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Nov 23 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable William H. Seals, Circuit Court Judge

MARQUIVES BOATWRIGHT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000565

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D. Gilliam
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR Court err in denying Petitioner a belated appeal pursuant to White v. State[1] where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal?

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1 263 S.C. 110, 108 S.E.2d 35 (1974).

STATEMENT

Petitioner was indicted by a Darlington County grand jury for criminal sexual conduct with a minor in the second degree on January 21, 2014. App. 109. He pled guilty before the Honorable Roger E. Henderson on October 18, 2017. Kevin Ethridge represented Petitioner; Kinli Abee appeared on behalf of the state.

The plea was made without negotiation or recommendation. App. 4 ll. 3 – 8. The facts giving rise to the charge, as alleged by the state, were that Petitioner disclosed his conduct during a pre-employment polygraph test in October 2013. App. 8 l. 25 – App. 10 l. 13. In mitigation, defense counsel stated that Petitioner was abused as a child. App. 12 ll. 19 – 23.

During questioning by the plea judge, Petitioner agreed with the state's recitation of the facts as substantially correct. App. 10 ll. 16 – 20. The plea judge found that the plea was made freely, voluntarily, and intelligently. App. 11 ll. 8 – 16. The plea was therefore accepted. Id. The plea judge noted that Petitioner had ten days to appeal. Id. Petitioner was sentenced to fifteen years' incarceration. App. 18 ll. 11 – 13.

Petitioner filed an application for post-conviction relief on or about June 27, 2018. App. 21. It contained allegations of ineffective assistance of counsel, including a claim that plea counsel did not file a notice of appeal. App. 23. The state filed its Return and Motion to Relax Time to File Return on or about November 26, 2018. App. 35. An Order granting the state's motion to relax the time to file the return was filed December 10, 2018. App. 107. A motion to amend the PCR application was filed in August 2019. App. 105.

An evidentiary hearing was convened on January 6, 2020 before the Honorable William H. Seals, Jr. App. 43. Overture Walker represented Petitioner; Jacob Isenberg appeared on behalf of the state. The PCR court heard testimony from Petitioner and plea counsel.

The plea court took the matter under advisement. App. 81 ll. 19 – 20. An Order of Dismissal was signed on May 16, 2021. App. 84. The PCR court found Petitioner failed to meet his burden and denied relief.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner a belated appeal pursuant to White v. State[2] where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal.

Relevant facts

Petitioner retained plea counsel following his arrest. App. 47 l. 18 – App. 48 l. 24. The two met approximately three or four times. App. 48 l. 25 – App. 49 l. 2. Petitioner testified at the PCR evidentiary hearing that the two never spoke about the elements of the offense for which Petitioner was indicted. App. 49 ll. 15 – 19. They similarly never discussed the strength of the state's case, nor did plea counsel explain potential penalties or consequences of the plea. App. 49 l. 24 – App. 50 l. 4; App. 55 ll. 4 – 7. Although plea counsel provided Petitioner with the discovery in his case, they never reviewed it together. App. 51 ll. 10 – 18. They never spoke about any potential defenses to the charge, either. App. 52 ll. 9 – 11.

Following the plea, Petitioner "said [he] wanted to file for an appeal." App. 56 l. 20 – App. 57 l. 3. According to Petitioner, plea counsel's response was "Okay. We'll talk about it." App. 57 ll. 4 – 12. Petitioner stated that plea counsel spoke about an appeal with his family, but he never filed a notice of appeal. Id.

Plea counsel did not believe that the plea resulted in any appealable issues. App. 71 ll. 14 – 17. Counsel recalled discussing a possible appeal with Petitioner's wife. App. 71 ll. 18 – 21. Counsel indicated that he spoke with her "three or four times and then [he] didn't hear anything back." App. 71 l. 22 – App. 72 l. 5. Counsel thought the family might have "gone a different

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2 263 S.C. 110, 108 S.E.2d 35 (1974).

route." Id. He agreed that the family never got back to him in time to appeal. App. 72 ll. 10 – 12. Petitioner's wife did not testify at the PCR evidentiary hearing.

On cross examination, the following exchange occurred regarding this issue:

> Q: At any point did or do you recall Mr. Boatwright expressing to you that he wanted to appeal his guilty plea?
>
> A: I do not remember Mr. Boatwright telling me that not saying he did not. I don't remember that. I do remember conversations with his wife about filing the appeals process.

App. 75 l. 23 – App. 76 l. 4.

Discussion

This petition has been prepared in accordance with the South Carolina Appellate Court Rules. According to Rule 243(i)(2), SCACR:

> When the post-conviction relief judge has found that the applicant is not entitled to a White v. State review, the petition shall raise the question of waiver of the right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a White v. State review is granted; this statement of issues shall comply with the requirements of Rule 208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.

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).

"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores–Ortega, 528 U.S. 470, 480 (2000). In White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) this Court held that a defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. Since then, this Court has announced two distinct standards for evaluating ineffective assistance of counsel claims for failure to file an appeal. For convictions following a trial this Court has held that "[i]n 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)." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). For guilty pleas, this Court has held that "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

"The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Weathers, 319 S.C. at 61, 459 S.E.2d at 839. In Turner v. State, 380 S.C. 223, 224; 670 S.E.2d 373, 374 (2008) this Court clarified that the standards articulated in Roe v. Flores-Ortega, *supra*, were examples of extraordinary circumstances that triggered counsel's duty to consult with a defendant about his direct appeal rights. In Roe v. Flores-Ortega, *supra*, the United States Supreme Court defined "consult" to mean that counsel advised "the defendant

about the advantages and disadvantages of taking an appeal" and made a "reasonable effort to discover the defendant's wishes." The Court noted that if counsel had not consulted with the defendant at all then "the court must ask whether that failure itself constitutes deficient performance." Roe v. Flores-Ortega, 528 U.S. at 471.

In Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010), this Court found the PCR court erred in denying Simuel a belated appeal following his trial. At the PCR hearing counsel testified that he "normally discusses an appeal with defendants after trials but was not sure whether he did so with Petitioner." Id. at 270, 701 S.E.2d at 739. He further testified that Simuel never asked him to file an appeal. Id. at 269, 701 S.E.2d at 739. Much like the matter at hand, the PCR court found counsel's testimony credible and Simuel's testimony not credible. The court found that based on the testimony of counsel, Simuel was not entitled to a belated appeal because he did not request counsel file an appeal on his behalf. Id. This Court reversed the decision of the PCR court and granted Simuel a belated appeal. Id. Footnote 1 reiterated the above dichotomy regarding an attorney's obligations following a plea versus a trial. Id.

Regarding the contention that plea counsel failed to file a direct appeal, the PCR court in the matter *sub judice* found in its Order of Dismissal that "the allegation is without merit, post-conviction relief is denied on these grounds, and it is dismissed with prejudice." App. 100. The PCR court, after examining the transcripts of both the plea and the PCR hearing, concluded that "[t]he record clearly reflects that [Petitioner] was aware of his right to appeal his plea, as he was made aware of such by the court prior to sentencing." App. 99. Therefore, the PCR court denied relief on this issue:

> Given the inconsistencies with Applicant's allegations and the plea colloquy as well as the evidence presented at the PCR hearing, this Court sees no reason justifying post-conviction relief on these grounds. It is clear that plea counsel made Applicant aware of his right to appeal, made efforts to discuss these rights

> with him and his family, and was willing to make arrangements for an appeal to be filed if [Petitioner] so desired. It is not clear from the evidence before the Court that [Petitioner] ever requested that appellate review be pursued, given the lack of evidence corroborating [Petitioner's] lone assertion.

App. 99 – 100.

In Petitioner's case, extraordinary circumstances should have caused plea counsel to file a notice of appeal. The plea judge's remark about his own family member who was the same age as the minor victim in Petitioner's case meant that the plea judge had interjected his own bias and emotions into the case. The resulting sentence was capricious. Petitioner claimed that the plea judge was emotional and that resulted in a harsher sentence. App. 56 ll. 1 – 12. Furthermore, Petitioner claimed that he asked for counsel to file a notice of appeal. The Order of Dismissal does not contain a finding that Petitioner's testimony was incredible. As a result, plea counsel should have filed a Notice of Appeal, both because of the plea judge's remarks and because Petitioner requested one.

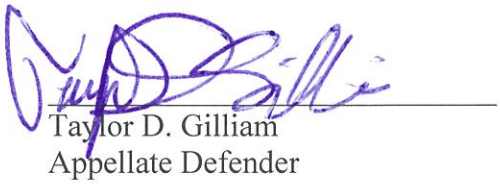
The PCR judge erred as a result, both because extraordinary circumstances were present such that counsel should have known to file a notice of appeal and because Petitioner requested an appeal in order to allow for further review of his plea.

STATEMENT OF ISSUE ON APPEAL

Did the plea judge err in sentencing Petitioner harshly, where Petitioner pled guilty to criminal sexual conduct with a minor, where the plea judge had a family member the same age as Petitioner's minor victim, and where the plea judge was "heated" and referenced his family member during sentencing?

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing on the issues raised herein.



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ATTORNEY FOR PETITIONER

This 23rd day of November, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marquives Boatwright 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 William H. Seals, which was held on January 6, 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 Marquives Boatwright.

Respectfully Submitted,

Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of November, 2021.

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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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