

RECEIVED

Oct 27 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO OCONEE COUNTY

Court of Common Pleas

The Honorable R. Scott Sprouse, Plea Judge

The Honorable Letitia H. Verdin, Post-Conviction Relief Judge

Appellate Case No. 2021-000279

JONATHAN W. DUNCAN

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General
S.C. Bar No. 103665

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

STATEMENTS OF THE ISSUE..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW..... 5

ARGUMENT 6

The post-conviction relief court properly granted Duncan belated appellate review of his guilty plea pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), because he did not knowingly and voluntarily waive his right to a direct appeal. 6

CONCLUSION..... 8

PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge correctly find that Petitioner did not freely and voluntarily waive his appellate rights and is entitled to a belated appeal pursuant to White v. State, 263 S.C. 1 10, 208 S.E.2d 35 (1974)?

RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

The post-conviction relief court properly granted Duncan belated appellate review of his guilty plea pursuant to *White v. State*, 263 S.C. 1 10, 208 S.E.2d 35 (1974), because he did not knowingly and voluntarily waive his right to a direct appeal.

STATEMENT OF THE CASE

Jonathan W. Duncan (Petitioner) was arrested on June 7, 2016, after violently attacking his wife, Margaret Duncan, and Justin Stazney the day prior. During its September 2016 term, the Oconee County grand jury indicted Duncan for attempted murder, second-degree domestic violence, and possession of a weapon during the commission of a violent crime. (App'x 36–41).

On October 15, 2018, Duncan appeared before the Honorable R. Scott Sprouse and pleaded guilty as indicted. (App'x 1–35). Gordon Senerius, Esquire (Counsel) represented Duncan. Senior Assistant Solicitor Bethany Blundy of the Tenth Circuit Solicitor's Office prosecuted the case. The State recommended the maximum sentence on all charges. Judge Sprouse accepted Duncan's plea and sentenced him to concurrent terms of twenty-seven years' imprisonment for attempted murder, five years for possession of a weapon during the commission of a violent crime, and three years for second-degree domestic violence.¹ (App'x 42–44). Duncan did not appeal his guilty pleas or sentences.

Duncan commenced the underlying action for post-conviction relief on February 11, 2020. (App'x 45–49). The State made its return on October 21, 2020, requesting a hearing only on Duncan's claim of ineffective assistance of counsel for failing to file an appeal and moving to dismiss the remaining allegations as barred

¹ Applicant was serving a one-year probationary sentence on an unrelated possession of methamphetamine charge at the time he committed the crimes which are the subject of this action. At the time of the plea, Applicant had been incarcerated for over a year. Judge Sprouse terminated probation and sentenced Applicant to time served.

by the statute of limitations. (App'x 50–57).

On February 1, 2021, the PCR court convened an evidentiary hearing before the Honorable Letitia H. Verdin via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.² (App'x 58–79). Duncan was present and represented by Don Thompson, Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Duncan and Counsel both testified at the hearing. By order signed on February 2, 2021, and filed February 8, 2021, Judge Verdin granted Duncan belated appellate review pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), but denied relief on all remaining grounds. (App'x 80–85). This appeal follows.

² See S.C. Sup. Ct. Memorandum dated September 14, 2020 (“Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. Consent of the parties or counsel is not required. Please use WebEx, the conferencing platform supported by the Judicial Branch.”).

STATEMENT OF FACTS

On June 5, 2016, Applicant; his wife, Margaret Duncan; and his friend, Justin Stazney, were using methamphetamine together. (App'x 7). There was sexual relationship between Justin and Margaret that Applicant was aware of. (App'x 7).

The following morning, on June 6, 2016, Applicant attacked Margaret and grabbed her by the throat, choking her until she could not breathe. (App'x 7). Applicant threw Margaret up against the wall, causing multiple bruises all over her body. (App'x 7). Justin then stepped in, trying to protect Margaret. (App'x 7–8).

Justin was sitting on the corner of his own bed when Applicant approached him from behind, slashing his neck from ear to ear. (App'x 8). Justin held his throat, knowing he had to get out of the house, and he ran into the woods, with Applicant chasing him. (App'x 8). Justin tried to make it to the neighbor's house, but Applicant caught him in the woods. (App'x 8). A struggle ensued between Applicant and Justin. (App'x 8). Justin ultimately decided to play dead, hoping Applicant would go away. (App'x 8). While Applicant was about fifty yards away, Justin attempted to call out for the neighbor. (App'x 8). Applicant ran back to Justin, stabbing him in the eye and back. (App'x 8). Justin was hospitalized for twenty days following the attack due to the extensive injuries sustained. (App'x 8–9).

STANDARD OF REVIEW

In post-conviction relief matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The PCR court correctly granted Duncan belated appellate review of his guilty plea pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), because he did not knowingly and voluntarily waive his right to a direct appeal.

Duncan contends the PCR court correctly concluded he did not knowingly and voluntarily waive his right to appeal, and therefore he is entitled a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).³ The State agrees. Based on the testimony presented at the evidentiary hearing, there is probative evidence in the record to support the PCR court's finding that Duncan did not knowingly and intelligently waive his right to a direct appeal.

Where an applicant establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, he is entitled to file a petition for a writ of certiorari and seek review of the issues normally addressed in a direct appeal. *See Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986) (establishing procedural guidelines for *White* review when the PCR judge determines the applicant did not freely and voluntarily waive his appellate rights); Rule 243(i), SCACR.

³ In *White*, the PCR judge found the applicant did not knowingly and intelligently waive his right to direct appeal due to ineffective assistance of counsel. 263 S.C. at 117, 208 S.E.2d at 39. As a result, the PCR court directed PCR counsel to attempt to secure a belated appeal to the Supreme Court from his original conviction and sentence. *Id.* On appeal, this Court explained that it did not have jurisdiction to entertain a belated direct appeal absent the timely filing of notice of appeal. *Id.* at 119, 208 S.E.2d at 39. However, because the *post-conviction relief appeal* was properly before it, this Court reviewed the trial record and all issues properly raised as if the direct appeal had been perfected. *Id.* at 119, 208 S.E.2d at 39–40. This Court ultimately held that “that there was no reversible error in the trial and that there was not an arguably meritorious ground of appeal, even if notice of intention to appeal had been timely served.” *Id.* at 119, 208 S.E.2d at 40.

At the hearing, Duncan testified Counsel never discussed an appeal with him nor explained to him he had a right to appeal. Counsel testified it is his general practice to discuss with his clients that they have a right to appeal, although he could not specifically recall having this conversation with Duncan. In the order, the PCR judge noted there was nothing in the plea transcript indicating Duncan had been advised of his right to appeal.

Accordingly, the PCR court properly determined Duncan is entitled to belated appellate review of his guilty plea pursuant to *White*.

CONCLUSION

The PCR court's finding that Duncan neither knowingly nor intelligently waived his right to appeal is supported by evidence in the record. Accordingly, this Court should affirm the PCR court's ruling.

Respectfully submitted,

ALAN WILSON
Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General

BY: s/LillianMeadows
Lillian L. Meadows
S.C. Bar No. 103665
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

October 27, 2021

ATTORNEYS FOR RESPONDENT