

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

RECEIVED

J. Derham Cole, Circuit Court Judge

JUN 25 2018

S.C. SUPREME COURT

KENDEAL JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002556

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief 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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 III. Trial counsel erred in twice misstating the burden of proof in a
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ISSUES PRESENTED

- I. The PCR judge ruled properly that petitioner did not voluntarily waive his right to a direct appeal.
- II. Trial counsel erred in failing to challenge the state's presentation of evidence of flight via an explanation regarding the underlying reason behind the flight evidence.
- III. Trial counsel erred in twice misstating the burden of proof in a criminal trial during opening argument.

STATEMENT

Petitioner Kendecal Jones was convicted of first degree burglary and three counts of armed robbery per jury trial held during the March 2011 term of the Spartanburg County General Sessions Court before Judge J. Mark Hayes, II. Petitioner was sentenced to imprisonment for an aggregate period of twenty-five years. Max Singleton represented petitioner at trial¹ and Assistant Solicitor Derrick Balsa appeared on behalf of the state. App. 1-273. Petitioner did not enjoy the benefit of a direct appeal in the case.

On December 9, 2011, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 279-292. The respondent filed a Return dated November 27, 2012, requesting that a hearing be held in response to petitioner's PCR action. App. 293-296.

PCR hearings were convened on October 2, 2013, and January 22, 2014, at the Spartanburg County Courthouse before Judge J. Derham Cole. App. 298-325; App. 329-344. Petitioner was represented by Charles L. Rollins at both PCR hearings and Suzanne H. White appeared at both hearings on behalf of the state.

On December 12, 2017, Judge Cole signed an "Order of Dismissal Granting White v. State Appeal," but denied petitioner's remaining PCR claims in the case. App. 346-355.

Petitioner appealed. This petition follows.

¹ Petitioner was tried along with codefendant Chavis Pullen.

QUESTION I

The PCR judge ruled properly that petitioner did not voluntarily waive his right to a direct appeal.

Petitioner alleged in effect in his PCR application that he desired a direct appeal in his case, but that trial counsel failed to inform [him of his] right to notice of appeal. App. 289-290. During the October 2, 2013 PCR hearing, petitioner testified that counsel did not file a timely notice of appeal on his behalf. App. 316, l. 16-19. Also, during the hearing, the Assistant Attorney General conceded that “the notice of appeal was not properly filed or served and that [petitioner] would be entitled to a review of his direct appeal issues pursuant to White v. State”². App. 301, lines 13-16; App. 308, lines 16-19.

During the PCR hearing held on January 22, 2014, trial counsel testified and admitted that he did not properly file and serve the notice of appeal in the case. App. 331, l. 21 – 332, 4, l. 6.

The PCR judge issued an “Order of Dismissal Granting White v. State Appeal” with a finding that petitioner did not knowingly and voluntarily waive his appellate right and was entitled to an appeal from his convictions,³ but denied his remaining PCR allegations. App. 346 – 355.

If after an indigent client wishes to appeal, then trial counsel must serve and file a notice of appeal. In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E. 483 (1991). Here, trial counsel did not properly perform his duty with respect to securing petitioner’s appellate rights.

² White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

³ Apparently, trial counsel’s service of the notice of appeal did not constitute the proper service and filing requirements.

A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). Petitioner did not voluntarily waive his right to an appeal. Trial counsel erred in failing to take the appropriate steps to ensure that the notice of appeal was properly served and filed in order for petitioner to have his case reviewed on direct appeal as petitioner desired an appeal of his case. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal in the case.

QUESTION II

Trial counsel erred in failing to challenge the state's presentation of evidence of flight via an explanation regarding the underlying reason behind the flight evidence.

During the PCR hearing, petitioner testified that he was at the Middleton apartment to buy marijuana on the day in question and that he knew nothing about what went on with the two gunmen who came in after he left the apartment. Petitioner exited out of the back door because he had four traffic tickets pending and a prior drug charge from six months earlier that was also pending, which meant that his exit, i.e., flight, had nothing to do with the burglary and robbery charges assigned to the two gunmen who came into the apartment after his exit. Thus, petitioner's flight was unrelated to the events that occurred in the Middleton apartment. In other words, petitioner's exit, or flight, was based on unrelated charges. This clarification and information, i.e. the misinterpretation of that flight, in this case was not evidence of guilt in connection to the gunmen's robbery and burglary charges for which he was on trial because the exit did not constitute flight in relation to this case. This should have been made know to the jury at trial by trial counsel. App. 302, lines 5-15; App. 309, l.23 – p. 311, l. 16. The PCR judge ruled that counsel was not ineffective for failing to object to flight evidence. App. 351-351.

The issue of flight was explained in State v. Robinson, 360 S.C. 187, 600 S.E.2d 100 (2004), to the extent that although flight has been associated with evidence of guilty knowledge and intent, there must be some nexus between the flight and the charge in order to satisfy the relevance requirement, and the fleeing must have been related to the crime charges.

Counsel's error in failing to address the flight issue constituted deficient legal representation in violation of the Sixth Amendment, and but for the error, a reasonable probability exists that the outcome of petitioner's trial would have been different.

QUESTION III

Trial counsel erred in twice misstating the burden of proof in a criminal trial during opening argument.

During opening argument, trial counsel made the following comments to the jury:

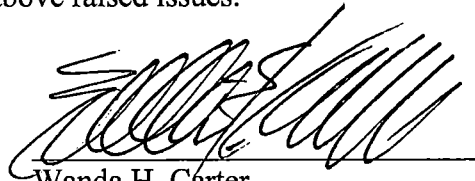
- 1.) Listen to what the judge instructs you as to the elements of the law and determine whether the solicitor has proved his case by a preponderance of the evidence. App. 36, l. 24 – App. 37, l. 2.
- 2.) We want you to listen to the evidence, see if it fits...see if they've proven by a preponderance of the evidence whether my client is guilty. App. 37, l. 19-21.

In a criminal case, the prosecution must prove every element of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). Trial counsel erred in informing the jury of the wrong burden of proof for petitioner's criminal trial. A statement to the jury announcing a different standard other than the proper burden of proof than what is required violates due process and cannot be considered harmless error: Compare the use of "moral certainty," which was struck down as a charge requiring a different degree of doubt than what is required for acquittal under the reasonable doubt standard. See Cage v. Louisiana, 498 U.S. 39

(1990). Trial counsel's error in this regard constituted deficient representation in violation of the Sixth Amendment (see Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984)). But for the error, a reasonable likelihood exists that the outcome of petitioner's trial would have been different.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above raised issues.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

KENDEAL JONES,

PETITIONER

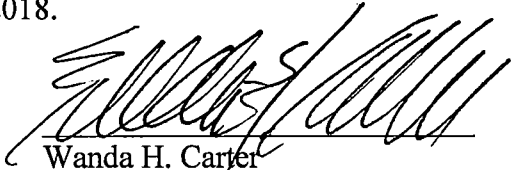
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jordan Cox, 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 Kendal Jones, #282573, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 25th day of June, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 25th day of June, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022