

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Oct 30 2020

S.C. SUPREME COURT

Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

JOANIE HOLCOMBE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2020-000495

JOHNSON PETITION FOR WRIT OF CERTIORARI

Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in finding that plea counsel was not ineffective for failing to file a notice of appeal of Petitioner's guilty plea where Petitioner conveyed to plea counsel that she wanted to appeal her plea?

STATEMENT

Petitioner was indicted by the Anderson County grand jury in June 2016 for murder. App. 83. Petitioner was represented by Rodney Richey and the state was represented by Catherine Huey. App. 1.

On July 13, 2017, Petitioner appeared before the Honorable R. Lawton McIntosh and pled guilty to homicide by child abuse. App. 2, ll. 1 – 9. At Petitioner’s plea, the state alleged that Petitioner killed her newborn daughter by placing her in a trash bag and burying her. App. 12, ll. 13 – 25. Petitioner confessed to her actions on video after being advised of her rights. App. 13, ll. 2 – 15. Petitioner was sentenced to fifty-years-imprisonment. App. 24, ll. 4 – 10. Petitioner’s counsel did not file a notice of appeal.

Petitioner filed an application for post-conviction relief on April 5, 2018 and the state filed its Return on June 11, 2018. App. 26 – 39. An evidentiary hearing was held on February 18, 2020 before the Honorable R. Scott Sprouse. App. 41. Linda Whisenhunt represented Petitioner and Taylor Smith represented the state. App. 41. Petitioner and her plea counsel both testified at the hearing. App. 42.

Petitioner testified that after she pled guilty, she wanted to appeal her sentence but that her plea counsel never discussed an appeal with her. App. 48, l. 9 – 49, l. 10. Petitioner maintained that counsel told her that he would come and speak with her about an appeal after she pled but that he never did. App. 51, ll. 6 – 24. Petitioner’s plea counsel, Richey, claimed that he did not recall Petitioner asking him about appealing her plea. App. 58, ll. 1 – 6. However, Richey did recall Petitioner’s mother calling him after her plea to ask what their options were and that he discussed the appeal with Petitioner’s mother. App. 58, ll. 6 – 15. Richey further

admitted that he did not go to speak with Petitioner about an appeal after she pled guilty. App. 58, l. 16 – 59, l. 6.

Whisenhunt argued to the PCR judge that plea counsel was ineffective for failing to file an appeal on Petitioner’s behalf. App. 65, l. 10 – 19. Whisenhunt argued that not only did counsel fail to properly advise Petitioner of her right to an appeal, but counsel also failed to file the appeal after both Petitioner and her mother had indicated a desire to appeal her case. App. 65, l. 14 – 67, l. 8. Finally, Whisenhunt argued that Petitioner was prejudiced by counsel’s failure to appeal because the appellate courts never had an opportunity to consider Petitioner’s case. App. 67, l. 9 – 68, l. 9.

The PCR judge found that Petitioner failed to show that she had informed her plea counsel of her desire to appeal. App. 78. The PCR judge further found that Petitioner failed to show that “a rational defendant in her situation would want to appeal because she pleaded guilty to homicide by child abuse in order to leave the plea court with the option to sentence her to a lower minimum sentence that would have otherwise been available.” App. 78. Petitioner’s application was denied. App. 82.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that plea counsel was not ineffective for failing to file a notice of appeal of Petitioner's guilty plea because Petitioner conveyed to plea counsel that she wanted to appeal her plea.

In order to prove ineffective assistance of counsel, Petitioner must show that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient,” meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

“[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). “[W]hen counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit.” Peguero v. United States, 526 U.S. 23, 28 (1999) citing Rodriguez v. United States, 395 U.S. 327 (1969). “[W]hen counsel's constitutionally deficient performance deprives a defendant of an

appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” Roe, 528 U.S. 470, 484. “The defendant need not show that his hypothetical appeal might have had merit, only that but for counsel’s deficient conduct, the defendant would have appealed.” Kinard v. State, 418 S.C. 478, 481, 795 S.E.2d 15, 16 (2016).

Here, Petitioner’s plea counsel acted in a professionally unreasonable manner when he failed to file a notice of appeal on Petitioner’s behalf. As Petitioner testified, she asked Richey about appealing her case and Richey told her he would come talk to her about appealing. However, Richey admitted that he never actually went to speak with Petitioner about appealing her plea. Richey failed to file the appeal even after speaking with Petitioner’s mother who had strongly indicated that they were unhappy with the result of the plea and wanted to appeal.

In Kinard v. State, 418 S.C. 478, 480, 795 S.E.2d 15, 16 (2016), this Court found that plea counsel was ineffective for failing to file an appeal on the defendant’s behalf. The Kinard Court found that the PCR judge had used the incorrect legal standard in evaluating the defendant’s claim of ineffective assistance of counsel by considering whether the defendant’s appeal would have been successful. Id. at 481, 795 S.E.2d at 16. The Kinard Court went on to affirm the defendant’s convictions after a review of the merits of his direct appeal claims. Id. at 481-482, 795 S.E.2d at 16-17. See Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) (establishing procedural guidelines for PCR cases where the petitioner’s waiver of his right to appeal is at issue).

Here, Petitioner’s plea counsel was ineffective for failing to file a notice of appeal on her behalf after she expressed a desire for him to do so. Counsel’s failure was professionally

unreasonable, and the PCR judge erred in finding otherwise. See Kinard v. State, 418 S.C. 478, 795 S.E.2d 15 (2016).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

s/Adam Sinclair Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of October, 2020.

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Counsel for Joanie Faith Holcombe states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Scott Sprouse, which was held on February 18, 2020, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
Therefore, counsel requests that the Court relieve him as counsel for Joanie Faith Holcombe.

Respectfully Submitted,

s/Adam Sinclair Ruffin
Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of October, 2020.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/Adam Sinclair Ruffin

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Appellate Defender

South Carolina Commission on Indigent
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This 30th day of October, 2020.