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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Oconee County

Edgar W. Dickson; R. Lawton McIntosh, Circuit Court Judges

TYSON T. WATT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000082

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. The PCR court properly ruled that petitioner did not voluntarily and intelligently waive his right to a direct appeal in the case.

II. Trial counsel erred in failing to appeal petitioner's case on the issue of a request for his time served credits while on house arrest.

STATEMENT

Petitioner Tyson T. Watt pled guilty to assault and battery of a high and aggravated nature and possession of a weapon during the commission of a violent crime during the October 2012 term of the Oconee General Sessions Court before Judge R. Lawton McIntosh. Petitioner was sentenced him to imprisonment for a period of twenty years, suspended upon the service of fifteen years and five years probation on the assault conviction, and five years on the weapon conviction. Scott D. Robinson represented petitioner at the plea proceeding, and Assistant Solicitor Lindsey Satterfield Simmons appeared on behalf of the state. App. 1 – 110. Petitioner did not enjoy the benefit of a direct appeal of his convictions and sentences.

Petitioner filed a PCR application on December 20, 2012, with the Oconee County Office of the Clerk of Court. App. 112 – 121.

The respondent filed a return dated January 6, 2014, requesting that a PCR hearing be held in the case. App. 122 – 128.

A PCR hearing was held on July 28, 2014, at the Oconee County Courthouse before Judge Edgar W. Dickson. App. 130 – 176. Petitioner was present at the hearing and represented by Hugh Welborn, and Assistant Attorney General John W. Whitmire appeared on behalf of the state.

On December 7, 2015, Judge Dickson issued an Order of Dismissal denying the allegations of ineffective assistance of counsel raised in the case. App. 178 – 188.

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

QUESTION I

The PCR court properly ruled that petitioner did not voluntarily and intelligently waive his right to a direct appeal in the case.

During the PCR hearing, petitioner testified that trial counsel never informed him about an appeal, and that he desired an appeal and would have appealed had he been advised about the right to an appeal his case. App. 139, lines 2 – 16. Trial counsel admitted outright that he did not advise petitioner of the right to appeal his case. App. 170, l. 2 – 5.

The PCR judge ruled that "it did not appear [petitioner] knowingly and intelligently waive his right to appeal; therefore, he is entitled to an appeal." App. 187-188.

A defendant is entitled to a direct appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). As a rule, trial counsel has a duty to make certain a client is fully aware of the right to appeal and ascertain whether his client desires an appeal, and then file an appeal if the client wishes to appeal. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991). In Re Anonymous member of the Bar, 303 S.C. 308, 400 S.E.2d 483 (1991). Here, trial counsel did not perform his duty with respect to petitioner's appellate rights and as a result, petitioner did not voluntarily waive his right to a direct appeal in the case.

QUESTION II

Trial counsel erred in failing to appeal petitioner's case on the issue of a request for his time served credits while on house arrest.

The feud between petitioner and Tevin Lewis ended when petitioner shot Lewis on May 2, 2011, in Oconee County. App. 58, l. 23 – p. 59, l. 16. During an in camera identification hearing held prior to the plea proceeding, eyewitness Daquan Bruce testified that he saw petitioner shoot Lewis and selected petitioner's picture from a photograph lay-out shown to him by police fingering petitioner as the shooter. App. 71, l. 11 – p. 76, l. 6.

Prior to sentencing, trial counsel entered a request for time served as follows:

> Mr. Robinson: He has – he served a certain amount of time in jail at the Oconee County Detention Center. He got out on a bond. He's been on electronic monitoring for – how long?
>
> The defendant: A year and a half.
>
> Mr. Robinson: For a year and a half now. He was in jail for – how long?
>
> The defendant: Four and a half.
>
> Mr. Robinson: Four and a half months. He'd like to see if he could get time – any credit for time.
>
> The Court: Do you have any idea how many days that would constitute, four and half months for Mr. Watts? Thirty-five days… App. 103, l. 5 – App. 104, l. 25.
>
> Mr. Robinson: But I ask the Court to take into consideration just – although the Court can't – the time in jail is the only time the Court can really do, but I would ask the Court to think about that in mitigation as far as him being on monitoring and working full time. App. 105, l. 3 – 8
>
> Mr. Robinson: But, Your Honor, I would ask the Court for mercy in this case, considering the time he did spend in jail, the time he's been on monitoring. App. 105, l. 14 – 16

> The Court: These will be concurrent. You will get whatever day's credit you're entitled to. App. 109, l. 23-24

A contemporaneous objection is required to preserve an issue for appellate review State v. Hoffman 312 S.C. 386, 440 S.E.2d 869 (1994). Trial counsel **properly** preserved the time served issue for appellate review. Petitioner pled guilty on October 16, 2012; however, on June 7, 2013, the legislature amended S.C. Code Ann § 24-13-40 to allow persons on house arrest to receive credit for time served. Clearly, it appears that the plea judge was only interested in giving appellant time served for jail time (four months only). On appeal, (had counsel appealed the issue), the argument would have been that the legislation was remedial and procedural in nature, which meant the statute change wa applicable retroactively to petitioner's case.

REMEDIAL

As a rule, enacted statutes are to be construed retroactively rather than prospectively if the statute is remedial or procedural in nature. Edwards v. State Law Enforcement Division, 395 S.C. 571 720 S.E.2d 462 (2011). Statutes are to be construed retroactively rather than prospectively if they are remedial or procedural in nature, and a statute is remedial where it creates a new remedy for an existing right or enlarges the right of person under disability. Edwards, supra. Originally, S.C. Code Ann § 24–13-40, as interpreted in Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004), held that time served credit must be awarded only to prisoners awaiting trial who served time in a penal institution without any credit for prisoners serving time while on home detention. However, §24–13-40, as amended, announced that credit for time served may be granted to prisoners serving time under monitored house arrest. This amended statute would qualify as remedial in nature because it created a new remedy, i.e., the right to time served credit for pre-trial detainees on house arrest awaiting trial, for an existing right, i.e., the existing right to time served credits already in

effect for pre-trial detainees awaiting trial under the original statute. The new remedy for an existing right under the amended statute at issue effectively expanded the definition of the location of pretrial detainees who await trial in connection with the existing right to receive time served credit.

Thus, this remedial provision under the amended statute in turn meant that it applied retroactively in petitioner's case. Compare Edwards, where the Court held that amendment to S.C. Code Ann. § 23– 3–430 did not require Edwards who was pardoned of his sex crime, to re-register on the sex offender registry via a retroactive application because there was no existing registration right in place in that regard prior to the amendment as the prior statute was silent on the issue of whether pardoned sex offenders must so register; and as a result, there was no remedy for an existing right that came into play. To the contrary, the right to time served credit in the case at bar was in existence prior to the amended statute at issue here, save a new location from which a pretrial detainee could apply and receive such credit.

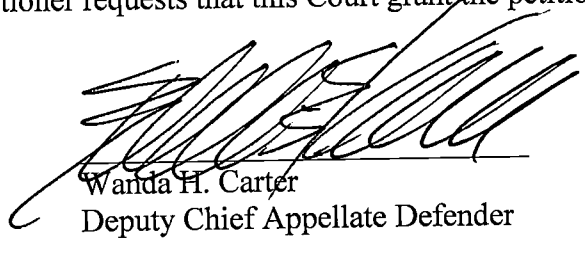
PROCEDURAL

Statutes are to be construed retroactively rather than prospectively if they are remedial or procedural in nature; and a statute is procedural where it sets out a mode of procedure for a court to follow or prescribes a method of enforcing a particular right. Edwards, supra. This amended time served credit statute that enlarged the rights of prisoners to receive time served credits accrued while on house arrest would qualify as procedural in nature because of the expansion of such a right; and because of the trial judge's discretion in the matter since such credit "may" be given, which obviously means there must be some mode of procedure for a judge to follow (mini hearing at the very least) in in these cases.

This procedural aspect of the amended statute meant that it applied retroactively to petitioner's case. Compare, Wiesart v. Stewart, 379 S.C. 300, 665 S.E.2d 187 (Ct. App. 2008), where the Court held that since the prior automatic sex registration requirement for indecent exposure offenders had been amended under S.C. Code § 23-3-430, then the trial judge would be charged with the new task of making specific findings on the records based on the circumstances as to whether indecent exposure offenders would have to register as sex offenders; and that this in turn was deemed a mode of procedure that characterized the amended statute to be applied retroactively. Likewise, in the case at bar, the presence of the word "may" in the amended time served credit statute signaled a discretionary finding by the trial judge that would certainly be accomplished by some mode of procedure to enforce such credit. Therefore, this procedural aspect of the amended time served credit statute in this case applied retroactively in petitioner's sentence. Counsel erred in violation of the Sixth Amendment in failing to appeal the case in order for the time served question to receive appellate review on petitioner's behalf. See Hill v. Lockhart, 484 U.S. 668 (1985).

CONCLUSION

Based on the foregoing arguments, petitioner requests that this Court grant the petition on the above raised issues.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of October, 2016.

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Honorable Edgar W. Dickson, Circuit Court Judge

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johanna C. Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Tyson T. Watt, #352812, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 14th day of October, 2016.

Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me this 14th day of October, 2016.

ATTORNEY FOR PETITIONER

(L.S)

Notary Public for South Carolina
My Commission Expires: 10/30/2022