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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Frank R. Addy, Circuit Court Judge

ANN SMITH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-001171

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge correctly find that petitioner did not knowingly and voluntarily waive her right to appeal the first PCR judge's order denying relief and dismissing the PCR application?

STATEMENT

In October of 2006, the Lexington County Grand Jury indicted Smith for murder, indictment #2006-GS-32-3722. On January 31, 2008, Smith appeared before the Honorable J.C. Nicholson, Jr. and pled guilty to voluntary manslaughter. Attorney William Tetterton represented Smith at the plea. Attorney Alton H. Eargle prosecuted the case on behalf of the State. Judge Nicholson sentenced Smith to twenty five (25) years. A notice of intent to appeal was not filed.

On July 21, 2008, Smith filed an application for post conviction relief. The State filed a return on November 15, 2008. On November 30, 2010, an evidentiary hearing was held before the Honorable William P. Keesley. Attorney F. Arnold Beachum represented Smith at the PCR hearing. Attorney A. West Lee was present on behalf of the State. In a written order signed March 29, 2011, Judge Keesley denied relief and dismissed the application. A notice of intent to appeal was not filed.

On December 1, 2011, Smith filed a second application for post conviction relief. The State filed a return on May 29, 2012. On April 18, 2013, a brief hearing was held before the Honorable Frank R. Addy, Jr. Attorney Douglas E. Leadbitter represented Smith at the hearing. Attorney J. Walt Whitmire was present on behalf of the State. On June 14, 2013, Judge Addy signed a consent order granting belated review pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). A timely notice of intent to appeal was filed on May 31, 2013. This petition for writ of certiorari and a separately filed Austin petition follow.

ARGUMENT


The PCR judge correctly found that petitioner did not knowingly and voluntarily waive her right to appeal the first PCR judge's order denying relief and dismissing the PCR application.

Both counsel for Smith and counsel for the State spoke with previous PCR counsel and determined that there was an issue as to whether Smith received notice of Judge Keesley's order of dismissal in a timely fashion to file the notice of intent to appeal. (App. pp. 117-118). Based on the fact that Smith did not freely and voluntarily waive her right to appeal Judge Keesley's order, the parties agreed that Smith was entitled to a belated review, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), of Judge Keesley's order denying relief. The PCR judge correctly signed the consent order granting Austin review.

CONCLUSION

Based on the above argument this court should hear the belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of February, 2014.

STATE OF SOUTH CAROLINA
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Frank R. Addy, Circuit Court Judge

ANN SMITH,

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STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-001171

CERTIFICATE OF SERVICE

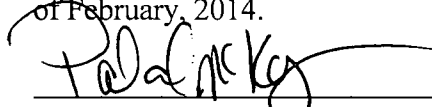
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Ms. Ann Smith #326549 Graham Correctional Institution 4450 Broad River Road Columbia, SC 29210, this 10th day of February, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of February, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.