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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

JAMES WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001608

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Did the PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal?

2.

Whether the PCR court erred in finding plea counsel provided effective representation where counsel failed to object when the court sentenced Petitioner without giving him the opportunity to speak on his own behalf in mitigation especially after the court had twice assured Petitioner that he would be given the opportunity to allocute?

STATEMENT OF THE CASE

Starting during the late evening hours of January 17, 2016, Petitioner and a co-defendant were alleged to have committed a series of robberies in Lexington County, South Carolina. Petitioner was arrested in the early morning hours of January 18, 2016, after he crashed a stolen car he was driving while fleeing from the police. Petitioner's co-defendant did not survive the crash. App. 11-14. On June 20, 2017, Petitioner appeared before the Honorable Grace Knie to enter a guilty plea[1] to assault and battery of a high and aggravated nature, armed robbery, and possession of a weapon during the commission of a violent crime. Petitioner waived presentment to the grand jury on all three charges. At the guilty plea Petitioner was represented by Stephen Story. The state was represented by Casey Rankin. App. 1-3.

Twice during the guilty plea Judge Knie informed Petitioner that he would be allowed to address the court prior to sentencing. App. 4, ll. 9-15; App. 18, ll. 7-10. However, the last person to address Judge Knie was Probation Agent Rentz. Agent Rentz informed the court that Petitioner was on community supervision and would be facing a violation in Charleston County. The basis for the violation was tampering with his GPS monitor and pleading guilty to the Lexington County charges. App. 18, ll. 11-25.

After a brief recess Judge Knie sentenced Petitioner to twenty years imprisonment for assault and battery of a high and aggravated nature, twenty-five years imprisonment for armed robbery, and five years imprisonment for possession of a weapon during the commission of a violent crime, all to run concurrently. App. 19-20. Petitioner was never given an opportunity to address the court prior to sentencing. Later that same day Petitioner was brought back before

1 At the PCR hearing it became clear that a number of charges, including a first degree burglary charge and another armed robbery charge, were dismissed pursuant to the plea agreement. App. 59, ll. 20-25; App. 69, ll. 18-21.

Judge Knie and offered an opportunity to address the court. However, at that time Petitioner declined to speak as the court had already sentenced him. App. 21-22; App. 53, ll. 2-8.

Petitioner filed an application for post-conviction relief on May 14, 2018. App. 24-31. The state filed a return dated September 7, 2018. App. 32-41. On January 17, 2019, Art Aiken, PCR counsel for Petitioner, filed an amended PCR application alleging two grounds of ineffective assistance of counsel: (1) That counsel was deficient for failing to object when the circuit court failed to give Petitioner an opportunity to speak prior to sentencing as was Petitioner's right pursuant to Ashe v. North Carolina, 586 F.2d 334 (4th Cir., 1978); and (2) that plea counsel was deficient in failing to provide Petitioner with any advice regarding his right to a direct appeal, making it impossible for Petitioner to have made a knowing and intelligent waiver of his right to a direct appeal. App. 42-44.

An evidentiary hearing was convened before the Honorable Walton J. McLeod, IV, on April 5, 2019. Petitioner was represented by Art Aiken. The state was represented by Johnny James. App. 45. Petitioner and plea counsel Stephen Story testified at the hearing. App. 46.

Petitioner testified that as soon as they left the court after his guilty plea, he told counsel that he wanted to appeal his sentences because he was not given the opportunity to speak prior to sentencing. App. 56, ll. 8-19. Conversely, Counsel Story testified that Petitioner never asked him about an appeal. App. 73, ll. 22-23. However, Counsel Story also admitted to never having a substantive discussion with Petitioner regarding his direct appeal rights. App. 77, ll. 13-25. Counsel Aiken admitted into evidence a letter from Petitioner requesting to appeal his sentences that he sent to the Lexington County Clerk of Court the same day that he pled guilty. App. 80.

The PCR court issued an order on July 26, 2019. App. 81-87. In the order the PCR court granted Petitioner a belated appeal pursuant to White, *supra*, but denied Petitioner's other claim

regarding counsel being ineffective for failing to object to the plea court not allowing Petitioner to allocute prior to sentencing him. The state filed a motion to alter or amend, challenging the grant of the belated appeal, on August 19, 2019. App. 88-91. The PCR court denied the state's motion to alter or amend on August 16, 2019. App. 92-93.

Petitioner now files this petition simultaneously with a brief addressing the direct appeal issue, as required by Rule 243, SCACR.

ARGUMENT

1.

The PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal.

Relevant Facts

According to Petitioner, right after the guilty plea hearing he asked Counsel Story about filing an appeal because he had not been given the opportunity to speak prior to sentencing. App. 56, ll. 8-15. Counsel Story told him that he had to "get in touch with the court" in order to file an appeal. However, counsel did not explain which court or how to go about starting the appeal process. App. 56, ll. 16-25. Petitioner did not know how to start the criminal appeal process and stated this was the only time that he spoke with Counsel Story about an appeal. App. 57, ll. 1-3; App. 58, l. 21-App. 59, l. 8.

Based on this single conversation with Counsel Story, Petitioner sent a letter to the Lexington County Clerk of Court the day that he pled guilty. App. 57, ll. 7-App. 58, l. 2. In the letter Petitioner stated that he wanted to appeal the sentences he had received and requested that he be sent all the paperwork he would need for the appeal process. App. 58; App. 80. Petitioner never received a response to his letter. He eventually sent another letter to the Lexington County Clerk of Court asking, "where he was in the appeal process." App. 58, ll. 9-10. The Clerk of Court responded to Petitioner telling him that no appeal had been filed in his case. App. 58, ll. 10-11.

Counsel Story admitted that he never had a meaningful conversation with Petitioner about the appeal process or Petitioner's direct appeal rights. The only time an appeal was

mentioned to Petitioner was during the plea colloquy when Judge Knie advised him he had ten days to file an appeal. App. 77, l. 13-App. 78, l. 1. Counsel Story maintained that Petitioner did not ask him to file an appeal. He further stated that he never told Petitioner to "get in touch with the court" regarding an appeal. App. 73, l. 22-App. 74, l. 1. Counsel Story testified that if Petitioner had asked for an appeal, he would have discussed the merits of the appeal and then, if Petitioner still wanted an appeal, he would have filed the "appropriate paperwork." App. 74, ll. 4-9.

The PCR court found that Counsel Story's "recollection and testimony" was credible but did not make a ruling as to Petitioner's credibility. However, "out of an abundance of caution" the court believed Petitioner should be granted a belated appeal. The court simultaneously found that Counsel Story was not deficient and even if he had been deficient Petitioner had failed to show any prejudice. App. 87.

The state challenged the PCR court's grant of the belated appeal in a motion to alter or amend. App. 88-91. The state asserted that the PCR court had applied the post-trial standard regarding counsel's duty to consult with a defendant regarding his direct appeal rights in making the decision to grant belated appellate review pursuant to White. The state, citing Turner v. State, 380 S.C. 233, 224-25, 670 S.E.2d 373, 374 (2008) and Roe v. Flores–Ortega, 528 U.S. 470, 480 (2000), argued that since Petitioner entered a guilty plea, he was required to show "extraordinary circumstances" in order to justify a belated appeal. The state contended that Petitioner had not made the requisite showing of "extraordinary circumstances" and thus was not entitled to a belated appeal. Interestingly, the state asserted that Petitioner did not "testify credibly" at the PCR hearing, even though the PCR court never made such a finding. App. 88-89.

The PCR court issued an order denying the state's motion to alter or amend. The PCR ruled that the initial order had "properly and fully" addressed all of the allegations and issues raised by both parties. Further, the court held that the proper place for the state to challenge the grant of a belated appeal pursuant to White was through the appellate courts and not a Rule 59, SCRCP, motion. App. 92-93.

Discussion

Counsel Story admitted that he did not consult with Petitioner regarding his direct appeal rights. In fact, Counsel Story stated the only time Petitioner was informed of his right to appeal was during the plea colloquy. App. 77, l. 13-App. 78, l. 1. Furthermore, Petitioner's letter to the Lexington Clerk of Court supports his testimony that he had asked Counsel Story about filing an appeal and had been told to "get in touch with the court." App. 80. Counsel Story's complete failure to consult with Petitioner about his direct appeal rights once Petitioner had expressed an interest in appealing his sentences was deficient performance.

"[C]ounsel has a constitutionally imposed duty to consult with the 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 was interested in appealing." Roe v. Flores–Ortega, 528 U.S. 470, 480 (2000). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). Clark v. State, 396 S.C. 164, 719 S.E.2d 708 (2011). "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 (1967)." Simuel at 270.

In Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995), this Court held that "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Id. "The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Id. In Turner v. State, 380 S.C. 223, 224; 670 S.E.2d 373, 374 (2008) this Court clarified that the standards articulated in Roe v. Flores-Ortega, *supra*, were examples of extraordinary circumstances that triggered counsel's duty to consult with a defendant about his direct appeal rights. In Roe v. Flores-Ortega, *supra*, the United States Supreme Court defined "consult" to mean that counsel advised "the defendant about the advantages and disadvantages of taking an appeal" and made a "reasonable effort to discover the defendant's wishes." The Court noted that if counsel had not consulted with the defendant at all then "the court must ask whether that failure itself constitutes deficient performance." Roe v. Flores-Ortega, 528 U.S. at 471.

In the present case, Counsel Story admitted that he never discussed Petitioner's appeal rights or the appellate process with Petitioner. By counsel's own admission, the only time Petitioner heard about his right to appeal was during the plea colloquy. This was a total failure by counsel to consult with Petitioner about his direct appeal rights after Petitioner had expressed an interest in appealing his sentences. Counsel Story was deficient in failing to consult with Petitioner about his appeal rights in any manner, much less a meaningful one.

Notably, Petitioner's testimony that he expressed interest in filing an appeal is bolstered by the letter he sent to the Clerk of Court the day of his guilty plea. That letter was direct evidence that Petitioner had expressed a desire to appeal his sentence. Further, Petitioner's testimony was specific that he wanted to appeal because he was not able to speak prior to sentencing. Petitioner showed extraordinary circumstances when he testified that he asked about

filing an appeal and then followed up on the advice provided to him by counsel. Based on the standards articulated by this Court and the evidence produced at the PCR hearing, the PCR court correctly granted Petitioner a belated appeal pursuant to White v. State, *supra.*

2.

The PCR court erred in finding plea counsel provided effective representation where counsel failed to object when the court sentenced Petitioner without giving him the opportunity to speak on his own behalf in mitigation especially after the court had twice assured Petitioner that he would be given the opportunity to allocute.

Relevant Facts

At the beginning of Petitioner's guilty plea Judge Knie addressed Petitioner stating "Mr. Williams, I need to go over some questions with you before we proceed with the plea, okay? … I will give you an opportunity to address the Court at the conclusion of the plea before I issue a sentence, all right?" App. 4, ll. 9-15. Thereafter a standard plea colloquy occurred, and Petitioner entered a guilty plea.

Counsel Story spoke in mitigation stating that Petitioner did "pretty well" while in SCDC, obtaining his GED and staying drug free. He further stated that for a short period of time after his release Petitioner "did pretty well." However, Petitioner began "hanging out" with people he had met in prison and "those types of people were not good structural support" for Petitioner. Counsel Story concluded by asking the court to give Petitioner a sentence that would allow him the opportunity to "get out and make something of himself." App. 17, ll. 4-19.

Petitioner was also on community supervision at the time of his guilty plea. Near the conclusion of the plea the court again addressed Petitioner stating, "Mr. Williams, before I give you an opportunity to address the Court, I need to also hear from probation about the community [supervision]." App. 18, ll. 7-12. After the probation agent had given his presentation Judge Knie asked counsel to approach the bench and held a side bar off of the record. App. 19, ll. 1-5.

After a short recess Judge Knie retook the bench and sentenced Petitioner. App. 19-20. At no time prior to sentencing was Petitioner given the opportunity to address the court.

Later that same day Petitioner was brought back before Judge Knie. The following exchange occurred:

> THE COURT: Mr. Williams, when you were here earlier today, sir, we took a recess for me to confer with counsel and I came back and I neglected to give you the opportunity to address the Court. If you would like to do that, I would give you that opportunity at this time. You are still under oath sir, because you were sworn earlier today.
>
> MR. WILLIAMS: Uhm, I don't have anything to say.
>
> THE COURT: Are you sure?
>
> MR. WILLIAMS: Mm-hmm. Yes, ma'am.

App. 21, ll. 1-15.

At the PCR hearing Petitioner testified that when he was brought back before Judge Knie to address the court he did not say anything because he "had already been sentenced and convicted. Nothing that I would have said then would have held any weight in what I'd already been given." App. 53, ll. 2-8. Petitioner then proceeded to testify that, if he had been given the opportunity to speak prior to sentencing, he would have told the court that when he was released from prison a few months prior to being arrested, he was not prepared or "rehabilitated at all." He had spent eleven years in prison, from the age of seventeen until he was twenty-eight, and nothing he had experienced in SCDC had prepared him to be released back into society. App. 53, ll. 12-21.

Petitioner testified that he had wanted the court to know that because he was on the sex offender registry due to a prior kidnapping charge, he had struggled to find good work and affordable housing. Further, even though he was *working three jobs* he was not making enough

money to pay for rent, necessities, and his supervision fees. App. 53, l. 22-App. 54, l. 11. Petitioner wanted the court to know that he had panicked and committed the robberies. He wanted to ask the court to show him mercy. App. 54, l. 11-App. 55, l. 5.

Counsel Story testified that he did not have any indication from Judge Knie that she would have altered Petitioner's sentence based on any remarks made by Petitioner when he was brought back to court after sentencing. App. 73, ll. 1-12. Counsel Story was not aware of what Petitioner wanted to communicate to the court and stated that Petitioner did not inform him that he wanted to speak on his own behalf prior to sentencing. App. 72, ll. 6-12. On cross-examination Counsel Story conceded that the court twice told Petitioner he would be given the opportunity to speak prior to sentencing, but that never occurred. He further stated that he did not object to the judge issuing a sentence prior to Petitioner being given the opportunity to allocute. App. 76, l. 17-App. 77, l. 6.

Counsel Story maintained that "they never sincerely contemplated going to trial." App. 68, ll. 18-19. However, he admitted that Petitioner inquired about filing a speedy trial motion and that they discussed the merits of going to trial on the charges. App. 68, ll. 7-18. Petitioner testified that he had "made it clear" to counsel that he would rather go to trial and "be found innocent of the charges that I'm innocent of and guilty of the charges I'm guilty of instead of just going in there blindly" to enter a guilty plea. App. 56, l. 23-App. 56, l. 5. On cross-examination Petitioner testified that if he had known, prior to entering his guilty plea, that he would not have been able to speak on his own behalf prior to sentencing, he would not have pled and he would have gone to trial. App. 63, ll. 20-24.

The PCR court found counsel's testimony was credible, but again did not rule on the credibility of Petitioner. The PCR court ruled that Petitioner had not shown that plea counsel

was deficient in failing to object prior to Judge Knie issuing the sentence to allow Petitioner to speak. Further, the court found that even if counsel was deficient, Petitioner did not suffer any prejudice because Judge Knie brought Petitioner back into the court room after he was sentenced to allow him to address the court and Petitioner stated that he did not have anything to say at that time. App. 84.

Discussion

The failure of counsel to ensure that Petitioner was allowed to speak on his own behalf prior to sentencing, after the court had twice assured Petitioner that he would be given the opportunity to speak, was deficient performance. App. 4; App. 18. Petitioner wanted to convey specific mitigating circumstances to the plea court but was denied the right to do so. App. 53-54. Consequently, the plea court never heard important mitigating testimony. This deficient performance resulted in prejudice and therefore the PCR court should have found that plea counsel provided ineffective representation.

"[S]entencing is a critical stage of the criminal proceeding at which [a defendant] is entitled to the effective assistance of counsel." Gardner v. Florida, 430 U.S. 349, 358 (1977). The Sixth Amendment provides a right to counsel during sentencing in both noncapital and capital cases. Lafler v. Cooper, 566 U.S. 156, 165 (2012). "Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because *any amount of additional jail time has Sixth Amendment significance*." Id. (internal quotations and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001)) (emphasis added).

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and

(2) the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668 (1984). In a guilty plea the "prejudice" requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. at 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pled guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

The appellate courts of this state have frequently held that counsel's failure to object when a substantive evidentiary rule or right of the defendant is violated constitutes deficient performance. See Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (finding counsel's failure to object when the solicitor reneged on the plea agreement by making a specific recommendation was deficient performance); Smith v. State, 386 S.C. 562, 689 S.E.2d. 629 (2010) (counsel's failure to object to improper hearsay and bolstering testimony amounted to ineffective assistance of counsel); Tappeiner v. State, 416 S.C. 239, 785 S.E.2d. 471 (2016) (failure to object to solicitor's improper comments during closing argument was ineffective assistance of counsel).

While the appellate courts of this state have not recognized an affirmative right to allocution in non-capital in cases so many words, the jurisprudence of this state sets forth the principle that, where it falls to the court to determine the appropriate punishment to be imposed, either on the finding of the jury or on a plea of guilty, and there is any discretion as to the punishment, it is the correct practice that the court hear evidence in mitigation or aggravation of the punishment. See, State v. Adcock, 194 S.C. 234, 9 S.E.2d 730, 732 (1940). As stated in State v. Green, 220 S.C. 315, 318, 67 S.E.2d 509, 510 (1951) "we have held that with the view of

fixing the sentence to be imposed upon a defendant, *it is proper for the trial judge, in open court, in the presence of the defendant, to inquire into any relevant facts in aggravation or mitigation of punishment*." (emphasis added). Notably, in State v. Holmes, 320 S.C. 259, 269, 464 S.E.2d 334, 340 (1995 (Finney, CJ. Dissenting), then Chief Justice Finney stated that "failure to accord appellant his right to allocution requires, at a minimum, that the case be remanded for resentencing" implying that defendants in this state have, at least, a common law[2] right to allocution.

When the judge began to hand down Petitioner's sentence plea counsel had a duty to object and ensure that Petitioner was provided an opportunity to allocute. Of note is the fact that the judge expressly informed Petitioner twice that he would be able to speak prior to the imposition of a sentence. The judge recognized Petitioner's right to allocution and then proceeded to deny him that right. Counsel Story's failure to object when a right of the defendant was violated cannot be held to be reasonable under prevailing professional norms. The failure of counsel to object was deficient performance.

Importantly, Petitioner had specific and powerful mitigation that he wanted to present to the plea court. Petitioner would have told the court he was working three jobs but still could not keep up with his bills. Further, he wanted the court to understand that having spent a large portion of his young adult years incarcerated had left him ill prepared to be a productive member of society without some form of guidance. This was information that the court should have had prior to fashioning Petitioner's sentence.

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2 See Green v. United States, 365 U.S. 301, 304 (1961) (stating that the common law right to allocution was documented as early as 1689 where it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal).

In analyzing any potential prejudice, the PCR court found that Petitioner could not prove prejudice because he was given the opportunity to address the court later that day and did not say anything. This ruling was flawed for two reasons.

First, the purpose of allocution is to allow the defendant a chance to speak in mitigation *prior to sentencing* so that a judge may accurately mitigate and individualize a punishment. See Kimberly A. Thomas, Beyond Mitigations: Towards a Theory of Allocution, 75 Fordham L. Rev. 2641, 2657 (2007) (emphasis added). In a guilty plea setting, giving the defendant a chance to speak prior to sentencing is often the only way that a court will be informed of potentially powerful mitigation. As the United States Supreme Court noted in Green, 365 U.S. at 304, "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Allowing a defendant to address the court, hours after a sentence has been imposed, did nothing to serve the purpose of allocution.

Second, the prejudice analysis does not rest upon whether Petitioner was eventually given an opportunity to address the court. The analysis turns on whether "there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The fact that Petitioner was eventually given an opportunity to address the court, hours after he had been sentenced, was irrelevant. See Thompson v. State, 340 S.C. 112, 115–17, 531 S.E.2d 294, 296–97 (2000) (holding that the fact that the judge sentenced Thompson within the range is irrelevant … [t]o establish prejudice, the proper analysis is to determine whether there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial).

Significantly, the PCR judge did not find that Petitioner was not credible. Petitioner's testimony was that he would not have pled guilty and would have gone to trial if he had known that he would not be able to address the court prior to sentencing. Thus, that uncontroverted testimony, combined with the testimony of plea counsel that Petitioner had expressed interest in a speedy trial motion and that they had discussed the merits of going to trial on the charges, was enough to satisfy the prejudice prong. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (holding that petitioner had satisfied the prejudice prong when "the only evidence in the record on this point [was] petitioner's own testimony that had trial counsel not misinformed him that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty"). Petitioner had met his burden under Strickland, *supra*, and was therefore entitled to relief.

CONCLUSION

Petitioner respectfully requests that this Court grant Certiorari.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of August, 2020.