STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

James W. Johnson, Jr., Circuit Court Judge

MILO E. TUDOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2013-001242

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

ISSUE PRESENTED

Did the PCR judge correctly find that Petitioner did not knowingly and intelligently waive the right to a direct appeal and correctly grant a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?

STATEMENT

In January of 1997, the Newberry County Grand Jury, in a three count indictment, indicted Petitioner for kidnapping, assault and battery with intent to kill [ABWIK] and possession of a knife during the commission of a violent crime, indictment #1997-GS-36-00021. Petitioner proceeded to jury trial on August 7, 1997, before the Honorable James W. Johnson, Jr. Attorney Harry DePew represented Petitioner at trial. The jury returned a verdict of guilty on each count. Judge Johnson sentenced petitioner to 30 years suspended upon the service of 15 years for the kidnapping charge, 20 years concurrent for the ABWIK charge and 5 years concurrent for the weapon charge. It appears that a timely notice of intent to appeal was filed but the appeal was not perfected and on May 5, 1998, the appeal was dismissed. The transcript of this trial is no longer available.

Petitioner next filed a petition for habeas corpus in federal court. On August 1, 2002, the federal court dismissed the petition for failure to exhaust all state court remedies. On August 21, 2002, Petitioner filed an application for post conviction relief, 2002-CP-36-357. (App. pp. 76-82). In the application Petitioner alleged ineffective assistance of trial counsel in failing to perfect the direct appeal. The State filed a return on August 22, 2003. (App. pp. 83-87). On May 14, 2004, the State, represented by attorney Julie M. Thames, and the Petitioner, represented by attorney Donald B. Hocker, appeared before the Honorable James E. Lockemy. (App. pp. 88-94). The State moved to dismiss the application based on the statute of limitations and the doctrine of laches. The PCR court did not hear testimony at the May 14, 2004, hearing. In a written order signed June 24, 2004, the PCR judge dismissed the application based on the statute of limitations and the doctrine of laches. (App. pp. 95-99). In the order of dismissal the PCR judge specifically noted that the trial transcript was no longer available. (Order of

Dismissal 2002-CP-36-357, p. 3). A timely notice of intent to appeal was filed and a petition for writ of certiorari was filed pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). In an order dated August 26, 2005, this Court denied the petition for writ of certiorari. (App. p. 100).

Petitioner filed a second petition for habeas corpus in federal court. It appears that on January 30, 2007, the federal court granted the State's motion for summary judgment, denying the habeas claim. On April 5, 2010, Petitioner filed a second application for post conviction relief, 2010-CP-36-0154. (App. pp. 102-106). Petitioner specifically argued in the application that trial counsel was ineffective for failing to perfect the direct appeal and Petitioner did not knowingly and intelligently waive the right to direct appeal. (App. p. 103). On October 17, 2011, the State filed a return and motion to dismiss. (App. pp. 107-113). On October 25, 2011, the Honorable Eugene C. Griffith, Jr. signed a conditional order of dismissal. (App. pp. 114-119). On December 9, 2011, Judge Griffith signed the final order of dismissal. (App. pp. 120-124). A timely notice of intent to appeal was filed but on February 3, 2012, this Court dismissed the appeal based on the failure, as required by Rule 243(c), SCACR, to assert an arguable basis for asserting that the determination by the lower court was improper. (App. p. 125).

On September 17, 2012, Petitioner filed a petition for writ of habeas corpus in the Court of Common Pleas in the Eighth Judicial Circuit. (App. pp. 1-31). The petition was docketed 2012-CP-36-00511. The State filed a return and motion to dismiss on October 30, 2012. (App. pp. 36-42). In an order filed November 26, 2012, the Honorable William P. Keesley, as acting chief judge for administrative purposes, ordered that a hearing be held on the issues raised in the petition. Petitioner again alleges that trial counsel was ineffective in failing to perfect the direct appeal. (App. p. 1). On March 12, 2013, an evidentiary hearing was held before the Honorable

Clifton B. Newman. (App. pp. 50-67). Attorney Tommy Thomas represented Petitioner at the hearing. Attorney J. Rutledge Johnson was present on behalf of the State. In a written order signed May 21, 2013, Judge Newman granted a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). (App. pp. 68-72).

On March 3, 2014, in an effort to perfect the belated appeal granted by Judge Newman, Petitioner filed with this Court a petition for order to reconstruct the record of the trial as the trial transcript is not available. Counsel alternatively requested an order setting aside the conviction and ordering a new trial based on the fact that it may be impossible to reconstruct the record in such a way as to provide meaningful review. The trial judge, the Honorable James W. Johnson, Jr. passed away in 2008. Trial counsel, Harry Depew, is no longer a member of the South Carolina Bar. On March 7, 2014, the State filed a return to the petition for order to reconstruct the record of the trial or in the alternative an order setting aside the convictions and ordering a new trial. On March 13, 2014, Petitioner filed a reply to the State's return to the petition for order to reconstruct the record of the trial or in the alternative an order setting aside the convictions and ordering a new trial.

On May 7, 2014, this Court denied the petition for order to reconstruct the record of the trial or in the alternative an order setting aside the convictions and ordering a new trial. Instead, this Court directed Petitioner to file a petition for writ of certiorari addressing the issue of whether the PCR judge correctly found that petitioner was entitled to a belated direct appeal. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge correctly found that Petitioner did not knowingly and intelligently waive the right to a direct appeal and correctly granted a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Petitioner did not knowingly and intelligently waive his right to direct appeal. During the May 14, 2004, PCR hearing before Judge Lockemy, the attorney representing the State told the judge, "He is alleging that his attorney allowed his appeal to be dismissed. His appeal, the notice of intent to appeal was filed and dismissed, his attorney filed a motion to re-open that file and it was again dismissed. He was retained and the family did not pay him any money, they kept promising him money and did not pay him, so the appeal was never perfected." (App. p. 89, line 25 – p. 90, lines 1-7). After the direct appeal was dismissed, Petitioner filed a petition for habeas corpus in federal court, rather than an application for post conviction relief in state court. Once the federal court dismissed the petition on August 1, 2002, for failure to exhaust all state court remedies, Petitioner immediately on August 21, 2002, filed an application for post conviction relief in state court, 2002-CP-36-357.

In the written order signed June 24, 2004, the first PCR judge dismissed the application, without taking testimony, based on the statute of limitations and the doctrine of laches. (App. pp. 95-99). A timely notice of intent to appeal was filed and a petition for writ of certiorari was filed pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). In an order dated August 26, 2005, this Court denied the petition for writ of certiorari. (App. p. 100). Respectfully, the first PCR judge erred in finding the application for post conviction relief seeking a belated direct appeal pursuant to White v. State was barred by the statute of limitations. See Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002)(one year statute of limitations for PCR claims does not apply to allegation applicant was denied the right to direct appeal due to the

ineffective assistance of counsel). The error was not raised by appellate counsel and was not corrected on appeal.

Additionally, the first PCR judge erred in finding the application was barred by the doctrine of laches. In Eldridge v. Eldridge, 398 S.C. 113, 121-122, 728 S.E.2d 24, 28 (2012) this Court wrote:

> The equitable defense of laches follows the equitable maxim: "Equity aids the vigilant, not those who slumber on their rights." Hemingway v. Mention, 228 S.C. 211, 89 S.E.2d 369 (1955). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee Cty., 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Thus, the predicate for laches is an unreasonable and unexplained delay.

The delay in filing the post conviction was apparently based on erroneous legal advice. If counsel had been properly counseled, he would have immediately filed a post conviction relief application seeking a belated direct appeal instead of filing a federal habeas petition. Petitioner's mistaken belief that federal habeas rather than state post conviction relief was the proper avenue to seek a belated direct appeal does not constitute an unreasonable and unexplained delay. Again, once the federal court dismissed the habeas petition on August 1, 2002, for failure to exhaust all state court remedies, Petitioner immediately on August 21, 2002, filed an application for post conviction relief in state court, 2002-CP-36-357. That first application was erroneously dismissed based on the statute of limitations and the doctrine of laches.

In the second PCR application Petitioner again attempted to obtain a belated direct appeal. The second PCR judge, again without taking testimony, dismissed the application as successive. Petitioner still did not receive his "one bite at the apple" as he was again denied the

right to direct appeal. In Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) this Court wrote, "All applicants are entitled to a full and fair opportunity to present claims in one PCR application. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999). Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than "one bite at the apple as it were." Id. Petitioner has never been given a full and fair opportunity to present claims in one PCR application because the first application was erroneously dismissed based on the statute of limitations and the error was missed on appeal. The third PCR judge correctly recognized that Petitioner was entitled to his one bite at the direct appeal apple.

Retained trial counsel was ineffective in failing to take the steps required to preserve Petitioner's right to direct appeal. Petitioner wished to appeal and trial counsel filed the notice of intent to appeal. When trial counsel was not retained to perfect the direct appeal, rather than referring the case to the South Commission on Indigent Defense, Appellate Division, for a determination of indigency, it appears trial counsel simply abandoned the appeal. Under these circumstances it can not be said that Petitioner knowingly and intelligently waived his right to direct appeal.

In Matter of Anonymous Member of the Bar, 303 S.C. 306, 307, 400 S.E.2d 483, 483 (1991), this Court wrote:

> If the client wishes to appeal and is indigent or claims at the end of trial to be indigent, trial counsel (whether appointed or retained) must serve and file a Notice of Appeal as required by Rule 203, SCACR, and request a determination of indigency by the Office of Appellate Defense. If determined to be indigent, trial counsel is automatically relieved as counsel unless otherwise requested by the Office of Appellate Defense.Rule 602(E)(4), SCACR. If determined not to be indigent, counsel must continue to represent the client until relieved by the Court under Rule 235, SCACR. Id.

Trial counsel did not request a determination of indigency. It does not appear that trial counsel was relieved of representation by the Court. It appears that trail counsel simply abandoned the direct appeal without protecting Petitioner's direct appeal rights. Based on the ineffective assistance of trial counsel, Petitioner's direct appeal was dismissed. Petitioner is entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver [of his right to appeal] by the defendant, counsel must either initiate an appeal or comply with the procedure set forth in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Where the PCR judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State, supra. See Rule 227 of the South Carolina Rules of Appellate Procedure; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). "Even when the post-conviction relief judge makes this finding he may not grant relief on this basis. Instead, the applicant must petition [the Supreme Court] for a White v. State review." Davis, 286 S.C. at 291, n. 1, 342 S.E.2d at 60.

In Frasier v. State, 306 S.C. 158, 161, 410 S.E.2d 572, 574 (1991) this Court wrote:

> All defendants who have been found guilty of a crime have a right to be informed of the possibility of appeal and the method for taking an appeal. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Further, here it appears that petitioner retained his trial counsel, rather than having counsel appointed to him. Retained counsel possess the express duty to assist their clients to properly perfect their appeals. Rule 51(E)(4). Sup.Ct.Rules; Rule 602(E)(4), SCACR. We hold that counsel was ineffective in failing to perfect petitioner's appeal, and that petitioner was prejudiced thereby because but for counsel's deficient performance, petitioner would have taken a direct appeal.

The PCR judge in the present case correctly found that counsel was ineffective in failing to perfect Petitioner's appeal and Petitioner was prejudiced by the deficient performance. But for trial counsel's deficient performance, Petitioner would have had a direct appeal. This Court should grant White v. State review.

The present action is not barred by the doctrine of laches. See Dearybury v. State, 367 S.C. 34, 41, 625 S.E.2d 212, 216 (2006) (Laches is an affirmative defense that must be pleaded pursuant to Rule 8(c), SCRCP. See also Adams v. B & D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989)). The State did not plead laches in this third action and accordingly is barred from asserting it now. As discussed above, neither the statute of limitations nor the prohibition against successive applications should bar the grant of White v. State review under the specific facts of the case. Petitioner, through no fault of his own, was deprived the right to direct appeal. In the order granting the belated appeal the PCR judge wrote: "This Court finds that the Petitioner is entitled to a review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). It appears to the Court that this issue was preserved by trial counsel and that Mr. Tudor is entitled to present this issue on appeal. Due to procedural issues, he has not been afforded his one bite at the apple on this matter. There also appears to be evidence that the direct appeal was dismissed for failure to pursue. There is no evidence presented that Mr. Tudor agreed to a dismissal of this appeal." (App. p. 72).

In Jones v. State, 382 S.C. 589, 595, 677 S.E.2d 20, 23 (2009) this Court wrote:

> This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 63 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith, 369 S.C. at 138, 631 S.E.2d at 261. This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled

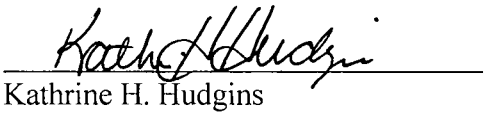
by an error of law. Suber v. State, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007).

There is ample evidence to uphold the finding of the PCR judge that Petitioner did not knowingly and intelligently waive his right to direct appeal and is entitled to a belated appeal. The only error of law was committed by the first PCR judge when he dismissed the first post conviction relief application seeking a belated direct appeal based on the statute of limitations. The error will finally be corrected by this Court granting the belated direct appeal pursuant to White v. State. This Court should grant the belated appeal.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari and grant Petitioner's previously filed petition for order to reconstruct the record or, in the alternative, an order setting aside the convictions and ordering a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County
James W. Johnson, Jr., Circuit Court Judge

MILO E. TUDOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2013-001242

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 J. Rutledge Johnson, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 8th day of September, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of September, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .