

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jun 29 2022

S.C. SUPREME COURT

Certiorari to Richland County

Honorable Roger E. Henderson, Circuit Court Judge

ARYEE HENDERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001521

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX.....i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR court properly granted Petitioner relief pursuant to *Austin*
v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner’s
PCR counsel failed to file a Notice of Appeal and where the State
agreed that Petitioner was entitled to belated review.6

CONCLUSION.....7

ISSUE PRESENTED

Whether the PCR court properly granted Petitioner relief pursuant to *Austin v. State*, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner's PCR counsel failed to file a Notice of Appeal, and where the State agreed that Petitioner was entitled to belated review?

STATEMENT OF THE CASE

In November 2002, the Richland County grand jury indicted Petitioner for one count of murder. App. 454-455. The case was originally called to trial on September 21, 2004, before the Honorable Alison Renee Lee and a jury. The State was represented by Luck Campbell and Bryan S. Jeffries. Petitioner was represented by Charles Johnson. Petitioner was found guilty as indicted and sentenced to thirty years imprisonment. App. 4, ll. 3-10; App. 93, ll. 8-22.

Petitioner appealed his conviction and sentence. The appeal was eventually dismissed pursuant to *Anders v. California*¹ in an unpublished opinion. *State v. Henderson*, Op. No. 2008-UP-107 (S.C. Ct. App. filed February 12, 2008); App. 93, l. 22-App. 94, l. 5. Petitioner filed an application for post-conviction relief on March 4, 2008. The State made its return on January 30, 2009. An evidentiary hearing was convened on August 12, 2009, before the Honorable G. Thomas Cooper, Jr. Petitioner was represented by Charles T. Brooks, III. The State was represented by Brian Petrano. Judge Cooper signed an order granting Petitioner post-conviction relief which was filed on July 14, 2010. App. 94, ll. 6-15

The State appealed Judge Cooper's grant of relief in a petition for writ of certiorari filed on September 20, 2010. The Court of Appeals affirmed the PCR court's grant of relief. *State v. Henderson*, Op. No. 2014-UP-122 (S. Ct. App. filed March 19, 2014). The State filed a petition for rehearing on April 2, 2014, which was denied on April 24, 2014. Subsequently, the State filed a petition for writ of certiorari to the Court of Appeals on December 17, 2014. The South Carolina Supreme Court ultimately dismissed that writ as improvidently granted. *State v. Henderson*, Op. No. 2015-MO-063 (filed October 28, 2015). App. 94, l. 15-App. 95, l. 1.

¹ 386 U.S. 738 (1967)

Petitioner's case was returned to the Richland County Court of General Sessions. On June 20, 2016, Petitioner appeared before the Honorable Clifton Newman to enter a guilty plea to the lesser included offense of voluntary manslaughter. The State was represented by Luck Campbell. Petitioner was represented by Rhodes Bailey. App. 1; App. 4, ll. 3-17. After a lengthy plea hearing, Judge Newman sentenced Petitioner to twenty-five years imprisonment. App. 58, ll. 16-18. Petitioner did not appeal his conviction or sentence from the guilty plea.

On July 21, 2016, Petitioner filed an application for post-conviction relief alleging, *inter alia*, ineffective assistance of counsel, where plea counsel forced him to plead guilty against his will, failed to investigate the facts of the case, and failed to object when the solicitor breached the plea agreement. App. 60-70. The State filed a return on July 13, 2017. App. 71-79. Petitioner filed a *pro se* amended PCR application on August 22, 2017, alleging counsel was ineffective for failing to advise him of the right to proceed *pro se* and failing to have a hearing held on Petitioner's motion to relieve counsel. App. 80-87. PCR Counsel Jonathan Waller filed an amended PCR application dated January 18, 2018, alleging plea counsel was ineffective for failing to ensure timely scheduling of Petitioner's *pro se* motion to relieve counsel, failing to object to the presentation of Petitioner's SCDC disciplinary record during sentencing, and failing to advise Petitioner that the victim's family would be able to speak at sentencing. App. 88-89.

An evidentiary hearing was held before the Honorable Jocelyn Newman on January 24, 2018. Petitioner was represented by Counsel Waller. The State was represented by Jessica Kinard. App. 90. At the conclusion of the hearing, Judge J. Newman denied Petitioner's PCR application and requested the State prepare an order for her to sign. App. 194-195. An order of dismissal was filed on March 22, 2018. App. 205-216. Counsel Waller failed to file a notice of appeal.

On May 22, 2018, Petitioner filed a *pro se* motion² requesting an extension of time to file a Rule 59(e) SCRCF motion because he had not received a copy of the order of dismissal until May 2, 2018, and his ability to respond was limited due to a state-wide institutional lockdown after the riot at Lee Correctional Institution. App. 214-217. Petitioner subsequently mailed a copy of a Rule 59(e) SCRCF motion dated August 7, 2018, to the Attorney General's office, however it does not appear the motion was ever properly filed. In the Rule 59(e) motion, Petitioner urged the PCR court alter or amend its order because it failed to address the claim that counsel was ineffective for failing to advise Petitioner of his right to proceed *pro se* and ensure a hearing was held on his motion to relieve counsel. App. 221-265.

Counsel Waller filed a motion pursuant to Rule 60(b) SCRCF requesting the court grant relief from the order of dismissal issued on March 22, 2018. In requesting relief, Counsel Waller submitted that he had not been properly served with the order by the State. He stated he only received an email from a member of the Clerk of Court's office with the dismissal order attached to it that he overlooked. App. 266-271. Judge Newman denied the motion pursuant to Rule 60(b) SCRCF on July 21, 2018. App. 272-273.

Petitioner filed the instant PCR application on September 20, 2018, alleging ineffective assistance of PCR Counsel Waller for failing to file an appeal. App. 274-317. Petitioner sent an amended PCR application dated November 27, 2018, to the Attorney General's office, though it appears the document was not filed. App. 318-382. However, a second amended application was filed by Petitioner on March 5, 2019. App. 383-419. The State filed a return dated July 19, 2019. App. 420-428.

² Petitioner also filed a *pro se* motion for a preliminary injunction against the administrative officials at Lieber Correctional on May 22, 2018, to lift the lock down so that he could access the law library. App. 218-220.

An evidentiary hearing was convened before the Honorable Roger E. Henderson on August 21, 2019. Petitioner was represented by Arthur Aiken. The State was represented by Lindsey McCallister. App. 429. At the start of the hearing, the State conceded Petitioner was entitled to belated review of the denial of his first PCR under *Austin*. Counsel Aiken informed the court that Petitioner agreed to the dismissal of the other claims against PCR counsel that he had alleged in his application. App. 433, l. 17-App. 434, l. 18.

Counsel Waller testified that he had expected to be served with a hard copy of the order and did not realize the email he received from the Clerk of Court contained the order of dismissal. When he finally opened the email and order, the time to file a notice of appeal had lapsed. App. 436, l. 9-App. 438, l. 6. Counsel Waller testified if he had opened the email when he received it, he would have filed a notice of appeal as it was Petitioner's desire to appeal the order. App. 438, ll. 7-20.

A consent order granting Petitioner belated review of the denial of his initial PCR application pursuant to *Austin* was filed on November 16, 2021. The order found that the parties agreed Petitioner did not voluntarily waive his right to appeal the denial of his initial PCR application and this finding was supported by the testimony provided by Counsel Waller.

This petition for writ of certiorari pursuant to *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992), follows.

ARGUMENT

The PCR court properly granted Petitioner relief pursuant to *Austin v. State*, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner’s PCR counsel failed to file a Notice of Appeal and where the State agreed that Petitioner was entitled to belated review.

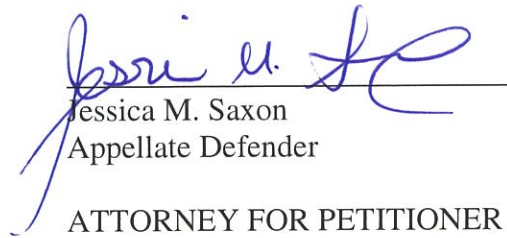
“An indigent defendant has the right to be informed of an appeal and the manner and method for taking the appeal.” *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In *Austin v. State*, counsel failed to file a timely appeal following the denial of the petitioner’s first PCR application. Subsequently, the petitioner filed a second PCR application alleging counsel was ineffective for failing to appeal the denial of his first PCR. *Id.* at 454, 246 S.E. 2d at 396. This Court recognized that the right to seek appellate review was expressly authorized by state law under the PCR Act. *Id.* To safeguard that right, this Court crafted a remedy allowing belated appellate review of an order dismissing a PCR application if the petitioner could show that they in fact requested and were denied an opportunity to seek appellate review. *Id.*

In Petitioner’s case, Counsel Waller testified that he overlooked the email that contained the order of dismissal. He stated that it was completely his fault that a timely notice of appeal of the order was not filed. Further, based on his representation of Petitioner, he fully believed Petitioner intended to appeal the decision of the first PCR court. Additionally, the State conceded that Petitioner was entitled to relief under *Austin*. The PCR court’s order properly provided that relief.

The evidence in the record reflects that the grant of relief pursuant to *Austin* was warranted in Petitioner’s case. Petitioner, through no fault of his own, was denied the opportunity for appellate review of the dismissal of his first PCR application. This unjust procedural defect can only be remedied by granting him belated appellate review.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests this Court grant certiorari, affirm the lower court's determination that Petitioner is entitled to belated review, and review the petition for writ of certiorari pursuant to *Austin* that was filed simultaneously with this petition.


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ATTORNEY FOR PETITIONER

This 29th day of June, 2022.