

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Oconee County

Honorable R. Lawton McIntosh, Circuit Court Judge
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MARCUS DANIEL ALLISON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001520
—————

PETITION FOR WRIT OF CERTIORARI
—————

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ISSUE PRESENTED

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

An Oconee County grand jury indicted Petitioner on August 2, 2010 for first degree burglary and grand larceny. App. 638-641. His case was called to trial on April 23, 2012 before the Honorable Benjamin H. Culbertson, and a jury. App. 1. Solicitor David Wagner represented the state. App. 1. W. Wilson Burr and Keith Denny represented Petitioner. App. 1. On April 25, 2012, the jury found Petitioner guilty as indicted. App. 262, ll. 14-21. He was sentenced to twenty-five years for first degree burglary and five years concurrent for grand larceny. App. 270, l. 18 – 271, l. 3.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Allison, 2014-UP-473 (S.C. Ct. App. filed December 17, 2014). On April 13, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 324-330. The state filed a return to this application on February 18, 2016. App. 331-335. With the assistance of counsel, Petitioner filed an amended application on July 25, 2016. App. 336-342. An evidentiary hearing was convened on February 23, 2018 before the Honorable J. Cordell Maddox, Jr. App. 343. Assistant Attorney General Lindsey McAllister represented the state. App. 343. William Yarborough represented Petitioner. App. 343. By order filed April 19, 2018, the PCR judge denied Petitioner relief. App. 433-451.

On May 4, 2018, Petitioner filed a motion to alter or amend the judgment pursuant to Rules 52(b) and 59(e), SCRCP. App. 452-457. Attached to this motion was an affidavit of Paul Silvaggio. App. 458-459. The state filed a return to the motion to alter or amend and a motion to strike on May 31, 2018. App. 460-466. By order filed October 9, 2019, the PCR judge denied the motion to alter or amend the judgment. App. 467. Petitioner did not appeal from the order of dismissal or the order denying his motion to alter or amend the judgment.

On May 20, 2020, Petitioner filed a second application for post-conviction relief. App. 469-481. The state filed a return and motion to dismiss dated August 12, 2021. App. 619-633. The Honorable R. Lawton McIntosh issued a conditional order of dismissal on October 12, 2021 provisionally denying and dismissing Petitioner's second PCR application. App. 634-648. After the conditional order of dismissal was served on Petitioner's then counsel, Charles Grose, the state agreed Petitioner was entitled to a belated appeal from the order denying his first application for post-conviction relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 649. Accordingly, by consent order filed October 3, 2022, Judge McIntosh vacated the conditional order of dismissal and granted Petitioner a belated appeal. App. 649-651.

This petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief (PCR) court properly granted 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) since the undisputed evidence showed Petitioner did not knowingly and intelligently waive the right to appellate review of his original PCR application.

The PCR court correctly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief. See *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. *Id.* This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. *Id.* at 261, 523 S.E.2d at 755-756. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. *Austin*, 305 S.C. at 455, 409 S.E.2d at 396.

The undisputed evidence showed Petitioner wished to appeal the PCR court’s denial of his first PCR application. For whatever reason, Petitioner’s PCR counsel failed to timely file a notice of appeal. The state consented to the circuit court granting Petitioner a belated appeal pursuant to *Austin*. The state agreed there is no evidence in the record that Petitioner voluntarily waived his right to seek an appeal of the PCR court’s denial of his first application.

Under these circumstances, the PCR court’s decision granting Petitioner belated appellate review of his first PCR application should be upheld. See *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (“The appropriate scope of review of this Court is that ‘any

evidence' of probative value is sufficient to uphold the PCR judge's findings.'). Simply stated, Petitioner is entitled to his one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's conclusion that Petitioner is entitled to a belated appeal of 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), and consider his belated appeal.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2023.