

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-000366

RECEIVED

APR - 7 2014

S.C. Supreme Court

Clarence Kendall Cook, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

 I. Probative evidence supports the PCR judge’s finding Petitioner
 knowingly and voluntarily waived his right to a direct appeal.....3

CONCLUSION.....7

QUESTION PRESENTED

Did the PCR judge properly find Petitioner knowingly and voluntarily waived his right to a direct appeal where trial counsel informed Petitioner of the right to appeal and Petitioner never asked trial counsel to file an appeal?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to convictions from Marlboro County. (App. pp. 656-57). The Marlboro County Grand Jury indicted Petitioner for murder (2010-GS-34-466), unlawful possession of a pistol (2010-GS-34-92), and possession of a weapon during the commission of a violent crime (2010-GS-34-91). (App. pp. 650-55).

On April 18, 2011, Petitioner proceeded to trial before the Honorable J. Michael Baxley and a jury. (App. p. 1). Myesha L. Brown, Esquire, and Rosalind L. Sellers, Esquire, represented Petitioner at trial. (App. p. 1). At the close of its case, the State withdrew the charge for unlawful possession of a pistol. (App. p. 432, lines 6-12). On April 21, 2011, the jury found Petitioner guilty of the lesser-included offense of voluntary manslaughter and of possession of a weapon during the commission of a violent crime. (App. p. 634, lines 4-11) Judge Baxley sentenced Petitioner to consecutive terms of confinement for twenty years for voluntary manslaughter and five years for possession of a weapon during the commission of a violent crime. (App. p. 648, lines 2-7). Petitioner did not appeal his conviction.

Petitioner filed an Application for Post-Conviction Relief on February 16, 2012. (App. p. 658-65). Respondent made its return on or about May 18, 2012. (App. p. 666-69). On January 11, 2013, the Honorable Brooks P. Goldsmith ("PCR judge") convened an evidentiary hearing into the application. (App. p. 671). Mary P. Miles, Esquire, represented Petitioner. (App. p. 671). Tyson A. Johnson was present on behalf of Respondent. (App. p. 671). The PCR judge denied relief and dismissed the application in a written order dated January 30, 2013. (App. p. 812-818).

ARGUMENT

I. Probative evidence supports the PCR judge's finding Petitioner knowingly and voluntarily waived his right to a direct appeal.

Petitioner assert there is no evidence he made a knowing and intelligent decision not to pursue an appeal. However, the record includes abundant credible evidence Petitioner understood his appellate rights and never asked trial counsel to file an appeal. Therefore, Respondent submits the PCR judge properly denied Petitioner's application.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)).

"To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010) (quoting Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004)). Trial counsel has a duty to ensure a defendant is "made fully aware of the right to appeal." Id. at 270, 701 S.E.2d at 739 (citing Turner v. State, 380 S.C. 223, 670 S.E.2d 373 (2008); Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009)). In the absence of a knowing and intelligent waiver, trial counsel must file a notice of appeal. Id. (quoting Turner, 380 S.C. at 224, 670 S.E.2d at 374). "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. Waiver, p. 1063 (1955)).

At the PCR hearing, Petitioner testified he “immediately” told Brown he wanted to appeal his case and he instructed her to do so. (App. p. 703, lines 19-p.704, line 12; p. 717, lines 11-18). Petitioner testified Brown did not inform him of the deadline for filing the notice of intent to appeal (App. p. 718, lines 5-8; p. 718, lines 15-23), and Brown told him she would file his appeal (App. p. 718, lines 10-14; p. 718, lines 18-23; p. 721, lines 17-19; p. 724, lines 21-p. 725, line 8). Petitioner’s mother also testified she asked Brown to appeal Petitioner’s case “[t]he day of his sentencing,” and claimed Brown was aware Petitioner wanted to appeal. (App. p. 801, lines 2-12).

Brown testified Petitioner did not inform her immediately after trial—or at any other time—that he wanted an appeal:

“[Petitioner] never informed me at the time that he wanted to file an appeal. He never asked me to file an appeal for him. That is why he signed his name there [on State’s Exhibit 1] indicating the deadline that he needs to have it postmarked if he so chose to file an appeal”

(App. p. 770, lines 2-6). Brown testified Petitioner’s family contacted her and “ask[ed] about videos and either [sic] evidence that they believe they should have been entitled to,” but they waited to do so until well after the period to file an appeal had expired. (App. p. 770, lines 9-15).

At the hearing, Respondent introduced a handwritten document that the PCR judge admitted into evidence as Defendant’s Exhibit One. (App. p. 719, lines 1-p. 721, line 5; Supp. App. p. 1). Exhibit one states: “I, Clarence Cook, have been informed that my appeal must be filed or postmarked by May 2, 2011, or I will lose my right to an appeal.” (Supp. App. p. 1). Brown testified she “wanted [Petitioner] to be absolutely clear the [sic] deadline he had to file the appeal. So [she] wrote it out specifically so he could read, so he could actually look at it, and so that he could sign something.” (App. p.

788, lines 6-10). Petitioner admitted to signing exhibit one, but denied the document contained the paragraph informing him about the deadline for his appeal when he signed it. (App. p. 719, lines 1- p. 720, line 14; p. 726, lines 6-p. 727, lines 23). Brown testified she wrote exhibit one out and Petitioner signed it. (App. p. 771, lines 12-22). Brown testified she discussed the information in exhibit one with Petitioner, she advised him about the deadline to file an appeal, (App. p. 771, lines 23-25), and “[Petitioner] was informed of his rights to appeal and he knew when it needed to be in fact postmarked.” (App. p. 772, lines 13-16). She stated “[Petitioner] never directed [her] to appeal his case.” (App. p. 773, line 1). Brown continued to maintain throughout her testimony that she advised Petitioner of his right to appeal, but that he did not inform her that he wished to appeal his case. (App. p. 773, lines 2-15; p. 786, lines 24-p. 789, line 17). Brown also testified she discussed what issues may exist in an appeal. (App. p. 787, lines 16-17). Sellers, Brown’s co-counsel, went with Brown to the county jail to speak with Petitioner following the trial. (App. p. 797, lines 3-5). Sellers testified she did not hear Petitioner at any time during that visit ask for or talk about appealing his case. (App. p. 797, lines 3-8).

On the issue of whether a direct appeal “was requested or promised,” the PCR court was “persuaded by” exhibit one and found Petitioner failed to show that it had been altered. (App. p. 810, lines 6-13). The PCR judge denied Petitioner’s application and found petitioner waived his right to a direct appeal. (App. p. 816). The PCR judge also found Brown’s testimony credible, and Petitioner’s testimony not credible. (App. p. 817)

The PCR judge properly found Petitioner failed to meet his burden of proving he did not knowingly and voluntarily waive his right to a direct appeal. Brown’s testimony overwhelmingly indicates she advised Petitioner of the right to appeal. She explained to

him that he could appeal the conviction. She explained an appeal must be filed within ten (10) days. She also discussed with him some potential appellate issues. Therefore, the evidence indicates Petitioner was fully aware of the right to an appeal.

Furthermore, Brown testified Petitioner never asked her to file an appeal. Although Petitioner claims Brown asked for more money to file an appeal, she candidly testified she would have been obligated to file an appeal if he asked for one whether he could pay or not. (App. p. 789, lines 4-8). The PCR judge found this testimony to be more credible than Petitioner's. See Simuel, 390 S.C. at 271 n.2, 701 S.E.2d at 740 n.2 (relying on PCR judge's credibility finding). Furthermore, exhibit one demonstrates Petitioner understood his right to appeal the conviction and the deadline for doing so. The Court found exhibit one persuasive in determining whether Petitioner understood how long he had to ask Brown to file an appeal. Petitioner simply failed to ask for an appeal after Brown advised him of the deadline for doing so. Petitioner's inaction in failure to ask for an appeal certainly constitutes a waiver under the facts of this case. Bonnette, 277 S.C. at 18, 282 S.E.2d at 598. Therefore, the PCR judge properly determined Petitioner waived his right to a direct appeal.

Because the record contains significant probative evidence Petitioner failed to request a direct appeal after trial counsel advised him of the right, the PCR judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the
Petition for Writ of Certiorari.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

April 7, 2014

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas
Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2012-CP-34-0041
Appellate Case No.: 2013-000366

CLARENCE KENDALL COOK, Applicant,

v.

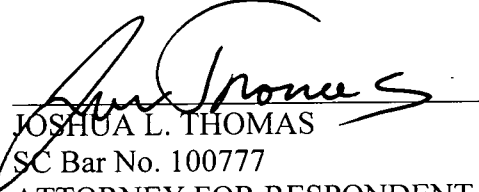
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

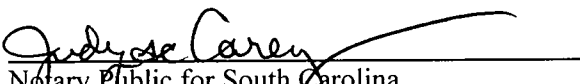
The undersigned hereby certifies that a true copy of the **Return to Petition for a Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

This 7th day of April, 2014


JOSHUA L. THOMAS
SC Bar No. 100777
ATTORNEY FOR RESPONDENT

SWORN to before me this 7th day of April, 2014.


Notary Public for South Carolina.
My Commission Expires May 11, 2014



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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

April 7, 2014

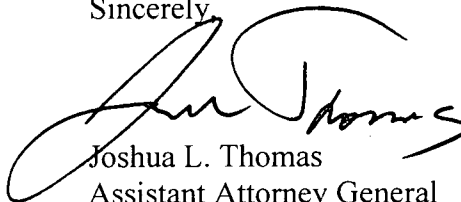
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Clarence Kendall Cook v. State of South Carolina
Appellate Case No: 2013-000366
Lower Court Case No. 2012-CP-34-0041

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies each of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,



Joshua L. Thomas
Assistant Attorney General
S.C. Bar # 100777

JLT/jacc
Enclosures

cc: Kathrine H. Hudgins, Esquire
Trisha Allen, Victim Services