

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Warren K. Smith, #184653,)
Applicant,)

Case No. 2013-CP-16-942

v.)

**ORDER GRANTING APPEAL
PURSUANT TO
AUSTIN V. STATE**

State of South Carolina,)
Respondent.)

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 20, 2013. Respondent made a timely Return on or about May 30, 2014. The Court convened an evidentiary hearing into the matter on July 21, 2014, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent. The Court had before it general sessions records of the Darlington County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and the records from Applicant's post-conviction relief action. Pursuant to S.C. Code Ann. § 17-27-80, the Court finds as follows:

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CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. In August 2011, the Darlington County Grand Jury indicted Applicant for petit larceny (2011-GS-16-1059), kidnapping (2011-GS-16-1061), first-degree burglary (2011-GS-16-1062) and first-degree assault and battery (2011-GS-16-1063). In May 2012, the Grand Jury indicted Applicant for

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armed robbery (2012-GS-16-0525). Chelsea B. McNeill, Esquire, represented Applicant. On August 29, 2012, Applicant pled guilty to all of the charges as indicted – except the State reduced the armed robbery charge to strong arm robbery during the plea hearing. The Honorable J. Michael Baxley sentenced Applicant to concurrent terms of thirty (30) days for petit larceny, twenty-five (25) years for kidnapping, twenty-five (25) years for first-degree burglary, ten (10) years for first-degree assault and battery, and fifteen (15) years for strong arm robbery. Applicant did not appeal his plea or sentence.

Applicant filed his first post-conviction relief action on August 28, 2012 (2012-CP-16-0732). Respondent made a timely return on January 17, 2013. The Honorable R. Ferrell Cothran, Jr., convened an evidentiary hearing into the matter on July 16, 2013, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Parker E. Howle, Esquire. Judge Cothran denied relief in an order filed September 9, 2013. Applicant filed a notice of appeal from Judge Cothran's order, but the South Carolina Supreme Court dismissed the appeal as untimely on October 30, 2013.

In his current application, Applicant alleges his prior post-conviction counsel, Mr. Howle, failed to timely file an appeal from Judge Cothran's order.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court finds meritorious Applicant's allegation he was denied an appeal from the decision in his prior post-conviction relief action.

"The right to seek appellate review of the denial of PCR is expressly authorized by state law." Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. §

17-27-100). “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, 262, 523 S.E.2d 753, 756 (1999) (citations omitted). Even if the post-conviction court determines the applicant did not freely and voluntarily waive his appellate rights, the applicant must still petition the South Carolina Supreme Court to determine “whether he was prejudiced by his failure to obtain review of a meritorious issue.” Odom, 337 S.C. at 263, 523 S.E.2d at 756 (1999).

Applicant’s prior post-conviction counsel was present at the hearing on this matter, but did not testify. Respondent’s counsel represented prior counsel admitted he did not file a notice of appeal within thirty (30) days of receiving notice of judgment. See Rule 203, SCACR. The Court also examined the notice of appeal prior counsel did file and the Supreme Court’s order dismissing the appeal. Those documents indicate prior counsel received the clocked order on September 12, 2013, and filed the notice of appeal on October 17, 2013.

The uncontested evidence reveals prior post-conviction counsel did not timely file a notice of appeal from Judge Cothran’s order of dismissal. Therefore, the Court affirmatively finds Applicant requested and was denied an opportunity to seek appellate review. Accordingly, the Court hereby grants Applicant’s request for a review of his post-conviction relief action pursuant to Austin v. State.

III. CONCLUSION

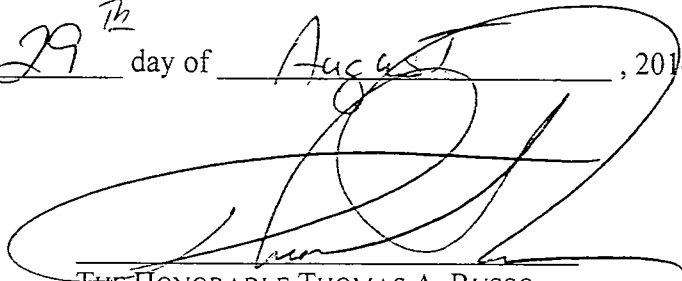
Based on the foregoing, the Court finds and concludes Applicant is entitled to an appeal of his prior post-conviction relief action pursuant to Austin v. State.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Counsel and Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), for the appropriate procedure for securing appellate review pursuant to Austin v. State.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief seeking an appeal pursuant to Austin v. State is granted; and
2. Applicant must be remanded to the custody of the Department of Corrections.

AND IT IS SO ORDERED this 29th day of August, 2014.



THE HONORABLE THOMAS A. RUSSO
Presiding Judge

Lexington, South Carolina

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AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

"Success is all that matters"

Stuart Mark Axelrod
Carlton E. Elliott
W. Christopher Castro*
Tristan M. Shaffer

4701 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

635 East Bay Street
Charleston, SC 29403
Phone: (843) 805-7200
Fax: (843) 577-3911

*Currently on Active Military Leave

November 11, 2014

Supreme Court of South Carolina
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Case No.: 2012-CP-16-942

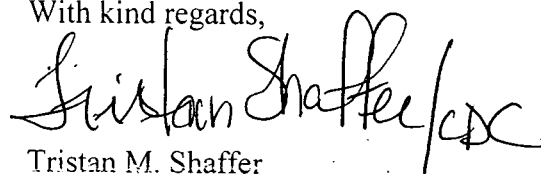
S.C. SUPREME COURT

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

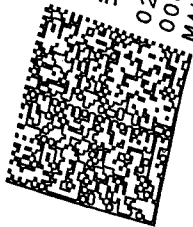
With kind regards,



Tristan M. Shaffer

TMS/cdc

cc: Joshua L. Thomas, Esquire
Darlington County Clerk of Court
Kimberly McCall
Warren K. Smith



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