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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Union County

John C. Hayes, III, Circuit Court Judge

DONNIE M. MALPASS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001460

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

DAVID ALEXANDER
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

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ISSUE PRESENTED

Whether the PCR court erred in finding petitioner was not entitled to a belated appeal of his trial pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) because the trial court made an error of law in crediting trial counsel with advising petitioner that he could be tried again on a charge of which he was acquitted if he filed an appeal?

STATEMENT

On September 11, 2003, a Union County grand jury indicted petitioner for two counts of lewd act on a minor. App. 374. On March 9, 2004, petitioner was tried before the Honorable Lee S. Alford and a jury. App. 1. Lisa Collins and Dan Kinkard represented the State. App. 1. Bill Aul represented petitioner. App. 1. The jury convicted petitioner of one count, but acquitted him on the other count. App. 288, ll. 14 – 21. Petitioner did not file an appeal.

On August 7, 2008, petitioner filed a PCR application. App. 302. On February 4, 2010, a hearing was held before the Honorable Brooks P. Goldsmith. App. 322. Jennifer Kinzeler represented the State. App. 322. Melinda Butler represented petitioner. App. 322. On March 24, 2010, Judge Goldsmith denied petitioner's PCR application. App. 336. Petitioner did not file an appeal.

On August 2, 2012, petitioner filed a second PCR application. App. 343. On May 14, 2013, a hearing was held before the Honorable John C. Hayes, III. App. 355. J. Rutledge Johnson represented the State. App. 355. Caroline Horlbeck represented petitioner. App. 355. On June 13, 2013, Judge Hayes granted petitioner a belated appeal from the first PCR. App. 369. This petition follows.

ARGUMENT

The PCR court erred in finding petitioner was not entitled to a belated appeal of his trial pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) because the trial court made an error of law in crediting trial counsel with advising petitioner that he could be tried again on a charge of which he was acquitted if he filed an appeal.

Petitioner did not waive his right to an appeal. A waiver of the right to an appeal must be knowing and voluntary. White v. State, 236 S.C. 110, 118-19, 108 S.E.2d 35, 39 (1974). Petitioner told trial counsel that he wanted an appeal immediately after the verdict. App. 327, ll. 12 – 18. He wanted an appeal because he was innocent. App. 327, ll. 19 – 20. Trial counsel indicated to petitioner that he would file an appeal. App. 327, ll. 12 – 18.

The PCR court erred in how it credited the testimony of trial counsel. The PCR court found that trial counsel told petitioner that, even though he was acquitted on one of the charges, if he won on appeal "he could face both charges again." App. 340. The PCR court found that in response to this, petitioner told him not to appeal. App. 340 – 41. Had this been trial counsel's advice, it would have been in error. Any prosecution after an appeal on a charge where petitioner was acquitted by a jury would violate the Double Jeopardy Clause. No person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Const. amend. V. "The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." State v. Brandt, 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011) (internal quotations omitted).

Had petitioner succeeded in reversing his conviction on appeal, his acquittal would remain undisturbed. Even if petitioner only obtained a new trial, and not a complete reversal, he could not

be tried again for the charge on which he was acquitted. Therefore, the PCR court made a legal error in using this as a rationale to support trial counsel's testimony that petitioner did not want an appeal.

Furthermore, this finding by the trial court is not supported by the evidence presented at the PCR hearing. Trial counsel did not testify that he told petitioner he could be retried on his acquittal. App. 330, ll. 16 – 331, l. 6. Trial counsel testified:

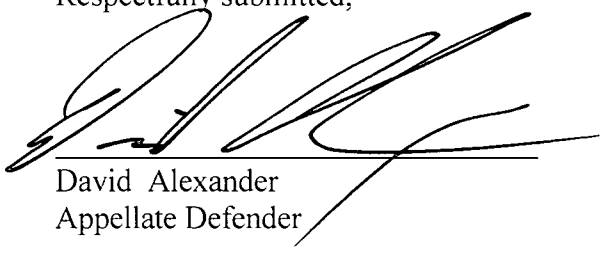
> We talked after the trial about whether he wanted to appeal or not and he indicated he did not want to appeal, because we talked about the fact if he had an appeal he could not be tried again on the one charge but on the one that he was found guilty of he would be tried again and he might get a more substantial sentence and he indicated that he was okay with that.

App. 330, l. 25 – 331, l. 6. Trial counsel's testimony was essentially the opposite of that found by the PCR judge. Therefore, the PCR court's factual finding was incorrect and this error eviscerates the PCR court's credibility finding as to trial counsel's testimony. As such, this Court should not apply a deferential standard of review. It should review this case *de novo* and credit petitioner's testimony that he wanted an appeal. Since there was little to lose from appealing, petitioner's testimony that he wanted an appeal is credible. This Court should reverse the finding of the PCR court and grant petitioner a belated White v. State appeal.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and allow petitioner an appeal pursuant to White v. State, 236 S.C. 110, 118-19, 108 S.E.2d 35, 39 (1974).

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2014.

STATEMENT OF ISSUE ON APPEAL

Whether petitioner was entitled to a directed verdict on the charge of lewd act because petitioner's conduct, even viewing the evidence in the light most favorable to the State, did not rise to the level of a lewd act because the State's proof showed that petitioner only licked the minor's foot and any other alleged touching of the minor was done without the requisite mental state?

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RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire and Mr. Donnie M. Malpass, at 3685 Claypond Village Road, Apt. 2, Myrtle Beach, SC 29579, this 27th day of March, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of March, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.