

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

2010-CP-10-8516

Ernest Battle, #165247,)
)
Applicant,)

vs.)

State of South Carolina,)
)
Respondent.)

**CONSENT ORDER GRANTING AN
APPEAL PURSUANT TO AUSTIN V. STATE**

FILED
2013 JUL 23 AM 10:31
JULIE ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 12, 2010.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment by the Charleston County Clerk of Court. The Applicant was indicted during the November 1999 term of the Charleston County Grand Jury for trafficking cocaine 28-100 grams, third offense (1999-GS-10-7109), possession with intent to distribute cocaine within the proximity of a school (1999-GS-10-7110), and conspiracy to violate South Carolina drug laws (1999-GS-10-7111).

The Applicant proceeded to trial and was convicted of trafficking cocaine and possession with intent to distribute cocaine within the proximity of a school. The conspiracy charged was *nolle prossed* pursuant to the Applicant's directed verdict motion at trial. The Honorable T. L. Hughston sentenced the Applicant to confinement for twenty-five (25) years with a \$50,000 fine for trafficking cocaine and for ten (10) years with a \$10,000 fine for possession with intent to distribute within the proximity of the school.

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The Applicant filed a timely Notice of Appeal. The Applicant's appeal was dismissed by the South Carolina Court of Appeals on May 20, 2003. The Applicant petitioned for rehearing which was denied by the Court of Appeals on June 26, 2003. The Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court which was denied on February 5, 2004. The Remittitur was issued on February 9, 2004.

The Applicant filed his first application for post-conviction relief on September 10, 2004 (2004-CP-10-3794). The Applicant was represented by Rad Deaton, Esquire. By Order dated July 5, 2006, the Honorable William P. Keesley granted the Applicant's application for post-conviction relief on the ground that counsel was ineffective for failing to object to the judge's charge on reasonable doubt and circumstantial evidence. The Court denied and dismissed the remaining allegations in the Applicant's application.

The State of South Carolina filed a timely Notice of Appeal. After full briefing by both sides, the post-conviction relief court's granting of the Applicant's post-conviction relief application was reversed and the Applicant's convictions and sentences were affirmed.

The Applicant filed a second application for post-conviction relief on October 12, 2010 (2010-CP-10-8516). The Applicant alleged his post-conviction relief counsel failed to timely cross-appeal on the allegations that were denied and dismissed by the post-conviction relief court. The State filed a Return and Motion to Dismiss the application as successive and untimely. The application was summarily dismissed by the Honorable Kristi L. Harrington by Order dated April 4, 2012.

The Applicant filed a timely Notice of Appeal. The South Carolina Supreme Court granted the Applicant's Petition for Writ of Certiorari, dispensed with further briefing and

remanded the matter to the lower court for an evidentiary hearing to determine whether the Applicant is entitled to an Austin review of the prior PCR order.

The Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to cross-appeal the denial of allegations in the Applicant's post-conviction relief application, the parties below have consented to the granting of an appeal pursuant to Austin v. State of the Applicant's first post-conviction relief application (2004-CP-10-3794). While the Applicant's application for post-conviction relief was originally granted on a limited issue, the parties agree that the Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of the Applicant's remaining issues. PCR counsel for the Applicant has indicated the Applicant expressed a desire to cross-appeal his first application for post-conviction relief and that he failed to file a timely Notice of Appeal of the application.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first PCR (2004-CP-10-3794) pursuant to Austin v. State is warranted. It is appearing the below listed individuals all consent to the granting of a PCR appeal in this matter.

IT IS THEREFORE ORDERED:

1. That the Applicant remain in the custody of the South Carolina Department of Corrections and/or the South Carolina Parole and Community Corrections Department if under the supervision of either agency; and
2. That the Applicant be granted an appeal of case #2004-CP-10-3794 pursuant to Austin v. State.

AND IT IS SO ORDERED this 22nd day of July, 2013.

DL Jefferson
The Honorable Deadra L. Jefferson
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.

I CONSENT:

Christopher L. Murphy
Christopher L. Murphy, Esquire
Attorney for Applicant

Ernest Battle
Ernest Battle, Applicant

Ashleigh Wilson
Ashleigh Wilson, Esquire
Assistant Attorney General
Attorney for Respondent

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Aug 4
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