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Nov 14 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable J. Derham Cole, Plea Judge
The Honorable G. Thomas Cooper, PCR Judge
The Honorable William A. McKinnon, *Austin* Hearing Judge

Appellate Case No. 2021-001378

JERRY SIMPSON.....Petitioner.

v.

STATE OF SOUTH CAROLINA.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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The second post-conviction relief judge correctly granted belated appellate review of the first post-conviction relief judge’s order of dismissal where Petitioner did not knowingly and intelligently waive his right to appellate review from the first post-conviction relief action.....6

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STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

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?

Respondent's Counterstatement of Issue on Certiorari

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 did not knowingly and intelligently waive his right to appellate review from the first post-conviction relief action?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. In March 2016, the Spartanburg County Grand Jury indicted Petitioner for trafficking in cocaine, more than 200 grams (2016-GS-42-1687). Petitioner was subsequently indicted in August 2016 for conspiracy to traffic cocaine, more than 200 grams (2016-GS-42-4459). Petitioner was represented by Joseph Watson, Esquire. Assistant Solicitor James Farr of the Seventh Circuit Solicitor's Office prosecuted the case. On October 14, 2016, Petitioner appeared before the J. Derham Cole, circuit court judge, and pled guilty to the lesser included offenses of conspiracy to traffic cocaine, 28 to 100 grams, second offense (2016-GS-42-4459) and possession with intent to distribute cocaine, second offense (2016-GS-42-1687). Pursuant to a negotiated sentence, Judge Cole sentenced Petitioner to imprisonment for twelve years for conspiracy to traffic cocaine to be served concurrently with Federal supervised release Petitioner had violated which was approximately thirty-seven months. Also pursuant to a negotiated sentence, Judge Cole sentenced Petitioner to thirty years suspended to five years of probation for possession with intent to distribute cocaine, to be served consecutively to the twelve-year conspiracy sentence.

Petitioner filed a timely notice of appeal on October 26, 2016. The South Carolina Court of Appeals dismissed Petitioner's appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on February 17, 2017.

Petitioner filed his first PCR application on September 11, 2017, alleging:

1. "Counsel was ineffective during critical stages."
2. "Sentence violates Apprendi, Alleyne, Blakely, Cunningham."
3. "Indictment must be dismissed for Count 2."

Respondent filed its return on January 8, 2018, requesting an evidentiary hearing. An evidentiary hearing convened October 7, 2019, at the Spartanburg County Courthouse before the Honorable G. Thomas Cooper, circuit court judge. Petitioner was represented by William Yarborough, III, Esquire. Assistant Attorney General Jacob A. Isenberg of the South Carolina Attorney General's Office represented the State. By order filed January 6, 2020, Judge Cooper denied and dismissed the action with prejudice.

Counsel Yarborough filed a notice of appeal and motion to allow late filing on August 18, 2020. In this motion, Counsel Yarborough stated that Petitioner's family was communicating with him in Petitioner's stead. Counsel claimed that while communicating with him, Petitioner's family informed Counsel Yarborough that he did not want to file an appeal. After ten days had lapsed, Petitioner himself contacted Counsel stating his family misunderstood and he wanted to appeal after all. Counsel Yarborough therefore requested the Court accept the belated appeal. By written order, the court denied the motion and dismissed the notice of appeal for failure to timely serve the order under Rules 243(b) and 203(b), filed on October 21, 2020. The remittitur was issued on November 9, 2020.

Petitioner filed his second post-conviction relief application on September 13, 2021, requesting relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). An evidentiary hearing on this matter was conducted before the Honorable William A. McKinnon, circuit court judge. Petitioner was represented by Rodney Richey, Esquire, and Chelsey Marto, Esquire, represented Respondent. The order granting *Austin* relief was filed on September 17, 2021. This appeal follows.

STATEMENT OF FACTS

Between early January and January 20, 2016, an investigation occurred involving Petitioner and the Spartanburg County Sheriff's Office. (App. 9-10). Two controlled buys occurred with a co-defendant, Joshua McKinney, who gave statements implicating Petitioner. (App. 10). Specifically, McKinney stated he would call the defendant in this case to get at least half an ounce of cocaine and would go sell it. (App. 10). This happened on two different occasions. (App. 10). On one occasion he got half an ounce of cocaine and on the other he was referred to another co-defendant, Andrew Smith, who delivered the cocaine in that case. (App. 10).

On January 20, they got word they would clean out Public Storage Unit. (App. 10). While doing surveillance, the Uncle, Gary Lewis, drove up, opened the storage unit, and picked up a black bag containing 242 grams of cocaine. (App. 10). Lewis gave a statement stating Petitioner told him to go to the storage unit and get this bag, giving him the key and pass code. (App. 10). This was the conspiracy. (App. 10).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the PCR court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCF; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts he was denied the opportunity to appeal the denial of his first PCR application through no fault of his own. (Pet. 5). Specifically, he contends PCR counsel failed to appeal within the statutory time to do so. (Pet. 5). Petitioner produced texts between his fiancée and his first PCR Counsel where his fiancée informed Counsel he wanted to appeal and Counsel informed Petitioner's fiancée that he filed the notice of appeal. (App. 283).

Respondent concedes that Petitioner is entitled to relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Should this Court find that evidence shows Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application, Respondent respectfully requests this Court consider the question presented in the *Johnson* Petition for Writ of Certiorari in conjunction with the issue raised herein. *See Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (finding “allegation that counsel failed to seek review [of denial of PCR] sufficiently states a claim of ineffective assistance” and “remand[ing] for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review”).

CONCLUSION

Based on the foregoing, this Court should consider the question presented in the *Johnson* Petition for Writ of Certiorari pursuant to *Austin v. State* in conjunction with the issue raised herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
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ATTORNEYS FOR RESPONDENT

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Jerry Simpson,

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State of South Carolina,

Respondent.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Taylor D. Gilliam, Esquire
tgilliam@sccid.sc.gov

This 14th day of November 2022.

/s Chelsey F. Marto
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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

November 14, 2022

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(via ctappfilings@sccourts.org)

RE: Jerry Simpson v. State of South Carolina
Appellate Case No.: 2021-001378

Dear Ms. Kitchings:

Enclosed please find the original Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
S.C. Bar #104191

CFM/jbh
Enclosures

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division