

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Donald B. Hocker, Circuit Court Judge

RECEIVED

FEB 11 2015

S.C. Supreme Court

BRIAN KEITH STEPHENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000471

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

LAURA R. BAER
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

INDEX

INDEX.....	1
ISSUE PRESENTED.....	2
STATEMENT.....	3
ARGUMENT.....	9
STATEMENT OF <u>AUSTIN</u> QUESTION.....	14
CONCLUSION.....	15

ISSUE PRESENTED

Whether the PCR court erred in denying Petitioner's request to file a belated appeal of the denial of his prior PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where former PCR counsel failed to file an appeal despite Petitioner's request and where the PCR court's denial of relief was based on a merits finding regarding the first PCR which was not relevant to Austin relief?

STATEMENT

Procedural History

Petitioner was indicted by the Laurens County Grand Jury on November 6, 2009 and March 26, 2010 for Felony DUI Resulting in Death, Hit and Run with Death, Possession of Stolen Vehicle, Felony DUI with Great Bodily Injury, Hit and Run with Great Bodily Injury, and Hit and Run with Minor Personal Injury. App. 143 – 154.

On January 26, 2011, Petitioner entered a guilty plea to the above indicted offenses before the Honorable Eugene C. Griffith, Jr. Petitioner was represented by Bill Mayer, and the State was represented by Assistant Solicitor Jack Hammack. App. 1. The plea agreement included a negotiated maximum sentence of twenty-five years and dismissal of two additional charges of Felony DUI with Great Bodily Injury and Hit and Run with Great Bodily Injury. App. 3.

Judge Griffith accepted Petitioner's guilty plea and sentenced him to concurrent sentences of one year for Hit and Run with Minor Personal Injury, fifteen years and a \$10,100 fine for Felony DUI with Great Bodily Injury, ten years for Hit and Run with Great Bodily Injury, five years for Possession of Stolen Vehicle, twenty-five years and a \$10,100.00 fine for Felony DUI Resulting in Death, and twenty-five years and a \$10,100.00 fine for Hit and Run with Death. App. 23-24.

No direct appeal followed.

First PCR Application and Hearing (2011-CP-30-00721)

On April 27, 2011, Petitioner filed his application for post-conviction relief ("PCR") alleging ineffective assistance of counsel, that plea counsel had a conflict of interest, and involuntariness of his plea. App. 26 – 32. The State filed its Return on August 22, 2011. App. 33 – 36.

On March 14, 2012, an evidentiary hearing was held before the Honorable Frank R. Addy. Petitioner was represented by Gary Williams, and the State was represented by Assistant Attorney General J. Rutledge Johnson. App. 37. The witnesses at the hearing were Petitioner and plea counsel, Bill Mayer.

At the PCR hearing, Petitioner testified that if he had known he was going to receive a twenty-five year sentence, he would not have pled guilty. App. 47, 4-11. He testified that plea counsel told him that he would probably get between eighteen and twenty years, despite the possible range of zero to twenty-five. App. 47, 18-22. He further testified that he did not mention any other promises to the Court because plea counsel told him that if he did, he would go before another judge who would give him the full twenty-five year sentence. App. 57, 3-7. Petitioner also testified that officers had promised they would recommend a fifteen year sentence during interrogation, but plea counsel instructed him that the judge would not accept his plea if he told him that any other promises were made or if he expressed dissatisfaction with plea counsel. App. 45, 14-18; App. 45, 25 – 46, 3; App. 48, 9-19; App. 53, 12-19. Plea counsel also failed to raise Petitioner’s long-time drug addiction in mitigation and failed to explain the circumstances surrounding Petitioner’s prior felony DUI with death offense. App. 48, 20 – 50, 24. Petitioner did not dispute that he was in the car at the time of the accident, but stated that he was not the driver. App. 54, 16-23; App. 57, 21 – 58, 4. However, he testified that plea counsel told him that an Alford¹ plea was not an option and that it was not in his “best interest” to tell the Court that he was not the driver. App. 45, 22-25; App. 54, 24 – 55, 2.

¹ North Carolina v. Alford, 400 U.S. 25(1970).

Plea counsel testified that this case was about “damage control.” App. 62, 20-22. He tried to negotiate a plea agreement with a lower cap, but that the Solicitor’s office would not entertain it due to Petitioner’s record and the severity of the offenses. App. 63, 7-18. Thus, the only formal offer ever made by the Solicitor was for zero to twenty-five years. App. 63, 21 – 64, 11. Plea counsel further stated that he reviewed the questions that would be asked at the plea hearing with Petitioner but never instructed Petitioner to answer in any particular fashion. App. 64, 16 – 65, 17. However, he did admit that he told Petitioner “The only thing you are being promised is the 25 cap. If you say you’re promised something else, there is not a deal and that plea will stand out and that’s where we are.” App. 65, 5-8. He also admitted that he did not expect Judge Griffith “to hit him with the maximum under the cap” and he had hoped for eighteen or twenty years. App. 70, 22-25. Additionally, plea counsel did not view the law enforcement’s statements to Petitioner regarding a fifteen year sentence as anything more than one of “all kinds of promises they have no authority to make” and did not feel it relevant to the plea hearing. App. 72, 13 – 73, 1. Plea counsel also testified that Petitioner never indicated to him that there was a third party driving the car at the time of the accident and defended his failure to present more evidence of mitigation during sentencing as being the “call [he] made” based on “the judge’s reaction to things.” App. 65, 18-22; App. 69, 24 – 70, 19.

Order of Dismissal (2011-CP-30-00721)

Judge Addy initially issued a Form 4 Order on April 2, 2012, indicating that a more formal order would follow. App. 76-77. On April 16, 2012, Judge Addy issued an Order of Dismissal denying Petitioner’s PCR application. Judge Addy ruled that there was no conflict of interest presented when Petitioner told plea counsel of an offer made to him by police during interrogation

and that plea counsel was not ineffective for not presenting the fifteen year “offer” made by police to the plea court. Judge Addy also found that Petitioner’s plea was voluntary despite Petitioner’s testimony that he was advised by plea counsel that he would get a lesser sentence and that he was otherwise coerced. Lastly, Judge Addy found no merit in the contention that Petitioner had insufficient time to discuss the case with plea counsel, whom he only met with two to three times.

PCR counsel did not file a timely Notice of Appeal.²

Second PCR Application and Hearing (2013-CP-30-00721)

Petitioner filed a subsequent PCR application on September 16, 2013, asserting that former PCR counsel, Gary Williams, was ineffective in failing to file a timely notice of appeal. App. 89 – 95. The State filed its Return and Motion to Dismiss All Claims Except Austin Review on October 25, 2013. App. 97 – 103.

An evidentiary hearing was held on February 18, 2014 before the Honorable Donald B. Hocker. Petitioner was represented by Carson Henderson, and the State was represented by Assistant Attorney General J. Rutledge Johnson. App. 104.

It is undisputed that former PCR counsel did not file an appeal from the Order of Dismissal issued by Judge Addy. App. 125, 2-4; App. 104. Petitioner testified at the 2013 PCR hearing that he and former PCR counsel discussed his appellate rights after the hearing before Judge Addy and that he indicated that he would like to appeal if the judge ruled against him.

² Due to the prohibition against hybrid representation, Petitioner was not only under no obligation to file a *pro se* Notice of Appeal but could not file a *pro se* Notice of Appeal because he was represented by counsel. See Miller v. State, 388 S.C. 347, 697 S.E2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”)

App. 111, 23-25; App. 112, 24 – 113, 2; App. 117, 17-22. Former PCR counsel testified that he recalled that he had a brief conversation with Petitioner but was not sure what they spoke about. App. 121, 9-14; App. 122, 23 – 123, 3. It is undisputed that neither letter from former PCR counsel, the first enclosing the Form 4 Order and the second enclosing the Order of Dismissal, informed Petitioner of his appellate rights. App. 113, 10 – 115, 9; App. 124, 5-24. However, the Order of Dismissal did contain the normal advisement of the thirty day period to file an appeal. App. 118, 18-21. Former PCR counsel testified that it is not his practice to follow-up with clients but rather expects them to write him a letter if they seek further appeal, though he admitted as an attorney he is in a better position to understand appellate procedure and his letters gave no indication that Petitioner needed to write him back regarding his desire to appeal.³ App. 130, 21 – 131, 7.

Petitioner testified that he did not make any further request to former PCR counsel regarding appeal because he thought that former PCR counsel would take the initial appellate steps based on their conversation in the courtroom after the PCR hearing. App. 115, 10-16. Petitioner testified that he subsequently learned that no appeal had been filed, so he filed a belated Notice of Appeal on March 15, 2013, which was ruled untimely. App. 117, 11-16; App. 85 (*Pro Se* Notice of Appeal); App. 87 (Supreme Court Order). On May 25, 2013, following

³ Notably, at the conclusion of Petitioner's testimony at the first PCR hearing, Judge Addy agreed to defer ruling so that Petitioner could take a few extra days to determine if he wanted to withdraw his PCR application. Petitioner made no subsequent attempt to contact former PCR counsel regarding withdrawal of the application, so the Court eventually issued its ruling. See App. 76 (Form 4); App. 112, 1 – 113, 9; App. 121, 23-25. Logically, Petitioner's decision not to withdraw the PCR application was an indication that he wanted to proceed, which would have included the appellate process as discussed with PCR counsel after the PCR hearing.

receipt of the Supreme Court's Order, former PCR counsel sent Petitioner a letter with a blank PCR application to complete and advising "You should be granted an [Austin] appeal." App. 116, 2 – 117, 10; App. 125, 16-25.

Order of Dismissal (2013-CP-30-00721)

On February 28, 2014, Judge Hocker issued an Order of Dismissal denying Petitioner's application for post-conviction relief. App. 136 – 142. Judge Hocker found that even though Petitioner may have proven that former PCR counsel was deficient, he failed to prove that he was prejudiced by counsel's performance because there is ample evidence to support Judge Addy's Order of Dismissal in the original PCR case. App. 140 – 141. Judge Hocker further found that Petitioner received Judge Addy's Order of Dismissal, which stated that he had thirty days to file an appeal, but did not inquire as to the status of an appeal until almost one year after the time to file had passed. Judge Hocker thus stated "[b]ased on Applicant's own inaction in this case, this Court denies his allegations against PCR Counsel." App. 141.

Petitioner filed a timely Notice of Appeal.

This petition follows pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated review of an Austin PCR application).

ARGUMENT

The PCR court erred in denying Petitioner's request to file a belated appeal of the denial of his prior PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where former PCR counsel failed to file an appeal despite Petitioner's request and where the PCR court's denial of relief was based on a merits finding regarding the first PCR which was not relevant to Austin relief.

The PCR court erred in denying Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application. App. 136 – 142; see Austin, 305 S.C. 453, 409 S.E.2d 395 (1991). In the present case, the PCR Court found that Petitioner made a request for and was denied the opportunity to seek appellate review. However, the PCR court then misinterpreted its role in Austin review, engaged an unwarranted prejudice analysis regarding the merits of the first PCR, and held Petitioner's delay in making any *pro se* filing against him. App. 136 – 142.

This Court has held that “[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). “Under the PCR rules, an appellant is entitled to a full adjudication on the merits of the original petition, or ‘one bite of the apple.’ 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 755-56 (internal citations omitted). “The right to seek appellate review of the denial of PCR is expressly authorized by state law.” Austin, 305 S.C. at 454, 409 S.E.2d at 396 (citing S.C. Code Ann. § 17-27-100 (1985)).

Furthermore, a petitioner is denied his right to appellate review when either: (1) he requested, yet was denied an opportunity to seek appellate review; or (2) his right to appellate review was not knowingly and intelligently waived. Odom, 337 S.C. at 261, 523 S.E.2d at 755

(citing King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992)). Accordingly, when a petitioner is denied his right to appeal under either of the two circumstances, then he is entitled to belated appellate review of his initial PCR application. See, e.g., Austin, 305 S.C. at 454, 246 S.E.2d at 396.

In the present case, former PCR counsel did not file an appeal from the Order of Dismissal issued by Judge Addy. App. 125, 2-4; App. 104. Petitioner never contended that he did not understand the timeline of the appellate process; rather, he testified that he believed his conversation with former PCR counsel after the hearing on February 18, 2014 notified his attorney that he wanted to pursue appeal in the event of an unfavorable decision such that former PCR counsel would effectuate same. App. 111, 23-25; App. 112, 24 – 113, 2; App. 115, 10-16; App. 117, 17-22. Petitioner’s subsequent actions are consistent with his contention. Former PCR counsel recalled that he had a brief conversation with Petitioner but was not sure what they spoke about. App. 121, 9-14; App. 122, 23 – 123, 3. Neither of former PCR counsel’s subsequent letters to Petitioner enclosing the Form 4 and enclosing the Order of Dismissal gave Petitioner any indication that he needed to further confirm his desire to go forward with an appeal.⁴ App. 113, 10 – 115, 9; App. 124, 5-24; App. 130, 21 – 131, 7. However, once

⁴ Former PCR counsel testified that he “would have thought” Petitioner would write to him after receipt of the final Order “concerning what he sought,” despite the fact that no such procedure was set forth to the letters to Petitioner. App. 130, 21 – 131, 7. However, in In Re Anonymous Member of the Bar, 303 S.C. 306, 308, 400 S.E.2d 483, 484 (1991), this Court held that an attorney who is retained solely for the purpose of trial of a non-indigent criminal defendant must serve and file a timely Notice of Appeal as required by Rule 203, SCACR, and continue to represent the client until relieved by Court because counsel is required to take all necessary steps as may be reasonably practicable to protect the client’s interests under Rule 1.16 of the Rules of Professional Conduct. See Rule 602(e)(4), SCACR; see also S.C. Code Ann. § 17-27-100 (2003) (expressly authorizes the right to seek appellate review of the denial of a PCR application).

Petitioner learned that no appeal had been filed, he filed a belated Notice of Appeal and later a second application for post-conviction relief under Austin. App. 117, 11-16; App. 85 (*Pro Se* Notice of Appeal); App. 89- 95 (Second Application for PCR). In fact, the second PCR application was mailed to Petitioner by former PCR Counsel with a letter stating that he should be granted an appeal. App. 116, 2 – 117, 10; App. 125, 16-25.

The PCR Court noted all of the above facts, yet denied Petitioner's second PCR application requesting belated review of the denial of his first PCR application. The denial appears to be the result of the PCR Court's misapprehension of the standard of review it was to apply. The PCR Court correctly noted that review under Austin requires the PCR court to conduct an "evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." Austin v. State, 305 S.C. at 454, 409 S.E.2d at 396. Austin goes on to instruct:

If the circuit court finds this to be true, this Court [the Supreme Court of South Carolina] shall review whether the petitioner was prejudiced by the failure to obtain review of a meritorious issue. In deciding this question, we shall use an analysis akin to that of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding and we shall review the appeal based on the normal "any evidence" standard.

Id. at 454-55; 409 S.E.2d at 396. However, the PCR Court instead interpreted Austin to mean that it should go on to apply a Strickland test once it found applicant requested and was denied appellate review. The PCR Court apparently did find that the petitioner requested and was denied an opportunity to seek appellate review because it then proceeded to engage in a Strickland analysis. Instead, the PCR Court's analysis should have ended when it determined that Petitioner

requested and was denied the opportunity to seek appellate review, which should have resulted in the PCR Court's granting Petitioner's request for belated review of the denial of his first PCR application.

In denying Petitioner's application for Austin review, Judge Hocker's Order of Dismissal included the following legal findings and conclusions:

While arguable the first prong of Strickland – that counsel failed to render reasonably effective assistance under professional norms – may have been satisfied in light of Rule 71.1 (g) SCRPC, Applicant has failed to prove the second prong of Strickland – that he was prejudiced by PCR Counsel's performance.

Applicant failed to show resulting prejudice in this case because this Court finds the findings and holdings in the Honorable Frank R. Addy, Jr.'s Order of Dismissal in the Applicant's first PCR case are correct.

Even if this Court did not agree with the Honorable Frank R. Addy, Jr.'s ruling, Applicant still has failed to show resulting prejudice.

...

There is ample evidence in the record to support Honorable Frank R. Addy, Jr.'s Order of Dismissal. Additionally, the Honorable Frank R. Addy, Jr. found trial counsel's testimony to be credible while finding Applicant testimony not credible. This Court finds PCR Counsel's testimony credible. The Court finds Applicant is not entitled to review pursuant to Austin. Applicant admitted he received a copy of the Order of Dismissal from his first PCR application, which clearly stated that Applicant has thirty (30) days in which to file an appeal, yet decided not to inquire about the status of an appeal until almost one year after the time to file has passed. Based on Applicant's own inaction in this case, this Court denies his allegations against PCR Counsel.

App. 140 – 141 (emphasis added). As such, it is clear that the PCR Court's denial was premised on an incorrect interpretation of Austin, the result of which was the PCR Court's finding that Petitioner was not prejudiced because he would not have been successful on appeal from Judge Addy's Order

of Dismissal. Notably, the merits of Petitioner's appeal from the original Order of Dismissal were not presented to the 2013 PCR Court because they were not a proper subject of consideration it.

Furthermore, the PCR Court's consideration of Petitioner's delay in filing for Austin review is inconsistent with this Court's explicit holding and reasoning in Odom v. State that "the one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin v. State. Austin appeals are considered 'belated appeals' and are used to rectify unjust procedural defects, such as when an attorney does not file a timely appeal." 337 S.C. at 263, 523 S.E.2d at 756-57 (citing Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997) (permitting a belated appeal pursuant to Austin in 1992 from a denial of a PCR application in 1989)). This Court noted that by applying a statute of limitations, the "Court would be holding a *pro se* Austin applicant to a one-year statute of limitations even though the only reason he is filing an Austin appeal is because he was unaware and uninformed of the statute of limitations that applied to his original PCR application." Id. at 264, 523 S.E.2d at 757. Likewise in this case the Petitioner thought that a Notice of Appeal had been filed and made an effort to rectify PCR Counsel's inaction when he became aware of it. The delay should not be held against Petitioner under these circumstances, in view of the above authorities.

Therefore, Petitioner proved that he made a request for appellate review and that PCR counsel failed to file a timely Notice of Appeal such that he is entitled to a file a Petition for Certiorari pursuant to Austin v. State to complete his one fair bite at the apple.

STATEMENT OF AUSTIN QUESTION

Pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), the issue to be raised in a belated petition for certiorari is provided as follows:

Whether the PCR Court erred in finding that plea counsel was not ineffective where plea counsel provided baseless advice to Petitioner that he would receive a sentence of between eighteen and twenty years despite the plea agreement cap of twenty-five years, in view of the damages resulting from and circumstances surrounding the incident, Petitioner's lengthy prior record, and where the record shows that plea counsel was not prepared to proceed to trial?

CONCLUSION

For the reasons set forth herein, Petitioner Brian Keith Stephens respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of February, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County
Donald B. Hocker, Circuit Court Judge

RECEIVED

FEB 11 2015

S.C. Supreme Court

BRIAN KEITH STEPHENS,

PETITIONER,

V.


STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000471

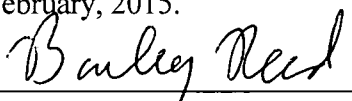
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire and Brian Keith Stephens, #131066, at on this 11th day of February, 2015.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of February, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.