

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Deandrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2012-212845

RECEIVED

JAN 21 2015

S.C. Supreme Court

JAMES WEST,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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Senior Assistant Deputy Attorney General
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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE

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

STATEMENT OF THE CASE

Petitioner James West is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment. The Dorchester County Grand Jury indicted Petitioner for Assault and Battery of a High and Aggravated Nature (ABAHN) (2009-GS-18-1000). Jonathan Scott Bischoff, II, Esquire, represented Petitioner at trial. A jury convicted Petitioner of ABAHN. On February 5, 2010, the Honorable Diane Goodstein sentenced Petitioner to eight (8) years imprisonment. Petitioner did not appeal.

Petitioner filed an application for post-conviction relief on October 7, 2010. In the application, Petitioner alleged his trial counsel was ineffective because he failed to subpoena certain witnesses, he forced Petitioner to testify in violation of his Constitutional rights, he did not notify Petitioner of his right to a direct appeal, and the original indictment had been changed. The State filed a return on July 7, 2011. A hearing was held on May 24, 2012, before the Honorable Deandrea Benjamin. An order was issued on August 15, 2012, denying relief on all claims. Petitioner timely served a notice of appeal on August 23, 2012. Petitioner's counsel filed a Petition for Writ of Certiorari to the Supreme Court pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), on March 12, 2014. This Court directed the parties to address whether "petitioner knowingly and intelligently waive[d] his right to direct appeal." West v. State, S.C.Sup.Ct. Order dated September 18, 2014. Petitioner submitted a Petition for Writ of Certiorari addressing the question requested. This Return follows.

STATEMENT OF FACTS

Between 11:00 p.m. on May 18, 2009 and 3:30 a.m. on May 19, 2009, James West (“Petitioner”) assaulted Lance Malmquist (“Victim”), his roommate, and gouged out his eye, causing permanent vision loss. App. 340.

The State charged Petitioner with Assault and Battery of a High and Aggravated Nature (“ABHAN”). App. 350-52.

At trial, the State presented evidence that Petitioner had become angry with Victim after Victim asked about rent money that Petitioner owed. App. 80-81. Victim testified that after the initial argument, he left the home he rented with Petitioner, and went to a neighbor’s house for several hours, hoping “that [Petitioner] would go to bed and forget about [the argument] and that I could sneak back into my own house and I could go to bed.” App. 86. However, when Victim returned to his home in the early morning hours of May 19, 2009, Petitioner became enraged and assaulted Victim, gouging his eye out, causing severe pain and vision loss. App. 87-88; 93.

The State presented evidence from an ophthalmologist that treated the Victim, regarding the severity of the victim’s injuries. App. 139-43. The State also presented evidence from responding officers that there were no visible injuries to Petitioner. App. 185; 205.

Petitioner asserted that he was the victim of an assault by Victim, and any injuries Victim sustained were the results of justified self-defense by Petitioner. App. 76. Petitioner testified at trial that he acted in self-defense, and that Victim was the original aggressor. App. 245-79

During deliberations, the jury asked to again hear the testimony of the Victim’s neighbors, with whom the victim had been staying while he waited for Petitioner to go to sleep.

App. 337. After approximately an hour and a half of deliberation, the jury found Petitioner guilty of ABHAN. App. 340. He was sentenced to eight years in prison. App. 347.

STANDARD OF REVIEW

In a post-conviction relief proceeding, Petitioner bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The PCR court's findings will be affirmed when supported by any probative evidence. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626. The appellate court will reverse only if there is no evidence to support the PCR court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). An appellate court gives great deference to a PCR judge's findings where matters of credibility are involved. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).

ARGUMENT

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

Petitioner asserts that he did not knowingly and voluntarily waive his right to a direct appeal and that the PCR court erred in finding he waived his right and in declining to grant appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). (App. 400). Respondent submits that there is probative evidence in the record to support the PCR court's ruling and the order must be affirmed.

Petitioner testified during his PCR evidentiary hearing that he only learned he had a right to a direct appeal "after I got to Allendale." App. 354; 372. Thereafter, Petitioner testified, he contacted his attorney to find out "what he was going to do about [the appeal]." App. 372. Petitioner recalled his attorney telling him that his 10 days to appeal had already passed. Id. Furthermore, according to Petitioner, his attorney "said we had talked about this, which we

didn't." Id. Petitioner denies that he had any conversation of substance with his attorney following his conviction. Id.¹

The State presented Petitioner's trial counsel, Johnathan Scott Bischoff, II, during Petitioner's PCR hearing. Mr. Bischoff stated that he did discuss Petitioner's right to appeal following his conviction. App. 391. "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." Id. Furthermore, Mr. Bischoff testified that Petitioner told him, "no, we gave it a good run. I'm not interested in an appeal." Id.

Following a trial, trial counsel must inform a defendant found guilty of a crime of the possibility of appeal and the method for taking an appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); see also Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010), citing Turner v. State, 380 S.C. 223, 670 S.E.2d 373 (2008) (Turner I); Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009) (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 S.C. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)." Id. "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Id.

The Court's reasoning in Simuel v. State, 390 S.C. 267, 701 S.E.2d 738 (2010), is instructive. The petitioner in Simuel was convicted after a trial of possession with intent to distribute crack cocaine. Id. at 268, 701 S.E.2d at 738. No direct appeal was taken, but the

¹ The only conversation Petitioner recalls having with Trial Counsel after the verdict was returned was "[w]hen we got downstairs, I shook his hand. I said, we rolled the dice, we lost." App. 372.

petitioner subsequently filed an application for post-conviction relief seeking a review pursuant to White v. State. Id. The petitioner testified that he spoke with his trial counsel about filing an appeal and his lawyer failed to file that appeal. Id. at 269, 701 S.E.2d at 738. The petitioner's trial counsel testified that he normally informs his clients about their rights to appeal, but he could not recall telling the petitioner about his right to appeal. The PCR court found the petitioner failed to show he was entitled to an appeal pursuant to White v. State. Id. at 269, 701 S.E.2d at 739. "The PCR court held [trial counsel's] testimony showed Petitioner never requested [trial counsel] to file an appeal on Petitioner's behalf." Id. at 269, 701 S.E.2d at 739. However, this Court held that there was no probative evidence in the record with which the PCR court could find that the petitioner "knowingly waived his right to appeal . . . [or] [trial counsel] made certain Petitioner was aware of his right to appeal." Id. at 271, 701 S.E.2d at 740.

Critical to the Court's holding, was trial counsel's testimony that he "normally discusses an appeal with defendants after trials, but he was not sure whether he did so with Petitioner." Id. at 271, 701 S.E.2d at 740 n.2. This Court noted that testimony to the effect that trial counsel "probably" spoke to the petitioner about a direct appeal "is not the same as affirmatively stating that he spoke with Petitioner about an appeal." Id.

As in Simuel, Petitioner here was convicted after a jury trial. Petitioner testified at the PCR hearing that trial counsel failed to tell him about the right to appeal. His specific complaint is that his attorney never mentioned a direct appeal to him. (App. 372). However, where the trial counsel in Simuel could not state definitively whether or not he notified his client of the right to a direct appeal, Mr. Bischoff unequivocally testified that he did notify Petitioner of his right to appeal. Petitioner's testimony is directly contradictory to that of his attorney's testimony. The

PCR court weighed the credibility of each witness and determined that Petitioner was advised of the right to appeal by counsel, and told his attorney he did not want to appeal. See 5 C.J.S. Appeal and Error § 944 (“Implied findings of fact made by a trial court in support of its judgment may be within the general rule giving conclusive effect to the findings of the trial court on appeal.”); see also Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (stating that a defendant who tells his attorney not to appeal cannot later complain that his attorney performed in a deficient manner by following the directive not to appeal).

Respondent notes that now on appeal, Petitioner contends counsel failed to explain the nature of the appeal right in a way that the waiver of the right to appeal was knowingly and voluntarily made. However, that is not the specific ground raised by Petitioner at the PCR hearing. Petitioner did not argue that counsel failed to explain the nature of his right to appeal causing the waiver of right to appeal to be unknowingly made. Petitioner’s position was the trial counsel failed to tell him anything about appeal. However, the testimony from trial counsel indicates that counsel consulted Petitioner about an appeal to ensure Petitioner was aware of the right and to ascertain whether Petitioner wished to appeal. Petitioner expressed to counsel an unequivocal desire to end judicial proceedings. See Roe v. Flores-Ortega, 528 U.S. 470 (2000). The issue Petitioner now argues, that trial counsel failed to explain the nature of the appeal such that he could understand and waive it is not supported by any evidence or allegation presented by Petitioner at the PCR hearing and is not properly before the court on appeal. Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct.App. 2005); Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951). The PCR court found that counsel advised Petitioner about his right to appeal and the time framed within which he

must do so and that Petitioner told counsel he did not want to appeal. The PCR court's denial of relief was correct.

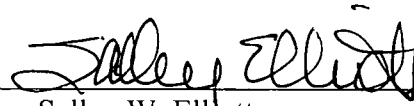
CONCLUSION

Because there is evidence in the record to support the PCR court's findings, this Court should deny Petitioner's request for certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

BY: 
Salley W. Elliott

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ATTORNEYS FOR RESPONDENT

January 21, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Deandra G. Benjamin, Circuit Court Judge

Appellate Case No. 2012-212845

JAMES WEST,

Petitioner,

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THE STATE,

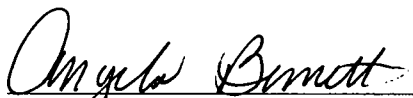
Respondent.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 21st day of January, 2015.


ANGELA BENNETT
Administrative Assistant

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ALAN WILSON
ATTORNEY GENERAL

January 21, 2015

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JAN 21 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: James West v. The State
Appellate Case No: 2012-212845

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: Kathrine H. Hudgins, Esquire
Ms. Trisha Allen