STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable George C. James, Circuit Court Judge

BERNARD MCFADDEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002319

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
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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ISSUES PRESENTED

I. Did the PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed trial counsel failed to file and serve a timely notice of appeal following Petitioner's trial?

II. Whether the PCR Court erred in denying Petitioner relief where trial counsel failed to object and argue on the record that Petitioner's prior conviction was more prejudicial than probative and therefore should have been excluded so that Petitioner could take the stand in his own defense?

STATEMENT

Petitioner was indicted for burglary in the second degree by a Sumter County Grand Jury during the February 18, 2010 term of court. App. 716. He proceeded to trial before the Honorable W. Jeffrey Young and a jury on November 16, 2010. App. 1. R. Kirk Griffin represented the State, and Willie Brunson represented Petitioner.

Following a four-day trial, the jury found Petitioner guilty as indicted. App. 458 l. 23 – App. 459 l. 6. Judge Young sentenced Petitioner to a period of fifteen years' imprisonment. App. 468 ll. 1 – 9. An allegedly untimely notice of appeal was filed on Petitioner's behalf on December 15, 2010. An Order of Dismissal was entered on December 31, 2010 for failure of Appellant to serve a timely Notice of Appeal on opposing counsel.

Petitioner filed an application for post-conviction relief on or about October 20, 2011. App. 470. The State filed its Return on or about May 11, 2012. App. 509. An evidentiary hearing was conducted on April 16, 2013 before the Honorable George C. James, Jr. App. 515. Daniel F. Gourley represented the State, and Petitioner represented himself. Petitioner and trial counsel testified during the hearing.

On October 11, 2016, Judge James issued an order granting Petitioner's request for a belated direct appeal under White v. State[1] but denied the remainder of his allegations of ineffective assistance of counsel in the case. App. 658. He ruled that Petitioner's allegations of ineffective assistance of counsel were meritless and should be dismissed. App. 661.

Petitioner filed a Motion for Reconsideration on November 2, 2016. App. 672. An Order denying the Motion was issued on November 4, 2016. App. 675.

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[1] 263 S.C. 110, 108 S.E.2d 35 (1974).

Petitioner now files this petition simultaneously with a brief addressing the direct appeal issues, as required by Rule 243, SCACR.

ARGUMENT

I. The PCR court correctly granted Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed trial counsel failed to file and serve a timely notice of appeal following Petitioner's trial.

Petitioner never waived his right to appeal, as conceded by trial counsel during the PCR hearing. App. 535 ll. 12 – 14. The PCR court found Petitioner's testimony "that he told Trial Counsel he wanted to file an appeal" to be credible, "especially in light of the fact that Trial Counsel did file a notice of appeal, *albeit* too late." App. 670 (emphasis in original). Citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000), the PCR court noted the constitutional requirement that counsel consult with a 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 reasonable demonstrated to counsel that he was interested in appealing." Therefore, under White v. State, 263 S.C. 110, 109 S.E.2d 35 (1974), the PCR court correctly granted Petitioner leave to file a belated appeal.

"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). When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "In the absence of an intelligent waiver by the defendant, counsel must

either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Smith v. State, 309 S.C. 413, 424 S.E.2d 480 (1992).

The PCR judge's ruling is supported by Petitioner's claim that he asked his attorney to file an appeal. Trial counsel did not file a timely appeal. As Judge James found there was no evidence of an intelligent and voluntary waiver of his right to an appeal. Therefore, this evidence supports the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to White, supra. At the PCR hearing, trial counsel claimed Judge Young advised Petitioner of his right to appeal:

> The judge did [advise him]. In fact when - - when the judge delivered the sentence in open court, he of course advised him of his right to appeal. Mr. McFadden never told me that he wanted to appeal, and he was taken out of the courtroom. After that, there was some discussion regarding Mr. McFadden writing or contacting the court reporter directly.

App. 623 ll. 14 – 20.

This conversation took place off the record. App. 623 l. 23.

There is no doubt that "[f]ollowing a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). Further, "[i]n the absence of an intelligent waiver by the defendant counsel *must* either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Id. (emphasis added). "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). The United States Supreme Court has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). There is no doubt "that counsel had 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 reasonable demonstrated to counsel that he was interested in appeal." Id. at 480.

The PCR judge's ruling is supported by Petitioner's allegations that trial counsel failed to file a timely notice of appeal. Further, the judge's ruling is supported by trial counsel's admission that only the judge advised Petitioner of his right to appeal. Trial counsel failed in his duty to ensure Petitioner was aware of his right to appeal following the trial.

In fact, trial counsel never indicated that he spoke with Petitioner after sentencing. See Clark v. State, 396 S.C. 164, 719 S.E.2d 708, (Ct. App. 2011) (noting that where defense counsel testified that he never spoke to the defendant at the end of the trial, the testimony demonstrated "that trial counsel could not have ascertained whether [the defendant] wanted to appeal his conviction"). The record is clear that trial counsel failed in his duty to file a timely notice of appeal in the absence of Petitioner's intelligent waiver. As Judge James found, there was no evidence of an intelligent and voluntary waiver of his right to an appeal. Therefore, this evidence supports the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to White, supra. Petitioner respectfully requests this Court affirm the PCR judge's decision and grant belated review of his direct appeal issue.

II. The PCR Court erred in denying Petitioner relief where trial counsel failed to object and argue on the record that Petitioner's prior conviction was more prejudicial than probative and therefore should have been excluded so that Petitioner could take the stand in his own defense.

Following the close of the state's case-in-chief, counsel indicated that Petitioner wanted to testify at his trial. App. 369 ll. 14 – 17. However, that decision changed once the trial court ruled that the prior conviction would be admissible.

Petitioner was incarcerated for a prior burglary conviction and released in December 2000. App. 372 ll. 14 – 22. Therefore, it was the trial court's position that the prior conviction would be admissible. App. 373 ll. 14 – 24. The trial court's ruling was as follows:

> It is my ruling that the prior burglaries, and is probably a 5-part test. The impeachment value of these prior crimes is high. And the state quite frankly is within the 10 years. And granted it is similar to this charge. And I will charge the jury that he is only on trial for this charge. Is my understanding. And again, I think that will go do the credibility issue as well.

App. 379 ll. 4 – 11.

Based on the fact that his prior conviction was admissible, Petitioner elected not to testify. App. 404 l. 23 – App. 405 l. 3. However, as trial counsel noted during the PCR hearing, "the solicitor never made the argument that the probative value [of Petitioner's prior conviction] exceeded the prejudicial effect" and "the judge never did the balancing test on the record." App. 626 ll. 18 – 22. In fact, counsel admitted he should have objected on the record. App. 627 l. 6. Further, he conceded that he "probably should have had the argument that [was] had in chambers again on the record to preserve the issue." App. 627 ll. 7 – 10.

Petitioner's 2010 trial on the burglary charge was his second jury trial for that charge—the first ended with a hung jury. App. 628 ll. 6 – 22. Counsel posited that he did not move to exclude the prior conviction because he "agreed with [Petitioner's] opinion to not testify." App. 648 l. 12 – App. 649 l. 4. However, Petitioner decided not to testify based on the trial judge's ruling that the prior conviction would come in. App. 649 l. 19 – 25. Counsel admitted that he should have done things differently:

> I admit that I should have put the argument on the record. And that the judge ruled, and I should have objected again. Yes, I admit that. I should have objected again.

App. 652 ll. 7 – 11.

Petitioner correctly asserted that Counsel was ineffective, because he did not argue on the record that Petitioner's prior conviction should be inadmissible due to its highly prejudicial nature. Had counsel argued on Petitioner's behalf instead of leaving Petitioner to make legal arguments on his own behalf, the prior conviction could have been excluded. Had counsel explored the credit for time served issue, the prior conviction could have been excluded.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. "'[T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, counsel failed to object on the record to the mention of Petitioner's prior conviction should Petition elect to testify. In fact, this was the sole reason Petitioner elected not to testify. Had counsel contested the issue and perhaps been successful, Petitioner would have testified in his own defense. As evidenced by the hung jury in Petitioner's first trial, this may have had an effect on the outcome of his case.

"The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The prejudice in his case manifested itself in Petitioner's 2010 conviction, which could have been avoided if counsel had sought to prevent the mention of Petitioner's prior conviction. Petitioner did not testify in his own defense. Had he done so, there is a reasonable probability that he could have swayed at least one juror, preventing a conviction.

Petitioner never received credit for the four months' time served on the prior conviction. App. 372 ll. 23 – 25. Had he received that credit, he likely would have been released in September 2000, which would have meant that any evidence of the prior conviction would be inadmissible. However, counsel did not press this issue. Similarly, trial counsel also admitted that he should have objected to the admission of DNA evidence, but elected not to because Petitioner was not going to testify. App. 648 ll. 2 – 11. Trial counsel did not diligently pursue these matters because he had resigned himself to the fact that Petitioner was not going to testify, even though counsel was aware Petitioner wanted to testify.

Petitioner would have testified had his prior convictions not been allowed in. However, this matter was not contested by anyone other than Petitioner, leaving Petitioner with ineffective assistance of counsel.

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's decision that he is entitled to a belated direct appeal. Petitioner likewise requests that this Court grant his petition for writ of certiorari and allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2017.

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BERNARD MCFADDEN,

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V.

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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 Julie Coleman, 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 Bernard McFadden, at P.O. Box 1622, Columbia, SC 29202, this 18th day of September, 2017.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 18th day of September, 2017.

ATTORNEY FOR PETITIONER

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025