

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Colleton County

S.C. Supreme Court

D. Craig Brown, Circuit Court Judge

JIMMY LEE DUNCAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-203246

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the post-conviction relief judge err in finding petitioner was not entitled to a belated direct appeal of his conviction for furnishing or possessing contraband in a county or municipal prison?

STATEMENT

Petitioner was convicted of furnishing or possessing contraband in a county or municipal prison after a jury trial held before the Honorable Perry M. Buckner, III in Colleton County on January 13-14, 2010. A three year sentence was imposed. Everett W. Bennett, Jr., Esquire was trial counsel. On January 14, 2010, petitioner also pled guilty to possession of cocaine base and was sentenced to time served. Petitioner's probation was revoked on a separate charge for eighteen months.

Petitioner filed an application for post-conviction relief on June 7, 2010. An evidentiary hearing was held on September 1, 2011, before the Honorable D. Craig Brown. Petitioner was present and was represented by J. D. Bryan, Esquire. Respondent was represented by Matthew J. Friedman, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing.

On October 6, 2011, Judge Brown issued an order denying and dismissing the application for post-conviction relief.

A Johnson petition was filed on petitioner's behalf on May 14, 2012, presenting the issue of whether trial counsel was ineffective in failing to file a direct appeal. On April 4, 2014, this Court issued an order denying the motion to be relieved as counsel and directing the parties to address the question contained herein.

This petition follows.

ARGUMENT

The post-conviction relief judge erred in finding petitioner was not entitled to a belated direct appeal of his conviction for furnishing or possessing contraband in a county or municipal prison.

This Court has held many times that it will not uphold the findings of the PCR judge if there is no probative evidence to support those findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994).

Attorneys can be held accountable for failing to file an appeal for their clients. In White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974) the South Carolina Supreme Court wrote that attorneys can not rely on assumptions about whether a client is aware of his right to appeal. Instead, they must make certain that a client is fully aware of his right to appeal. 263 S.C. at 118, 208 S.E. 2d at 39. In Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989) the Court wrote that “an indigent has the right to be informed of an appeal and the manner and method for taking the appeal.” In that case, the Court found that there was “no evidence that trial counsel informed Cherry as to the manner and method for taking the appeal.” Neither did counsel attempt to find out if Cherry wanted to appeal. 300 S. C. at 119-120, 386 S.E. 2d at 626. In the Matter of Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991) the Court reiterated that “trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal. Counsel should give the client his professional judgment whether an appeal should be taken and ascertain whether the client wishes to appeal.” 303 S. C. at 307, 400 S.E. 2d at 483.

In this case petitioner testified at the evidentiary hearing that he was rushed out of the courtroom after his conviction. He asked Officer Koger, who rushed him out, if he would “please

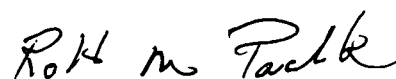
let my attorney know that I wanted to file a direct appeal?" He said the officer came back later and told him that he had told his attorney. (App. p. 294, line 24 – p. 295, line 6). Trial counsel testified that petitioner did not ask him to appeal. He said petitioner did not file an appeal and he did not ask him to appeal. He said Officer Koger was a good friend of his. He said generally, if an inmate makes a request like that, they have a form that they use at the detention center. The form is a "Request to Staff." A guard writes a message on there that the inmate wants to get to the attorney. Trial counsel said he looked in his file and there was no "Request to Staff." (App. p. 301, line 25 – p. 302, line 20). He concluded by saying that petitioner got a pretty good sentence and he just assumed he did not want to appeal. (App. p. 303, lines 18 – 22).

Counsel did exactly what the case law on belated appeals says an attorney is not to do – that is to assume. He never took time to ascertain if petitioner wished to appeal.

CONCLUSION

The findings of the PCR judge that petitioner was not entitled to a belated appeal should not be upheld.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Colleton County
D. Craig Brown, Circuit Court Judge

JIMMY LEE DUNCAN,

PETITIONER,

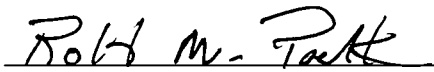
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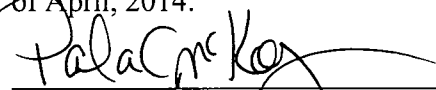
CERTIFICATE OF SERVICE

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 Ashleigh R. Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of April, 2014.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of April, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.