

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 ORIGINAL

Certiorari to Chesterfield County

G. Thomas Cooper, Circuit Court Judge

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NOV 29 2017

PETITIONER
SUPREME COURT

WILLIAM OUTLAW,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000811

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
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Division of Appellate Defense
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The PCR court correctly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) where the undisputed evidence showed trial counsel failed to file a notice of appeal following Petitioner’s trial, Petitioner desired an appeal, and the state consented to the granting of a belated direct appeal.4

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ISSUE PRESENTED

Did the PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) where the undisputed evidence showed defense counsel failed to file a notice of appeal following Petitioner's trial and disposition of the post-trial motions, Petitioner desired an appeal, and the state consented to the granting of a belated direct appeal?

STATEMENT

A Chesterfield County grand jury indicted Petitioner for murder on February 28, 2002. App. 561-562. The state, represented by Kernard Redmond and Franklin Joyner, called the case to trial before the Honorable Paul M. Burch and a jury on April 4-6, 2005. App. 1. Paul Cannarella represented Petitioner. App. 1. The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter. App. 324, ll. 11-16. Judge Burch sentenced Petitioner to twenty-five years' imprisonment. App. 338, ll. 11-14; App. 563.

Thereafter, on April 7, 2005, trial counsel filed a motion to reconsider sentence. App. 341. Then, on April 13, 2005, and April 25, 2005, trial counsel filed motions for new trial. App. 342-343. On May 13, 2005, Judge Burch signed an order requiring the solicitor to submit "all of the ballistics to SLED's Ballistics Laboratory for testing, comparison, and analysis." App. 344-345.

Although the post-trial motions remained pending, Petitioner filed an application for post-conviction relief (PCR) on January 10, 2007 (2007-CP-13-0029). App. 346-353. The state filed a motion to dismiss. App. 354-357. By an order filed June 8, 2007, the Honorable John M. Milling dismissed the application without prejudice. App. 358-360.

Petitioner then retained James T. Irvin to represent him. App. 415; App. 482, l. 4 – App. 483, l. 3. Irvin argued the post-trial motions. App. 483, ll. 1-18. Judge Burch denied the motions in orders dated September 1, 2010. App. 420-421. No one filed and served a notice of appeal on Petitioner's behalf.

Petitioner filed an application for post-conviction relief (PCR) on February 16, 2012 (2012-CP-13-0113). App. 363-388. On April 2, 2012, the state filed a return and motion to dismiss. App. 389-396. The judge, who was also the trial judge, issued a conditional order of

dismissal on May 21, 2012. App. 404-407. On September 4, 2012 and September 18, 2012, the order became final. App. 427-429; App. 430-431. Petitioner appealed. App. 434-439. Robert M. Pachak represented Petitioner on appeal. App. 440-448. In lieu of a formal return, the state wrote a letter consenting to remanding the case to the PCR court. App. 449. On June 18, 2014, the Court of Appeals reversed the PCR court's summary dismissal. App. 450-451. The Court concluded there was a question of whether Petitioner knowingly waived his right to direct review, and therefore, the Court remanded the case to the PCR court for an evidentiary hearing. App. 450-451. Remittitur issued on July 8, 2014. App. 452.

Returning to the PCR trial proceedings, the state filed an amended return on December 30, 2016. App. 453-459. On January 10, 2017, Judge Cooper presided over an evidentiary hearing. App. 460. Lance Boozer represented Petitioner. App. 460. Valerie Giovanoli represented the state. App. 460. During the hearing, Judge Cooper denied the state's motion to dismiss all claims except the request for belated direct review, finding the "case was remanded from the South Carolina Court of Appeals to consider the merits of [Petitioner]'s entire application and all claims therein." App. 542. Further, Judge Cooper found Petitioner "did not knowingly waive his right to a direct appeal." App. 542; App. 550-551. Thus, Judge Cooper granted Petitioner a belated direct appeal. App. 550-551. However, Judge Cooper denied Petitioner relief on his other claims. App. 552-559.

Petitioner served his notice of appeal on April 4, 2017. This petition for writ of certiorari follows.

ARGUMENT

The PCR court correctly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) where the undisputed evidence showed trial counsel failed to file a notice of appeal following Petitioner's trial, Petitioner desired an appeal, and the state consented to the granting of a belated direct appeal.

Relevant facts

Petitioner retained trial counsel to represent him at his trial concerning allegations of murder. App. 479, ll. 3-11; app. 504, ll. 7-14. At the conclusion of the trial, defense counsel filed post-trial motions. App. 341-343. Those motions remained pending for quite some time. On September 14, 2005, Petitioner relieved trial counsel as his legal representative. App. 415. Subsequently, Petitioner retained James Irvin to represent him in the prosecution of his post-trial motions. App. 482, ll. 4-11; App. 483, ll. 1-3. Judge Burch presided over a hearing on the motions in 2010. App. 483, ll. 4-18; App. 484, ll. 5-12. During the hearing on the motions, Irvin explained that if the judge did not rule in his favor, then he could appeal the decision. App. 489, ll. 9-18. Petitioner very much wanted an appeal to be filed. App. 489, ll. 19-21.

When Petitioner contacted Irvin regarding the status of the motions, Irvin told him to "wait a little while longer." App. 485, ll. 14-25. Thereafter on September 12, 2011, Petitioner contacted the clerk of court to inquiry about the motions. App. 361; App. 485, l. 25 – App. 486, l. 2. The clerk provided him with an order denying his post-trial motions. App. 486, ll. 2-22. Petitioner provided Irvin with a copy of the order. App. 487, ll. 9-21; App. 362. On October 17, 2011, Irvin attested that he never received a copy or notice that the order was filed on September 2, 2010. App. 362. Irvin did not file and serve a notice of appeal on Petitioner's behalf.

At the conclusion of the PCR hearing, Petitioner argued he was entitled to a belated direct appeal. App. 531, l. 24 – App. 532, l. 2; App. 532, l. 14. The state did “not context a belated appeal” for Petitioner. App. 532, l. 25 – App. 533, l. 2. In his order, Judge Cooper found Petitioner “did not knowingly waive his right to a direct appeal.” App. 542; App. 550. Judge Cooper relied upon the fact that Petitioner “was not sleeping on his rights” as was “illustrated by his first, premature pro se PCR application filed on January 10, 2007, at the time his post-trial motions continually pended for five years after trial.” App. 551 n. 10. Judge Cooper found Petitioner’s testimony credible that he had discussed the filing of a notice of appeal with Irvin and that he expected Irvin to pursue an appeal in the event that he lost the motion. App. 551. The PCR judge concluded Petitioner did not knowingly and intelligently waive his right to an appeal, and, therefore, he was entitled to a belated appeal. App. 551.

Discussion

“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).

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 testimony, which the PCR judge found to be credible, that he desired an appeal and had discussed the filing of an appeal with Irvin in the event his post-trial motions were not successful. The ruling is further supported by the state’s consent to the granting of a belated direct appeal. Irvin’s affidavit indicated he was not aware of the trial judge’s ruling on the post-trial motion until over a year after the issuance of the order. Thereafter, Irvin did not attempt to file a notice of appeal on Petitioner’s behalf. The PCR judge’s ruling is also supported by the fact that Petitioner repeatedly attempted to challenge his conviction and sentence as evidenced by his filing of a PCR application in 2007, and his pursuit of further relief in 2012, including seeking certiorari in this Court when a judge dismissed his PCR application. The record amply supports the PCR judge’s decision, and Petitioner is entitled to a belated direct appeal pursuant to White, supra.

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR judge's decision and grant belated review of his direct appeal issue.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of November, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Chesterfield County

G. Thomas Cooper, Circuit Court Judge

WILLIAM OUTLAW,

PETITIONER

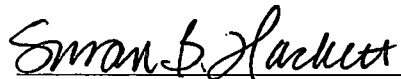
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

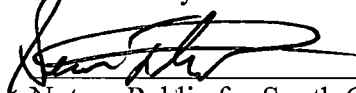
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above referenced case has been served upon Valerie Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and copies of the Petition for Writ of Certiorari, Appendix, and Supplemental Appendix have been served on William Outlaw, #308544, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 29th day of November, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of November, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.