

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marlboro County

Honorable Roger E. Henderson, Circuit Court Judge

HARRY JAMES ROLLER,

RECEIVED
NOV 14 2018
S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000493

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

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Division of Appellate Defense
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ORIGINAL

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The PCR court correctly granted a belated direct appeal review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney failed to file the notice of appeal.6

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ISSUE PRESENTED

Did the PCR court correctly grant a belated direct appeal review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney failed to file the notice of appeal?

STATEMENT

On October 3, 2016, in McColl, Shameika Clark was working at the Dollar General. She had taken her break and was sitting in her car outside the store when she saw a man come out of the store “walking funny.” Then she saw a bunch of Gamecock tee shirts hanging out of the side of the man. She had just folded those tee shirts, so she recognized them. When she spoke to the man, he started running away. The cashier came out of the store and told Ms. Clark that that man had stolen those tee shirts. Ms. Clark then called 911. App. 55, ll. 1 – 25; App. 56, ll. 1 – App. 59, ll. 6.

On October 3, 2016, Sergeant Billy Stubbs with the McColl Police Department was at the local paint and body shop which was next door to the Dollar General in McColl. He saw a burgundy truck pull up and a man get out, who then walked into the Dollar General. About five or ten minutes later, the same man came running out of the store with an armful of merchandise. App. 42, ll. 7 -App. 43, ll. 25.

The man ran down the street into an apartment complex, although the officer had told him not to run. The man did not get back into the vehicle. Sergeant Stubbs then went into the apartment of Wayne Taylor, as residents of the complex had pointed to Taylor’s apartment as the one the man ran into. When Sergeant Stubbs checked that apartment, he found Roller in a small pantry on the back side of the kitchen. The tee shirts were found in the same pantry. App. 44, ll. 1 – App. 46, ll. 25.

Sergeant Stubbs talked to the man who denied taking the shirts until Sergeant Stubbs told him what he had seen. The officer then placed the man under arrest and took possession of the tee shirts. Roller was charged with shoplifting, and the shirts were returned to Dollar General. App. 47, ll. 1 – 24. The value of the shirts was estimated to be \$225. App. 48, ll. 1.

On November 29, 2016, the Marlboro County Grand jury indicted Roller on the charge of shoplifting as a third or subsequent offense. App. 128 – App. 129. On December 12, 2016, Roller proceeded to trial before the Honorable D. Craig Brown and a jury. Roller was represented by Michael Stephens, and the state was represented by Elizabeth R. Munnerlyn. App. 1.

In a pretrial motion, defense counsel told the court that he was stipulating that this shoplifting charge was a greater than third shoplifting charge for Roller. Counsel said specifically:

Yes, we stipulate in order for it not to come up before the jury.

App. 18, ll. 20 -21.

The state then told the court that she would like for that “stipulating” to include the dates of the three prior convictions for shoplifting. The solicitor then listed the prior dates as November 17, 2011; November 20, 2014; June 23, 2015. Defense counsel agreed with those dates. The judge then said that the prior shopliftings had been stipulated to. App. 19, ll. 1 – 25.

In her opening statement to the jury, the solicitor told the jury:

As you have also heard the offense was actually shoplifting of a value of goods or merchandise of a value of less than \$2000 with an enhancement which is he has these prior convictions for the same type of a charge as shoplifting. There will be a stipulation in this case.

App. 34, ll. 16 – 21.

Defense counsel immediately objected. The judge called both attorneys to the bench where a bench conference was held. App. 34, ll. 22 – App. 35, ll. 5. Later, the judge said he wanted to put on the record what happened at the sidebar. The judge said that at the side bar, defense counsel moved for a mistrial following the state’s statement about the prior convictions for

shoplifting. The judge denied the motion and asked if counsel wanted a curative instruction which counsel declined. App. 63, ll. 1 – App. 64, ll. 3.

The judge explained that he denied the mistrial motion because he told the jury “at the outset in his opening remarks” that what the attorneys told them in opening statements was not evidence in this case. He said he would tell them again before closing arguments. App. 64, ll. 1 – 12. Defense counsel renewed his motion for a mistrial and objected for the record. App. 65, ll. 8 – 13.

The jury returned a verdict of guilty. App. 88, ll. 24 – App. 89, ll. 24. The judge sentenced Roller to seven years incarceration. App. 95, ll. 19 – 25. Roller did not file an appeal for his conviction nor sentence. App. 125.

On March 15, 2017, Petitioner Roller filed an application for post-conviction relief (PCR). The state filed a return on July 15, 2017. App. 124. Roller filed an amended PCR application on August 24, 2017. Supp. App. An evidentiary hearing was held on January 16, 2018 before the Honorable Roger E. Henderson. Roller was represented by Lance S. Boozer, and the state was represented by Johnny E. James. App. 112.

At the PCR hearing, the state introduced an affidavit from trial counsel that he failed to discuss with Roller his right to appeal the verdict. Trial counsel stated in his affidavit that he did not file a notice of appeal for Roller. This affidavit was admitted as a state’s exhibit. App. 122. The state then conceded that Roller was entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). App. 116, ll. 1 – App. 117, ll. 5.

PCR counsel then stated that Roller would consent to having his remaining PCR allegations dismissed or be allowed to withdraw those other PCR claims. App. 117, ll. 10 – App.

118, ll. 2. After questioning Roller, the PCR judge allowed him to withdraw his PCR application except for those issues that concerned the direct appeal. App. 118, ll. 3 – App. 120, ll. 15.

On February 20, 2018, the PCR judge issued an order granting Roller a belated direct appeal, and denying all other allegations and dismissing them with prejudice. App. 124 – App. 127.

Roller's PCR counsel filed a notice of appeal. This petition follows accompanied by an initial brief of appellant pursuant to White v. State.

ARGUMENT

The PCR court correctly granted a belated direct appeal review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney failed to file the notice of appeal.

Trial counsel sent an affidavit to the court stating that he failed to file a notice of appeal following Petitioner Roller's trial. App. 122. At the PCR hearing, the state conceded that Roller should be granted a belated appeal. App. 116, ll. 25 – App. 117, ll. 5.

The PCR judge issued an order where he found that Roller did not knowingly and voluntarily waive his right to a direct appeal and granted him the right to a belated appeal according to White v. State, 263 S.C. 110, 108, S.E.2d 35 (1974). App. 124 – App. 127.

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The order of the PCR court granting the belated appeal should be affirmed.

CONCLUSION

Based on the above, the order of the PCR court granting a belated appeal should be affirmed.

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2018.

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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 Johnny Ellis James, Jr., 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 Harry James Roller, #276544, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 14th day of November, 2018.

LaNelle Cantey DuRant

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2018.

Scott Leverette (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028