

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2013-001275

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S.C. Supreme Court

BRUCE WILSON, #192733,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR court err in denying Petitioner an appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), of his first PCR application?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the April 2005 term of General Sessions for the Richland County Grand Jury for two (2) counts of Armed Robbery (2005-GS-40-00024, -00026) and at the July 2005 term for an additional charge of Armed Robbery (2005-GS-40-00056). Katherine H. Hudgins, Esquire, represented the Petitioner on the charges. On January 5, 2006, Petitioner pleaded guilty as indicted. The Honorable James W. Johnson, Jr. sentenced Petitioner to confinement for a period of twenty-three (23) years on each count, with the sentences to run concurrently. Petitioner did not appeal the pleas or sentence.

Petitioner filed an application for post-conviction relief (PCR) on May 23, 2006. (2006-CP-40-02981). He was represented by Charlie Jay Johnson, Jr., Esquire. An evidentiary hearing was convened into the matter on August 1, 2007, at the Richland County Courthouse at which Petitioner was present with counsel. By Order filed September 18, 2007, Judge James W. Williams, Jr. denied and dismissed the action with prejudice.

Petitioner subsequently filed a second PCR application on September 21, 2010 (2010-CP-40-06562). The State filed a Return and Motion to Dismiss the application on September 30, 2011, requesting the action be summarily dismissed. Pursuant to this motion, the Honorable James R. Barber, III issued a Conditional Order of Dismissal provisionally dismissing the action while giving Petitioner thirty (30) days to submit his objections in writing. Upon receipt of Petitioner's responses, Judge Barber requested the matter be set for a hearing on Petitioner's claim of newly-and after-discovered evidence.

A hearing was convened into the matter on October 18, 2012, at the Richland County Courthouse before the Honorable Clifton B. Newman. Petitioner was present and represented by C. Cliff Rollins, Esquire. Respondent was represented by Robert D. Corney, Esquire. On February 19, 2013, Judge Newman filed an order dismissing the application with prejudice. Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. A hearing was held on the motion on April 2, 2013. On May 20, 2013, Judge Newman issued an Order denying Petitioner's motion to alter the judgment. Petitioner filed a notice of appeal and a Petition for Writ of Certiorari. This return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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 post-conviction relief 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

Certiorari is not warranted where there is probative evidence to support the PCR court's ruling that Petitioner knowingly and intelligently waived his right to appellate review of his first application.

Petitioner asserts that his PCR counsel was ineffective in not filing a notice of appeal after his application was dismissed with prejudice. Petitioner argues that the PCR court erred in ruling that Petitioner is not entitled to an appeal of his first PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). This allegation is without merit as there is clearly evidence to support the PCR court's finding.

Petitioner testified at the PCR hearing that he learned his first application was dismissed near the end of 2008 or beginning of 2009. (App. p. 292, lines 24-25). He also testified that PCR counsel (Counsel Johnson) moved to a different firm shortly after his PCR hearing and that he had no further contact with him. (App. p. 291, lines 4-25). Petitioner also testified that he made no further attempts to contact Counsel Johnson to ascertain the disposition of his PCR case. Id. Petitioner did not send any letters to Counsel Johnson's former office and did not inquire into where he was practicing at that time. Id.

Petitioner testified that he received the order dismissing his first application from the clerk of court. (App. p. 288, lines 22-25). Petitioner testified that he read the order dismissing the application and was aware of the paragraph that advised him of his rights to appeal the PCR court's judgment. (App. p. 294, lines 2-22). Petitioner went on to state that he did not file a notice of appeal when he received the Order of Dismissal because he knew the thirty (30) day window to file had expired. (App. p. 295, lines 16-23).

The PCR Court ruled that Petitioner made a knowing and intelligent waiver of his appellate rights because he failed to exercise reasonable and due diligence in pursuing relief.

(App. p. 338). The PCR Court based this decision on the fact that Petitioner was fully aware of his appellate rights as of “late 2008” or “early 2009” and did not file a notice of appeal or a second PCR until September 21, 2010 when he filed this current action. (App. p. 339). The court noted that Petitioner did not ask Counsel Johnson to file an appeal if it was denied. (App. p. 338).

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, “the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under ' 17-27-90.’” Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin “is limited to its particular factual situation,” Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. “A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived.” Odom v. State, 337 S.C. 256, 260, 523 S.E.2d 753, 755 (1999).

There is evidence of probative value that supports the PCR judge’s holding that Petitioner made a knowing and intelligent waiver of his right to appeal the dismissal of his first PCR

application after he obtained full knowledge of his appellate rights and where he failed to exercise reasonable diligence in pursuing relief. Petitioner concedes that he did not request an appeal be filed on his behalf, so the analysis shifts to whether Petitioner knowingly and intelligently waived his right to appeal his first application's dismissal. (App. p. 290, lines 20-25 – p. 291, lines 1-3). Respondent submits Petitioner knowingly and intelligently waived those rights. Odom, 337 S.C. at 200, 523 S.E.2d at 755. It is clear Petitioner had knowledge of his right to appeal the dismissal of his first application in "late 2008" or "early 2009" at the latest. (App. p. 292, lines 24-25). The order dismissing Petitioner's first PCR contains a section which clearly informed Petitioner of his right to appeal and instructed him on the proper procedure to file an appeal. Petitioner fully acknowledged that he read and understood the contents of those instructions and also understood that he had thirty (30) days to file a notice of appeal. (App. p. 295). Petitioner, knowing he was under strict time constraints, did not file this second PCR application until September 21, 2010. This was over 18 months after he knew of his rights to appeal. This delay in Petitioner's pursuit of relief, combined with Petitioner's knowledge of his appellate rights, constitutes a waiver of those rights. Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981)(citing 92 C.J.S. Waiver, p. 1062 (1955). "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.""). Austin appeals are used when a defendant is prevented from seeking review of the denial of a PCR application. Odom, 337 S.C. at 261-62. Here, Petitioner was admittedly aware of the time bars in filing a notice of appeal and chose not to pursue an appeal. He was in no way prevented from seeking appellate review. Petitioner made no attempts to contact Counsel Johnson to inquire into how to pursue an appeal. (App. p. 291, lines 4-25 – p. 292, lines 1-5). Instead, Petitioner filed a successive PCR action that initially only raised issues of subject matter

jurisdiction and ineffective assistance of trial counsel. (App. p. 246). Petitioner waived his rights to appellate review. He should not now be able to claim he was prevented from seeking an appeal. The PCR Court's ruling that Petitioner waived his rights to appeal should not be disturbed as there is probative evidence to support the PCR Court's finding that Petitioner waived his rights to appellate review. Cherry, 300 S.C. at 119, 386 S.E.2d at 626).

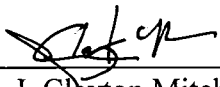
CONCLUSION

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 fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 9th, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2013-001275

Bruce Wilson,.....Petitioner,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

**LaNelle C. Durant, Esquire
S.C. Commission on Indigent Defense
1330 Lady St., Suite 401
Columbia, SC 29211**

This 8th day of October, 2014.



J. CLAYTON MITCHELL, SC Bar #101443
ATTORNEY FOR RESPONDENT

SWORN to before me this 8th day of October, 2014.



Notary Public for South Carolina.
My Commission Expires: 6-29-2020