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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
Robert E. Hood, Post-Conviction Relief Judge
Maite Murphy, Trial Judge

Appellate Case No. 2019-000812

LEROY GLOVER, JR., SCDC #314746,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Did the PCR judge correctly find that Petitioner did not freely and voluntarily waive his right to a direct appeal and is entitled to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)?

Did the PCR judge err in refusing to find trial counsel deficient for failing to properly object to the admission of a letter sent to the prosecutor, that included a purported confession by the co-defendant, Petitioner's brother, when the confession could not be authenticated?

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly find trial counsel was not ineffective for failing to contemporaneously object to the admission of a letter sent to the prosecutor, that included a purported confession by the co-defendant, Petitioner's brother, where the letter was properly authenticated by Petitioner's brother and Petitioner was not prejudiced by the alleged deficiency where an appellate court would have affirmed the lower court's denial of trial counsel's objection had it been properly made?

STATEMENT OF THE CASE

In November of 2013, the Orangeburg County Grand Jury indicted Petitioner, Leroy Glover, for murder, indictment #2013-GS-38-1624. (App. p. 770-771). On September 14, 2015, Petitioner, with his co-defendant and brother, Jason Glover, proceeded to jury trial before the Honorable Maite Murphy. Eduardo Curry represented Petitioner at trial. Michael Culler and Glen Walters represented the co-defendant. Donald N. Sorenson prosecuted the case. The jury found the co-defendant not guilty, but found Petitioner guilty. Judge Murphy sentenced Petitioner to life in prison. (App. p. 772). The notice of intent to appeal was not properly filed.

On January 25, 2016, Petitioner filed for post-conviction relief (PCR). (App. p. 773-779). The State filed a return on January 11, 2017. (App. p. 780-785). On May 23, 2017, an evidentiary hearing was held before the Honorable Robert E. Hood. Jonathan D. Waller represented Petitioner at the PCR hearing. Ruston W. Neely represented the State. In a written order signed November 13, 2017, Judge Hood granted relief pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), but denied relief on all other grounds. (App. p. 831-838). PCR counsel did not receive a copy of the order until May 15, 2019. Petitioner filed his petition for writ of certiorari and brief pursuant to White on January 9, 2020. This return to petition for writ of certiorari and brief of respondent pursuant to White follow.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

1. The PCR judge correctly found that Petitioner did not freely and voluntarily waive his right to a direct appeal and is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

In the PCR application Petitioner asserts that trial counsel was ineffective for failing to file a request for a direct appeal. (App. p. 775). Petitioner testified at the PCR hearing that he asked trial counsel to file an appeal. (App. p. 796, lines 18-20). During the PCR hearing trial counsel testified that he thought he filed the notice of intent to appeal but was not sure what happened. (App. p. 818, lines 4-18). A copy of the notice of intent to appeal was marked as State's exhibit #3. (App. p. 829). The notice is dated by trial counsel and time stamped by the Orangeburg County Clerk of Court for September 21, 2015. It does not appear that the notice was filed with the Appellate Court. Petitioner requested a direct appeal. The notice of intent to appeal, however, was not properly filed with the appellate court. Petitioner did not waive his right to a direct appeal. The PCR judge correctly found that Petitioner was entitled to a belated direct appeal pursuant to White.

2. The post-conviction relief court properly found trial counsel was not ineffective for failing to contemporaneously object to the admission of a letter sent to the prosecutor, that included a purported confession by the co-defendant, Petitioner's brother, where the letter was properly authenticated by Petitioner's brother and Petitioner was not prejudiced by the alleged deficiency where an appellate court would have affirmed the lower court's denial of trial counsel's objection had it been properly made

Petitioner and his brother, Jason Glover, were charged in the fatal shooting of Richard Michael Carter, Senior. The two men were tried together. Jason initially admitted to an investigator that he shot Carter. (App. p. 472, line 2- p. 473, lines 1-24). During the cross-examination of the

investigator Jason's attorney, outside the presence of the jury, raised concerns about his ability to introduce a letter that was sent to the prosecutor purporting to be a confession by Jason. (App. 478, line 7- p. 479, p. 480, lines 1-23). The State agreed to stipulate that the letter was received by the solicitor's office through the United States Postal Service on January 7, 2014. (App. p. 480, lines 4-19). Counsel for Petitioner objected to the admission of the letter because it could not be authenticated. (App. p. 480, line 25- p. 481, lines 1-25). The judge ruled stating, "And certainly I think that creates a question of fact for the jury to determine. In regards to the stipulation by the solicitor, I think that cures your problem as far as being able to enter it into evidence." (App. p. 482, line 17). The letter, however, was not admitted in evidence at this time in the trial. The State did not move to have the letter admitted in evidence. Counsel for the co-defendant later moved to admit the letter in evidence.

Jason's testimony at trial differed from the statement he initially gave to the investigator. At trial Jason claimed that Petitioner shot Carter in a back room of Petitioner's trailer while Jason was in the living room playing games. (App. p. 620, line 1- p. 621, lines 1-21). According to Jason, his only involvement was in helping to dispose of the body. (App. p. 621-626). Jason denied writing the confession sent to the solicitor's office in January of 2014. (App. p. 675, lines 15-21). According to Jason, the handwriting was his brother's. (App. p. 675, lines 22-25). The January 2014 confession letter was marked as Defense Exhibit number one and admitted into evidence without objection. (App. p. 676, lines 1-9). Jason's attorney called a hand writing expert was a witness. The witness opined that the January 2014, confession letter, signed by Jason Glover, was written by Petitioner. (App. p. 682- lines 9-22).

During the PCR hearing trial counsel was questioned as to why he did not object when the letter was admitted into evidence. Counsel testified that "at that point, we had questioned the letter.

I thought the letter itself may have been in for the authentication not for the truthfulness or veracity. That would be for the jury who are the triers of the fact. And so, my objection would be duly noted. We talked about how it was gonna come in regard to that but not the truthfulness, or the authentication of it would've been something that the jury would have to make that determination." (App. p. 809, lines 25- p. 810, lines 1-8).

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, 80 L.Ed.2d 674 (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. 2052). 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. 2052. "Under• I 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. 2052). 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. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was not ineffective for failing to object when Jason's lawyer moved to have the January 2014, confession letter, signed by Jason, admitted in evidence. Trial counsel did not have a meritorious basis upon which to object to the admission of the letter where it was properly authenticated by opinion testimony of Petitioner's brother/co-defendant Jason Glover. Further, if this Court were to find counsel was deficient for failing to object to the admission of the letter,

Petitioner has failed to show prejudice where the trial court would have denied trial counsel's objection and the appellate court would have affirmed the lower court's ruling.

First, trial counsel was not ineffective for failing to make a contemporaneous objection to the admission of the confession letter into evidence where the letter was properly authenticated through non-expert opinion testimony on handwriting. Petitioner conclusively argues that trial counsel was deficient for failing to object to the letter because it could not be authenticated. However, the letter was properly authenticated, thus removing any meritorious basis upon which trial counsel could object.

Trial counsel did not have a basis for objecting to the admission of the letter where it was properly authenticated before being admitted into evidence. Earlier in the trial, prior to the admission of the letter, trial counsel objected and argued extensively that the letter should not be allowed in evidence as it could not be properly authenticated. (App. p. 480). Trial counsel argued that since they could not prove who authored the letter, they would not be able to get it into evidence. Specifically, counsel argued that "they don't have who the... the person who would be the author of the document. They've got to prove that in order to get it in and I think that's his problem." (App. p. 480, lines 16-17). Trial counsel, like Petitioner, appears to have misinterpreted what the South Carolina Rules of Evidence require in order to properly authenticate a document. Trial counsel and Petitioner appear to both argue that proper authentication of the letter required proving that Petitioner was the author of the letter. However, SCRE 901 clearly provides that handwriting can be properly authenticated by non-expert opinion testimony on the genuineness of the handwriting, based upon familiarity not acquired for purposes of the litigation. At trial, Petitioner's brother/co-defendant was shown the document during redirect examination by his attorney Michael Culler. (App. p. 675). Ultimately, Jason was asked if the letter was Petitioner's

handwriting and he testified that it was. (App. p. 675). Jason Glover is Petitioner's brother and would be considered a non-expert who would have sufficient familiarity with Petitioner's handwriting as to be able to identify it for authentication purposes. Therefore, the letter was properly authenticated for purposes of admission and trial counsel did not have a basis (concerning authentication) upon which to object. Petitioner has failed to meet his burden in proving that trial counsel was deficient for failing to object to the admission of the letter into evidence, as counsel had no basis to make such an objection.

Second, Petitioner has failed to prove prejudice, such that the result of the proceeding would have been different had counsel objected to the introduction of the confession letter. In evaluating prejudice, this Court must determine whether Petitioner's claim would have been meritorious had it been properly preserved and whether the verdict would have been different absent the evidence that should have been excluded. For the reasons discussed previously, Petitioner would not have been meritorious on appeal had counsel properly preserved the issue. The confession letter was properly admitted into evidence after being the handwriting was authenticated by Petitioner's brother. Trial counsel did not have a basis upon which to object to the letter being admitted at that point, particularly, there was no basis for an objection to the introduction of the letter based on a lack of proper authentication. Therefore, even if the issue was properly preserved for appellate review, Petitioner's appeal would have failed on the merits.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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July 30, 2020



ALAN WILSON
ATTORNEY GENERAL

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211
(By Electronic Filing Only)

RE: Leroy Glover, Jr. v. State of South Carolina
Appellate Case No.: 2019-000812

Dear Mr. Shearouse:

Enclosed please find the Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

s/ Benjamin Limbaugh
Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jj
Enclosures

cc: Kathrine Hudgins, Esquire (by email only)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY

Robert E. Hood, PCR Judge
Maite Murphy, Trial Judge
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LEROY GLOVER, JR.,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

Pursuant to the Supreme Court’s Order “RE: Operation of the Appellate Courts During the Coronavirus Emergency,” dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel’s primary e-mail address as listed in the Attorney Information System (AIS):

Kathrine Hudgins, Esquire
khudgins@sccid.sc.gov

This 30th day of July, 2020.

s/ Benjamin Limbaugh
BENJAMIN H. LIMBAUGH
Assistant Attorney General

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From: Benjamin Limbaugh
Sent: Thursday, July 30, 2020 4:51 PM
To: 'Hudgins, Kathrine'
Subject: Glover RPWC and BOR
Attachments: Glover RPWC (02339464xD2C78).pdf; Glover BOR (02339462xD2C78).pdf

Good afternoon Ms. Hudgins,

I hope you're doing well! Please find attached my RPWC and BOR pursuant to White for Mr. Glover. Please let me know if there is anything else you need.

Thank you,
Ben



Benjamin Limbaugh
A.A.G.
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Section

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