

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Larry B. Hyman, Circuit Court Judge

CHRISTOPHER HAMPTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002374

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

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S.C. SUPREME COURT

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The second PCR judge ruled properly in granting petitioner’s
request for a belated PCR appeal per Austin v. State, 305 S.C. 453,
409 S.E.2d 395 (1991).3

QUESTION II

The first and second PCR judges ruled properly in granting
petitioner’s request for a belated direct appeal per White v. State,
263 SC 110, 208 S.E.2d 35 (1974).4

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ISSUES PRESENTED

- 1.) The second PCR judge ruled properly in granting petitioner's request for a belated PCR appeal per Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).
- 2.) The first and second PCR judges ruled properly in granting petitioner's request for a belated direct appeal per White v. State, 263 SC 110, 208 S.E.2d 35 (1974).

STATEMENT OF THE CASE

Petitioner pled guilty to murder on April 3, 2006, at the Spartanburg County General Sessions Court before Judge John C. Few and was sentenced to life imprisonment. App. 1-44. Inasmuch as trial counsel passed away two days after the guilty plea proceeding, the filing of a notice of appeal out of time was submitted, but the South Carolina Court of Appeals denied and dismissed it on May 17, 2006.

On September 15, 2006, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. In response to the PCR action, a PCR hearing was convened on September 17, 2007, at the Spartanburg County Courthouse before Judge Roger L. Couch. On November 2, 2007, Judge Couch signed an Order of Dismissal, which was filed on November 5, 2007, denying petitioner's allegations of ineffective assistance of counsel in the case, but granting him a belated direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d (1974). App. 46 – 59. However, because PCR counsel failed to appeal Judge Couch's Order of Dismissal per the first PCR action, petitioner did not enjoy the benefit of an appeal of his first PCR action or his belated direct appeal that was granted to him by the first PCR judge.

On April 15, 2014, petitioner filed a PCR application, requesting a belated appeal of his first PCR action. App. 60 – 79. A Return was filed by the Respondent on May 8, 2015. App. 80-85. A second PCR hearing was held on November 9, 2015 before Judge Larry B. Hyman, Junior. App 87-89. At the second PCR hearing, petitioner was present and represented by J. Brandt Rucker, and Assistant Attorney General Alicia A. Olive appeared on behalf of the State. On October 4, 2017, Judge Hyman granted petitioner's request for a belated appeal of his first PCR action per Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 91-99.

Thereafter, petitioner's first PCR hearing was successfully reconstructed via a hearing held on November 26, 2018, at the Spartanburg County Courthouse before Judge Couch. App. 101-170. The undersigned counsel was present and represented petitioner at the reconstruction hearing and Assistant Attorney General Jordan Cox appeared on behalf of the state.

Petitioner appealed. This petition follows.

QUESTION I

The second PCR judge ruled properly in granting petitioner's request for a belated PCR appeal per Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

At the second PCR hearing, petitioner asserted his request in effect for a belated appeal of his first PCR action. The second PCR judge granted relief on this basis after finding that petitioner's first PCR counsel did not file an appeal after the Order was issued denying relief on the first PCR action. App. 87, 1.1-p. 89, 1.25. Petitioner has a right to appellate review of the denial of his PCR action where PCR counsel failed to appeal the same. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1998). The second PCR judge ruled as follows :

A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review, or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. See King, 308 S.C. at 348, 417 S.E.2d at 868. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and this Court will review whether the petitioner was prejudiced by the failure to obtain appellate review. Id.; see King, 308 S.C. at 349, 417 S.E.2d at 868 (outlining the procedure used to seek review pursuant to Austin v. State); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992).

Applicant also claims that he was not given an opportunity to appeal the Order of Dismissal of his PCR claim. The Applicant testified that his PCR attorney, Mr. McGurck, failed to appeal the Order of Dismissal of the Applicant's application

despite the Applicant repeatedly requesting him to do so. This testimony is uncontradicted as Mr. McGurck did not appear at this hearing, and the State offered no evidence against the Applicant. It appears from the record and the testimony, that the Applicant is entitled to an appeal. 96-98.

The second PCR judge ruled properly in granting petitioner's request for a belated PCR appeal in the case.

QUESTION II

The first and second PCR judges ruled properly in granting petitioner's request for a belated direct appeal per *White v. State*, 263 SC 110, 208 S.E.2d 35 (1974).

Petitioner's trial counsel died two days after petitioner pled guilty to murder on April 3, 2006, and therefore, could not file a notice of appeal. However, a notice of appeal was filed out of time subsequently, but the South Carolina Court of Appeals denied the motion. The request for a belated direct appeal was raised at petitioner's first PCR hearing. The first PCR judge granted petitioner's request for a belated direct appeal and the second PCR judge did not disturb the first PCR judge's grant of a belated direct appeal to petitioner. The first PCR judge ruled on the issue as follows:

Direct Appeal Issue

At the hearing, the Applicant alleged that he was denied effective assistance of counsel when trial counsel failed to inform him of his right to appeal his guilty plea. The State consented to allow the Applicant to file his belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

This Court agrees that the allegation that the Applicant was denied a direct appeal is meritorious. 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). 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*.¹ *White*, Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily

waive their 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 Court affirmatively finds that the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that the Applicant is entitled to a belated review of his conviction(s). The Applicant's lack of a direct appeal can be remedied by a petition for belated review pursuant to White v. State. App. 53.

The second PCR judge agreed that petitioner was due a belated direct and ruled as follows:

The Applicant presented evidence through his testimony. Applicant testified that he was seeking appellate review of his original guilty plea, and was seeking appellate review of his denial of PCR. Applicant testified that because of the death of his plea counsel, Michael Bartosh, he was never informed of his right to appeal, the deadline to appeal, and the time limits for such appeal. The Applicant testified that Mr. Bartosh and he were supposed to meet in the time after his guilty plea, but because Mr. Bartosh died, he was not able to go over his options with him. He testified that he would have appealed his guilty plea had he been given the opportunity. The review of the plea transcript indicates that the Applicant was not informed of his right to appeal the guilty plea on the record, that there is an exceptional circumstance in this case in that Mr. Bartosh passed away before the meeting with the Applicant regarding a potential appeal and the State produced no evidence that the Applicant had knowledge of his rights regarding an appeal or wished to waive his appeal rights. There is simply no contradictory evidence to the Applicant's assertions App. 96-97.

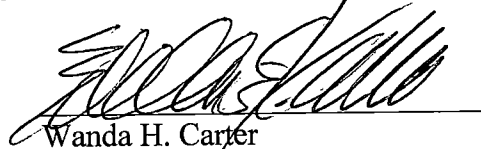
Trial counsel has a duty to make certain a client is fully aware of the right to appeal and ascertain whether his client desires an appeal, and then file an appeal if the client wishes to appeal. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991). If after an indigent client requesting an appeal the client wishes to appeal,

then trial counsel must serve and file a notice of appeal. In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E. 483 (1991). Here, trial counsel could not (due to death) perform his duty with respect to petitioner's appellate rights. A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975).

Petitioner desired an appeal of his case and did not voluntarily waive his right to an appeal.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court would grant the petition and allow full briefing on the above-raised issues.)



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Larry B. Hyman, Circuit Court Judge

CHRISTOPHER HAMPTON,

PETITIONER

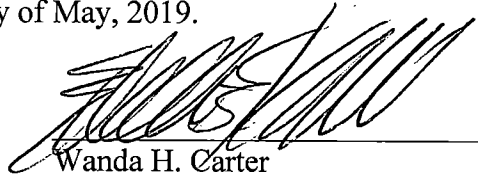
V.

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 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 Christopher Hampton, #314697, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of May, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of May, 2019.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.