STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Steven H. John, Circuit Court Judge

DUSTIN EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2015-002141

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I.

The circuit court erred by summarily dismissing Petitioner's PCR application for failing to file within one year of his conviction where another circuit court judge had previously ruled that summary dismissal of Petitioner's PCR application was improper and that Petitioner was entitled to an evidentiary hearing on the merits of his application.

II.

The PCR court erred in finding plea counsel provided effective assistance of counsel where plea counsel failed to perfect Appellant's direct appeal, despite being requested to do so, because plea counsel did not believe that Petitioner should have appealed his sentence.

STATEMENT

On October 4, 2007, Dustin Evans was indicted by the Clarendon County Grand Jury for one count of assault and battery with intent to kill (ABIK), two counts of first degree criminal sexual conduct and two counts of kidnapping. App. 154 - 157. He was represented by Scott Robinson, who was appointed under a contract he had with the Clarendon County Public Defender Association, as will be discussed *infra*. App. 124, l. 17 - 125, l. 23. The State was represented by Assistant Solicitor Amy Land.

On April 30, 2008, Evans pled guilty to all five counts before the Honorable George C. James.[1] Pursuant to a negotiated agreement, Judge James sentenced Evans, who had a sixth grade education and was 23 years old at the time, to a total sentence of forty-seven years imprisonment. App. 114, ll. 1-17. Contrary to Evans' request, Counsel Robinson never filed a notice of appeal. App. 69, l. 2 - 70, l. 17; App. 123, ll. 15-25.

PCR Application and Hearing before the Honorable Clifton B. Newman

On February 25, 2013, Evans filed an application for post-conviction relief alleging that Counsel Robinson was ineffective for failing to file a timely notice of appeal when asked to do so. App. 1 - 7. On June 27, 2013, the State filed a Return and Motion to Dismiss. App. 8-13.

On September 9, 2014, a hearing was held by the Honorable Clifton B. Newman to determine whether to allow Evans an evidentiary hearing on the allegations in his PCR application. App. 14 - 50. Tommy Thomas represented Evans and Assistant Attorney General Daniel Gourley represented the State. Petitioner testified at the hearing that he had not filed an application within

[1] As will be discussed *infra* the transcript of the guilty plea is not available as Evans first filed for post-conviction relief in 2015.

one year of his conviction because he believed that Counsel Robinson had appealed his sentence. App. 30, l. 2 - 31, l. 19.

On November 3, 2014, Judge Newman issued a written order finding that summary dismissal of Evans' PCR application would be improper. App. 51 - 53. Judge Newman found Evans' testimony to be credible, "the Court finds and concludes that the Petitioner has not had a direct appeal of his conviction nor a Post-Conviction Relief Hearing." App. 52. Judge Newman concluded that Evans "believed that his original conviction was under appeal. He only discovered at a later date that his appeal had not been perfected. ***Any delay in the Applicant's filing of his Post-Conviction [application] was based on this erroneous belief.***" App. 52 (*emphasis added*).

Accordingly, Judge Newman excused Evans' failure to file his PCR application within one year of his conviction and granted Evans' an evidentiary hearing on the merits of his application. *Id.*

Evidentiary Hearing before the Honorable Steven H. John

On July 16, 2015, the Honorable Steven H. John held an evidentiary hearing. App. 54 - 141. Tommy Thomas represented Evans and Assistant Attorney General Daniel Gourley represented the State.

Hearing Testimony of Petitioner Dustin Evan

Evans testified that, at the time he was arrested, he had a sixth grade education and had no prior criminal record. App. 67, ll. 1 - 17. Evans recalled Counsel Robinson had told him that he could expect a total sentence of sixteen years if he pled guilty. App. 68, l. 5 - 69, l. 24. Instead, he was sentenced to forty-seven years. *Id.*

Evans stated that he was shocked by the length of the sentence and asked Counsel Robinson to appeal it. *Id.* He believed that Counsel Robinson had appealed his sentence and only discovered several years later that no notice of appeal had been filed. App. 69, l. 2 - 70, l. 17; App. 84, ll. 14-19.

PCR counsel then had Evans identify a written plea offer from Assistant Solicitor Amy Land dated March 3, 2008 offering to allow Evans to plead guilty in exchange for a sentence range of up to forty years. App. 72, l. 5 - 73, l. 22; App. 140. Evans testified that Counsel Robinson advised him against accepting the plea deal and believed that it was too severe. *Id.*

Counsel Robinson led Evans to believe that a sentencing range of between sixteen and twenty years was likely. However, Counsel Robinson told Evans that "sometimes a little money helps" and explained that, in order to get the best possible offer from the State, Evans and his family would need to pay him $3,500. App. 75, l. 1 - 77, l. 25. PCR counsel then introduced a check written by Evan's mother, Shirley Evans, on March 6, 2008 to the law firm of Johnson, McKenzie, and Robinson for $3,400. App. 141. His mother also gave the firm a one hundred dollar bill to satisfy Counsel Robinson. App. 103, ll. 9-21. This payment was made the day that the State's written offer expired. App. 72, l. 8 - 74, l. 20; App. 140 - 141.

Evans summarized his claims against Counsel Robinson as, "[t]he only -- the only -- thing -- I just had a forty-year cap on the table. Mr. Robinson told me to turn that down. My mom closed out her savings account and gave him $3,500. I got seven extra years on top of that [forty year cap] and paid $3,500 extra dollars [when] the State had appointed him to represent me. That's why I don't understand how he can just run me out there like that." App. 84, ll. 14-19.

On cross-examination, Evans stated that when he signed the sentencing sheets before formally pleading guilty, the sentencing box was marked concurrent. App. 90, l. 1 - 92, l. 25. However, at some point the concurrent box on three of his five sentencing sheets was crossed out and the consecutive box was checked. App. 158 - 162.

Hearing Testimony of Shirley Evans

Shirley Evans testified that she had paid Counsel Robinson the additional money with the understanding that it was to secure a better deal for her son. App. 104, ll.3-14. Mrs. Evans stated that her son had asked Counsel Robinson to file an appeal of his guilty plea and that she tried to call him several times but was never able to speak with Robinson. App. 105, l. 3 - 106, l. 25.

Hearing Testimony of Anna Evans DuBose

Dubose, Evans' sister, recalled that she personally delivered her mother's check to Counsel Robinson's law office. App. 109, l. 7 - 110, l. 9. She also tried to call Counsel Robinson about the status of her brother's appeal, but the attorney never returned her call. *Id.*

Hearing Testimony of Assistant Solicitor Amy Land

Land testified that she offered Evans and his co-defendant, Jeremey Sweat an offer of a forty year sentence in exchange of pleading guilty. App. 113, l. 1 - 115, l. 20. Land claimed that Sweat accepted the deal, but was sentenced to eighty years by Judge James. After Evans' plea offer expired, the State prepared for trial. In light of Sweat's sentence, the State offered a negotiated forty-seven year sentence if Evans plead guilty. *Id.* Land further stated that she filled out the sentencing sheets and noted that each the sentences were to be served concurrently for a total sentence of forty-seven years. App. 116, l.3 - 117, l. 1.

Hearing Testimony of Counsel Robinson

Counsel Robinson admitted that he did not prepare for trial in Evans' case. App. 118, ll. 11-24. Instead he attempted to give the solicitors the impression that he was preparing for trial in order of force them to offer Evans a forty-seven year sentence. *Id.* When presented with the written and signed forty-year plea offer from Land, Counsel Robinson responded evasively: "I mean I remember discussions about a lot of numbers. I do remember that, yes." App. 119, l. 23 - 120, l. 21.

However, he claimed that he did not remember whether he advised Evans to accept or reject the offer. App. 120, ll. 5-12. "[Y]ou know, I don't ever specifically remember telling him to turn down the forty." *Id.* at ll. 23-24. Counsel Robinson denied promising Evans that he would receive a sixteen year sentence. App. 121, l. 2 - 123, l. 22. Despite having received a written offer of a forty year sentence signed by the prosecutor, Counsel Robinson averred "[t]he only sentence I ever promised him was the forty-seven years. . . . But that's the only number that he was promised with any certainty [*sic*] was forty seven years." App. 121, ll. 6-14.

Whereas he claimed to have no recollection of his advice to Evans regarding the written offer of a forty year sentence, Counsel Robinson was almost certain that he had refused to file an appeal for Evans. App. 123, ll. 15-23. With regards to the $3,500 dollar payment he received from Evans' mother, Counsel Robinson claimed he had contract with the Clarendon County Public Defender Corporation that paid him a flat fee for indigent clients. App. 124, l. 17 - 126, l. 5.

While Evans' case was pending, he elected to terminate that contract. Counsel Robinson informed Evans that he could continue to represent him "because I had time invested in his case and had done a lot of work on it" if his family paid him $3,500, otherwise the new contract attorney would take his case. *Id.* In response, Shirley Evans wrote Counsel Robinson the check on March 6, 2008, the same day that the State's offer of a forty year sentence expired. App. 140 - 141. Evans pled guilty less than two months later on April 30, 2008. App. 158 - 162.

Order of Dismissal

On August 4, 2015, Judge John issued a written order of dismissal denying Petitioner a belated direct appeal. App. 142 - 153. The order also "summarily dismissed" Petitioner's allegation of ineffective assistance of counsel resulting in an involuntary guilty plea. App. 151 - 153. Despite, Judge Newman's previous order excusing Petitioner's failure to comply with the

statute of limitations for filing a PCR application and the implicit credibility findings contained in it, Judge John concluded that Petitioner failure to comply with the filing procedures of the Uniform Post-Conviction Procedures Act procedurally barred. *Id.* Accordingly, the PCR court granted the State's motion for summary judgment and did not make any specific findings of fact regarding the effectiveness of Counsel Robinson's representation. *Id.*

ARGUMENT

I.

The circuit court erred by summarily dismissing Petitioner's PCR application for failing to file within one year of his conviction where another circuit court judge had previously ruled that summary dismissal of Petitioner's PCR application was improper and that Petitioner was entitled to an evidentiary hearing on the merits of his application.

On September 9, 2014, Judge Newman conducted a hearing on the State's motion for summary dismissal of Petitioner's PCR Application. App. 14 - 50. At this hearing, Petitioner, who has a sixth grade education, testified that he had asked plea counsel to appeal his sentence. App. 69, l. 2 - 70, l. 17. Plea counsel never informed Petitioner that he did not file a notice of appeal. Petitioner further testified that he did not file his PCR application within one year of his conviction because he believed his case was on appeal. *Id.*

Once Petitioner discovered that plea counsel never filed an appeal, he filed an application for post-conviction relief. After hearing the evidence and arguments by PCR counsel and the State, Judge Newman concluded, that as a matter of equity and out of concern for the integrity of the court system: "I'm deciding [Petitioner's] entitled to an evidentiary hearing on everything." App. 48, ll. 3-15.

On July 16, 2015, Judge John held an evidentiary hearing on Petitioner's PCR application, including claims of ineffective assistance of counsel and Petitioner's arguments in favor of granting him a belated Appeal. App. 54 - 149. Despite Judge Newman having determined that Petitioner was entitled to a full evidentiary hearing of the merits of his claims, Judge John issued an order of dismissal that summarily denied Petitioner's allegations of ineffective assistance of counsel on the grounds that Petitioner had failed to comply with the one year statute of limitations. App. 151 - 152.

Discussion: one circuit court judge may not review or reverse the findings of another circuit court judge.

Generally one circuit court judge does not have the power to review, modify, affirm, or reverse the findings of another circuit court judge. *Cook v. Taylor,* 272 S.C. 536, 252 S.E.2d 923 (1979); *Sheppard v. Kimbrough,* 282 S.C. 348, 318 S.E.2d 573 (Ct.App.1984). This principle is applies with particular force where the ruling involves a purely legal question. *Belton v. State*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (holding that one circuit court was without authority to review findings of another with regards to whether Budget and Control Board had jurisdiction to hear reinstated employee's appeal of the Board's calculation of her "back pay").

The test for determining when one circuit court judge has infringed on the earlier findings of another circuit court judge is whether the second judge "entered findings on the issues ruled upon" by the first judge. *State ex rel. Medlock v. Love Shop, Ltd.,* 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985).

In Petitioner's case, Judge Newman ruled that, as a matter of law, Petitioner's failure to comply with the statute of limitations on filing a post-conviction relief action was excused and that Petitioner was entitled to an evidentiary hearing on the merits of his application. App. 51- 53. Despite this ruling, Judge John's order of dismissal ruled that Petitioner's application "must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act." App. 151.

By summarily dismissing Petitioner's application, Judge John clearly made findings on an issue previously ruled upon by Judge Newman. *Cook v. Taylor,* 272 S.C. 536, 252 S.E.2d 923. In effect, Judge John reviewed and reversed Judge Newman's order granting Petitioner an evidentiary hearing on the merits of his application, including Judge Newman's findings regarding Petitioner's credibility.

This allowed the State two trial level "bites at the apple" challenging the timeliness of Petitioner's application. If the State believed Judge Newman erred in granting Petitioner a full evidentiary hearing on the merits of his PCR claim and belated direct appeal, the State should have appealed Judge Newman's order rather than re-litigating the issue in front of Judge John.

Most respectfully, Judge John erred in summarily dismissing Petitioner's application on procedural grounds as he did not have the power to reverse Judge Newman.

Prejudice

Petitioner was prejudiced by the PCR court's error as he was improperly denied the opportunity to have the merits of his PCR application adjudicated where Judge Newman, after hearing testimony and arguments by both Petitioner and the State, had concluded that he was entitled to such a hearing as a "matter of equity" arising out of Judge Newman's concerns for the "integrity of the court system." App. 51 - 53. This was a manifestly reasonable conclusion given the implications of Petitioner's allegations.

Petitioner presented evidence that plea counsel, who had been appointed under a contract with the Clarendon County Public Defender Corporation, had coerced his family into paying $3,500 with the promise of receiving a better plea offer than the rejected forty-year sentence. App. 74, l. 20 - 76, l. 25; *see Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding that generally, constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty).

Troublingly, the check was written on the same day that the State's forty-year sentencing offer expired. App. 140 - 141; *Cf. In re Archer*, 398 S.C. 145, 728 S.E.2d 29 (2012) (public reprimand for attorney who failed to disclose payments received from indigent applicant's family

when submitting voucher for payment). Even more troublingly, less than two months after paying Counsel Robinson, Petitioner pled guilty to a negotiated forty-seven year sentence.

Petitioner testified and presented documentary evidence that he had, at the advice of plea counsel, rejected a written and signed offer of a recommended forty year sentence. App. 86, l. 4 - 87, l.10; *see Missouri v. Frye*, 566 U.S. ____, (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and reaffirming *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to guilty pleas); *see also Lafler v. Cooper*, 566 U.S. ____ (2012) (addressing as the companion case to *Frye*, situations where the subsequent conviction is from a full trial and jury verdict, where "inadequate assistance of counsel caused non-acceptance of a plea and further proceedings led to a less favorable outcome").

Therefore, Petitioner presented *prima facie* evidence of having entered into an unknowing and involuntary guilty plea. *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970)("[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results"); *see also Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him).

Conclusion

This Court has held that, "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Judge John's summary dismissal of Petitioner's application, in contravention of Judge Newman's earlier order, prevented Petitioner from having "a full adjudication on the merits of the original

petition, or one bite of the apple." *Id.* at 261, 523 S.E.2d at 755-56 (citing *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (internal quotations and citation omitted)).

Respectfully, Judge John erred in summarily denying Petitioner's application for failing to comply with the one year statute of limitations when Judge Newman had previously ruled that Petitioner was failure to comply with the filing procedures was excused and that he was entitled to a ruling on the merits of his application. App. 51 - 53; App. 150 - 152.

II.

The PCR court erred in finding plea counsel provided effective assistance of counsel where plea counsel failed to perfect Appellant's direct appeal, despite being requested to do so, because plea counsel did not believe that Petitioner should have appealed his sentence.

Petitioner was denied his "one fair bite at the apple" because he did not voluntarily or intelligently waive his right to a direct appeal. App. 142 - 153; *See Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (provides that "[a] defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal."); *see also Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002) (provides that a defendant has the right to a belated appeal when the applicant did not knowingly and intelligently waive his right to a direct appeal.).

Accordingly, the PCR court erred in finding plea counsel provided effective assistance of counsel when he failed to perfect Appellant's direct appeal, and Petitioner is entitled to a belated direct appeal of his guilty plea pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) (provides that a criminal defense attorney must make certain that his client is fully aware of his right to appeal and in the absence of an intelligent waiver by the client, must either pursue an appeal or file a brief under *Anders v. California*, 386 U.S. 738 (1967)). App. 142 - 153; *see Hill*, 474 U.S. 52.

Deficient Performance

In this case, plea counsel's performance was constitutionally deficient, as it fell well below an objective standard of reasonableness when plea counsel either failed or refused to file a notice of appeal for two reasons. *See Hill*, 474 U.S. at 57-58.

First, Petitioner testified that he told plea counsel to file an appeal of his guilty plea. App. 69, l. 2 - 70, l. 17. Plea counsel could not specifically recall whether Petitioner requested him to file an appeal. Second, there was no evidence that plea counsel had been granted leave to withdraw from his representation of Petitioner pursuant to Rule 264, SCACR (provides that "[a]n attorney of

record in a matter pending before an appellate court may not withdraw from representation of his client without justifiable cause, or the consent of his client; and then only after proper written notice to his client, on petition to and by written order of the appellate court, and with notice to the adverse party."). Instead, plea counsel recalled that he very likely simply refused to file a notice of appeal because Petitioner had entered into a negotiated guilty plea. App. 123, ll. 15-25.

Plea counsel had a duty to perfect Petitioner's appeal until granted leave to withdraw by the Court under Rule 264, SCACR. *See In Re Anonymous Member of the Bar*, 303 S.C. 306, 308, 400 S.E.2d 483, 484 (1991) (the our Supreme Court has held that an attorney who is retained solely for the purpose of trial of a non-indigent criminal defendant must serve and file a timely Notice of Appeal as required by Rule 203, SCACR, and continue to represent the client until relieved by Court because counsel is required to take all necessary steps as may be reasonably practicable to protect the client's interests under Rule 1.16 of the Rules of Professional Conduct); *see also* Rule 602(e)(4), SCACR (provides that "retained counsel shall assist in representing the accused in any manner necessary to properly establish the indigency of the accused and properly perfect the appeal," and "if the Office of Appellate Defense determines that the accused is not indigent, retained counsel shall continue representation of the accused during the appeal, unless granted leave to withdraw under Rule 264, SCACR.").

Therefore, plea counsel's performance was constitutionally deficient, as it fell below an objective standard of reasonableness. *See Hill*, 474 U.S. at 57-58; *cf. Brady*, 397 U.S. at 758 (1970) (the United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results.").

Prejudice

Here, the record demonstrates that there is a reasonable probability that but for plea counsel's deficient performance; Petitioner would not have been denied his "one fair bite at the apple" because he did not voluntarily or intelligently waive his right to a direct appeal. *See Hill*, 474 U.S. at 57-58; *see also Legge*, 349 S.C. 222, 562 S.E.2d 618 (provides that a defendant has the right to a belated appeal when the applicant did not knowingly and intelligently waive his right to a direct appeal.).

Accordingly, the PCR court erred in holding that plea counsel provided effective assistance of counsel because Petitioner is entitled to a belated direct appeal of his guilty plea pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35. *See Hill*, 474 U.S. at 57-58; *see also Wilson v. State*, 348 S.C. at 218, 559 S.E.2d at 582.

STATEMENT OF ISSUE ON APPEAL

Pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), the issue to be raised on a belated direct appeal is provided as follows: Did the trial court abuse its discretion in finding Appellant knowingly, voluntarily, and intelligently pleaded guilty where Appellant, with no prior criminal and only a sixth grade education, believed that plea counsel, whom his family had paid $3,500 in addition to the amount paid to plea counsel under his contract with the local public defender corporation, had secured him a sentence ranging from sixteen to twenty years?[2]

[2] In the event that a belated direct appeal is granted, Counsel for Appellant reserves the right to raise additional arguments as may be merited.

CONCLUSION

For the reasons set forth herein, Petitioner Dustin Evans' petition for writ of certiorari should be granted to allow further briefing on these issues and pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), Petitioner is entitled to a belated direct appeal.

Respectfully submitted,

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Steven H. John, Circuit Court Judge

DUSTIN EVANS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2015-002141

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 Julie Coleman, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Dustin Evans at Lieber Correctional Institution, PO Box 205 Ridgeville, SC 29472, this 25th day of May, 2016.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of May, 2016.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.