

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 29 2018

Certiorari to Greenville County
Court of Common Pleas
The Honorable John C. Hayes., Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-000057

DEMETRIUS SIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

RESPONDENT’S QUESTIONS PRESENTED	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	4
ARGUMENT	6
I. The Petitioner is entitled to direct appeal pursuant to <u>White v. State</u> where he did not knowingly and voluntarily waive his right to a direct appeal.....	6
CONCLUSION.....	7

RESPONDENT'S QUESTIONS PRESENTED

- I. Is Petitioner entitled to a direct appeal pursuant to White v. State where he did not knowingly and voluntarily waive his right to a direct appeal?

STATEMENT OF THE CASE

Petitioner is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Petitioner was indicted by the October 2013 term of the Greenville County Grand Jury for one count of Resisting Arrest (2013-GS-23-004562), one count of Breaking and Entering a Motor Vehicle (2013-GS-23- 004563), two counts of Larceny/Breaking into a Motor Vehicle (2013-GS-23-004564, -004565), one count of Grand Larceny (2013-GS-23-004566), and two counts of Burglary, First Degree (2013-GS-23-004567, -004568). Joey Maxwell, Esquire, and Sarah Henry, Esquire, represented Petitioner.

On December 11, 2013, Petitioner was tried in his absence before the Honorable Victor Pyle, Jr and jury. Petitioner was found guilty as indicted on all charges except the two counts of Larceny/Breaking into a Motor Vehicle. Judge Pyle sealed the record. On October 16, 2014, Judge Pyle sentenced Petitioner to confinement for one year for Resisting Arrest, five years for Break and Entering a Motor Vehicle, thirty days for Grand Larceny, and fifteen years on each count of Burglary, First Degree. The sentences were set to run concurrently. Petitioner did not appeal his conviction or sentence.

On September 17, 2015, Petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 204-214. Respondent filed a return dated July 7, 2016, requesting that an evidentiary hearing be held. App. 215-220. A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App, 222-253. Petitioner was present at the hearing and was represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina

Attorney General's Office. On December 20, 2016, Judge Hayes signed an Order of Dismissal denying Petitioner's PCR application. App. 255-261.

Petitioner filed a timely notice of appeal and a Johnson Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issued an Order requiring Petitioner to file a merit Petition for Writ of Certiorari and brief pursuant to White v. State¹ to be filed in the case Petitioner submitted both on January 26, 2018. This Return to Petition for Writ of Certiorari follows.

¹ 263 S.C. 110 (1974)

STANDARD OF REVIEW

The standard of review in post-conviction relief (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 trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

Petitioner is entitled to direct appeal pursuant to White v. State where he did not knowingly and voluntarily waive his right to a direct appeal.

Respondent concedes that Petitioner is entitled to a review of direct appeal issues pursuant to White v. State where the record does not support that Petitioner knowingly and voluntarily waived his right to a direct appeal. Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. Respondent submits a relief of Petitioner's appeal issue is proper.

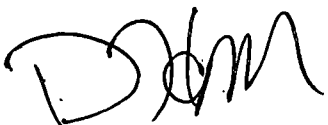
CONCLUSION

For the foregoing reasons, Respondent does not challenge a review of direct appeal issues pursuant to White v. State.

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

By: 

ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

May 29, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 29 2018

APPEAL FROM GREENVILLE COUNTY

S.C. SUPREME COURT

The Honorable John C. Hayes III, Circuit Court Judge

Appellate Case No. 2017-000057

DEMETRIUS SIMMONS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,


RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 29th day of May, 2018


CAROLINE COLLINS
Administrative Coordinator



RECEIVED

MAY 29 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

May 29, 2018

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Demetrius Simmons v. State of South Carolina
Appellate Case No. 2017-000057
Lower Court Case No. 2015-CP-23-5741

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Petition for Writ of Certiorari**. By copy of this letter we are serving opposing counsel today.

Sincerely,

DeShawn H. Mitchell
Assistant Attorney General
SC Bar #101813

DHM/cc

cc: Wanda H. Carter, Esquire