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Arthur K. Aiken

A. Bea Hightower

September 20, 2019

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: James Williams #308816 v. State of South Carolina
Civil Action No.: 2018-CP-32-01656

Dear Mr. Shearouse:

I am appointed counsel for the Applicant, James Williams, in the above captioned post-conviction relief case. I have enclosed an original and one (1) copy of a Notice of Appeal for this case. Please file the original and return the file stamped copy in the enclosed SASE.

By copy of this letter with the filing enclosed, I have filed the filing with the Clerk of the Lexington County Court of Common Pleas, I have also served the filing on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,


Arthur K. Aiken
art@aikenandhightower.com

cc: Clerk, Lexington County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
James Williams (w/enclosures)

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-01656

James Williams #308816.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order filed on July 26, 2019 in this case to the extent that it denied relief on some of Appellant's grounds for relief. The Order filed July 26, 2019 also granted Appellant a belated direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and Appellant intends to present his direct appeal issues in this appeal. Respondent filed a timely Motion under Rule 59(e) SCRCP, and Appellant received written notice of the Order denying Respondent's Rule 59(e) SCRCP Motion on August 21, 2019. A copy of the Order appealed from is attached.

September 20, 2019



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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-01656

James Williams #308816.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

PROOF OF SERVICE AND FILING

I certify that, on September 20, 2019, I served and filed the Notice of Appeal in this case
by mailing copies of the Notice to:

South Carolina Attorney General's Office
Assistant Attorney General Johnny E. James, Jr.
PO Box 11549
Columbia, SC 29211

and

The Honorable Lisa M. Comer
Lexington County Clerk of Court
205 E. Main Street
Lexington, SC 29072

SIGNATURE ON THE FOLLOWING PAGE



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Columbia, SC
September 20, 2019

ORIGINAL

FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

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<p>James Williams #308816, Applicant, vs. State of South Carolina, Respondent.</p>	<p>Case No.: 2018-CP-32-01656</p> <p>ORDER</p>
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INTRODUCTION

This is a post-conviction relief action brought by James Williams (“Applicant”), who is currently incarcerated in the South Carolina Department of Corrections under Orders of Commitment issuing from Lexington County, South Carolina. The State of South Carolina (“Respondent”) produced for this court all records concerning Applicant’s convictions and sentences as well as a complete transcript of Applicant’s plea. On April 5, 2019, this court held an evidentiary hearing on the matter. Applicant was represented by Arthur K. Aiken, and Respondent was represented by Johnny E. James, Jr. Applicant and his plea counsel, Stephen R. Story, Jr., testified at the hearing.

This court has reviewed all the records concerning Applicant’s convictions and sentences as well as the transcript of Applicant’s guilty plea hearing and has considered all the testimony presented at the April 5, 2019 hearing. This review and consideration convinces this court that none of Applicant’s assertions of ineffective assistance of counsel have any merit except for Applicant’s claim that the circumstances of his plea and lack of appeal were such that he is entitled to a belated, direct appeal under White v. State, 263 S.C. 110, 208

S.E.2d 35 (1974). As explained more fully in the following sections of this Order, this court denies, in part, and grants, in part, Applicant's Application for Post-Conviction relief and orders that Applicant be given the right to a belated, direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

FACTS

I. The allegations in the Application

In his Amended Application, Applicant alleges two grounds of ineffective assistance of counsel. First, Applicant alleges that he had a due process right to allocution or the right to speak prior to the imposition of his sentence following his plea. Ashe v. North Carolina, 586 F.2d 334 (4th Cir. 1978). Applicant's guilty plea judge allegedly deprived him of that right despite twice assuring him that he would be allowed to speak prior to his sentencing. (Tr. p. 4, ll. 11-15 and Tr. p. 18, ll. 7-9). Applicant's plea counsel allegedly provided Applicant deficient representation by not objecting to the court's failure to give Applicant an opportunity to speak prior to sentencing. Applicant further alleged that Applicant's plea counsel provided Applicant with deficient representation by failing to move to withdraw Applicant's plea when the plea court did not give Applicant any opportunity to speak prior to his sentencing. Applicant claims he suffered prejudice as a result of these instances of deficient representation.

Second, Applicant alleges that his plea counsel failed to give him any advice about his right to a direct appeal from his guilty plea. Applicant argues, therefore, that he could not have made a knowing and intelligent waiver of his right to a direct appeal from his guilty plea.

For the reasons set forth below, the court concludes that Applicant is entitled to a belated, direct Appeal from his guilty plea under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). As such, the court reasons that Applicant's allegation regarding allocution should be raised in his

appeal. However, the court concludes that plea counsel was not deficient and Applicant's request for relief must be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The test for ineffective assistance of counsel

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. at 2065). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. at 2065. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698).

II. Purported failure to object to denial of the right to allocution and failure to move to withdraw plea.

According to the transcript of the guilty plea hearing held on June 20, 2017, the only instance where anyone on the record referenced to allowing the Applicant an opportunity to

speaking was when the plea judge stated, "Mr. Williams, before I give you an opportunity to address the Court, I need to also hear from probation about the community service." Plea Transcript, 18:7-10. It is clear that the court subsequently issued its sentence prior to allowing Applicant an opportunity to speak. However, subsequent to the plea and sentencing, the plea judge brought Applicant back into the courtroom, on the record, to allow Applicant an opportunity to address the court. Plea Transcript, 21:1 – 22:4. When given this opportunity, Applicant stated, "Uhm, I don't have anything to say." Plea Transcript 21:8. When asked if he was sure, he provided, "Mm-hmm. Yes, ma'am." Plea Transcript 21:0-10. During the evidentiary hearing before this court, plea counsel testified that Applicant did not indicate that he wished to speak to the court. Plea counsel recalled that he believed the plea judge brought up the allocution issue and brought him before the court to be allowed to speak. He also recalled that Applicant declined to address the court when asked if he would like to do so.

The court finds plea counsel's testimony to be credible. Based on a review of the plea transcript and the testimony of the parties at the evidentiary hearing, the court determines that Applicant failed to prove that his plea counsel was ineffective. Even if the court were to find plea counsel ineffective, Applicant was not prejudiced because the plea judge brought Applicant back to the courtroom before he was transported to South Carolina Department of Corrections and allowed him the opportunity to speak, but he declined to do so. However for the reasons set forth below, the court finds that Applicant should be allowed to present the allocution issue on appeal.

III. Alleged failure to advise Williams about his appellate rights.

Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal; or (2) that

this particular defendant reasonably demonstrated to counsel that he or she was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). “Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.” Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

“Generally, there is not constitutional deprivation in not being advised of the right to appeal from a guilty plea absent extraordinary circumstances.” S.C. Post-Conviction Relief Manual, 3rd Edition, at p. 48. “Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal or when the defendant reasonably demonstrated an interest in appealing . . . , there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.” Id. (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)).

The Fourth Circuit Court of Appeals “held that counsel has a duty to consult with a defendant regarding an appeal from a guilty plea, which is distinct from the generic obligation to inform a defendant of that right.” Frazer v. South Carolina, 430 F.3d 696, 707 (4th Cir. 2005). Thus, plea counsel can be deficient and a defendant prejudiced if plea counsel fails to consult with the defendant regarding an appeal if the defendant expressed some interest in appealing. “Although counsel need not press particular issues of the defendant's choosing, by implication counsel must consult with the defendant to identify whether there are any meritorious issues to appeal.” Frazer, at 705 (citing Jones v. Barnes, 463 U.S. 745, 752 (1983)).

An applicant who meets the burden of showing that he or she did not knowingly and voluntarily waive his or her right to a direct appeal of his or her conviction is entitled to a belated appeal. Wilson v. State, 348 S.C. 215, 218, 599 S.E.2d 581, 582 (2002); Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986); White v. State, 263 S.C. 110, S.E.2d 35 (1974). If a post-conviction

relief court finds that an applicant did not knowingly and intelligently waive his or her right to an appeal, the post-conviction court must make that finding in its final order. S.C. Post-Conviction Relief Manual, 3rd Edition, at p. 53. Then, the applicant must petition the South Carolina Supreme Court by writ of certiorari to be granted a belated review of his or her direct appeal. *Id.* Such petition must include any other issues presented at the post-conviction hearing that the applicant wishes to appeal. *Id.*; see also *Wilson*, 288 S.C. at 291 (“All post-conviction relief issues, including the waiver of a direct appeal, must be raised and argued in the Petition [for a writ of certiorari] . . .”). Additionally, the applicant must submit a separate brief addressing each direct appeal issue intended to be raised. *Id.* (citing SCACR Rule 227(g)(1)).

Here, Applicant testified that as soon as he walked out of the door from his plea, he wanted to appeal. He testified further that he told his plea counsel that he wanted to appeal. Applicant was then told to contact the Clerk of Court, so he sent a letter to the Lexington County Clerk of Court. The purported letter dated June 20, 2017, was admitted into evidence as Applicant’s #1.¹ In Applicant’s letter, Applicant states:

[I’m] writing to inform you I would like to appeal my sentencing that I received on June 20, 2017 [i]n Lexington County, [b]y Judge Kine [sic]. . . I am appealing [sic] the sentencing, and case of Armed Robbery Indictment/Case # 2017GS3202176, sentencing and case of Assault & Battery High & Agrevated [sic] Nature, Indictment/Case # 2017GS3202175, and Sentencing & Case of Possession of weapon during violent crime, Indictment/Case # 2017GS3202178. Please send me all [paperwork] I will need for this Appeal process. Thank you

Plea counsel Stephen Story testified that he met with Applicant at least four times. He countered that Applicant had never asked him for an appeal. He emphasized that had Applicant asked for an appeal, he would have talked about the merits of an appeal and file it for him.

¹ The court has on file a letter dated June 22, 2017, from the Clerk of Court’s Office confirming that the office received Applicant’s letter dated June 20, 2017. The Clerk of Court’s letter indicates that the Clerk of Court’s Office complied with Applicant’s request and sent him the documents he requested for his appeal.

The court acknowledges that plea counsel's recollection and testimony is credible, but the court feels that out of an abundance of caution, Applicant should be allowed to file a belated appeal. At the same time, the court finds and concludes that Applicant failed to prove that his plea counsel provided deficient representation. The court further finds that even if plea counsel did provide deficient representation, Applicant failed to show that he was unfairly prejudiced by such representation.

CONCLUSION

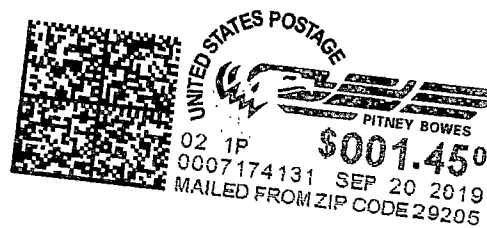
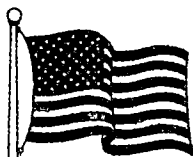
For these reasons this court **GRANTS** James Williams' request to allow him a belated appeal. James Williams' post-conviction application on the allegations that plea counsel provided deficient representation is **DENIED**.

AND IT IS SO ORDERED.


Walton J. Walton, IV
Presiding Circuit Court Judge

JULY 25, 2019
Lexington, South Carolina

Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205



The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
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