

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Kristi Curtis, Circuit Court Judge

Case No. 2022-CP-22-00684

Stanley Moultrie,

Petitioner,

vs.

The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Stanley Moultrie submits this Notice of Appeal granting an *Austin*¹ appeal in this matter.

Respectfully submitted,

/s/ Elizabeth Franklin-Best,
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September 23, 2022.

¹ *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
)	
Stanley Moultrie, #185590,)	CASE NO. 2022-CP-22-00684
)	
Applicant,)	
)	
v.)	ORDER GRANTING BELATED APPEAL
)	PURSUANT TO <u>AUSTIN V. STATE</u>
State of South Carolina,)	
)	
Respondent.)	
)	

This matter comes before the Court by way of an Application for Post-Conviction Relief. The Court convened a hearing on September 9, 2022. The State was represented by Chelsey Marto, Esquire, of the South Carolina Attorney General’s Office. Applicant was present and represented by Elizabeth Franklin-Best, Esquire. Applicant testified on his own behalf. Prior PCR Counsel James K. Falk, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant is entitled to an Austin appeal from his first PCR Action. Findings of fact and conclusions of law are set forth below.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In May 2015, the Georgetown County Grand Jury indicted Applicant for kidnapping (2015-GS-22-00458) and armed robbery (2015-GS-22-00459). Jeffery T. Lucas, III, Esquire represented Applicant. James A. Thomas prosecuted the case. On August 22-24, 2016, Applicant proceeded to trial before the Honorable D, Craig Brown, circuit court judge, and a jury. Applicant was found guilty of armed robbery and acquitted of kidnapping.

Applicant filed a timely notice of appeal, and a direct appeal was perfected by Laura R. Baer, Esquire, who raised the following issues:

1. Whether the trial judge erred in denying the defense's motion for a mental health evaluation to determine Appellant's criminal responsibility?
2. Whether the trial judge erred in denying the defense's motion for a mental health evaluation to determine Appellant's competency to stand trial?

Briefing was completed on January 24, 2018. The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Moultrie, 2019-UP-013 (S.C. Ct. App. filed Jan. 9, 2019). The remittitur was issued on January 30, 2019.

First PCR Action: (2019-CP-22-00354)

Applicant filed his first PCR application on April 17, 2019, alleging:

1. "Ineffective Assistance of Counsel"
 - a. "Trial Counsel ineffective for failing to interview (a) State's witness/alleged victim. Under the 6th (sixth) Amendment of the United States of America holds that a defendant has an absolute right to confront a witness(es). This process shall be conducted by defendant's counsel; to interview and investigate. Counsel failed to interview the alleged victims unaware of what she would testify to. Applicant's lawyer did not know what line of questioning to avoid, or how to rebut. Counsel also failed to discredit and/or impeach the witness, where evidence existed to do just that."
 - b. "Counsel failed to communicate with the defendant as defendant wished to plead guilty & not go to trial, which is Applicant's definitive right as a defendant. The case at hand was traded/passed from & to multiple solicitors and multiple defense attorney's from the retained firm."
 - c. "Counsel failed to obtain or investigate said weapon or any factual evidence of its existence. Applicant contends there was no weapon or evidence of a weapon [therefore] the charge of armed robbery is invalid. The state [nolle prossed] the weapon but the charge remained armed robbery. Counsel failed to challenge the validity of the indictment. Counsel failed to charge the courts with the lesser-included offense."
 - d. "Counsel ineffective to raise constitutional violation of illegal search & seizure."
2. "State Misconduct"

Respondent made its return on July 12, 2019, requesting an evidentiary hearing be

convened. Applicant, through Counsel James K. Falk, filed an amendment dated November 30, 2020, alleging:

1. "Trial Counsel provided ineffective assistance of counsel by failing to seek a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972) before Joyce Messinger was permitted to make an in-court identification of Applicant."
2. "Trial Counsel provided ineffective assistance of counsel by failing to object to the trial court's burden shifting 'search for the truth' language uttered as part of the Court's opening comments to the jury (TT p. 104 lines 18-23) and jury charge (TT p. 246 line 21; TT p. 251 line 3; and TT 257 line 20 through 258 line 5)."
3. "Trial Counsel provided ineffective assistance of counsel by failing to object to the prosecution's vouching for the credibility of its witnesses. (TT p. 229 lines 5-8; 232 lines 2-6)."

Applicant, through Counsel Falk, made his second PCR Amendment on March 10, 2021, alleging:

1. "Applicant was never personally served with timely notice of the State's intention to seek a life without parole sentencing as required by S.C. Code § 17-25-45 (H)."
2. "Trial Counsel was ineffective for not seeking a charge on the lesser included offense of Strong Armed Robbery."

An evidentiary hearing was held before the Honorable William H. Seals, Jr., circuit court judge, on Wednesday, June 23, 2021, at Georgetown County Courthouse. James K. Falk, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent. At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel for:
 - a. Failure to request a Biggers hearing;
 - b. Failure to object to police officer's narration of the video of the vehicle pulling into the parking lot;
 - c. Failure to object to trial court's burden shifting 'search for the truth' language;
 - d. Failure to object to prosecution's vouching for the witnesses' credibility; and
 - e. Failure to request a lesser-included offense instruction of strong armed robbery.
2. Applicant was not served with an LWOP notice.
3. Applicant's 1993 conviction was improperly used as an enhancement to make Applicant LWOP eligible, even though the pertinent 1995 statute was enacted after the conviction took place.

Judge Seals signed an order of dismissal denying Applicant PCR relief on July 31, 2021.

Applicant did not appeal.

CURRENT ACTION BEFORE THIS COURT

In his current application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Applicant requests appellate review of the denial of his first PCR case.
 - a. Applicant did not knowingly and intelligently waive his right to the appeal of his first PCR case, his court-appointed lawyer failed to file a notice of appeal.

Respondent made its return requesting an Austin hearing be held on August 29, 2022.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Georgetown County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, prior PCR action records and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Applicant contends that PCR Counsel was ineffective for failure to timely file a notice of appeal. "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); Austin v. State, 305 S.C. 453, 409 S.E.2d 395, 396 (1991). In Austin, the South Carolina Supreme Court framed the inquiry as whether the PCR applicant "requested and was denied an opportunity to seek appellate review." Austin at 454, 409 S.E.2d at 396. Under Austin, an Applicant is entitled to appeal the denial of a PCR application when they have not voluntarily

waived the right to appeal. An applicant may waive the right to appeal by making a “knowing and intelligent decision not to pursue the appeal.” Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010).

“The right to seek appellate review of the denial of PCR is expressly authorized by state law.” Austin, 305 S.C. at 454, 409 S.E.2d at 396; S.C. Code Ann. § 17-27-100 (2014). Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for belated discretionary review of the dismissal of his or her application in some circumstances. A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999).

This Court finds Applicant wanted an appeal from his prior PCR action and did not waive this right. Additionally, this Court finds Counsel informed Applicant he would file a notice of appeal if he received an order of dismissal in the action but failed to do so. Counsel testified that any failure to appeal from the PCR action was the fault of Counsel and was not an indication of Applicant’s decision to waive his right to an appeal. Accordingly, this Court find that Applicant is entitled to an Austin appeal of the denial of his PCR application.

CONCLUSION

The Court finds that the Applicant is entitled to an Austin appeal of the denial of his PCR application.

AND IT IS SO ORDERED this Monday day of Sept, 2022.

Kristi Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter

, South Carolina