

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
The Honorable Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-000193

BERNARD GILLIARD,

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FEB 17 2015

Petitioner, **S.C. Supreme Court**

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

ASHLEIGH R. WILSON
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ATTORNEYS FOR RESPONDENT

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TABLE OF AUTHORITIES

Cases:

<u>In re Anonymous Member of the Bar</u> , 303 S.C. 306, 400 S.E.2d 483 (1991).	4
<u>Simuel v. State</u> , 390 S.C. 267, 701 S.E.2d 738 (2010).	4
<u>White v. State</u> , 263 S.C. 110, 208 S.E.2d 35 (1974).	4

QUESTION PRESENTED

I. Whether the lower court erred by finding the Petitioner did not freely and voluntarily waive his right to appeal his armed robbery conviction when it is undisputed trial counsel advised the Petitioner of his right to appeal and the Petitioner never indicated to counsel a desire to appeal his armed robbery conviction?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Petitioner was indicted at the March 2010 term of the Charleston County Grand Jury for possession of a firearm during the commission of a violent crime (2010-GS-10-2059), armed robbery (2010-GS-10-2060), murder (2010-GS-10-2061), and unlawful carrying of a pistol (2010-GS-10-2173). The Petitioner was represented by J. Michael Bosnak, Esquire.

On May 27, 2010, the Petitioner proceeded to trial. He was found guilty of armed robbery. The jury was unable to reach a verdict on the remaining murder and weapons charge and a mistrial was declared. Sentencing on the Petitioner's armed robbery conviction was deferred. On February 25, 2011, the Petitioner proceeded to trial a second time on murder and possession of a weapon charges and the result was a hung jury. After the second trial, the Honorable J.C. Nicholson sentenced the Petitioner to confinement for twenty-five years for armed robbery. On April 21, 2011, the Petitioner pled guilty to voluntary manslaughter (a lesser included offence of murder), possession of a weapon during the commission of a violent crime, and unlawful carrying of a pistol. The Honorable T.L. Hughston sentenced the Petitioner to confinement for five years for possession of a weapon, one year for unlawful carrying of a weapon, and twenty years for voluntary manslaughter. The Petitioner did not appeal his convictions or sentences.

On November 15, 2012, the Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel for counsel's failure to file an appeal of the Petitioner's armed robbery conviction. The Respondent filed its Return on June 26, 2013. The Petitioner amended his application for post-conviction relief on November 8, 2013. In the amended

application, the Petitioner once against alleged he failed to voluntarily waive his right to appeal. An evidentiary hearing was held on November 20, 2013 at the Charleston County Courthouse. The Petitioner was represented by T. Dylan Rankin, Esquire. The Respondent was represented by Ashleigh R. Wilson, Esquire. By Order filed January 13, 2014, the Honorable Stephanie P. McDonald granted the Petitioner's request for an appeal pursuant to White v. State. The Petitioner filed a Notice of Appeal, a Petition for Writ of Certiorari, and an Anders brief. This Return follows.

ARGUMENT

The lower court erred in finding the Petitioner is entitled to an appeal pursuant to White v. State.

The Petitioner asserts the post-conviction relief court properly granted the Petitioner an appeal pursuant to White v. State¹. The Respondent submits the lower court erred and the Petitioner's appeal should be dismissed. The Petitioner is not entitled to an appeal pursuant to White v. State since the record reflects counsel advised the Petitioner of his right to appeal and there is no credible evidence showing the Petitioner indicated to counsel a desire to appeal his armed robbery conviction.

Generally, after a client is convicted and sentenced, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal. In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991). Counsel should give the client his professional judgment whether an appeal should be taken and ascertain whether the client wishes to appeal. Id. To waive an appeal, defendant must make a knowing and intelligent decision not to pursue the appeal. Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010).

The Respondent submits trial counsel discussed with the Petitioner his right to appeal. The record presents undisputed evidence that trial counsel advised the Petitioner of his right to appeal. Counsel testified that after the Petitioner was sentenced for armed robbery they discussed the Petitioner's right to appeal. (App. 757:16-19). The record also reflects the Petitioner testified that he discussed his right to appeal with counsel. (App. 761:15-18).

While the record reflects the Petitioner was advised by counsel of his right to appeal, the Petitioner freely and voluntarily waived his right to appeal by failing to inform counsel of his desire to appeal his armed robbery conviction. The record reflects trial counsel provided credible

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

testimony that the Petitioner never expressed a desire to appeal his armed robbery conviction. (App. 755:2-6,758:4-9). The only evidence in the record indicating the Petitioner's desire to appeal are the Petitioner's own self-serving statements during his post-conviction relief hearing. The Respondent submits the Petitioner freely and voluntarily waived his right to appeal by failing to indicate to counsel his desire to appeal.

Lastly, the Respondent notes the Petitioner's argument that "the State did not oppose the request" for an appeal pursuant to White v. State is erroneous and misplaced. The record is void of any indication that the Respondent consented to the granting of the Petitioner's request for an appeal pursuant to White v. State. Also, there is no requirement that the Respondent object **after** an adverse ruling by the court, as the Petitioner's claim seems to indicate. Further, this Court should not consider the Respondent's failure to object after the Court granted the Petitioner an appeal pursuant to White v. State acquiescence by the Respondent. It is clear from the record that the Petitioner's request for an appeal pursuant to White v. State was the sole issue in dispute before the lower court at the evidentiary hearing. The Petitioner's argument that the Respondent "did not oppose the request" for an appeal pursuant to White v. State is misguided and should be given little credence by this Court.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

Feb. 17, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Charleston County
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

BERNARD O. GILLIARD,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
SC Commission of Indigent Defense - Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 17th day of February, 2015


ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

February 17, 2015

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FEB 17 2015

S.C. Supreme Court

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

RE: **Bernard Gilliard, #314249 v. State of South Carolina**
Appellate Case No. 2014-000193
Lower Court Case No. 2012-CP-10-7484

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving the petitioner with this Return to Petition for Writ of Certiorari.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Susan Hackett, Esquire