

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

JERRY SIMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001378

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the second post-conviction relief judge correctly grant belated appellate review of the first post-conviction relief judge's order of dismissal where Petitioner had not knowingly and intelligently waived his right to appellate review?

STATEMENT

Petitioner was indicted in March of 2016 by the Spartanburg County grand jury for trafficking in cocaine, more than 200 grams. App. 321 – 325. Petitioner was also indicted in August of 2016 for conspiracy to traffic cocaine, more than 200 grams. App. 369 – 370. Joseph Watson represented Petitioner and the state was represented by James Farr. App. 1.

On October 14, 2016, Petitioner appeared before the Honorable J. Derham Cole and pled guilty to the lesser-included offenses of conspiracy to traffic cocaine, 28 to 100 grams, second offense and possession with intent to distribute cocaine, second offense (PWID). App. 4, ll. 3 – 17. Pursuant to a negotiated sentence, the plea judge sentenced Petitioner to twelve-years imprisonment on the conspiracy charge and a consecutive thirty-years imprisonment suspended to five-years of probation on the PWID charge. App. 11, ll. 9 – 16.

Petitioner filed a notice of appeal which was dismissed by the Court of Appeals on February 1, 2017 for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. App. 37. Petitioner then filed an application for post-conviction relief on September 11, 2017. App. 13 – 36. The state filed its Return on January 12, 2018. App. 76 – 84. Petitioner then filed an amended application through his attorney, William G. Yarborough, III on September 13, 2019. App. 86 – 89. An evidentiary hearing was held on October 7, 2019 before the Honorable G. Thomas Cooper. Mr. Yarborough represented Petitioner and the state was represented by Jacob Isenberg. App. 90. Petitioner and his plea counsel testified. App. 91.

At his PCR hearing, Petitioner testified that the drugs for which he was charged were found in his co-defendant's vehicle while Petitioner was not present. App. 98, l. 24 – 99, l. 3. Specifically, Petitioner recalled that the drugs were discovered inside of a bag that Petitioner had

no connection to. Petitioner believed that there may have been DNA or fingerprint testing done on the bag, but he was never made aware of the results and would have wanted to know those results before he made the decision to plead guilty. App. 111, l. 15 – 112, l. 4.

Plea counsel confirmed in his testimony at the PCR hearing that the drugs were found inside a bag that was located in the co-defendant's car. At the time the drugs were located in the car, Petitioner was not present. App. 171, l. 8 – 172, l. 7. After the drugs were discovered in the co-defendant's car by the police, the co-defendant told the police that Petitioner had asked him to go to a storage unit to retrieve the drugs for Petitioner. App. 154, l. 11 – 155, l. 8.

The PCR judge found that Petitioner was “merely speculating” about the results of the fingerprint test on the bag where the drugs were found. App. 236 – 237. The judge further found that Petitioner's testimony that he would not have pled guilty without access to the fingerprint test results was not credible. The PCR judge denied Petitioner relief by order on January 6, 2020. App. 238.

Petitioner's PCR counsel filed a notice of appeal and a motion to file out of time on August 12, 2020. App. 241 – 242. This Court dismissed the appeal and denied the motion to file out of time on October 21, 2019. App. 266 – 267. On December 4, 2020, Petitioner filed a PCR application alleging ineffective assistance of PCR counsel for failing to timely file a notice of appeal from the PCR judge's order denying him relief. App. 268 – 284. The state filed its return and partial motion to dismiss on May 25, 2021. App. 285 – 291.

An evidentiary hearing was held before the Honorable William A. McKinnon on September 13, 2021. Petitioner was represented by Rodney Richey and the state was represented by Chelsey Marto. Petitioner and his PCR counsel, William Yarborough, both testified. App. 293 – 295. At the end of the hearing, Judge McKinnon granted Petitioner relief and ordered that

Petitioner was entitled to an appeal from the denial of his PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 318 – 320.

This petition and a separately filed Austin petition follow.

ARGUMENT

The post-conviction relief judge correctly granted belated appellate review of the first post-conviction relief judge’s order of dismissal because Petitioner had not knowingly and intelligently waived his right to appellate review.

At Petitioner’s second PCR hearing, he testified that he asked his PCR counsel to appeal his case “pretty much immediately after the denial of the PCR.” App. 299, ll. 5 – 9. PCR counsel testified that there was no question that Petitioner asked him to file an appeal at some point but his understanding immediately after the PCR hearing was that Petitioner did not want to appeal. App. 303, ll. 9 – 24. Petitioner also produced text messages between his fiancée and PCR counsel where his fiancée told counsel he wanted to appeal the denial of his PCR and that counsel responded that he had already filed the appeal. App. 283.

The assistant attorney general argued that the failure to timely file the notice of appeal was not PCR counsel’s fault but rather the fault of Petitioner for not communicating his desire to appeal to counsel. App. 313, ll. 12 – 25. The judge asked then why PCR counsel had sent a text message to Petitioner’s fiancée telling her that he had already filed the appeal if counsel did not know Petitioner wanted to appeal. App. 314, ll. 21 – 25. The attorney general did not know the answer but believed there was some confusion regarding whether Petitioner wanted to appeal or not. App. 315, ll. 1 – 12. The PCR judge granted Petitioner a belated appeal pursuant to Austin. App. 318 – 320.

The second PCR judge correctly determined that Petitioner was entitled to a belated appeal from the denial of his PCR application because he asked his counsel to appeal within the statutory time to appeal and counsel failed to do so. See Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (holding that if the circuit court determines that the petitioner requested and was denied an appeal due his counsel's failure to timely file the notice of appeal, the appellate court will review whether the petitioner was prejudiced by the failure of his counsel to file a timely notice of appeal to review a meritorious issue).

CONCLUSION

Based on the above argument, Petitioner should be allowed to file an Austin petition for writ of certiorari.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of July, 2022.