RECORD NO. 09-7701

In The
United States Court of Appeals
For The Fourth Circuit

ARTHUR SINGLETON,

Plaintiff – Appellant,

v.

WILLIE EAGLETON, Warden,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT BEAUFORT

REPLY BRIEF OF APPELLANT

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I. THE RECORD REFUTES THE STATE'S CLAIM THAT MR. SINGLETON ACTIVELY SOUGHT TO HINDER HIS LEGAL DEFENSE.

Though the State argues at length in its brief that Mr. Singleton was carrying out a carefully devised strategy to make his case fail, no court has found that Mr. Singleton purposefully acted to delay court proceedings, to impede his counsel's efforts, or even to be absent from trial. In its brief, the State misleadingly relies upon selected excerpts from the record below to argue that Mr. Singleton was "the architect of the blueprint for his case failing." (Resp't's Br. 19, 38) These characterizations are not facts but instead a reiteration of the State's own arguments at Mr. Singleton's trial. (*Compare* Resp't's Br. 18, 36 *and* J.A. 131)

On January 10, 2000, a grand jury indicted Arthur Singleton on two counts of assault and battery with intent to kill (ABWIK) and one count of possession of a firearm. (J.A. 117) The state court appointed a public defender to represent Mr. Singleton (J.A. 75, 130); three-and-a-half years passed with no apparent development in Mr. Singleton's case. (*See* J.A. 130) Dissatisfied with the progression of his case, Mr. Singleton retained a private attorney, Steven McKenzie, in anticipation of a scheduled court appearance.[1] (*See* J.A. 87, 130-31)

[1] "So I came down and spoke with the solicitor. The solicitor had said that [he] had no knowledge of what was going on. So I talked to [Mr. McKenzie] and he told me he would take care of it, still get a continuance." (J.A. 87)

At that appearance Mr. McKenzie's partner sought and was granted an eight-day continuance during which Mr. McKenzie tried another case.[2] (J.A. 131) This occurred only ten days before Mr. Singleton's trial *in abstentia* took place.

At some point during the next eight days Mr. Singleton asked his new counsel to obtain another continuance, and Mr. McKenzie agreed to seek one at the next scheduled court appearance. (J.A. 87-88, 95) Mr. Singleton, believing that Mr. McKenzie would secure a continuance, did not appear in court that day. (J.A. 88) The trial court denied the motion, however, (J.A. 132), and the trial took place only two days later. (J.A. 135) The record does not reflect whether Mr. McKenzie advised Mr. Singleton what would happen if the court denied the continuance. However, without elaboration, Mr. McKenzie suggested to the court that the trial should be delayed until a competency examination of Mr. Singleton could be conducted. (J.A. 130) There is nothing in these facts to suggest that Mr. Singleton was trying to undermine his defense. To the contrary, the record reflects that Mr. Singleton believed that his trial would be continued and consequently, that his appearance would not be necessary. (J.A. 88)

[2] Though the State argues that Mr. Singleton's decision to change attorneys at the eve of trial was designed to forestall the State's prosecution, this ignores the fact that the change was court-approved. (*See* J.A. 130-31) Under South Carolina law, "motions to withdraw must lie within the sound discretion of the trial judge." *Lucas v. State*, 572 S.E.2d 274, 277 (S.C. 2002). Further, the South Carolina Rules of Professional Conduct permit counsel to withdraw from representation only if "it can be accomplished without material adverse effect on the interests of the client." S.C. R. Prof. Conduct, R. 1.16.

II. MR. SINGLETON'S COUNSEL'S DUTIES WERE NOT DIMINISHED BECAUSE MR. SINGLETON DID NOT APPEAR AT TRIAL.

The State argues that Mr. McKenzie's duty to Mr. Singleton must be viewed "in the context of counsel's testimony of his efforts to have Singleton show up for trial and testify" (Resp't's Br. 34-35), and even that Singleton, "alone, was responsible for any . . . deficiencies by counsel" (Resp't's Br. 19). This erroneously implies that Mr. McKenzie's duty to represent Mr. Singleton was somehow different because Mr. Singleton was absent at trial. But Mr. Singleton's absence has no bearing on the quality of legal representation to which he was entitled at trial, or upon the quality of advice about an appeal that his counsel was obligated to provide. Under *Strickland v. Washington*, 466 U.S. 668 (1984), Mr. McKenzie's duty to Mr. Singleton is governed by a fixed, "objective" standard.[3] *Id.* at 688. It is not relaxed because a client fails to appear at trial.

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Supreme Court set out counsel's minimum duty concerning advice about an appeal: to "advis[e] . . . about the advantages and disadvantages of taking an appeal, and mak[e] a reasonable

[3] In addition, because the trial had already concluded by the time the supposed conversation about an appeal occurred, it strains logic to suggest that Mr. McKenzie's statements should be viewed within the context of his efforts to secure Mr. Singleton's attendance at the trial. Had the conversation occurred prior to the trial, one might understand that Mr. McKenzie was attempting to emphasize the importance of attending trial. Given that the alleged conversation occurred "after the case," however, this conclusion is untenable. (*See* J.A. 98)

effort to discover the defendant's wishes." *Id.* at 478. Mr. McKenzie did not meet that standard. Indeed, there is nothing in the record that suggests Mr. McKenzie did anything to "discover [Mr. Singleton's] wishes." *See Id.* At the state evidentiary hearing, counsel denied that Mr. Singleton explicitly asked him to file a notice of appeal, but counsel did *not* testify affirmatively that Mr. Singleton ever expressed a desire not to appeal.[4] (J.A. 98)

III. COUNSEL HAD A DUTY TO CONSULT BECAUSE A RATIONAL DEFENDANT WOULD HAVE WANTED TO APPEAL.

In *Flores-Ortega* the Supreme Court held that counsel 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 (for example, because there are non-frivolous grounds for appeal), *or* (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. at 480 (emphasis added). Even if the state post-conviction review ("PCR") court was correct in determining that Mr. Singleton had not explicitly

[4] The State reads much into Mr. Singleton's confusion regarding the exact date on which he asked his counsel to file appeal. (Resp't's Br. 24.) At the post-conviction review ("PCR") court hearing, Mr. Singleton was questioned about his inconsistency and explained, quite simply, that he had made a mistake when completing the PCR application. (J.A. 93) The district court below made a similar mistake when it discussed confusion about these dates. (*Compare* J.A. 231 and J.A. 73)

requested an appeal, a rational defendant would have wanted to appeal because there were non-frivolous grounds for doing so.

Instead of answering the objective question of whether a rational defendant would want to appeal, as *Flores-Ortega* requires, the State relies on its self-serving characterization of Mr. Singleton's actions to argue that he did not want to appeal. (Resp't's Br. 36) A rational defendant would indeed wish to appeal the case because of the presence of several non-frivolous grounds for doing so. The disjunctive nature of the *Flores-Ortega* test prevents a court from basing its decision solely on whether the client expressed an interest in appealing. The PCR court did not find, and Mr. McKenzie did not claim, that Mr. Singleton did not wish to appeal. Accordingly, that left open the issue of whether a rational defendant would have wanted to appeal.

The State grossly mischaracterizes Mr. Singleton's intentions by asking, "[H]ow could a rational defendant in Singleton's circumstance want an appeal when he did not want a trial?" (*Id.*) But at no point did Mr. Singleton even remotely intimate that he did not want a trial, nor did counsel ever make that claim, nor did any court ever make that finding. Mr. Singleton's absence from the courtroom does not suggest in any way that he did not want a fair trial. Fairly viewed, the record suggests that Mr. Singleton's primary concern throughout was to obtain counsel who was prepared to defend him; that apparently is why he asked

permission to replace his appointed counsel with Mr. McKenzie on the eve of his trial.

IV. A RATIONAL DEFENDANT WOULD HAVE WANTED TO APPEAL BECAUSE THERE WERE THREE NON-FRIVOLOUS CLAIMS THAT COULD HAVE BEEN RAISED ON APPEAL.

To demonstrate that counsel had a duty to consult with him about an appeal, Mr. Singleton must show only that he reasonably demonstrated his interest in appealing or that a rational defendant would have wanted to appeal. *See Flores-Ortega*, 528 U.S. at 479-80. The latter is satisfied if Mr. Singleton can show that there was at least one non-frivolous ground on which he could have appealed. *See Frazer v. South Carolina*, 430 F.3d 696, 708 (4th Cir. 2005). Mr. Singleton has demonstrated that there are at least three such non-frivolous grounds: ineffective assistance of counsel, insufficiency of the evidence, and the denial of his motion for a continuance.

As stated in Mr. Singleton's opening brief, for a court to find that grounds for appeal are non-frivolous, it must determine only that the "issues do not clearly 'lack an arguable basis either in law or in fact.'" *Bostick v. Stevenson*, 589 F.3d 160, 167 n.9 (4th Cir. 2009) (quoting *McLean v. United States*, 566 F.3d 391, 399 (4th Cir. 2009)). A frivolous claim, in contrast, is one whose "factual allegations are 'so nutty,' 'delusional,' or 'wholly fanciful' as to be simply 'unbelievable.'" *McLean*, 566 F.3d at 399 (quoting *Gladney v. Pendleton Corr. Facility*, 302 F.3d

773, 774 (7th Cir. 2002); *Denton v. Hernandez*, 504 U.S. 25, 29 (1992)). In its analysis of whether a claim is frivolous, the State repeatedly refers to its estimation of the merits of the claim. However, as clearly stated in *Bostick*, this Court does not look to the likelihood of success on the merits when addressing the question of frivolity. 589 F.3d at 167 n.9.

A. Mr. Singleton Received Ineffective Assistance of Counsel.

A defendant may demonstrate ineffective assistance of counsel by showing that (1) an attorney's performance "fell below an objective standard of reasonableness" and (2) that defendant was prejudiced by the deficient representation. *Strickland*, 466 U.S. at 687-88, 694. Here, Mr. Singleton received ineffective assistance of counsel due to Mr. McKenzie's failure to prepare adequately for trial as well as his failure to object to an improper out-of-court identification. Though Mr. McKenzie was present at the trial, he did not provide effective assistance sufficient to pass constitutional muster. That conclusion can be made on the trial record and does not require development of additional facts.

First, under South Carolina law, Mr. McKenzie had a duty to perform a reasonable investigation. *Lounds v. State*, 670 S.E.2d 646, 649 (S.C. 2008). At trial, however, Mr. McKenzie did not call any witnesses, introduce any evidence, or cross-examine the State's witnesses on points of conflicting testimony. (J.A. 153-61, 166-76) Though counsel moved the trial court for a competency hearing

for Mr. Singleton, and for a directed verdict, he did not offer any reasons why those motions should be granted. (J.A. 130, 175) To the contrary, Mr. McKenzie at one point conceded that he lacked sufficient information about his client even to argue the motion.[5] At other points he offered no support for motions for which there were strong bases in the evidence.[6]

In addition, Mr. McKenzie was ineffective in failing to object to an improper identification by one of the State's witnesses. South Carolina law requires that a witness's identification be based upon the witness's own observation of the commission of the crime. *See State v. Simmons*, 417 S.E.2d 92, 93 (S.C. 1992). Here, the only witness to implicate Mr. Singleton in the shooting of an alleged second victim offered the following account upon examination:

> Q. And you didn't know Arthur Singleton at the time, is that correct?
>
> A. No, I didn't know him.

[5] To raise the question of whether Mr. Singleton needed a competency hearing, Mr. McKenzie stated: "Your Honor, I am not real sure that [Mr. Singleton] is in his right mind right now and . . . I don't know whether or not he needs a competency evaluation." (J.A. 130)

[6] Mr. McKenzie's motion for a directed verdict was only, "Judge, I would make a motion for a directed verdict and am ready to proceed." (J.A. 175) He did not argue the fact that the only testimony linking Singleton to the injuries suffered by the alleged second victim was an improper witness identification. (*See* J.A. 165, 167-68)

Q. And later on the police told you it was Arthur who was doing the shooting?

A. No later on – yeah, friends said it was Arthur.

(J.A. 167) Because this identification was not the result of the witness's own observation, Mr. McKenzie should have objected to it. Had the improper identification been ruled inadmissible, as it should have been, no other evidence would have connected Mr. Singleton to the shooting of the second victim. However, Mr. McKenzie did not object, and consequently Mr. Singleton was convicted of the ABWIK charge relating to the second alleged victim.

The State argues that ineffective assistance of counsel is not an appropriate ground for direct appeal in South Carolina, and can be pursued only in a PCR court. (Resp't's Br. 37) This Court, however, considered this issue in *Bostick* on very similar facts and held that ineffective assistance of counsel was a non-frivolous ground for direct appeal in South Carolina.[7] 589 F.3d at 167. Where, as here, the records provides an adequate basis for review of counsel's performance, we submit that *Bostick* is correct.

[7] The State suggests that this Court was mistaken in its ruling in *Bostick* and that this Court failed to consider distinctions between a defendant's right to a direct appeal and a PCR court appeal. In *Bostick*, however, this Court acknowledged distinctions between the two types of courts. *See* 589 F.3d at 164 (discussing South Carolina's PCR courts and noting various "PCR-court errors that continue to permeate [South Carolina's] judicial system" (internal quotations omitted)).

B. Mr. Singleton Was Convicted on Insufficient Evidence.

The trial court erred in not granting a directed verdict for Mr. Singleton on at least one count. At trial, the state's two witnesses, Mr. Bradley and Ms. Davis, gave materially inconsistent testimony. While Mr. Bradley testified that his assailant exited the vehicle before he began firing (J.A. 149), Ms. Davis testified that the shots were fired by an individual from inside the vehicle. (J.A. 167) Moreover, Ms. Davis, the sole witness who testified about the shooting of the second alleged victim, was unable to identify the assailant until a third party told her it was Mr. Singleton. (J.A. 154) Ms. Davis's testimony relied on this improper out-of-court identification to provide the only evidence connecting Mr. Singleton to the second alleged shooting, and the court should have granted a directed verdict on the charge of ABWIK with respect to the second victim. Therefore, insufficiency of the evidence is a non-frivolous ground for appeal.

Mr. Singleton's counsel preserved this issue by moving for a directed verdict following the close of the State's case. The State argues that, because Mr. Singleton's counsel did not make an argument in support of the motion, Mr. Singleton is procedurally barred from arguing it in the appeal. (Resp't's Br. 39) To the contrary, the Supreme Court of South Carolina has frequently held that even counsel's failure to move for a directed verdict at the close of trial does not bar a criminal defendant from raising an insufficiency of the evidence claim on appeal.

South Carolina v. McCrary, 131 S.E.2d 687, 689 (S.C. 1963). Because this is a criminal case and counsel did make a motion for a directed verdict, the State's argument that this claim is procedurally barred lacks merit.

C. Mr. Singleton Properly Preserved the Right to Appeal the Denial of his Motion for Continuance.

The trial court's denial of Mr. Singleton's motion for continuance is yet another non-frivolous ground for appeal. Under South Carolina law, trial counsel's objections are preserved for appeal provided they are raised to and ruled upon by the lower court and are "sufficiently specific to identify the grounds for the trial court." *See State v. Hatcher*, 681 S.E.2d 925, 927 (S.C. Ct. App. 2009).

Here, the issue has been preserved for appeal because Mr. Singleton's counsel moved for a continuance (J.A. 129-30), and the trial judge denied the motion. (J.A. 132) Rather than claiming that this argument lacks an arguable basis in law or fact, the State questions the probability of Mr. Singleton's success on the merits with respect to this appeal. (Resp't's Br. 46-47) This Court, however, does not look to the likelihood of success on the merits when addressing the question of frivolity. *See Bostick*, 589 F.3d at 167 n.9. Because Mr. Singleton's claim has an arguable basis both in law and in fact, as discussed in Mr. Singleton's opening brief, this ground for appeal is non-frivolous. We submit that the denial of a continuance after permitting a new lawyer on the eve of trial to undertake Mr. Singleton's defense against very serious charges, was an abuse of discretion. Mr.

McKenzie's incompetent performance at trial demonstrates the harm Mr. Singleton suffered as a result.

V. THE BRIEF CONVERSATION THAT COUNSEL TESTIFIED HE MAY HAVE HAD WITH MR. SINGLETON DID NOT SATISFY HIS DUTY TO CONSULT WITH MR. SINGLETON.

If Mr. Singleton did indeed discuss an appeal with his counsel, the discussion did not amount to consultation under *Flores-Ortega*. Under that standard, consultation regarding an appeal "'conveys a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes.'" *United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000) (quoting *Flores-Ortega*, 528 U.S. at 478).

Here, Mr. McKenzie did not consult with Mr. Singleton about an appeal. Mr. McKenzie never definitively stated that he discussed an appeal with Mr. Singleton (*see* J.A. 98-99), and the PCR court did not explicitly find that there was consultation. (*See* J.A. 104-10) Counsel's testimony before the PCR court was uncertain at best. Mr. McKenzie stated that he "may have discussed the appeal," but could not firmly testify that he had done so. (J.A. 98) In its opinion, the PCR court makes no mention of Mr. Singleton and his counsel consulting, but merely states that it found counsel's testimony credible. (J.A. 106-07) Finding counsel's

testimony credible is not equivalent to finding that he satisfied his duty under *Flores-Ortega* to consult with Mr. Singleton.

Even assuming that Mr. Singleton and his counsel discussed an appeal, to the extent speculated by his counsel, such discussion would not have constituted consultation under *Flores-Ortega*. Counsel testified that if he addressed the matter at all, rather than discussing the advantages and disadvantages, he summarily told Mr. Singleton that there was no case to appeal because he had not shown up for trial, which meant that there was no evidence on which to base an appeal. (J.A. 98.) However, as this Court has noted, "asserting the view that an appeal would not be successful does not constitute 'consultation' in any meaningful sense." *Bostick*, 589 F.3d at 166 (quoting *Thompson v. United States*, 504 F.3d 1203, 1207 (11th Cir. 2007)). Moreover, though the State argues that Mr. Singleton was aware of his right to appeal notwithstanding Mr. McKenzie's mistaken advice, the record suggests otherwise. As noted by the district court below, the state court never informed Mr. Singleton of his right to appeal the ABWIK convictions.[8]

The State's attempt to distinguish this case from *Thompson v. United States* is unpersuasive; this Court has previously cited *Thompson* favorably. In *Bostick,*

[8] When his sentence was unsealed, Mr. Singleton was specifically advised of his right to appeal the court's decision concerning a probation violation. The court was silent, however, about Mr. Singleton's right to appeal the ABWIK convictions. As the District Court correctly noted, the PCR Court erroneously found that Mr. Singleton had been informed of his right to appeal the ABWIK conviction despite the lack of any evidence suggesting this. (J.A. 229 n.5)

this Court considered a case that was in a procedurally similar position to the instant case and cited *Thompson* for the proposition that merely telling the client that an appeal would be unsuccessful does not constitute consultation. *Bostick*, 589 F.3d at 166. Furthermore, *Bostick* was decided under the deferential standards of AEDPA, thus making Mr. Singleton's reliance on *Thompson* appropriate.

VI. THE PCR COURT'S LEGAL CONCLUSION ABOUT MR. MCKENZIE'S PURPORTED ADVICE ABOUT AN APPEAL IS NOT A FACTUAL FINDING ACCORDED SPECIAL DEFERENCE UNDER AEDPA.

Mr. Singleton agrees that under AEDPA state court factual findings are presumed to be correct in a habeas action. However, the State mistakenly suggests that the PCR court held that a consultation within the meaning of *Flores-Ortega* had occurred. The PCR court made no fact determination about whether Mr. McKenzie consulted Mr. Singleton about an appeal. Instead, in boiler-plate language repeated several times in its opinion, the PCR court found only that Mr. Singleton failed to show that trial counsel's representation fell below the standard of professional reasonableness.[9] (J.A. 106-08) Accordingly, the correct standard of review of the PCR court's determination is whether that court's decision is

[9] The State misleadingly recounts the PCR Court's scant findings. The PCR court held only that "trial counsel's testimony was credible"; the State extrapolates from that phrase that each statement offered by Mr. McKenzie was accepted as true by the court. (Resp't's Br. 26-27) The PCR court's recounting of parties' testimony was later found by the district court to erroneously attribute statements to Mr. Singleton. (J.A. 229 n.5)

contrary to, or an unreasonable application of, the Supreme Court's decision in *Flores-Ortega*. *See* 28 U.S.C. § 2254(d)(1).

As discussed above, even if Mr. McKenzie's testimony at the PCR court hearing is taken as wholly true, his brief conversation with Mr. Singleton, assuming it took place, did not satisfy the requirements of *Flores-Ortega*. The mere assertion of his opinion that an appeal would be unsuccessful does not constitute consultation in "any meaningful sense." *See Thompson*, 504 F.3d at 1207. However, Mr. McKenzie's testimony suggests only that he "may have" had such a conversation with Mr. Singleton. (J.A. 98) Therefore, any finding that Mr. McKenzie satisfied his duty to consult with Mr. Singleton about an appeal, as he had an obligation to do under *Flores-Ortega*, is contrary to Supreme Court precedent.

CONCLUSION

Because Mr. Singleton's counsel did not meet the minimum constitutional requirements established by the Supreme Court in *Flores-Ortega*, and because Mr. Singleton had at least three non-frivolous grounds for appeal, his Application for a Writ of Habeas Corpus should be granted.

Respectfully submitted,

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Dated: January 26, 2011

/s/ James E. Coleman, Jr.
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 26th day of January, 2011, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 26th day of January, 2011, I caused the required number of bound copies of the Reply Brief of Appellant to be hand-filed with the Clerk of the Court.

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