STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Alison Renee Lee, Circuit Court Judge

BRIAN EDISON GAINES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PELLATE CASE NO. #2015-000103

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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ISSUE PRESENTED

Did the PCR judge err in finding that Petitioner knowingly and intelligently waived his right to direct appeal?

STATEMENT OF ISSUE ON APPEAL

Was the guilty plea to trafficking in crack cocaine rendered involuntary by the State seeking a mandatory sentence of life without parole if Petitioner was convicted at trial?

STATEMENT

On August 22, 2013, the York County Grand Jury indicted Petitioner Gaines for trafficking in crack cocaine, indictment #2013-GS-46-2979. On October 8, 2013, after a pre-trial suppression motion, Petitioner appeared before the Honorable J. Derham Cole and pled guilty. Melissa Inzerillo represented Petitioner. Marina Hamilton prosecuted the case. Pursuant to negotiations with the State, Judge Cole sentenced Petitioner to twenty (20) years. Petitioner did not file a notice of intent to appeal.

On May 7, 2014, Petitioner filed an application for post conviction relief. The State filed a return on August 20, 2014. On November 20, 2014, an evidentiary hearing was held before the Honorable Alison Renee Lee. W. Michael Hemlepp represented Petitioner at the PCR hearing. J. Rutledge Johnson represented the State. In an order signed December 10, 2014, Judge Lee denied relief and dismissed the application. A timely notice of intent to appeal was served on January 12, 2015. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that Petitioner knowingly and intelligently waived his right to direct appeal.

Petitioner pled guilty to a reduced charge of trafficking in crack cocaine second offense for a negotiated sentence of twenty years. (App. p. 3, lines 4-10). The plea judge did not advise Petitioner of his right to appeal. During the PCR hearing Petitioner testified that, prior to signing the sentencing sheet, he asked pleas counsel to appeal his case. (App. p. 42, lines 10-13). Plea counsel testified that she discussed with Petitioner the right to appeal and the ten day time frame. (App. p. 52, lines 22-25). Plea counsel testified that Petitioner never told her he wished to appeal. (App. p. 53, lines 1-2). Plea counsel admitted that she did not talk with Petitioner after the plea and sentencing. (App. p. 55, lines 15-23). Plea counsel testified, "Mr. Gaines was pretty u[set and angry at that point. So I did not speak with him. (App. p. 55, lines 22-23). Petitioner testified that he was aware of the ten day time frame but never had the opportunity to speak with plea counsel about an appeal following the guilty plea. (app. p. 42, line 7 – 24). Petitioner testified that he wanted to appeal his case. (App. p. 43, lines 2-9).

In the order of dismissal the PCR judge wrote:

> The only dispute is whether Applicant informed Inzerillo [Plea counsel] that he would like to appeal. Applicant testified that he informed Inzerillo before entry of his guilty plea that he would want to appeal; Inzerillo testified that at no point did Applicant ever tell her that he wanted to appeal. This Court finds the testimony of Inzerillo credible and the testimony of the Applicant not credible. Therefore, because Applicant was fully informed of his right to an appeal and did not inform Inzerillo that he wanted to appeal, this Court denies this application on the basis that Counsel's performance did not fall below the standard required.

The PCR judge erred. While counsel advised Petitioner of his right to appeal **prior** to the guilty plea, she did not discuss an appeal with Petitioner after the guilty plea was entered and sentence

imposed. Based on the fact that Petitioner was angry and upset after the plea, counsel should have asked if Petitioner wished to appeal.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the

constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

"The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. Pleas counsel was ineffective in failing to advise Petitioner of the right to appeal following the guilty plea. Petitioner was prejudiced by counsel's deficient performance.

In Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794-95 (2009), this Court wrote:

> Following a trial, counsel must inform a defendant who has been found guilty of a crime of the possibility of an appeal and the method for taking an appeal. Frasier v. State, 306 S.C. 158, 161, 410 S.E.2d 572, 574 (1991). In a plea proceeding, however, there is no requirement that plea counsel inform a defendant of the right to a direct appeal absent extraordinary circumstances. Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995); see also Roe v. Flores–Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (holding that counsel has a constitutional duty to inform a defendant of his right to appeal a guilty plea if there is reason to think that a rational defendant would want to appeal or that the defendant demonstrated an interest in appealing). (footnote omitted).

Plea counsel had a constitutional duty to inform Petitioner of his right to appeal. Petitioner's reaction after the plea demonstrated an interest in appealing. Plea counsel was ineffective in failing to advise Petitioner of his right to appeal following the guilty plea. Petitioner did not knowingly and intelligently waive the right to direct appeal. Petitioner is entitled to 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 find that Petitioner is entitled to a belated direct appeal and order briefing.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 14h day of September, 2015.

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CERTIORARI TO YORK COUNTY
ALISON RENEE LEE, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brian E. Gaines states:

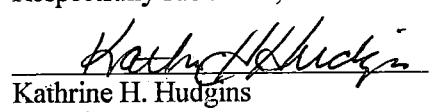
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on November 20, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Brian E. Gaines.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 14h day of September, 2015

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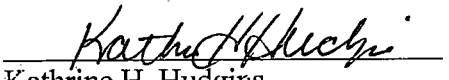
CERTIFICATE OF SERVICE

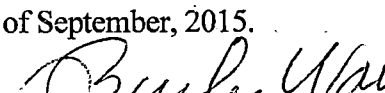
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire and Brian E. Gaines, #293395, at Lee Correctional Institution this 14h day of September, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of September, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021