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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Alison Renee Lee, Circuit Court Judge

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MAR 20 2014

S.C. Supreme Court

MAURICE A. KELLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-192810

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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Division of Appellate Defense
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ISSUES PRESENTED

1.) The PCR judge ruled properly in granting petitioner's request for a belated PCR appeal because petitioner did not voluntarily and intelligently waive his right to appeal his first PCR action.

2.) The PCR judge erred in denying petitioner's request for a belated direct appeal in the case because petitioner's first PCR counsel filed to raise this issue during the first PCR hearing held in the case.

STATEMENT

Petitioner Maurice A. Kelley pled guilty to murder, armed robbery and grand larceny during the December 2003 term of the Richland County General Sessions Court before Judge G. Thomas Cooper. Samuel Mokeba represented petitioner at the plea proceeding and Assistant Solicitor Donald Sorenson appeared on behalf of the state. Petitioner was sentenced to imprisonment for a period of forty years. App. 1-37. Petitioner did not enjoy the benefit of a direct appeal of his trial court convictions and sentences in the case.

On October 21, 2004, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App. 39-49. The respondent filed a return dated September 9, 2012, requesting that a hearing be held in response to petitioner's PCR action. App. 50-55. A PCR hearing was convened on May 19, 2006, at the Richland County Courthouse before Judge L. Casey Manning.¹ Petitioner was present at the PCR hearing and represented by Charlie Johnson. The reconstructed PCR transcript of the May 19, 2006, PCR hearing can be found at App. 119-177. On July 16, 2007, Judge Manning issued an Order of Dismissal in the case therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 57-64.

On August 12, 2009, petitioner filed a second PCR application with the Richland County Office of the Clerk of Court requesting a belated direct appeal and a belated PCR appeal. App. 65-76. A Conditional Order of Dismissal was filed on October 15, 2010, by Judge Alison Renee Lee, who denied petitioner's request for a belated direct appeal. On November 9, 2010, petitioner filed a Motion to Object/Reconsider. See Supplemental Appendix. Judge Lee issued a Final Order dated April 20, 2011, therein granting petitioner's request for a belated PCR appeal. App. 77-89; App. 90-95. This petition follows per petitioner's appeal of Judge Lee's Orders.

¹ The May 19, 2006 PCR hearing was reconstructed on July 16, 2013, per Court Order. App. 106-107.

QUESTION I

The PCR judge ruled properly in granting petitioner's request for a belated PCR appeal because petitioner did not voluntarily and intelligently waive his right to appeal his first PCR action.

The belated PCR appeal per Austin v. State 305 S.C. 453, 409 S.E.2d 395 (1991), was granted by the second PCR judge based on petitioner's "PCR attorney's failure to perfect an appeal (PCR appeal) on his (petitioner's) behalf," and because "his Austin request [was] meritorious and not barred." Moreover, the second PCR judge noted that the respondent conceded that petitioner's first PCR counsel erred in failing to appeal petitioner's first PCR action. App. 92-93.

Clearly, the second PCR judge correctly granted an Austin appeal to petitioner because his first PCR counsel failed to appeal petitioner's first PCR action. One has right to appellate review of the denial of his PCR action where PCR counsel fails to appeal the same. Austin v. State.305 S.C. 453, 409 S.E.2d 395 (1991). As a result, the PCR judge ruled properly in finding that petitioner did not knowingly and voluntarily waive his right to appellate review of his first PCR action and in granting petitioner's request for an Austin appeal in his case.

QUESTION II

The PCR judge erred in denying petitioner's request for a belated direct appeal in the case because petitioner's first PCR counsel failed to raise this issue during the first PCR hearing.

Petitioner's request for a belated direct appeal in his second PCR action was denied by both Conditional and Final Orders due to successiveness² and untimeliness³ in effect because his White v. State 263 S.C.110, 208 S.E. 2d 35(1974) claim could have been raised during his first PCR action.

² As a rule, PCR claims can be dismissed as successive if said claim could have been raised in a previous PCR action. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

³ As a rule, a PCR action must be filed within one year of an inmate's conviction. S.C. Code Ann. § 17-27-45(A).

As a rule, a PCR application 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. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). See also, S.C. Code Ann. 17-27-45(a). However, belated appeals are exempt from the Peloquin rule in order to rectify procedural defects “such as when an attorney does not file a timely (direct) appeal.” See Odom v. State, 337 S.C. 256, 523 S.E. 2nd 753 (1999). Compare Wilson v. State, 348 S.C. 215, 559 S.E. 2nd 581 (2002), where the court held that the petitioner did not make a knowing and intelligent decision to waive his right to direct appeal and that per Odom, his request for a belated direct appeal via his PCR action constituted a viable claim not subject to the Peloquin limitation. The court in Wilson held that:

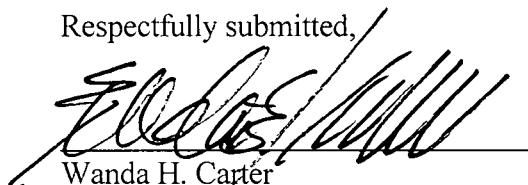
Just as it was in Odom, Austin’s policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to ineffective assistance of counsel, and then was denied his right to a PCR application because of the one year statute of limitations.

Here, trial counsel failed to file a direct appeal notice in petitioner’s case and apparently petitioner’s first PCR counsel failed to raise this issue during his first PCR hearing. Thus, the PCR judge erred in denying petitioner’s request for a belated direct appeal in this case.

CONCLUSION

Based on the foregoing arguments, petitioner requests that this petition be granted and full briefing allowed on the issues raised above.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of March, 2014.

STATEMENT OF ISSUE ON DIRECT APPEAL

The lower court erred in accepting petitioner's guilty pleas without explaining sentencing consequences, i.e. that his sentences could run concurrently or consecutively; and as a result, his pleas were not given voluntarily and intelligently in the case.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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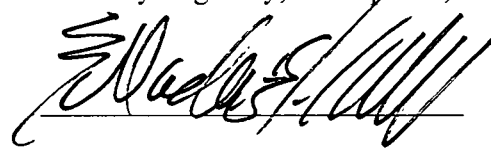
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

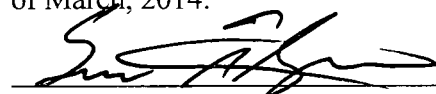
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Maurice A. Kelley #288629, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 20th day of March, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of March, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.