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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

ANTONIO O. SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001091

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX.....i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR judge correctly found that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).....4

CONCLUSION.....5

ISSUE PRESENTED

Did the PCR judge correctly find that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT

In December of 2014, the Charleston County Grand Jury indicted Petitioner, Antonio Orlando Simmons, for five counts of armed robbery, indictments #2014-GS-10-0711, 07123, 07142, 07145, 07147. (App. pp. 42-51). On March 20, 2018, Petitioner appeared before the Honorable R. Markley Dennis and pled guilty pursuant to a negotiated sentencing range between seventeen (17) and twenty-eight (28) years. Michael Apicella represented Petitioner. David Osborne prosecuted the case. On the lead indictment, #2014-GS-10-0711, Judge Dennis sentenced Petitioner to thirty (30) years, provided upon the service of eighteen (18) years the balance was suspended. (App. p. 52). Judge Dennis sentenced Petitioner to eighteen (18) years concurrent on the remaining indictments. (App. pp. 53-56). Petitioner did not file a notice of intent to appeal.

On September 18, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 57- 63). The State filed a return and motion for more definite statement on January 10, 2019. (App. pp.64-70). On July 23, 2019, an evidentiary hearing was held before the Honorable Michael G. Nettles. Christopher L. Murphy represented Petitioner. Jacob A. Isenberg represented the State. In a written order filed October 1, 2019, Judge Nettles granted relief in part and dismissed in part. (App. pp. 129 – 141). Judge Nettles found that the suspended sentence for the lead indictment was illegal and remanded for re-sentencing. PCR counsel did not file a notice of intent to appeal.

On December 10, 2019, Petitioner filed a second PCR application requesting an “Austin hearing.” (App. pp. 168-175). On January 10, 2020, prior to the State filing the return to the second PCR application, Petitioner appeared before Judge Dennis for re-sentencing pursuant to Judge Nettles’ order. (App. pp. 142-165). Christopher R. Geel represented Petitioner. David L.

Osborne represented the State. Instead of re-sentencing only on the lead indictment where the sentence was found to be illegal, Judge Dennis re-sentenced Petitioner to twenty-eight years concurrent for all five indictments. (App. p. 166). A timely notice of intent to appeal was filed. On October 22, 2021, however, Petitioner signed an affidavit asking to drop the direct appeal. On February 9, 2022, the South Carolina Court of Appeals dismissed the appeal.

On February 22, 2021, over a year after Petitioner filed the second PCR application, the State filed a return and motion to dismiss. (App. pp. 176-182). On November 3, 2022, an evidentiary hearing was held before the Honorable Diane S. Goodstein. James K. Falk represented Petitioner. Samantha J. Weidauer represented the State. This second PCR hearing was limited to the belated appeal and did not address re-sentencing¹. In a written order signed April 10, 2023, Judge Goodstein granted a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. pp. 230-233). A timely notice of intent to appeal was served on July 10, 2023. This petition for writ of certiorari and a separately filed petition for writ of certiorari pursuant to Austin follow.

¹ As will be discussed in the Austin petition, this Court should vacate the re-sentencing order on all five counts because the guilty plea was rendered involuntary by plea counsel's failure to object and move to withdraw the plea when the judge refused to sentence in accordance with the negotiation entered with the State and instead sentenced Petitioner to an increased but suspended sentence.


ARGUMENT

The PCR judge correctly found that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Plea counsel admitted that he did not discuss with Petitioner the right to appeal Judge Nettles' PCR order. (App. p. 225, lines 7-20). During the PCR hearing PCR counsel argued that relief should not be limited to re-sentencing. (App. p. 80, line 16 – p. 81, lines 1-8; p. 116, lines 9-20). The PCR judge disagreed and remanded for re-sentencing rather than a new trial. PCR counsel advised the PCR judge that he would file an appeal but did not. (App. p. 126, line 25 – p. 127, lines 1-2). Petitioner did not knowingly and voluntarily waive his right to appeal Judge Nettles' order granting relief in part and dismissing in part to include the decision to remand for re-sentencing rather than a new trial. Petitioner is entitled to a belated appeal pursuant to Austin.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari and allow the belated appeal.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of March, 2024.