THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2018-000646

Lewis Chisolm #196380,..... Appellant,

vs.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF CERTIORARI PURSUANT TO WHITE V. STATE

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QUESTION PRESENTED

Did the Lower Court err in not granting Petitioner a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E. 2d 35 (1974)?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Court of General Sessions. Petitioner was indicted during the September 2015 term, the Beaufort County Grand Jury indicated Applicant for criminal sexual conduct with a minor, second-degree. (2015-GS-07-1529). Jared Newman, Esq. represented Petitioner. Assistant Solicitor Julie Kate Keeney prosecuted the case. Applicant plead guilty as indicted before the Honorable Eugene C. Griffith, Jr. On November 9, 2015, Judge Griffith sentenced Petitioner to imprisonment for ten years.

A timely Notice of Appeal was filed. The South Carolina Court of Appeals affirmed Petitioner's conviction on June 6, 2016.

STATEMENT OF FACTS

Petitioner filed a Post-Conviction Relief Application on July 11, 2016 and later amended his application on May 30, 2017, alleging That trial Counsel was ineffective for the following additional reasons:

a. Failure to adequately investigate the case.

b. Failure to adequately explain the State's evidence against Applicant.

c. Failure to investigate and/or use the fact that the Police threatened to take his son away from him unless he admitted to the crime.

d. Failure to adequately investigate and use inconsistent descriptions by the victim of the alleged incident.

e. Failure to adequately present and argue the Motion to suppress the statements at pre-trial hearing. However, there is no evidence that a Pretrial Motion to Suppress was ever held.

3. That the Applicant is informed and believes that his guilty plea was not freely, voluntarily.

4. That the Applicant is informed and believes that he lacked sufficient knowledge to enter the plea knowingly or intelligently.

A Jackson v. Denno, 378 U.S. 368 (1964), hearing was held prior to trial. At issue was a written statement taken after the Petitioner had contacted an attorney. (App. p. 13, lines 8-11) The investigator, John Kelleher, testified at the hearing. He testified that Petitioner was read his Miranda rights (App. p. 16, lines 5-9) Investigator Kelleher testified that he remembers the Petitioner saying that he was going to contact Bruce Marshall, an attorney. On the 18th of September, 2013, he was contacted by Mr. Marshall, via telephone. Investigator Kelleher stated that he was informed that Mr. Marshall was not representing Petitioner, but that he was requesting a meeting with the Detective and Petitioner. He did in fact meet with Mr. Marshall and the Petitioner. (App. p. 24, lines 1-23)

Detective Kelleher testified that he went to the Petitioner's residence and at that time, the Petitioner gave him a description of what happened and confessed to the crime. (App. p. 30, lines 1-25, p. 31, lines 1-6)

Counsel makes his argument that Petitioner did invoke his right to Counsel when he brought counsel to the second interview. That Officer Kelleher later initiated the investigative conversation on September 19, 2013 which produced the written statement that implicated the Petitioner. (App. p. 55, lines 11-24)

The Court finds that the first two statements were given freely and voluntarily after warning and that the Petitioner waived his rights (App. p. 57, lines 13-15) The Court denies the Motion to Quash the statement. (App. p. 76, lines 1-4) This is based upon the fact that he was not in custody at any time. That there were no warrants at the time of the questioning therefore there was no threat to be carried out regarding arresting the Petitioner. That the Detective stated that he was not going to try to take the son and that he didn't want to get DSS involved and that the Detective never threatened the Petitioner with anything. (App. p. 77, lines 8-24)
The Court found that the record established that Petitioner did receive a full Appellate review of his guilty plea conviction. The Court found that the Petitioner was not deprived of his right to a Direct Appeal and that Plea Counsel was not ineffective in his representation on Appeal. (App. p. 201, 202) Plea counsel states that he did speak with Petitioner after the plea about an Appeal (App. p. 158, lines 16-18) Plea Counsel did state that he did in fact filed an Appeal for the Petitioner and that he did it as *pro se*. That his contractual relationship with the Petitioner did not include an Appeal. (App. p. 159, lines 11-17) He also indicated that he filled out an Affidavit of Indigency, had is signed and filed with the Clerk of Court and the Court of Appeals sent a copy to Appellate Defense. (App. p. 159, lines 16-23)

Plea Counsel testified regarding a letter he received from the Court requiring an explanation pursuant to Rule 203. (App. p. 160, lines 1-11) It was his understanding that the Appeal was dismissed for failure to provide an explanation pursuant to the Rule (App. p. 160,

lines 12-19) Counsel does admit that he had difficulty understanding the form so it was his guess that the Petitioner, out of frustration never sent this form in. (App. p. 161, lines 8-12)

ARGUMENT

Did the Lower Court err in not granting Petitioner a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E. 2d 35 (1974)?

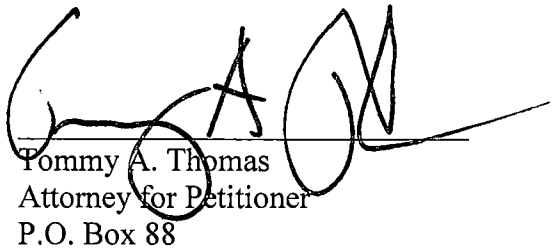
In the absence of an intelligent waiver by the Petitioner, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State, See Rule 227 (g) (1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

The appropriate scope of review of the Court is that any evidence of probative value is sufficient to uphold the PCR Judge's finds. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The PCR Judge's ruling is not supported by Petitioner testimony or the testimony of the Detective. Therefore, the evidence does not support the PCR Judge's conclusion that petitioner is not entitled to a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974).

In addition, counsel failed to file an explanation as required by Rule 203. Plea Counsel testified at PCR that there were appellate issues. (App. p. 158, lines 10-12)

CONCLUSION

Therefore, based upon the foregoing the Court should grant the Petition and consider Petitioner's belated appeal.



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