

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

J. Ernest Kinard, Jr., Circuit Court Judge

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S.C. Supreme Court

DETRICK WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002100

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Whether petitioner was denied his right to a direct appeal from his bench trial?

STATEMENT

Petitioner was convicted of indecent exposure after a bench trial before the Honorable R. Knox McMahon on June 19, 2013, in York County. He was represented by Phil Smith, Esquire. Erin Joyner, Esquire, was the assistant solicitor. Petitioner was sentenced to three (3) years incarceration concurrent to his current active sentence. (App. p. 1 – p. 60.)

Petitioner filed an application for post-conviction relief on January 2, 2014. (App. p. 61 – p. 67.) Respondent filed a return dated April 10, 2014. (App. p. 68 – p. 72.) An evidentiary was held on August 6, 2014, before the Honorable J. Ernest Kinard, Jr. Petitioner was present and was represented by William Michael Hemlepp, Jr., Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both petitioner and defense counsel testified at the hearing. (App. p. 73 – p. 90.) On September 26, 2014, Judge Kinard filed an order denying and dismissing the application for post-conviction relief (App. p. 91 – p. 96).

Because the PCR judge found that petitioner was not entitled to a belated appeal a “Statement of Issue(s) on Appeal” will be shown on the page following this petition.

This petition follows.

ARGUMENT

Petitioner was denied his right to a direct appeal from his bench trial.

Petitioner alleged in his application for post-conviction relief that trial counsel failed to advise him about an appeal and he failed to file an appeal (App. p. 62). He testified at the evidentiary hearing that after everybody testified at his bench trial, but before the judge ruled, he talked with his attorney about an appeal. His attorney asked him, “Well, if it don’t go in your favor, do you want me to file an appeal?” Petitioner replied in the affirmative. (App. p. 7, lines 14 – 24.) He said after the judge ruled in his case, he never heard anything about an appeal. He later found out from the “appeal office” that he did not have an appeal. (App. p. 80, lines 2-11.) He wanted to appeal his bench trial. (App. p. 80, line 22 – p. 81, line 10.) Defense counsel testified that he indeed did talk to petitioner during the bench trial and petitioner did indicate his desire to appeal. The appeal was not perfected. He explained that Judge McMahon gave him concurrent sentencing and did not order the registry. In the court room, he asked petitioner if he was okay with it. Petitioner said yes. Counsel said he took that to mean that he didn’t want to go through with it, but knowing petitioner, he should have filed the appeal. When he got a letter sometime later from petitioner he realized he didn’t tell him he did not appeal. He said a review of the transcript showed that Judge McMahon did not indicate that he had the opportunity to appeal. Counsel said he contacted appellate defense but the time had lapsed for an appeal. (App. p. 83, line 12 – p. 84, line 14.)

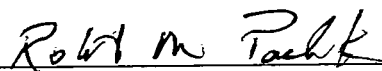
The PCR judge ignored Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and the procedure to be used in determining if one is entitled to a belated appeal. Instead, he determined that petitioner was not entitled to a belated appeal because he could not show prejudice or that the result would have been any different if an appeal had been filed. (App. p. 94 – p. 95.) That is not

the standard to be used in determining whether one is entitled to a belated appeal. Our court has previously held that it will not uphold the findings of the PCR judge if there is no probative evidence to support those findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). The decision of the PCR judge in this case should not be upheld. Counsel has an affirmative duty to determine if his client wants to appeal. White v. State, 255 S.C. 491, 179 S.E.2d 906 (1971); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Matter of Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991). The testimony of both petitioner and counsel in this case supports the conclusion that petitioner is entitled to a belated appeal.

CONCLUSION

Petitioner should be granted a belated appeal.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of February, 2015.

STATEMENT OF ISSUE ON APPEAL

Whether petitioner should have been granted a directed verdict to the charge of indecent exposure when the act did not occur in the view of any person on a street or highway and it was also not in a public place?

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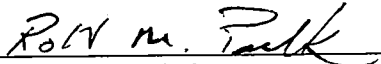
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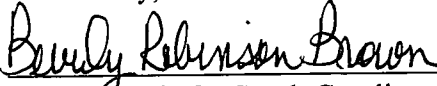
CERTIFICATE OF SERVICE

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 J. Rutledge Johnson, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Deitrick Williams, Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 19th day of February, 2015.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of February, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 9, 2024.