RECEIVED
Jun 25 2021
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

JOHNNY N. GREGG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001491

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
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

INDEX

ISSUES PRESENTED

I. 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 he desired a direct appeal, and where he never knowingly and voluntarily waived his right to a direct appeal, and where the state consented to allow a belated direct appeal for Petitioner?

II. Did the PCR court err in denying relief, where trial counsel failed to fully investigate Petitioner's case fully and prepare for trial, where counsel failed to put Petitioner on the stand for a hearing to determine the voluntariness of his statement?

STATEMENT

On June 8, 2017, Petitioner was indicted by a Florence County grand jury on eight counts: possession of a weapon during the commission of a violent crime, possession of a stolen pistol, possession with intent to distribute Xanax, heroin trafficking, possession with intent to distribute heroin within proximity of a school, possession with intent to distribute cocaine base, possession with intent to distribute cocaine, and possession with intent to distribute marijuana. App. 452 – 453. He proceeded to trial before the Honorable William H. Seals, Jr. and a jury on April 16, 2018. App. 1. B. Scott Suggs represented Petitioner; John Jepertinger appeared on behalf of the state.

The state dismissed the possession of a stolen pistol and possession with intent to distribute cocaine charges. App. 99 ll. 13 – 18; App. 272 ll. 16 – 18; App. 329 ll. 18 – 19. After a three-day trial, the jury found Petitioner guilty of the remaining six offenses. App. 374 l. 13 – 375 l. 7. Judge Seals sentenced Petitioner to twenty-five years' incarceration on the heroin trafficking conviction, consecutive to five years on the possession with intent to distribute cocaine base. App. 378 l. 19 – 380 l. 2. The remaining sentences were concurrent, with Petitioner receiving ten years on the marijuana offense, three years on the Xanax offense, four years on the possession of a weapon charge, and eight years on the possession with intent to distribute heroin within the proximity of a school. Id. In sum, Petitioner received a thirty-year sentence.

Trial counsel did not file a notice of appeal. Petitioner filed an application for post-conviction relief on or about March 18, 2019. App. 382. It contained allegations of ineffective assistance of counsel, including contentions that counsel failed to pursue a direct appeal, failed to challenge subject matter jurisdiction, and failed to preserve issues. App. 385 – 386. An

amendment to the PCR application was filed through counsel on December 18, 2019 which added "Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant thus rendering Applicant's counsel unprepared to properly defend Applicant at trial." App. 390. The state filed its Return and Partial Motion to Dismiss on July 5, 2019. App. 391.

An evidentiary hearing was held before the Honorable Craig Brown on December 19, 2019. Jonathan Waller represented Petitioner, and Samuel Key appeared on behalf of the state. Petitioner and trial counsel testified at the hearing. Judge Brown granted belated appellate review under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). By way of a written order signed October 23, 2020, Judge Brown denied post-conviction relief but granted belated review of Petitioner's direct appeal issue(s). App. 435.

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

ARGUMENTS

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

Relevant facts

Near the conclusion of Petitioner's trial, after the jury's verdict was read, counsel requested ten days to submit post-trial motions:

> I like to do that, Judge, because I don't do much in the way of [appellate] work and I think that extends out my - - my time to appeal.

App. 376 ll. 5 – 8. The trial judge gave counsel the requested ten days. Id.

On cross-examination at the PCR evidentiary hearing, Petitioner testified that he asked counsel to appeal the convictions. App. 416 ll. 20 – 23. During redirect, Petitioner indicated that he never signed a waiver of his right to his appeal. App. 417 ll. 4 – 16.

Counsel was asked about the direct appeal matter as well. He did not recall Petitioner asking for an appeal but admitted that Petitioner's mother may have. App. 424 ll. 3 – 7.

At the conclusion of the hearing, the state consented to belated appellate review of direct appeal issues. App. 432 ll. 2 – 6. As mentioned, the PCR court granted the request under White v. State. App. 433 ll. 15 – 16; App. 449.

Discussion

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "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). "In the absence of an intelligent waiver

by the defendant, counsel must either initiate an appeal or comply with the procedure in [Anders]." Id. (quoting Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). Following a guilty plea, when there is reason to think a defendant would want to appeal or when the defendant reasonably demonstrated an interest in appealing, there is a constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores–Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995).

"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). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [Anders]." Id. (quoting Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)).

"The appropriate scope of review of this Court is that any evidence 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). The PCR court's order correctly concluded that Petitioner is entitled to a belated appeal, where Petitioner's mother asked counsel to file an appeal. App. 449. Accordingly, the PCR court found Petitioner was entitled for belated appellate review of his guilty plea under White v. State, supra. The evidence supports the PCR judge's conclusion.

II. The PCR court erred in denying relief, where trial counsel failed to fully investigate Petitioner's case fully and prepare for trial, where counsel failed to put Petitioner on the stand for a hearing to determine the voluntariness of his statement.

Relevant facts

Petitioner was in an apartment when law enforcement executed a search warrant and found him there. App. 402 ll. 15 – 22; App. 421 l. 13 – 422 l. 2. Drugs and weapons were located in the apartment, and Petitioner was the only person inside at the time. Id. Petitioner did not live at the apartment and did not have access to the locked bedrooms. App. 406 l. 19 – 407 l. 22. Trial counsel and Petitioner, over the course of approximately four meetings, did not discuss many details regarding trial strategy; they never conversed about how ownership of the apartment may affect the legality of the search warrant. App. 404 l. 20 – 405 l. 9; App. 408 ll. 8 – 23. Counsel never prepared Petitioner for the possibility that the search warrant could not be challenged due to lack of standing. Id. Additionally, Petitioner contended trial counsel never explained the concept of constructive possession to Petitioner. App. 412 ll. 19 – 21. Counsel's testimony confirmed this assertion. App. 423 ll. 13 – 24.

Trial counsel indicated that Petitioner originally retained John Ethridge of the Gardner Law Firm. App. 418 l. 20 – 419 l. 10. Ethridge associated trial counsel to handle the trial. Id. Counsel did not have the benefit of any file materials at the evidentiary hearing. App. 426 l. 20 – 427 l. 16. Nonetheless he recalled that there was an on-scene confession, at least according to law enforcement, wherein Petitioner claimed all of the weapons and drugs in the apartment. App. 429 l. 22 – 430 l. 9.

Discussion

Counsel failed to prepare Petitioner for the trial in this case. According to Petitioner, the two never discussed constructive possession; the PCR evidentiary hearing was the first time he had heard of the concept. Additionally, counsel failed to put Petitioner on the stand at the Denno hearing in order to show that the on-scene confession was coerced and the product of an imposing law enforcement presence.

"There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991)). "Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Alexander, 303 S.C. at 541–42, 402 S.E.2d at 485). "A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); see also Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. 2052.

Whenever evidence is introduced that was allegedly obtained by conduct violative of a defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing outside of the presence of the jury at the threshold point to establish circumstances under which it was gained. State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978).

In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the United States Supreme Court declared it axiomatic that a defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury. Thus, where there is conflicting evidence about a statement, the court must first make a finding as to the validity of the statement. See State v. Silver, 307 S.C. 326, 414 S.E.2d 813 (1992), aff'd as modified, 314 S.C. 483, 431 S.E.2d 250 (1993); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989).

In State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), this Court instructed:

> In determining whether a confession was given "voluntarily," this Court must consider the totality of the circumstances surrounding the defendant's giving the confession. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). As the United States Supreme Court has instructed, the totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." Id. (internal citations omitted). Furthermore, no one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. Id.

Pittman, 373 S.C. at 566, 647 S.E.2d at 164. See also Arizona v. Fulminante, 499 U.S. 279, 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (applying totality of the circumstances test to determine confession's voluntariness); State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) ("A determination whether a statement was 'given voluntarily requires an examination of the totality of the circumstances.' "); State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) ("The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances.") (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)).

It is difficult, if not impossible, to ascertain an individual's state of mind and accompanying comfort level, in order to determine voluntariness, without that individual's perspective and testimony. Appellate courts in South Carolina have recognized some of the factors to include in the totality-of-circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police representations, threats of violence, and promises of leniency. State v. Parker, 381 S.C. 68, 87, 671 S.E.2d 619, 629 (Ct. App. 2008). Testimony from law enforcement cannot speak to a number of those factors.

The pre-trial hearing in Petitioner's case illustrated how forceful the police officers were when they rammed open the apartment door:

> We went to the rear of the residents due to the information that we had saying that the rear is where most of the traffic was used. We went there, because usually if that's not the door they're using, sometimes it's barricaded. So, we went to the residence, knocked, knocked and announced police search warrant. Nobody responded to the door. I, myself, forced the door open [with a] police department issued ram and that's when everyone made entry at that point.

App. 47 ll. 5 – 16. Five officers were involved with knocking open the door and rushing into the home. App. 54 ll. 7 – 17.

After breaking into the residence, an officer saw Petitioner run into the kitchen. App. 48 ll. 15 – 21. Andron Brown, the testifying officer, suggested that Petitioner claimed all of the drugs and weapons in the apartment:

> He told us that everything in there belonged to him. He also told us that the suspected cocaine that was sitting on the kitchen in plain view was there because he was about to leave and go make a sale and that's why his vehicle was still running. He also pointed out other drugs that we hadn't found yet that were in the cabinets in the kitchen and also around the house.

App. 51 ll. 7 – 15. Critically, Brown testified that there was a time when other officers may have spoken with Petitioner outside of Brown's presence. App. 63 l. 20 – 64 l. 4. As such, it is unknown what representations, threats, or promises were made to him.

The list of illegal items located in the apartment was extensive: approximately 320 Xanax pills, 10.5 grams of cocaine, eight Ecstasy pills, 5.5 grams of suspected cocaine base, 33 grams of suspected heroin, 1,132 grams of marijuana, and four guns. App. 51 l. 16 – 52 l. 1. Police also located over thirty thousand dollars in cash. Id. According to Brown, Petitioner agreed to talk to police and was "very cooperative." App. 53 ll. 2 – 7. The trial judge ruled that Petitioner "gave his statement freely and voluntarily." App. 65 ll. 1 – 2.

"The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the given [statement]. The due process test takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." State v. Miller, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007) (quoting Dickerson v. United States, 530 U.S. 428, 434, 120 S.Ct. 2326 (2000) (internal quotation marks omitted)). The potential circumstances to consider include, but are not limited to, "the crucial element of police coercion," location and length of interrogation, its continuity, as well as the defendant's maturity, education, physical condition, and mental health. Id. 375 S.C. at 385, 652 S.E.2d at 452 (quoting Withrow v. Williams, 507 U.S. 680, 693-94, 113 S.Ct. 1745 (1993)).

Importantly, although "[c]oercive police activity is a necessary predicate to finding a statement is not voluntary," it is "determined from the perspective of the suspect." State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). "A statement may not be extracted by any sort of threats or violence, or obtained by any direct or indirect promises, however slight, or obtained by the exertion of improper influence." Id. (internal quotations omitted).

Given the totality of the circumstances in this case, especially considered from Petitioner's perspective, the large police presence that barged into the apartment likely invalidated Petitioner's confession. The failure to put Petitioner on the stand, especially considering Petitioner's willingness

to testify in his own defense after the state rested, was ineffective assistance of counsel which prejudiced Petitioner. Had Petitioner testified, his confession likely would have been suppressed. As a result, he would not have been convicted of all six offenses.

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's decision that he is entitled to a belated direct appeal. Petitioner likewise requests that this Court grant his petition for writ of certiorari and allow full briefing on these issues, reverse the charges against him, and remand the case for a new trial.

s/ Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of June, 2021.