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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County
William P. Keesley, Circuit Court Judge

S.C. Supreme Court

ERNEST BATTLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001776

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether there was any evidence to support the PCR judge's findings that petitioner was entitled to a belated appeal on the issues that were not cross-appealed from his post-conviction relief hearing?

STATEMENT

Petitioner was convicted of trafficking in cocaine and for possession with intent to distribute cocaine within proximity of a school on June 4, 2001, after a jury trial held before the Honorable Thomas L. Hughston, Jr., in Charleston County. Respective sentences of twenty-five (25) years and ten (10) years were imposed. William McGuire, Esquire, and Leslie Sarji, Esquire, represented petitioner. Mike Bosnak, Esquire, Mark Bourdan, Esquire, and John Crout, Esquire, were the assistant solicitors. (App. p. 1 – p. 515).

Petitioner appealed his convictions and the appeal was dismissed by the Court of Appeals on May 20, 2003, after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Battle, Op.No. 2003-UP-348. (App. p. 517 – p. 531). Petitioner filed an application for post-conviction relief on September 10, 2004. (App. p. 532 – p. 577). Respondent filed a return dated May 25, 2005. (App. p. 578 – p. 583). An evidentiary hearing was held on May 30, 2006, before the Honorable William P. Keesley. Petitioner was present and was represented by Rad S. Deaton, Esquire. Respondent was represented by Colleen E. Dixon, Assistant Attorney General. Petitioner testified in his own behalf and called Lana Nelson, Joshua Robinson, Felicia Smalls, James Condon, Jason Wallace, and Rodney Davis to testify. William S. McGuire testified in respondent's behalf. (App. p. 585 – p. 752). On July 5, 2006, Judge Keesley issued an order granting relief on one issue, but ruling against him on the other issues that were presented. (App. p. 753 – p. 771). Respondent appealed the grant of post-conviction relief and the South Carolina Supreme Court reversed the PCR court on April 13, 2009. (App. p. 798 – p. 826).

On October 12, 2010, petitioner filed a second application for post-conviction relief alleging his first PCR counsel was ineffective for not cross appealing on the remaining issues. (App. p. 827 – p. 843). Respondent filed a return and motion to dismiss dated May 9, 2011. The Honorable

Kristi L. Harrington issued a conditional order of dismissal dated August 16, 2011. (App. p. 850 – p. 855). Petitioner filed an objection and response dated September 19, 2011. (App. p. 856 – p. 863). On April 4, 2012, Judge Harrington issued a final order denying and dismissing petitioner’s application for post-conviction relief. (App. p. 864 – p. 866). Petitioner appealed and filed a petition for writ of certiorari on October 15, 2012. (App. p. 867 – p. 875). On March 15, 2013, the South Carolina Supreme Court remanded petitioner’s case for an evidentiary hearing on petitioner’s current application for post-conviction relief. (App. p. 877 – p. 878). On July 22, 2013, the Honorable Deadra L. Jefferson issued a consent order granting a belated appeal on the issues that were not cross appealed pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (App. p. 879 – p. 882).

A separate Austin petition has been filed with the Court.

This petition discussing the granting of the belated appeal follows.

ARGUMENT

There was evidence to support the PCR judge's findings that petitioner was entitled to a belated appeal on the issues that were not cross-appealed from his post-conviction relief hearing.

Petitioner's application for post-conviction relief alleged ineffective assistance of post-conviction relief (PCR) counsel. He sought an evidentiary hearing on the issue of whether he requested and was denied the opportunity to seek appellate review of claims that were denied in his first PCR application. (App. p. 831 – p. 832). He had wanted a cross-appeal on issues that were raised below. (App. p. 835).

With respect to petitioner's allegations, the PCR judge made the following findings:

After review of the facts and circumstances surrounding the waiver of the Applicant's right to cross-appeal the denial of allegations in the Applicant's post-conviction relief application, the parties below have consented to the granting of an appeal pursuant to Austin v. State of the Applicant's first post-conviction relief application (2004-CP-10-3794). While the Applicant's application for post-conviction relief was originally granted on a limited issue, the parties agree that the Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of the Applicant's remaining issues. PCR counsel for the Applicant has indicated the Applicant expressed a desire to cross-appeal his first application for post-conviction relief and that he failed to file a timely Notice of Appeal of the application.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first PCR (2004-CP-10-3794) pursuant to Austin v. State is

warranted. It is appearing the below listed individuals all consent to the granting of a PCR appeal in this matter.

(App. p. 881).

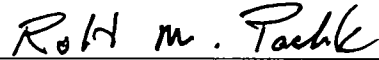
On the next page of the order all of the parties signed their consent to the granting of a belated cross-appeal of issues that were raised at the original PCR hearing.

This Court has repeatedly held that it must uphold the findings of the PCR judge if there is any evidence of probative value to support them. Roberts v. State, 361 S.C. 1, 602 S.E.2d 768 (2004); Caprood v. State, 335 S.C. 103, 525 S.E.2d 514 (2000); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624; Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986); Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985); Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984); Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

CONCLUSION

The consent order granting petitioner a belated cross-appeal should be upheld.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
William P. Keesley, Circuit Court Judge

ERNEST BATTLE,

PETITIONER,


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

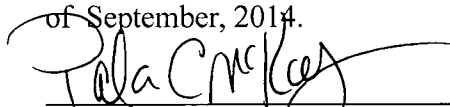
I certify that a true copy of the petition for writ of certiorari in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of September, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of September, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.