

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

R. Lawton McIntosh, Circuit Court Judge

 ORIGINAL

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JUN 18 2014

S.C. Supreme Court

CLARENCE CRITTENDON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-~~97-893~~ 002380

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Where Petitioner asked PCR counsel to file an appeal wrote PCR counsel asking for an appeal, yet PCR counsel failed to file an appeal, did the PCR court properly grant petitioner a belated appeal from his first PCR pursuant to Austin v. State?

STATEMENT

On March 16, 2004, an Oconee County grand jury indicted petitioner for first degree criminal sexual conduct and lewd act upon a child under the age of sixteen. App. 343-46. N. Gruber Sires originally represented petitioner on these charges. App. 182. On July 18, 2006, petitioner was reindicted for first degree criminal sexual conduct. App. 347-48. On December 11-12, 2006, petitioner was tried before the Honorable Alexander S. Macaulay and a jury. App. 1. Chrissy T. Adams and Lindsey S. Simmons represented the State. App. 1. Bruce Byrholdt replaced Sires and represented petitioner at his trial. App. 1. The jury convicted petitioner. App. 172, ll. 5 – 14. Judge Macaulay sentenced petitioner to concurrent terms of thirty years' imprisonment for criminal sexual conduct and fifteen years' imprisonment for lewd act. App. 179, l. 23 – 180, l. 11. Petitioner withdrew his direct appeal. App. 202.

On December 17, 2008, petitioner filed a PCR application. App. 190. On October 3, 2011, the Honorable J. Cordell Maddox, Jr. held a hearing on petitioner's application. App. 204. Kaelon E. May represented the State. App. 204. R. Mills Ariail, Jr. represented petitioner. On January 17, 2012, Judge Maddox denied petitioner's application. App. 270. No notice of appeal was filed.

On October 10, 2012, petitioner filed a PCR application seeking the right to a belated appeal of the denial of his 2008 application. App. 286. On September 16, 2013, the Honorable R. Lawton McIntosh heard the case. App. 320. Judge McIntosh granted petitioner a belated appeal at the hearing and asked the State to prepare an order. App. 332, l. 21 – 333, l. 19. On October 31, 2013, Judge McIntosh entered a written order granting petitioner a belated appeal. App. 338. This petition, and the petition pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), follow.

ARGUMENT

Ample evidence supports the PCR court's grant of a belated appeal from petitioner's first PCR pursuant to Austin v. State.

Relevant Facts

No appeal was filed after the 2012 denial of petitioner's first PCR (the "2008 PCR"). At the second PCR hearing, Petitioner testified that after the PCR hearing, he wrote PCR counsel a letter asking him to be sure to file a Rule 59 motion. App. 324, ll. 3 – 325, l. 17. Attached to petitioner's application was a letter he wrote PCR counsel which asked for a Rule 59 motion and a notice of appeal. App. 297-98. PCR counsel admitted he received this letter. App. 328, ll. 4 – 17. PCR counsel admitted that the letter asked for an appeal. App. 328, ll. 13 – 17. PCR counsel characterized this request for an appeal as premature. App. 329, ll. 11 – 16. PCR counsel also admitted that he had a conversation with petitioner and discussed an appeal, but trial counsel "didn't feel there were any appellate grounds that were there." App. 329, ll. 17 – 23.

After Judge Maddox denied the 2008 PCR, PCR counsel sent petitioner a letter asking him if he still wanted to appeal. App. 329, l. 17 – 330, l. 9. PCR counsel testified that even though he had not heard back from petitioner, he did not file an appeal because he "hadn't heard from him." App. 330, ll. 6 – 9. PCR counsel also testified, "And second of all, I didn't believe there were any appellate grounds in that." App. 330, ll. 8 – 9. PCR counsel had in his file two letters from petitioner dated July 12, 2012, and August 15, 2012, asking about the status of the appeal from his PCR denial. App. 330, l. 24 – 332, l. 3. App. 335-36.

Discussion

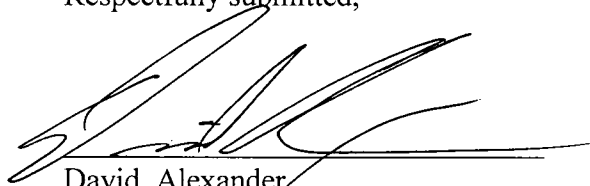
“An indigent defendant has the right to be informed of an appeal and the manner and method for taking the appeal.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In Austin, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” Austin at 454, 409 S.E.2d at 396. The appropriate scope of review of the PCR court’s holding is whether there is any evidence of probative value to uphold the PCR court’s findings. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

Ample evidence supports the PCR court’s conclusion that petitioner desired an appeal, told his attorney he wanted an appeal, and no appeal was filed. Judge McIntosh ruled from the bench. App. 333, ll. 3 – 14. Judge McIntosh stated “it seems to me that Mr. Crittendon did want an appeal in this case.” App. 333, ll. 3 – 14. Judge McIntosh also noted that the State had not opposed the belated appeal in its PCR pleadings. App. 333, ll. 3 – 14. In his written order, Judge McIntosh ruled, “This Court finds counsel was deficient because it was objectively and subjectively reasonable to believe applicant desired an appeal although he made a premature request.” App. 341. Under Austin, the PCR court correctly ruled that petitioner’s desire for an appeal was communicated to PCR counsel and no appeal was filed. Under the “any evidence” standard of review of Webb, this Court should conclude that the PCR court’s ruling was correct, grant certiorari, and grant petitioner a belated appeal from the 2008 PCR.

CONCLUSION

This Court should grant certiorari and grant petitioner a belated appeal from the 2008 PCR.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of June, 2014.

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RESPONDENT

APPELLATE CASE NO. 2013-37-893

CERTIFICATE OF SERVICE

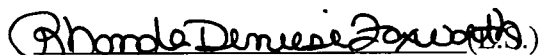
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Clarence Crittendon, #266744, at McCormick Correctional Institution this 18th day of June, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of June, 2014.



Notary Public for South Carolina

My Commission Expires: October 17, 2021.