

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Beaufort County
Court of Common Pleas
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001327

OSIEL NARCISO,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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ISSUE PRESENTED

I. Did the lower court err by finding the Respondent's waiver of all other post-conviction relief claims was not entered knowingly and voluntarily when post-conviction relief counsel fully advised the Respondent of the rights he was waiving, the Respondent signed and initialed a written waiver of rights form drafted by counsel, and at the time of the waiver the Respondent had no other post-conviction relief claims he wished to pursue?

STATEMENT OF THE CASE

On January 16-18, 2007, the Respondent proceeded to trial before a jury and was convicted of trafficking cocaine in excess of 100 grams (2005-GS-07-1304). The Honorable Howard P. King sentenced the Respondent to confinement for twenty-five years.

On August 1, 2007, the Respondent filed an application for post-conviction relief. In the application, the Respondent alleged “ineffective assistance of counsel” (App. 3) and asked the court for “leave to file a belated appeal”. (App.6). In a document attached to the application, the Respondent alleged “my allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so”. (App. 8). The Petitioner filed a Return on May 15, 2008.

An evidentiary hearing was held on August 26, 2008. At the hearing, counsel for the Respondent called the case and the parties approached the bench briefly to speak to the Honorable J. Cordell Maddox who was presiding. The contents of the bench conference were not put on the record. (App. 25). Shortly thereafter, Judge Maddox, the Respondent, and counsel for both parties signed a consent order granting the Respondent a direct appeal pursuant to White v. State. The consent order stated “[t]he White v. State issue is the Applicant’s only allegation in the PCR application. The Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. The Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal.” (App. 28).

The Respondent filed a Notice of Appeal to this Court to effectuate an appeal pursuant to White v. State. On appeal, the Respondent asked this Court to review the waiver of the Respondent’s other post-conviction relief allegations. In its opinion, this Court affirmed the Respondent’s conviction and remanded his case to the post-conviction relief court for a

determination as to whether or not the Respondent knowingly and voluntarily waived his right to raise additional PCR claims. (App. 54-56). The Remittitur was issued on March 30, 2012.

On February 20, 2014, after the Court's remand, a second evidentiary hearing was held in the Respondent's post-conviction relief matter. The Respondent was represented by Carol Ruff, Esquire, and Harley Ruff, Esquire. Present and testifying at the hearing were Philip Rios, Esquire, Rebecca McCann, Donald Colongeli, Esquire, and the Respondent. An interpreter was also present to assist the Respondent at the hearing. By Order dated June 5, 2014, the lower court found "the PCR waiver fails the test outlined in Brannon and Spooone", "the Petitioner's purported waiver of his PCR rights in the Consent Order is hereby declared null, void, and of no effect", and "the Petitioner's request to bring a PCR application is hereby granted". (App. 140). This Appeal by the State follows.

ARGUMENT

The lower court erred by finding the Respondent's waiver of all other post-conviction claims was not entered freely and voluntarily when the record reflects post-conviction relief counsel fully advised the Respondent that he could amend his application to raise additional claims and that by signing the consent order granting him an appeal pursuant to White v. State he would be waiving his ability to raise any additional claims.

While the transcript of the Respondent's first post-conviction relief hearing does not reflect the circumstances surrounding the waiver of the Respondent's right to raise any other PCR allegations, the record now established in this matter on remand supports the conclusion that the Respondent knowingly and voluntarily waived his right to raise any other PCR allegations. This Court should reverse the post-conviction relief court's finding that the Respondent is now entitled to bring his remaining post-conviction relief claims. The Petitioner submits there is no evidence in the record to support the lower court's findings.

The waiver of a constitutional or statutory right requires a showing on the record that the defendant made the waiver knowingly and intelligently. State v. Reed, 332 S.C. 35, 45, 503 S.E.2d 747, 752 (1998). The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Berghuis v. Thompkins, 560 U.S. 370, 382-83, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010).

When addressing the waiver of collateral-attack rights, the Court must examine "the particular facts and circumstances surrounding the case." Spoone v. State, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008) (citing United States v. Broughton-Jones, 71 F.3d 1143, 1146 (4th Cir.1995)). In Spoone, this Court looked at background, experience, and conduct of the accused, the text of the agreement, and the transcript of the proceeding. Id. at 143-144. On appeal, this

Court must reverse the circuit court's grant of relief when there is no probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The record established on remand reflects the Respondent's waiver of his right to raise any other post-conviction relief claims was knowingly and voluntarily entered. The Petitioner submits a formal colloquy between the Court and the defendant is not the only way to establish a valid waiver of rights. The record reflects prior to the signing of the consent order a colloquy took place between the Respondent and his initial post-conviction relief counsel during which counsel, with the assistance of an Spanish speaking interpreter, fully advised the Respondent of his right to pursue additional post-conviction relief claims and the consequences of waiving such right. The record also reflects counsel's colloquy with the Respondent was memorialized in a signed waiver of rights form drafted by post-conviction relief counsel and signed and initialed by the Respondent.

Counsel provided credible testimony that prior to the Respondent signing the consent order granting him an appeal pursuant to White v. State, he spoke with the Respondent about the consent order and advised him that "he would be waiving his right forever" and "that he's only given one application for PCR". (App. 112-113). Counsel also testified that with the assistance of the interpreter, he reviewed with the Respondent the written consent order and a handwritten checklist that he created which outlined the rights the Respondent would be waiving by signing the consent order. Counsel testified further he was able to effectively communicate with the Respondent with the assistance of the interpreter. (App. 155).

The checklist drafted by counsel was signed by the Respondent and clearly reflects counsel's full advisement of the Respondent's rights and the consequences of the Respondent's

waiver. Counsel reviewed the handwritten waiver form with the Respondent with the assistance of a Spanish speaking interpreter. The form reads as follows:

“I understand that although Mr. Rios has offered to amend the application and raise other allegations, I am unwilling to raise new allegations.

I understand that I am forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and am raising my right and agreeing to a belated appeal only.

My attorney, Phillip J. Rios, has reviewed with me the terms of the consent order and the legal consequences of those terms (through the assistance of translator Rocio-Maria-Riley) and I understand the terms and am in agreement with them.

Mr. Rios advised me that my appeal may or may not be successful and has not promised a successful appeal or a new trial.

My attorney Philip J. Rios has answered all my questions to my satisfaction and has communicated to me often and throughout the period of his representation of me.

I have been informed and advised by my attorney, Philip J. Rios, about my PCR application, the legal meaning of its substantive content, the standard of relief in PCR cases, and the waiver of issues and all other matters arising out of my PCR application.

I am not under the influence of any alcohol, and drugs and nothing today would impair my ability to make decisions concerning the PCR application and hearing today.

My attorney Philip J. Rios has not promised or guaranteed me anything to induce me into making decisions today.

I have not been coerced or threatened into entering into the Consent Order agreeing to its limited relief and am entering into the agreement in the Consent Order freely, intelligently, and voluntarily.

It is not my desire to amend the PCR application and raise new allegations against Mr. Colongeli although Mr. Rios has provided me the opportunity and has offered to amend the application.

I am satisfied with my attorney, Philip J. Rios, and the representation that he has provided me.” (App. 89-91).

The form reflects the Respondent signed his name and initialed under the word “Yes” after the advisement of each right listed on the waiver form.¹

While the record does not reflect an oral waiver of rights before the court, this checklist drafted by post-conviction relief counsel and signed by the Respondent reflects a clear explanation by post-conviction relief counsel and a written waiver of rights by Respondent. The waiver form reflects the Respondent was made aware that he was “forever waiving [his] right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and [was] raising [his] right and agreeing to a belated appeal only.” (App. 89).

The plain language in the consent order signed by the Respondent is also evidence of the knowing and voluntary waiver of the Respondent’s right to raise any other post-conviction relief claims. As this Court correctly noted in the Respondent’s direct appeal opinion, the consent order signed by the Petitioner is straightforward. (App. 56). The record established on remand reflects that the plain language of the order was explained to the Respondent by counsel with the assistance of a Spanish speaking interpreter. (App. 112-113). Counsel’s use of an interpreter when during his discussions with the Respondent should quiet any of this Court’s concerns about the Respondent’s limited command of the English language. All of counsel’s communications with the Respondent including his written correspondence to the Respondent took place in the Respondent’s native language of Spanish.

Lastly, the fact that the Respondent has no interest in pursuing any other claims during his initial post-conviction relief proceeding is further evidence of the voluntariness of his waiver of all other post-conviction relief claims. The Respondent’s PCR application, counsel’s testimony, and the written waiver of rights form signed by the Respondent reflect the sole issue

¹ The record reflects the Respondent identified his signature on the written waiver form drafted by post-conviction relief counsel. (App. 127).

the Respondent wanted to pursue in his post-conviction relief proceeding was counsel's failure to file an appeal.

In the Respondent's application for post-conviction relief he states "my allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so". (App. 8). Counsel testified he spoke with the Respondent multiple times about amending his application to raise additional claims, but that the Respondent was interested solely in pursuing a belated appeal. (App. 110, 113, 119).

The written waiver form signed by the Respondent reflects "I understand that although Mr. Rios has offered to amend the application and raise other allegations, I am unwilling to raise new allegations. I understand that I am forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and am raising my right and agreeing to a belated appeal only." (App. 89).

Because the Respondent had no interest in pursuing any claims other than counsel's failure to file an appeal, the waiver of his right to pursue any other PCR claims (which the record reflects did not exist) in the consent order aligns with his desire to solely obtain a belated appeal. The Respondent was entitled to a direct appeal and the Petitioner did not consent to an appeal pursuant to White v. State in exchange for the waiver of all other post-conviction relief claims as Respondent's second post-conviction relief counsel asserts. Had the Respondent been interested in pursuing claims other than trial counsel's failure to file an appeal, an evidentiary hearing would have been held on the Respondent's remaining claims.

Based on the evidence and testimony presented to the lower court on remand, the record now demonstrates the Respondent's waiver of his right to raise any additional post-conviction

relief claims in the consent order granting him a belated appeal was knowingly and voluntarily entered. The Petitioner submits there is no probative evidence to support the lower court's claim that the waiver of the Respondent's rights to raise any other PCR claims was invalid. The Respondent's waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. The Petitioner asks this Court to grant this Petition, proceed with further briefing, and reverse the lower court's finding that the Respondent is entitled to bring a new post-conviction relief application.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ALAN WILSON
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ASHLEIGH R. WILSON
Assistant Attorney General



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December 22, 2014

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STATE OF SOUTH CAROLINA,

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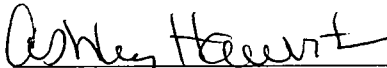
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and the Appendix To The SC Supreme Court has been served upon the respondent's attorney Carmen Ganjehansi, this 22th day of December 2014.



Anne R. Hepley
Legal Assistant

SWORN to before me this
22nd day of December, 2014.

 (L.S.)

Notary Public for South Carolina.

My Commission Expires: 3-18-23



ALAN WILSON
ATTORNEY GENERAL

December 22, 2014

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

RE: Osiel Narciso v. State of South Carolina
Appellate Case No. 2014-001327
Lower Court Case No. 2007-CP-07-2195

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari and two (2) copies of appendix to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return to Petition for Writ of Certiorari.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Carmen V. Ganjehsani, Esquire

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