

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JAMES WHALEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001610

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUES PRESENTED

I.

Whether Petitioner was entitled to a belated appeal pursuant to White v. State, where the state consented to that relief, where his trial attorney was on notice that Petitioner wanted to appeal his conviction, and where trial attorney filed the notice of appeal, but failed to request the trial transcript for the appeal which led to Petitioner's direct appeal being dismissed?

II.

Whether the Court should have ordered an evidentiary hearing for Petitioner's PCR claims, or in the alternative, remanded Petitioner's case for a limited hearing on whether his PCR application was time barred?

STATEMENT

During the November 2011 term the Aiken County Grand Jury indicted Petitioner for Disseminating Harmful Material to a Minor, Lewd Act Upon a Child, and Indecent Exposure. App. 220 – 225. Petitioner’s bench trial was held before Honorable Doyet A. Early, III on September 10 – 12, 2013. App. 1. Ashley Agnew and J. William Weeks represented the state. Id. Brian Katonak represented Petitioner. Id.

Judge Early found Petitioner guilty as indicted. App. 180, ll. 16 – 23. Judge Early sentenced Petitioner to ten years’ imprisonment for disseminating harmful material to a child. Id. He sentenced Petitioner fifteen years’ imprisonment for a lewd act upon a child, to run concurrently with the ten-year sentence. Id. He sentenced Petitioner to three years’ imprisonment for indecent exposure to run consecutively. Id.

A timely Notice of Appeal was filed on Petitioner’s behalf. However, on April 10, 2014, the South Carolina Court of Appeals dismissed the appeal because trial attorney failed to order the transcript. App. 202. The remittitur was issued April 28, 2014. Id.

On June 1, 2015, Petitioner filed a post-conviction relief application that alleged ineffective assistance of counsel for failure to order the trial transcript leading to dismissal of Petitioner’s appeal. App. 192 – 199. On September 23, 2015, the state filed its return, which moved to dismiss Petitioner’s post-conviction relief allegations as untimely made; however, the state conceded Petitioner’s White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974) claim to a belated direct appeal. App. 201 – 205.

On May 26, 2017, Petitioner’s post-conviction hearing was held before the Honorable Diane S. Goodstein. App. 207. Julie Coleman represented the state. Id. Aimee Zmroczek represented Petitioner. Id.

During the hearing the state moved to dismiss all of Petitioner's post-conviction relief allegations as untimely; however, it consented to Petitioner's White v. State claim to a belated appeal. App. 210, ll. 14 – 17. In the seven pages of transcript that comprise the entirety of the post-conviction relief hearing, Petitioner was never afforded the opportunity to testify as to why his post-conviction relief application was filed outside of the one-year time limit. App. 207 – 214.

On June 22, 2017, Judge Goodstein denied all of Petitioner's post-conviction relief allegations with prejudice as untimely made, but granted Petitioner's White v. State allegation for a belated appeal. App. 216 – 219.

This petition follows.

ARGUMENT

Petitioner was entitled to a belated appeal pursuant to White v. State, where the state consented to that relief, where his trial attorney was on notice that Petitioner wanted to appeal his conviction, and where trial attorney filed the notice of appeal, but failed to request the trial transcript for the appeal which led to Petitioner's direct appeal being dismissed.

Relevant Facts

Petitioner filed a timely notice of appeal; however, his attorney erroneously failed to order the trial transcript for his direct appeal. App. 202. On April 10, 2014, the Court of Appeals dismissed Petitioner's direct appeal due to that failure by trial counsel. Id.

On June 1, 2015, Petitioner filed a post-conviction relief application. App. 192 – 199. Petitioner's post-conviction relief application alleged ineffective assistance of counsel for failure to order the trial transcript which led to the dismissal of appeal. Id.

On September 21, 2015, the state filed its return. App. 201 – 205. The state moved to dismiss his PCR allegations as barred by the one-year statute of limitations. Id. However, the state conceded Petitioner's White v. State claim for a belated appeal. Id.

On May 26, 2017, Petitioner's evidentiary hearing was held in front of the Honorable Diane S. Goodstein. App. 207. Julie Coleman represented the state. Id. Aimee Zmroczek represented Petitioner. Id.

At the hearing, the state again moved to dismiss all of Petitioner's post-conviction relief allegations, except his White v. State claim for a belated appeal. App. 210, ll. 14 – 17. The state conceded Petitioner's White v. State claim because Petitioner's trial counsel explained that Petitioner was not at fault for the transcript not being ordered and his appeal being dismissed.

App. Id.; App. 213, l. 16 – 214, l. 1. Judge Goodstein dismissed all of Petitioner’s post-conviction relief allegations except for his White v. State claim. App. 213, ll. 9 – 15.

Discussion

In Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002), this Court held 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.”

In Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002), this Court further held that a defendant has the right to a belated appeal when the applicant did not knowingly and intelligently waive his right to a direct appeal. Therefore, this Court has reaffirmed the principle that a criminal defense attorney must make certain that his client is fully aware of his right to appeal and in the absence of an intelligent waiver by the client, must either pursue an appeal or file a brief under Anders v. California, 386 U.S. 738 (1967). *See* White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

In this case, Petitioner was denied his “one fair bite at the apple” because he did not voluntarily or intelligently waive his right to a direct appeal of his conviction. App. 214, ll. 2 – 6; Legge v. State, 349 S.C. 222, 562 S.E.2d 618; Wilson v. State, 348 S.C. at 218, 559 S.E.2d at 582.

The assistant attorney general at the post-conviction relief hearing consented to the White v. State, claim because Petitioner’s trial attorney failed to order the transcript for Petitioner’s direct appeal. App. 210, ll. 14 – 17. Moreover, Judge Goodstein recognized that, “[the trial transcript] failed to be ordered through no fault of [Petitioner].” App. 214, ll. 2 -3.

Trial counsel’s failure to order the transcript led to Petitioner’s direct appeal being dismissed. Trial counsel’s failure deprived Petitioner of his right to a direct appeal, and the state consented to his White v. State claim. Therefore, Petitioner was entitled to a belated direct appeal pursuant to White v. State.

II.

The Court should have ordered an evidentiary hearing for Petitioner's PCR claims, or in the alternative, remanded Petitioner's case for a limited hearing on whether his PCR application was time barred.

Relevant Facts

At the PCR hearing, PCR counsel explained that she thought trial counsel's failure to order the trial transcript for Petitioner's direct appeal was the reason for his delay in filing his post-conviction relief application. App. 212, ll. 2 – 4. She further stated, "I would say that the reason he didn't file timely was because of his - - because of the problems with the appeal." App. 212, ll. 21 – 23.

Judge Goodstein recognized that trial counsel's failure to order the transcript for the appeal was, "through no fault of the applicant." App. 214, ll. 2 – 6. However, she also ruled that Petitioner's post-conviction relief allegations were time-barred, even if the failure by trial counsel to order the trial transcript, which began the confusion in Petitioner's case, caused Petitioner to delay the filing of his post-conviction relief application. Judge Goodstein described the issue as, "all academic because there was a remittitur." App. 213, ll. 5 – 7.

The PCR judge was wrong when she ruled that the cause for the delay Petitioner's post-conviction relief allegations was immaterial and, that no matter what the reason for the delay, his allegations were time-barred.

That was an error and that error prejudiced Petitioner.

Discussion

In this case, Petitioner's evidentiary hearing was held in name only. Petitioner was never given the opportunity to utter a single word at *his* post-conviction relief hearing.

South Carolina's statutory scheme governing post-conviction relief procedures provides for a one-year statute of limitations for filing of applications. "An application for relief ... must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45(a).

"When considering the state's motion for summary dismissal of an application for PCR when no evidentiary hearing has been held, the court must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). However, "counsel should be appointed under Rule 71.1(d) when the State moves for dismissal under § 17-27-45(A) and the PCR applicant raises an issue of material fact regarding the applicability of the one-year limitation." Gary, 347 S.C. at 630, 557 S.E.2d at 664.

In Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (2008), the South Carolina Court of Appeals endorsed the following summarization of equitable tolling:

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

Id., at 521, 662 S.E.2d at 620.

The Court of Appeals provided examples of when equitable tolling has been applied: (1) “extraordinary circumstances prevented the plaintiff from filing despite his or her diligence,” (2) the plaintiff pursued judicial remedies by filing a defective pleading during the statutory pleading or was induced or tricked by the defendant’s misconduct into allowing the deadline to pass; (3) the plaintiff was unable to obtain vital information for the claim despite due diligence; and (4) the plaintiff was misled by the defendant about the cause of action or was prevented in some extraordinary way from asserting his or her rights. *Id.*, at 521, 662 S.E.2d at 620 – 621.

In this case, the PCR court erred when it denied Petitioner’s PCR application because it was filed outside of the statutory time limit without giving Petitioner a meaningful hearing on the issue. At Petitioner’s PCR hearing, Judge Goodstein should have given Petitioner the opportunity to explain the cause of his PCR application’s delay. He should have been allowed to explain that because the delay derived from trial counsel’s ineffective assistance, the statute of limitations to file his PCR application should have been tolled to allow his allegations to be heard.

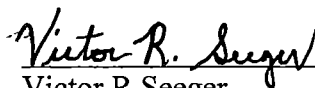
PCR counsel explained that Petitioner filed his PCR application late because of trial counsel’s failure to perfect Petitioner’s direct appeal. App.212, ll. 2 – 4. Trial counsel failed to order the trial transcript for Petitioner’s appeal and due to that failure Petitioner’s appeal was dismissed. There was no evidence on the record that showed trial counsel informed Petitioner of the time limits for filing a post-conviction relief application. There was no evidence on the record that trial counsel ever informed Petitioner that his direct appeal was dismissed. There was no evidence on the record that trial counsel ever informed Petitioner that the remittitur was issued by the Court of Appeals.

Due to trial counsel’s ineffective assistance Petitioner was left without any guidance to navigate the complex appellate process on his own. Petitioner was not aware of the dismissal of his appeal, the issuance of the remittitur, or the deadline to file his post-conviction relief application

because trial counsel failed his duty to properly represent Petitioner. Therefore, Judge Goodstein erred when she denied Petitioner's PCR application without giving him an opportunity to explain that the delay in the filing of his PCR application was not his fault and was the result of his trial counsel's ineffective assistance, which would have tolled the statute of limitations for filing a PCR application and allowed Petitioner to raise his PCR allegations at his evidentiary hearing.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his petition for writ of certiorari to allow a White v. State belated direct appeal, and grant a PCR hearing on his ineffective assistance of counsel issues, or in the alternative, a remand for a limited hearing on whether Petitioner's PCR application was time barred.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JAMES WHALEY,

PETITIONER

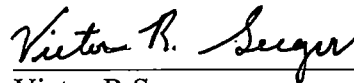
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

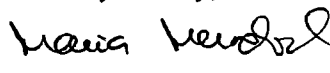
CERTIFICATE OF SERVICE

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 Julie Coleman, 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 James C. Whaley, #357132, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335, this 30th day of July, 2018.



Victor R Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 30th day of July, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023