

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County
Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2017-001820

DOMINIQUE CASH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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OCT 29 2018

S.C. SUPREME COURT

TABLE OF CONTENTS

RESPONDENT’S QUESTIONS PRESENTED.....1

STATEMENT OF THE CASE2

STANDARD OF REVIEW.....3

STATEMENT OF THE FACTS.....4

ARGUMENT.....8

 I. The PCR court correctly found Petitioner was not entitled to belated appellate review of his conviction pursuant to White v. State, 63 S.C. 110, 208 S.E.2d 35 (1974), because Counsel informed Petitioner of his right to appeal and Petitioner did not request a notice of appeal be filed on his behalf until after the ten-day timeframe had expired.....8

 II. The PCR court correctly found Counsel was not deficient in his preparation of mitigation for sentencing because Petitioner never requested Counsel contact his family; Petitioner was given the opportunity to speak during sentencing, but chose to maintain his innocence rather than offer evidence of his own good character; and in any event, the trial judge’s main concern was Petitioner’s prior record.....9

CONCLUSION.....12

RESPONDENT'S QUESTIONS PRESENTED

- I. Did the PCR court correctly find Petitioner was not entitled to belated appellate review of his conviction pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where Counsel informed Petitioner of his right to appeal and Petitioner did not request a notice of appeal be filed on his behalf until after the ten-day timeframe had expired?

- II. Did the PCR court correctly find Counsel did not render ineffective assistance in his presentation of mitigation during sentencing where Petitioner never requested Counsel contact his family; Petitioner was given the opportunity to speak during sentencing, but chose to maintain his innocence rather than offer evidence of his own good character; and in any event, the trial judge's main concern was Petitioner's prior record?

STATEMENT OF THE CASE

Dominique Cash (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In March 2013, the Florence County Grand Jury indicted Petitioner for assault on law enforcement officer (2013-GS-21-207). Wallace "Jay" Jordan, Esquire, represented Petitioner. On April 9, 2013, Petitioner proceeded to trial before the Honorable D. Craig Brown and a jury. On April 10, 2013, the jury found Petitioner guilty as indicted. Judge Brown sentenced Petitioner to ten years' imprisonment with credit for time served.

On April 16, 2013, Petitioner sent a letter requesting an appeal to the Florence County Clerk of Court. The Public Defender's Office received a copy of the letter on April 25, 2013. On May 8, 2013, Counsel sent the letter and a notice of appeal to the South Carolina Court of Appeals. However, the Court of Appeals dismissed the appeal as untimely on June 6, 2013. The remittitur was returned to the circuit court on June 27, 2013.

Petitioner filed an application for post-conviction relief (PCR) on August 30, 2013, and subsequently filed amendments on July 12, 2016, and March 9, 2017. Respondent made its Return on April 22, 2014. An evidentiary hearing into the matter was convened on March 17, 2017, at the Florence County Courthouse before the Honorable Paul M. Burch. Petitioner was present and was represented by Kristy G. Goldberg, Esquire. Respondent was represented by Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office. By order filed August 24, 2017, Judge Burch denied Petitioner's application for relief, including Petitioner's request for belated appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Petitioner filed a notice of appeal of the denial of post-conviction relief and, through counsel, filed a Petition for Writ of Certiorari on June 13, 2018.

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 (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. Id. at 180, 810 S.E.2d at 839. (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. at 180-81, 810 S.E.2d at 839-40. 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).

STATEMENT OF THE FACTS

Charlene Mickens (Mickens) was working as a front desk clerk at the Motel 6 in Florence on the morning of October 20, 2012. App. p. 41. According to Mickens, Petitioner's two female codefendants approached the front desk asking to retrieve some items they had left in a room. App. p. 41. However, because the room was not registered in either of their names, Mickens refused to allow them access. App. p. 41. Mickens testified the girls became upset and belligerent, and another codefendant, Adrian Boney (Boney), threw a pen at Mickens and began cursing at her and threatening her. App. pp. 41-42. The manager¹ of the Motel 6 heard the commotion and called 911. App. pp. 42-43. Mickens testified Petitioner had been in the lobby but left before the confrontation began. App. p. 42.

Mickens further testified Deputy Josh Phillips (Phillips) arrived on the scene alone and began speaking with the three codefendants who were still in the lobby. App. p. 42. Eventually, according to Mickens, Phillips asked the two girls to wait outside because Boney continued to yell and refused to cooperate, so Phillips placed him in handcuffs and walked him outside to the patrol car. App. pp. 42-43. Mickens testified Petitioner "caught" Phillips from behind as Phillips was putting Boney in the car, and they all began "tussling." App. pp. 43-44. Mickens further testified her manager called 911 again to report the attack on Phillips, and another officer arrived to break up the fight. App. pp. 44-45. Mickens testified she feared for Phillips' life because all four codefendants were hitting and kicking him, with Petitioner on top of Phillips. App. p. 44.

Phillips testified when he arrived on the scene, he was met at the door of the lobby by the two female codefendants and Boney, but Petitioner was nowhere to be seen at that time. App. p.

¹ The manager, Stephanie El-Amin, also testified, and her testimony was nearly identical to Mickens'. App. pp. 55-66.

68. According to Phillips, he detained Boney in handcuffs because he was argumentative and cursing at Phillips. App. p. 68. Phillips testified he then asked all three to return inside the lobby with him, and he began speaking with Mickens about what was going on. App. p. 68. Phillips testified Petitioner returned to the lobby and asked why his brother was in handcuffs. App. p. 69. Phillips then took Boney outside to his patrol car, while Petitioner and the two girls followed them to the lobby door. App. p. 70.

As Phillips was performing a pat-down search of Boney, Petitioner approached him from the back and grabbed his shoulder. App. pp. 70-71. Phillips testified he said, "back up" and pushed Petitioner back, at which time Petitioner grabbed his arm, and they fell to the ground. App. pp. 70-71. Phillips testified Petitioner was on top of him, and Boney and the two female codefendants also approached and began kicking him in the head and side. App. pp. 71-72. Phillips testified Petitioner and the others continued to assault him until the second officer arrived, at which point Petitioner was subdued and arrested. App. pp. 72-74. The second officer, Lieutenant Wilson Powell (Powell), had a dashboard camera recording as he pulled up to the scene, which captured the end of the altercation. App. p. 91. The video was admitted into evidence without objection. App. p. 91.

Petitioner alleged self-defense, in support of which both he and Boney testified. Boney testified Petitioner was not present for the verbal altercation between the female codefendants and the motel clerk. App. p. 147. According to Boney, when Officer Phillips arrived, Phillips put him in handcuffs, and without provocation, pulled his gun and pressed it into Boney's back. App. pp. 147, 154. Boney also alleged Phillips called him the n-word as he was escorting Boney to the patrol car. App. pp. 147. Boney testified Petitioner walked up at that point, Phillips told Petitioner to step back, and as Petitioner was complying with the command, Phillips shoved Petitioner and "started getting aggressive" with him. App. pp. 147-48. Boney claimed Petitioner

put his hands in the air to show he was not trying to fight with the officer, but Phillips fell to the ground with Petitioner on top of him. App. pp. 148, 158. Boney testified he kicked Phillips after seeing him strike Petitioner, but Petitioner never fought back or touched the officer at all. App. pp. 148, 161. According to Boney, he was the only person out of all four codefendants who ever struck the officer. App. pp. 161-62.

Petitioner then testified and confirmed the basics of the incident: the girls were upset about not being allowed to access their clothes and became loud and argumentative with the motel staff. App. pp. 168-69. Petitioner testified he left because "the girls were acting so crazy" and went across the street to Hardee's. App. p. 169. When he got to the Hardees, he saw Phillips' police car pull up outside the motel, so he returned to the lobby to find out what was happening. App. p. 169. Petitioner testified the scene was calm until the motel clerks claimed one of the codefendants did something they did not do, at which point Boney became agitated, and Phillips placed him under arrest. App. p. 170.

Petitioner testified Phillips was aware he was following them outside, and he was several feet away from Phillips asking about what would happen to Boney, so he could let Boney's family know what to do and how to get him. App. pp. 170-71. Petitioner testified when he asked Phillips what was going on, Phillips responded by pushing him back, but Petitioner raised his hands and never hit or struck Phillips. App. p. 171. According to Petitioner, Phillips tripped and pulled Petitioner down on top of him, then held onto to Petitioner's neck so Petitioner could not get off the ground. App. p. 172. Petitioner testified Phillips then punched him in the face, and Boney responded by kicking Phillips. App. p. 172. At that point, the other officers arrived and Petitioner was arrested. App. p. 173.

At defense counsel's request, the judge charged the jury with the indicted offense of assault on a law enforcement officer and the lesser-included offense of resisting arrest. App. pp.

191-92, 216. The trial judge, on defense counsel's objection, declined to give a hand of one, hand of all charge. App. pp. 140-41. After beginning deliberations, the jury requested to see the video again and wrote a note to Judge Brown asking what the timeframe was from when Phillips and Petitioner fell to the ground and when Lieutenant Powell pulled up (i.e. when the video begins). App. pp. 222-25. The video was replayed several times, paused, and played frame-by-frame at the request of several jurors. App. pp. 225-27. Judge Brown further instructed the jurors the timeline was an evidentiary issue for them to decide. App. p. 227. The jury then retired for further deliberation and returned a verdict of guilty as indicted. App. p. 229.

ARGUMENT

- I. **The PCR court correctly found Petitioner was not entitled to belated appellate review of his conviction pursuant to White v. State, 63 S.C. 110, 208 S.E.2d 35 (1974), because Counsel informed Petitioner of his right to appeal, and Petitioner did not request a notice of appeal be filed on his behalf until after the ten-day timeframe had expired.**

The PCR court correctly denied Petitioner belated appellate review of his conviction pursuant to White. The PCR court concluded Counsel “fully explained [Petitioner’s] right to appeal, but [Petitioner] failed to make a timely request, and Counsel took appropriate action to file a notice once he realized [Petitioner] wanted him to do so.” App. p. 381. Therefore, the PCR Court correctly denied Petitioner’s request for belated appellate review of direct appeal issues.

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, 224-25, 670 S.E.2d 373, 374 (2008) (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). *Id.* “If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant’s express instructions with respect to an appeal.” Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000).

In this case, Counsel testified he had a clear memory of talking to Petitioner during jury deliberations and explaining what would happen in each scenario – guilty or not guilty – and the rights and options Petitioner would have in each circumstance. App. pp. 357-58. Moreover, both Petitioner and Counsel agreed the first time Petitioner requested an appeal was in the letter he sent to Counsel, which Counsel received on April 25, 2013 – fifteen days after Petitioner’s conviction. App. p. 340-41, 360. Petitioner acknowledged he did not attempt to contact Counsel

by phone to ask him to file an appeal, and he did not write the letter to Counsel until six days after his trial concluded. App. pp. 306-07. Counsel's testimony that Petitioner did not request an appeal prior to that date is further corroborated by documentation Counsel sent to the Court of Appeals on May 8, 2013, explaining the situation and attempting to file a notice of appeal as Petitioner directed. App. p. 248. In the cover letter accompanying the notice of appeal, Counsel explained, "Following his trial, which concluded on April 10, 2013, [Petitioner] was sentenced to ten (10) years and given credit for the time he has served thus far. [Petitioner] did not, at that time, notify me of an interest in appealing his case." App. p. 248.

The PCR court expressly found Counsel's testimony on this issue credible while also finding Petitioner's testimony was not credible. App. p. 381. Therefore, the PCR court in this case correctly found Petitioner was not entitled to pursue a belated appellate review of his guilty plea, and there is probative evidence, in the form of Counsel's testimony and the contemporaneous documentation between Counsel and Court of Appeals, in the record to support the PCR court's decision. Accordingly, the Petition for Writ of Certiorari should be denied as to this issue.

II. The PCR court correctly found that Counsel was not deficient in his preparation of mitigation for sentencing because Petitioner never requested Counsel contact his family; Petitioner was given the opportunity to speak during sentencing, but chose to maintain his innocence rather than offer evidence of his own good character; and in any event, the trial judge's main concern was Petitioner's prior record.

Petitioner argues Counsel was ineffective because he "did not present mitigation" in the form of testimony from Petitioner's family members so Petitioner's "positive academic and employment history" was not brought to the Court's attention. PWC p. 14. However, Counsel testified Petitioner never asked him to notify any family members to be present for trial, Petitioner told the trial judge about his academic and employment history when he was given the

chance to speak on his own behalf, and the trial judge indicated his concern with Petitioner's prior record and apparent anger-management problems were the main factors in sentencing.

Counsel testified Petitioner never asked him to contact any family members, and his usual practice is to have the client notify whoever he or she wants to be present. App. p. 339, 361-62. Counsel also testified he discussed a strategy for sentencing with Petitioner, and Petitioner "wished to speak more for himself feeling like he conveyed to the court better than I could and sort of talk for himself, I guess you'd say." App. p. 344. The PCR court found that testimony credible and found Counsel was not deficient. App. p. 381.

Petitioner presented the testimony of his father, Terrell Williams, at the evidentiary hearing who testified, at the time of the incident, Petitioner was in school, employed, had his own vehicle, and was "trying to better himself." App. p. 326. However, these are points Petitioner himself brought up during his trial testimony and during sentencing, so Mr. Williams' testimony would have been cumulative in any event. Petitioner repeatedly testified in the defense's case he had a job, and he was concerned about getting back on time to go to work that evening. App. p. 176-77, 179. In his statement to the trial judge during sentencing, Petitioner had a further opportunity to highlight his positive contributions to society, but he chose to raise them only in passing and opted instead to reiterate his claim of innocence, saying "I know for a fact I never assaulted this officer. I never even attempted to. I had no reason to. I had a job. I wanted to go back to college. I was student of the year in college." App. p. 234.

Significantly, Petitioner's prior record includes multiple charges and convictions indicating a history of assault and, in particular, conflict with law enforcement officials. App. p. 231. In August 2009, Petitioner was charged with assault on an officer and convicted of the lesser-included offense of assault on a government official or employee. App. pp. 231-32. A few months later in December 2009, Petitioner was charged with common-law robbery and

assault to inflict serious injury; he was convicted as to the assault charge. App. p. 232. Finally, in January 2012, Petitioner was charged with assault on a campus police officer and resisting a public officer and was convicted for habitual misdemeanor assault. App. p. 232. The trial judge specifically cited this history in imposing the maximum sentence, explaining, "It is evident... based upon your prior record which I can certainly take into consideration in sentencing, and based upon the facts that were elicited during the course of this trial, that there is some problem with anger or whatever. I hope that you learn from this." App. p. 237.

Thus, even if Counsel had prepared an extensive mitigation presentation regarding Petitioner's good character, it is clear the judge was concerned with Petitioner's repeated aggressive conduct as a response to anger and imposed the sentence accordingly. Therefore, Petitioner was not prejudiced by the lack of Mr. Williams' presence because his testimony, in addition to being cumulative, would not have mitigated the trial judge's stated concerns. Because Petitioner has failed to meet his burden of establishing both deficiency and prejudice, certiorari should be denied as to this issue.

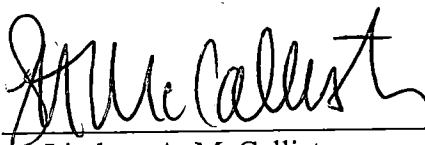
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

10/27, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas
The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2017-001820

DOMINIQUE CASH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

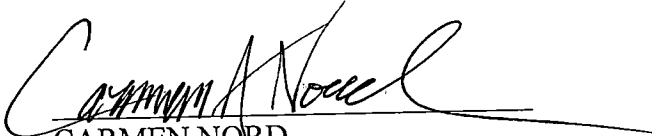
Respondent.

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:

**Ms. Joanna Katherine Delany
S.C. Commission on Indigent Defense
PO Box 11433
Appellate Defense
Columbia, SC 29211**

This 29th day of October, 2018


CARMEN NORD
Legal Assistant



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OCT 29 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 29 2018

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

Re: Dominique Cash v. State of South Carolina
Appellate Case No. 2017-001820
Lower Court Case No. 2013-CP-21-2304

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,

Lindsey McCallister
Assistant Attorney General
SC Bar No. 79054

LM/can
Enclosures

cc: Joanna K. Delany, Esquire (2 copies)