THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Lower Court Case No. 2015-CP-46-3699
Lower Court Case No.: 2021-CP-46-1049

Cassie Cunningham #362287

Petitioner,

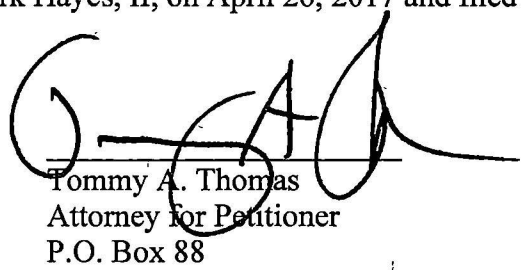
v.

State of South Carolina,

Respondent.

NOTICE OF *AUSTIN* APPEAL

Pursuant to a Consent Order Granting *Austin* Appeal signed by The Honorable Edward W. Miller on September 1, 2022, filed on September 7, 2022 and received by Petitioner on September 16, 2022. The Petitioner, Cassie Cunningham, through her attorney Tommy A. Thomas, appeals the Order of Dismissal signed by the Honorable J. Mark Hayes, II, on April 26, 2017 and filed on May 11, 2017.



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October 10, 2022

FILED-RECEIVED

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STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Cassie Cunningham, SCDC #362287, Applicant, v. State of South Carolina, Respondent.	Case No. 2021-CP-46-1049 **CONSENT ORDER GRANTING *AUSTIN* APPEAL**

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Cassie Cunningham (Applicant) on March 31, 2021. The State made its return and motion to dismiss on July 20, 2021, requesting a hearing only on Applicant's claim that she is entitled to belated appellate review of her first post-conviction relief action pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was arrested on February 10, 2014, for felony driving under the influence (DUI) resulting in the death of Kristen Knight. During its June 2014 term, the York County grand jury indicted Applicant for felony DUI resulting in death (2014-GS-46-1878).

On December 1, 2014, Applicant appeared before the Honorable Brian M. Gibbons and pleaded guilty as indicted without formal negotiations or recommendations from the State as to sentencing. James W. Boyd represented Applicant. Sixteenth Circuit Solicitor Kevin Brackett and Deputy Solicitor Walter William Thompson, Sr., prosecuted the case. Judge Gibbons accepted

35 (1974), and belated appellate review of her initial post-conviction relief action pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395. In its return, the State moved to dismiss Applicant's claim she is entitled to *White* review of her plea as successive[1] and requested an evidentiary hearing on the sole claim of whether Applicant is entitled to *Austin* review of her initial post-conviction relief action. PCR counsel subsequently conferred with the State, who agreed that Applicant is entitled to Austin review of her initial post-conviction relief action. PCR counsel additionally withdrew the *White* claim.

Before this Court are the York County Clerk of Court records regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; the plea transcript; Applicant's prior post-conviction relief records challenging this conviction; and the records of the current PCR action.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

Applicant alleges she was denied the right to appeal her first post-conviction relief action. This Court agrees. Our Supreme Court has held that every PCR applicant is entitled to a full and fair opportunity to present claims in one PCR application, or one "bite at the apple." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). This "bite" includes an applicant's right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal. *Id.* at 261, 523 S.E.2d at 755–56. Accordingly, successive applications are generally disfavored "because they allow an applicant to receive more than 'one bite at the apple.' " *Id.* at 261, 523 S.E.2d at 755; *see generally Graham*, 378 S.C. at 3, 661 S.E.2d at 338 ("A successive PCR application is one that

[1] *See Graham v. State*, 378 S.C. 1, 661 S.E.2d 337 (2008) (finding the applicant was barred from raising the claim that he was denied the right to direct appeal due to the ineffective assistance of counsel in a successive PCR application where the claim where claim could have been raised in first PCR application).

raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings.").

However, our Supreme Court has allowed successive PCR applications where the applicant has been denied complete access to the appellate process. *Odom*, 337 S.C. at 261, 523 S.E.2d at 755; *see Austin*, 305 S.C. at 454, 409 S.E.2d at 396 (1991) (noting that "[t]he right to seek appellate review of the denial of PCR is expressly authorized by state law" (citing S.C. Code Ann. § 17-27-100); S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). *Austin* provides for belated appellate review of the denial of a prior PCR action after the statute of limitations has expired where PCR counsel's failure to timely appeal prevented the applicant from seeking appellate review. *See, e.g., Hope v. State*, 328 S.C. 78 n.1, 492 S.E.2d 76 n.1 (1997) (permitting an *Austin* appeal where original PCR counsel failed to appeal from the first denial of PCR); *but see Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) (limiting the reach of *Austin* and holding that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel).

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*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King v. State*, 308 S.C. 348, 348–49, 417 S.E.2d 868 (1992)). If the PCR court finds the applicant was denied his or her right to appeal, the applicant can petition for certiorari and the Supreme Court will review whether he or she was prejudiced by the failure to obtain appellate review. *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. Alternatively, if the PCR court finds the applicant never in fact sought discretionary review, the applicant may

appeal that finding, and the Supreme Court will review the appeal based on the normal "any evidence" standard. *Id.* at 455, 409 S.E.2d at 396 (citing *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (highlighting that "any evidence" of probative value contained in the record is sufficient to uphold the PCR judge's factual findings on appeal)); *see generally Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (explaining that this Court "give[s] great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses").

Here, both Applicant and the State agree that Applicant was denied the opportunity to seek appellate review of the denial of her initial post-conviction relief action. Based upon the consent of both parties, this Court finds Applicant did not knowingly and intelligently waive her right to appeal the denial of her initial post-conviction relief action and, as such, she is entitled to belated appellate review pursuant to *Austin v. State*.

IV. CONCLUSION

Based on all the foregoing, this Court finds Applicant may petition the Supreme Court of South Carolina pursuant to *Austin*. *See King v. State*, 308 S.C. 348, 348, 417 S.E.2d 868, 868 (1992) (outlining the procedure used to seek *Austin* review). Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rules 203 and 243, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin*, 305 S.C. at 454, 409 S.E.2d at 396; Rule 71.1(g), SCRCP. Applicant is directed to Rules 203, 207, and 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. Applicant is granted belated appellate review of the denial of her initial post-conviction relief action pursuant to *Austin v. State*;
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED this 1 day of September, 2022.

EDWARD W. MILLER
Presiding Judge
Sixteenth Judicial Circuit

York, South Carolina

I SO MOVE:

s/TommyThomas
Tommy A. Thomas, Esquire
Counsel for Applicant

I CONSENT:

s/LillianMeadows
Assistant Attorney General Lillian L. Meadows
Counsel for the State

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) OF THE SIXTEENTH JUDICIAL CIRCUIT
)
Cassie Cunningham,) 2015-CP-46-3699
S.C.D.C. No. 362287,)
)
Applicant,)
)
v.) **ORDER OF DISMISSAL**
)
State of South Carolina,)
)
Respondent.)

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed November 25, 2015. Respondent made its Return on or about June 3, 2016. An evidentiary hearing into the matter was convened on Wednesday, February 1, 2017, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by James Craig, Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General's Office represented the Respondent. At the hearing, Applicant testified on her own behalf. James Boyd, Esquire, also testified. This Court also had before it a copy of the records of the York County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the June 2014 term of General Sessions for DUI felony causing death (2014-GS-46-01878). Applicant was represented by James W. Boyd, Esquire. On December 1, 2014, Applicant appeared before

the Honorable Brian Gibbons and pled guilty as indicted. Applicant was sentenced to twenty-three years imprisonment and a fine of $15,000. Applicant did not file a direct appeal.

PCR Allegations

In her application, Applicant alleges she is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. "Failing to properly advise the Defendant of all options available to her prior to enter of plea of guilt."
   b. "Failing to enter plea negotiations with the solicitor prior to the Defendant's plea of guilty."
   c. "Failing to fully investigate and challenge the Defendant's DUI 1st conviction."
   d. "Failing to properly and fully explain the circumstances of the Defendant's DUI 1st conviction at the Defendant's sentencing hearing."
   e. "In developing and implementing a totally ineffective defense strategy of hiring and relying upon the testimony of a psychologist, Dr. Goldsmith, who was the brother of the sentencing judge's predecessor; that is to say that the Defendant's trial attorney based his defense on the anticipated leniency of the trial judge because the trial judge's predecessor in office brother was to testify on behalf of the Defendant."
   f. "In making an ineffective presentation of the Defendant's medical condition and other mitigating factors at the Defendant's sentencing hearing."
   g. "In advising the Defendant that she had no grounds for an appeal."

II. SUMMARY OF EVIDENCE PRESENTED AT PCR HEARING

Applicant's Testimony

Applicant testified that Mr. Boyd (hereinafter "Counsel") did not properly represent the facts and circumstances of her prior DUI offense. She testified that her prior DUI occurred in 2008 after trouble with her abusive husband. She testified that she was back with her husband, on medication for her foot, and drinking alcohol. Applicant testified that she realized she should not be driving and pulled over to call for help. She testified that her husband threatened her and told her to drive home anyway. She testified that the DUI was the result of a reported tip. Applicant testified that all of these facts should have been relayed to the judge at the plea hearing to give

him a better understanding of the circumstances surrounding her first DUI, especially considering that the plea judge said that it was hard to have compassion for her based on her prior DUI" and that she must have had a "death wish." She further testified that she received a sentence that was too high compared to others with the same offense.

Applicant testified that she only saw Dr. Goldsmith for an hour and a half and never reviewed his findings. She testified that Counsel told her that he did not know what Goldsmith would say at the plea hearing. She testified that Dr. Goldsmith's mitigation should have focused more on her struggles with alcoholism, but instead he incorrectly told the court that she had bipolar disorder, PTSD, and had attempted suicide eight times. She testified that Counsel told her that Dr. Goldsmith would help because he is the brother of the plea judge's predecessor.

Counsel James Boyd's Testimony

Counsel testified that he discussed the State's evidence with Applicant and even hired an accident reconstructionist to review the MAIT report. He testified that the facts of the case were not favorable and the State was not offering any plea deal.

Counsel testified that the best recourse for Applicant was for the defense to focus on mitigation. He testified that Applicant wanted to explain her alcohol addiction and let the judge know that the accident was not the result of partying but due to deep rooted causes. He testified that he hired Dr. Patrick Goldsmith to evaluate Applicant and Dr. Goldsmith sent him a written report of his findings. He testified that he believed Dr. Goldsmith testified in Applicant's favor and was able to explain Applicant's underlying issues. Counsel further testified that he did not recall Applicant's suicide attempts or whether these were in Dr. Goldsmith's report. He testified that he did not provide Applicant with Dr. Goldsmith's report but did talk about the report with her in general terms.

Counsel testified that he knew the circumstances surrounding Applicant's prior DUI and that she was arrested at home following a tip to police. He testified that he did not believe going into great detail at the plea hearing would be helpful.

Counsel testified that the Solicitor's Office wanted to call the case during a certain period and Counsel believed that having the hearing before Judge Gibbons would give Applicant the best opportunity for leniency. He testified that wanting to plead before Judge Gibbons had nothing to do with the fact that Judge Gibbons is Judge Goldsmith's successor. Counsel testified that he believed Judge Gibbons was familiar with Dr. Goldsmith's work and respected Dr. Goldsmith.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was

deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, she would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the court as a post-conviction relief application. Applicant pled guilty to Felony DUI resulting in death. She received a 23 year sentence. Her assertion in the PCR is that her lawyer was ineffective by not fully explaining her prior DUI conviction and use of Dr. Goldsmith as a mitigating witness when the doctor presented information that was unknown by her lawyer prior to the hearing and such information presented Applicant in a negative light to the sentencing judge.

After considering the testimony of Applicant and that of her Counsel, and thoroughly reviewing the transcript, including but not limited to the judge's comments prior to announcing the sentence, this Court cannot rule that applicant has carried her burden of proof of establishing that her constitutional right to counsel has been violated. Thus this Court cannot vacate the sentence issued by the plea-judge.

While the sentencing judge did comment on the prior DUI and did state it was hard for him to have compassion for Applicant because of it, his other comments indicated that the more significant factors in deciding his sentence were the specific facts of the accident. The facts he

referenced were that Applicant's speed just prior to the accident was 107 miles per hour, her Blood Alcohol Level was .24 two hours after the wreck, and that it happened in the middle of the afternoon on the busiest highway in Rock Hill. The judge was articulate in expressing his struggles with deciding the sentence. The record indicated that the judge took a break after the presentation to gather his thoughts and to contemplate the sentence prior to deciding the sentence.

While many of the historical events surrounding the prior DUI may not have been presented in detail during the prior hearing, the transcript does indicate the prior DUI was an arrest at Applicant's home (not a traffic stop). Also the abusive relationship with her prior husband was presented to the sentencing judge.

From the review of the entire plea hearing, the State presented the horrific nature of the accident including the fact Applicant had THC in her system, the speed of her large vehicle and significant impact to the rear end of the victim's car. The State presented photographs which demonstrated the severity of the impact. Statements were also presented from the victim's family. These statements were heart wrenching in explaining their loss. The solicitor and the victim's family requested the maximum sentence of 25 years.

The presentation by Counsel was lengthy and substantively significant in painting the life of Applicant prior to the wreck and afterwards. The statements from the applicant's loved ones were sincere and also heart felt. Applicant's statements and comments during the plea were also significant and heartfelt. Reading her words at the plea and having witnessed her testimony during the present PCR hearing, Applicant's remorse for having taken the life of the victim was and is genuine. As the plea judge comments reflect, this is a very tough case where both families have suffered a tremendous loss.

From the overall presentation, this Court cannot rule that Counsel was deficient. Furthermore, this Court finds that even if Counsel's conduct was deficient, this Court can only speculate that further investigation or presentation as to the prior DUI would have made a difference in the judge exercising his discretion. As Applicant has failed to prove both prongs of Strickland, this Court finds that this allegation must be dismissed.

As to assertion that the testimony of the expert was incorrect or harmful, the judge's comments do not indicate he gave much weight to the expert's testimony. As such this Court finds that Counsel was not deficient in retaining and presenting Dr. Goldsmith at the plea hearing. Nevertheless, assuming Counsel was deficient in presenting the witness testimony, once again, this Court is left to speculate this testimony adversely affected the judge discretion. While the 23 year sentence is a substantial sentence given Applicant's almost no prior record, the judge's comments reveal he considered other factors upon which he based his decision that justify the imposition of such a sentence. As Applicant has failed to prove that she was prejudiced by Counsel's actions, this Court finds that this allegation must be dismissed.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing

professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of her sentence.

AND IT IS SO ORDERED this 26th day of April, 2017.

J. MARK HAYES, II
Presiding Judge
Sixteenth Judicial Circuit

York, South Carolina