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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Calhoun County
Court of Common Pleas
Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2021-001415

HERMAN LEE HUGHES,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief (PCR) court properly grant Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), where the undisputed evidence showed Petitioner did not knowingly and intelligently waive the right to appellate review of his original PCR application?

STATEMENT OF THE CASE

On March 18, 1994, Herman Lee Hughes and a cohort, Kelsey Pearce, robbed the Blue Diamond Casino, a video poker parlor in Orangeburg. *State v. Hughes*, 328 S.C. 146, 148, 493 S.E.2d 821, 822 (1997). Pearce remained outside while Hughes requested change from the employee of the casino, twenty-year-old, Kenneth Pressley. *Id.* When Pressley opened the cash drawer, Hughes pulled a gun and told Pressley to give him the money. *Id.* He simultaneously told Pressley's seventeen-year-old girlfriend, Kelly Hoffman, who was sitting behind the desk on the telephone, to get off the phone. *Id.* Hughes then asked Pressley for his car keys. *Id.* As Pressley handed over the keys, Hughes shot him in the head. *Id.* He then turned and shot Hoffman in the chest. *Id.* He shot Pressley in the head again, and then shot Hoffman in the face. *Id.* at 148–49, 493 S.E.2d at 822. Finally, he shot Pressley in the head a third time. *Id.* at 149, 493 S.E.2d at 822. Hughes took the money from the cash draw, then turned out the lights as he left the casino. *Id.* He and Pearce departed in Pressley's Mazda RX-7. *Id.* Hoffman survived the assault, Pressley died. *Id.* Hughes was sixteen years old when he committed these crimes.

A. Trial

On May 26, 1994, the Calhoun County Grand Jury indicted Hughes for murder, ABWIK, armed robbery, and grand larceny of a vehicle.¹ (1994-GS-09-0154, -0155, -0156) (1934–35, 1939–44). Subsequently, on October 31, 1994, the State served its notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment. (1945–50). Phillip F. Newsom represented Hughes on these charges and First Circuit Solicitor Walter M. Bailey, Jr., prosecuted the case. This Court assigned the case to the Honorable Edward B. Cottingham. Following a pre-trial motions hearing on August 22, 1995,

¹ Following a waiver hearing on April 8, 1994, the family court entered a written order transferring Hughes's case to the Court of General Sessions. (App'x 2029–32).

the case was called for trial on September 5, 1995. (App’x 1825–1928; 1–1325). At the conclusion of the guilt phase, the jury convicted Hughes as indicted. (App’x 1315–16).

After the requisite twenty-four-hour waiting period, the sentencing phase began on September 11, 1995. (App’x 1327–1756). Following deliberations, the jury found the existence of all three submitted statutory aggravating circumstances and recommended Hughes be sentenced to death. (App’x 1747–48; 1936–38; 1954–56). Judge Cottingham imposed the death sentence for murder. (App’x 1750–51). He additionally sentenced Hughes to consecutive terms of twenty-five years’ imprisonment for armed robbery and twenty-five years for ABWIK. (App’x 1751). Hughes received a five-year concurrent sentence for grand larceny. (App’x 1751).

B. Direct Appeal

Deputy Chief Appellate Defender Joseph L. Savitz represented Hughes on direct appeal to this Court, and briefed the following issue:

The judge erred by refusing to require co-defendant Kelsey Pearce, whose involvement in the crimes was the key defense issue at trial, to assert his privilege against self-incrimination before the jury, a procedure mandated by firmly established state law. In particular, this ruling denied appellant the opportunity to present relevant evidence in mitigation of punishment under the Eighth Amendment and S.C. Code § 16-3-20 and to rebut the state’s case under the due process clause of the Fourteenth Amendment.

On October 27, 1997, this Court issued a published opinion affirming Hughes’s convictions and death sentence. *State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821. This Court subsequently denied Hughes’s petition for rehearing by order dated November 20, 1998.

Hughes then filed a petition for a writ of certiorari in the United States Supreme Court, raising the following issue:

Does the harmless error standard South Carolina apply to the exclusion of mitigating and rebuttal evidence from capital

sentencing comport with Chapman v. California, 386 U.S. 18 (1967)?

The State filed its return on March 26, 1998. By opinion dated April 27, 1998, the Court denied Hughes's petition. *Hughes v. South Carolina*, 523 U.S. 1097 (1998).

C. Initial Post-Conviction Relief Action and Resentencing

Following an unsuccessful appeal, Hughes timely filed his first post-conviction relief application on June 19, 1998. (App'x 2187–93). This Court assigned the matter to the Honorable Paula H. Thomas. John H. Blume, Pamela A. Wilkins, and Sheri L. Johnson represented Hughes. Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Jeffrey A. Jacobs represented the State.

The State made its return and motion for a more definite statement on July 21, 1998. (App'x 2194–2222). Hughes subsequently filed three amended applications. (App'x 2223–32; 2233–46; 2363–82). On October 11–13, 1999, Judge Thomas convened an evidentiary hearing. (App'x 2383–3062). Both parties subsequently submitted post-hearing memoranda. (App'x 3063–3202; 3203–3374; 3375–80). By memoranda issued August 1, 2000, Judge Thomas made a preliminary ruling denying relief and instructed the State to prepare a proposed order in accordance with a thirteen-page outline of her findings. (App'x 3381–94). The State submitted a proposed order denying relief on September 7, 2000, to which Hughes filed objections on October 4, 2000. (App'x 3395–3498).

On November 17, 2000, Judge Thomas convened a hearing on the objections and other matters addressed in the post-hearing memoranda. (App'x 3499–3547). Judge Thomas subsequently issued an order denying the application on all grounds and dismissing the action with prejudice on December 8, 2000. (3550–3743). On December 27, 2000, Hughes filed a timely memorandum and motion to alter or amend pursuant to Rule 59(e), SCRPC. (3744–4540).

The State made its return in opposition to Hughes's 59(e) motion on January 30, 2001. (App'x 4541–48).²

Hughes subsequently filed a motion to stay the proceedings pending the outcome of *McCarver v. North Carolina*, 532 U.S. 941 (2001), a case before the United States Supreme Court concerning whether a person who commits murder while under the age of eighteen may be sentenced to death. (App'x 4558–61). On April 5, 2001, the State filed a memorandum in opposition to the motion to stay. (App'x 4562–65). Judge Thomas granted the stay by order issued May 4, 2001. (App'x 4583–85).

During the stay, the United States Supreme Court resolved the issue in *Roper v. Simmons*, 543 U.S. 551, 568 (2005), holding a person under the age of eighteen who is convicted of murder may not be sentenced to death. In light of *Roper*, Hughes filed a motion for partial summary judgment and to alter or amend the judgment on March 15, 2005. (App'x 4587–92). The State filed a response on April 7, 2005, agreeing that an order altering judgment was appropriate and that Hughes was entitled to resentencing in accordance with *Roper*. (App'x 4593–4605). On May 9, 2005, Judge Thomas issued an order vacating Hughes's death sentence by consent of both parties and granting him a new sentencing proceeding. (App'x 4606–07). Neither party appealed.

On October 10, 2006, Hughes appeared before the Honorable Howard P. King and was resentenced to life without parole for murder. (App'x 2034).

² On March 20, 2001, the State submitted a proposed order denying Hughes's motion per Judge Thomas' instructions. (App'x 4549–57). Hughes filed objections to the proposed order submitted by the State denying Hughes's Rule 59(e) motion. (App'x 4566–79). The State filed a response to Hughes's objections on April 12, 2001. (App'x 4580–82).

D. Second Post-Conviction Relief Action

Hughes filed a second post-conviction relief application on June 26, 2007, challenging his 1995 convictions based on multiple allegations of ineffective assistance of trial counsel. (App'x 2056–82). On August 27, 2007, the State made its return and motion to summarily dismiss the application as successive to his 1998 post-conviction relief action. (App'x 2063–2153). Pursuant to this request, the Honorable Diane S. Goodstein, acting in her capacity as Chief Administrative Judge, issued a conditional order of dismissal on September 27, 2007, provisionally denying and dismissing the application as successive while giving Hughes twenty days to show why the dismissal should not become final. (App'x 2154–70).

Hughes filed a response, alleging for the first time that he was entitled to belated appellate review of his 1998 post-conviction relief action pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). (App'x 2172–73). Judge Goodstein subsequently issued a final order on January 2, 2008, denying and dismissing the application with prejudice. (App'x 2174–75).

E. Appeal of Second Post-Conviction Relief Action

On July 16, 2010,³ Hughes filed a notice of appeal and explanation as to why the lower court improperly determined his second post-conviction relief application was barred as successive pursuant to Rule 243(c), SCACR. (App'x 2035–42). Appellate Defender Robert M. Pachak perfected Applicant's appeal by filing a *Johnson*⁴ petition for writ of certiorari with the Supreme Court, raising the following issue:

³³ Although Judge Goodstein issued the final order of dismissal in December 2008, Hughes stated in his notice of appeal that he did not receive written notice of the order until July 9, 2010. (App'x 2035).

⁴ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988) (approving of the withdrawal of counsel in meritless post-conviction appeals in accordance with the procedures outlined in *Anders v.*

Whether petitioner’s case should be remanded to determine if he knowingly and intelligently waived his right to appeal the denial of his first post-conviction relief application?

(App’x 2043–51). This Court subsequently transferred the case to the Court of Appeals pursuant to Rule 243(l), SCACR. On February 11, 2014, the Court issued an order denying appellate counsel’s motion to be relieved and directed the parties to address the issue raised in the *Johnson* petition and any other questions of arguable merit. (App’x 4609).

Appellate counsel subsequently filed a merits petition for a writ of certiorari on February 14, 2014. (App’x 4610–18). The State filed its return on May 28, 2014, asserting Hughes was not entitled to *Austin* review of his initial post-conviction relief action. (App’x 4619–44). By order dated December 12, 2014, the Court granted Hughes’s petition for a writ of certiorari to review the second post-conviction relief court’s decision. (App’x 4645). Following briefing and oral argument, the Court reversed and remanded for a hearing to determine whether Hughes knowingly and voluntarily waived the right to appeal the denial of his 1998 post-conviction relief action. (App’x 4646–55; 4656–83; 4686–89).

F. Remand on *Austin* Issue

On May 20, 2021, a hearing convened before the Honorable Kristi F. Curtis on remand from the Court of Appeals to determine the sole issue of whether Hughes was entitled to seek *Austin* review of his initial post-conviction relief action. (App’x 4690–4727). Jonathan D. Waller represented Hughes and Senior Assistant Deputy Attorney General Megan H. Jameson

California, 386 U.S. 738 (1967)). *Anders* requires that counsel who seeks to withdraw after finding the “case to be wholly frivolous” following a “conscientious examination” must submit a brief referencing anything in the record that arguably could support an appeal, furnish a copy of that brief to the defendant, and after providing the defendant with an opportunity to respond, the reviewing court must conduct a full examination of the proceedings to determine if further review is merited. 386 U.S. at 744.

represented the State. Hughes testified at the hearing as did two of his initial post-conviction relief attorneys, John H. Blume and Sheri L. Johnson.

At the conclusion of the hearing, the State conceded that Hughes did not knowingly and voluntarily waive his right to appeal the denial of his initial post-conviction relief action. (App'x 4722). On November 4, 2021, Judge Curtis issued an order granting Hughes the right to seek *Austin* review. (App'x 4728–37).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180–81, 810 S.E.2d at 839–40. However, appellate courts give no deference to the post-conviction relief court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The post-conviction relief judge properly granted Hughes belated appellate review of his initial post-conviction relief action pursuant to *Austin v. State* because he did not knowingly and intelligently waive his right to appeal the denial of that action

This Court has held that every post-conviction relief applicant is entitled to a full and fair opportunity to present claims in one post-conviction relief application, or one “bite at the apple.” *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999); *see Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (highlighting 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)). This “bite” includes an applicant’s right to appeal the denial of a post-conviction relief application, and the right to assistance of counsel in that appeal. *Odom*, 337 S.C. at 261, 523 S.E.2d at 755. 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 v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) (“A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings.”).

However, this Court has allowed successive post-conviction relief 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; *cf.* S.C. Code Ann. § 17-27-100 (codifying the right to appeal final judgment by post-conviction relief court). *Austin* provides for belated appellate review of the denial of a prior post-conviction relief action after the statute of limitations has expired where post-conviction relief counsel’s failure to timely appeal prevented the applicant from seeking appellate review. 305 S.C. 453, 409 S.E. 2d 395; *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 post-conviction relief applicant is entitled to an *Austin* appeal if the post-conviction relief 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)).

Hughes contends the PCR court correctly concluded he did not knowingly and voluntarily waive his right to appeal the denial of his 1998 post-conviction relief action, and therefore he is entitled to belated appellate review pursuant to *Austin*. The State agrees. Based on the testimony presented at the evidentiary hearing, there is ample probative evidence in the record to support the PCR court's finding that Hughes did not knowingly and intelligently waive his right to appeal the denial of his initial post-conviction relief action.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court consider the question presented in the *Austin* Petition for Writ of Certiorari and Return to the *Austin* Petition for Writ of Certiorari in conjunction with the issue raised herein.

Respectfully submitted,

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