

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Diane Schafer Goodstein, Circuit Court Judge

MICHAEL BOYKIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-002057

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUES PRESENTED

QUESTION I

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QUESTION II

The PCR judge erred in denying petitioner's request for a belated direct appeal because petitioner did not voluntarily and intelligently waive his right to a direct appeal.

STATEMENT OF FACTS

Petitioner Michael Boykin was convicted of possession of crack cocaine, possession of hydrocodone, and possession of oxycodone during the January 2018 term of the Kershaw County General Sessions Court before Judge G. Thomas Cooper, who sentenced petitioner to an aggregate fifteen-year prison term. Petitioner was represented at trial by Ronald W. Moak, and Assistant Solicitor Brett A. Perry appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal in the case.

On April 26, 2018, petitioner filed a PCR application with the Kershaw County Office of the Clerk of Court. The respondent filed a return dated April 26, 2018.

A PCR hearing was held on June 19, 2019, at the Richland County Courthouse before Judge Diane Schafer Goodstein. Petitioner was present at the hearing and represented by Kristy G. Goldberg, and Assistant Attorney General Brianna L. Schill appeared on behalf of the state. On August 30, 2019, Judge Goodstein issued an Order of Dismissal filed on September 19, 2019, denying petitioner's allegations of ineffective assistance of trial counsel.

A Rule 59(e) motion was filed by petitioner on October 7, 2019, and the respondent filed a return on October 22, 2019, but on November 18, 2019, Judge Goodstein filed an Order denying the motion. Petitioner appealed. This petition follows.

QUESTION I

Trial counsel erred in not specifically objecting to the trial judge's failure to issue a sealed sentence in the case after petitioner was tried in absentia because the sentencing phase was a critical stage at trial during which petitioner had a right to be present.

Petitioner was arrested when police stopped a cab that was transporting him from the Plantation Motel in Camden, South Carolina, pursuant to drug surveillance in that area. A search of petitioner's person yielded the discovery of crack cocaine and pills. App. 67, 1.1-p. 91, 1.24.

Midway through the trial in this case, petitioner, who was out on bond, left the courtroom after testifying and did not return to the courtroom for the remainder of the trial. App. 227, 1.2-p.228, 1.16. App. 294, 1.18-p.295, 1.13. After the jury verdicts were published, defense counsel asked the trial judge for a sealed sentence, but the request was denied. The trial judge went on to immediately sentence petitioner after the jury's verdicts were handed down. App. 229, 1.1-p. 230, 1.2.

During the PCR hearing held in the case, petitioner admitted that he was not present during the trial judge's sentencing, but added in effect that he wanted to appear at his sentencing proceeding. App. 295, 1.23-p. 297, 1.17; App. 298, 1.3-22.

Trial counsel testified that petitioner departed in the middle of the trial and did not return to the courtroom; and therefore, since petitioner was tried in absentia he (trial counsel) requested a sealed sentence from the trial judge, but the judge refused to do so and sentenced petitioner immediately after the verdicts were published. Trial counsel admitted in effect that he failed to properly object to the trial judge's denial of his motion for a sealed sentence. App. 322, 1.24-p.325, 1.12. Trial counsel's PCR testimony follows:

Q When the judge refused to seal the sentence, is there any reason you didn't object?

A The only thing that I can think of is I'd already asked and he said no and there—Judge Cooper and I'm—I probably should of objected for the record.

Q Do you understand—

A I wasn't – wasn't thinking about the appellate record or anything at that point.

Q Right. You understand it's probably not something preserved for appellate review when there's no objection?

A Probably so, yeah. App. 335, l. 17 – p, 336, l.2.

The PCR judge ruled that there was no legal requirement for a sealed sentence, and that because counsel requested a sealed sentence, there was no ineffective assistance rendered. App. 373-374.

Since sentencing is a critical phase of a trial, (See Illinois v. Allen, 397 U.S 337 (1970)), petitioner had a right to be present at his sentencing in order to present mitigation and for the purpose of allocution. See In Re Dwayne M. 287 S.C. 413, 339 S.E2d 130 (1986). Counsel's failure to specifically object to the judge's refusal to issue a sealed sentence on the ground that this was a critical stage where petitioner should have been present constituted error, which was exacerbated by the fact that the error also meant that the issue was not preserved for appellate review. An objection must be specific as a general objection does not preserve an issue for appellate review. State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). Note the case State v. Thompson 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003) where the Court stated that the sealed sentence was given as required by law.

Trial counsel erred in not specifically objecting to the trial judge's failure to issue a sealed sentence in the case in violation of the Sixth Amendment's guarantee of competent criminal representation at trial. See Strickland v. Washington, 466 U.S.668 (1984). Also, but for

the error, a reasonable likelihood exists that petitioner's sentencing outcome would have been different.

QUESTION II

The PCR judge erred in denying petitioner's request for a belated direct appeal because petitioner did not voluntarily and intelligently waive his right to a direct appeal.

During the PCR hearing held in the case, petitioner testified that trial counsel did not file a notice of appeal, but alleged that his family tried to contact counsel. App. 297, 1.21-25. Trial counsel testified in effect that the failure to receive a sealed sentence altered his view of the timeline to appeal, especially since he was not informed of the date on which petitioner was finally captured; however, counsel admitted that he should have filed a notice of appeal despite the unique difference in this case with respect to the fact that a sealed sentence was not issued. App. 322, 1.24-p.325, 1.12. Trial counsel's PCR testimony follows:

Q And I believe you already testified that you're waiting 'til he was picked up to file any motions or notice of appeal on his behalf.

A Yes ma'am.

Q Because of –because it wasn't a sealed sentence and there may be confusion regarding when that beginning date for those deadlines are, is there any reason you didn't go ahead and file those trial motions and a notice of appeal immediately after his sentencing?

A Well, I remember a reading of a rule and it said "imposed," and he hadn't been served with the sentence. So I—I felt like it was pretty clear that it was –it was when he got picked up. But you know, in retrospect I probably should have just filed it anyway. Because there's problems with sealed sentences, too, because I took a plea up in Marlboro County back in 2005, and it was one of those, it was sealed. The guy was supposed to, like, testify and it'd be unsealed after he testified at a trial and the trial never happened. And for all I know, it's now 2019, and he's never been picked up, so....App. 336, lines 3-23.

The PCR court ruled that since petitioner left the trial and counsel knew not of his whereabouts, then the appeal in effect was not an issue. App. 376-377.

Trial counsel testified that he believed the time to file a notice of appeal ran after a sealed sentence was published. However, there was no sealed sentence issued in this case. A case ends when a defendant is sentenced because then judgment is final, and thereafter the appeal may be taken. State v. Robinson 287 SC 173 337 S.E.2d 204 (1985). Here, judgement was final when the judge sentenced petitioner at the end of the trial. Thereafter, the defendant had ten days in which to file a notice of appeal. Trial counsel erred in failing to appeal in this case. Additionally, trial counsel erred in failing to advise appellant of his right to appeal notwithstanding petitioner's exit from the courtroom. Therefore, appellant was not advised of his appellate rights. One cannot voluntarily waive a right if he has not been advised of that right. Johnson v. Zerbst, 304 U.S. 458 (1938). Also, a defendant's failure to appear at trial does not waive his right to an appeal. Braddock v. State, 344 S.C. 578, 545 S.E.2d 498 (2001). The PCR court erred in denying petitioner's request for a belated direct appeal. The PCR judge in effect dismissed the appeal allegation. App. 371-372

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). Here, trial counsel did not 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. Therefore, trial counsel erred in failing to take the appropriate steps to ensure

petitioner's right to have his case reviewed on direct appeal. 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). The PCR court erred in denying petitioner's request for a belated direct appeal in the case.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that this Court grant the petitioner and allow full briefing on the issues raised above.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2020.

STATEMENT OF ISSUES ON DIRECT APPEAL

- 1.) The lower court erred in allowing prior bad acts testimony into evidence at trial.
- 2.) The lower court erred in violation of Rule 609, SCRE, in allowing appellant's prior record into evidence at trial.

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CERTIFICATE 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 Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Brianna L. Schill, Esquire, , at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael Boykin, #284399, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 20th day of November, 2020.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER