

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Anderson County

SC SUPREME COURT

Edgar W. Dickson, Circuit Court Judge

TERRY N. HAMBY, JR

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001829

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX.....	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	5
STATEMENT OF ISSUE ON DIRECT APPEAL.....	5
PETITION TO BE RELIEVED AS COUNSEL.....	7

ISSUE PRESENTED

The PCR judge erred in denying petitioner's allegation that he did not voluntarily waive his right to a direct appeal in his case.

STATEMENT

Petitioner Terry Neil Hamby, Jr. pled guilty to armed robbery, two counts of receiving stolen goods, and two counts of grand larceny during the December 2012 term of the Anderson County General Sessions Court before Judge J. Cordell Maddox, Junior. Petitioner was sentenced to imprisonment for an aggregate period of ten years. App. 1 – 11. Jennifer Johnson represented petitioner at the plea proceeding and Assistant Solicitor Rame Campbell appeared on behalf of the state. Petitioner did not appeal his convictions and sentences.

On August 28, 2013, petitioner filed a PCR application with Anderson County Office of the Clerk of Court. App. 13 – 19. The respondent filed a return dated December 31, 2013, requesting that a hearing be held in response to petitioner's PCR action. App. 20 – 24.

A PCR hearing was convened on July 30, 2014, at the Anderson County Courthouse before Judge Edgar W. Dickson. Petitioner was present at the hearing and represented by Hugh Welborn, and Assistant Attorney General John W. Whitmire appeared on behalf of the state. App. 26 – 52.

On August 14, 2015, Judge Dickson issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 54 – 61.

Petitioner appealed Judge Dickson's Order of Dismissal. This petition follows.

ARGUMENT

The PCR judge erred in denying petitioner's allegation that he did not voluntarily waive his right to a direct appeal in his case.

During the plea proceeding, the solicitor apprised the trial judge of the facts of the case. Apparently, petitioner was found in possession of a 1991 Honda Accord and 1995 Ford Thunderbird, both of which he knew were stolen. Also, petitioner was in possession of a 1994 Ford van and had been caught removing an air conditioning unit from a residential home. In addition, petitioner was charged with taking the pocketbook of a school teacher while armed with a tire tool. App. 7, l. 1 – 23.

During the PCR hearing, petitioner testified that counsel did not advise him of his right to appeal and that he desired an appeal, especially since the armed robbery warrant “[wasn’t] for [him].” App. 5, l. 6 – p. 6, l. 14; App. 39, l. 15 – 21.

Trial counsel testified during the PCR hearing and explained this was not a case to be appealed in part because the trial judge followed the sentencing recommendation of ten years concurrent on each offense charged in the case. App.21, lines 14 – 21.

The PCR judge ruled that in effect that petitioner presented no proof establishing ineffective assistance of counsel in his case. App. 54 – 61.

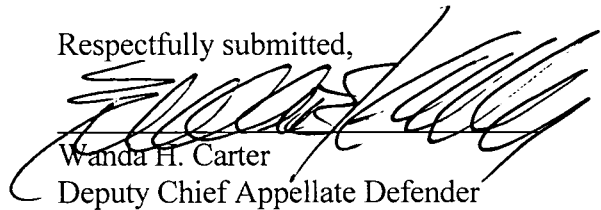
If after advising an indigent client requesting an appeal the client wishes to appeal, then trial counsel must serve and file a notice of appeal as required by Rule 203, SCACR. See In Re Anonymous Member of the Bar, 303 SE 306, 400 S.E. 2d 483 (1991). Here, it is clear that petitioner desired a direct appeal in his case. A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 SC 110, 208 S.E. 2d 35 (1975). See also, Frasier v. State, 306 S.C. 158, 410 S.E. 2d 572

(1991), and Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989), where counsels were found ineffective in failing to appeal where the defendants desired appeals, but counsels took no action to secure an appeal on their behalf. The PCR judge erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case. Clearly, petitioner did not voluntarily waive his right to a direct appeal, and trial counsel was ineffective in failing to file a timely notice of appeal after the plea proceeding.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this petition be granted and full briefing allowed on the above-raised issue in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of April, 2016.

STATEMENT OF QUESTION ON DIRECT APPEAL

1.) The trial judge erred in assigning restitution as part of appellant's sentence at his guilty plea proceeding without holding a separate restitution hearing per the mandate in State v. Fussell, 299 S.C. 162, 383 S.E.2d 1 (1989), in order to calculate the exact amount of money owed to the victims in the case.

STATE OF SOUTH CAROLINA
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CERTIORARI TO ANDERSON COUNTY
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terry Neil Hamby, Jr. states:

1. She is Deputy Chief 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 July 31, 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 Terry Neil Hamby, Jr..

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of April, 2016

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IN THE SUPREME COURT

Certiorari to Anderson County

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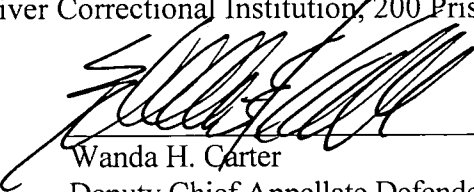
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

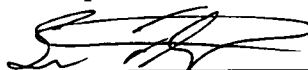
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Terry Neil Hamby, Jr., #353487, at Tyger River Correctional Institution, 200 Prison Road Enoree, SC 29355, this 8th day of April, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of April, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.