STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Florence County
Edgar W. Dickson, Circuit Court Judge

THOMAS E. DAVIS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

APPELLATE CASE NO. 2017-000105

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 to White v. State?

2. Did the PCR judge err in refusing to find that trial counsel was ineffective where trial counsel failed to adequately prepare the case for trial with Petitioner; failed to make an opening statement; failed to move to sequester the witnesses; failed to impeach a critical witness for the State with his prior record; failed to cross-examine the only testifying co-defendant about his hopes for a better deal from the State; failed to engage in any meaningful and thought-provoking cross-examination of the State's witnesses; failed to object to any of the State's evidence; failed to object to the Court's charge that implied malice is sufficient to sustain a conviction attempted murder; failed to object to the "hand of one, hand of all" being applicable in this case; and failed to object to the Assistant Solicitor's inappropriate and prejudicial comments during closing argument?

STATEMENT OF CASE

On September 8, 2011, the Florence County Grand Jury indicted Petitioner Davis, Tyon Michael Evans, and Rasheem Kevin Thomas for attempted murder and armed robbery and additionally indicted Petitioner Davis for possession of a weapon during the commission of a violent crime (2011-GS-21-1371). On June 18, 2012, Petitioner Davis selected a jury and proceeded to trial. Richard Strobel represented Petitioner. John Jepertinger represented the State. The Honorable Thomas A. Russo presided. On June 20, 2012, the jury convicted Petitioner as indicted of armed robbery and possession of a weapon during the commission of a violent crime and of the lesser-included offense of assault and battery of a high and aggravated nature. Judge Russo sentenced Petitioner to twenty (20) years for assault and battery of a high and aggravated nature, thirty (30) years concurrent for Armed Robbery, and five (5) years consecutive for the weapons charge. Counsel did not file a notice of appeal.

On March 27, 2013, Petitioner filed an application for post conviction relief. The State filed a return on December 17, 2013. On October 9, 2014, an evidentiary hearing was held before the Honorable Edgar W. Dickson. Jonathan D. Waller represented Petitioner at the PCR hearing. Croom Hunter represented the State. In an amended written order filed December 29, 2016, Judge Dickson denied relief but found Petitioner was entitled to a belated appeal pursuant to White v. State, 263, S.C. 110, 108 S.E.2d 35 (1974).

On January 19, 2017, Petitioner filed and served his notice of appeal. This petition for writ of certiorari follows. In compliance with this Court's directive in Davis

v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), Appellant is filing this petition for writ of certiorari addressing the issue of waiver of his direct appeal as well as the denial of his PCR claim of ineffective assistance of trial counsel, and Appellant is filing a brief addressing his direct appeal issue simultaneously.

ARGUMENT

The standard for review in PCR cases depends on the specific issue before the reviewing court: it will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law de novo, with no deference to the trial courts. Smalls v. State, --- S.E.2d ---, 2018 WL 736339 (2018).

1. THE PCR COURT CORRECTLY FOUND THAT PETITIONER DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THE RIGHT TO APPEAL AND WAS ENTITLED TO A BELATED DIRECT APPEAL PURSUANT TO WHITE V. STATE, 263 S.C. 110, 208 S.E. 2d 35 (1974).

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. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010); see also In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991); White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). "Following 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). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the

appeal." Clark v. State, 396 S.C. 164, 168; 719 S.E.2d 708, 710 (2011)(internal quotation omitted). "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); see also White, 263 S.C. at 118, 208 S.E.2d at 39. Even after a trial in absentia, a defendant is entitled to a direct appeal; the voluntary absence from trial does not act as a waiver of the right to a direct appeal. Braddock v. State, 344 S.C. 578, 580, 545 S.E.2d 498, 499 (2001).

"[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Oretega, 528 U.S. 470, 477 (2000). "This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is purely a ministerial task, and the failure to file reflects inattention to the defendant's wishes." Id. This Court held a defendant was entitled to a belated direct appeal where the defendant informed trial counsel he wanted to appeal but decided against appeal after receiving erroneous advice from counsel. Sheppard v. State, 357 S.C. 646, 651-652, 594 S.E.2d 462, 465-466 (2004). Sheppard had been convicted of murder, and the jury had found an aggravating circumstance but recommended a sentence of life imprisonment. Id. at 651-652, 594 S.E.2d at 465. When Sheppard told his counsel that he wanted appeal, counsel advised against an appeal because the state could seek the death penalty again if he were granted a new trial. Id. at 652, 594 S.E.2d at 465. Based on this advice, Sheppard decided not to appeal. Id. at 652, 594 S.E.2d at 466. Counsel's advice was erroneous in light of controlling Supreme Court precedent that the state

cannot seek a harsher sentence upon retrial when a jury or appellate court finds the prosecution failed to prove its case for death. Id. at 653, 594 S.E.2d at 466 (citing Sheppard's decision not to appeal was not a voluntary waiver as it was induced by erroneous advice; thus, he was entitled to a belated direct appeal. Id.

The appropriate scope of review on appeal in PCR proceedings is whether 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). Ample evidence supports the PCR court's determination. Petitioner testified that he requested trial counsel to file an appeal, and trial counsel failed to do so. Although trial counsel denies Petitioner asking him to file an appeal, it would be hard to imagine a scenario where one is convicted by a jury and sentenced to 35 years imprisonment but does not wish to appeal. Further, trial counsel's incompetence throughout the entire trial should shed light on whether he may have failed to file an appeal after being asked to do so. Petitioner was thus denied his "one fair bite at the apple" because he did not voluntarily or intelligently waive his right to direct appeal." Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (providing that "[a] defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal."); Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002)(providing that a defendant has the right to a belated direct appeal when he did not knowingly and intelligently waive his right to a direct appeal.) Therefore, the record is clearly sufficient to support the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to White, supra.

2. THE PCR JUDGE ERRED IN REFUSING TO FIND THAT TRIAL COUNSEL WAS INEFFECTIVE WHERE TRIAL COUNSEL FAILED TO ADEQUATELY PREPARE THE CASE FOR TRIAL WITH PEITIONER; FAILED TO MAKE AN OPENING STATEMENT; FAILED TO MOVE TO SEQUESTER THE WITNESSES; FAILED TO IMPEACH A CRITICAL WITNESS FOR THE STATE WITH HIS PRIOR CRIMINAL RECORD; FAILED TO IMPEACH THE ONLY TESTIFYING CO-DEFENDANT REGARDING HIS BIAS TOWARD THE STATE; FAILED TO ENGAGE IN ANY MEANINGFUL CROSS-EXAMINATION; FAILED TO OBJECT TO ANY OF THE STATE'S EVIDENCE; FAILED TO OBJECT TO THE COURT'S ERRONEOUS CHARGE THAT IMPLIED MALICE WAS SUFFICIENT TO SUSTAIN A CONVICTION FOR ATTEMPTED MURDER; FAILED TO OBJECT TO THE CHARGE OF "HAND OF ONE, HAND OF ALL" BEING APPLICABLE TO THIS CASE; AND FAILED TO OBJECT TO THE ASSISTANT SOLICITOR'S INAPPROPRIATE AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENT.

In the amended order of dismissal, the PCR judge found that Petitioner failed to prove that trial counsel was ineffective. (App. 530-537). The PCR judge erred. Trial counsel was clearly ineffective as evidenced by the entire record in this case.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a

manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

During the PCR hearing, trial counsel acknowledged the following:

(1) That he never interviewed the SLED analyst who performed the gunshot residue test prior to trial (App. 459);
(2) That he never interviewed the SLED ballistics expert prior to trial (App. 460);
(3) That he never spoke to the crime scene investigator prior to trial (App. 460);
(4) That he allowed the State to admit all of its exhibits without objection prior to trial (App. 463);
(5) That he filed no pretrial motions other than a motion for bond (App. 464);
(6) That he made no motion to sequester the witnesses (App. 464);
(7) That he made no opening statement prior to the State's case or prior to the defendant's case (App. 465);
(8) That he never impeached State's eyewitness Arenthus Garrett with his prior criminal record (App. 466);
(9) That he failed to object to the "hand of one, hand of all" charge being applicable to this case, despite reservations by the trial judge (App. 470)

A review of the trial record in this case confirms the above deficiencies of trial counsel and shows other ways in which trial counsel's performance prejudiced the Petitioner. Those are as follows:

(1) Trial counsel failed to try and impeach the sole testifying co-defendant regarding any bias toward the State. (App. 261-270).
(2) Trial counsel failed to object to the Court's erroneous charge regarding implied malice being sufficient to sustain a conviction for attempted murder (App. 354-355)
(3) Trial counsel failed to cross-examine the victim regarding the fact that he stated the shooter was wearing a black shirt, and Petitioner's booking photo showed he was wearing a white shirt (App. 76);
(4) Trial counsel failed to object to the following improper remarks by the prosecutor in his closing statement: "And in a way, to tell you the truth, after he testified yesterday I feel sorry for him. I feel sorry for him that the only solace, the only place that he can find protection is what did he say, in the hood. But my feeling sorry for him for his ignorance in terms of that lifestyle falls short when I consider

what he did to this man. Justice under your oath cries out for one verdict..." (App. 345).

(5) Trial counsel's cross-examination with regard to all of the State's witnesses was incredibly poor (App. 84-270).

In addition to the aforementioned examples of trial counsel's deficient performance, Petitioner alleges that trial counsel failed to meet with him at the jail for trial preparation; failed to show him the SLED GSR and ballistics reports; failed to prepare him to testify; and failed to file a notice of appeal after being requested to do so.

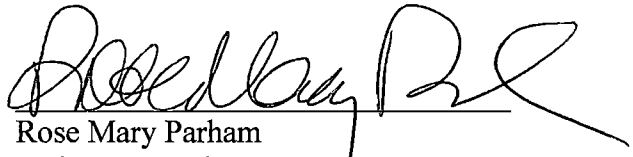
The PCR judge stated that assuming *arguendo* that trial counsel's performance was deficient, Peitioner cannot show resulting prejudice because he was convicted based on overwhelming evidence. Ordinarily, the existence of "overwhelming evidence" does not automatically preclude a finding of prejudice. Smalls v. State, --- S.E.2d ---, 2018 WL 736339 (2018). In Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), for example, despite finding evidence of Simmons' guilt was "overwhelming," the Court balanced the impact of counsel's errors against the strength of the State's case and found Simmons had proved prejudice.

In this case, the strongest piece of evidence is that according to SLED, Petitioner had gunshot residue on his hands and his codefendants did not. However, this fact could have easily been cast into doubt with proper cross-examination. The three were fleeing from police. The gun could have been tossed around in the car, and the codefendants could have wiped down their hands. The important factor in this case is that trial counsel did not just make a few mistakes, he made many, and those mistakes and errors prejudiced the entire trial.

CONCLUSION

Based on the above arguments this Court should grant the belated appeal and grant the petition for writ of certiorari to allow further briefing on the PCR issue.

Respectfully submitted,



Rose Mary Parham
Parham Law Firm, LLC

ATTORNEY FOR PETITIONER

This the 2nd day of March, 2018.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari and Appendix has been served upon Lindsey McCallister at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201; and a copy of the Brief of Petitioner has been served on Thomas E. Davis, #00351299, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, South Carolina 29210.

Rose Mary Parham
Parham Law Firm, LLC

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 2nd day of March, 2018.

Notary Public for South Carolina
My Commission Expires 10/17/2022