

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County

DeAndrea G. Benjamin, Circuit Court Judge

JONATHAN JAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213664

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in dismissing, without hearing testimony, the PCR application as successive, beyond the statute of limitation and on the ground of laches without addressing petitioner's claim that he is entitled to a belated appeal of his first post conviction relief application?

STATEMENT

On October 15, 2001, the Orangeburg County Grand Jury indicted James for assault and battery with intent to kill, criminal sexual conduct first degree and burglary first degree, indictments #2001-GS-38-1916. 17, 18. On July 15, 2002, James appeared before the Honorable J. Ernest Kinard, Jr. and pled guilty. Attorney Michael Culler represented James at the guilty plea. Attorney Angela Garrick prosecuted the case on behalf of the State. Judge Kinard sentenced James to three concurrent seventeen (17) year sentences. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. James, Op. No. 2003-UP-600 (S.C.Ct.App., filed October 20, 2003).

On October 19, 2004, petitioner filed an application for post conviction relief. An amendment to the application was filed on October 19, 2004. The State filed a return on July 21, 2005. On April 25, 2006, an evidentiary hearing was held before the Honorable James C. Williams. Attorney Evert Comer represented James at the PCR hearing. The transcript of this proceeding is missing. In a one page order dated June 7, 2006, Judge Williams remanded the case because “[u]pon examination of the entire record, it is apparent that the Defendant never entered a [g]uilty [p]lea. He was never asked how he pled and never made any statement that could be construed as an admission of guilt.” (App. p. 117). The order did not address the other issues raised by the application and amendment. The State appealed the remand. The South Carolina Supreme Court found that the PCR court erred in determining that Respondent did not enter a guilty plea. (App. pp. 206-210). State v. James, Op. No. 26449 (S.C.S.Ct. filed March 10, 2008).

On April 21, 2011, petitioner filed a second application for post conviction relief, seeking a belated appeal of the other issues raised in the application for post conviction relief but ruled upon by the PCR judge. (App. pp. 211-222). The State filed a return and motion to dismiss. (App. pp.

223-233). On May 21, 2012, a hearing was held before the Honorable DeAndrea G. Benjamin. Attorney Jeremy Thompson represented petitioner at the PCR hearing. Attorney David Spencer was present for the State. Judge Benjamin heard arguments from counsel but did not hear any testimony. In a written order signed July 24, 2012, Judge Benjamin dismissed the application for post conviction relief. (App. pp. 249-253). On October 25, 2012, petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. (App. pp. 254- 257). The motion was denied by written order signed November 8, 2012. (App. pp. 260-261). On December 20, 2012, petitioner filed a timely notice of intent to appeal with an explanation pursuant to Rule 243(c), SCACR. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in dismissing, without hearing testimony, the PCR application as successive, beyond the statute of limitation and on the ground of laches without addressing petitioner's claim that he is entitled to a belated appeal of his first post conviction relief application.

The PCR judge dismissed the second application as successive and beyond the statute of limitations. (App. pp. 251-252). The PCR judge erred because petitioner is seeking a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The first PCR counsel's failure to file a Rule 59(e), SCRCP or file a cross appeal following Judge Williams' remand order is the equivalent of PCR counsel failing to file an appeal and Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) and Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999) provide for the belated appeal sought by petitioner through a successive PCR application filed outside the statute of limitations. The PCR judge erred in dismissing the application as successive and outside the statute of limitations without addressing petitioner's claim that he is entitled to a belated appeal.

In Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) the Court wrote:

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. *See King*, 308 S.C. at 348, 417 S.E.2d at 868. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and this Court will review whether the petitioner was prejudiced by the failure to obtain appellate review. *Id.*; *see King*, 308 S.C. at 349, 417 S.E.2d at 868 (outlining the procedure used to seek review pursuant to *Austin v. State*); *Wicker v. State*, 310 S.C. 8, 425 S.E.2d 25 (1992).

Before dismissing the PCR application, the PCR court should have heard testimony and made findings about whether petitioner requested and was denied an opportunity to seek appellate review or determine if petitioner's right to appellate review was not knowingly and intelligently waived.

In the order denying the Rule 59(e) SCRPC motion the PCR judge found that Odom was inapplicable because Odom only applies to the denial of a PCR application and in the present case the application was granted by virtue of the remand that was later reversed. This is a procedural difference without a distinction. The remand order, by failing to address the other issues raised in the post conviction relief application, served as a denial to those other issues.

The PCR judge also dismissed the application based on the doctrine of laches. (App. p. 252). This too was error. In Whitehead v. State, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002) the South Carolina Supreme Court wrote:

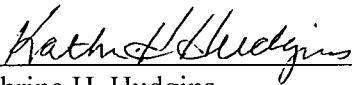
In cases where laches is properly raised as a defense to an Austin claim, the PCR court shall hear evidence on this defense at the same time it hears the applicant's Austin claim on the merits. In all such cases, the PCR judge shall make a specific finding on the laches issue as well as a specific find on the Austin claim.

The PCR judge failed to make findings on petitioner's Austin claim. Any specific findings in regard to the defense of laches should be made at the same time a judge makes findings on the laches issue. The case should be remanded to the PCR court for specific findings on both the Austin claim and the laches claim.

CONCLUSION

Based on the above argument, certiorari should be granted and the case remanded for specific findings in regard to the Austin claim.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of December, 2013.

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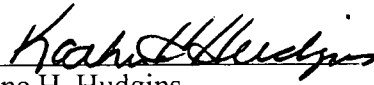
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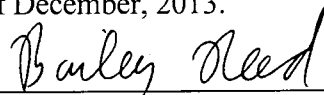
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire this 9th day of December, 2013.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of December, 2013.


_____(L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.