

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Aiken County

Edgar W. Dickson, Circuit Court Judge

TORYAST J. JOHNSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002099

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether there was evidence to support granting petitioner a belated appeal of the denial of his first PCR when both parties consented to the grant of a belated appeal?

STATEMENT

On August 31, 2011, petitioner appeared before the Honorable Doyet A. Early, III in Aiken County and pled guilty to armed robbery. He was sentenced to thirty (30) years imprisonment. Ola A. Johnson, Esquire was plea counsel. David W. Miller, Esquire was the assistant solicitor. (App. p. 1 – p. 22)

Petitioner filed an application for post-conviction relief on June 11, 2012. (App p. 23 – p. 34) Respondent filed a return dated September 11, 2012. (App. p. 35 – p. 41) An evidentiary hearing was held on July 10, 2013, before the Honorable R. Ferrell Cothran, Jr. Petitioner was present and represented by Marsha Banks, Esquire. Respondent was represented David Gourley, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 53 – p. 97) On August 19, 2013 Judge Cothran issued an order denying and dismissing the application for post-conviction relief. (App. p. 42 – p. 52) There was no appeal.

On March 10, 2014, petitioner filed a second application for post-conviction relief alleging his first PCR attorney failed to file a notice of appeal from the dismissal of his first application for post-conviction relief. (App. p. 98 – p. 108) Respondent filed a return and motion to dismiss all claims beyond Austin review.¹ (App. p. 109 – p. 112) On September 11, 2015, a brief hearing was held before the Honorable Edgar W. Dickson. Petitioner was represented by Lance S. Boozer, Esquire. Respondent was again represented by David Gourley, Esquire. With respondent's consent, Judge Dickson granted petitioner a belated appeal of the denial of his first post-conviction relief action pursuant to Austin v. State. (App. p. 113 – p. 120)

This petition follows with a discussion on the granting of a belated appeal. A separate Austin petition will be filed concerning issues presented during the first PCR hearing.

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

ARGUMENT

There was evidence to support granting petitioner a belated appeal of his first PCR action when both parties consented to the grant of a bleated appeal.

The United States Supreme Court has held that there is no constitutional right to appointed counsel in a post-conviction relief action. Pennsylvania v. Finley, 481, U.S. 551, 107 S.Ct. 1990 (1987). The right to effective assistance of counsel under the Sixth Amendment to the United States Constitution does not apply to attorneys in state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991). In Aice v. State, 305 S.C. 448 S.E.2d 392 (1991) the South Carolina Supreme Court held that a convict may not bring forth a successive application for post-conviction relief on grounds that the first post-conviction relief application was insufficient because the prior post-conviction relief counsel was ineffective. Thus, successive applications are not favored. S.C. Code § 17-27-90. In Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) the South Carolina Supreme Court did rule that there was an exception to the rule barring claims of ineffective assistance of post-conviction relief counsel. That exception is where a prior post-conviction relief counsel fails to appeal the denial of the application. The issue becomes whether the petitioner requested and was denied the opportunity to appeal. In such cases, the case will be remanded for an evidentiary hearing to determine whether a belated appeal of the denial of the first post-conviction relief action should be granted.

In King v. State, 308, S.C. 348, 417 S.E.2d 868 (1992) the Court set forth the following procedure for when a belated appeal is sought pursuant to Austin v. State, *supra*:

(1) When the post-conviction relief judge has affirmatively found that the right to appellate review of a previous post-conviction relief order was not knowingly and intelligently waived, the petition shall raise this question along with all other questions petitioner seeks to have reviewed from that order. At the same time this petition is served, petitioner shall

serve and file an Austin petition addressing all questions from the previous post-conviction relief order. The Austin petition shall comply with the requirements of Rule 227(d). The Appendix shall contain the entire records from both post-conviction relief proceedings. Respondent's return to the petition shall address the questions from the latest post-conviction relief order, including whether the right to appellate review of the previous post-conviction relief order was knowingly and intelligently waived. At the same time this return is served, respondent shall serve and file an Austin return addressing the questions from the previous post-conviction relief order.

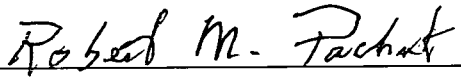
(2) When the post-conviction relief judge has found that the applicant is not entitled to and Austin v. State review, the petition shall raise the question of waiver of the right to appellate review of the previous post-conviction relief order along with all other questions petitioner seeks to have reviewed from that order. The petition shall also contain a "Statement of Austin Questions" listing the questions to be raised if an Austin v. State review is granted. An Austin petition addressing the questions will not be allowed unless certiorari is granted on the Austin v. State question.

There was no appeal of the denial of petitioner's first PCR. He raised this issue in his second PCR application. (App. p. 100) Respondent agreed in his return that there should be a hearing on this issue. (App. p. 109 – p. 112) Respondent consented to a belated appeal at the hearing. (App. p. 115 – p. 116) This was reflected in Judge Dickinson's order granting the belated appeal pursuant to Austin v. State. Consent orders are not appealable. Hooper v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999).

CONCLUSION

Judge Dickson's order granting a belated appeal pursuant to Austin v. State should be upheld.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Edgar W. Dickson, Circuit Court Judge

TORYAST J. JOHNSON

PETITIONER,

V.

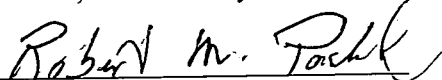
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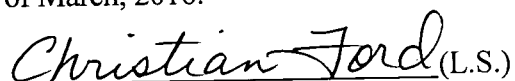
CERTIFICATE OF SERVICE

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 Daniel Gourley, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Toryast Johnson at the Perry Correctional Institution 430 Oaklawn Road, Pelzer, SC 29669, this 24th day of March, 2016.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of March, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: March 1, 2026.