

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. Supreme Court

DERRICK JAVARD GEORGE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002429

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court was correct in ruling that petitioner was entitled to a belated appeal from the denial of his first PCR as his first PCR attorney failed to file an appeal after petitioner requested one?

STATEMENT

In March 2011, the Florence County Grand Jury indicted Derrick George on the charge of armed robbery (AR). In May 2011, the Darlington County Grand Jury indicted Derrick George on two counts of armed robbery and carrying a concealed weapon by an inmate. On August 29, 2011, Petitioner George appeared before the Honorable Howard P. King and entered a guilty plea to three counts of AR and carrying a concealed weapon by an inmate which included both the Florence and Darlington County charges. App. 3, ll. 1 – 25; App. 12, ll. 1 – 16. Petitioner George was represented by John M. Ervin, III, and the state was represented by John Charles Jepertinger and John W. Holt. App. 1. Judge King accepted the recommendation by the state for thirteen years on the three armed robberies and ten years on the weapon's charge with all sentences to run concurrently. App. 20, ll. 25 – App. 21, ll. 25. Petitioner George attempted to file an appeal from his guilty plea. The Court of Appeals issued an order requiring George to file an identification of the issues pursuant to Rule 203 (d) (1) (B) (iv), SCACR. George's plea attorney had asserted that there were no issues raised during the guilty plea or sentence for appeal. App. 74.

On August 29, 2012, George filed his first PCR application. (2012-CP-16-0735). The state filed a return on January 17, 2013. An evidentiary hearing was held on July 17, 2013 before the Honorable R. Ferrell Cothran, Jr. George was represented by Parker E. Howle, and the state was represented by Karen C. Ratigan. App. 36. On August 27, 2013, Judge Cothran issued an order denying George's PCR application and dismissing it with prejudice. App. 57 – App. 63. George filed a notice of appeal from Judge Cothran's order which the Supreme Court dismissed as untimely on October 22, 2013. App. 89.

On November 26, 2013, George filed a second PCR application, (2013-CP-16-93). The state filed a return on June 2, 2014. A hearing was held on July 21, 2014 before the Honorable Thomas

A. Russo. George was represented by Tristan M. Shaffer, and the state was represented by Joshua L. Thomas. App. 95. On August 29, 2014, Judge Russo issued an order granting George a belated appeal of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395 (1991). App. 102-App. 103. George's PCR attorney filed a notice of appeal. This petition follows. A Johnson petition for a writ of certiorari pursuant to Austin v. State is filed simultaneously with this petition.

ARGUMENT

The PCR court was correct in ruling that petitioner was entitled to a belated appeal from the denial of his first PCR as his first PCR attorney failed to file an appeal after petitioner requested one, and this ruling should be affirmed.

Petitioner George pled guilty on August 29, 2011 to three counts of armed robbery and carrying a concealed weapon by an inmate. He was sentenced to a total of thirteen years. App. 1 – App. 22. The state recommended the sentence of thirteen years total with all sentences to run concurrent to each other. App. 12, ll. 3 – App. 13, ll. 3.

At his first PCR hearing on July 17, 2013, Petitioner George testified that his plea attorney was ineffective because he allowed George to plead guilty when George had a mental illness and did not understand the charges. George said he did not remember committing the crimes. His diagnosis was psychosis and antisocial personality. He was taking medication and told his attorney he did not want to go forward. App. 39, ll. 1 – App. 43, ll. 6.

George's plea attorney testified that he did not remember George telling him of any mental illness. Plea counsel saw no signs of mental illness and felt George was competent and understood. App. 48, ll. 11 – App. 49, ll. 25.

The first PCR judge, Judge Ferrell Cothran, dismissed George's PCR application by finding that George's guilty plea was voluntary and knowing. The judge found that George did not meet his burden of proof that plea counsel failed to render reasonably effective assistance under prevailing professional norms. App. 57 – App. 63.

At his second PCR hearing, the state explained to the judge that George's plea counsel candidly admitted that he missed the deadline for filing George's appeal from his first PCR. The state then requested that the judge grant Petitioner George an appeal from his first PCR pursuant to

Austin v. State. The second PCR judge, Judge Thomas Russo, issued an order granting George a belated appeal of his first PCR under Austin v. State. App. 100 – App. 103.

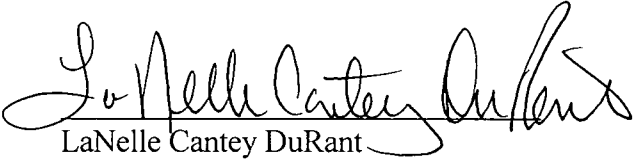
A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and the appellate court will review whether the petitioner was prejudiced by the failure to obtain appellate review. Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992). An applicant has a right to counsel's assistance in seeking review of the denial of PCR. Austin, 305 S.C. at 454, 409 S.E.2d at 396; Rule 71.1(g), SCRPC.

George was entitled to an appeal from his first PCR. The state requested that the judge grant a belated appeal from the first PCR.

CONCLUSION

For the above reasons, the order of the PCR court granting a belated appeal from the denial of the first PCR should be affirmed.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name and title.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of November, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County

Thomas A. Russo, Circuit Court Judge

DERRICK JAVARD GEORGE, PETITIONER,

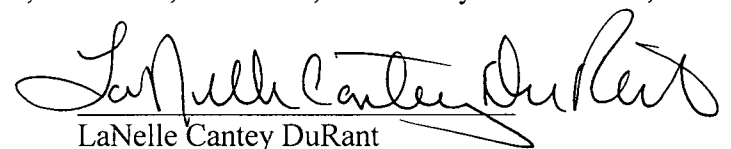
V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2014-002429

CERTIFICATE OF SERVICE

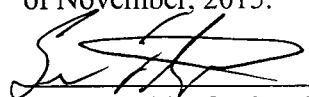
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Derrick George, #241851, at Broad River, Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of November, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of November, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.