STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable George C. James, Circuit Court Judge

ROBERT MATTHEW FULMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001437

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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ISSUES PRESENTED

1. Did the PCR judge correctly find that Petitioner did not knowingly and intelligently waive the right to direct appeal and was entitled to a belated direct appeal pursuant White v. State?

2. Did the PCR judge err in refusing to find counsel ineffective for telling the jury in opening statement that they would hear testimony from alibi witnesses and then failing to call the alibi witnesses at trial?

STATEMENT

In March of 2013, the Pickens County Grand Jury indicted Petitioner, Robert Fulmer, for attempted murder, burglary first degree, possession of a weapon during the commission of a violent crime and petit larceny, indictments #2013-GS-39-0716-0719. On August 25, 2014, Petitioner proceeded to jury trial before the Honorable Robin B. Stilwell. Scott D. Robinson represented Petitioner at trial. W. Douglas Richardson, Jr. prosecuted the case. The jury returned verdicts of guilty as charged. Judge Stilwell sentenced Petitioner to thirty (30) years for attempted murder, thirty (30) years concurrent for burglary first degree, five (5) years concurrent for the weapon violation and thirty days for petit larceny. The notice of intent to appeal was not filed.

On December 29, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on May 29, 2015. On June 13, 2016, an evidentiary hearing was held before the Honorable George C. James, Jr. R. Mills Ariail, Jr. represented Petitioner at the PCR hearing. Patrick Schmeckpeper represented the State. In a written order signed May 19, 2017, Judge James denied relief but granted a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). A timely notice of intent to appeal was served on June 23, 2017. This petition for writ of certiorari and a separately filed brief follow.

ARGUMENTS

1. **The PCR judge correctly found that Petitioner did not knowingly and intelligently waive the right to direct appeal and was entitled to a belated direct appeal pursuant White v. State.**

During the PCR hearing Melissa Morris testified that she spoke with trial counsel the day after Petitioner's conviction and he told her that he would file an appeal, that it had to be done within ten days and that his paralegal would be preparing the notice of intent to appeal. (App. p. 377, lines 8-16). The notice of intent to appeal, however, was not filed. Trial counsel did not recall advising Petitioner about the right to appeal and did not recall advising Melissa Morris that he would file the notice of intent to appeal. (App. p. 390, lines 14-23).

In the order finding that Petitioner was entitled to a belated appeal the PCR judge wrote, "The Court concludes the applicant has established he would have filed an appeal and that trial counsel committed to filing an appeal but failed to do so; therefore, Applicant is granted leave to file a belated appeal." (App. p. 429). The PCR judge found that Petitioner did not knowingly and voluntarily waive his right to direct appeal. (App. p. 430).

When a criminal defendant requests an appeal, but counsel fails to file an appeal, counsel is deemed deficient. In such a case, the defendant is entitled to a belated appeal without showing the appeal would likely have had merit. Roe v. Flores–Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Rodriquez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969). The PCR judge correctly found that Petitioner is entitled to a belated appeal.

2. **The PCR judge erred in refusing to find counsel ineffective for telling the jury in opening statement that they would hear testimony from alibi witnesses and then failing to call the alibi witnesses at trial.**

In opening statement trial counsel told the jury, "And in this case, he [Petitioner] wasn't anywhere near this incident site or anywhere near where this allegedly took place. In fact, at the time this all happened, you're going to hear he was someplace else. He was doing his tattoos. You're going to hear from witnesses that are going to put him completely different than this where they're saying he was at the time." (App. p. 54, lines 9-15). Trial counsel, however, rested without calling any witnesses or presenting any evidence. (App. p. 250, line 1 – p. 251, lines 1-18).

In the PCR application Petitioner alleges that trial counsel was ineffective in failing to ". . . call witnesses who would have testified favorably on behalf of Applicant." (App. p. 311). During the PCR hearing Petitioner testified that he told trial counsel of two alibi witnesses, Chad Hayes and Sarah Hamilton. (App. p. 330, line 13 – p. 331, lines 1-20). Prior to trial, counsel moved for a continuance based on the fact that he had been unable to secure the presence of alibi witnesses, Chad Hayes and Sarah Hamilton. (App. p. 5, line 15 – p. 6, lines 1-21). Trial counsel characterized the alibi witnesses as "crucial" to the case. (App. p. 5, line 24; p. 6, line 6). The trial judge denied the continuance motion but asked the Solicitor's Office and law enforcement to find the alibi witnesses and make them available for testimony. (App. 10, lines 15-18).

During the PCR hearing trial counsel testified that alibi witnesses Chad Hayes and Sarah Hamilton provided written statements. (App. p. 383, lines 9-23). Neither of the alibi witnesses testified at the PCR hearing and their statements were marked but not introduced in evidence.

(App. p. 359, lines 15-16). The PCR judge, however, allowed a proffer and Petitioner testified that both alibi witnesses stated that Petitioner was at a house all night doing tattoos. (App. p. 358, line 10 – p. 359, lines 1-4). During the PCR hearing Petitioner denied being involved in the burglary or shooting and testified that he was at a house all night tattooing. (App. p. 346, line 2 – p. 347, 348, lines 1-29). Specifically, Petitioner testified that he tattooed Chad Hayes and Sarah Hamilton. (App. p. 347, lines 19-21). There was no forensic evidence linking Petitioner to the crimes and Petitioner was only implicated after three of four co-defendants were arrested the following day. The State's case against Petitioner was based solely on the testimony of co-defendants. (App. p. 389, lines 2-11).

Trial counsel testified that the alibi witnesses appeared in court unwillingly. (App. p. 402, line 19 – p. 403, lines 1-4). It is unclear from the record whether counsel interviewed the witnesses prior to trial. The prosecutor was able to talk with the witnesses on two different occasions, prior to trial. (App. p. 7, lines 7-22). Trial counsel testified that he did not call the alibi witnesses because they were "wishy-washy" and he wanted final closing argument. (App. p. 386, line 13 – p. 387, lines 1-13). In the order of dismissal the PCR judge wrote, "This Court finds trial counsel's testimony on his reasons for not calling these witnesses to be credible and conclude trial counsel's decision to not call these witnesses was appropriate under the circumstances; therefore, trial counsel was not deficient." (App. p. 426). The PCR judge erred.

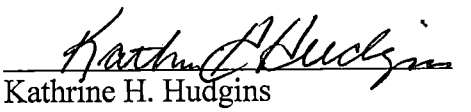
The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C.

115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Trial counsel was deficient in failing to call Chad Hayes and Sarah Hamilton as alibi witnesses to establish that Petitioner was at a house tattooing at the time of the burglary and shooting. Trial counsel's purported strategy for not calling the witnesses because they were "wishy-washy" is undermined by the fact that the witnesses provided written statements with which trial counsel could have used to impeach on any points of uncertainty by the witnesses. An alibi defense outweighs any perceived advantage from having final closing argument. Importantly, trial counsel told the jury they would hear from alibi witnesses. Trial counsel created a glaring negative inference by telling the jury that they would hear from alibi witnesses and then failing to call those alibi witnesses. Trial counsel was ineffective for telling the jury in opening statement that they would hear testimony from alibi witnesses and then failing to call the alibi witnesses at trial. There is a reasonable probability that if trial counsel had called the alibi witnesses and questioned them about their written statements establishing an alibi defense, the result of the proceeding would have been different.

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 26th day of February, 2018.

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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 DeShawn H. Mitchell, 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 Robert Matthew Fulmer, #317783, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of February, 2018.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 26th day of February, 2018.

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