

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

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S.C. Supreme Court

TERRANCE TERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000956

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred by refusing to grant Petitioner a belated appellate review of his original PCR claims pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where there was no evidence Petitioner knowingly and intelligently waived his right to appeal or that PCR counsel ever advised Petitioner of his right to appeal and where it was clear by Petitioner's actions, including following the Federal Court's instruction to file a second PCR application, that he wished to seek appellate review?

STATEMENT

A Greenville County Grand Jury indicted Petitioner at the February 22, 2005 term of General Sessions for first degree criminal sexual conduct with a minor and two counts of lewd act upon a child. App. 874-879. On March 8, 2005, Petitioner pled guilty as indicted before the Honorable Edward W. Miller. App. 1. Assistant Solicitor John Newkirk represented the state, and Ernest Hamilton represented Petitioner. App. 1. Petitioner was sentenced by Judge Miller to twenty years imprisonment for first degree criminal sexual conduct with a minor and fifteen years concurrent for each count of lewd act. App. 13, ll. 21-23. He did not appeal.

On November 11, 2005, Petitioner filed an application for post-conviction relief (PCR). App. 17-23. The state filed a return to this application dated January 6, 2006. App. 24-28. With the assistance of counsel, Petitioner filed an amended application for post-conviction relief on February 5, 2007. App. 29-30. The matter proceeded to an evidentiary hearing on March 1, 2007 before the Honorable Michael G. Nettles. App. 31. Assistant Attorney General Karen C. Ratigan represented the state, and Susannah C. Ross represented Petitioner. App. 31. By order dated March 26, 2007, Judge Nettles granted Petitioner relief on one of his claims of ineffective assistance of counsel, reversed his convictions and sentence, and remanded for a new trial.¹ However, Judge Nettles denied Petitioner relief on his remaining claims of ineffective assistance of counsel, prosecutorial misconduct, and lack of subject matter jurisdiction finding these claims to be without merit. App. 139-146.

¹ Specifically, Judge Nettles found plea counsel rendered ineffective assistance of counsel by failing to properly advise Petitioner of the definition of a sexual battery as it relates to the offense of first degree criminal sexual conduct with a minor and that the plea colloquy failed to cure this error. See App. 143-144.

On April 24, 2007, the state filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRC. App. 147-150. On April 25, 2007, Petitioner, acting *pro se*, likewise filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRC. App. 151-157. The state filed a return to Petitioner's motion on April 26, 2007. App. 158-160. By order dated July 2, 2007, Judge Nettles denied both motions and refused to alter or amend his original order. App. 161-162.

The state filed a notice of appeal on July 12, 2007 and a subsequent petition for writ of certiorari on March 10, 2008. App. 163-177. Petitioner, through his appellate counsel Robert M. Pachak, filed a return to the petition for writ of certiorari on May 5, 2008. App. 178-185. This Court granted certiorari by order dated November 6, 2008. App. 186. The state filed a Brief of Petitioner on November 19, 2008 and Petitioner filed a Brief of Respondent on December 12, 2008. App. 187-209. In an opinion filed July 13, 2009, this Court reversed Judge's Nettles' order granting Petitioner relief finding any deficient performance by plea counsel was cured by the plea colloquy. Terry v. State, 383 S.C. 361, 680 S.E.2d 277 (2009); App. 210-222.

On July 29, 2010, Petitioner filed three separate petitions for writ of habeas corpus in the United States District Court for the District of South Carolina. App. 224-491. By order dated September 20, 2010, the three petitions were consolidated into a single action. See App. 515. The state, represented by Assistant Attorney General Alphonso Simon, Jr., filed a return and memorandum of law in support of motion for summary judgment dated December 10, 2010.² App. 492-563. In its return, the state argued that "because Petitioner may still seek appellate review upon

² The state subsequently filed an amended return and memorandum of law in support of motion for summary judgment dated January 28, 2011. App. 564-620.

some of his post-conviction relief claims by utilizing the post-conviction relief procedures outlined in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) . . . this action should be dismissed without prejudice so that Petitioner can exhaust his remaining state remedy.” App. 564-565. The Honorable Joseph F. Anderson, Jr, United States District Court Judge, ultimately issued an order to stay the matter dated September 20, 2011. App. 640-649. The order to stay directed Petitioner to immediately commence an action in state court to exhaust his unexhausted claims. App. 649.

Petitioner filed a second application for post-conviction relief pursuant to Austin v. State on February 20, 2012. App. 650-656. The state filed a return to this application and partial motion to dismiss dated August 10, 2012. App. 762-768. The matter proceeded to an evidentiary hearing on December 17, 2013 before the Honorable G. Edward Welmaker. App. 769. Assistant Attorney General Karen C. Ratigan represented the state, and Brian P. Johnson represented Petitioner. App. 769. By order dated January 31, 2014, Judge Welmaker found Petitioner failed to meet his burden of proving he is entitled to an Austin review of the issues denied in his first PCR application. App. 841.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred by refusing to grant Petitioner a belated appellate review of his original PCR claims pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) where there was no evidence Petitioner knowingly and intelligently waived his right to appeal or that PCR counsel ever advised Petitioner of his right to appeal and where it was clear by Petitioner's actions, including following the Federal Court's instruction to file a second PCR application, that he wished to seek appellate review.

Second PCR Hearing

Petitioner testified that he received a letter from his initial PCR counsel, Susannah Ross, dated April 12, 2007 notifying him that Judge Nettles had granted him relief.³ In addition to enclosing the order granting relief, Ross wrote: "I will be closing my file on your case, but it is likely that the State will appeal the judge's ruling. The Office of Appellate Defense will represent your interest in the appeal." App. 794, ll. 2-14; See App. 824. Petitioner testified that as a result of this letter it was his belief that Ross no longer represented him as of April 12, 2007. App. 793, ll. 6-14.

Petitioner explained that because he believed he was without counsel, he filed a *pro se* motion pursuant to Rule 59(e), SCRPC, on April 25, 2007 requesting the court alter or amend its judgment related to the numerous claims in which the court either denied relief or failed to properly address in its order. App. 790, l. 22 – 791, l. 1. He testified that his reasoning for filing the Rule 59(e) motion was to ensure his issues were properly preserved for appellate review since he knew

³ The order granting relief was filed on April 11, 2007, the day before the date of this letter. App. 794, ll. 5-6; App. 139.

his case would likely be reviewed by the South Carolina Supreme Court.⁴ App. 791, l. 25 – 792, l. 4; App. 804, ll. 6-16.

Petitioner explained that he later learned the state had also filed a motion pursuant to Rule 59(e), SCRCR, on April 24, 2007, the day before Petitioner had filed his own motion. However, the state only served PCR Counsel Ross, with a copy of its motion. App. 792, ll. 5-10. Petitioner testified that he thought it was significant the state had only served Ross with a copy of its motion because he inferred by this action that Ross still represented him and that it was her responsibility to file and respond to any post-trial motions. App. 792, l. 11 – 793, l. 5. Moreover, the state filed a return to Petitioner’s *pro se* Rule 59(e) motion arguing Petitioner’s motion should be dismissed because Petitioner was represented by counsel and South Carolina does not recognize hybrid representation. App. 794, l. 15 – 795, l. 8; See App. 159.

Judge Nettles ultimately denied both Rule 59(e) motions and refused to alter or amend his original judgment. App. 795, ll. 15-18; App. 161-162. In his order denying both motions, Judge Nettles wrote in a footnote that “the Applicant’s motion to reconsider pursuant to Rule 59(e). SCRCR, is ineffective and void because Applicant is currently represented by counsel.” App. 797, ll. 1-12; App. 162.

Petitioner testified that it was always his intent to appeal Judge Nettles’ order denying him relief on his remaining claims of ineffective assistance of counsel, prosecutorial misconduct, and lack of subject matter jurisdiction despite the fact that the court had granted him relief on one of his

⁴ Notably, in Petitioner’s *pro se* Rule 59(e) motion, he wrote: “The Applicant presented several issues and exhibits at his post-conviction relief hearing and indicated that he did not wish to waive any of these issues for further appellate review.” App. 152.

claims of ineffective assistance of counsel. App. 798, ll. 9-13. He also testified that he directly asked PCR Counsel Ross to file an appeal on his behalf. App. 804, ll. 17-20. Moreover, he explained that he asked his appellate counsel, Robert M. Pachak, to appeal the issues in which he was denied relief, but Mr. Pachak's "only relevant concern was the issue that . . . Judge Nettles ruled upon that granted me relief from the PCR." App. 802, l. 19 – 803, l. 4.

On cross-examination by the state, Petitioner now stated that he "was not able to ask Ms. Ross to file a notice of appeal because by the time this had come to pass the time had expired, the ten day time limit had expired. I did not, in fact, make an effort to ask her to do so, because, again, the time limit had expired." App. 809, ll. 18-25.

PCR Counsel Ross testified that Petitioner never asked her to file a Rule 59(e) motion or a notice of appeal "in a timely way." Specifically, she said she learned Petitioner wanted to appeal "after the fact" when she "[got] grieved and [received] letters complaining about me . . ." App. 813, ll. 15-20. Ross maintained that she has "no letter asking for - - to file a 59(e) or an appeal." App. 811, ll. 17-19. Moreover, Ross testified that in her opinion, Petitioner did not have any meritorious grounds to file a motion pursuant to Rule 59(e) and that she did not think it was necessary to appeal. App. 811, l. 20 – 812, l. 2. She explained, "I certainly don't think appealing and raising Cain about an order that grants you relief is a good way to set the record. And I didn't think that the issues that, in fact, Judge Nettles ruled against him were meritorious." App. 813, ll. 10-14.

On cross-examination by Petitioner's counsel, Ross testified that she received a copy of Petitioner's *pro se* Rule 59(e) motion. She agreed that a Rule 59(e) motion to alter or amend is the proper means to preserve the record if you believe the court made an error in its order. App. 814, ll. 7-16. She admitted that when she received a copy of Petitioner's *pro se* motion she became aware

that Petitioner was dissatisfied “with the results of the issues that . . . Judge Nettles failed to grant him relief on.” App. 815, ll. 18-22. She further admitted that during the time period between when Petitioner filed his *pro se* Rule 59(e) motion and when Judge Nettles issued his order denying the motion, **she did not talk with Petitioner about his right to appeal** or his dissatisfaction with Judge Nettles’ order denying relief on numerous claims.⁵ App. 816, ll. 7-11. Notably, **Ross had no recollection of ever advising Petitioner of his right to appeal** Judge Nettles’ order. See App. 817, ll. 17-23.

Order of Dismissal

The PCR court stressed that Petitioner “admitted he never asked PCR counsel to file a notice of appeal after he was successful in obtaining relief” and that PCR counsel maintained Petitioner “did not ask her to file a notice of appeal.” App. 841. Because Petitioner did not expressly ask PCR Counsel Ross to file a notice of appeal, the court found Petitioner failed to meet “his burden of proving he is entitled to an Austin review of the issues denied in his first PCR application.” App. 841.

Furthermore, the PCR court found PCR counsel “made the strategic decision not to appeal as an attempt to minimize the chances of reversal of [Petitioner’s] relief.” App. 842. This finding was based on Ross’s testimony that “the Supreme Court would be substantially more likely to affirm a grant of relief based upon plea counsel’s failure to define sexual battery than on other grounds.” App. 842.

⁵ Petitioner’s *pro se* motion was filed on April 25, 2007. Judge Nettles’ order denying the motion was filed on July 6, 2007. Therefore, approximately two and a half months separated the two events. See App. 161-162.

Moreover, the PCR court found, “PCR counsel’s decision not to file a notice of appeal without [Petitioner’s] request was a legitimate strategic decision for his appeal, and [Petitioner] failed to demonstrate this decision fell below prevailing professional norms.” App. 842.

Discussion

The PCR court erred by refusing to grant Petitioner a belated appellate review of his original PCR claims pursuant to Austin where there was no evidence Petitioner knowingly and intelligently waived his right to appeal or that PCR counsel ever advised Petitioner of his right to appeal. Moreover, it was clear by Petitioner’s actions that he wished to seek appellate review.

“This Court has allowed successive PCR applications where the applicant has been denied complete access to the appellate process.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (citing Austin, 305 S.C. 453, 409 S.E.2d 395). “Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or ‘one bite at the apple.’” Id. (citing Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991)). “This ‘bite’ includes an applicant’s right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal.” Id. at 261, 523 S.E.2d at 755-756 (citing Aice, 305 S.C. at 448, 409 S.E.2d at 392). “Appellate counsel is required to brief arguable issues, despite counsel’s belief the appeal is frivolous, to safeguard the right to appeal.” Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 744 (2005) (citing Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)).

“An *Austin* appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when an attorney fails to seek timely review.” Id. at 261, 523 S.E.2d at 756 (citing Aice, 305 S.C. at 448, 409 S.E.2d at 392 and Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997)). A PCR applicant is entitled to an *Austin* appeal if (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. Id. at 262, 523 S.E.2d at 756 (citing King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992)) (emphasis added).

Additionally, in Bray, this Court held that PCR counsel “is required to advise an applicant of the right to appellate review of the denial of PCR.” 366 S.C. at 140, 620 S.E.2d at 745. Because the PCR attorney in Bray did not advise the applicant of his right to appeal, this Court found the applicant in Bray did not knowingly and intelligently waive his right to appellate review. Id.

In this case, Petitioner never received a complete “bite at the apple” because he did not knowingly and intelligently waive his right to the appellate review of the denial of relief on numerous claims he raised in his first PCR application. Notably, PCR counsel admitted during the evidentiary hearing that she never discussed with Petitioner his right to appeal after the order granting him relief was filed. See App. 816, ll. 7-11. This failure was a violation of this Court’s holding in Bray and prevented Petitioner from knowingly and intelligently waiving his right to appeal. Furthermore, despite knowledge that Petitioner was dissatisfied with Judge Nettles’ findings on many of his claims, PCR counsel did not safeguard Petitioner’s right to appellate review by filing a notice of appeal or seek to discover whether Petitioner wanted to appeal. If PCR counsel would have done her due diligence by contacting Petitioner, advising him of his right to appeal, and determining whether he wished to appeal, PCR counsel would have discovered that Petitioner wanted to seek appellate review.

The PCR court’s finding that Petitioner is not entitled to a belated appellate review pursuant to Austin seems to rely solely on the fact that there was conflicting testimony at the evidentiary hearing about whether Petitioner directly asked PCR counsel to file a notice of appeal. This was

error. The court was also required to determine whether Petitioner knowingly and intelligently waived his right to appellate review and whether PCR counsel had properly advised Petitioner of this right. Furthermore, the PCR court focused heavily on PCR counsel's testimony that she made a strategic decision not to appeal Judge Nettles' order granting Petitioner relief. This was also error. It was **not PCR counsel's decision** whether to file a notice of appeal and her alleged strategy for not doing so is irrelevant. Rather, it was Petitioner's decision to decide whether he wished to seek appellate review.

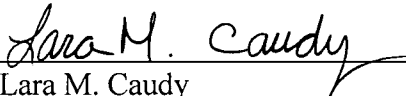
Moreover, Petitioner knew the state was going to appeal the order granting him relief and was correctly concerned that this Court may reverse Judge Nettles' order. Therefore, he rightly sought to ensure a cross-appeal was filed on his behalf to preserve his right to challenge the PCR court's denial of relief on many of his other claims. See Rule 203(c), SCACR.

Based on the foregoing argument, this Court should reverse the decision of the PCR court and find Petitioner is entitled to a belated appellate review of the claims denied in his first PCR proceeding.

CONCLUSION

Petitioner respectfully requests this Court grant the petition and allow full briefing on his PCR issues related to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of February, 2015.

STATEMENT OF *AUSTIN* QUESTIONS

1.

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where plea counsel failed to challenge Petitioner's competency to plead guilty, request a competency evaluation, or discover Petitioner's severe mental illness particularly where Petitioner was housed in the mental health sector of the law enforcement center for the nine months he was incarcerated prior to his guilty plea and where he was taking numerous prescription medications to treat his mental illness during his pre-trial incarceration and at the time of his plea?

2.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to present mitigating evidence at Petitioner's guilty plea proceeding including his twelve year military background, his severe mental health ailments, including depression, and the fact that the victims failed to attend the plea hearing or recommend incarceration?

3.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to effectively negotiate a plea offer with the solicitor when there was no physical or forensic evidence of a sexual battery, the alleged victim claimed the sexual battery occurred while her clothes were on, and where the solicitor indicated she would be "willing to discuss a cap on active time?"

4.

Whether the PCR court erred by finding the solicitor did not engaged in prosecutorial misconduct when he failed to turn over to the defense pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5, SCRCrimP, the SLED Forensic Services Laboratory Report summarizing the results of the analysis of the rape kit from the alleged criminal sexual conduct victim indicating no semen was identified on the oral, vaginal, and rectal swabs where this evidence was favorable to Petitioner, was in the possession and known to the solicitor, was suppressed, and was material to Petitioner's guilt or innocence?

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
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TERRANCE TERRY,

PETITIONER,

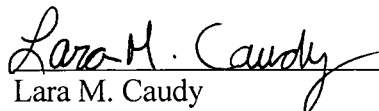
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STATE OF SOUTH CAROLINA,

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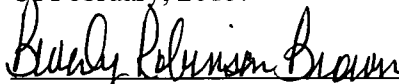
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of February, 2015.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
Of February, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: December 9, 2024.