

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Alex Kinlaw, Circuit Court Judge

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000437

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court correctly grant Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal?

STATEMENT

In May 2012 Petitioner was indicted by the Pickens County Grand Jury for one count of Criminal Sexual Conduct with a Minor, First Degree. App. 460-461. An amended indictment was later true billed during the August 2014 Grand Jury Term, revising the time frame in which the allegation was said to have occurred. App. 457-458.

On November 17, 2014 Petitioner proceeded to trial in front of the Honorable William P. Keesley, and a jury. App. 30. Sam Tooker appeared on behalf of the state and Steven Sumner represented Petitioner. Id. After a two and a half day trial the jury found Petitioner guilty as indicted. App. 383. Judge Keesely sentenced Petitioner to a term of imprisonment for thirty years. App. 388.

After sentencing and prior to being escorted out of the courtroom, Petitioner made a reference to Sumner about filing an appeal. App. 432 ll. 17-19. Petitioner's mother then spoke with Sumner the following day to ask about an appeal, but a few days later instructed Sumner "not to touch" Petitioner's file or work on it any more. App. 434-435. Sumner did not file a notice of intent to appeal. App. 409.

On August 1, 2017 Petitioner filed a PCR application alleging, inter alia, that trial counsel was ineffective for failing to file a direct appeal. App. 391-408. An evidentiary hearing was held before the Honorable Alex Kinlaw, Jr. on February 21, 2019. App. 426. R. Mills Ariail, Jr. represented Petitioner and Kelly Oppenheimer appeared on behalf of the State. Id. Counsel Sumner testified at the hearing and Petitioner was examined by the Court.

At the PCR hearing Sumner testified he was retained to represent Petitioner by Petitioner's parents. App. 432 ll. 20-21. After trial he had given Petitioner's mother several names of lawyers who handle criminal appeals and after being instructed not to touch

Petitioner's file again assumed the family had hired one of the other attorneys to handle the appeal. App. 434-435. Neither Petitioner nor Petitioner's family contacted Sumner again, consequently Sumner did not perfect Petitioner's appeal within ten days. App. 435 ll. 14-15 & 24. On cross-examination Sumner stated that Petitioner never indicated that he did not want to pursue an appeal. App. 436 ll. 23-25.

The PCR court found that, based on the testimony at the evidentiary hearing, Petitioner was entitled to a belated appeal. App. 438 ll. 12-15. In the Order granting a belated appeal the PCR Court stated that Petitioner did not knowingly and voluntarily waive his right to an appeal. App. 452.

Judge Kinlaw's order granting belated appellate review pursuant to White v. State¹ was filed on March 12, 2019. App. 447-455. Included in the order was the finding that Petitioner knowingly and voluntarily withdrew, with prejudice, all other ineffective assistance of counsel claims. Id.

Petitioner now files this petition simultaneously with a brief addressing the direct appeal issues, as required by Rule 243, SCACR.

¹ 263 S.C. 110, 108 S.E.2d 35 (1974)

ARGUMENT

The PCR court correctly grant Petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal.

“[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, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). “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). *Clark v. State*, 396 S.C. 164, 719 S.E.2d 708 (2011). “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.E.2d 493 (1967).” *Simuel* at 270.

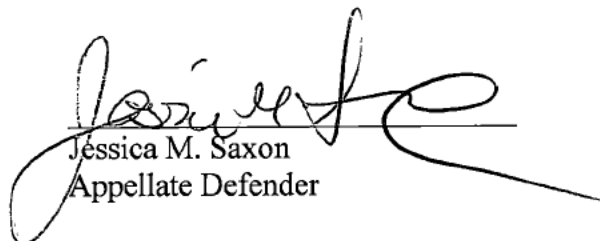
The PCR judge’s ruling is supported by the testimony from the evidentiary hearing. Counsel Sumner testified that Petitioner mentioned filing an appeal after sentencing, as he was being led from the courtroom, but that Petitioner’s mother then instructed Sumner not to continue working on Petitioner’s case. Having received conflicting request from Petitioner and Petitioner’s mother, Sumner incorrectly “assumed” the family had hired another lawyer for the appeal. Consequently, Sumner did not file a notice of intent to appeal to conclude his work on the case.

Despite the fact that Petitioner’s parents paid for Sumner’s services, Petitioner was the client and it was Petitioner’s wishes that should have been heeded. No evidence was presented to show that an intelligent and voluntary waiver of Petitioner’s right to an appeal occurred.

The testimony indicated that Petitioner did, in fact, request an appeal be filed on his behalf. As such, the PCR court correctly found that Petitioner was entitled to a belated appeal pursuant to White v. State, supra.

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's ruling that he is entitled to a belated direct appeal. Petitioner likewise request that this Court grant his petition for writ of certiorari and allow full briefing on his direct appeal.

A handwritten signature in black ink, appearing to read 'Jessica M. Saxon', is written over a horizontal line. The signature is fluid and cursive.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Alex Kinlaw, Circuit Court Judge

JUSTIN RYAN CONE,

PETITIONER

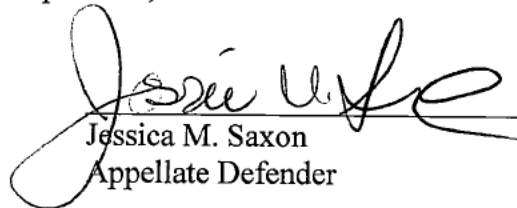
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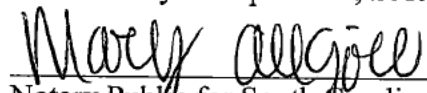
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Justin Ryan Cone, #362238, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20th day of September, 2019.


Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.