view the facts in the same fashion when reviewing the appropriateness of a dismissal. Leamon, 363 S.C. at 434, 611 S.E.2d at 494.

Crate’s other ineffective assistance of counsel claims were summarily dismissed. In the order of dismissal the PCR judge wrote, “This Court finds that the State’s Motion should be granted and summarily dismisses all of Applicant’s allegations, other than Applicant’s allegation of ineffective assistance of counsel for failure to file a direct appeal.” (App. p. 106). While there was a hearing in the present case as to the belated appeal issue, Crate was repeatedly prevented from presenting his other ineffective assistance of counsel and involuntary guilty plea claims. When questioned about counsel being ineffective for not exploring problems in the chain of custody for the drugs, the State objected and the PCR judge sustained the objection. (App. p. 82, lines 9 – p. 83, 84, lines 1-2). Crate testified at the PCR hearing that his drug offense should not have been treated as third offense. (App. p. 86, lines 13-19). Later, in response to another line of questioning, the judge again stated, “But whether or not he had effective assistance of counsel thereafter is not an issue before the Court any longer.” (App. p. 89, lines 5-7). (App. p. 106).

S.C. Code §17-27-45 (A) provides, “An application for relief filed pursuant to this chapter must be filed within one year after the entry of judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal of the filing of the final decision upon an appeal, whichever is later.” Viewing the facts presented by Crate as true and viewing those fact in the light most favorable to Crate, the judge erred in summarily dismissing the other allegations of ineffective assistance of counsel and involuntary guilty plea. Crate is entitled to a full hearing on those issues because the one year statute of limitations should not apply in the present case.

In Wilson v. State, 348 S.C. 215, 217-218, 559 S.E.2d 581, 582-583 (2002), the South Carolina Supreme Court wrote:

This Court has ruled, in Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999), that the one year statute of limitations required by S.C.Code Ann. § 17-27-45(A), does not apply to Austin appeals. Austin appeals do not have to be filed within the one year statute of limitations because they are belated appeals intended to correct unjust procedural defects. A petitioner is entitled to an *Austin* appeal if the PCR judge affirmatively finds either that (1) the applicant requested and was denied an opportunity to seek appellate review, or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. Odom, 337 S.C. at 262, 523 S.E.2d at 756.

We extend our reasoning in Odom and Austin to the instant situation. A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application. In this case, Wilson has not had “one bite of the apple” since he has not received either a direct appeal from his conviction or a PCR hearing. See Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000); Odom.

Just as it was in *Odom*, *Austin's* policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to ineffective assistance

of counsel, and then was denied his right to a PCR application because of the one year statute of limitations. (footnote omitted).

Crate has not had his procedural right to one fair bite at the apple. He was denied his right to direct appeal and denied a PCR hearing on his other grounds of ineffective assistance of counsel and involuntary guilty plea. Crate's application for post conviction relief is not successive. This is the first and only application filed by Crate. Crate filed this application within one month of learning that the direct appeal had not been filed. The case should be remanded for an evidentiary hearing on the remaining allegations of ineffective assistance of counsel and involuntary guilty plea.

2. The PCR judge erred in finding that petitioner was not entitled to a belated direct appeal pursuant to White v. State, when there was no evidence the plea judge informed petitioner of his right to appeal and petitioner testified that he asked his attorney to file a notice of intent to appeal.

Crate testified at the PCR hearing that, after he entered his guilty plea, he asked his retained counsel to file an appeal. (App. p. 81, lines 19-25). Crate testified that he believed his appeal was pending and wrote letters to plea counsel in regard to the status of his appeal. According to Crate, he did not receive any response from his lawyer. (App. p. 84, lines 9-10). Crate testified that his sister and Sonia Nash unsuccessfully tried to contact the attorney in regard to the appeal. (App. p. 84, lines 10 – 16). Nash testified at the PCR hearing that she tried to contact the attorney about the appeal over 50 times. (App. p. 91, lines 19 – p. 92, lines 1-11). Counsel testified that Crate never asked him to file an appeal. (App. p. 93, lines 16-23).

In the order of dismissal the PCR judge wrote, "This Court finds Counsel's testimony to be far more credible than either the Applicant or Ms. Nash's testimonies. This Court finds that Counsel was not informed by the Applicant of a desire to appeal the case within the 10 days

required by the rule. This Court finds that it was not demonstrated that the facts of the plea would have lead [sic] Counsel to believe that an appeal would be necessary or that Applicant was interested in an appeal. Therefore, this allegation is denied and dismissed.” (App. pp. 106-107).
The PCR judge erred.

In Jones v. State, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009), the South Carolina Supreme Court wrote:

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for 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, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

“Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights.” *Id.* Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008).

In Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995), the South Carolina Supreme Court wrote:

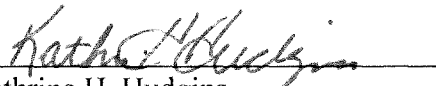
The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal. Younger v. Cox, *supra*. One extraordinary circumstances 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*.

Prior to entering his pleas and receiving a 25 year sentence, Crate moved to relieve plea counsel. (App. p. 3, lines 17-19). Crate testified at the PCR hearing that the plea judge denied his motion to relieve counsel and his motion for a continuance to hire different counsel. (App. p. 87, lines 25 – p. 88, lines 1-8). There is reason to believe that Crate would want to appeal the judge's decision to deny his motion to relieve counsel and hire another attorney. While there is conflicting testimony as to whether Crate asked plea counsel to file the notice of intent to appeal, the record reflects that the plea judge failed to advise Crate of his appeal rights. Counsel should have specifically advised Crate of his appeal rights at the conclusion of the guilty plea. The case presents extraordinary circumstances justifying a belated appeal.

CONCLUSION

Based on the argument presented in issue one, the case should be remanded for an evidentiary hearing to address the other allegations of ineffective assistance of counsel and involuntary guilty plea. Based on the argument presented in issue two, the PCR judge's order refusing to grant a belated appeal should be reversed and a belated appeal granted.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of August, 2011.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

KANDIA CRATE,

PETITIONER,

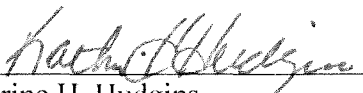
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Suzanne H. White, Esquire and Kandia Crate, #227541, at Lee Correctional Institution this 4th day of August, 2011.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of August, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.