STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Nov 25 2020
SC Court of Appeals

Certiorari to Aiken County

Courtney Clyburn-Pope, Circuit Court Judge

WILLIAM MCCLADDIE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001979

SECOND PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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The PCR court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the state consented to the request and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR. 4

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ISSUES PRESENTED

I. Did the PCR court correctly grant Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the state consented to the request and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR?

II. Did trial counsel provide ineffective assistance by failing to object to hearsay from a police officer and by eliciting hearsay from the same police officer where the testimony involved prior consistent statements by critical state witnesses despite no express or implied charge against the witnesses of recent fabrication or improper influence or motive?

STATEMENT

On July 6, 2015, an Aiken County grand jury indicted Petitioner for burglary in the first degree (2015-GS-02-1103), possession of implements capable of being used in a crime (2015-GS-02-1104), and possession of a stolen vehicle (2015-GS-02-1105). App. 286-287; App. 289-290; App. 292-293. On July 7-8, 2015, Petitioner was tried before the Honorable Doyet A. Early, III, and a jury. App. 1. Jay Slocum and Cassie Hall represented the state. App. 1. Bradley McMillian and Wallis Alves represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 254, l. 22 – App. 255, l. 7. On July 8, 2015, Judge Early sentenced Petitioner to fifteen years' imprisonment for burglary, ten years' imprisonment for the stolen vehicle, and five years' imprisonment for the burglary tools. App. 261, ll. 16-24. He ordered the sentences to be served concurrently. App. 261, ll. 24-25; App. 288; App. 291; App. 294.

On August 6, 2015, trial counsel served his notice of intent to appeal. App. 264-265. The notice was filed at the Court of Appeals on August 11, 2015. App. 264-265. On August 19, 2015, the Court of Appeals dismissed the notice of appeal because it was not timely served as required by Rule 203(b)(2), SCACR. App. 266-267. Remittitur was issued on September 28, 2015. App. 268-269.

On October 19, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 270-276. Subsequently, the state filed its return. App. 277-282. There was no hearing. By an order filed August 22, 2016, Judge Early dismissed Petitioner's PCR application with prejudice. App. 283-285. Judge Early also granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). App. 283-285.

On September 22, 2016, Petitioner filed and served his notice of appeal. Thereafter, undersigned counsel filed a petition for writ of certiorari on behalf of Petitioner. In compliance

with the directive in Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), Petitioner filed a petition for writ of certiorari addressing the issue of the waiver of his direct appeal as well as an additional (PCR) issue, and Petitioner filed a brief addressing his direct appeal issue simultaneously. On September 24, 2018, this Court granted certiorari, and Petitioner filed his brief on October 5, 2018. In lieu of a brief, the state filed a motion to remand for a hearing to determine if Petitioner knowingly, intelligently, and voluntarily waived his other (PCR) claims. On March 21, 2019, this Court granted the motion to remand.

On May 16, 2019, the Honorable J. Cordell Maddox presided over a hearing in compliance with this Court's remand order. Supp. App. 6. Zmroczek represented Petitioner, and Janell H. Gregory represented the state. Supp. App. 6. Based upon the undisputed evidence, Judge Maddox found Petitioner did not knowingly, voluntarily, and intelligently waive his right to pursue PCR on grounds other than his right to a belated direct appeal. Supp. App. 14-16. Thus, Judge Maddox granted Petitioner a full PCR hearing. Supp. App. 14-16.

Thereafter, the Honorable Courtney Clyburn Pope presided over a PCR evidentiary hearing for Petitioner. Supp. App. 32. Arthur K. Aiken represented Petitioner, and Brianna L. Schill represented the state. Supp. App. 32. By an order dated March 6, 2020, Judge Pope denied relief. Supp. App. 70-93. Subsequently, Petitioner filed a notice of appeal. On May 22, 2020, this Court consolidated Petitioner's appeals and ordered the filing of a second petition for writ of certiorari and supplemental appendix. In compliance with this Court's order, Petitioner now files this second petition for writ of certiorari.

ARGUMENT

I. The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), where the state consented to the request and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR.

When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010); see also In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991); White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). "Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Clark v. State, 396 S.C. 164, 168, 719 S.E.2d 708, 710 (2011) (internal quotation omitted). "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)." Smith v. State, 309 S.C. 413, 424 S.E.2d 480 (1992); see also White, 263 S.C. at 118, 208 S.E.2d at 39. Even after a trial in absentia, a defendant is entitled to a direct appeal; the voluntary absence from trial does not act as a waiver of the right to a direct appeal. Braddock v. State, 344 S.C. 578, 580, 545 S.E.2d 498, 499 (2001).

"[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). "This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects

in attention to the defendant's wishes." Id. This Court held a defendant was entitled to a belated direct appeal where the defendant informed trial counsel he wanted to appeal, but decided against appeal after receiving erroneous advice from counsel. Sheppard v. State, 357 S.C. 646, 651-652, 594 S.E.2d 462, 465-466 (2004). Sheppard had been convicted of murder, and the jury had found an aggravating circumstance, but recommended a sentence of life imprisonment. Id. at 651-652, 594 S.E.2d at 465. When Sheppard told his counsel that he wanted an appeal, counsel advised against an appeal because the state could seek the death penalty again if he were granted a new trial. Id. at 652, 594 S.E.2d at 465. Based on this advice, Sheppard decided not to appeal. Id. at 652, 594 S.E.2d at 466. Counsel's advice was erroneous in light of controlling Supreme Court precedent that the state cannot seek a harsher sentence upon retrial when a jury or appellate court finds the prosecution failed to prove its case for death. Id. at 653, 594 S.E.2d at 466 (citing Bullington v. Missouri, 451 U.S. 430 (1981)). Sheppard's decision not to appeal was not a voluntary waiver as it was induced by erroneous advice; thus, he was entitled to a belated direct appeal. Id.

The appropriate scope of review on appeal in PCR proceedings is whether any e vidence of probative value is sufficient to uphold the PCR judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Ample evidence supports the PCR court's determination. The state consented to the grant of the belated direct appeal, acknowledging that Petitioner was entitled to the appeal and no evidence in the record supported a conclusion that Petitioner waived that right. See Davis v. State, 288 S.C. 290, 290, 342 S.E.2d 60, 60 (1986)(granting a defendant the right to a belated direct appeal where the state conceded the defendant was entitled to such after a PCR hearing). Trial counsel's filing and serving of a notice of appeal, albeit untimely, demonstrated Petitioner's intent to appeal his convictions and sentences. Petitioner was denied his "one fair bite at the apple" because he did not voluntarily or intelligently waive his right to a direct appeal.

Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (providing that "[a] defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal."); Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002) (providing that a defendant has the right to a belated direct appeal when he did not knowingly an intelligently waive his right to a direct appeal). Therefore, the record is replete with evidence supporting the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to White, supra.

II. Trial counsel provided ineffective assistance by failing to object to hearsay from a police officer and by eliciting hearsay from the same police officer where the testimony involved prior consistent statements by critical state witnesses despite no express or implied charge against the witnesses of recent fabrication or improper influence or motive.

Relevant facts

During Petitioner's trial, his counsel failed to object to hearsay testimony elicited by the state from key witnesses that improperly served to corroborate and support other witnesses. Additionally, trial counsel actually elicited hearsay from a state's witness, which also improperly served to corroborate and support other witnesses.

On February 20, 2015, shortly before midnight, Officer James Hess was working for the Jackson Police Department. App. 98, ll. 10-12; App. 99, ll. 7-20. Officer Hess explained that Doug Clark pulled up to him while he was running radar along Highway 125. App. 99, ll. 10-15. Thereafter, Officer Hess testified to hearsay as follows: "[H]e comes to me and says, Officer Hess, I've got a vehicle at my deceased aunt's house that's backed up to the door, and it's not supposed to be there." App. 99, ll. 15-18. Trial counsel did not object.

Officer Hess went to the residence described by Doug, where he found a car backed up to the door, which he learned from dispatched had been reported stolen. App. 100, l. 8 – App. 101, l. 4. He also saw a window that "looked like it was jimmied or broke." App. 101, ll. 5-7. After other officers arrived at the house, Officer Hess returned to Doug in order to get a key for the home. App. 103, ll. 6-15. In the meantime, other officers found Petitioner on the ground near some bushes. App. 103, l. 16 – App. 104, l. 1. Officer Hess claimed others found a pry bar on the ground beneath Petitioner. App. 104, ll. 13-21. According to Officer Hess, Petitioner had a key to the car that was backed up to the residence in his pocket. App. 106, l. 24 – App. 107, l. 3.

Later, the state questioned Officer Hess about photographs taken by the police. Officer Hess testified regarding a clock: "This is the clock that Mr. Clark advised me that belonged to his grandmother and it was inside the residence. We found this in the trunk of the vehicle." App. 129, ll. 16-20. Trial counsel did not object. Officer Hess claimed "[t]he keyholder," who had been identified earlier as Doug Clark, identified the clock as "in the house before the burglary." App. 130, ll. 9-16. Again, trial counsel did not object.

On cross-examination of Officer Hess, trial counsel actually elicited additional hearsay. Specifically, counsel asked if Officer Hess noticed the missing washer, to which Hess responded that he had not noticed the washer was missing until Ms. Clark told him "other things that were missing." App. 146, ll. 4-14. Initially, Officer Hess responded that he had not noticed the washer was missing "not until prior." App. 146, ll. 8-9. Thereafter, trial counsel asked Officer to clarify, and Officer Hess then offered the improper hearsay – "Ms. Clark coming and telling me other things that were missing." App. 146, ll. 12-14. Despite knowing he had eliciting improper hearsay, trial counsel pressed forward with this line of questioning. He continued, "So there was a missing washer and a missing dryer?" App. 146, ll. 15-16. As he had previously explained, Officer Hess responded, "According to Ms. Clark, yes, sir." App. 146, l. 17.

At the PCR hearing, trial counsel claimed Officer Hess's testimony regarding what Clark told him about the car at his deceased's aunt's house was not "necessarily offered for the truth of the matter asserted." Supp. App. 54, ll. 12-25. He claimed he did not object "because Doug Clark was on their witness list and intended to testify." Supp. App. 54, l. 25 – Supp. App. 55, l. 1. Unprompted, trial counsel claimed he made a strategic decision not to object "just because had they put Doug Clark up to say, 'I went and told him that this car was at my aunt's house or

grandmother's house and' - - that was - - that was a call on my part." Supp. App. 55, ll. 2-6. Trial counsel was unsure if Doug Clark actually testified. Supp. App. 55, ll. 7-9.

Likewise, trial counsel testified at the PCR hearing that Officer Hess's testimony that Doug Clark advised him that a clock found in the trunk of the car belonged to his grandmother and had been inside the house was not offered for the truth of the matter asserted. Supp. App. 55, ll. 18-24. Again, unprompted, trial counsel claimed "it was a strategic decision not to object to kind of - - to keep the trial moving along." Supp. App. 55, l. 25 – Supp. App. 56, l. 2.

Turning to trial counsel's cross-examination of Officer Hess actually eliciting hearsay, trial counsel insisted that he did not ask him what Ms. Clark said. Supp. App. 57, ll. 1-6. Hess's answer was simply "his answer to [trial counsel's] question." Supp. App. 57, ll. 6-7.

Trial counsel claimed he does not "object each and every single time [he] find[s] something objectionable during a witness's testimony." Supp. App. 62, ll. 12-15. According to trial counsel,

> Losing an objection, making a frivolous objection, plays in a negative light in front of the jury, especially if the person's on their witness list or the testimony could be elicited another way. It's - - it's easier - - keeps everybody moving and doesn't - - doesn't have us arguing necessarily in front of the jury for no reason.

Supp. App. 62, ll. 17-22.

Regarding the first hearsay statement, Judge Pope found that trial counsel "gave a valid strategic reason for not objecting." Supp. App. 86. According to Judge Pope, "[t]rial counsel testified he does not object to every single objectionable statement as [that] could make his client appear unfavorable to the jury." Supp. App. 86. Further, "[t]rial counsel also testified he knew Doug[] was going to testify to the same information provided by Officer Hess." Supp. App. 86.

Similarly, concerning the second hearsay statement, Judge Pope found trial counsel "made a strategic decision to not object to this statement because the declarant, Doug Clark (Doug), was going to testify at the hearing to the same facts." Supp. App. 87. According to Judge Pope, Doug

"in fact did testify at his trial regarding the clock that was taken from Clark's home." Supp. App. 87. Also, Judge Pope again noted that "[t]rial [c]ounsel testified that he does not object to everything that is objectionable because it could make his client appear unfavorable to the jury." Supp. App. 87.

Regarding the third instance of hearsay, which trial counsel actually elicited, Judge Pope noted that "[t]rial [c]ounsel testified he did not purposefully elicit this testimony, but that the testimony given was simply the answer to his question." Supp. App. 88. According to Judge Pope, trial counsel "gave a valid strategic reason for not objecting to the testimony." Supp. App. 89. "Trial [c]ounsel testified he does not object to every single objectionable statement as it could have a negative effect on his clients." Supp. App. 89. Further, "Clark was expected to give nearly identical testimony regarding the missing washer and dryer, and Clark did in fact testify regarding the washer and dryer." Supp. App. 89.

Thus, Judge Pope found Petitioner failed to show how trial counsel was deficient or any resulting prejudice as a result of any of these errors. Supp. App. 87; Supp. App. 87-88; Supp. App. 89.

Discussion

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. "The benchmark for judging any claim of ineffectiveness must be whether 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, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the

ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

"Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. However, "[a] statement is not hearsay if … [t]he declarant testifies at the trial … and is subject to cross-examination concerning the statement, and the statement is … consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Rule 801(d)(1)(B), SCRE. Of course, "the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose." Rule 801(d)(1)(B), SCRE. "The plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence." State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001).

Contrary to trial counsel's assertion, and the PCR court's finding that objecting to the improper hearsay was unnecessary because the declarants would likely testify, the Rules of Evidence provide the opposite. As explained, pursuant to the Rules of Evidence, a prior consistent statement by a witness is hearsay and not admissible unless the proponent of the evidence can show the prior consistent statement is offered to rebut a charge of recent fabrication

or improper motive or influence. Here, there was no such charge. In fact, Officer Hess was the state's first witness; thus, there could have been no such allegation. Further, there was no such insinuation in trial counsel's opening statement. In light of the Rules of Evidence barring the admission of prior consistent statements except in very limited circumstances, trial counsel performed deficiently by failing to object to the state's eliciting of the improper hearsay and by eliciting improper hearsay himself during cross-examination.

Petitioner suffered prejudice due to trial counsel's failure to object to the state's eliciting of hearsay from Officer Hess and to eliciting additional hearsay from Officer Hess during cross-examination. The state's case against Petitioner was built upon circumstantial evidence. It was essential that the state shore up its case by relying upon Officer Hess to support testimony of Doug and Evelyn Clark. The police could only place Petitioner in proximity to a structure that appeared to have been burglarized. Doug and Evelyn Clark provided the necessary testimony to connect items found in the car to the structure. Thus, their testimony was critical to the state's case. "Erroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 246 (2001). See also State v. Simmons, 423 S.C. 552, 566-567, 816 S.E.2d 566, 574 (2018) (holding a medical doctor's testimony that "ventured far beyond the parameters of Rule 803(4), SCRE," was not harmless beyond a reasonable doubt where the state presented no physical evidence and relied upon the corroborative effect of the doctor's testimony to support its other witnesses).

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's decision that Petitioner is entitled to a belated direct appeal. Additionally, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. If this Court grants the petition but dispenses with full briefing, Petitioner respectfully requests this Court reverse the PCR judge and hold trial counsel provided ineffective assistance.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of November, 2020.

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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 Second Petition for Writ of Certiorari and a copy of the Supplemental Appendix in the above referenced case have been served upon Brianna L. Schill, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is briannaschill@scag.gov; and a copy of the Second Petition for Writ of Certiorari and a copy of the Supplemental Appendix have been served on William McCladdie, #364614, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067, this 25th day of November, 2020.

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER