

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
BROOKS P. GOLDSMITH, CIRCUIT COURT JUDGE
2014-CP-32-4072

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FEB 10 2016

SC SUPREME COURT

Michael Elders,.....Petitioner.

vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Michael Elders appeals the Honorable Edgar W. Dickson's May 2, 2014 Order of Dismissal under Docket Number 2012-CP-32-3136 pursuant to Austin v. State. Undersigned counsel received notice of entry of Judge Goldsmith's order on February 2, 2016. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Good
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Attorney for the Petitioner.

February 10, 2016.

OTHER COUNSEL OF RECORD:
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PROOF OF SERVICE

I, Anna Good, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Patrick Schmeckpepper, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 10th day of February 2016.

Respectfully submitted,



Anna R. Good, Esquire
Law Office of Anna Good, LLC
PO Box 7284
Columbia, South Carolina 29202

ORIGINAL

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

ELEVENTH JUDICIAL CIRCUIT

Michael Elders,
S.C.D.C. No. 345023,

FILED
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C.A. No. 2014-CP-32-4072

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FEB 10 2016

SC SUPREME COURT

Applicant,

CLERK OF COURT
LEXINGTON, SC

ORDER OF DISMISSAL PURSUANT
TO AUSTIN V. STATE.¹

v.)

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed November 7, 2014. The State submitted its responsive pleadings requesting partial summary dismissal. An evidentiary hearing into the matter was convened on April 23, 2015 at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Anna Goode, Esq. The Respondent was represented by Walt Whitmire, Esq., of the South Carolina Attorney General's Office.

In lieu of Tristan Shaffer's affidavit (1st PCR counsel), the State stipulated that Applicant would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of the C.A. No. 2012-CP-32-3136 Application entitled him to a Austin relief. Counsel for Applicant apprised the Court that she had fully discussed the current PCR Application with Applicant, advised Applicant of the procedural bars against successive and untimely PCR litigation, and was fully prepared to proceed forward.

This Court also had before it a copy of the transcript from the Applicant's trial transcript, the records of the Lexington County Clerk of Court, the Applicant's records from the South

¹ Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991).

Carolina Department of Corrections, the Application for Post-Conviction Relief, the State's Return, the prior PCR record and transcript, Counsel Shaffer's affidavit, and evidence presented at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the October 2009 term of the Court of General Sessions for Lexington County for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677). Applicant was then indicted at the February 2011 committing a lewd act upon a minor (2011-GS-32-0364). He was represented by William Rast, Esq. On March 2, 2011, Applicant proceeded to trial where he was found guilty as charged. He was sentenced by the Honorable William P. Keesley, to confinement for a period of thirty (30) years for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677) and fifteen (15) years committing a lewd act upon a minor (2011-GS-32-0364). The sentences were to be served concurrently. A timely Notice of Appeal was filed on Applicant's behalf. Applicant was represented by Elizabeth Franklin-Best, Esquire at the direct appeal. The appeal was subsequently withdrawn.

C.A. No. 2012-CP-32-3136

Applicant filed a timely Application for PCR on August 2, 2012. An evidentiary hearing into the matter was convened on at the Lexington County Courthouse on August 14, 2013. Applicant was present at the hearing and was represented by Tristan Shaffer, Esq. Respondent was represented by Walt Whitmire, Esq., of the South Carolina Attorney General's Office. Counsel testified at the hearing. The Honorable Edgar W. Dickson denied and dismissed the Application in an order filed on May 2, 2014. Applicant did not seek a discretionary appeal.

C.A. No. 2014-CP-32-4072 (present case)

In his present application for post-conviction relief, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of PCR counsel:
 - a. "PCR counsel denied Applicant his statutory right to an appeal."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the stipulations and waivers presented at the evidentiary hearing. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents, the written plea agreement from the General Sessions Records, the record from the original 2011 PCR Application, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact.

A.

As a result of Attorney Shaffer's affidavit, the State stipulated that Applicant would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of the C.A. No. 2012-CP-32-3136. Application entitled him to Austin relief where PCR counsel was unable to locate his file to rebut the allegation. Successive PCR Counsel for Applicant apprised the Court that she had fully discussed the current PCR Application with Applicant, advised Applicant of the procedural bars against successive and untimely PCR litigation, and was fully prepared to proceed on his case. Successive PCR Counsel apprised the Court that Applicant desired a discretionary appeal from Judge Dickson's order. Successive PCR Counsel also apprised the Court that Applicant wished to abandon any and all allegations that are

procedurally barred as untimely and successive.

This Court accepts the stipulation and finds that Applicant's allegation he was denied an appeal from the decision in his prior post-conviction relief action. "The right to seek appellate review of the denial of PCR is expressly authorized by state law." Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100). "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." Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citations omitted). Even if the post-conviction court determines the applicant did not freely and voluntarily waive his appellate rights, the applicant must still petition the South Carolina Supreme Court to determine "whether he was prejudiced by his failure to obtain review of a meritorious issue." Odom, 337 S.C. at 263, 523 S.E.2d at 756 (1999).

Based on the stipulations, the Court finds Applicant did not knowingly and voluntarily waive the right to seek appellate review of Judge McIntosh's order. Accordingly, the Court hereby grants Applicant's request for appellate review of his prior post-conviction relief action pursuant to Austin v. State.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant is entitled to an appeal of his prior post-conviction relief action pursuant to Austin v. State.


The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Counsel and Applicant are directed to King v. State, 308 S.C.

348, 417 S.E.2d 868 (1992), for the appropriate procedure for securing appellate review pursuant to Austin v. State.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief seeking an appeal pursuant to Austin v. State is granted; and
2. Applicant shall be remanded to the custody of the Department of Corrections.

AND IT IS SO ORDERED this 4 day of JANUARY, 2015.



BROOKS P. GOLDSMITH
Presiding Judge
11th Judicial Circuit


_____, South Carolina

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LEXINGTON, SC

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