

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge

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MAY 25 2016

SC SUPREME COURT

MAURICE C. KINARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001205

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the post-conviction relief judge err in finding defense counsel was not ineffective in failing to file a notice of appeal?

STATEMENT

In February of 2011, the Richland County Grand Jury indicted Petitioner for murder, indictment #2011-GS-40-1134. On December 9, 2013, Petitioner appeared before the Honorable Diane S. Goodstein and pled guilty to the lesser included offense of voluntary manslaughter. Tivis C. Sutherland, IV represented Petitioner at the plea. Joanna A. McDuffie and Nicole M. Simpson represented the State. Pursuant to a negotiated sentencing range of between fifteen and twenty five years (App. p. 22, lines 17-20), Judge Goodstein sentenced Petitioner to twenty five (25) years. A notice of intent to appeal was not filed.

On April 7, 2014, Petitioner filed an application for post conviction relief. The State filed a return on June 10, 2014. An evidentiary hearing was held before the Honorable Brooks P. Goldsmith on April 1, 2015. Jonathan D. Waller represented Petitioner at the evidentiary hearing. J. Clayton Mitchell represented the State. In a written order filed May 22, 2015, Judge Goldsmith denied relief and dismissed the application. A timely notice of intent to appeal was served on June 2, 2015. On February 1, 2016, counsel filed a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and a motion to be relieved as counsel. On April 25, 2016, this Court denied the motion to be relieved and directed the parties to address whether the post-conviction relief judge erred in finding defense counsel was not ineffective in failing to file a notice of appeal. This petition for writ of certiorari follows.

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in sentencing Petitioner to the maximum sentence allowed pursuant to the negotiations?

ARGUMENT

The post-conviction relief judge erred in finding defense counsel was not ineffective in failing to file a notice of appeal.

In the application for post conviction relief [PCR], Petitioner requested a belated appeal. (App. pp. 52-53). During the PCR hearing Petitioner testified that he asked plea counsel to file a notice of appeal immediately following the guilty plea and sentencing. (App. p. 76, lines 12-25). Plea counsel did not file a notice of appeal. (App. p. 77, lines 1-2). Upon cross examination Petitioner admitted that the plea judge advised him about the right to appeal and the ten day time frame. (App. p. 82, line 20 – p. 83, lines 1-10). Upon re-direct examination Petitioner again testified that he asked counsel to file the notice of appeal “right after court was over with.” (App. p. 83, lines 18-20).

When asked if Petitioner asked him to file an appeal plea counsel testified:

I do not remember. I listened to his testimony; I don't remember that. I remember a little while later getting a letter from him and talking about an appeal. And I'm pretty sure I wrote him back and said: Listen, you know, it's – either it's too late for that or – or something to that effect; you need to file a PCR. I don't remember at the time, particularly, only because it was a negotiated sentence. I mean, we made a contract with the state, and we ended up what we contracted for.

Typically, other than, you know, the advisement of the judge or something like that, in the—in the context of the negotiated sentence, we did this. We bargained for this. We worked for this. And we achieved this. And this is ours.

So I don't remember talking to him. I remember getting a letter from him awhile later asking about it, and I just wrote him back and told him to file PCR, I'm pretty sure.

(App. p. 90, lines 2-19).

The PCR judge found that Petitioner failed to carry his burden to prove counsel was ineffective in failing to file a notice of appeal. In the order of dismissal the PCR judge wrote:

Here, Counsel believed an appeal would be frivolous. He credibly emphasized that the two worked hard for the plea deal and received what Counsel testified as a near best case scenario in being able to plead to voluntary manslaughter. This Court finds Applicant was advised by the plea court that if he wished to appeal, he would have ten (10) days to do so. This Court also finds Applicant failed to present any evidence showing how he may be prejudiced by this alleged deficiency. See Rule 71.1, SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). This Court finds there were no objections made at the guilty plea hearing, and counsel had not [sic] reason to file a notice of appeal.

(App. p. 106). The PCR judge erred. Once Petitioner asked counsel to file the notice of intent to appeal, counsel had a duty to file the notice of intent to appeal, regardless of what counsel thought of the merits of that appeal.

In Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995), this Court wrote:

This Court has never addressed the issue of whether a defendant must be advised of the right to appeal following a guilty plea. We now adopt the holding of the majority of courts that, absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. See Laycock v. New Mexico, 880 F.2d 1184 (10th Cir.1989); Marrow v. United States, 772 F.2d 525 (9th Cir.1985); Davis v. Wainwright, 462 F.2d 1354 (5th Cir.1972); Carey v. Leverette, 605 F.2d 745 (4th Cir.), cert. denied, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979); Farrington v. North Carolina, 391 F.Supp. 714 (M.D.N.C.1975); Younger v. Cox, 323 F.Supp. 412 (W.D.Va.1971). The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal. Younger v. Cox, supra. One extraordinary circumstances [sic] which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal. Laycock v. New Mexico, supra; Marrow v. United States, supra.

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

In the present case plea counsel had a constitutionally imposed duty to consult with Petitioner about the direct appeal because Petitioner asked him to file an appeal. While plea counsel testified that he did not remember Petitioner asking him to file a notice of intent to appeal, plea counsel also testified that he did not see a reason to appeal because the guilty plea was negotiated. (App. p. 90, line 22 – p. 91, lines 1-6). Plea counsel also testified that under certain circumstances the appeal of a guilty plea may be frivolous. (App. p. 91, lines 2-6). Neither the negotiated nature of the guilty plea nor the fact that the notice of intent to appeal may ultimately be dismissed by the Court for failure to comply with Rule 203(B)(iv), SCACR, relieves plea counsel from the duty to file a notice of intent to appeal when asked to do so.

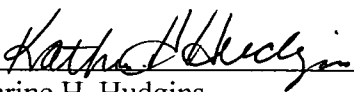
Plea counsel was ineffective in failing to file the notice of appeal. The PCR judge erred in refusing to find counsel ineffective for failing to file the notice of intent to appeal. The PCR judge additionally erred in finding that Petitioner failed to demonstrate prejudice because there were no objections made at the guilty plea. When a criminal defendant requests an appeal, but counsel fails to file an appeal, counsel is deemed deficient. In such a case, the defendant is entitled to a belated appeal without showing the appeal would likely have had merit. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969).

Petitioner sought a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The record supports the fact that Petitioner did not knowingly and intelligently waive the right to direct appeal and instead requested an appeal that counsel failed to file. The PCR judge erred in refusing to find defense counsel ineffective for failing to file a notice of intent to appeal. Petitioner is entitled to a belated appeal.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari, reverse the finding of the PCR judge, find that counsel was ineffective for failing to file a notice of intent to appeal, grant the belated appeal pursuant to White v. State and order briefing on the direct appeal issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of May, 2016.

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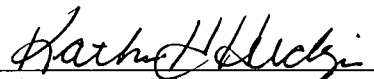
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APPELLATE CASE NO. 2015-001205

CERTIFICATE OF SERVICE

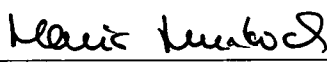
I certify that a true copy of the petition for writ of certiorari in this case has been served on Jessica Kinard, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of May, 2016.



Kathrine H. Hudgins
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: July 3, 2023.