

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO MARION COUNTY
COURT OF COMMON PLEAS

The Honorable William H. Seals, Jr., Plea Judge
The Honorable D. Craig Brown, Post-Conviction Relief Judge

Appellate Case No. 2020 – 001607

LARRY ANTHONY WHITE, # 371303,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

- I. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal per *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).
- II. The PRC judge erred in denying petitioner's allegation that trial counsel erred in coercing him to plead guilty in the case.

Respondent's Counterstatement of Issue on Certiorari

- I. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal per *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).
- I. The PCR judge properly found that Petitioner's plea was freely and voluntarily entered into.

STATEMENT OF THE CASE

Petitioner Larry Anthony White pled guilty to first degree burglary and attempted murder during the July 2018 term of the Marion County General Sessions Court before Judge William H. Seals, Jr. via a negotiated plea agreement. Petitioner was sentenced to two concurrent fifteen- year sentences and his remaining charges were dismissed. App. 1-11. Petitioner was represented at the hearing by Brad C. Richardson, and Assistant Solicitor Fitzlee McEachin appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal in the case.

On April 22, 2019, petitioner filed a PCR application with the Marion County Office of the Clerk of Court. App. 13-19. The respondent filed a Return dated July 1, 2019, requesting that a hearing be held in the case. App. 20-23.

A PCR hearing was convened on December 17, 2019, at the Marion County Courthouse before Judge D. Craig Brown. App. 26-64. Petitioner was present at the hearing and represented by Jonathan D. Waller and Assistant Attorney General Samuel L. Key appeared on behalf of the state. On October 26, 2020, Judge Brown filed an Order of Dismissal therein granting petitioner's request for a direct appeal per *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but denied petitioner's remaining questions regarding counsel's performance and the voluntariness of his plea. App. 66-81. Petitioner appealed Judge Brown's Order.

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, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is any probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. 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)). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief 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. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal per *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)

On appeal, Petitioner argues the PCR court correctly granted Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the evidence showed he desired a direct appeal, and where he never knowingly and voluntarily waived his right to a direct appeal, and where the State consented to allow a belated direct appeal for Petitioner. The State agrees with this argument. Accordingly, Petitioner is entitled to a belated appeal pursuant to *White v. State*.

During the PCR hearing held in the case, petitioner testified that he desired a direct appeal in the case, but subsequently learned in effect that the appeal paperwork submitted by counsel was not properly filed in his case. App. 41, lines 16-25. Trial counsel testified at the PCR hearing in reference to the notice of appeal papers that he filed in the case; and admitted that he filed the appeal documents incorrectly by not serving the lower court in addition to the appellate court. App. 57, lines 19-25.

The Assistant Attorney General conceded at the PCR hearing that counsel erred with respect to the improper filing of the notice of appeal documents and did not oppose petitioner's request for a belated appeal. App. 63, lines 5-7.

In the PCR judge's Order, the ruling on the belated appeal matter follows:

Applicant alleged counsel failed to file an appeal of his guilty plea after [petitioner] requested counsel to do so. Counsel testified he attempted to file an appeal, but failed to perfect the appeal on [petitioner's] behalf. Further, the State consented to [petitioner] receiving a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35, (1974). Therefore, based on the forgoing, this Court finds [petitioner] is entitled to a belated direct appeal pursuant to

[State v] *White*, and grants relief in the form of a belated appeal only. App.80.

Trial counsel has a duty to make certain a client is fully aware of the right to appeal and ascertain whether his client desires an appeal, and then to file an appeal if the client wishes to appeal. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989); *Frasier v. State*, 306 S.C. 158, 410 S.E.2d 572 (1991). If after so advising an indigent client wishes to appeal, then trial counsel must serve and file a notice of appeal. *In Re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E. 483 (1991). Here, trial counsel did not properly perform his duty with respect to petitioner's appellate rights. A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1975). Accordingly, Petitioner is entitled to a belated appeal pursuant to *White v. State*.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The PCR court's order correctly concluded that "Applicant alleged counsel failed to file an appeal of his guilty plea after [petitioner] requested counsel to do so. Counsel testified he attempted to file an appeal but failed to perfect the appeal on [petitioner's] behalf." App. 80. Accordingly, the PCR court found Petitioner was entitled for belated appellate review of his guilty plea under *White v. State, supra*. The evidence supports the PCR judge's conclusion.

II. The PCR judge The PCR judge properly found that Petitioner's plea was freely and voluntarily entered into.

On appeal, Petitioner claims the PCR court erred in finding Counsel did not coerce Petitioner into pleading guilty. However, it is clear that Petitioner was not coerced by Counsel to plead guilty, but rather he was induced to plead guilty to a negotiated fifteen-year sentence avoid a life sentence and be able to see his daughter graduate.

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. *Al-Shabazz v. State*, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant who pleads guilty with the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Dalton*, at 137-38,

654 S.E.2d at 874 (citing *Blackledge v. Allison*, 431 U.S. 63 (1977)). Therefore, admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” *Id.* (citing *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976)). “In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing.” *Id.* at 138-39, 654 S.E.2d at 874 (citing *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

Here, the record refutes any allegation Applicant did not knowingly enter his guilty plea. At the plea hearing, Petitioner was advised he was facing a minimum sentence of fifteen years and a maximum of life for burglary first degree. Petitioner affirmed he understood. Then Petitioner was advised he was facing up to thirty years for the attempted murder charge. Petitioner affirmed he understood. Petitioner was advised the plea was negotiated and if the plea judge accepted his guilty plea, Petitioner would receive a sentence of fifteen years. Petitioner affirmed he understood. App. 5–6.

Petitioner affirmed he was satisfied with his lawyer, that plea counsel answered all of his questions, and plea counsel had done everything that Petitioner had asked of him. Petitioner denied having been promised anything to get him to plead guilty. App. 6. Petitioner denied having been threatened in any way to make him plead and denied being under the influence of any alcohol or drugs. App. 7. Plea counsel, during mitigation, also stated “He doesn’t like being at Lee [Correctional Institution], but he doesn’t like the prospects of being up there for the rest of his life. He understand[s] this. He accepts his role and his culpability. And we just ask that the Court go along with the negotiations.” App. 9–10.

Here, the record clearly shows that Petitioner was not coerced by Counsel to plead guilty, but rather he was induced to plead guilty to a negotiated fifteen-year sentence avoid a life sentence and be able to see his daughter graduate. Accordingly, the PCR court did not err in finding Petitioner knowingly and voluntarily pleaded guilty, as this finding is supported by ample evidence of probative value, and certiorari should be denied.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner was entitled to a belated appeal pursuant to *White v. State*, Petitioner should be entitled to belated appellate review. However, because Petitioner failed to establish any constitutional deprivations regarding his plea being freely and voluntarily entered into, this Court should deny certiorari as to that issue. Should this Court grant Certiorari, the State requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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