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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Alex Kinlaw, Circuit Court Judge

DOUGLAS MURPHY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000263

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 post-conviction relief court err in finding plea counsel was not ineffective for failing to file a notice of appeal from Petitioner's guilty plea?

STATEMENT

Petitioner was indicted by the Richland County grand jury in May 2016 for murder and in July 2016 for attempted armed robbery. App. 130 – 134. Petitioner was represented by Lir Dirieg and the state was represented by Kathryn Cavanaugh. App. 1.

On May 30, 2018, Petitioner appeared before the Honorable Casey Manning and pled guilty to voluntary manslaughter and attempted armed robbery for a negotiated twenty-year sentence. App. 1. At Petitioner's plea, the state alleged that Petitioner, along with three co-defendants, conspired to rob a drug dealer of marijuana. App. 18, l. 23 – 20, l. 6. Petitioner and one of his co-defendants allegedly approached the victim while he was sitting in his car to purchase \$120 worth of marijuana but were only going to give the victim \$10. Petitioner approached the passenger side of the car and his co-defendant, who was armed with a gun, approached the driver's side door. While Petitioner was handing the victim the \$10, his phone fell into the victim's car and the co-defendant shot and killed the victim. App. 20, ll. 6 – 21. Petitioner confessed to law enforcement. App. 21, ll. 4 – 14.

Petitioner's sentencing hearing was deferred because the victim's mother was not able to be present at the guilty plea. App. 3, ll. 3 – 18. On June 21, 2018, Petitioner again appeared before the Honorable Casey Manning, who imposed the negotiated twenty-year sentence. App. 36, ll. 14 – 19. Petitioner's counsel did not file a notice of appeal.

Petitioner filed an application for post-conviction relief on October 18, 2018 and the state filed its Return on December 21, 2018. App. 38 – 68. An evidentiary hearing was held on October 28, 2020 via Cisco WebEx before the Honorable Alex Kinlaw. Jonathan Waller represented Petitioner and Samuel Key represented the state. App. 71. Petitioner and his plea counsel both testified at the hearing. App. 72.

Petitioner testified that after he pled guilty, he discussed filing an appeal with his plea counsel. App. 84, ll. 16 – 23; app. 89, ll. 7 – 15. Petitioner testified that although plea counsel told him he did not have to file an appeal, Petitioner asked plea counsel to file an appeal. App. 85, ll. 7 – 14.

Plea counsel agreed that he and Petitioner discussed Petitioner's right to appeal. Counsel however denied that Petitioner requested for him to file an appeal. Counsel maintained that he told Petitioner that filing an appeal would be a "waste of time" and that if Petitioner won his appeal, he would be subject to a murder charge and facing life imprisonment. App. 92, l. 11 – 93, l. 11.

Counsel admitted that "two to three weeks after the sentencing" he received a text message from Petitioner's mother asking Counsel to file a notice of appeal. App. 93, ll. 12 – 17. However, on cross-examination Counsel also admitted that he had received an email from Petitioner's mother the day after his guilty plea asking Counsel "what would happen" if Petitioner pursued an appeal. App. 102, l. 24 – 103, l. 15. Counsel responded to Petitioner's mother's email stating that Petitioner could file an appeal but that if he was successful "he would be going to trial for murder." App. 61.

The PCR judge found Counsel's testimony credible and Petitioner's testimony lacking in credibility. App. 128. Specifically, the judge found that Counsel's testimony that Petitioner never asked him to file a notice of appeal was credible and that "even if [Petitioner's] mother did, it was well after the ten-day deadline." App. 128. Petitioner's application was denied. App. 129.

This petition for writ of certiorari follows.

STATEMENT OF ISSUE ON APPEAL

Did the plea judge err in accepting Petitioner's guilty plea where there was not a factual basis for his guilty plea?

ARGUMENT

The post-conviction relief court erred in finding plea counsel was not ineffective for failing to file a notice of appeal from Petitioner's guilty 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.

"After the client is convicted and sentenced, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal." Matter of Anonymous Member of the Bar, 303 S.C. 306, 307, 400 S.E.2d 483, 483 (1991). A lawyer should also advise the client on whether an appeal is warranted and ascertain whether the client wants to file an appeal or not. Id. Even if the lawyer has a reasonable basis to believe that the client is aware of his appeal rights, counsel still should make sure that the defendant is aware of his rights and, if the client does not wish to waive his right to a direct appeal, counsel should pursue an appeal or follow the

procedure set forth in Anders v. State of California, 386 U.S. 738 (1967). White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002).

“[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 Rodriquez 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. According to Petitioner's testimony, he told counsel that he wanted to pursue an appeal after he pled guilty. Although counsel denied this, counsel admitted that the day after Petitioner pled guilty, he received an email from Petitioner's mother inquiring about filing a notice of appeal. It should have been evident to counsel at that point that Petitioner was interested in pursuing an appeal and that he did not wish to waive his right to an 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 a notice of 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 his behalf after he expressed a desire for him to do so. Counsel's failure was professionally unreasonable, and the PCR judge erred in finding otherwise. Petitioner is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). 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, reverse the finding of the PCR judge, find that counsel was ineffective for failing to file a notice of appeal, grant the belated appeal pursuant to White v. State and order briefing on the direct appeal issue.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of August, 2021.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

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DOUGLAS MURPHY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Douglas Murphy 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 Alex Kinlaw, which was held on October 28, 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 Douglas Murphy.

Respectfully Submitted,



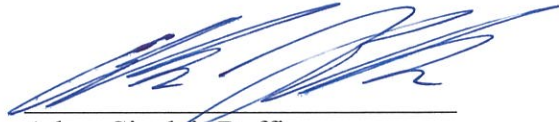
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of August, 2021.

CERTIFICATE OF COUNSEL

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."



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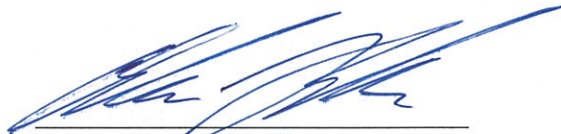
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000263

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and Appendix in the above referenced case have been served upon Michael D. Davidson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; on Douglas Murphy, #376887, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 24th day of August, 2021.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER