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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County

Honorable Frank R. Addy, Circuit Court Judge

LEVITICUS DONYASKI YOUNG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001120

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to file a notice of intent to appeal?

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress surveillance camera video that only showed the front of the business where the crimes were committed?

STATEMENT

In March of 2015, the Greenville County Grand Jury indicted Petitioner, Leviticus Donyaski Young, for assault and battery first degree, armed robbery and possession of a weapon during the commission of a violent crime, indictments #2014-GS-23-8396, 8398. The indictment has a 2014 number but on one side 2014 is marked out and replaced with 2015. March 10, 2015, is stamped on the other side of the indictment. The witness is listed as Alvin King with the Greenville County Sheriff's Office. The date listed under the witness's name is July 18, 2014. It is unclear how this witness was involved in the case other than to have purportedly testified before the grand jury on July 18, 2014, with the grand jury not true billing the indictment until March of 2015. There was no objection to the irregularities contained on the face of the indictment at trial or at the PCR hearing.

On January 11, 2017, Petitioner proceeded to jury trial before the Honorable Robin B. Stilwell on the assault and battery and armed robbery charges only. Lauren Taylor represented Petitioner at trial. Mark Moyer prosecuted the case. The jury returned verdicts of guilty and Judge Stilwell sentenced Petitioner to eighteen (18) years for armed robbery and ten (10) years concurrent for assault and battery first degree. Petitioner filed a *pro se* notice of intent to appeal on January 26, 2017. The South Carolina Court of Appeal sent a deficiency letter to counsel on February 8, 2017. On May 5, 2017, the South Carolina Court of Appeals dismissed the appeal for failure to properly serve the notice.

On August 7, 2017, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on March 9, 2018. On April 19, 2018, an evidentiary hearing was held before the Honorable Frank Addy. R. Mills Ariail, Jr. represented Petitioner at the PCR hearing. Kelly Oppenheimer represented the State. In a written order signed May 31, 2018, and filed June 6,

2018, Judge Addy denied relief and dismissed the application. A timely notice of intent to appeal was served on June 13, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to file a notice of intent to appeal.

On January 12, 2017, a jury found Petitioner guilty. Petitioner filed a *pro se* notice of intent to appeal on January 26, 2017. The South Carolina Court of Appeals sent a deficiency letter to counsel on February 8, 2017. On May 5, 2017, the South Carolina Court of Appeals dismissed the appeal for failure to properly serve the notice. In the PCR application filed on August 7, 2017, Petitioner noted that trial counsel failed to file a notice of intent to appeal. (App. p. 333). During the PCR hearing when asked if he asked trial counsel to file a notice of intent to appeal, Petitioner answered, “I – the—the day—the morning I came up here to pick my jury, my trial started that same day. And the next day, my trial proceeded and I got sentenced that day. That afternoon, I told – I – I addressed her and I told her – I asked her was – was I appealing – was I going to be able to appeal. She said – she said yes. She said, ‘Give me a second and I’ll be out there to talk to you.’ Ms. Taylor never showed up back there to talk to me. I never seen Ms. Taylor again. This is – today is my first time seeing her since I got – since I got my time.” (App. p. 363, lines 5-13).

When trial counsel was asked at the PCR hearing if she discussed with Petitioner his right to appeal she answered, “I did.” (App. p. 371, lines 9). When questioned on cross-examination, however, about having a discussion with Petitioner about his right to appeal, trial counsel answered, “He talked to me about if he could appeal like the day of the trial, before the trial started.” (App. p. 375, lines 12-13). She then testified, “After the trial, we did not have a discussion about it.” (App. p. 375, lines 15-16). Trial counsel further testified, “I – if my memory serves me right, I was going to speak to him, and he turned around and walked away.”

(App. p. 375, lines 18-20). When asked if Petitioner asked her to file a notice of intent to appeal, trial counsel answered, "He did not to my recollection." (App. p. 371, line 11).

In the order of dismissal the PCR judge wrote, "She [trial counsel] further testified that she and Applicant discussed his right to appeal, but Applicant never asked her to appeal. She further testified she did not see any meritorious issues which could have been raised on appeal." (App. p. 389). Trial counsel testified that Petitioner asked about an appeal before the trial started but after the trial, she did not discuss his right to appeal. Trial counsel did not testify that she and Petitioner discussed his right to appeal after the trial.

Later in the order of dismissal the PCR judge wrote:

Here, Applicant testified he and Counsel did not discuss his right to appeal, but he did ask Counsel to appeal on his behalf. On the other hand, Counsel testified she and Applicant did discuss his right to appeal, and Applicant never asked her to appeal. This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Because Counsel and Applicant did consult regarding Applicant's right to appeal and Applicant never requested Counsel to file an appeal, this Court finds Applicant has failed to establish any deficiency on the part of Counsel. Additionally, having reviewed the trial transcript, the Court is unable to find any meritorious issue which could have been raised on appeal. Therefore, any appeal would have been fruitless. Accordingly, this allegation is dismissed with prejudice.

(App. p. 391). The PCR judge erred. The discussion trial counsel had with Petitioner about his right to appeal took place on the day the trial started. As stated above, trial counsel testified that Petitioner asked about an appeal before the trial started **but after the trial, she did not discuss his right to appeal.** Trial counsel was ineffective in failing to discuss with Petitioner, after trial, his right to appeal. Petitioner is entitled to a belated appeal.

In Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010), the South Carolina Supreme Court wrote:

Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374


(2008) (citation omitted) (Turner I); see also Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (Turner II). “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, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).” Turner, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted).¹

Trial counsel failed to make certain that Petitioner was fully aware of his right to appeal and failed to advise Petitioner that he only had ten days to file and serve the notice of intent to appeal. Petitioner’s questions about an appeal before the trial started were a clear indication that, if he was convicted at trial, Petitioner wanted an appeal. Petitioner requested an appeal and trial counsel failed to file and serve the notice of intent to appeal. Petitioner is entitled to a belated appeal without showing the existence of appealable issues. See Fleming v. State, 399 S.C. 380, 731 S.E.2d 889 (2012) (“However, when a criminal defendant requests an appeal, but counsel fails to file an appeal, counsel is deemed deficient. In such a case, the defendant is entitled to a belated appeal without showing the appeal would likely have had merit. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Rodriquez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969). Accordingly, the PCR judge erred in finding petitioner was required to show there were appealable issues in order to support his allegation that he was denied his right to an appeal from the probation revocation.”).

There is no evidence in the record that trial counsel discussed Petitioner’s right to appeal after he was convicted at trial. The only discussion about an appeal took place on the day the trial started. There is no evidence in the record that Petitioner waived his right to a direct appeal. Petitioner is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

CONCLUSION

Based on the above argument this Court should grant Petitioner a belated appeal.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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LEVITICUS DONYASKI YOUNG,

PETITIONER


V.

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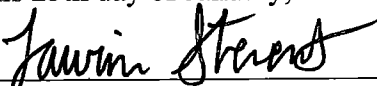
RESPONDENT

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 Kelly Oppenheimer, 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 Leviticus Donyaski Young, #311607, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 25th day of January, 2019.


Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 25th day of January, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.