

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 24 2014

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge **S.C. Supreme Court**

Appellate Case No. 2012-213572

John Garner Kimble,..... Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW4

ARGUMENT

 The PCR judge did not err in finding Petitioner failed to
 meet his burden of proving he was entitled to a review of
 his direct appeal issues pursuant to White v. State.....4

CONCLUSION.....6

QUESTION PRESENTED

1. Did Petitioner knowingly and voluntarily waive his right to a direct appeal?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner for first-degree burglary (2009-GS-23-0476), two counts of armed robbery (2009-GS-23-0477, -0478), and possession of a weapon during commission of a violent crime (2010-GS-23-2717). (App.pp.318-19; pp.321-22; pp.324-25; pp.327-28). H. Chase Harbin, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was tried in absentia and found guilty of the charges as indicted. (App.p.264). On June 9, 2010, the Honorable Edward W. Miller sealed Petitioner's sentence. (App.p.267). At the sentencing hearing on December 6, 2010, Judge Miller sentenced Petitioner to concurrent terms of 30 years for first-degree burglary, 30 years for each count of armed robbery, and 5 years for possession of a weapon during commission of a violent crime. (App.p.320; p.323; p.326; p.329). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on January 3, 2011 (2011-CP-23-0011) and counsel filed amendments on June 6, 2011. (App.pp.269-77; pp.279-82). A hearing was held at the Greenville County Courthouse on October 30, 2012. (App.pp.289-308). Petitioner was present and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable R. Markley Dennis, Jr. denied relief in an order filed December 5, 2012. (App.pp.310-17).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was entitled to a review of his direct appeal issues pursuant to White v. State.

At the PCR hearing, Petitioner stated he asked trial counsel to file an appeal “before they opened the sealed sentence.” (App.p.296). Petitioner stated trial counsel replied “there’s nothing to appeal so I’m not going to appeal it.” (App.p.296).

Trial counsel testified he did not recollect this conversation about an appeal but that he “never had somebody ask [him] to file an appeal and [he] just say no, I’m not going to do it.” (App.p.300). Trial counsel testified he “certainly did not refuse to file an appeal.” (App.p.300). Trial counsel testified he would have filed a notice of appeal if he had been asked to do so. (App.p.305).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proof on this issue. After summarizing the testimony from both Petitioner and trial counsel, the PCR judge noted “trial counsel is an experienced criminal defense attorney and finds his testimony to be more credible than that of [Petitioner].” (App.p.315).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have filed a notice of appeal. While Petitioner argues he asked trial counsel to file an appeal and trial counsel would not do so,¹ trial counsel testified he did not refuse to file an appeal and that he would have done so if Petitioner had requested it. The PCR judge presided over the PCR hearing and was able to observe the demeanor of these two witnesses. In Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993), this Court gave "great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses." While Petitioner and trial counsel gave conflicting testimony, the PCR judge observed these witnesses, noted trial counsel was an experienced criminal defense attorney, and concluded he was the more credible witness in this case. This Court should accord great deference to this finding and affirm the PCR judge's denial of relief. See Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

¹ Respondent notes the only evidence to support Petitioner's argument was his own self-serving testimony.

Accordingly, as Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

October 24, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2012-213572

John Garner Kimble, Petitioner,

v.

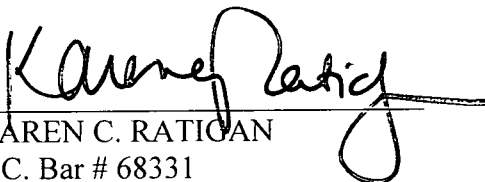
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Benjamin J. Tripp, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 24th day of October, 2014.


KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

October 24, 2014

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

RECEIVED

OCT 24 2014

S.C. Supreme Court

**Re: John G. Kimble v. State
Appellate Case No. 2012-213572**

Dear Mr. Shearouse:

Enclosed for filing, please find an original and six copies 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,

Karen C. Ratigan
Senior Assistant Deputy Attorney General

cc: Benjamin J. Tripp, Esquire
Trisha Allen