

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Diane S. Goodstein, Circuit Court Judge

2010-CP-38-1758

RECEIVED

SEP 04 2015

S.C. SUPREME COURT

Tony Lee Belton, #340217,

Appellant,

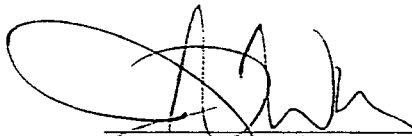
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Tony Lee Belton, #340217, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed April 2, 2012. Mr. Belton, subsequently filed a second Application for Post-Conviction Relief (2013-CP-38-01200) and by Order filed August 21, 2015, Judge Maité Murphy ordered that Mr. Belton be granted an appeal of his initial Post-Conviction Relief Application pursuant to Austin v. State.



Jonathan D. Waller

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ATTORNEY FOR PETITIONER

This 2 day of September, 2015.

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

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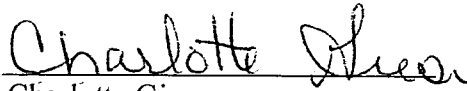
v.

STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 2nd day of September 2015.


Charlotte Giese

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Tony Lee Belton, #340217,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

ORDER GRANTING AN
APPEAL PURSUANT TO
AUSTIN V. STATE¹

Case No. 2013-CP-38-01200

FILED
2015 JUN 21 A 11:44

CLERK OF COURT
ORANGEBURG, SC

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 25, 2013. Respondent made its Return and Motion to Dismissal All Claims Beyond Austin Review of First PCR on May 1, 2014, requesting an evidentiary hearing be convened solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. Jonathan D. Waller, Esquire was appointed by the Orangeburg County Clerk of Court. An evidentiary hearing was held on May 20, 2015, at the Dorchester County Courthouse. Applicant was present and represented by counsel, Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted for Assault and Battery with Intent to Kill (2008-GS-38-00688) and Burglary in the First Degree (2008-GS-38-00689). Applicant was represented by Margaret E. Hinds, Esquire and pled guilty on April 5, 2010, before the Honorable James C. Williams, Jr., to Assault and Battery with Intent to Kill and

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

ATTEST: TRUE COPY

Wingie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY

to the lesser included offense of Burglary in the Second Degree (Non-violent). Judge Williams sentenced Applicant to nine years confinement on each charge, with the sentences to be served concurrently. Applicant did not appeal his conviction or sentence.

Applicant subsequently filed an application for post-conviction relief on December 7, 2010. (2010-CP-38-1758). In his first application, Applicant asserted a claim of ineffective assistance of counsel. An evidentiary hearing was convened on November 29, 2011, at the Dorchester County Courthouse before the Honorable Diane S. Goodstein. Applicant was present at the hearing and was represented by Thomas Sims, Esquire. By written Order filed April 2, 2012, Judge Goodstein denied and dismissed Applicant's post-conviction relief action.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel due to violations of my Constitutional Rights of the 6th, 9th, and 14th Amendments."
 - a. "Counsel was ineffective due to depriving Applicant of a Bond."
 - b. "Counsel lied to Judge on or about date 9/9/09 about a fictitious charge."
 - c. "Excessive delay on conviction."
2. "Petitioner's Public Defender has made a false statement on stand during the PCR hearing and Petitioner is seeking a new hearing based on Public Defender and PCR Counsel – Thomas Sims."

At the outset of evidentiary hearing, Respondent renewed its Motion to Dismiss All Claims Beyond Austin Review of First PCR. Applicant's counsel candidly informed the court that Applicant had no grounds to oppose the Respondent's motion and would be proceeding only on

Applicant's claim that he was denied the right to appeal the dismissal of his previous post-conviction relief application.

II. SUMMARY OF TESTIMONY

At the hearing, the Applicant testified on his own behalf. The Applicant testified that he pled guilty to his charges in 2010 and did not appeal his conviction or sentence. He further testified that he filed an Application for Post Conviction Relief in December of 2010. Applicant testified that Thomas Sims represented him on his Post Conviction Relief Application from 2010 and that an evidentiary hearing took place in front of Judge Goodstein; who subsequently denied his application in April of 2012. Applicant testified that counsel did not file an appeal from Judge Goodstein's Order and that he and Mr. Sims did not discuss an appeal. Specifically, Applicant testified that he never told counsel that he did not wish to appeal Judge Goodstein's Order of Dismissal. Further, Applicant testified that he attempted to file an appeal *pro se* but his appeal was dismissed for being filed after the 30 day time limit.

Following Applicant's testimony, PCR counsel, Thomas Sims testified. Mr. Sims testified that he represented Applicant on his PCR that was ultimately dismissed by Judge Goodstein. He further testified that he believed that appealing that Order of Dismissal would have been frivolous, as he did not feel there were any appealable issues. He testified that he has since become aware that an appeal is required following a dismissal of a PCR following an evidentiary hearing, absent a knowing and voluntary waiver of that right to appeal.

III. 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.

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 post-conviction relief application (2010-CP-38-1758). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. 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.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action (2010-CP-38-1758) pursuant to Austin v. State is warranted.

IT IS THEREFORE ORDERED:

1. That the Applicant be granted an appeal of case 2010-CP-38-1758 pursuant to Austin v. State; this second application for post-conviction relief is hereby denied and dismissed with prejudice;
2. Within thirty (30) days of the service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR, for the appropriate procedure for a belated appeal; and
3. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 3 day of Aug, 2015

Maité Murphy
Maité Murphy
Presiding Judge

St. Mary, South Carolina

THE GIESE LAW FIRM, LLC
1315 BLANDING STREET
COLUMBIA, SC 29201

W. BARNEY GIESE

KEITH GIESE

JONATHAN D. WALLER

JUSTIN M. KATA

KELLY L. GIESE

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September 2, 2015

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

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SEP 04 2015

Re: Tony Lee Belton vs. State of South Carolina
C/A No: 2010-CP-38-1758

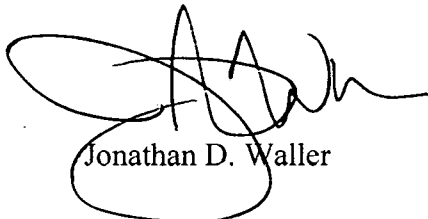
S.C. SUPREME COURT

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Belton in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

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