

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Deadra L. Jefferson, PCR Judge
George C. James, Jr., Trial Judge

Appellate Case No. 2017-002544

ERIC ANCRUM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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AUG 29 2018

S.C. SUPREME COURT

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STATEMENT OF ISSUE

Did the post-conviction relief court properly determine Petitioner was entitled to belated appellate review of direct appeal issues pursuant to White v. State, 263 S.C 110, 208 S.E.2d 35 (1974)?

STATEMENT OF THE CASE

During its June 2006 term, the Charleston County Grand Jury indicted Petitioner Eric Ancrum for trafficking in cocaine (more than 400 grams) (2006-GS-10-4066), possession with intent to distribute cocaine within proximity of a school (2006-GS-10-4069), manufacturing cocaine base (2006-GS-10-070), possession of a firearm during the commission of a violent crime (2006-GS-10-4071), and manufacturing cocaine base within proximity of a school (2006-GS-10-4188). Subsequently, during its October 2006 term, the Charleston County Grand Jury also indicted Petitioner for trafficking cocaine base (200-400 grams) (2006-GS-10-9674) and possession with intent to distribute cocaine base within proximity of a school (2006-GS-10-9675).

John D. Delgado, Esquire and William N. Nettles, Esquire, represented Petitioner on these charges. Assistant Solicitors Nathan Williams and Gregory Voigt of the Ninth Circuit Solicitor's Office prosecuted the case.

On October 8, 2007, Petitioner proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable George C. James, Jr., then circuit-court judge. On October 11, 2007, the jury convicted Petitioner of all offenses as indicted except for possession of a firearm. The trial court sentenced Petitioner to confinement for fifteen years for manufacturing cocaine base and life without the possibility of parole for each of the other five offenses pursuant to S.C. Code Ann. § 17-25-45 based on Petitioner's prior convictions.

Counsel filed a notice of appeal on behalf of Petitioner, but failed to serve the State. On October 24, 2007, the South Carolina Court of Appeals dismissed Petitioner's appeal for failing to properly serve the State. The remittitur was returned to the circuit court on November 9, 2007.

Thereafter, on March 25, 2008, Petitioner filed an application for post-conviction relief (2008-CP-10-1670), alleging he was being held in custody unlawfully based on an allegation that counsel was ineffective for failing to perfect an appeal on his behalf. The State served its return on December 23, 2008. An evidentiary hearing was convened on November 18, 2009, in the Charleston County Court of Common Pleas before the Honorable Kristi L. Harrington, circuit court judge. At the hearing, Petitioner proceeded forward on the following claims:

1. Ineffective assistance of counsel in that counsel

- a. Did not meet with Petitioner enough times.
- b. Did not contact witnesses that could have verified Petitioner did not live in the apartment in question.
- c. Did not request a continuance when aware that they were not prepared for trial.
- d. Did not develop the mere presence defense properly.
- e. Failed to file a timely appeal.

Petitioner was represented at the evidentiary hearing by Joseph Stephen Schmutz, Esquire, and Anthony P. LaMantia, III, Esquire. Respondent was represented by Assistant Attorney General Matthew J. Friedman of the South Carolina Attorney General's Office. At the hearing, Petitioner testified on his own behalf and presented testimony from trial counsels Delgado and Nettles. At the hearing, Respondent agreed Petitioner was entitled to belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974), but challenged the remaining allegations for relief. By order filed December 14, 2009, the post-conviction relief court granted Petitioner belated review of direct appeal issues pursuant to White and denied relief as to all other allegations.

Petitioner, though post-conviction relief counsel, filed a notice of appeal with this Court challenging the court's denial of post-conviction relief. Counsel subsequently filed a petition for a writ of certiorari, arguing, "The PCR court erred in denying Petitioner's request for a new trial based upon his claims of ineffective assistance of counsel." However, counsel did not file a separate brief of petitioner pursuant to White as required under Rule 243(i)(1), SCACR and did not otherwise argue any direct appeal issues. The State served its return to the petition for a writ of certiorari on April 18, 2011. Petitioner then filed a reply to Respondent's return to the petition on June 6, 2011. This Court denied certiorari and the remittitur was returned to the circuit court on June 7, 2012.¹

Thereafter, on June 12, 2017, Petitioner, through retained counsel Tristan Shaffer, filed a second post-conviction relief application and accompanying affidavit from initial post-conviction relief counsel, arguing he was entitled to White review as granted by the initial post-conviction relief court and that initial post-conviction relief counsel had improperly neglected to file a brief of petitioner pursuant to White on his behalf. Respondent consented to the grant of belated review of direct appeal issues pursuant to White as granted by the original post-conviction relief court, and by order filed on November 8, 2017, the Honorable Deadra L. Jefferson, acting in her capacity as Chief Administrative Judge for Common Pleas for Charleston County, granted Petitioner belated appellate review pursuant to White.

¹ The only documents from Petitioner's initial post-conviction relief appeal included in the Appendix are the petition for a writ of certiorari and appendix (which is full of improper markings and commentary from an unknown source). The return to the petition for a writ of certiorari the reply to this return, the order denying certiorari, and remittitur were all improperly omitted from the appendix. Respondent is filing a motion to strike the Appendix and require Petitioner to file an amended appendix that comports with the appellate court rules.

Petitioner filed a notice of appeal. On April 30, 2018, Petitioner filed a petition for a writ of certiorari and a brief of petitioner pursuant to White. This return to petition for a writ of certiorari and accompanying brief of respondent pursuant to White follow.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly granted Petitioner belated appellate review of direct appeal issues pursuant to White.

Petitioner asserts counsel was ineffective for failing timely file a direct appeal on his behalf and asserts he wanted to appeal his convictions and life sentence. Respondent conceded, both at the time of his initial post-conviction relief proceeding and in his second post-conviction relief proceeding, that Petitioner was entitled to belated appellate review of direct appeal issues pursuant to White.

“Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal.” Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations 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).” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Simuel, 390 S.C. at 271, 701 S.E.2d at 740 (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted).

In the present case, there is no evidence Petitioner made a knowing and intelligent decision not to pursue a direct appeal. Rather, the record establishes Petitioner not only wanted to pursue a direct appeal, but was only denied this opportunity by his counsel’s failure to timely serve notice on the State, resulting in dismissal of his direct appeal. Therefore, since Petitioner did not knowingly and intelligently waive his right to appeal, the post-conviction relief court properly determined Petitioner is entitled to a belated appellate review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Respondent addresses the issues

raised in this belated appellate review in the accompanying Brief of Respondent Pursuant to White v. State, also served on today's date.

CONCLUSION

For the foregoing reasons, this Court should grant this petition as Petitioner did not knowingly and voluntarily waive his right to appellate review and is entitled to belated appellate review of direct appeal issues pursuant to White.

Respectfully submitted,

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8/29, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Kristi L. Harrington, PCR Judge
George C. James, Trial Judge

Appellate Case No. 2017-002544

ERIC ANCRUM,

PETITIONER

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RESPONDENT

CERTIFICATE OF SERVICE

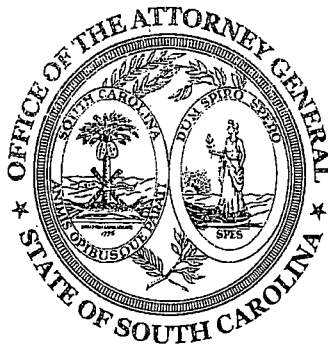
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two copies in the United States mail, postage prepaid, addressed to:

Tristan Michael Shaffer, Esquire
Shaffer Law Firm
Post Office Box 1027
Chapin, SC 29036

This 29th day of August, 2018.



Jennifer Jennison
Legal Assistant for Respondent



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AUG 29 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
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August 29, 2018

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

**RE: Eric Ancrum v. State of South Carolina
Appellate Case No.: 2017-002544**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari**, and the original and fourteen copies of the **Brief of Respondent Pursuant to White v. State** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar # 100108

MHJ/jaj
Enclosures

cc: Tristan M. Shaffer, Esquire
Victim Advocacy Division