

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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DEC 29 2014

Certiorari to Aiken County

S.C. Supreme Court

Edgar W. Dickson, Circuit Court Judge

THADDEUS CURRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000839

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court properly grant Petitioner a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his PCR application and the PCR court's denial of relief?

STATEMENT

On May 6, 2004, the Aiken County grand jury indicted Petitioner for possession of a firearm or knife during the commission of a violent crime (2004-GS-02-0838) and murder (2004-GS-02-0839). App. 794-795; App. 797-798. The state called the case to trial on May 10, 2014 before the Honorable Reginald I. Lloyd and a jury. Michael Chesser represented Petitioner, and Everett Chandler and Bill Weeks represented the state. App.1. The jury found Petitioner guilty as charged. App. 360, lines 5-16. Judge Lloyd sentenced Petitioner to life imprisonment for murder and to five years' imprisonment to be served consecutively for the weapon charge. App. 371, lines 2-5; App. 796; App. 799.

Petitioner filed a timely notice of appeal, which was perfected by Robert M. Dudek. App. 375-401; App. 424-430. Jeffrey A. Jacobs represented the state on appeal. App. 402-423. A divided panel of the Court of Appeals affirmed Petitioner's conviction and sentence in a published opinion on October 9, 2006. App. 431-458. Petitioner filed a petition for rehearing on December 21, 2006. App. 458-464. The petition for rehearing was denied on February 5, 2007 with the Honorable Ralph King Anderson, Jr. dissenting. However, the original opinion was withdrawn and a new opinion substituted. App. 467-493. Petitioner sought review in this Court on May 7, 2007. App. 494-520. Donald J. Zelenka, representing the state, filed a return to the petition for writ of certiorari. App. 521-543. On April 3, 2008, this Court denied review. App. 544-546. On April 4, 2008, the remittitur was issued. App. 546.

Petitioner filed an application for post-conviction relief (PCR) on July 24, 2008 (2008-CP-02-1271). App. 547-558. On January 29, 2010, the matter proceeded to an evidentiary hearing before the Honorable W. Jeffrey Young. William Sussman represented Petitioner, and Mary Williams represented the state. App. 565. The parties re-convened on July 14, 2010.

App. 630. By an order filed on October 8, 2010, Judge Young denied Petitioner relief. App. 751-762. On October 29, 2010, Petitioner filed a timely pro se notice of appeal. App. 763-765. On December 22, 2010, this Court dismissed the appeal due to Petitioner's failure to request the transcript timely. App. 766-767. Remittitur was issued on January 7, 2011. App. 768.

On December 5, 2011, Petitioner filed an application for PCR (2011-CP-02-2719). App. 769-777. On January 22, 2014, the matter proceeded to a hearing before the Honorable Edgar W. Dickson. Lance Boozer represented Petitioner, and Daniel Gourley represented the state. App. 784. By an order filed April 14, 2014, Judge Dickson granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 790-793.

Petitioner filed a timely notice of appeal. This certiorari petition follows.

ARGUMENT

The PCR court properly granted Petitioner a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his PCR application and the PCR court's denial of relief.

Relevant facts

During the PCR hearing on January 22, 2014, the state informed the court that first PCR counsel “explained that he helped [Petitioner] file his notice of appeal. However, he did not actually move to be relieved of counsel at that stage.” App. 787. Thus, PCR counsel was still considered counsel of record. PCR counsel failed to order the transcript in a timely fashion because “[h]e was unaware that he needed to make a motion to be relieved as counsel after the notice of appeal was filed.” App. 787-788. The state agreed with Petitioner that he was “entitled to his appeal pursuant to” *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 788. Without question, the state consented to a belated appeal. App. 788. Based upon the agreement of the parties and the undisputed evidence in the record, the judge granted Petitioner a belated PCR appeal.

The PCR court found the parties “consented to the granting of an appeal pursuant” to *Austin, supra*. App. 792. As found by the PCR judge, the “parties agree that [Petitioner] did not voluntarily waive his right to appeal the post-conviction relief court’s denial and dismissal of [Petitioner]’s application for post-conviction relief.” App. 792. Petitioner’s first PCR attorney “indicated [Petitioner] did not freely and voluntarily waive the right to appeal his first application for post-conviction relief and that he failed to file a motion to be relieved as counsel.” App. 792. First PCR counsel “indicated he was unaware that he was counsel of record for [Petitioner]’s appeal and therefore did not know he was required to order the PCR transcript.” App. 792. Based upon

these findings, the PCR court granted Petitioner a belated appeal pursuant to Austin, *supra*. App. 793.

Discussion

The PCR court properly granted Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application. In South Carolina, “[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. Id. This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. Id. at 261, 523 S.E.2d at 755-56. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. Austin, 305 S.C. at 455, 409 S.E.2d at 396.

This Court held that the procedures prescribed by Anders v. California, 386 U.S. 738 (1967) applied in PCR matters. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1998). Thus, appellate counsel is required to engage in a conscientious investigation of the possible grounds of appeal and brief arguable issues before appellate counsel may ask to withdraw. Anders, 386 U.S. at 744. The United States Supreme Court held: “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.” Id.

During the January 22, 2014 hearing, undisputed evidence was presented that Petitioner’s initial PCR was not appealed due to first PCR counsel’s deficient performance and unfamiliarity

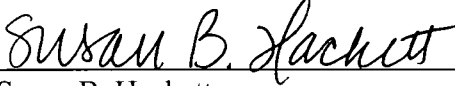
with the Rules. Although a timely notice of appeal was filed, PCR counsel failed to move to be relieved or order the transcript. Through no fault of Petitioner, the appeal was dismissed. Based on the undisputed evidence of deficient performance and prejudice – and the complete lack of evidence that Petitioner waived his appeal – the state consented to a belated appeal. App. 788. Based upon the agreement of the parties and the undisputed evidence in the record, the judge granted Petitioner a belated PCR appeal.

Under these circumstances, the second PCR court's decision granting Petitioner belated appellate review of his first PCR application should be upheld. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (“The appropriate scope of review of this Court is that ‘any evidence’ of probative value is sufficient to uphold the PCR judge’s findings.”). Simply stated, Petitioner is entitled to his one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's grant of his right to a belated appeal of his PCR application and the PCR court's denial of relief.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
Edgar W. Dickson, Circuit Court Judge

THADDEUS CURRY,

PETITIONER,

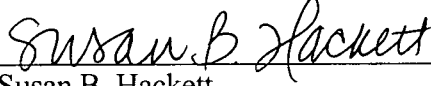
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STATE OF SOUTH CAROLINA,

RESPONDENT

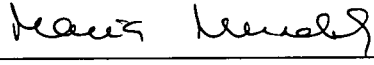
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Thaddeus Curry #301924, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 29th day of December, 2014.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of December, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.