STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Kershaw County

Honorable G. Thomas Cooper, Circuit Court Judge

MITCHELL LOGAN HINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001643

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the Allen[1] charge when the jury had not yet indicated that it was deadlocked?

2. Did the PCR judge err in finding that Petitioner knowingly and intelligently waived his right to a direct appeal?

[1] Allen v. United States, 164 U.S. 492, 17S.Ct.154, 41 L.Ed.528 (1896).

STATEMENT OF ISSUE ON APPEAL

1. Did the trial judge err in refusing to conduct a hearing and grant Petitioner's motion for a new trial based on an allegation that the jury foreman failed to disclose his relationship with both the victim and Petitioner?

STATEMENT

In March of 2011, the Kershaw County Grand Jury indicted Petitioner, Mitchell Logan Hinson, for burglary first degree, indictment #2011-GS-28-0220. On June 27, 2011, Petitioner proceeded to jury trial before the Honorable L. Casey Manning. C.J. "Neil" Riley represented Petitioner at trial. Ronald W. Moak prosecuted the case. The jury returned a verdict of guilty and Judge Manning sentenced Petitioner to fifteen (15) years. On July 8, 2011, Petitioner filed a motion for a new trial. (App. p. 205). On November 3, 2015, while the motion for new trial was still pending, Petitioner filed an application for post-conviction relief [PCR]. The application was dismissed without prejudice because the motion for a new trial was still pending. In an order signed March 24, 2016, filed April 4, 2016, the trial judge denied the motion for a new trial.

On November 4, 2016, Petitioner filed a second PCR application. Petitioner filed an amended application on May 24, 2017. The State filed a return on June 23, 2017. On July 19, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Kristy Goldberg represented Petitioner at the PCR hearing. Jessica Kinard represented the State. In a written order filed April 12, 2018, Judge Cooper denied relief and dismissed the application. A timely motion to alter or amend was filed April 24, 2018, and then denied on September 5, 2018. A timely notice of intent to appeal was served on September 10, 2018. The petition for writ of certiorari was filed on April 26, 2019. The State filed a return on September 9, 2019. On September 24, 2019, the South Carolina Supreme Court, pursuant to Rule 243(l), transferred the case to the South Carolina Court of Appeals. On December 10, 2021, the South Carolina Court of Appeals granted the petition for writ of certiorari as to issues 3 and 4. This brief of petitioner follows.

STANDARD OF REVIEW

The appellate courts defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The appellate courts review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, (2018).

ARGUMENTS

1. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the Allen charge when the jury had not yet indicated that they were deadlocked.

Petitioner's trial started on June 27, 2011, and the jury began deliberations sometime[2] on June 28, 2011. (App. p. 79; p. 173). During deliberations the jury asked to see the home surveillance video tape, asked about the penalty for the offense, asked for a mug shot or profile picture of Petitioner and then, after a discussion about ordering dinner, the jury elected to stop deliberations for the day and return in the morning at 9:30 AM. (App. pp. 173-178). The next morning, after the jury was sent back to resume deliberations, the judge stated, "In the next hour and a half from now if they haven't made a decision, perhaps we should consider the Allen charge. Let's give them some time. We'll be at ease." (App. p. 179, line24 – p. 180, lines 1-2). The jury then asked for the definition of burglary and the judge re-charged the jury on the law of burglary first degree. (App. p. 180, line 5 – p. 181, 182, 183, 184, lines 1-15). The jury continued to deliberate for some amount of time, presumably before a lunch break was needed, when the judge stated, "I have discussed this with the lawyers in Chambers, and the bottom line is I can give the Allen charge, so I will read the Allen Charge unless the lawyers object." (App. p. 184, lines 18-21). There is no indication in the record that the jury had completed their deliberations and no indication that they were unable to reach a unanimous verdict. The lawyers did not object and the judge gave the Allen charge. (App. pp. 184 – 191).

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[2] The trial transcript does not indicate what specific time deliberations began on June 28, 2011, but it was after lunch, closing arguments and the jury instructions. (App. p. 173, lines 13-16; pp. 159-178).

The Allen charge was lengthy, taking up seven pages in the transcript. During the charge the judge told the jury, "A mistrial in a case is a very unfortunate thing. If you cannot agree on a verdict it does not mean anybody wins or the case is over, but simply means that at some future time another jury will sit where you are." (App. p. 187, lines 15-18). The judge also told the jury, "This is an important case, as to time, effort and money by the Defense and the Prosecution, and if you fail to agree on a verdict the case is left open and undecided. Like all cases, it must be disposed of and decided at some time." (App. p. 189, lines 7-11). After the charge the jury was provided lunch and then returned a verdict of guilty. (App. p. 192, lines 2-24).

In the amended application for post-conviction relief Petitioner alleged, "Ineffective assistance of counsel for failing to object to the Court's Allen charge." (App. p. 219). During the post-conviction relief hearing trial counsel did not recall the jury indicating that they were deadlocked. (App. p. 267, line 21 – p. 268, lines 1-6). Trial counsel testified, "And we may have discussed it in chambers. In fact, he says that: I have discussed this with the lawyers in chambers. I didn't object to it, no. Perhaps I should have." (App. p. 268, line 24 – p. 269, lines 1-2). On cross-examination, when asked again if the jury indicated it was deadlocked, trial counsel testified:

> No. That puzzles me. You know, had I not been able to read over the transcript of the trial, I would have sworn that they had somehow communicated to the judge that they were unable to reach a unanimous verdict. But the transcript doesn't reflect that, so I think the judge just felt that after sending out three different questions, that that indicated that there was some sort of problem that had surfaced in the jury room reaching a decision.
>
> And again, I don't know, other than we were in the second day of the jury's deliberations, which isn't a whole lot of time. But the transcript doesn't reflect times of day, so when it was that the judge started thinking in terms of the Allen charge, what time of day it was –

(App. p. 292, line 14 – p. 293, lines 1-4). Trial counsel testified there was no particular reason he did not object to the Allen charge, and indicated he believed it was within the judge's discretion. (App. p. 293, line 21 – p. 294, lines 1-3).

At the close of the PCR hearing PCR counsel argued, "In researching Allen charges in preparation for this, I couldn't find any case law on this because all says when a jury says they're deadlocked, then you do this. I don't see any law that says what happens when they're not, and that's because a judge should not issue an Allen charge if the jury does not say they're deadlocked because that would be, per se, coercive." (App. p. 309, lines 15-22).

In the order of dismissal the PCR judge wrote:

> Despite the apparent propriety of the Allen charge itself, Applicant argues the instruction was nonetheless impermissible because the jury did not state on the record that it was deadlocked or otherwise unable to reach a verdict. However, this argument is without merit, as there is not such requirement before the trial court can give an Allen instruction. See Darr, 262 S.C. at 587, 206 S.E.2d at 870 ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them."); Ayers, 284 S.C. at 269, 325 S.E.2d at 581 ('The trial judge has a duty to urge the jury to agree on a verdict, so long as his not coercive."). Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

(App. p. 340). The PCR judge erred.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

A. Deficient Performance

Trial counsel was ineffective in failing to object to the Allen charge when the jury had not indicated that they were deadlocked or had even completed deliberations. "An Allen charge is 'an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's argument; deriving its name from the case of Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).' *Black's Law Dictionary,* 74 (6th ed.1990)." State v. Lee-Grigg, 374 S.C. 388, 418, 649 S.E.2d 41, 57, fn #1 (Ct. App. 2007). As this Court noted in State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019):

> Although labelled the "dynamite" charge because of its proven ability to "blast a verdict out of a jury otherwise unable to agree," United States v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972), the label could just as well describe the Allen charge's success in blowing up otherwise error-free trials by introducing volatile elements into the fluid and emotionally charged atmosphere prolonged jury deliberations often create. Like dynamite, the charge must be handled with extreme care.

The Allen "dynamite" charge in the present case was not handled with extreme care. The judge gave the "dynamite" charge before the jury indicated they had completed their deliberations. The judge gave the "dynamite" charge before the jury indicated that they were deadlocked. In this case, under these circumstances, the charge was coercive because it urged the jurors to hurry and make a decision before they had completed their deliberations.

The PCR judge's reliance on State v. Darr, 262 S.C. 585, 206 S.E.2d 870, (1974), in the order of dismissal is misplaced. In Darr the trial judge simply instructed the jury upon the importance of reaching a verdict and then, based on a question from a juror, re-charged the law on self-defense. The instruction was not referred to in the opinion as an Allen charge. On direct appeal Darr challenged the judge's instruction on the importance of reaching a verdict. The Court wrote:

> The case was submitted to the jury at 3:10 p.m. on September 13. At 5:42 p.m. the trial judge recalled the jury, which had not yet reached a verdict, and instructed it upon the importance of reaching a verdict. In response to a question from a juror, he charged further upon the law of self-defense. The jury retired, but defense counsel requested its immediate recall and a further clarification by the trial judge of his instructions as to the law of self-defense, which request was granted. Following this the jury retired again at 5:51 p.m. and returned a verdict of guilty at 6:23 p.m.
>
> The appellant first contends that His Honor erred in urging the jury to reach an agreement. There is no merit in the contention. It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them. See numerous cases collected in West's South Carolina Digest, Criminal Law, 865. We find nothing whatever in the charge of the trial judge which was in any manner coercive of the jury.

State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974). The simple instruction to the jury in Darr, on the importance of reaching a verdict, is distinguished from the long full "dynamite" Allen charge given in the present case. The instruction in Darr was not challenged on the basis that the jury had not indicated it was deadlocked. Additionally, in Darr there was an intervening re-charge on the law of self-defense between the instruction on the importance of reaching a verdict and the actual verdict. In the present case the jury reached a verdict shortly after the judge gave the Allen charge.

In Workman v. State, 412 S.C. 128, 130–31, 771 S.E.2d 636, 638 (2015), the South Carolina Supreme Court found that trial counsel was ineffective in failing to object to an unconstitutionally coercive Allen and wrote:

> Whether an Allen charge is unconstitutionally coercive must be judged in its "context and under all the circumstances." Tucker v. Catoe, 346 S.C. 483, 490–91, 552 S.E.2d 712, 716 (2001). The four factors adopted by this Court in Tucker to determine whether an Allen charge is unconstitutionally coercive are:
>
> (1) Does the charge speak specifically to the minority juror(s)?
> (2) Does the charge include any language such as "You have got to reach a decision in this case"?
> (3) Is there an inquiry into the jury's numerical division, which is generally coercive?
> (4) Does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion?

While the Court in Workman found the specific language used by the trial judge coercive, using the framework of analysis from Workman and Tucker, and judging the context and circumstances of the present case, the Allen charge given, without an indication that the jury completed deliberation or was deadlocked, was coercive. The Allen charge in the present case was coercive, not because the charge spoke specifically to the minority or inquired into the jury's numerical division. Instead, the charge was coercive because it urged the jury to hurry and reach a verdict before any indication from the jury that deliberations were complete and the jury was deadlocked.

The PCR judge's reliance on State v. Ayers, 284 S.C. 266, 325 S.E.2d 579 (Ct.App. 1985), is misplaced because in Ayers there was a clear indication from the jury that they were deadlocked. The jury in the present case did not indicate that they were deadlocked. The jury in the present case did not indicate they had completed their deliberations.

In the motion to alter or amend judgment PCR counsel wrote:

> The order of the Court spends several pages defending the propriety of an Allen charge in general, which has not been contested by the Applicant in this matter. Rather, the Applicant argues the Court cannot and should not provide an Allen charge to the jury when the jury had not yet indicated that it is deadlocked. The Applicant contends that trial counsel should have objected to the use of an Allen charge under these circumstances. The Applicant argues that an Allen charge given to a still-deliberating jury is coercive in nature as it may cause an individual

> abandon their own opinion and bend to the will of the group or rush to judgement. Due to the fact that the jury reached a verdict very shortly after the Allen charge was given there is a reasonable likelihood that the charge affected the jury's deliberations. (*See* trial transcript pages 185-193)

(App. pp. 345-346).

A non-coercive Allen charge is proper when the jury indicates they have completed their deliberations and are unable to reach a verdict. Without the predicate indications from the jury that they are finished deliberating and are deadlocked, the "dynamite" Allen charge becomes coercive. Trial counsel was ineffective in failing to object to the charge.

B. Prejudice

The PCR judge did not address the prejudice prong because he did not find deficient performance. As discussed above, trial counsel was deficient. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. The prejudice prong is supported by the fact that the jury reached a verdict shortly after the judge improperly gave the Allen charge, a factor discussed in Workman and Tucker in deciding if the language of the charge is coercive. Petitioner was prejudiced by trial counsel's failure to object to the Allen charge when the jury had not yet indicated that they were deadlocked or had completed deliberations. The prejudicial error requires reversal and a remand for a new trial.

2. The PCR judge erred in finding that Petitioner knowingly and intelligently waived his right to a direct appeal.

On July 8, 2011, following Petitioner's conviction, trial counsel, Kershaw County Public Defender C. J. "Neil" Riley, moved for a new trial. (App. p. 205). The motion was not ruled upon until March 24, 2016, over four years later. (App. p. 324). The motion was ruled upon

without a hearing. (App. p. 302, line 14 – p. 303, lines 1-3). In the amended application for post-conviction relief Petitioner alleged, "Ineffective assistance of counsel for failing to file Notice of Appeal after the Motion to Reconsider was disposed of March 24, 2016." (App. p. 219). During the PCR hearing Petitioner testified that, following conviction at trial, he asked trial counsel to file an appeal. (App. p. 249, lines 11-25). Petitioner testified that when he did not hear anything after a few years he filed an application for post-conviction relief. "I kept writing him, didn't hear anything back. And then finally, after a few years went by, still haven't heard anything or got anywhere with the new trial motion, I had a family assistance, who is a public defender, he asked me to put in a PCR and ask for assistance because you have to do it in one year, and the PCR was denied because the motion for new trial was still not heard." (App. p. 250, lines 10-17). Petitioner testified that he expected a notice of appeal to be filed once the motion for new trial was ruled upon. (App. p. 251, lines 19-23).

When trial counsel was asked if Petitioner asked him to file an appeal, trial counsel answered, "He may have, but I opted instead to file a motion. And I can't say for certain that he requested filing an appeal. But I know I sent him a copy of the motion. He knew it was pending. He knew because I explained it to him either in a letter or by meeting with him. But, anyway, I explained to him that the time for filing an appeal began to run after the motion was ruled upon." (App. p. 294, lines 6-14). Trial counsel admitted that he knew Petitioner wished to challenge the conviction. (App. p. 294, line 15 – p. 295, line 1). Trial counsel left the public defender office before the judge ruled on the new trial motion. (App. p. 295, lines 2-4).

Jason Kirincich, another attorney from the Kershaw Public Defender Office, who represented Corbin Bailey, the co-defendant who testified against Petitioner at trial, testified at the PCR hearing that he attempted to schedule a hearing on the motion for new trial after trial

counsel left the office. (App. p. 302, lines 19-25). Mr. Kirincich testified that he did not consider filing a notice of intent to appeal because once he learned the motion for new trial had been denied, Petitioner had filed a second PCR application. (App. p. 303, lines 1-22). The judge signed the order denying the motion for new trial on March 24, 2016. Petitioner filed the second application for post-conviction relief over seven months later on November 4, 2016. Mr. Kirincich admitted that once he learned of the pending motion for new trial he never contacted Petitioner. (App. p. 305, lines 9-19). He also testified, "I think it would have been appropriate for our office to contact Mr. Hinson and let him know and then he can make whatever decision he wants to make." (App. p. 307, lines 5-8). No attorney consulted with Petitioner about an appeal once the judge denied the motion for new trial. (App. p. 252, lines 2-7; p. 307, lines 5-10).

In the order of dismissal the PCR judge wrote, "In the present case, this Court finds Applicant made a knowing and intelligent decision to forego a direct appeal and proceed directly to post-conviction relief remedies. Once his motion to reconsider his sentence was denied, Applicant proceeded forward with filing a second post-conviction relief application and did not request his counsel file a direct appeal on his behalf. This Court finds Applicant has failed to meet his burden of proof and denies this allegation." (App. p. 341). The PCR judge erred. Under the facts of this case with a four-year delay during which time counsel left the Public Defender Office, Petitioner did not make a knowing and intelligent decision to waive direct appeal by filing a second PCR application.

PCR counsel asked Petitioner, Once the motion for a new was ended, did you expect a notice of appeal to be filed for your case so you could still meet your appeal?" (App. p. 251, lies

19-21). Petitioner answered, Yes. I just figured that was the first step to the appeal." (App. p. 251, lines 22-23). In the motion to alter or amend judgment PCR counsel wrote:

> The Court's Order dismisses this ground on the basis that the "Applicant made a knowing and intelligent decision to forego a direct appeal and proceed directly to post-conviction relief remedies." The Applicant would argue that this finding does not reflect the testimony and evidence offered at the evidentiary hearing.
>
> The testimony reflects that the Applicant unequivocally requested that notice of appeal be filed, and after the five year delay trial counsel Riley was no longer overseeing the Applicant's case and had not left instructions with anyone in his office regarding the Applicant's wishes. Further, Attorney Kirincich never consulted with the Applicant to determine if he wanted a notice of appeal filed on his behalf or if he wanted to waive that right.

(App. p. 346). Petitioner was not advised of his right to appeal once the motion for a new trial was denied. Petitioner did not waive the right to direct appeal.

In Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010), the South Carolina Supreme Court wrote:

> Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (Turner I); see also Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (Turner II). "In 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, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)." Turner, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted)(footnote omitted).

In the present case, no attorney made certain that Petitioner was made fully aware of the right to appeal following the trial and denial of the motion for a new trial, over four years after trial. When the motion for new trial was finally denied, trial counsel, Riley, was no longer with the Public Defender Office. (App. p. 295, lines 2-4). The other public defender who testified at the PCR hearing and represented the co-defendant who testified against Petitioner at trial, Kirincich, did not make certain that Petition was made fully aware of his appellate rights. At the

critical time Petitioner should have been advised by counsel about his appellate rights, Petitioner was without representation by counsel. Petitioner did not waive his right to the assistance of counsel. Petitioner could not have intelligently waived his appellate rights when he was not represented by counsel and was never made aware of his appellate rights.

"To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (citation omitted). In Osbey v. State, 425 S.C. 615, 619–20, 825 S.E.2d 48, 50 (2019), the South Carolina Supreme Court, addressing the waiver of the right to counsel, wrote, "By definition, 'A waiver is a voluntary and intentional abandonment or relinquishment of a known right.' Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (citing Eason v. Eason, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009)), *opinion clarified on other grounds*, 386 S.C. 274, 688 S.E.2d 120 (2009). 'Waiver requires a party to have known of a right and known that right was being abandoned.' 385 S.C. at 496-97, 685 S.E.2d at 607." Petitioner did not abandon his right to a direct appeal by filing a second PCR application.

When the motion for new trial was finally ruled upon, trial counsel was no longer with the public defender office. No attorney from the public defender office advised Petitioner of his right to appeal following the denial of the new trial motion. Without the assistance of counsel to notify Petitioner that the motion for new trial had been denied, to advise about the right to appeal, and to timely file the notice of intent to appeal, Petitioner filed a second PCR application. The *pro se* filing of the second post-conviction relief application should not serve as an intelligent waiver of the right to direct appeal when Petitioner was not advised of the right to a direct appeal following the denial of the motion. Petitioner is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

CONCLUSION

Based on the argument presented in issue one, this Court should reverse the finding of the PCR court, grant relief and remand for a new trial. Based on the argument presented in issue two, this Court should grant the petition for writ of certiorari, find that Petitioner did not waive his right to direct appeal and order briefing pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

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This 10th day of January, 2022.