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APR 22 2015

S.C. Supreme Court

April 15, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Case No. 2013-CP-14-444
Billy Lisenby v. State of South Carolina

Dear Mr. Shearouse,

Enclosed for filing are two (2) copies of a Notice of Appeal in the above referenced Post-Conviction Relief case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondent.
2. A copy of the order granting the right to appeal.

Please return a clocked copy of the notice to my office in the self-addressed stamped envelope provided.

Thank you for your cooperation in this matter. Please feel free to contact my office if you have any questions or concerns.

Kindest regards,

Steve Fowler

Cc: Daniel Gourley, Assistant Attorney General

Enclosures: As stated

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NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A
POST CONVICTION RELIEF (PCR) ACTION

APR 22 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

S.C. Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

J. COREDELL MADDOX, JR, Circuit Court Judge.

Case No. 2013-CP-14-444

The State of South Carolina, Respondent,

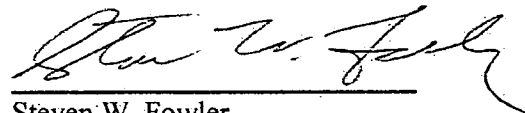
v.

BILLY LISENBY, #200273, Appellant.

NOTICE OF APPEAL

Billy Lisenby appeals the order of the Honorable w. Jeffrey Young, dated April 11, 2013, which denied and dismissed his Post-Conviction Relief application. The Appellant was granted the right to appeal pursuant to Austin v. State in an order signed by the Honorable J. Cordell Maddox, Jr. dated March 12, 2015

April 14, 2015



Steven W. Fowler
1019 Highway 17 South
North Myrtle Beach, South Carolina 29582
(843) 663-0006
Attorney for Appellant

Other Counsel of Record:
Daniel Gourley
Assistant Attorney General
S.C. Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

PROOF OF SERVICE OF A NOTICE OF APPEAL

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2013-CP-14-444

RECEIVED

APR 22 2015

S.C. Supreme Court

The State of South Carolina,

Respondent,

v.

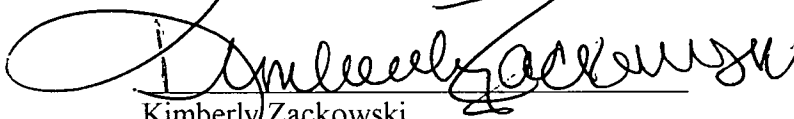
BILLY LISENBY, #200273,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina, via the Attorney General's office, by depositing a copy of it in the United States Mail, postage prepaid, on April 15, 2015, addressed to the attorney of record, Daniel Gourley, Assistant Attorney General, SC Attorney General's Office, Rembert C. Dennis Building, 1000 Assembly St., Columbia, SC 29201.

April 15, 2015



Kimberly Zackowski
Paralegal to Steven W. Fowler
Attorney for Appellant
1019 Highway 17 South
North Myrtle Beach, SC 29582
(843)663-0006

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Billy Lisenby, #200273,

2013-CP-14-444

Applicant,

ORDER GRANTING AN APPEAL
PURSUANT TO AUSTIN V. STATE

vs.

State of South Carolina,

Respondent,

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This matter comes before the Court by way of an application for post-conviction relief (PCR) dated October 25, 2013. The Respondent made its Return and Motion to Dismiss on April 14, 2014. An evidentiary hearing on the matter was convened on December 18, 2014, at the Sumter County Courthouse. The Applicant was present at the hearing and represented by Steven Fowler, Esquire. Daniel Gourley, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

The Court had before it the guilty plea transcript, the Clarendon County Clerk of Court's records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return and Motion to Dismiss, and the South Carolina Court of Appeals records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Applicant was true bill indicted during the October 2010 term of the Clarendon County Grand Jury for Assault on a Correctional Facility (2010-GS-14-0484). Scott Robinson, Esquire, represented him. On

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July 19, 2010, the Applicant pled guilty. He was sentenced by the Honorable Howard P. King to six months imprisonment.

A timely Notice of Appeal was filed. The appeal was dismissed in a written order dated and filed March 6, 2012, for failing to establish any preserved issues. The Remittitur was sent on March 22, 2012.

The Applicant subsequently filed an application for post-conviction relief (PCR) on March 14, 2012 (C.A. No. 2012-CP-14-00132). An evidentiary hearing into the matter was convened on March 20, 2013, at which the Applicant was present and represented by Shaun C. Kent, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of trial counsel.
 - a. Counsel was ineffective for failing to file a direct appeal.
 - b. Counsel was ineffective for failing to pursue an insanity defense

The Honorable W. Jeffrey Young denied and dismissed Applicant's application with prejudice by written Order dated April 11, 2013 and filed April 17, 2013. No appeal was filed.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of Counsel
2. Denial of Due Process
3. Conflict of Interest
4. The right to file an appeal from the denial of my P.C.R.

Respondent made its Return and Motion to Dismiss on April 14, 2014, requesting an evidentiary hearing be held solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing was held to solely address whether or not the Applicant freely and voluntarily waived his right to appeal the denial of his application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. The Court heard testimony from Applicant, who testified that he requested his prior post-conviction relief counsel, Shaun Kent, Esquire, to file an appeal upon the denial of his prior action; several documents affixed to his current application support his testimony. Counsel testified that it was his practice to discuss the right to appeal with his clients. However, Counsel stated that he never discussed Applicant's right to appeal.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that the Applicant is entitled to appeal the denial of his first post-conviction relief application (2012-CP-14-00132) pursuant to Austin v. State. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

However, this Court summarily dismisses the Applicant's allegation that his prior PCR Counsel was ineffective for failing to file a 59(e) and thereby entitling him to a belated 59(e) of his first PCR application (2012-CP-14-00132), as this claim is outside the scope of PCR. This Court notes 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). This Court finds that the contention that prior PCR counsel was ineffective for failing to file a 59(e) is non justiciable. Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-

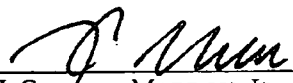
conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation . . ." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Applicant invites this Court to extend Austin's holding to include a claim of ineffective assistance of PCR counsel for failing to file a motion to alter or amend judgment pursuant to rule 59(e) SCRPC. However, this Court finds Austin does not contemplate such reasoning and declines to extend Austin's specific exception to ineffective assistance of post-conviction relief counsel to include a claim of ineffective assistance of PCR counsel for failing to file a rule 59(e) SCRPC.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action (2012-CP-14-00132) pursuant to Austin v. State is warranted. All other allegations are denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. That the Applicant be granted an appeal of case 2012-CP-14-00132 pursuant to Austin v. State; and
2. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 12 day of March, 2015.


J. CORDELL MADDOX, JR.
Presiding Judge
Third Judicial Circuit

Anderson, South Carolina.

Fowler Law Firm
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North Myrtle Beach, SC 29582

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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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