

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

RECEIVED

Honorable John C. Hayes, Circuit Court Judge

SEP 15 2017

DAVID SMITH,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001823

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in finding that Petitioner was not entitled to a belated direct appeal, pursuant to White v. State, from his plea of guilty to assault and battery of a high and aggravated nature when Petitioner received the maximum sentence and filed a motion to reconsider sentence which was denied?

ISSUE TO BE PRESENTED IN BELATED APPEAL

Did the plea judge abuse his discretion in sentencing Petitioner to the maximum twenty (20) year sentence following a guilty plea?

STATEMENT

In May of 2012, the Charleston County Grand Jury indicted Petitioner for attempted murder, indictment #2012-GS-10-2533. On July 10, 2014, Petitioner appeared before the Honorable Roger M. Young and pled guilty to the lesser included offense of assault and battery of a high and aggravated nature. Luke Malloy represented Petitioner at the guilty plea. Jessica Baldwin prosecuted the case. Judge Young sentenced Petitioner to twenty (20) years in prison. Petitioner filed a timely motion to reconsider sentence on July 18, 2014. On November 17, 2014, Judge Young held a hearing on the motion to reconsider sentence and denied the motion. Petitioner did not appeal the sentence or conviction.

On March 31, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on August 12, 2015. On August 1, 2016, an evidentiary PCR hearing was held before the Honorable John C. Hayes, III. Christopher L. Murphy represented Petitioner at the PCR hearing. J. Rutledge Johnson represented the State. In a written order signed August 3, 2016, Judge Hayes denied relief and dismissed the application. A timely notice of intent to appeal was served on September 1, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that Petitioner was not entitled to a belated direct appeal, pursuant to White v. State, from his plea of guilty to assault and battery of a high and aggravated nature when Petitioner received the maximum sentence and filed a motion to reconsider sentence which was denied.

At the close of the evidentiary hearing PCR counsel asked for a belated direct appeal. (App. p. 73, lines 19-23). Earlier in the hearing when PCR counsel asked Petitioner if he talked with plea counsel about an appeal the State objected and stated, “Anything about an appeal is not in the application; should be stricken from any testimony on that.” (App. p. 56, lines 10-12). The judge ruled, “Again, I will allow it. Keeping in mind that I’m the finder of fact and I will give it the weight it deserves.” Petitioner testified that following the unsuccessful motion to reconsider sentence, plea counsel advised him that he did not have grounds for an appeal. (App. p. 57, lines 11-20). Plea counsel testified that Petitioner did not ask him to file an appeal but admitted that he did not speak to Petitioner about filing the notice of intent to appeal following the unsuccessful motion to reconsider sentence. (App. p. 72, lines 2 – 25). Petitioner testified that he wanted to appeal the sentence. (App. p. 57, lines 6-8).

In the order of dismissal the PCR judge wrote, “Taking the second stated ground first, trial counsel is not ineffective for not filing an appeal for a plea of guilt unless the client requests or where a reasonable attorney would conclude that one entering a plea desires an appeal. See Roe v. Flores-Ortega, 528 U.S. 470 (2000). Applicant has not carried his burden of proof as to either of these exceptions.” (App. p. 78). The PCR judge additionally wrote, “Perhaps more significantly, and on its own dispositive of this second ground is that it is not alleged as a ground in Applicant’s application for Post-Conviction Relief. Therefore, his second ground is not before the Court for consideration.” (App. p. 78). The record reflects, however, that the PCR judge

allowed the testimony about plea counsel's failure to file the notice of intent to appeal over the objection by the State.

Plea counsel should have discussed an appeal with Petitioner following the unsuccessful motion to reconsider sentence. Petitioner received the maximum sentence following a guilty plea to assault and battery of a high and aggravated nature. Plea counsel testified at the PCR hearing, "I thought he could get – I was expecting to get somewhere less than the max just for pleading guilty."


"[A]bsent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of a right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). Counsel has a duty to advise a defendant about an appeal when there is reason to think either: (1) a rational defendant would want to appeal; or (2) this particular defendant reasonably demonstrated that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). In determining whether a rational defendant would have desired an appeal, "the court must consider such factors as whether the defendant received the sentence bargained for as a part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Flores-Ortega, supra.

Counsel had a duty to advise Petitioner about an appeal following the unsuccessful motion to reconsider sentence. A rational defendant would have desired an appeal. Plea counsel admitted that he did not expect Petitioner to receive the maximum sentence following a guilty plea. Petitioner testified that he did not know that he could file an appeal until he arrived at the department of corrections where he attempted to file an appeal. (App. p. 56, line 20 – p. 57, lines 1-5). The plea judge did not advise Petitioner about his right to file a notice of intent to appeal. The PCR judge erred in finding that Petitioner was not entitled to a belated direct appeal

pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Under the facts of this case, counsel was deficient in failing to advise Petitioner of his right to appeal. Petitioner did not knowingly and intelligently waive his right to direct appeal. Petitioner was prejudiced by counsel's deficient performance and should be entitled to relief pursuant to White.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable John C. Hayes, Circuit Court Judge

DAVID SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

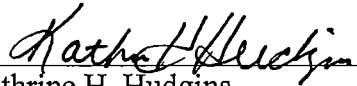
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David I. Smith states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. She has reviewed the record of petitioner's trial before Judge John C. Hayes, which was held on August 1, 2016 and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve her as counsel for David I. Smith.

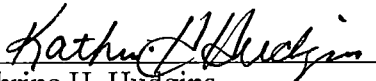
Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of September, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


Kathrine H. Hudgins
Appellate Defender

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This 15th day of September, 2017.

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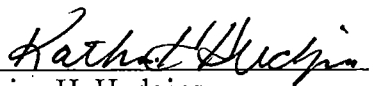
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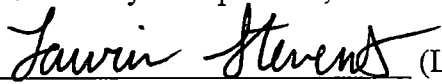
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Judah VanSyckel, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on David I. Smith, #360603, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 15th day of September, 2017.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of September, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.