

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Frank R. Addy, Circuit Court Judge

MICHAEL A. RICHARDSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000964

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL

RECEIVED
JAN 09 2019

S.C. SUPREME COURT

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

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.....6

CONCLUSION.....8

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

Quincey Whitner worked with the Greenville County Sheriff's Office in an undercover capacity making undercover drug buys throughout Greenville County. He would approach known drug dealers and try to buy drugs. App. 43, ll. 21 – App. 45, ll. 5. On December 11, 2015, he was working in the area known as Buncombe and Shaw. App. 45, ll. 6 – 24.

Around eight o'clock that evening, Whitner was near the Super Safe Mart when he saw a couple of men "loitering" around the area. He knew one of them from previous encounters who was Alrad Cobbs. Deputy Whitner called Cobbs to Whitner's car and told Cobbs that Whitner was "looking to get twenty hard." "Twenty hard" was the street terminology for crack cocaine. App. 46, ll. 5 – App. 47, ll.

According to Whitner, Cobbs then yelled to Richardson: "Hey! I need a rock." "Rock" was also street terminology for a piece of crack. App. 47, ll. 15 – App. 48, ll. 4. Whitner said that he saw Cobbs hand the twenty dollars to Richardson which Cobbs had received from Whitner. Whitner's story was that he then saw the two men do a hand-to-hand transaction. Then Cobbs brought a piece of white rock-like substance to Whitner which Whitner believed to be crack cocaine based on Whitner's experience. Whitner then called other deputies who then proceeded to arrest Cobbs and Richardson. App. 49, ll. 1 – 23; App. 51, ll. 1 – App. 52, ll. 7.

On August 23, 2016, the Greenville County Grand jury indicted Petitioner Richardson on the charges of distribution of crack cocaine and conspiracy. App. 280 – App. 287. On January 18, 2017, Petitioner Richardson proceeded to trial before the Honorable Roger Henderson and a jury. Richardson was represented by Stuart Sarratt, and the state was represented by Walker Miller. App. 1.

Richardson's co-defendant, Alrad Cobbs, testified at trial as a state's witness against Richardson. According to Cobbs, he had pled guilty to the distribution charge from the December 11, 2015 incident where he said that he and Richardson had sold drugs to the undercover officer. App. 116, ll. 1 – 25. Cobbs described how he took the money from the officer who approached Cobbs asking for a "twenty hard." Cobbs then took the money to Richardson who allegedly gave drugs to Cobbs who then delivered the drugs to the officer. App. 117, ll. 1 – 22.

Sean Collins, the drug analyst with the Greenville County Forensics, Crime Lab Report, testified that he analyzed the drugs in this case. He testified that the drug was cocaine base with a weight of 0.12 grams. App. 106, ll. 16 – App. 107, ll. 2; App. 111, ll. 1 – App. 113, ll. 23.

Following jury deliberations and before the verdict was announced, the judge said to the alternate juror:

COURT: Before I ask about the verdict, Mr. Thomas David (Alternate). All right. You are----I should actually have excluded you from the jury pool when you went back in. but did you participate in the deliberation of the verdict?

JUROR: No.

COURT: Okay. So you did not?

JUROR: No sir.

COURT: Okay. All right, sir.

App. 190, ll. 14 – 25.

The jury found Petitioner Richardson guilty of distribution of crack cocaine and conspiracy. App. 191, ll. 1 – 25. Following the verdict, when the judge recognized defense counsel, counsel renewed his objections and moved the court for a new trial. Counsel said:

I understand we didn't poll the jury and the alternate indicated he did not participate in deliberations. I feel that I have an obligation to my client to make a motion for a new trial based on that. And I renew my directed verdict.

App. 194, ll. 3 – 15.

The judge denied the motions, including the motion for a new trial “with regard to the alternate being in the jury room.” The judge explained that the alternate had clearly said on the record that he did not participate in deliberations. Then the judge spoke of an “older case” where the alternate was allowed to go in the jury room and actually participated in deliberations for a while. However, according to the judge, the Supreme Court found no reversible error because of a curative instruction. App. 194, ll. 16 -App. 195, ll. 6.

The judge sentenced Richardson to five years on the conspiracy charge and to twenty years on the distribution of crack charge third offense. The sentences were to run concurrent. App. 207, ll. 13 – 25. Richardson did not appeal his convictions nor sentences. App. 273.

On June 8, 2017, Petitioner Richardson filed a PCR application. The state filed a return on October 20, 2017. App. 272. An evidentiary hearing was held on February 23, 2018 before the Honorable Frank R. Addy. Richardson was represented by Rodney W. Richey, and the state was represented by Deshawn H. Mitchell. App. 228.

Petitioner Richardson testified at the hearing that he was an innocent bystander during this incident as he had gone into the store just to get change. App. 249, ll. 1 – 14. Richardson asked his attorney to file an appeal for him following the trial but he did not get an appeal. App. 247, ll. 1 -23. Richardson said he was asking the PCR court to grant him a direct appeal. App. 253, ll. 1 – 13.

One of Richardson's issues was that his attorney did not object to the jury misconduct when the alternate juror was allowed into the jury room during jury deliberations. He was still

pursuing that issue at the PCR hearing. He testified that his attorney should have asked for a mistrial due to the juror misconduct. App. 273; App. 253, ll. 14 – 19.

Trial counsel testified at the PCR hearing that he did not file a notice of appeal although he knew that Richardson wanted an appeal. Counsel said he just failed to do it. App. 242, ll. 13 – 21; App. 236, ll. 10 – 13. The PCR judge asked counsel if he saw any issue with the alternate juror staying in the jury room during jury deliberations. Counsel replied that it was very unusual. The judge agreed and said: “I don’ t know that I’ve ever heard of that happening before.” App. 244, ll. 20 – App. 245, ll. 11.

Trial counsel admitted that he probably should have moved for a mistrial. But he did not since the alternate told the court that he did not take part in the deliberations. Counsel said: “And I felt that what else could I do at that point.” App. 245, ll. 12 – 25.

The PCR judge issued an order on May 7, 2018 denying Petitioner Richardson’s PCR application and dismissing it with prejudice with the exception of a belated direct appeal. The judge granted Richardson a belated review of his conviction pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

PCR counsel filed a notice of appeal. This petition follows accompanied by an initial brief pursuant to White v. State, id.

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 testified and admitted that he did not file a notice of appeal although he acknowledged that Petitioner Richardson asked for an appeal. App. 236, ll. 10 – App. 238, ll. 7. At the PCR hearing, the state conceded that Richardson should be granted a belated appeal. App.266, ll. 4 – 8.

The PCR judge issued an order where he found that Richardson 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. App. 272- App. 279.

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).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, supra; Butler v. State, supra.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable

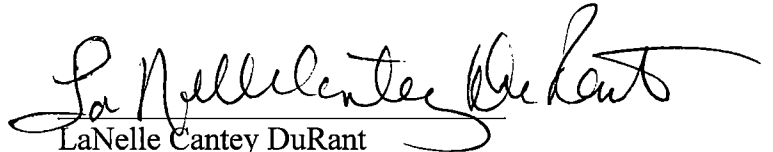
professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Frank R. Addy, Circuit Court Judge

MICHAEL A. RICHARDSON,

PETITIONER

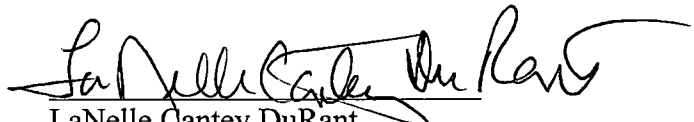
V.

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 Megan Harrigan Jameson, 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 Michael A. Richardson, #268870, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of January, 2019.


LaNelle Qantey DuRant
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 9th day of January, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.