

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Bamberg County
Edgar W. Dickson, Circuit Court Judge

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JUL 11 2013

S.C. Supreme Court

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212581

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court properly grant Petitioner a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal?

STATEMENT

During its February 2000 term, the Bamberg County Grand Jury indicted Petitioner for possession with intent to distribute cocaine within proximity of a park (2000-GS-05-054) and trafficking in cocaine (2000-GS-05-055). App. 362-363; App. 365-366. Petitioner, who was represented by J. Christopher Wilson, was tried on January 14, 2004. Grant Gibbons represented the state. App. 1. After the jury found Petitioner guilty, the Honorable Reginald Lloyd sentenced Petitioner to twenty-five years on the trafficking in cocaine conviction and fifteen years on the possession with intent to distribute conviction. App. 148, line 24 – App. 149, line 11; App. 152, lines 21-25.

Petitioner filed a direct appeal thereafter. Robert Pachak filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) on Petitioner's behalf. App. 155-165. The Court of Appeals affirmed his convictions and sentences in an unpublished opinion. *State v. Miller*, 2005-UP-272 (Ct. App. filed April 8, 2005); App. 166-167. The Court issued remittitur on May 11, 2005. App. 168.

Petitioner filed an application for post-conviction relief on February 7, 2006. App. 169-181. An evidentiary hearing convened before the Honorable Doyet A. Early on August 10, 2006. W.D. Rhoad, IV represented Petitioner, and Colleen E. Dixon represented the state. Judge Early denied Petitioner relief by ordered filed on October 2, 2006. App. 187-195. No appeal was taken.

Petitioner filed another application for post-conviction relief on January 26, 2011. App. 196-210. The matter proceeded to a hearing before the Honorable Edgar W. Dickson on January 25, 2012. Nicole Singletary represented Petitioner, and Mary Williams represented the state. App. 217. By order dated March 21, 2012, Judge Dickson granted Petitioner a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 229-231.

In preparing Petitioner's belated appeal, Petitioner learned that the transcript from his August 10, 2006 evidentiary hearing was no longer available. As a result, Petitioner filed a petition for order to reconstruct the record of Petitioner's PCR hearing. App. 232-236. By order dated December 20, 2012, this Court granted the petition and ordered the parties to reconstruct the hearing. The order provided for Judge Early to determine whether the hearing could be reconstruction. If he determined reconstruction were not possible, then he was directed to notify this Court of such within fifteen days. On the other hand, if he determined reconstruction were possible, then the matter would proceed upon Petitioner's receipt of the transcript. App. 315-316.

On January 22, 2013, Petitioner appeared before Judge Early to reconstruct the record of his August 10, 2006 hearing. Undersigned counsel represented Petitioner, and Megan Harrigan appeared on behalf of the state. App. 317. At the conclusion of the hearing, Judge Early ruled orally that the matter had been reconstructed. App. 356, lines 15-16.

Petitioner now files this timely petition for writ of certiorari concerning the PCR judge's finding that Petitioner is entitled to a belated appeal of the denial of post-conviction relief.¹

¹ Pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), Petitioner files this petition for writ of certiorari raising the issue of whether the PCR judge correctly held that Petitioner had not knowingly and intelligently waived his right to appellate review of the previous PCR order. As required, Petitioner is filing a separate petition addressing the questions from the previous post-conviction relief order that Petitioner seeks to have reviewed.

ARGUMENT

The PCR court properly granted Petitioner a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal.

The PCR court properly granted Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application. App. 700, ll. 9-19; App. 701, ll. 3-4; App. 702-708; See *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). In South Carolina, “[a]ll 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 755-56. 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 South Carolina Supreme Court held that the procedures prescribed by *Anders v. California*, 386 U.S. 738 (1967) applied in PCR matters. *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1998). Thus, appellate counsel is required to engage in a conscientious investigation of the possible grounds of appeal and brief arguable issues before appellate counsel may ask to withdraw. *Anders*, 386 U.S. at 744. The United States Supreme Court held: “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.” Id.

At the January 25, 2012 hearing concerning Petitioner's request for a belated appeal of his PCR application and order, the state did not oppose the granting of the belated review. The state informed the Court that prior PCR counsel informed her that the failure to file a notice of appeal was "an oversight on the part of his office." Prior PCR counsel informed the state that his office did not send the order to Petitioner within thirty days. App. 220, lines 10-13; App. 220, lines 19-21 ("He just tells me it was an oversight that he did not send [Petitioner] his order in time to determine whether he would like to appeal."). During the hearing the PCR judge asked Respondent: "You believe filing a belated appeal would be in order?" App. 220, lines 22-23. Respondent responded affirmatively. App. 220, line 24.

Petitioner testified that he did not recall the exact day that he received the order of dismissal but he believed it was several months after the date on the order. App. 222, lines 15-20. Petitioner, however, asked his prior PCR counsel, to file an appeal on the date of the hearing. App. 222, lines 21-25; App. 225, lines 9-16. Additionally, Petitioner wrote to prior PCR counsel twice asking for an appeal to be filed. App. 223, lines 9-14; App. 226, lines 7-19 (Petitioner testified that he wrote to prior PCR counsel within two weeks of receiving the order requesting an appeal). Petitioner received no response to his inquiries. App. 223, lines 15-17.

Under these circumstances, the second 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 uphold the lower court's ruling that he is entitled to a belated appeal of his PCR application. Thus, Petitioner asks this Court to grant the writ and review the companion petition in which he raises the pertinent issue for review.

Respectfully submitted,

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Bamberg County
Edgar W. Dickson, Circuit Court Judge

MICHAEL MILLER,

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V.

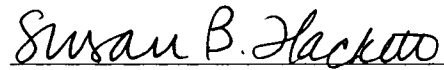
STATE OF SOUTH CAROLINA,

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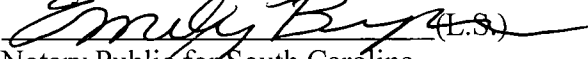
APPELLATE CASE NO. 2012-212581

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Michael Miller, #259269, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 11th day of July, 2013.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of July, 2013.


Notary Public for South Carolina
My Commission Expires: November 16, 2022.