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SC Court of Appeals

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
)
 John Alexander Darrieux, #366929,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No.: 2021-CP-08-01370

ORDER GRANTING LATE APPEAL

2025 JAN 14 AH 10:39
 LEAH GUERRY DUPREE
 CLERK OF COURT
 BERKELEY COUNTY, SC

FILED

This matter is before the Court by way of an application for Post-Conviction Relief (PCR) filed by John A. Darrieux (Applicant) on July 6, 2021. Respondent made its return requesting an evidentiary hearing. On June 29, 2023, an evidentiary hearing convened before the Honorable Kristi F. Curtis. Applicant was present and was represented by Denise Grainger Swope, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. At the hearing, the Court was informed that the Applicant was proceeding only on the late appeal issue pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The Applicant waives all other claims in his application. The Court heard testimony from prior PCR counsel, Christopher L Murphy, Esquire. Following a thorough review of the records before this Court and the testimony presented at the hearing, this Court finds that Applicant is entitled to a belated discretionary review of the dismissal of his application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its June 2015 term, the Berkeley County Grand Jury indicted Applicant for first-degree burglary (2015-GS-08-1026), third-degree burglary (2015-GS-08-1024), three counts of armed robbery (2015-GS-08-01027; 2015-GS-08-01028; 2015-GS-08-01029), three counts of kidnapping (2015-GS-08-01030; 2015-GS-08-01031; 2015-GS-08-01032) and possession of a weapon during the

commission of a violent crime (2015-GS-08-01034). Rodney Davis, Esquire represented Applicant. Assistant Solicitor's E. Mason West and Daniel Poulos of the Ninth Circuit Solicitor's Office prosecuted the case. On January 26, 2016, Applicant appeared in the Berkeley County Court of General Sessions in front of the Honorable Benjamin H. Culbertson, circuit court judge and proceeded to trial. Applicant was found guilty for all three counts of kidnapping, all three counts of armed robbery, possession of a weapon during the commission of a violent crime, and first degree burglary. Applicant was acquitted on the charge of third-degree burglary. Judge Culbertson sentenced Applicant to imprisonment for terms of thirty years for each charge of kidnaping, armed robbery and first-degree burglary, and five years for possession of a weapon during the commission of a violent crime, to be served concurrently.

Applicant filed a timely notice of appeal and was represented by Lanelle Cantey Durant, Esquire of the South Carolina Office of Indigent Defense-Office of Appellate Defense. Applicant raised the following issues on appeal:

1. Did the trial court err in denying Applicant Darrieux's motion for a new trial based on after-discovered evidence that the CD with the jail call Applicant made to his girlfriend that was presented at trial was not the original when the original was available which was a violation of Rule 1002, SCRE and Rule 1004, SCRE and which was prejudicial to Applicant because the state argued to the jury that this jail call was "critical evidence"?
2. Did the trial court err in admitting the jail call that Applicant Darrieux made to his girlfriend when the state did not authenticate that it was Darrieux because no witness was called to identify the voice as Darrieux or that the witness talked to

him, and the records custodian admitted that another inmate could use the account and name of Darrieux if Darrieux agreed and provided his name?

The South Carolina Court of Appeals affirmed Applicant's conviction on May 9, 2018. State v. Darrieux Op. No. 2018-UP-197 (S.C. Ct. App. filed May 9, 2018). The remittitur was returned to the circuit court on May 25, 2018.

APPLICANT'S 1ST APPLICATION FOR POST CONVICTION RELIEF (2018-CP-08-01068)

Applicant commenced his first Post-Conviction Relief action in this matter on June 14, 2018. Applicant made the following allegations: for the following reasons:

1. "Ineffective Assistance of Counsel," in that:
 - a. "Counsel failed to properly and fully investigate the case"
 - b. "Counsel failed to investigate the investigator's informant "Tristen Brower" to make sure he was registered with SLED for a violent crime investigation for kidnapping, armed robbery, possession of a firearm during the commission of a violent crime, burglary first degree, burglary second degree. The informant was not registered with SLED, pursuant to policy 13.30, use of informants for investigations and furthermore this investigation was unlawful and illegal"
 - c. "Counsel failed to investigate the informant's video recorded statement of the investigator's and to make sure there was an application processed, for the interception of wire, electric or oral communications, pursuant to S.C. Code 17-30-70, for a violent crime investigation. Furthermore, the investigators violated 17-30-70, by using a video recorded statement, by the co-defendant Tristen Brower, during the trial and failing to process an application that must be initiated by the chief of SLED. After reviewing the application, the attorney general may authorize the submission of the application to a judge of competent jurisdiction, and the judge may grant in conformity with this chapter."
 - d. "Counsel failed to investigate and make sure an application for an order authorizing or approving the interception of wire, electric, or oral communications must be made in writing upon oath or affirmation to a judge of competent jurisdiction, pursuant to S.C. Code 17-30-80."
 - e. "Failure of counsel to request and require as part of discovery that copies of the application process of all intercepted communications be provided as they are gathered so that a proper defense for physical evidence can be built as is provided for by S.C. Code 17-30-105"
 - f. "Failure of counsel pursuant to S.C. Code 17-30-130 to ensure that no impropriety occurred in the reporting of the intercepted communications to the administrative office of the United States Court as outlined in 18 U.S.C. subsection 2519."
 - g. "Counsel failed to suppress the video recorded statement, pursuant to S.C. Code 17-30-110, as the investigators obtained the evidence in violation of the

interception of wire, electronic or oral communications act"

- h. "Failure of counsel to advise me and inform the court that none of these subsections in chapter 30, title 17 were adhered to and that these actions and/or lack thereof were illegal, pursuant to S.C. Code 17-30-20 (prohibited acts)."
- i. "Counsel failed to properly and fully prepare petitioner for testimony in the case"
- J. "Counsel failed to adequately investigate the alleged crime scene or the allegations so as to be prepared to present testimony through direct and cross-examination of relevant evidence related to the matter"
- k. "Counsel failed to request a preliminary hearing so petitioner could more adequately be informed about case"
- l. "Counsel failed to spend adequate time with petitioner reviewing discovery with him"
- m. "Counsel failed to challenge the testimony of the state's witnesses and failed to adequately object and preserve objections to portions of the witnesses testimony and failed to effectively cross-examine the witnesses on their testimony"
- n. "Counsel failed to challenge or move to quash the indictment, before the jury is sworn, that indictment is not sufficient"
- o. "Counsel failed to move for a pretrial motion for a directed verdict"
- p. "Counsel failed to move for a mistrial when the Solicitor violated a cardinal trial rule and expressed his own opinion of the Petitioner's guilt by making a comment about the petitioner. (Tr. p. 461 Line 10-12) "If the kids are inside I'm going to break their fingers" That's sadistic. That's terror. That's the way this defendant was thinking before he changed these people's lives forever. For this comment by the solicitor, tainted the jury about petitioner's guilt"
- q. "Counsel failed to provide a valid defense for trial"
- r. "Counsel failed to object about the state's circumstantial evidence being admitted at trial"

Respondent made its return on October 23, 2018. On March 20, 2019, Applicant amended his application to include the allegation that counsel was ineffective for failing to object to the trial court instructing the jury on the *Allen* charge on the grounds that the jury was not deadlocked and therefore the *Allen*¹ charge was inappropriate under the facts and circumstances during trial. An evidentiary hearing into the matter was convened in front of the Honorable Michael G. Nettles. Christopher L Murphy, Esquire represented Applicant. Assistant Attorney General Benjamin Limbaugh represented Respondent. At the hearing, Applicant proceeded only the issue of the *Allen* charge. Following the hearing, Judge Nettles issued a written order denying and dismissing the application with prejudice dated December 26, 2019.

CURRENT APPLICATION

In his second and current post-conviction relief application, Applicant alleges he is being held unlawfully due to:

1. Ineffective Assistance of Counsel
 - a. Petitioner presented sufficient facts at the PCR hearing to warrant a new trial.
2. Denial of Due Process/Erroneous Allen Charge
3. Ineffective Assistance PCR Counsel
 - a. PCR Counsel failed to file appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Berkeley County Clerk of Court records regarding the subject convictions, the trial transcript, and record of direct appeal, the record of Applicant's previous PCR action, and the PCR transcript, and the current application. This Court has further had the opportunity to observe the witnesses presented at the PCR hearing, closely pass upon their credibility, and weigh their testimony accordingly. Applicant alleged that he was denied the right to appeal the dismissal of his previous post-conviction relief application when his previous PCR counsel failed to timely file a notice of appeal of the denial of that action. 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 belated discretionary review of the dismissal of his or her application in some circumstances. A PCR applicant is entitled to an *Austin* appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Odom v. State*, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999). This Court affirmatively finds that the Applicant requested and was denied an opportunity to seek appellate review. *Odom*

v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999).

CONCLUSION

Based on the foregoing, this Court concludes that Applicant is entitled to petition the South Carolina Supreme Court for belated discretionary review of the dismissal of his PCR application.

IT IS THEREFORE ORDERED:

1. This application for PCR as to the right to petition the South Carolina Supreme Court for belated discretionary review of the dismissal of Applicant's previous application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 8th day of Jan., 2025

Kristi F. Curtis
KRISTI F. CURTIS
Presiding Judge
Ninth Judicial Circuit

Sumter, South Carolina