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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Steven H. John, Circuit Court Judge

HEYWARD DAVIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213604

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 8

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CONCLUSION 10

ISSUE PRESENTED

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STATEMENT

Indictments

On June 14, 2006, Petitioner Heyward Davis, Jr. was indicted by the Georgetown County Grand Jury for (1) assault and battery with intent to kill; (2) assault with intent to kill; (3) first degree burglary; and (4) possession of a weapon during the commission of a violent crime. App. 398-414.

Trial and Sentence

On May 1, 2007, Petitioner was tried before the Honorable Paul M. Burch and a jury. App. 1. Petitioner was represented by Charles David Barr, and the State was represented by Assistant Solicitors Dorie C. Biagianti and Matthew Modica. App. 1. The jury found Petitioner guilty on all counts. App. 293, ll. 4-18. Judge Burch sentenced Petitioner to twenty-five (25) years for first degree burglary; twenty (20) years concurrent for assault and battery with intent to kill; ten (10) years concurrent for assault with intent to kill; and five (5) years concurrent for possession of a weapon during the commission of a violent crime. App. 301, l. 17 – 302, l. 4.

Direct Appeal

Petitioner filed a direct appeal to the South Carolina Court of Appeals which affirmed his convictions on April 27, 2009. App. 304.

First PCR Application and Hearing (2009-CP-22-1540)

On September 23, 2009, Petitioner filed his first application requesting post-conviction relief ("PCR"). App. 305-317. Petitioner specifically alleged that his trial counsel was ineffective for failing to object to improper closing argument by the solicitor

which bolstered the credibility of the prosecution's witnesses. App. 314-316. The State filed its Return on October 22, 2009. App. 318-322.

On August 26, 2010, an evidentiary hearing was held before the Honorable Larry B. Hyman, Jr. App. 323-334. Petitioner was represented by Paul Archer, and the State was represented by Assistant Attorney General Christina J. Catoe. App. 323. Only Petitioner testified at the hearing. App. 326-333.

Order of Dismissal (2009-CP-22-1540)

On October 12, 2010, Judge Hyman issued his Order of Dismissal denying Petitioner's PCR application. App. 336-340. Judge Hyman found that Petitioner's allegations in his PCR application regarding the improper closing argument by the solicitor raised a question of law. Judge Hyman further found that Petitioner's trial counsel was not ineffective for failing to object to certain remarks made by the solicitor in her closing argument because arguments regarding the credibility of the victims and their lack of motive to lie were permissible arguments. App. 338-339.

Petitioner's PCR counsel sent Petitioner a letter dated October 18, 2010 enclosing the Order of Dismissal and which also advised Petitioner that he could file a direct appeal to the South Carolina Supreme Court if he wished. App. 341. The letter, however, went on to say that the State had no more money to pay Petitioner's PCR counsel for his representation of Petitioner and therefore, if Petitioner wanted PCR counsel to file an appeal, he would have to pay PCR counsel $500.00. Id.

On October 26, 2010, Petitioner then filed a *pro se* Motion to Alter or Amend Judgment Pursuant to Rule 59(e). App. 342-346. The PCR court filed an Order Dismissing the *Pro Se* Motion to Alter or Amend on December 20, 2010, finding that

pursuant to Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), Petitioner's *pro se* motion was improper and a nullity because Petitioner was represented by counsel. App. 347-349.

There was no Notice of Appeal filed on behalf of Petitioner.

Second PCR Application and Hearing (2011-CP-22-1620)

On December 29, 2011, Petitioner filed a second PCR application requesting relief. App. 350-359. In this application, Petitioner asserted that he did not freely or voluntarily waive his right to appeal the Order of Dismissal of his first PCR application. App. 355. In support of his application, Petitioner attached his PCR counsel's October 18, 2010 letter to him advising Petitioner that he would have to pay $500.00 to appeal. App. 357. Petitioner also asserted that he sent a letter to the South Carolina Supreme Court about the matter because he had a right to appeal the order dismissing his first PCR application and that the Supreme Court forwarded the letter to his PCR counsel. App. 355, 358. The State filed its Return and Motion to Dismiss on March 1, 2012. App. 360-366.

On November 16, 2012, an evidentiary hearing on the second PCR application was held before the Honorable Steven H. John. App. 367-393. Petitioner was represented by Brett Mehalic, and the State was represented by Assistant Attorney General Tyson Andrew Johnson, Sr. App. 367. Both Petitioner and his first PCR counsel, Paul Archer, testified at the hearing. App. 371-388.

Archer acknowledged that he did not file a Notice of Appeal on Petitioner's behalf. Archer remembered that Petitioner asked him to file a motion for reconsideration, but Archer thought that there was nothing for the PCR judge to reconsider. App. 372, ll. 5-10. Archer testified that he did not see anything in his records indicating that Petitioner asked

him to appeal, but he again conceded that he at least knew that Petitioner wanted him to file a motion to reconsider. App. 372, ll. 11-25.

With respect to the letter he sent Petitioner advising him that the State had no more money to pay Archer to represent Petitioner and that he would need $500.00 from Petitioner to file an appeal on his behalf, Archer admitted he was wrong to send that letter. App. 374, l. 20 – 375, l. 13; 376, ll. 10-22. Archer said because he never received any money from Petitioner, he never filed a notice of appeal or motion to reconsider. App. 375, ll. 18-22.

On cross-examination by the Assistant Attorney General, Archer then admitted that he really did not remember if Petitioner asked him to file an appeal and that perhaps Petitioner did:

> Q: And Mr. Davis never asked you to file [a notice of appeal], did he?
>
> A: You know, in all fairness, I don't know. My letter would indicate that he did, I mean, I clearly stated that you have a direct appeal, so maybe he did and maybe I didn't mark it on my file. My file is not marked.

App. 378, ll. 5-10.

Petitioner testified that after the first evidentiary hearing, he did in fact ask Archer to file an appeal and he thought Archer was going to file it. App. 382, l. 22 – 383, l. 4; 388, ll. 12-14. Petitioner thereafter received the Order of Dismissal from Archer, along with the letter requesting $500.00 for Archer to file an appeal on behalf of Petitioner. App. 383, ll. 5-17. Petitioner, already having been declared indigent, did not have the $500.00 for Archer to file an appeal, so Petitioner then filed his *pro se* motion to reconsider. App. 383, ll. 16-25; 385, ll. 21-22. Petitioner testified that he did not know that he could file an appeal by himself without Archer after his *pro se* motion to reconsider was denied by Judge Hyman as being a nullity since Petitioner's attorney did not file such motion. App. 384, ll. 1-8.

Petitioner also testified that he did not know that if he had asked Archer to file an appeal on his behalf, Archer would have had to do it regardless of whether Petitioner paid Archer the $500.00. App. 384, ll. 9-11.

Judge John ruled at the conclusion of the hearing that Petitioner was entitled to a belated appeal of the order dismissing his first PCR application:

> Based upon the facts and circumstances presented in this matter, counsel for the State and the Applicant are correct in that the standard here is did the Applicant knowingly waive his right to appeal, knowingly and intelligently waive his right to appeal. In this particular case – in some cases, I'm called to decide credibility and believability, you know, the attorney over the applicant or the applicant over the attorney. In this case, I don't think I really need to call into question anybody's credibility or believability. Both sides have testified, in the Court's mind, as to a confusion over whether the Applicant asked for an appeal, whether the appeal was to go forward or not. Mr. Archer indicates that he believes there was some confusion. The Applicant in this testimony certainly indicates that I can't find the testimony or evidence presented that the Applicant knowingly and intelligently waived his right to an appeal considering either party's testimony. I can't see that the evidence rises to that standard. Therefore, I do find that the belated appeal is proper under these circumstances. The facts and the evidence do not indicate that the Applicant knowingly and intelligently waived his right to appeal and therefore such a belated appeal is granted.

App. 392, l. 15 – 393, l. 11.

Order Granting Belated Appeal Pursuant to Austin v. State (2011-CP-22-1620)

On November 20, 2012, Judge John filed his order granting Petitioner a belated appeal of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 395-397.

This petition follows pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated appellate review of an Austin PCR application).

ARGUMENT

The PCR court properly granted Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991) where (1) Petitioner affirmatively testified that he asked his first PCR counsel to file an appeal on his behalf; (2) Petitioner's first PCR counsel improperly requested $500.00 from Petitioner before he would file an appeal even though this PCR counsel was under a duty to file the appeal whether Petitioner paid the $500.00 or not; (3) Petitioner's first PCR counsel admitted at the hearing that it was entirely possible that Petitioner did ask him to file an appeal; and (4) the PCR court found there was confusion between Petitioner and his PCR counsel over whether an appeal was to be filed such that Petitioner did not knowingly, intelligently and voluntarily waive his right to appeal.

The PCR court properly granted Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application (2009-CP-22-1540). See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

The South Carolina Supreme Court has held that "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application. Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). "Under the PCR rules, an appellant is entitled to a full adjudication on the merits of the original petition, or 'one bite of the apple.' This 'bite' includes an applicant's right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal." Id. at 261, 523 S.E.2d at 755-56 (internal citations omitted).

Furthermore, a petitioner is denied his right to appellate review when either: (1) he requested, yet was denied an opportunity to seek appellate review; or (2) his right to appellate review was not knowingly and intelligently waived. Id. (citing King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992)). Accordingly, when a petitioner is denied his right to appeal under either of the two circumstances, then he is entitled to belated appellate review of her initial PCR application. See, e.g., Austin, 305 S.C. at 454, 246 S.E.2d at 396.

In this case, Judge John properly found that Petitioner had not knowingly and intelligently waived his right to appeal the denial of his first PCR application. Petitioner affirmatively testified that he asked his first PCR counsel to file an appeal on his behalf. App. 382, l. 22 – 383, l. 4; 388, ll. 12-14. When his PCR counsel improperly requested $500.00 from Petitioner before he would file an appeal, Petitioner did not realize that his PCR counsel was under a duty to file the appeal whether Petitioner paid the $500.00 or not. App. 374, l. 20 – 375, l. 13; 376, ll. 10-22; 384, ll. 9-11. Petitioner's first PCR counsel admitted at the hearing that it was entirely possible that Petitioner did ask him to file an appeal. App. 378, ll. 5-10. Furthermore, PCR court found there was confusion between Petitioner and his PCR counsel over whether an appeal was to be filed such that Petitioner did not knowingly, intelligently and voluntarily waive his right to appeal. App. 392, l. 15 – 393, l. 11.

Under these circumstances, the second PCR court's decision granting Petitioner belated appellate review of his first PCR application is supported by the evidence and should be upheld. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) ("The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings."). Simply stated, Petitioner is entitled to his one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

For the foregoing reasons, Petitioner Heyward Davis, Jr. respectfully requests this Court to grant his petition for certiorari and affirm the PCR court's grant of belated review of Petitioner's original PCR application.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

HEYWARD DAVIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

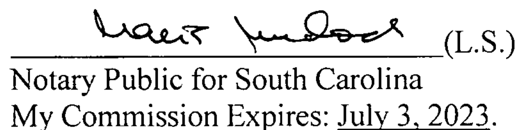
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Heyward Davis, #321720, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of October, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of October, 2013.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.