

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Nov 13 2023
S.C. SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

HENRY DUKES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000522

PETITION FOR WRIT OF CERTIORARI

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The PCR court properly granted Petitioner a belated appeal from the denial of his application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner wanted to appeal but PCR counsel did not serve notice of intent to appeal, and where the State agreed Petitioner was entitled to belated review6

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ISSUE PRESENTED

Whether the PCR court properly granted Petitioner a belated appeal from the denial of his application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner wanted to appeal but PCR counsel did not serve notice of intent to appeal, and where the State agreed Petitioner was entitled to belated review?

STATEMENT

On August 21, 2008, an Horry County Grand Jury indicted Henry Dukes (Petitioner), for murder. Petitioner was tried before the Honorable Steven H. John and a jury, on July 20, 2011 and August 1 – 2, 2011. J. Eric Fox represented Petitioner. Jimmy A. Richardson, II, and Robert Paul Taylor prosecuted the case. Petitioner was convicted as indicted, and he was sentenced to serve forty-seven years' imprisonment.¹

Petitioner directly appealed his conviction. *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013) (*cert. denied*, July 25, 2014). From there, this case has a complex procedural history. Petitioner filed his first post-conviction relief (PCR) application on September 23, 2011, while his direct appeal was pending. The State made a return and motion to dismiss without prejudice on November 18, 2011. The Honorable Larry B. Hyman, Jr., granted the motion and dismissed the matter in an order filed November 30, 2011.²

Petitioner filed his second PCR application on July 9, 2013. The State made its return on June 2, 2014. On February 11, 2016, a hearing was held on the matter before the Honorable D. Craig Brown. Tristan Shaffer represented Petitioner and Jessica Kinard represented the State. By order filed on March 10, 2016, Judge Brown denied relief and dismissed the application. Notice of appeal was not filed from this order. PCR counsel did not serve notice of intent to appeal from the order, and it was undisputed Petitioner did not timely receive notice of the order of dismissal,

¹ App. 773 – 774; App. 1; App. 394, ll. 16 – 21; App. 400, ll. 7-14; App. 775.

² App. 516 – 523; App. 524 – 525; App. 526 – 527.

and thus did not have the opportunity to request an appeal or to knowingly, intelligently and voluntarily waive the right to appeal. (It is this PCR that is the subject of belated *Austin* review.)³

While the second PCR application was pending, Petitioner filed a third application for PCR on August 8, 2014. The State made a return and motion to summarily dismiss on August 14, 2014. By order filed September 3, 2014, the Honorable Larry B. Hyman, Jr., granted the motion and dismissed the matter.⁴

Petitioner filed a fourth application for PCR on February 24, 2017. Respondent made a return and partial motion to dismiss on June 29, 2017. Steven Fowler represented Petitioner; Johnny James represented the State. A hearing was scheduled but no testimony was taken. Instead, the State conceded Petitioner was entitled to relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). The State confirmed with Petitioner's 2016 PCR counsel, Mr. Shaffer, that Petitioner was not timely notified of the order of dismissal and thus did not have an opportunity to timely appeal or to knowingly, intelligently, and voluntarily waive his right to appeal. By order filed June 18, 2018, the Honorable Larry B. Hyman, Jr., granted Petitioner's request for *Austin* relief, found the remaining allegations were untimely and successive, and denied and dismissed those claims without prejudice. Unfortunately, once again no notice of appeal was filed.⁵

Petitioner filed a pro se habeas corpus application in federal court on April 26, 2019. (A detailed procedural history of the federal action is available at pp. 761 – 762 of the Appendix.)

³ App. 528 – 534; App. 535 – 538; App. 539; App. 574 – 580.

⁴ App. 581 – 590; App. 591 – 594; App. 595 – 596.

⁵ App. 597 – 604; App. 605 – 612; App. 613 – 620; App. 616.

The federal district court held the matter in abeyance for Petitioner to exhaust his state remedies available under *Austin*. The current PCR application followed.⁶

On October 21, 2019, Petitioner again filed an application for post-conviction relief and requested belated appellate review of his PCR hearing. On October 13, 2020, the State filed its return, partial motion to dismiss, and concession to *Austin* relief. On December 10, 2020, Petitioner filed a response. On April 19, 2021, the PCR court, Honorable Benjamin Culbertson, issued a conditional order granting *Austin* relief and dismissing the remaining allegations. This order was served on Petitioner May 4, 2021. Petitioner filed a response to the conditional order of dismissal dated May 7, 2021. On June 10, 2021, Judge Culbertson sent a letter asking the State to schedule a hearing.⁷

On June 2, 2022, a hearing was held before the Honorable H. Steven DeBerry, IV. James Falk represented Petitioner and Chelsea Marto represented the State. The State again conceded Petitioner was entitled to *Austin* review. On February 22, 2023, the court issued an order granting relief pursuant to *Austin* and dismissing the PCR application. The court noted the State's 2017 concession that Petitioner was entitled to belated appellate review based on its communications with Petitioner's prior PCR counsel that Petitioner was not timely notified of the order of dismissal. The order concluded that, "This Court finds Applicant wanted an appeal from his prior PCR action and did not waive this right. The State consented to his request. Accordingly, Applicant is entitled to a belated appeal of his prior PCR matter."⁸

⁶ App. 621; App. 621 – 669; App. 668 – 669.

⁷ App. 670 – 676; App. 677 – 686; App. 687 – 688; App. 689 – 698; App. 699 – 713; App. 714.

⁸ App. 715; App. 720, ll. 2-8; App. 758 – 772; App. 761; App. 766.

This petition for writ of certiorari follows. *See King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992) (delineating procedure where review of denial of PCR sought based on defendant's failure to waive right of appellate review of prior denial).

ARGUMENT

The PCR court properly granted Petitioner a belated appeal from the denial of his application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner wanted to appeal and PCR counsel did not serve notice of intent to appeal, and where the State agreed Petitioner was entitled to belated review.

The PCR court properly granted Petitioner a belated appeal from the denial of his application for post-conviction relief pursuant to *Austin v. State*. In *Austin*, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. The proper scope of review of the PCR court’s ruling is whether there is any evidence of probative value to uphold the PCR court’s findings. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984); *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

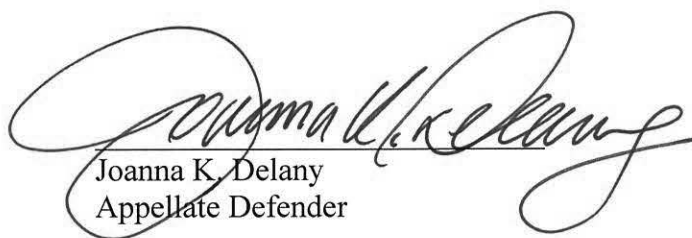
As seen, the State conceded that Petitioner was entitled to *Austin* review of his PCR hearing. Petitioner’s former PCR counsel confirmed that Petitioner was not timely notified of the 2016 order of dismissal and thus did not have an opportunity to timely appeal or to knowingly, intelligently, and voluntarily waive his right to appeal. App. 616; App. 720, ll. 2-8. Once Petitioner became aware of the order of dismissal, he repeatedly attempted to attain belated appellate review of that decision. App. 597 – 604; App. 623 – 625; App. 670 – 676. There is ample evidence to support the PCR court’s finding that Petitioner wanted to appeal from his prior PCR action and did not waive this right.

In *Austin*, this Court recognized that the right to seek appellate review of the denial of PCR is expressly authorized by S.C. Code Ann. § 17-27-100. *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. Under *Austin*, the PCR court correctly ruled that Petitioner wanted to appeal and did not

knowingly, intelligently, and voluntarily waive this right. Under the “any evidence” standard of review of *Webb*, this Court should hold that the PCR court’s ruling was correct, grant certiorari, and grant Petitioner a belated appeal from the denial of his original application for post-conviction relief.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for a writ of certiorari and affirm the lower court's determination that Petitioner is entitled to belated appellate review, and review the petition for writ of certiorari pursuant to *Austin* that was filed simultaneously with this petition.



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This 13th day of November, 2023.