STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Larry B. Hyman, Circuit Court Judge

JOSHUA MONROE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002434

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did the PCR court correctly rule that that Petitioner did not waive his right to a direct appeal and was entitled to belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where Petitioner asked plea counsel to file a notice of appeal, plea counsel actually filed a notice of appeal, but the appeal was dismissed because counsel failed to properly serve the notice of appeal on the State?

II. Did the PCR court err by finding counsel provided effective representation where counsel advised Petitioner to give a proffer statement to the State admitting his guilt before reviewing all of the State's evidence and Petitioner subsequently hired new counsel to represent him at trial, since Petitioner only pled guilty because the State would have used the proffer statement against Petitioner at trial and counsel refused to withdraw the proffer statement and invoke Rule 410, SCRE?

STATEMENT OF FACTS

This case involved a series of armed robberies committed in Charleston County, South Carolina in 2008.

On April 28, 2008, the Applebee's restaurant on Rivers Avenue in Charleston County, South Carolina, was robbed. R. 17, ll. 3 – 7. At around 2:40 a.m., employees were leaving the restaurant after closing up for the night. R. 17, ll. 11 – 12. The employees were met in the parking lot by individuals with guns. R. 17, ll. The employees were forced back into the restaurant at gunpoint. R. 17, ll. 12 – 14. The robbers ordered the employees to turn off the security alarm and open the safe. R. 17, ll. 14 – 15. Fifty-five hundred dollars was stolen from the safe. R. 17, ll. 15 – 16.

The next robbery occurred about a month later on May 25, 2008 at the Noisy Oyster restaurant in North Charleston. R. 20, ll. 2- 6. At around 3:20 a.m., two restaurant employees were leaving the restaurant for the night and met individuals with guns pointed at them in the parking lot. R. 20, ll. 6 – 9. The two employees were forced back into the restaurant. R. 20, ll. 6 – 9. The armed individuals took the night deposit bag with cash inside and cash from inside the safe. R. 20, ll. 10 – 11. They stole a total of sixty-seven hundred dollars and some personal property from the employees. R. 20, ll. 11 – 14.

After taking the money, one of the robbers forced a female employee to take off her clothes and perform oral sex on him at gunpoint. R. 20, ll. 15 – 20. She was also forced to perform oral sex on the male employee. R. 21, ll. 1 – 8. Both employees were left naked inside the walk-in refrigerator of the restaurant. R. 21, ll. 9 – 10. The police were not able to determine which of the individuals sexually assaulted the employee as all of the robbers wore masks during the robbery. R. 21, ll. 11 – 13.

About a week later on June 2, 2008, individuals attempted to rob the Chuck E. Cheese restaurant in Charleston County. R. 17, ll. 17 – 19. A restaurant employee was closing up the restaurant at around 12:50 a.m. that morning. R. 17, ll. 22 -23. Three individuals, who police later identified as Petitioner, Bryan Mulligan and Corey Larkin, followed the employee to his home in Dorchester County. R. 17, l. 23 – R. 18, l. 5. They allegedly forced him into the back seat of the employee's car at gunpoint and drove the car back to the restaurant. R. 17, l. 23 – R. 18, l. 5.

The employee's car ran out of gas on the way back to the restaurant. R. 18, ll. 6 – 7. Petitioner, Mulligan, Larkin, and the employee got into what was later identified as Mulligan's car and abandoned the employee's. R. 18, ll. 6 – 8. When they arrived back at the restaurant, the employee was ordered to turn off the security alarm and open the safe at gunpoint. R. 18, ll. 10 – 13. However, he was not able to open the safe. No money was taken from the restaurant and the employee was tied up and left inside. R. 18, ll. 14 – 15.

The employee of the Chuck E. Cheese identified Mulligan's vehicle as the one used in the robbery. R. 49, ll. 24 – 25. Police found Mulligan's identification inside the vehicle. R. 49, l. 25 – R. 50, l. 4. Mulligan turned himself in to police and gave a verbal statement in which he confessed to committing the Chuck E. Cheese robbery. R. 50, ll. 5 – 9. Further, Mulligan's girlfriend showed police the location of the apartment where Petitioner and Larkin lived. R. 50, ll. 10 – 12.

Officers stopped Larkin's vehicle as he was leaving the apartment and discovered evidence of the other robberies inside. R. 50, ll. 12 – 17. Larkin gave a written statement in which he confessed to committing all three armed robberies. R. 50, ll. 12 – 17. He also identified Mulligan and Petitioner as being involved in the robberies. R. 50, ll. 12 – 17.

Petitioner initially hired Michael Dupree to represent him. R. 125, l. 23 – R. 126, l. 1. Petitioner stated that defense counsel Dupree told him that the only way he could help Petitioner is if Petitioner implicated himself in the armed robberies. R. 127, ll. 6 – 7. Dupree advised Petitioner to give a "proffer agreement" in which Petitioner would admit to being involved in the robberies. R. 127, ll. 17 – 20. Petitioner gave police a statement that he was the "lookout" in the Applebee's and Chuck E. Cheese robberies, but was not involved in the robbery of the Noisy Oyster restaurant. R. 128, l. 10 – App. 129, l. 14. Petitioner understood that he would be "exempt" from the kidnapping charges and the robbery of the Noisy Oyster. R. 129, ll. 2 – 14.

Petitioner had not seen any of the evidence the police had against him before giving the proffer statement. R. 129, ll. 15 – 20. The only reason Petitioner gave the proffer statement was because defense counsel Dupree advised him to give the statement. R. 129, ll. 21 – 25. Dupree walked out of the visitation room when meeting with Petitioner at the county jail and wished Petitioner "good luck" after getting frustrated. R. 131, ll. 15 – 17. Petitioner contended that Dupree did not serve him with any document to "withdraw from the case." R. 131, ll. 19 – 24. Petitioner stated that if the plea judge had asked Petitioner whether he was satisfied with Dupree's services at the time he represented Petitioner, Petitioner would have said "No." R. 132, l. 22 – R. 133, l. 3.

Petitioner's grandmother then hired Milton Stratos to represent Petitioner. R. 131, l. 25 – R. 132, l. 3. Petitioner wanted to proceed to trial. R. 133, ll. 4 – 18. However, he had no choice but to plead guilty because of his proffer statement. App. 133, ll. 4 – 18. The proffer statement that he gave would be used against him at trial and "that statement alone would hinder [Petitioner] in any defense that . . . [he] would have." R. 133, ll. 14 – 18. Petitioner wanted to withdraw the proffer statement, but Dupree refused. Dupree then fired him. R. 136, ll. 1 – 10.

On October 6, 2008, Petitioner was indicted for two counts of armed robbery, one count of attempted armed robbery, two counts of kidnapping, and one count of first-degree criminal sexual conduct. R. 177 – 190. On November 18, 2010, Petitioner pled guilty before the Honorable J.C. Nicholson. R. 1. However, sentencing was deferred until after Petitioner testified against the co-defendants at trial. R. 13, ll. 1 – 18. Milton Demetrios Stratos represented Appellant. Burns Malone Wetmore represented the State. R. 1.

The trial never occurred for Petitioner to testify. On February 3, 2011, Petitioner and the two co-defendants were sentenced by the Honorable Roger M. Young, Sr. R. 28. Judge Young sentenced Petitioner and Corey Larkin to a concurrent sentence of twenty-five years' imprisonment. R. 79, l. 25 – R. 80, l. 4. Bryan Mulligan was sentenced to a concurrent thirty-year sentence. R. 79, ll. 23 – 25.

Petitioner asked Stratos to file a notice of appeal on Petitioner's behalf. R. 138, ll. 19 – 25. Stratos filed the notice of appeal but failed to timely serve the notice on opposing counsel. R. 139, ll. 6 – 13. Petitioner's appeal was dismissed for failure to serve opposing counsel pursuant to Rule 203, SCACR. R. 116. The Remittitur was issued on October 11, 2012. R. 116.

PCR Hearing

Petitioner filed a PCR application on September 17, 2013. R. 92. Respondent filed its return on February 19, 2014 requesting an evidentiary hearing. R. 115. An evidentiary hearing was held on September 10, 2015, before the Honorable Larry B. Hyman. R. 121. James K. Falk represented Petitioner. J. Rutledge Johnson represented the State. R. 122.

Petitioner testified during the evidentiary hearing. R. 125. Counsel Dupree testified at the hearing. R. 146. Dupree agreed that he advised Petitioner to give the proffer statement to

police. R. 148, ll. 1 – 15. Dupree asserted that the State could have tried Petitioner separately for each armed robbery and could possibly seek life without parole. R. 148, ll. 16 – 23.

Dupree explained that he had watched a surveillance video from one of the robberies but did not have the results from SLED for forensic evidence collected from the crime scenes. R. 151, ll. 18 – 20. Dupree admitted that Petitioner wanted to retract the proffer statement. R. 150, ll. 14 – 18. However, Dupree advised against it, telling Petitioner that it would not be to his benefit to retract his statement. R. 150, ll. 14 – 18.

Counsel Stratos also testified at the evidentiary hearing. R. 154. Stratos was aware of Petitioner's proffer statement when he took over Petitioner's case. R. 155, ll. 6 – 9. Stratos agreed that if Petitioner had gone to trial, the proffer statement would have prejudiced Petitioner if introduced by the State. R. 158, ll. 15 – 18. Petitioner's statement matched his co-defendant Larkin's statement. R. 158, ll. 10 – 14.

Stratos stated that he did file a notice of appeal per Petitioner's request. However, the appeal was "dismissed on procedural grounds it was improperly perfected." R. 164, ll. 2- 4.

Order of Dismissal

Judge Hyman issued an order granting Petitioner a belated appeal of his guilty plea pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and dismissing the remaining allegations of ineffective assistance of counsel. R. 167 – 176. The judge agreed that "the allegation that the [Petitioner] was denied a direct appeal [was] meritorious." R. 174. The judge found that Petitioner "did not knowingly and voluntarily waive his right to a direct appeal." R. 174. Thus, Petitioner "is entitled to a belated review of his convictions." R. 174.

The PCR judge found that Counsel Dupree and Counsel Stratos both provided effective assistance of counsel. R. 173. The judge found that counsel advised Petitioner of the charges

and sentences he faced and negotiated with the State on Petitioner's behalf. R. 173. The judge also found that Petitioner made the decision to plead guilty freely and voluntarily. R. 173. The judge wrote that Petitioner had not met his burden of proving both Counsel Dupree and Counsel Stratos "failed to render reasonably effective assistance." R. 174.

Petitioner appealed the judge's order denying post-conviction relief. This petition for writ of certiorari follows.

ARGUMENTS

I. The PCR court correctly ruled that that Petitioner did not waive his right to a direct appeal and was entitled to belated review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where Petitioner asked plea counsel to file a notice of appeal, plea counsel actually filed a notice of appeal, but the appeal was dismissed because counsel failed to properly serve the notice of appeal on the State.

Petitioner did not waive his right to a direct appeal of his guilty pleas and sentences. Petitioner requested that counsel file a notice of appeal. Although counsel filed the notice, he failed to timely serve the State. Because of counsel's failure to properly perfect Petitioner's appeal, the appeal was dismissed.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

This Court has held when there is "evidence of extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal . . . or when the defendant reasonably demonstrated an interest in appealing," a defendant must be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citing Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010).

Under Rule 203(b)(2), SCACR, "[a]fter a plea or trial resulting in conviction . . . a notice of appeal shall be served on **all respondents** within ten (10) days after the sentence is imposed."

(emphasis added). "If the notice of appeal is not timely filed . . . the appeal shall be dismissed." Rule 203(d)(3), SCACR.

Here, Petitioner did not waive his right to a direct appeal of his guilty plea. Petitioner and Counsel Stratos stated that Petitioner asked counsel to file a notice of appeal. In fact, Stratos did file a notice of appeal, which evidenced Petitioner's intent to appeal. However, Stratos failed to perfect the appeal by failing to timely serve the notice of appeal on the State. Because of counsel's failure, Petitioner was deprived to his right to appellate review of his guilty plea and sentence. Thus, the PCR court correctly ruled that Petitioner was entitled to a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974).

II. The PCR court erred by finding counsel provided effective representation where counsel advised Petitioner to give a proffer statement to the State admitting his guilt before reviewing all of the State's evidence and Petitioner subsequently hired new counsel to represent him at trial, since Petitioner only pled guilty because the State would have used the proffer statement against Petitioner at trial and counsel refused to withdraw the proffer statement and invoke Rule 410, SCRE.

Counsel Dupree was ineffective for advising Petitioner to give a proffer statement admitting his guilt prior to reviewing all of the State's evidence against Petitioner. Petitioner subsequently hired a new attorney to represent him at trial. However, Petitioner did not proceed to trial and pled guilty because the State would have used the proffer statement against him at trial. Dupree refused to withdraw the proffer statement and invoke Rule 410, SCRE, which made the statement inadmissible at trial.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). In the context of a guilty plea, a court will conduct a two-prong test when determining whether defense counsel's assistance was ineffective. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Hill, 474 U.S. at 58 – 59. Whether counsel was "deficient" turns on whether the guilty plea was entered voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). See Hill, 474 U.S. at 56 (1985) ("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.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Second, the applicant must show that he was prejudiced by counsel's deficient performance during the guilty plea process. Hill, 474 U.S. at 59. Specifically, the applicant must show that there is a reasonable probability that "but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

Rule 410, SCRE, provides "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" is inadmissible against a defendant. State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (2005) addresses the applicability of Rule 410, SCRE.

In that case, Compton was serving a fifteen-year sentence in the department of corrections on unrelated burglary charges, but was implicated in a murder which occurred months prior to his incarceration. Id. at 676, 623 S.E.2d at 664. Compton entered into a plea agreement with police about the murder. Id. As part of the plea agreement, the State offered to reduce the sentence for the burglary charges to seven and a half years in exchange for his full and truthful cooperation in the murder investigation. Id. Compton admitted to being present at the time of the murder and driving the "getaway vehicle." Id. He also implicated two other men in the murder. Id.

Prior to trial, Compton moved to suppress his statement, alleging *inter alia* that the statement violated Rule 410, SCRE. Id. The trial court denied Compton's motion and found that

"the agreement was not entered into pursuant to plea negotiations." Id. The Court of Appeals affirmed the trial court's ruling denying the motion. Id. at 679, 623 S.E.2d at 665.

The Court agreed that Rule 410 provides "a statement made during plea negotiations with a prosecuting authority, even if a guilty plea is not entered or is later withdrawn, is not admissible." Id. The Court found that Rule 410 did not apply to Compton's case because the discussions between Compton and the police "were not in furtherance of Compton making a plea on any charges." Id. The Court further held that "[n]othing in the record indicates Compton ever offered to plead guilty or planned to plead guilty to the . . . murder in exchange for anything from the State." Id.

In State v. Wills, 409 S.C. 183, 762 S.E.2d 3 (2014), this Court also recognized the protections afforded by Rule 410, SCRE. In that case, Wills entered into a proffer agreement in which he agreed to take a polygraph examination. Id. at 185, 762 S.E.2d at 4. According to the agreement, if the "polygraph examination demonstrated deception, inconsistencies, or that [Wills] shot the victim, 'then the terms of [the] proffer are null and void **and** any statements made by [Wills] may be used against him by the State for any legal purpose, including . . . disposition of charges through plea or trial.'" Id. This Court recognized the protections provided by Rule 410. Id. However, this Court found that Wills, with the advice and consent of counsel, waived the protections of Rule 410. Id.

Here, Counsel Dupree was ineffective for advising Petitioner to give the State a proffer statement admitting his guilt to the armed robberies prior to reviewing all of the evidence in the case. Counsel was also ineffective for failing to withdraw Petitioner's proffer statement and invoke Rule 410, SCRE, which made the statement inadmissible against Petitioner.

Petitioner gave the proffer statement only because Counsel Dupree advised him that it would be "to his benefit." The State could have tried Petitioner for each armed robbery individually. Petitioner was also facing life without parole. See R. 148 – 149. However, when Petitioner gave the statement, "it was really early on in the process" and the State did not have forensic test results from SLED. R. 151, ll. 10 – 25.

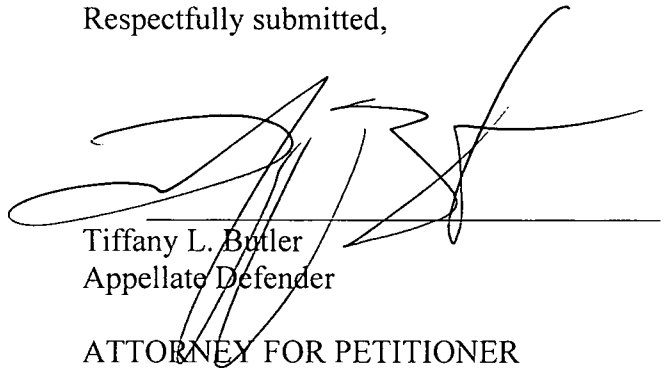
When Petitioner requested that his statement be withdrawn, Dupree refused to withdraw the statement and invoke Rule 410, SCRE, which made the proffer statement inadmissible against Petitioner. Although Petitioner hired new counsel and wanted to proceed to trial, Petitioner had already given the statement detailing his involvement. Counsel Stratos, like Dupree, failed to invoke Rule 410, SCRE, to withdraw. Petitioner pled guilty instead of proceeding to trial because the State would have used the statement against him at trial, ruining any defense that he would have asserted.

Because Counsel Dupree advised Petitioner to give the proffer statement admitting his involvement in the armed robberies prior to reviewing all of the State's evidence and refused to withdraw the statement, Stratos could not fully defend Petitioner. Had Dupree or Stratos invoked Rule 410, SCRE, and withdrawn the proffer statement Petitioner would not have pled guilty and would have insisted on going to trial.

CONCLUSION

For the reasons argued above, Petitioner Joshua Monroe respectfully request this Court to affirm the PCR court's ruling granting Petitioner a belated appeal pursuant to White v. State and to grant his petition for writ of certiorari and order full briefing on Issue II.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a 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 and Joshua Monroe, #344735, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 5th day of July, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day of July, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026