

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. Supreme Court

ANN SMITH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-001171

JOHNSON PETITION FOR
WRIT OF CERTIORARI PURSUANT
TO AUSTIN V. STATE

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX.....	1
ISSUE PRESENTED	2
STATEMENT OF ISSUE ON APPEAL.....	3
STATEMENT	4
ARGUMENT	5
CONCLUSION	7
PETITION TO BE RELIEVED AS COUNSEL.....	8

ISSUE PRESENTED

Did the first PCR judge err in finding that petitioner was not entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?

STATEMENT OF ISSUE ON APPEAL

Was the sentence imposed excessive in light of the circumstances involved in the shooting?

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 Austin petition and a separately filed petition for writ of certiorari follow.

ARGUMENT

The PCR judge erred in finding that petitioner was not entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

In her initial PCR application Smith writes that she was not informed about the appeal process. (App. p. 43). During the first PCR hearing before Judge Keesely, Smith testified that she did not remember plea counsel discussing her right to appeal. (App. p. 55, lines 16 – 22). Smith testified that plea counsel advised her that if she pled guilty she would not receive over ten years. (App. p. 56, lines 7-13). When asked if she remembered the judge advising her about her appellate rights during the guilty plea, Smith testified that she did not remember much of that day at all. (App. p. 58, lines 7-18). Smith testified that she wanted to talk with counsel after the guilty plea but learned that he had gone on vacation. (App. p. 58, line 24 – p. 59, p. 60, lines 1-20).

Plea counsel testified that after the plea he told Smith that if she wanted to appeal to let him know within ten days. (App. p. 83, lines 15-23). Plea counsel testified that he did not believe there were any issues to appeal as the guilty plea was freely and voluntarily entered but if she wanted to talk about it they could make the decision later. (App. p. 83, line 23 – p. 84, lines 1-2). Plea counsel testified that he never heard from Smith in regard to an appeal. (App. p. 84, line 3). Counsel did not recall being on vacation at the time of the plea. (App. p. 86, lines 8-17). Plea counsel admitted that he was surprised by the severity of the twenty five year sentence imposed. (App. p. 82, line 19 – p. 83, lines 1-4).

In the order of dismissal Judge Keesley addresses the failure to advise of appellate rights writing:

With respect to this claim, this court finds that the applicant has failed to meet her burden of proof. Applicant testified that she was not advised of her appeal rights. Counsel testified that because it was a guilty plea he did not see that there were any appealable issues, but


that he advised her of her appeal rights nonetheless, as did the court during the course of the Applicant's guilty plea. This Court finds Counsel's testimony on this issue to be credible, as it is supported by the transcript of the guilty plea hearing. During her colloquy with the plea court, the judge asked the applicant if she understood that she had the right to appeal her guilty plea within ten days of the hearing, and the applicant replied that she understood. (Tr. p. 12, lines 4-7). Therefore, this court finds Applicant's testimony on this issue not to be credible. As such, this court finds that the Applicant is unable to prove either ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

(App. p. 96). Judge Keesley erred. Although Smith was advised of her right to appeal, she was unable to exercise that right when she was unable to reach her attorney to discuss the filing of the notice of intent to appeal.

CONCLUSION

Based on the argument above, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
FRANK R. ADDY, CIRCUIT COURT JUDGE

ANN SMITH,

RESPONDENT,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-001171

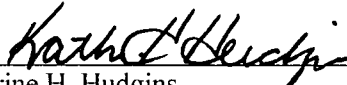
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ann Smith states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 18, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Ann Smith.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of February, 2014

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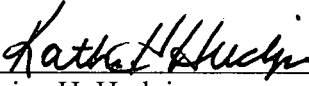
STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

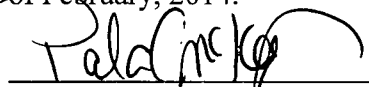
I certify that a true copy of the Johnson petition for writ of certiorari pursuant to Austin v. State in this case have been served on John Walt Whitmire, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Ann Smith, #326549, at Graham Correctional Institution 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 .