

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

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S.C. Supreme Court

JAMES WEST,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212845

PETITION FOR WRIT OF CERTIORARI

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Division of Appellate Defense
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ISSUE PRESENTED

Did petitioner knowingly and intelligently waive his right to direct appeal?

STATEMENT

In August of 2009, the Dorchester County Grand Jury indicted Petitioner West for assault and battery of a high and aggravated nature [ABHAN], indictment #2009-GS-18-1000. On February 2, 2010, West proceeded to jury trial before the Honorable Diane Schafer Goodstein. Attorney J. Scott Bischoff, II represented West at trial. Attorney B. Harrison Bell, Jr. prosecuted the case on behalf of the State. On February 5, 2010, the jury returned with a verdict of guilty. Judge Goodstein sentenced West to eight years. A notice of intent to appeal was not filed.

On October 7, 2010, West filed an application for post conviction relief, 2010-CP-18-2806. The State filed a return on July 7, 2011. On May 24, 2012, an evidentiary hearing was held before the Honorable DeAndrea G. Benjamin. Attorney Charles Brooks represented West at the PCR hearing. Attorney Salley Elliot was present on behalf of the State. In a written order signed August 15, 2012, Judge Benjamin denied relief and dismissed the application. A timely notice of intent to appeal was served on August 23, 2012. On March 12, 2014, counsel filed a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 91988), raising the issue of whether the PCR judge erred in finding that petitioner freely and voluntarily waived his right to appeal following his jury trial when petitioner testified that trial counsel did not explain his appellate rights and the record reflects that the trial judge did not discuss appellate rights. On September 18, 2014, this Court directed the parties to address the issue whether petitioner knowingly and intelligently waived his right to direct appeal. This petition for writ of certiorari follows.

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to direct a verdict of acquittal?

ARGUMENT

Petitioner did not knowingly and intelligently waive his right to direct appeal.

A jury found Petitioner James West guilty of assault and battery of a high and aggravated nature which was the result of a fight between petitioner and his roommate. In his PCR application, West states that he did not appeal his conviction because he did not understand and was not instructed that he could do so. (App. p. 354). During the PCR hearing West testified that trial counsel did not explain the right to appeal. (App. p. 372, lines 6-24). West testified: "When I got to Allendale I learned I had the right, since I took a jury trial that I had a right to a direct appeal." (App. p. 372, lines 6-8). West testified, "When we got downstairs, I shook his hand. I said we rolled the dice, we lost." (App. p. 372, lines 12-13). Then West testified, "When I got to Allendale I wrote him [trial counsel] and asked him what he was going to do about it. He was [sic] the 10 was over. He said we talked about this, which we didn't. And by the way the Judge told you. The judge didn't tell me nothing. I got the transcripts. Judge said nothing about no appeal. Nobody told me nothing about no appeal." (App. p. 372, lines 15-20).

According to trial counsel, West was informed of his right to appeal but was not interested in an appeal. During the PCR hearing trial counsel testified, "I met with him at the lower level of the Dorchester County Courthouse and explained to him that he's got a right to appeal within 10 days. That if he wants to appeal he should tell me and I'll follow through with that appeal. But we did. I remember shaking hands with him through the small cut-out and he said, no, we gave it a good run. I'm not interested in an appeal." (App. p. 391, lines 17-23). There was, however, no written waiver of the right to appeal following trial and no testimony that trial counsel explained the nature of an appeal. The trial transcript reflects that the trial judge did not inform West of the right to appeal.

In the order of dismissal the PCR judge wrote: “However, based upon the testimony before it, this Court finds that applicant was advised of and understood the right to appeal and the time frame within which appeal must be taken but knowingly and voluntarily relinquished the right to appeal.” (App. p. 400). The PCR judge erred.

In Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) the South Carolina Supreme Court wrote:

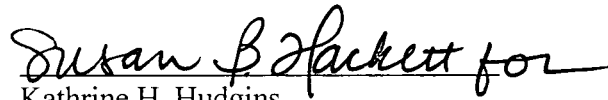
Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (Turner I); see also Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (Turner II). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).” Turner, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted).

While counsel testified that he told West he had the right to appeal within ten days, there is nothing in the record to support that counsel explained the nature of that appeal right in such a way that any alleged waiver of the right to appeal could be deemed to have been intelligently made. “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (citation omitted). The record in this case does not support that West knowingly and intelligently waived his right to direct appeal. The PCR judge erred in finding that West waived his right to a direct appeal and in refusing to grant a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

CONCLUSION

Based on the above argument this Court should grant the petition for writ of certiorari and order a belated appeal pursuant to White v. State.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
DeAndrea G. Benjamin, Circuit Court Judge

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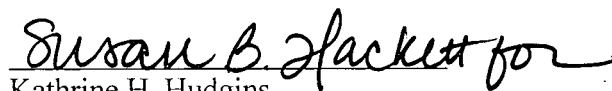
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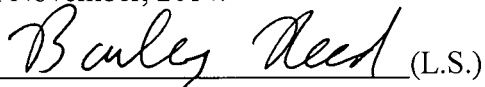
CERTIFICATE OF SERVICE

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 Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 19th day of November, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of November, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.