

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Calhoun County

Honorable Maite Murphy, Circuit Court Judge
—————

EDWARD BRITT, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000845
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

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ATTORNEY FOR PETITIONER

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Jan 19 2022

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel in advising petitioner that he could not appeal?

STATEMENT

A Calhoun County jury indicted petitioner Edward Britt for murder. App. 97. On May 22, 2017, petitioner pled guilty before the Honorable Edgar W. Dickson. App. 1. Don Sorenson represented the State and Martin Banks represented petitioner. App. 1. Judge Dickson sentenced petitioner to forty years' imprisonment. App. 24, 1. 20 – 25, 1. 2. No appeal was filed.

On March 21, 2018, petitioner filed a PCR application. App. 27. On February 26, 2019, a hearing was held before the Honorable Maite Murphy. App. 43. Jonathan D. Waller represented petitioner and Benjamin H. Limbaugh represented the State. App. 43. On July 16, Judge Murphy denied petitioner's application. App. 88. This appeal follows.

ARGUMENT

Plea counsel provided ineffective assistance of counsel in advising petitioner that he could not appeal.

Petitioner unequivocally testified that he asked plea counsel to file an appeal. App. 59, l. 18 – 19. When petitioner first raised the subject, plea counsel told him “Well, there’s no reason to appeal. App. 59, l. 8 – 12. After petitioner asked him to file one, plea counsel said petitioner had “no reason, no grounds or nothing.” App. 59, l. 20 – 22. Petitioner remembered this conversation took place immediately after sentencing. App. 59, l. 10 – 12.

Plea counsel did not recall petitioner asking him to file for an appeal. App. 70, l. 22 – 24. Plea counsel denied ever telling a criminal defendant he did not have the right to an appeal. App. 70, l. 11 – 17. He did admit that the “closest I’ve ever come to saying something similar to that would be that it’s very difficult to appeal a—a guilty plea.” App. 70, l. 11 – 17. He further stated that “it’s very difficult to successfully appeal a guilty plea.” App. 70, l. 18 – 21.

The PCR court denied relief on this issue. The court stated it found “counsel’s testimony to be highly credible, especially regarding not advising a client that they were not entitled to an appeal.” App. 93. The court held petitioner did not meet his burden of proving plea counsel was ineffective. App. 93.

The PCR court erred in denying petitioner a belated appeal. See White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). “Any party aggrieved may appeal. . . .” S.C. Code Ann. § 18-1-30. “Only a party aggrieved by an order, judgment, sentence or decision may appeal.” Rule 201(b), SCACR. “Appeal may be taken, as provided by law, from any final judgment, appealable order or decision.” Rule 201(a), SCACR. “After a plea or trial resulting in conviction . . . a notice of

appeal shall be served on all respondents within ten (10) days after the sentence is imposed.” Rule 203(b)(2), SCACR.

When a criminal defendant appeals a guilty plea, the notice of appeal must contain “a written explanation showing that there is an issue which can be reviewed on appeal.” Rule 203(d)(1)(B)(iv), SCACR. The written explanation must identify the issue, its factual basis, and the ruling of the lower court on the issue. Rule 203(d)(1)(B)(iv), SCACR.

“Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal.” Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). “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 (1967).” Id. (internal quotations and citations omitted). “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).

The PCR court erred in resolving the credibility contest against petitioner. Petitioner’s memory of his conversation was specific. Plea counsel’s testimony was a general blanket denial. Viewing the evidence in a light favorable to petitioner, plea counsel decided that an appeal would be fruitless and refused petitioner’s request. Counsel in Simuel substituted his own judgment about the merits of an appeal for that of his client. In Simuel, the defendant asked his attorney to appeal. Simuel at 269-70, 701 S.E.2d at 738-39. The attorney said he would speak to the defendant’s mother about it and file the appeal. Id. At PCR, the attorney admitted discussing an appeal with the defendant’s mother, but told her that the defendant received a good sentence and did not think there were any grounds for appeal. Id.

This Court reversed, holding that even in the face of adverse credibility findings by the PCR judge, no probative evidence existed that the defendant knowingly waived his right to a direct appeal. Id. at 271, 701 S.E.2d at 740. Whether petitioner had no grounds is not a valid legal reason to deny a client his appeal. The proper recourse is to file the appeal and follow the Anders procedure.

“A defendant has the procedural right to one fair bite at the apple.” Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002). “That is, every defendant has a right to file a direct appeal and one PCR application.” Id. In Wilson, the PCR applicant filed his application almost two years after his conviction. Id. at 216-17, 559 S.E.2d at 582. The PCR court granted the State’s motion to dismiss based on the statute of limitations. Id. Wilson’s lawyer failed to file an appeal and viewing the evidence in the light most favorable to Wilson, the Court found that he “did not voluntarily waive his direct appeal.” Id. The Court then concluded that the PCR statute of limitations did not apply because Wilson did not have his direct appeal. Id.

This Court should follow Simuel and Wilson and allow petitioner a belated appeal of his guilty plea. This Court should reverse.

STATEMENT OF ISSUE TO BE REVIEWED ON APPEAL UNDER
ANDERS V. CALIFORNIA PURSUANT TO RULE 243(D)(2)

Whether the trial court erred in accepting petitioner's plea of guilty because, given petitioner's age of fifty-six, it was unreasonable for petitioner to plead guilty to a crime carrying a minimum sentence of thirty years?

CONCLUSION

For the foregoing reasons, this Court should reverse.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of January, 2022.

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Counsel for Edward Britt 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 Maite Murphy, which was held on February 26, 2019, 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 Edward Britt.

Respectfully Submitted,

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of January, 2022.

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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.”

s/David Alexander
Appellate Defender

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ATTORNEY FOR PETITIONER

This 19th day of January, 2022.