STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Clifton Newman, Circuit Court Judge

MORRIS C. HARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002757

JOHNSON PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
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 PCR court err in denying Petitioner's request for a belated direct appeal where the record showed Petitioner filed a pro se notice of appeal that was dismissed due to his failure to order the transcript?

STATEMENT

A Lancaster County grand jury indicted Petitioner for murder on December 4, 2008 (2007-GS-29-891). App. 82 – 83. On March 30, 2009, Petitioner entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Douglas Barfield represented the prosecution, and William Frick represented Petitioner. App. 1. The Honorable Kenneth Goode sentenced Petitioner to thirty years' imprisonment, the maximum allowable pursuant to South Carolina statutory law. App. 35, lines 21 – 22; App. 84. Petitioner filed a pro se notice of appeal on April 9, 2009. App. 37 – 38. On May 26, 2009, the Court of Appeals dismissed the notice due to Petitioner's failure to order the transcript timely. App. 39. On June 12, 2009, remittitur was issued. App. 40.

On October 26, 2012, Petitioner filed an application for post-conviction relief. App. 41 – 47. On July 9, 2013, the state filed its return. The state argued that all claims except the claim for a belated appeal were barred by the statute of limitations. The state requested an evidentiary hearing on the limited issue of a belated direct appeal. App. 48 – 50. An evidentiary hearing occurred on August 5, 2013 before the Honorable Clifton Newman. Suzanne White defended the conviction and sentence. Charles Brooks represented Petitioner. App. 51. By an order filed December 16, 2013, Judge Newman denied Petitioner's request for a belated direct appeal. App. 76 – 81.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows pursuant to Rule 243(i)(2), SCACR and Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) because the PCR judge denied Petitioner a belated direct appeal.

ARGUMENT

The PCR court erred in denying Petitioner's request for a belated direct appeal where the record showed Petitioner filed a *pro se* notice of appeal that was dismissed due to his failure to order the transcript.

Relevant Facts

After his plea pursuant to Alford, supra Petitioner filed a pro se notice of appeal. App. 37 – 38. This evidenced Petitioner's clear intent to appeal his conviction and sentence. Unfortunately, the Court of Appeals dismissed the notice due to Petitioner's failure to order the transcript – a common short coming among pro se litigants. App. 39. Although the plea counsel testified at the PCR hearing that Petitioner did not ask him to file a notice of appeal, the record clearly disputes this claim because, Petitioner attempted to file and perfect his appeal on his own. App. 68, line 24 – App. 69, line 4. Additionally, plea counsel's mitigation presentation at the plea hearing included a showing that Petitioner suffered from mental illness, including post-traumatic stress disorder as a result of the severe physical torture he suffered at the hands of his father. App. 26, lines 6 – 24; App. 28, line 21 – App. 29, line 5.

At the close of the hearing, the PCR judge stated that "based on the nature of the crime committed, the admissions of the defendant in the record it does not appear to me that any rational defendant would want to appeal or that this - - this defendant, Mr. Harris, demonstrated any interest in wanting to appeal." App. 74, lines 7-11. In the written order, the PCR court found no indication that Petitioner or any rational defendant would want to appeal the plea. App. 79. The PCR court arrived at this conclusion by applying the test announced in Roe v. Flores-Ortega, 528 U.S. 470 (2000). App. 79.

Discussion

Petitioner was denied his "one fair bite at the apple" because he did not voluntarily or intelligently waive his right to a direct appeal. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (providing that "[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."); Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002) (providing that a defendant has the right to a belated direct appeal when he did not knowingly an intelligently waive his right to a direct appeal). "[A]bsent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). This Court has advised that an example of an extraordinary circumstance is when the defendant inquires about an appeal. Id. In 2000, the United States Supreme Court explained that extraordinary circumstances include when a rational defendant would want to appeal and when the defendant expressed an interest in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000).

"[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Id. at 477. "This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects in attention to the defendant's wishes." Id. Even more basic than the filing of the notice is the consultation with the defendant by the lawyer regarding the advantages and disadvantages of taking an appeal. Id. at 478. The lawyer must make a reasonable effort to discover the defendant's wishes. Id. When counsel fails to consult, the question is whether counsel's failure to consult constitutes deficient performance. Id.

Although the Supreme Court refused to hold "as a constitutional matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient," the Court held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is either 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." Id. at 479-480. Concerning prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. at 485.

The judge erred in finding no evidence in the record that Petitioner demonstrated any interest in wanting to appeal. Within ten days of his guilty plea, Petitioner filed a pro se notice of appeal. This was a clear indication that Petitioner sought to appeal his guilty plea and sentence. The "rational defendant" test was inapplicable to resolution of Petitioner's PCR application because Petitioner had demonstrated his interest in appeal.

CONCLUSION

Petitioner respectfully requests this Court grant him a belated direct appeal.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of June, 2014.

STATEMENT OF ISSUE ON APPEAL

Did the plea judge err in accepting Petitioner's plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) where the record contained evidence that Petitioner was not competent to enter a plea?

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LANCASTER COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Morris C. Harris 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 August 5, 2013. 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 Morris C. Harris.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of June, 2014

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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 Suzanne White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Morris C. Harris, #292040, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of June, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of June, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.