

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
The Honorable Frank R. Addy, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001120

LEVITICUS DONYASKI YOUNG,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
S.C. Bar No. 100231
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ATTORNEYS FOR RESPONDENT

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ISSUES PRESENTED

The post-conviction relief judge erred in finding trial counsel was not ineffective for failing to file a notice of intent to appeal.

STATEMENT OF THE CASE

Petitioner is presently confined by the South Carolina Department of Corrections pursuant to orders of commitment by the Greenville County Clerk of Court. Petitioner was indicted at March 2015 term of the Beaufort County Grand Jury for first-degree assault and battery, armed robbery, and possession of a weapon during the commission of a violent crime. (2014-GS-23-8396, 8398). On January 11, 2017, Petitioner proceeded to a jury trial before the Honorable Robin G. Stilwell on the assault and battery and armed robbery charges. Lauren Taylor, Esquire, represented Petitioner; Assistant Solicitor Mark Moyer, Esquire, represented the State. The jury returned verdicts of guilty on both charges. Judge Stilwell sentenced Petitioner to eighteen years' incarceration for armed robbery and ten years' incarcerations for first-degree assault and battery, with both sentences to run concurrently. Petitioner filed a pro se notice of intent to appeal on January 26, 2017. The South Carolina Court of Appeals sent a deficient letter to counsel on February 8, 2017. On May 5, 2017, the South Carolina Court of Appeals dismissed the appeal for failure to properly service the notice.

On August 7, 2017, Petitioner filed an application for post-conviction relief (PCR), alleging he was being held unlawfully for the following reasons:

Ineffective Assistance of Counsel

- a. Trial Counsel ineffective in failing to move the court to quash the indictment before the jury was sworn on the grounds that the indictment failed to charge criminal liability.
- b. Trial Counsel ineffective in failing to move the court to quash the indictment before the jury rendered its verdict.
- c. Trial Counsel ineffective in failing to raise a lack of subject matter jurisdiction claim.

On April 19, 2018, an evidentiary hearing was held before the Honorable Frank Addy. R. Mills Ariail, Jr., Esquire, represented Petitioner; Kelly Oppenheimer, Esquire, represented the

State. At the hearing, Petitioner testified he morning prior to trial, he asked trial counsel whether he would be able to appeal the result of the trial. He further testified he never spoke with trial counsel after the verdict about appealing. Trial counsel testified she spoke with Petitioner prior to trial about the potential of appealing his case, but did not speak with him after the verdict and that he appeared “not satisfied with the outcome.”

In a written order 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. Petitioner filed his Petition for Writ of Certiorari and Appendix on January 25, 2019. This Return on behalf of the State now follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Trial counsel must ensure a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. When counsel fails to file a notice of an appeal, counsel is deemed deficient without the defendant being required to show that such an appeal would likely have merit. See Fleming v. State, 399 S.C. 380, 381, 731 S.E.2d 889 (Mem) (2012).

ARGUMENT

The post-conviction relief judge erred in finding trial counsel was not ineffective for failing to file a notice of intent to appeal.

Petitioner argues the PCR judge erred in finding trial counsel was not ineffective in failing to file a notice of intent to appeal. The State agrees with this allegation of error. As noted by Petitioner, trial counsel did not discuss his right to an appeal with him after his trial. Both Petitioner and trial counsel testified they spoke only about the possibility of an appeal before trial, and never spoke after the verdict. Further, trial counsel observed that Petitioner appeared unhappy with the result. Accordingly, petitioner is entitled to a belated appeal pursuant to White v. State.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

BY: 

WILLIAM F. SCHUMACHER, IV
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ATTORNEYS FOR RESPONDENT

May 8, 2019.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2018-001120

LEVITICUS DONYASKI YOUNG,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

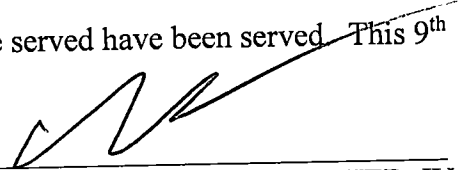
Respondent.

PROOF OF SERVICE

I, William F. Schumacher, IV, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 9th day of May, 2019.


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ALAN WILSON
ATTORNEY GENERAL

May 9, 2019

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MAY 09 2019

S.C. SUPREME CC

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

Re: Leviticus D. Young v. State of South Carolina
Appellate Case No. 2018-001120
Lower Court Case No. 2017-CP-23-5236

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
SC Bar No. 100231

WFS/jacc

cc: Kathrine H. Hudgins, Esquire

Victim Advocacy Division (without enclosure)