STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Anderson County

The Honorable R. Lawton McIntosh, Plea Judge
The Honorable R. Scott Sprouse, PCR Judge

Appellate Case No. 2020-000495

JOANIE HOLCOMBE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

PETITIONER'S 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE

Did the post-conviction relief court correctly find that Petitioner failed to prove that she did not knowingly and voluntarily waive her right to direct appellate review of her conviction and sentence when Petitioner did not make a reasonable demonstration to her criminal defense lawyer that she wanted to appeal and when she did not prove that a rational defendant in her circumstances would want to appeal?

STATEMENT OF THE CASE

Joanie Faith Holcombe ("Petitioner") is presently imprisoned in the South Carolina Department of Corrections. During its June of 2016 term, the Anderson County Grand Jury indicted Petitioner for murder (2016-GS-04-1016). Rodney W. Richey ("plea counsel"), Esquire, represented Petitioner. Deputy Solicitor Cather Huey of the Tenth Circuit Solicitor's Office prosecuted the case. On July 13, 2017, Petitioner appeared before the Honorable R. Lawton McIntosh ("plea court") and pleaded guilty to homicide by child abuse, after waiving presentment of the indictment to the Grand Jury.[1] The plea court sentenced Petitioner to imprisonment for fifty years. Petitioner did not appeal her conviction or sentence.

Petitioner filed an application for post-conviction relief on April 5, 2018, raising multiple claims, which Respondent interprets as follows: (1) Petitioner did not knowingly and voluntarily waive her right to direct appellate review of her conviction and sentence; and (2) plea counsel was constitutionally ineffective for failing to present more evidence about Petitioner's mental health challenges. On February 18, 2020, the parties appeared before the Honorable R. Scott Sprouse ("PCR court") at the Anderson County Courthouse for an evidentiary hearing in this matter. Linda V. Wisenhunt, Esquire, represented Petitioner. The undersigned represented Respondent. On March 6, 2020, the PCR court issued an order denying Petitioner's application for post-conviction relief with prejudice, finding that Petitioner failed to prove that she did not knowingly and voluntarily waive her right to direct appellate review of her conviction and sentence because Petitioner did not prove that she made a reasonable demonstration to plea counsel that she desired

[1] The State amended the indictment to make the new offense homicide by child abuse as part of a plea agreement with Petitioner so that the mandatory minimum would be lowered from thirty years' imprisonment to twenty years'. App. 15-16.

to appeal and because Petitioner did not prove that a rational defendant in her circumstance would want to appeal the conviction and sentence.

Petitioner's appeal followed.

STATEMENT OF FACTS

At Petitioner's guilty plea hearing, held on July 13, 2017, Deputy Solicitor Huey present the following recitation of facts:

> On or about December 13th of 2015, [Petitioner], . . . who was age 23 at the time, gave birth to a girl at her trailer located . . . in Anderson County. Upon delivering the baby on her own, [Petitioner] placed the baby in the toilet. When the baby continued to cry, [Petitioner] placed her in a trash bag causing her to asphyxiate.
>
> Over the next several days, [Petitioner] buried the newborn in the woods more than once, as she was discovered by dogs and dug up. The severely decomposed body of this newborn was discovered by a passer-by in the woods near this trailer, and law enforcement was called out as a result.
>
> When law enforcement got there, [Petitioner's] own mother and sister came out, in shock, essentially, and said that they thought [Petitioner] had been pregnant but had been concealing that pregnancy and that she no longer looked pregnant. So, of course, things turned toward her direction.
>
> [Petitioner] was also nearby, . . . and she was confronted with the allegation of having been recently pregnant. Later coworkers thought the same thing. She was even on video at her workplace appearing to have a bump in her stomach.
>
> [Petitioner] eventually confessed to this crime . . . after a voluntary waiver of rights, and this was video recorded.
>
> An autopsy later confirmed asphyxia was the infant's cause of death, and the report also notes puncture marks consistent with canine teeth.

App. 12-13.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. Plea counsel had no constitutional duty to consult with Petitioner about whether she wanted to appeal her conviction and sentence because plea counsel had no reason to think that a rational defendant in Petitioner's situation would have wanted to appeal and because Petitioner did not make a reasonable demonstration to plea counsel that she wanted to appeal.

The PCR court correctly found that Petitioner failed to prove that she did not knowingly and voluntarily waive her right to direct appellate review of her conviction and sentence. Petitioner argues that plea counsel was constitutionally ineffective for not filing and serving a notice of appeal on Petitioner's behalf following her guilty plea, but she is not entitled to relief because she has not proven that a rational defendant in her circumstances would want to appeal and because she has failed to prove that she made a reasonable demonstration to plea counsel that she wanted to appeal. A defense lawyer has a constitutionally-imposed duty to consult with his client about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that the lawyer's particular client reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). In determining whether the duty attached, a post-conviction relief court "must take into account all the information counsel knew or should have known." Id. at 480 (citation omitted). When counsel has consulted with the defendant regarding the right to appeal, "Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Id. at 478 (emphasis added). In order to establish that he was prejudiced by counsel's failure to file an appeal, an applicant for post-conviction relief must show that he would have appealed absent counsel's deficient performance. Id. at 484.

A rational defendant in Petitioner's situation.

The PCR court correctly found that Petitioner failed to prove that that a rational defendant in Petitioner's situation would want to appeal. App. 78. Petitioner knew the potential sentences she could face if she pleaded guilty. At the guilty plea hearing, Petitioner affirmed that she understood that the minimum sentence that the plea court could impose was twenty years' imprisonment, and that she could be sentenced to as much as life in prison. App. 4-5. Petitioner affirmed to the plea court that plea counsel had done everything on her behalf that she felt that should have been done. App. 8, 10. Plea counsel affirmed that he had talked with Petitioner about, among other things, the minimum and maximum lengths of prison time that she could receive if she pleaded guilty. App. 11. Petitioner admitted before the PCR court that the sentence she actually received was not greater than the sentences that she and plea counsel had discussed. App. 48-49.[2]

Plea counsel believed that Petitioner would receive a stiff sentence and that he made Petitioner aware of that belief. While asking the plea court to issue only the mandatory minimum sentence at the guilty plea hearing, plea counsel said that he had discussed with Petitioner that "she's going to have to do a lot of time." App. 19. As plea counsel put it, even if the plea court sentenced Petitioner to the mandatory minimum sentence, Petitioner would "still do a ton of time." App. 19.

Petitioner communicated to plea counsel, directly and indirectly, her desire to plead guilty and accept whatever sentence she received. In her statement to the plea court, Petitioner said, "And whatever I get today is, I believe, you know, is God's will." App. 22. Though the prosecution

[2] Petitioner immediately backtracked in her testimony to say that she had not discussed "that" with plea counsel at all, which contradicted the testimony that she had just given. App. 49. This is evidence of Petitioner's lack of credibility.

asked for a life sentence, the plea court declined to issue that sentence, and instead sentenced Petitioner to imprisonment for fifty years. App. 15-16, 24. Petitioner then *thanked* the plea court. App. 24. Plea counsel testified at the evidentiary hearing that Petitioner wanted to plead guilty because she told him that "she just wanted to accept what she had done . . . ." App. 53. Plea counsel testified that he told Petitioner that the plea deal she was accepting "[was] a bad deal" and, due to Petitioner's decision to plead guilty without pursuing defenses that may have been available to her, that her case was "not going to work out really good . . . ." App. 57. Plea counsel testified that Petitioner knew that she could receive a life sentence and that plea counsel believed her sentence would not be favorable for her because she was not pursuing any defenses. App. 60. Plea counsel testified that he did not think that Petitioner wanted to appeal her conviction and sentence because Petitioner had been so adamant throughout his representation of her that she did not want to pursue any defenses and had made multiple statements to him that she would be fine with whatever sentence was imposed. App. 61-62. As plea counsel put it before the PCR court, Petitioner said to him, "'Well, whatever I get, I get.'" App. 62. All of this together gave plea counsel no reason to think that Petitioner wanted to appeal.

Petitioner's failure to demonstrate a desire to appeal.

The PCR court correctly found that Petitioner failed to prove that she made a reasonable demonstration to plea counsel that she wanted to appeal her conviction and sentence. App. 78. At the guilty plea hearing, plea counsel affirmed to the plea court that he explained to Petitioner that she had the right to appeal the conviction and sentence. App. 12. The plea court, in its question to plea counsel in Petitioner's presence, noted that Petitioner had the right to appeal regardless of the fact that she was pleading guilty and that she would have a ten-day window in which to do so.

App. 11-12. A colloquy with a guilty plea court can cure an alleged deficiency in advice given to a defendant by his lawyer. Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011) (citations omitted) (concluding that any alleged deficiency in plea counsel's advice to Holden was cured by the plea court's colloquy), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Even if plea counsel had not informed Petitioner of her right to appeal, the plea court's colloquy would have cured any deficiency. Petitioner affirmed to the plea court that she understood that she had the right to appeal. App. 12. After the plea court issued a fifty-year sentence, it again informed Petitioner that she had ten days in which to appeal. App. 24.

At the evidentiary hearing before the PCR court, Petitioner denied that she and plea counsel had ever discussed "appeal at all" and denied that she and plea counsel had discussed whether she had a reason to appeal. App. 47. Petitioner denied that she had an opportunity to discuss an appeal with plea counsel following the guilty plea hearing. App. 47. Petitioner affirmed that the plea court "mentioned" during the guilty plea hearing that she had the right to appeal, but she testified that she had not known what that meant at the time of the guilty plea hearing. App. 48. Petitioner testified that, after the guilty plea hearing, she asked plea counsel what an appeal was, and that he did not say anything; according to Petitioner, plea counsel only told her that he would discuss it with her later, but that he then did not visit her to discuss it. App. 48, 51. Petitioner testified that she had sent a single letter to plea counsel about a week after her guilty plea hearing to ask for an appeal and that plea counsel did not reply. App. 51-52. Petitioner affirmed that she wanted to appeal due to the length of her sentence. App. 49.

Plea counsel did not remember discussing with Petitioner before the guilty plea hearing the possibility of appealing, and reasoned that he probably did not discuss that with her before the

hearing. App. 57. He did not recall being told by Petitioner after the guilty plea hearing that she wanted to appeal. App. 58. He did, however, remember getting a call afterwards from Petitioner's mother, in which the mother asked for "their" options, and that he discussed the appeal "with them." App. 58. Plea counsel estimated that the call from Petitioner's mother came about a week after the guilty plea hearing. App. 61. Plea counsel did not remember "expressly talking to [Petitioner]" and did not know whether Petitioner's mother relayed the information he gave to Petitioner. App. 58. Plea counsel did not go to consult with Petitioner after the guilty plea hearing about the advantages or disadvantages of appealing, whether there were any grounds for an appeal, or whether Petitioner wanted to appeal. App. 58-59. Plea counsel could not remember whether or not he had received a letter from Petitioner in which she requested an appeal. App. 60-61.

At the hearing before the PCR court, plea counsel testified that he did not remember discussing with Petitioner in advance of the guilty plea hearing her right to appeal, despite the fact that he had affirmed to the plea court that he had informed Petitioner of her right to appeal. App. 12. Plea counsel's later testimony on that point should be viewed in light of plea counsel's earlier, and more certain, statements to the plea court that he did discuss the right to appeal with Petitioner. This Court should accept that plea counsel did discuss that right to appeal with Petitioner and that any of her testimony to the contrary is not credible.

Petitioner relies upon Kinard v. State, 418 S.C. 478, 795 S.E.2d 15 (2016), but her reliance is misplaced because the cases are easily distinguished from one another. In Kinard, the defendant testified that he asked his lawyer to file a notice of appeal shortly after his sentencing, the defense lawyer could not remember whether the defendant had made the request, and the defense lawyer acknowledged that he received an appeal request from the defendant by mail after the time to

appeal had expired. Id. at 480, 795 S.E.2d at 16. This Court reversed the PCR court's denial of relief because the PCR court applied a wrong standard when considering Kinard's claim, and instructed that the merits of a defendant's appeal "are not relevant where a PCR applicant alleges counsel failed to file an appeal after being asked to do so." Id. at 481, 795 S.E.2d at 16 (citing Flores-Ortega). In this case, Petitioner's argument is not that she asked for an appeal and that plea counsel failed to file a notice of appeal; Petitioner alleges that plea counsel never discussed her right to appeal with her at all. This allegation is contradicted by plea counsel's assertion to the plea court that he did discuss that right with Petitioner before her guilty plea hearing. App. 12. The evidence proves that plea counsel discussed the right to appeal with Petitioner and that Petitioner did not make a timely request of plea counsel that he file a notice of appeal; further, though, plea counsel did not even have the duty to discuss the issue of an appeal with Petitioner further after her guilty plea hearing.

CONCLUSION

Plea counsel had no duty to consult with Petitioner about her desire to appeal because there was no reason for plea counsel to think that a rational defendant in Petitioner's circumstances would have wanted to appeal and because Petitioner did not make a reasonable demonstration to plea counsel that she wanted to appeal. Even so, there is evidence that plea counsel did discuss the right to appeal with Petitioner before her guilty plea hearing. Thus, Petitioner has failed to prove that her waiver of her right to direct appellate review was anything other than knowing and voluntary. This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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October 15, 2021

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **RETURN TO PETITION FOR WRIT OF CERTIORARI** has been served upon Petitioner by e-mailing one copy addressed to:

Adam S. Ruffin, Esquire
aruffin@sccid.sc.gov

This 15th Day of October, 2021.

s/Taylor Zane Smith
Taylor Z. Smith
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
Oct 15 2021
SC Court of Appeals

October 15, 2021

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(via ctappfilings@sccourts.org)

Re: Joanie Holcombe v. State of South Carolina
Appellate Case No. 2020-000495
Lower Court Case No. 2018-CP-04-667

Dear Ms. Kitchings:

Please find attached the **Return to Petition for Writ of Certiorari** in the above-captioned case, which I am submitting for filing in your office by email.

In addition, please forward a time stamped copy back to our office for our file.

Sincerely,

s/Taylor Zane Smith
Taylor Z. Smith
Assistant Attorney General
S.C. Bar No. 103282

TZS/geh

cc: Adam S. Ruffin, Esquire (via e-mail)