

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.G. Supreme Court

Certiorari to Darlington County
Thomas A. Russo, Circuit Court Judge

WARREN K. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002426

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

LAURA R. BAER
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Division of Appellate Defense
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ISSUE PRESENTED

Did the PCR court properly grant Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner's prior PCR counsel filed an untimely Notice of Appeal of the Order of Dismissal and the State consented to Petitioner's pursuit of a belated review of the denial of his first PCR application?

STATEMENT OF THE CASE

Procedural History

On August 25, 2011, the Darlington County grand jury indicted Petitioner for petit larceny, kidnapping, first degree burglary, and first degree assault and battery. App. 126 – 127, 129, 131 – 132, and 134 – 135. On May 3, 2012, the Darlington County grand jury indicted Petitioner for armed robbery arising from the same alleged events. App. 137 – 138.

On May 7, 2012,¹ Petitioner appeared before the Honorable J. Michael Baxley. App. 1. The case was originally set for trial that afternoon, but was called for a motion to relieve counsel and then a guilty plea. App. 3 – 4. Petitioner was represented by Chelsea McNeill, and the State was represented by assistant solicitor Kendall Burch. App. 1. Judge Baxley denied Petitioner's motion to relieve counsel McNeill and proceed *pro se*. App. 5, l. 13 – 6, l. 24. The Court then accepted Petitioner's guilty plea to the indicted offenses, with the exception of armed robbery. The court reduced the armed robbery charge to common law robbery, also known as strong arm robbery, due to Petitioner's disagreement that he used a brick. App. 19, l. 5 – 25, l. 15.

Judge Baxley sentenced Petitioner to concurrent sentences of thirty days for petit larceny, ten years for first degree assault and battery, fifteen years for common law robbery, twenty-five years for first degree burglary, and twenty-five years for kidnapping. App. 33, l. 18 – 34, l. 18.

No direct appeal was filed.

¹ The cover page of the guilty plea transcript is dated August 29, 2012. App. 1. However, page 3 of the transcript indicates that the hearing commenced on May 7, 2012. App. 3. There was evidence at the guilty plea hearing that Petitioner was indicted for armed robbery the week prior to appearing for trial, such that May 7, 2012 appears to be the correct date of the plea hearing. App. 20, ll. 2-15.

First PCR Application and Hearing (2012-CP-16-732)

On August 28, 2012, Petitioner filed his application for post-conviction relief ("PCR") alleging involuntariness of his plea and ineffective assistance of counsel. App. 37 - 43. The State filed its Return on January 17, 2013. App. 44 - 48. 841-43. Petitioner filed an amended PCR application on April 26, 2013. App. 49 - 54.

On July 16, 2013, an evidentiary hearing was held before the Honorable R. Ferrell Cothran Jr. Petitioner was represented by Parker E. Howle, and the State was represented by Assistant Attorney General Karen C. Ratigan. App. 55. Petitioner and plea counsel McNeill both testified at the hearing.

At the PCR hearing, Petitioner testified that he was originally represented in his case by Jim Cox. Cox had negotiated a fifteen year plea agreement on his behalf, which was to run concurrent to a seven year sentence for a probation violation. He never received an explanation as to why he was appointed a public defender when he paid Cox to represent him. App. 59, ll. 8 - 60, l. 12. He never rejected the fifteen year offer. Petitioner attempted to have counsel McNeill relieved so that he could represent himself but the plea judge denied his motion. Counsel McNeill told the plea court that the fifteen year offer had been rejected. App. 62, l. 5 - 63, l. 16; App. 64, l. 23 - 65, l. 2. When asked why he did not tell the plea judge that he thought he had accepted the fifteen year offer, Petitioner responded that he did not know that he could raise an objection to that. App. 71, ll. 3 - 72, l. 6. He further testified that counsel McNeill did not advise him of his right to appeal. App. 65, ll. 9-14.

Plea counsel McNeill testified that the Fourth Circuit public defender's office was appointed to represent Petitioner on August 16, 2011. Another public defender was assigned to the case in September, and counsel McNeill took over the case on October 6, 2011. Their first meeting

together was in April 2012. App. 77, 2-17. Counsel McNeill contacted Cox's office and was advised that he represented Petitioner on a prior probation violation matter and a bond hearing in the present case, but said that it was her "understanding" that Cox was not retained for the case in chief. She also understood that a fifteen year offer was made at the time of Petitioner's probation revocation hearing, while he was represented by Cox, and the State took his failure to accept it that day as a rejection. Counsel McNeill said "I know that he [Petitioner] did not understand he was rejecting it but the State took it as a rejection." App. 75, l. 2 – 76, l. 18; App. 81, l. 12-14; App. 82, ll. 7-9. App. 76, ll. 4-18. She communicated with the solicitor, but the solicitor adamantly refused to extend any offer. Plea counsel admitted that her relationship with Petitioner was strained because of his frustration that Cox was not representing him and that the fifteen year offer was no longer available. This was compounded when the State indicted him for armed robbery less than one week before trial. App. 77, l. 18 – 78, l. 21.

Order of Dismissal (2012-CP-16-732)

Judge Cothran's Order of Dismissal denying Petitioner's PCR application was filed September 9, 2013. App. 86 – 93. He ruled that trial counsel's representation was not deficient and found that Petitioner did not make any averment that he was represented by a private attorney, Jim Cox, to the judge at the plea hearing. He further found that Petitioner failed to meet his burden of proving that he was entitled to a review of his direct appeal issues and "failed to articulate [why] a rational defendant would have wanted to appeal in this situation..." App. 91.

PCR counsel did not file a timely Notice of Appeal on Petitioner's behalf.

Second PCR Application and Hearing (2013-CP-16-942)

Petitioner filed a subsequent PCR application on November 20, 2013, asserting that his original PCR counsel, Howle, was ineffective in failing to file a timely notice of appeal. App. 94 –

108. The State filed its Return on May 30, 2014. App. 109 - 113. An evidentiary hearing was held on July 21, 2014 before the Honorable Thomas A. Russo. Petitioner was represented by Tristan M. Shaffer, and the State was represented by Assistant Attorney General Joshua L. Thomas. App. 114. The parties placed a consent agreement on the record in light of that fact that Howle filed an untimely Notice of Appeal from the Order of Dismissal, resulting in its dismissal. The parties agreed that based on the circumstances, Petitioner should be given an opportunity to appeal from Judge Cothran's Order. App. 117 - 119.

Order Granting Belated PCR Appeal Pursuant to Austin (2013-CP-16-942)

On September 12, 2014, Judge Russo entered an Order Granting Appeal Pursuant to Austin v. State, finding that the Notice of Appeal filed by Howle was untimely such that Petitioner requested and was denied an opportunity to seek appellate review. He accordingly granted Petitioner's request for a review of his PCR action pursuant to Austin. App. 121 - 124.

This petition follows pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated appellate review of an Austin PCR application). Additionally, appellate counsel is filing a petition for writ of certiorari pursuant to Johnson v. State² on today's date.

² 294 S.C. 310, 364 S.E.2d 201 (1988).

ARGUMENT

The PCR court properly granted Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991) where Petitioner's prior PCR counsel filed an untimely Notice of Appeal of the Judge's Order of Dismissal and the State consented to Petitioner's pursuit of a belated review of the denial of his first PCR application.

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. App. 121 – 124; see Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

The South Carolina Supreme 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).

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. Id. (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 this case, the State consented to Petitioner's request for a belated appeal of the Order of Dismissal. App. 117, ll. 17-19. Assistant Attorney General Thomas proffered that Petitioner's first PCR counsel filed a Notice of Appeal, but due to an oversight on his part the appeal was untimely. App. 117, ll. 9 – 17. The second PCR court properly found that Petitioner

was entitled to file a belated Notice of Appeal from the Order of Dismissal in the first PCR action. App. 118, l. 23 – 119, l. 1; App. 121 – 124.

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

For the reasons set forth herein, Petitioner Warren K. Smith respectfully request this Court grant his petition for certiorari and affirm the PCR court's grant of belated review of Petitioner's original PCR application.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Thomas A. Russo, Circuit Court Judge

WARREN K. SMITH,

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V.

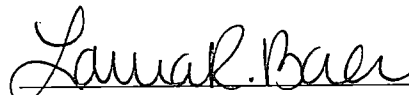
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APPELATE CASE NO. 2014-002426

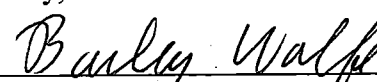
CERTIFICATE OF SERVICE

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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Warren K. Smith at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 1st day of July, 2015.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of July, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.