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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to Lancaster County
Honorable R. Knox McMahon, Trial Judge
Honorable Patrick C. Fant, III, Post-Conviction Relief Judge

Appellate Case No. 2024-000474

David D. Stalk, #358508,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

I. Did the circuit court err in finding Stalk voluntarily waived his right to appeal the denial of his first post-conviction relief order of dismissal?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

I. Whether the post-conviction relief court properly found Petitioner failed to establish he was entitled to belated appellate review of his initial post-conviction relief application where Petitioner was properly advised of the right to appellate review following the summary dismissal of his initial post-conviction relief action, and Petitioner failed to seek appellate review?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections (SCDC) pursuant to the Lancaster County Clerk of Court orders of commitment. In May 2013, the Lancaster County Grand Jury indicted Petitioner for Murder (2013–CP–29–758), Attempted Armed Robbery (2013–CP–29–759), and Possession of a Firearm During the Commission of a Violent Crime (2013–CP–29–760). Petitioner was represented by Assistant Public Defender Marion H. (Mark) Grier, Jr., Esquire.

After a withdrawn guilty plea, Petitioner proceeded to a jury trial on January 13–17, 2014, before the Honorable R. Knox McMahon. On January 17, 2014, the jury convicted Petitioner as indicted. Judge McMahon sentenced Petitioner to a total term of forty-five years imprisonment. Petitioner timely appealed his convictions and sentences.

Petitioner filed a timely notice of appeal. On June 29, 2016, after briefing, the Court of Appeals affirmed without oral argument pursuant to Rule 215, SCACR. State v. Stalk, Op. No. 2016-UP-341 (S.C. Ct. App. filed June 29, 2016). The Remittitur was returned to the circuit court on July 15, 2016.

FIRST PCR ACTION: 2018–CP–29–1006

More than two years after the conclusion of his direct appeal, Petitioner subsequently *untimely* filed an application for PCR on August 28, 2018, in which he alleged various allegations of ineffective assistance of counsel. In response, the State moved to summarily dismiss the application as untimely. On November 20, 2020, the initial post-conviction relief court filed a Conditional Order of Dismissal.[1] On January 22, 2021, the court issued the Final Order of Dismissal, informing Petitioner of the dismissal and his right to appeal and detailing what

[1] For reasons unknown, on December 10, 2020, the Honorable Brian M. Gibbons issued a second Conditional Order of Dismissal that was identical to the first Conditional Order of Dismissal.

Petitioner needed to do to appeal the Final Order of Dismissal.

SECOND PCR ACTION: 2023–CP–29–00015

On January 6, 2023, Petitioner filed a successive post-conviction relief application. Respondent made its Return on August 4, 2023, requesting an evidentiary hearing to determine whether Petitioner was entitled to Austin[2] review of his initial PCR action. On February 21, 2024, an evidentiary hearing convened at the Lancaster County Courthouse before the Honorable Patrick C. Fant, III. Elizabeth Franklin-Best, Esquire, represented Petitioner. Petitioner did not testify on his own behalf but submitted several documents to the post-conviction relief court.[3]

Petitioner averred the documents established Petitioner had an intellectual disability that made him unable to comprehend the last paragraph of the Final Order of Dismissal, where the original post-conviction relief court instructed Petitioner how to appeal the denial of his action. The second post-conviction relief court admitted Petitioner's documents into evidence over Respondent's objection. Respondent argued that the psychological report was conducted when Petitioner was twelve (12) years old[4], was too remote in time to Petitioner's current action, and was not relevant to Petitioner's current intellectual abilities. In response, the court *sua sponte* asked Respondent for suggestions on how to remedy the non-existence of a current or more recent psychological evaluation. Respondent submitted that Petitioner is not precluded from acquiring a psychological assessment to evaluate whether he has a present intellectual disability.[5] Petitioner

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[2] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

[3] The documents Applicant submitted include (1) a letter written by Applicant to the Lancaster County Clerk of Court explaining why his first PCR application was untimely filed on August 8, 2019; (2) uncertified school records containing an alleged psychological evaluation of Applicant conducted on April 11, 2002; and (3) a printout of a Flesch-Kincaid reading assessment of a paragraph of the Final Order of Dismissal (https:/readable.com/readability/flesch-reading-ease-flesch-kincaid-grade-level/).

[4] Applicant is now thirty-four years old.

[5] Notably, Applicant bears the burden to prove his claim(s), and not Respondent.

argued a psychological evaluation was unnecessary. At the conclusion of the hearing, the court asked each party to submit briefs on this issue.

Petitioner filed his "Briefing on the Issue of Court Ordered Psychological Assessment and Motion to Reconsider" on March 1, 2024. On March 13, 2024, Respondent filed its "Reply Brief and Renewed Motion to Dismiss." After reviewing the party's memorandum and considering the documents and arguments submitted by the parties, the second post-conviction relief court denied Petitioner relief, finding Petitioner failed to establish he was entitled to relief pursuant to Austin.

STATEMENT OF THE FACTS

On January 26, 2013, Petitioner shot the victim, Kevisis Anthony, in the head. The victim died two days later as a result of anoxic encephalopathy—brain death due to a laceration of the brain that was due to a gunshot wound to the head. (Trial Tr. pp. 250-51, 255, 265; R. pp. 148-49, 150, 158). Quinshun Evans (Evans) testified he recalled Petitioner being at the residence on January 26. (Trial Tr. p. 299; R. p. 186). A call from a cellphone number later associated with Petitioner was received by 911 at approximately 9:41 p.m. on January 26. (Trial Tr. pp. 169, 406, 468, 553; R. pp. 92, 243, 300, 337). The caller indicated that someone had been shot on Pleasant Hill Street. (Trial Tr. p. 171; R. p. 93). Law enforcement was later dispatched to St. Paul Street in Lancaster. (Trial Tr. pp. 174-75; R. pp. 96-97). They were specifically dispatched to what was later determined to be Ketta Evans' house. (Trial Tr. pp. 175-76, 179; R. pp. 97-98, 101).

Petitioner was arrested on February 5, 2013. Investigator Hall, the lead investigator in the case, testified that Petitioner was interviewed on February 5. (Trial Tr. pp. 371, 388; R. pp. 216, 233). Hall testified that Petitioner denied having any involvement in the murder during the February 5th interview. (Trial Tr. pp. 400, 401-07; Supp. R. pp. 16; R. pp. 238-44). Petitioner was interviewed again on February 6th, where he admitted that he was the one that had shot the victim. (Trial Tr. pp. 411-16; State's Exh. 69; R. pp. 248-53). Petitioner asserted that he had only intended to rob the victim because he and Evans needed money, and Evans advised him that the victim had money because he was involved in selling marijuana. (Trial Tr. p. 412; see State's Exh. 67, 69; R. p. 249).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish he was entitled to belated appellate review of his initial post-conviction relief application, where Petitioner was properly advised of the right to appellate review following the summary dismissal of his initial post-conviction relief action, and Petitioner failed to seek appellate review.

On appeal, Petitioner argues the second post-conviction relief court committed multiple errors of law in finding that Petitioner voluntarily waived his right to appeal the denial of his initial post-conviction relief action. Specifically, Petitioner argued the second post-conviction relief court committed errors of law in focusing its inquiry on whether Petitioner had a learning disability and not on whether Petitioner voluntarily and knowingly waived his right to appeal his initial post-conviction relief action. Additionally, Petitioner argues the second post-conviction relief court committed an error in finding Petitioner did not have a learning disability, attacking the manner in which the court weighed the evidence. However, in his second post-conviction relief action, Petitioner relied on the fact he had present and fixed cognitive limitations to assert he was entitled to Austin[6] relief, and his application should not be barred by the statute of limitations. Further, what Petitioner asserts are errors of law concerning the second post-conviction relief court's findings as to the existence of a significant cognitive impairment more accurately amount to his dissatisfaction with the court's ultimate denial of relief. The second post-conviction relief court properly found that Petitioner voluntarily waived his right to appeal the denial of his initial post-conviction relief action, where the Final Order of Dismissal advised Petitioner of his right to appeal and the procedure to appeal and where Petitioner failed to provide credible and relevant evidence of an existing sufficient reason for his failure to timely appeal his initial post-conviction relief action.

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[6] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

The Uniform Post-Conviction Procedure Act filing procedures require an applicant to file a PCR application as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the Remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45. The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The statute of limitations does not apply to Austin[7] claims.

Successive applications such as the one before this Court are disfavored. S.C. Code Ann. § 17-27-90. The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. 305 S.C. 453, 409 S.E.2d 395 (1991). Austin provides for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application or Applicant otherwise did not voluntarily and knowingly waive his right to appeal. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). But Austin "is limited to its particular factual situation." Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 394 (1991).[8] Where an applicant's action is summarily dismissed, and he is not represented by counsel, the Supreme Court has held that PCR judges are required to inform *pro se* applicants of their right

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[8] Aice was issued in conjunction with Austin, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

to appeal and the statute of limitations to appeal. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999).

As the second post-conviction relief court noted, Petitioner's initial post-conviction relief action was untimely,[9] and the Final Order of Dismissal advised Petitioner of his right to appeal and the procedure to appeal. (App. pp. 596, 684); See Odom, 337 S.C. at 262-263 (Establishing rule requiring PCR judges to advise *pro se* Petitioners of their right to appeal and right to appellate counsel).

Clearly, the record established that Petitioner was advised of his rights in the Final Order of Dismissal, as required by Odom. However, Petitioner argued that even though the Final Order of Dismissal advised him of his rights, he did not voluntarily waive his right to appeal as he had a diagnosed learning disability, which prevented him from understanding the initial post-conviction relief court's instruction. (App. pp. 622–23, 631–32). Confusingly, Petitioner now contends the second post-conviction relief court committed an error of law in conflating the question of whether Petitioner voluntarily waived his right to appeal and whether he had a learning disability. Additionally, Petitioner argues that the second post-conviction relief court committed significant errors in the manner in which it weighed the evidence, failing to provide what specific error of law the court committed other than Petitioner's disagreement with its findings.

First, Petitioner avers that the second post-conviction relief court "committed substantial errors of law while focusing its inquiry into whether [Petitioner] has intellectual or learning disabilities and not on whether he knowingly and voluntarily waived his right to

[9] The Remittitur from Petitioner's direct appeal was issued in June of 2016, and Petitioner filed his initial post-conviction relief action in August 2018, *over a year* after the statutory time period had passed.

challenge the order of dismissal..." (PWC pp. 8–9). Petitioner admits that the questions overlap but ultimately fails to acknowledge that the foundation of his contention that he did not voluntarily waive his right to appeal depended on his alleged existing cognitive limitations. For instance, in response to Respondent's motion to dismiss at the hearing, Petitioner immediately presented the uncertified school records and argued Petitioner was diagnosed with "significant learning disabilities in both reading comprehension and in mathematics." (App. p. 622). Included in the records was a psychological report, which Petitioner purported to be a psychological evaluation that acknowledged Petitioner's diagnoses of two different learning disabilities. (App. p. 623). Petitioner *relied* on the fact that the records illustrated that the provisions in the Final Order of Dismissal, utilized to protect his right to appeal, were insufficient due to his cognitive limitations. (App. p. 626). Further, in Petitioner's memorandum to the second post-conviction relief court, Petitioner patently argued that he had "provided evidence of [Petitioner's] cognitive limitations to show that untimeliness should be excused in this case." (App. p. 631).

Clearly, Petitioner's claim that he was entitled to an Austin appeal—making his *untimely* applications not subject to the statute of limitations—was predicated on his assertion that his cognitive limitations prevented him from understanding the court's instructions in the Final Order of Dismissal. Now, Petitioner reconstructs the nature of his argument on appeal in a veiled attempt to prompt this Court to overlook the proper deference afforded to the second post-conviction relief court's findings, alleging error where the court considered the integral question Petitioner posed concerning his cognitive impairments. The second post-conviction relief court was required to assess the credibility of Petitioner's claim as to his cognitive impairments to determine the ultimate question—whether Petitioner knowingly and

voluntarily waived his right to appeal. Thus, there was no error of law, as the second post-conviction relief court properly considered the evidence Petitioner provided to the court, ultimately finding Petitioner's contention not credible and that Petitioner was not entitled to relief pursuant to Austin. (App. pp. 685–86).[10]

Second, Petitioner asserts that the second post-conviction relief court's "order is so rife with misunderstandings about the nature of [Petitioner's] condition" and detailed various ways it disagreed with the second post-conviction relief court's findings. (PWC pp. 5–8). Namely, Petitioner contends the second post-conviction relief court erroneously found that Petitioner's educational and psychological reports lacked probative value. In its Order, the second post-conviction relief court found that the psychological report Petitioner relied on was negligibly relevant, as it was completed in 2002—when Petitioner was 12 years old. (App. p. 685). Specifically, the second post-conviction relief court found, "Though the report is minimally relevant, it has lost its probative value because it is too far removed from the issue, whether [Petitioner] has a present cognitive impairment." See State v. Bright, 323 S.C. 221, 473 S.E.2d 851 (Ct. App. 1996); See also State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979) (Agreeing with the trial court that the results of defendant's brain scan, which was performed

[10] Petitioner also asserts that the second post-conviction relief court intended to order Petitioner to submit to a psychological evaluation to assess his IQ at the request of the State. (PWC p. 9). This mischaracterizes what took place during the evidentiary hearing and at the bench conference between the parties and the court. After the State argued the remoteness of Petitioner's psychological evaluation, the court questioned the State on how to remedy Petitioner's failure to provide a more recent evaluation. (App. pp. 626–627). The AG's Office ultimately suggested—*not requested*—having Petitioner evaluated so an appropriate determination could be made as to Petitioner's present mental capacity. (App. p. 627). It is telling that Petitioner objected to an evaluation at the bench conference and in his post-hearing memorandum to the court, instead choosing to rely on the uncertified records and on his own conclusory assertions. (App. pp. 630–633).

on defendant 12 years prior to crimes, were too remote in time to be relevant as to issue of defendant's mental capacity on night of the murder.).

Petitioner further argued that this finding "fundamentally misapprehends the nature of learning disabilities which do not go away," citing the National Institute of Health. (PCR p. 5). Notably, nowhere in the article Petitioner cites does it state learning disabilities do not go away, and it even notes, "Learning disabilities can last a person's entire life, but he or she can still be successful with the right educational supports." About Learning Disabilities, Sept. 11, 2018, https://www.nichd.nih.gov/health/topics/learning/conditioninfo. Petitioner cites Blackwell,[11] Sparkman,[12] and McCaskill[13] to support his contention, the second post-conviction relief court committed reversible error in finding the psychological report lacked probative value.

However, Blackwell only serves to diminish Petitioner's position. In Blackwell, Blackwell argued, "the trial court erred in making the pre-trial determination that he was

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[11] State v. Blackwell, 420 S.C. 127, 801 S.E.2d 713 (2017).

[12] In Sparkman, the Supreme Court held that "under the circumstances of this case, the Family Court judge erred in denying appellant's counsel **access** to the juvenile's record." State v. Sparkman, 287 S.C. 489, 339 S.E.2d 865 (1986) (emphasis added). The circumstances being that counsel had shown "a substantial need and legitimate interest in the juvenile's record, and that he was unable to secure the information from any other source." Sparkman, 287 S.C. at 492, 339 S.E.2d at 867. Sparkman does nothing to support Petitioner's position that the second post-conviction relief court erred in finding his *decades old, uncertified, unauthenticated* school records were irrelevant. Notably, the court in Sparkman held that they made no determination as to the admissibility of the juvenile's records at trial, and in this case, Petitioner had access to his own school records. Id.

[13] McCaskill is a family court case which addressed the admissibility of the appellant's 332-page file from the S.C. School for the Deaf and Blind in the determination of custody of her infant child. Kershaw Cnty. Dep't of Soc. Servs. v. McCaskill, 276 S.C. 360, 278 S.E.2d 771 (1981). Ultimately, the Supreme Court held that the portions of appellant's record which contained subjective opinions and judgments was not admissible under the business records exception, as cited *infra* concerning the admissibility of portions of Petitioner's records in this case. McCaskill, 276 S.C. at 362, 278 S.E.2d at 773.

eligible for the death penalty given the evidence 'conclusively demonstrated' that he is mentally retarded." 420 S.C. at 137, 901 S.E.2d at 718. The Supreme Court noted that the trial court considered voluminous evidence, including Blackwell's school records, I.Q. scores, employment records, medical and mental health records, records from immediate family, and interviews with family members and acquaintances. Id. In analyzing the trial court's determination, the Supreme Court stated:

> Although Blackwell suggests the trial court committed an error of law in reaching its conclusion, he fails to identify any specific error. Instead, he expresses his disagreement with the trial court's credibility determinations and the weight afforded to the experts' opinions and then appears to argue that these decisions equate to errors of law. Because the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we must defer to the court's determinations. See State v. Kelly, 331 S.C. 132, 149, 502 S.E.2d 99, 108 (1998) (recognizing, in reviewing a trial judge's determination of a defendant's competency to stand trial, that the judge is the sole judge of the credibility of the witnesses and the weight to be given their testimony and is entitled to evaluate conflicting testimony).

Id. at 140–41.

Ultimately, the Supreme Court found Blackwell failed to show the trial court committed an error of law or that the trial court's decision was unsupported by evidence. Id. at 143. Likewise, Petitioner does not identify a specific error but complains of the manner the second post-conviction relief court weighed the evidence, hoping this Court will re-evaluate the evidence and decide in his favor. See State v. Heyward, 432 S.C. 296, 314, 852 S.E.2d 452, 461 (Ct. App. 2020), aff'd as modified, 441 S.C. 484, 895 S.E.2d 658 (2023) ("The admissibility of evidence is within the sound discretion of the trial judge.")

Further, even if the second post-conviction relief court had found the psychological report was relevant, it would constitute inadmissible hearsay. The psychological report,

provided in Petitioner's uncertified records, was allegedly conducted by Dr. David G. Yarborough, III, containing his opinions, judgments, and conclusions. (App. pp. 653–57). However, Dr. Yarborough was not called to testify as to his opinions, and the State was not given the opportunity to cross-examine Dr. Yarborough as to his findings in the report. See Rule 803(8), SCRE; See also Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014) (Reports containing opinions, judgments, or conclusions are outside the scope of the public records exception to hearsay rule); see also McCaskill, 276 S.C. at 361–62, 278 S.E.2d at 772–73 (Concluding that appellant's school file contained subjective opinions and judgments, and the portions of the record should have been excluded because appellant was denied the right to cross-examine the maker of the report.)

The second post-conviction relief court properly found that the uncertified records Petitioner provided "do not conclusively support a finding Petitioner is cognitively impaired in that [Petitioner] cannot read, write, or comprehend." (App. p. 685). See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."). Further, the second post-conviction relief court properly found that Petitioner was not entitled to relief pursuant to Austin and that his application was barred by the statute of limitations. It is Petitioner's burden to show he is entitled to relief, and merely asserting the existence of an intellectual disability without providing credible, relevant, admissible evidence for the second post-conviction relief court to review does not amount to an error of law requiring reversal. See Rule 71,1(e), SCRCP. The findings of the second post-conviction relief court should be given deference, and the court properly found that Petitioner's case did not fall into Austin's particular factual situation that it is limited to.

Therefore, this Court should deny certiorari and uphold the findings of the post-conviction relief court.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the post-conviction relief court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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