

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

JOSHUA RAY GREER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000377

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge correctly find that Petitioner is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT

In November of 2002, the Spartanburg County Grand Jury indicted Petitioner Greer for murder, indictment #02-GS-42-5209. In June of 2003, the Spartanburg County Grand Jury indicted Petitioner for armed robbery, indictment #03-GS-42-2201. On September 20, 2005, Petitioner proceeded to jury trial before the Honorable Wyatt T. Saunders. Jason Chehoski represented Petitioner at trial. James Donald Willingham, II and Melissa Millican prosecuted the case. The jury returned verdicts of guilty and Judge Saunders sentenced Petitioner to thirty (30) years for murder and a consecutive twenty (20) years for armed robbery. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction. State v. Greer, No. 2007-UP-512 (S.C.Ct.App. November 7, 2007).

On August 21, 2008, Petitioner filed an application for post conviction relief, 2008-CP-42-4438. On May 26, 2009, an evidentiary hearing was held before the Honorable J. Mark Hayes, II. Franklin M. Mann, Jr. represented Petitioner at the PCR hearing. Karen C. Ratigan represented the State. In a written order signed July 24, 2009, Judge Hayes denied relief and dismissed the application. Counsel for Petitioner did not file a notice of intent to appeal. On August 17, 2009, Petitioner filed a *pro se* notice of intent to appeal with the Spartanburg County Clerk of Court but not with the appellate court. The appeal was not perfected. (App. p. 899- 900).

On April 13, 2012, Petitioner filed a second application for post conviction relief, 2012-CP-42-1605. In the second application Petitioner requested a belated appeal from the denial of post conviction relief. (App. pp. 892-898). On August 23, 2013, the State filed a return and motion to dismiss. (App. p. 901). On October 3, 2013, the Honorable Roger L. Couch signed a conditional order of dismissal. (App. p. 907). Petitioner, acting *pro se*, objected to the conditional order of dismissal. (App. p. 913). ON September 16, 2014, an evidentiary hearing was held before Judge

Couch. J. Brandt Rucker represented petitioner at the PCR hearing. J. Clayton Mitchell represented the State. In a written order signed December 9, 2014, Judge Couch granted the belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). A timely notice of intent to appeal was filed and this petition for writ of certiorari as well as a separately filed Austin petition for writ of certiorari follows.

ARGUMENT

The PCR judge correctly found that Petitioner is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

During the second PCR hearing, requesting the belated appeal pursuant to Austin, the first PCR attorney testified that he would not have filed the notice of intent to appeal on Petitioner's behalf because that would have exceeded his representation. (App. p. 929, line 18 – p. 930, lines 1-5). PCR counsel testified that while he met with client after the PCR hearing, he did not discuss an appeal with Petitioner because an order had not been issued. (App. p. 928, line 11 – p. 929, lines 1-2). PCR counsel testified that he believed that Petitioner had a meritorious PCR claim. (App. p. 928, lines 16-18). Petitioner testified that he told PCR counsel he wished to appeal. (App. p. 923, line 16 – p. 924, lines 1-6). In the order of dismissal the second PCR judge found PCR counsel ineffective in failing to file the notice of intent to appeal and granted the belated appeal pursuant to Austin v. State. The PCR judge correctly granted the belated appeal.

In Odom v. State, 337 S.C. 256, 261-62, 523 S.E.2d 753, 756 (1999), this Court wrote:

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. See Aice, 305 S.C. at 448, 409 S.E.2d at 392; Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997) (permitting an Austin appeal where original PCR counsel failed to appeal from the first denial of PCR). In Austin, the defendant never received a full procedural “bite at the apple” because he was prevented from seeking *any* review of the denial of his PCR application. Aice, 305 S.C. at 452, 409 S.E.2d at 395. As a method of effectuating the purpose of Rule 71.1(g) SCRCP and enforcing Austin's entitlement to a PCR proceeding, this Court held Austin could attack his PCR counsel as ineffective by a petition for a writ of certiorari. Id.

A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (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. See King, 308 S.C. at 348, 417 S.E.2d at 868. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and this Court will review whether the


petitioner was prejudiced by the failure to obtain appellate review. Id.; see King, 308 S.C. at 349, 417 S.E.2d at 868 (outlining the procedure used to seek review pursuant to Austin v. State); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992).(footnote omitted).

Petitioner requested and was denied an opportunity for appellate review of the order denying post conviction relief. Petitioner did not knowingly and intelligently waive the right to appellate review of the previous PCR order. As discussed in the separately filed Austin petition, Petitioner was prejudiced by PCR counsel's failure to obtain appellate review. The grant of the belated appeal was proper.

CONCLUSION

Based on the above argument, this court should find that the PCR court properly granted the belated appeal pursuant to Austin v. State.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of September, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

JOSHUA RAY GREER,
PETITIONER,

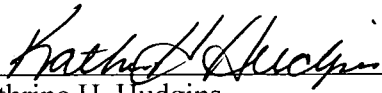
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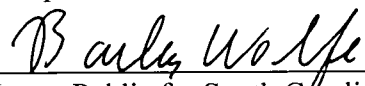
CERTIFICATE OF SERVICE

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 J. Clayton Mitchell, Esquire this 25th day of September, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of September, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021