

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO UNION COUNTY
Court of Common Pleas

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JUL 14 2014

The Honorable John C. Hayes, III, Circuit Court Judge

S.C. Supreme Court

Case No. 2013-001460

Donnie M. Malpass,..... Petitioner,

v.

State of South Carolina,..... Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

ALAN WILSON
Attorney General

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(803) 734-3737

ATTORNEYS FOR RESPONDENT

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The PCR court properly held Petitioner was not entitled to a belated appeal of his trial pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) where Counsel advised Petitioner concerning his right to appeal, Petitioner knew Counsel did not file an appeal on Petitioner’s behalf and Petitioner waited over three years to file his first PCR application.
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QUESTION PRESENTED

Did the PCR court properly hold Petitioner was not entitled to a belated appeal of his trial pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) where Counsel advised Petitioner concerning his right to appeal, Petitioner knew Counsel did not file an appeal on Petitioner's behalf and Petitioner waited over three years to file his first PCR application?

STATEMENT OF THE CASE

Donnie M. Malpass, (Petitioner), was indicted in September 2003 by the Union County Grand Jury for Lewd Act Upon A Child Under 16 (2003-GS-44-0772). William D. All, II, Esquire represented him on the charge. On March 10, 2004, Petitioner proceeded to trial and was found guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of ten (10) years, suspended upon the service of five (5) years confinement and five (5) years' probation. Petitioner did not appeal his conviction or sentence.

Petitioner filed his first application for Post-Conviction Relief (PCR) on August 7, 2008 (2008-CP-44-0269). Respondent made its Return and Motion to Dismiss on October 14, 2008. Pursuant to that motion, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed October 31, 2008, provisionally denying and dismissing this action, while giving the Petitioner twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Petitioner then filed a document in response captioned "Opposition and Reply to the Respondent's Motion to Dismiss."

An evidentiary hearing was subsequently convened at the Moss Justice Center in York County, South Carolina on February 5, 2010. Petitioner was present and was represented by Melinda I. Butler, Esquire. Jennifer A. Kinzeler, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. The Honorable Brooks P. Goldsmith denied and dismissed the Petitioner's application by written Order on March 24, 2010.

Petitioner subsequently filed an application for post-conviction relief (PCR) on August 2, 2012 (2012-CP-44-0327). An evidentiary hearing into the matter was convened on May 14,

2012, at the Moss Justice Center in York, SC. Petitioner was present at the hearing and was represented by Caroline M. Horlbeck, Esquire. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. The Honorable John C. Hayes, III, granted a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) by written order dated June 3, 2013.

A timely notice of appeal from the Order of Dismissal was filed on Petitioner's behalf. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. The PCR court properly held Petitioner was not entitled to a belated appeal of his trial pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) where Counsel advised Petitioner concerning his right to appeal, Petitioner knew Counsel did not file an appeal on Petitioner's behalf and Petitioner waited over three years to file his first PCR application.

Petitioner asserts the first PCR court erred in finding Petitioner was not entitled to a belated review of direct appeal issue pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) because the "court made an error of law in crediting trial counsel with advising petitioner that he could be tried again on a charge which he was acquitted of if he filed an appeal." This argument is without merit.

At the original PCR evidentiary hearing held on February 4, 2010, Petitioner testified that he told Counsel All he wanted to appeal the guilty verdict in his case. However, Counsel testified:

We talked after the trial about whether [Petitioner] wanted to appeal or not and [Petitioner] indicated he did not want to appeal, because we talked about the fact if he had an appeal he could be not(sic) tried again on the one charge but on the one that he was found guilty of he would be tried again and he might get a more substantial sentence and [Petitioner] indicated he was okay with that.

(App. p. 330 line 25- p. 331 line 6).

Counsel All then testified Petitioner actually told him not to appeal. (App. p. 331 lines 7-

9). On cross-examination, the following colloquy occurred between the State and

Counsel All:

Q: So it's your testimony that [Petitioner] was aware of his right to appeal and y'all discussed it?

A: We discussed it, yes

Q: And [Petitioner] specifically told you not to appeal?

A: [Petitioner] told me no when we were in the courthouse, yes.

(App. p. 332 lines 18-22).

In its Order of Dismissal, the PCR court found Counsel's testimony credible while finding Petitioner's not credible. (App. p. 341). See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (Great deference is given to the PCR court's findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses.). The PCR court also found:

Counsel stated he could remember having this discussion [about an appeal] with [Petitioner] because he explained to [Petitioner] that at the time he was convicted of one charge and acquitted of the other charge, but that if [Petitioner] won on appeal and were granted a new trial, he could face both charges, rather than one charge or neither charge. [Counsel] testified [Petitioner] told him [Petitioner] did not want to appeal because he did not want to take the chance of getting more time.

(App. p. 340).

Petitioner's main argument is that this was an error of law in using this testimony in support of dismissing Petitioner's allegation that he should be entitled to a belated review of direct appeal issues pursuant to White, supra.

Respondent submits the PCR court simply made a mistake of fact. The PCR court did not have the benefit of having the transcript from the hearing when he wrote the Order of Dismissal. The Order of Dismissal was signed and entered on April, 1, 2010. (App. p. 342). The PCR transcript was transcribed on September 24, 2013. (App. p. 335). The transcript contains the exact advice Counsel told to Petitioner, and this testimony proves Counsel's advice to Petitioner was correct. Clearly, the PCR court merely misstated the testimony from the hearing. Additionally, this does not change the analysis of the Order of Dismissal. The PCR court found Counsel's testimony was more credible on the issue of whether Petitioner asked him to file an appeal. This finding is further strengthened by the fact that Petitioner waited over three years to

file his first PCR action. Therefore, the Petitioner failed to meet his burden of proof that he is entitled to a belated review of direct appeal issues under White. Thus, sufficient evidence exists to affirm the PCR court's order.

CONCLUSION

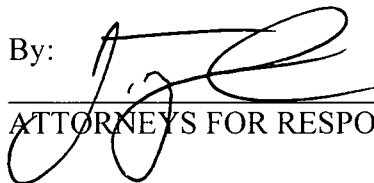
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

By:



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July 14, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County

The Honorable John C. Hayes, III, Circuit Court Judge

Donnie M. Malpass,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari Pursuant to Austin V. State**, has been served upon opposing party by mailing two (2) copies in the United States mail, postage prepaid:

**David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211**

This 14th day of July, 2014


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

VIA HAND DELIVERY

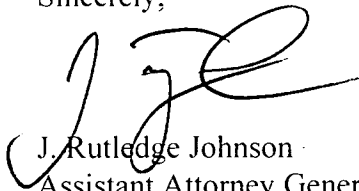
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Donnie M. Malpass v. State of South Carolina
Appellate Case No: 2013-001460

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari Pursuant To Austin V. State** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,


J. Rutledge Johnson
Assistant Attorney General
Bar No: 78871

JRJ/nb
Enclosures

cc: David Alexander, Esquire (2 copies)