STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

TONY LEE BELTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001875

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I.

Did the PCR court properly grant Petitioner's request for a belated PCR appeal pursuant to *Austin v. State*[1] where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal?

II.

Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where Petitioner based his decision to plead guilty on plea counsel's advice when Petitioner had no knowledge of plea counsel's failure to adequately investigate Petitioner's possible alibi defense?

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

STATEMENT

On January 3, 2008, Phillip Miles, a student at S.C. State, returned to his Orangeburg, South Carolina apartment after winter break and discovered several moving boxes stacked next to his front door. App. 11, l. 2 - 12, l. 17. Miles initially did not think much of the boxes as a roommate was moving out. *Id.*

Miles then went upstairs and discovered that his bedroom was in disarray. He then walked into an adjoining bedroom and saw an unknown individual hiding in the bedroom closet. *Id.* Miles and the intruder began fighting and soon ended up in the second floor hallway of Miles' apartment. There, a second intruder, whom Miles would later identify as Petitioner, interrupted the fight by pointing a gun at Miles. *Id.*

Miles was shot in the arm while attempting to flee. Once Miles reached his apartment's leasing office, he contacted police. *Id.* Shortly after arriving at the apartment complex, police interrogated Michael Simmons, a non-resident they found loitering in the parking lot. *Id.*

Simmons subsequently provided police with a written statement implicating Petitioner and another individual, Tommy Wilson, in the burglary. *Id.* Simmons and Miles later identified both Petitioner and Wilson in separate photographic lineups. *Id.* Neither Simmons nor Miles nor any of the police reports entered into the record indicated that any of the perpetrators had been shot during the incident. *Id.*; App. 118 - 124.

Indictment

On May 5, 2008, the Orangeburg County Grand Jury indicted Petitioner for assault and battery within intent to kill (ABIK) and first degree burglary. App. 107 - 110.

Guilty Plea

On April 5, 2010, Petitioner pled guilty to second degree burglary and ABIK before the Honorable James C. Williams, Jr. App. 1 - 16. Margaret Hinds represented Petitioner and Assistant Solicitor Tommy Scott represented the State. Judge Williams sentenced Petitioner to two concurrent sentences of nine years imprisonment. App. 15, l. 10-14.

First PCR Application and Evidentiary Hearing

On December 17, 2010, Petitioner filed an application for post-conviction relief (PCR) alleging that defense counsel was ineffective. App. 17 - 23. On May 3, 2011, the State filed a Return. App. 24 - 28 On November 29, 2011, an evidentiary hearing was held before the Honorable Diane Schafer Goodstein. Thomas R. Sims represented Petitioner. Assistant Attorney General Robert D. Corney represented the State. Defense counsel and Petitioner both testified.

Hearing Testimony of Petitioner

Petitioner stated that he had provided defense counsel with an alibi for the night of the incident. App. 36, l. 8 - 39, l. 13. Petitioner recalled that he had been shot while at a friend's house off of Garner's Ferry Road in Columbia. *Id.* Petitioner had been admitted to the Dorn Va Hospital, on Garner's Ferry, at around 11:40 pm on the day of the incident. App. 121.

Petitioner also provided defense counsel with the names of two alibi witnesses: Kalina Thompson and Shawndella Houston. App. 37, l. 8-13. He did not know if defense counsel ever contacted these witnesses. *Id.* Petitioner testified that, because counsel did not investigate his potential alibi, he lost faith in her ability to represent him.

He recollected that defense counsel ordered him not to protest his innocence at the guilty plea hearing and that he entered into the guilty plea because he felt abandoned by counsel. App. 39,

ll. 3-19; App. 52, l. 19 - 23, l. 15. Petitioner maintained that, had counsel adequately investigated his case, he would not have pled guilty, but would have stood trial. App. 42, l. 2 - 43, l. 18.

Hearing Testimony of Defense Counsel

Mirroring Petitioner's testimony, defense counsel recalled that Petitioner provided her with an alibi, "[h]e immediately told me about an alibi defense." App. 56, l. 6 - 57, l. 9. Counsel claimed that the burglary occurred approximately one hour and fifteen minutes before Petitioner was admitted to the hospital. Thus, in theory, Petitioner could have participated in the burglary. *Id.* Petitioner was treated at both the Dorn VA and Richland Memorial.

Counsel averred that she contacted two potential alibi witnesses. App. 58, l. 4 - 59, l. 16. Kalina Thompson could not remember if she had been with Petitioner on the day of the burglary and shooting. *Id.* The second witness, a Mr. Utsey, was uncooperative. *Id.*

Counsel never mentioned whether she contacted Shawndella Houston. Defense counsel gave no indication that she attempted to verify whether Petitioner had been the victim of a shooting off of Garner's Ferry.

Order of Dismissal

On April 2, 2012, Judge Goodstein denied Petitioner's application via a written order of dismissal. The PCR court determined that defense counsel was not ineffective for failing to adequately investigate Petitioner's alibi defense. App. 102 - 103. "Based on the records produced at the hearing, there was roughly a one hour and fifteen minute time frame in which [Petitioner] could have fled the scene" in Orangeburg and reached the Columbia area hospitals. App. 103.

Second PCR Application and Hearing

On September 25, 2013, Petitioner filed a second PCR application. App. 73 - 79. On May 1, 2014, the State filed a Return and "Motion to Dismiss All Claims Beyond *Austin* Review of the First PCR."

A hearing was held before the Honorable Maite Murphy on May 20, 2015. App. 80 - 90. Jonathan D. Waller represented Petitioner. Assistant Attorney General J. Clayton Mitchell represented the State. Petitioner and former PCR counsel Thomas Sims both testified.

Petitioner testified that, while he never requested that his attorney file an appeal, he did not sign any waiver of his right to appeal the order of dismissal. App. 84, l. 2 - 85, l. 15. Petitioner further testified that he attempted to file a notice of appeal on his own, but that it was dismissed without prejudice and this Court directed him to the *Austin* procedures. *Id.*

Counsel Sims did not recall advising Petitioner of his right to appeal, although it would have been his normal practice to do so. Sims did recall receiving a letter from Petitioner indicating that Petitioner believed Sims was going to file an appeal on his behalf. App. 87, l. 1-14. Sims candidly admitted that Petitioner never told him that he wanted to waive his right to an appeal. *Id.* App. 88, ll. 7-14.

Order of Dismissal and Belated PCR Appeal Granted

On August 3, 2015, Judge Murphy filed an order dismissing Petitioner's second PCR application and granting Petitioner a belated appeal of the denial of his first PCR application. App. 92 - 97.

ARGUMENT

I.

The PCR court properly granted Petitioner's request for a belated PCR appeal pursuant to *Austin v. State* where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal.

"All [PCR] applicants are entitled to a full and fair opportunity to present claims in one PCR application." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). This Court has held that "[u]nder the PCR rules, an appellant is entitled to a full adjudication on the merits of the original petition, or one bite of the apple" and that "[t]his bite includes an applicant's right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal." *Id.* at 261, 523 S.E.2d at 755-56 (citing *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (internal quotations and citation omitted)). Thus, although successive PCR applications and appeals are generally disfavored, this Court has allowed successive PCR applications where an applicant has been denied complete access to the appellate process. *See Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Furthermore, "[a]n *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." *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *Aice*, 305 S.C. at 448, 409 S.E.2d at 392); *see 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).

Specifically, "[i]n *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." *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *Aice*, 305 S.C. at 452, 409 S.E.2d at 395) (emphasis in original)). Accordingly, a petitioner is entitled to belated appellate review of his prior PCR

application and Order of Dismissal when: (1) he requested, yet was denied an opportunity to seek appellate review; or (2) his right to appellate review was not knowingly and intelligently waived. *Id.*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992)).

In this case, Petitioner "never received a full procedural 'bite at the apple' because he was prevented from seeking *any* review of the denial of his PCR application." *Id.*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *Aice*, 305 S.C. at 452, 409 S.E.2d at 395). Petitioner testified that he assumed that PCR counsel would appeal the denial of the PCR application and that he later attempted to appeal the denial of the PCR application on his own. App. 83, l.4 – 85, l. 15. PCR counsel admitted that he never filed a notice of appeal and that he had no recollection of Petitioner waiving of his right to appeal the PCR court's Order of Dismissal. App. 86, l. 5 - 88, l. 25.

Therefore, the PCR court properly granted Petitioner's request for a belated PCR appeal pursuant to *Austin v. State* because Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and Order of Dismissal. *See Odom*, 337 S.C. at 262, 523 S.E.2d at 756.

II.

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where Petitioner based his decision to plead guilty on plea counsel's advice when Petitioner had no knowledge of plea counsel's failure to adequately investigate Petitioner's possible alibi defense.

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.*

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (a guilty plea is voluntarily and knowingly entered into when accused has a full understanding of consequences of his plea and charges against him).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." *Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (2009) (citing *Hill*, 474 U.S. at 57-59; *See Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991) (defendant's guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel).

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland* at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

Without question, a defense attorney "'has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting *Strickland*, 466 U.S. at 691). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." *Id.*

However, this Court has held that if counsel articulates a valid reason for employing certain strategy and the strategy used satisfies an objective standard of reasonableness, then the conduct is not ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

In this case, Petitioner did not freely and intelligently waive his constitutional trial rights because defense counsel failed to adequately investigate Petitioner's alibi defense. App. 55, l. 20 - 58, l. 17. Specifically, counsel failed to investigate the circumstances under which Petitioner was shot. App. 102 - 103. This was crucial as neither the complaining witness nor the former co-defendant told police that Petitioner was wounded during the attempted burglary. App. 118 - 124. Nor did counsel contact Shawndella Houston. App. 58, ll. 5-20.

Instead of conducting a reasonable investigation, defense counsel simply compared the time of the burglary with the time of Petitioner's admission to the hospital and concluded that an alibi defense was untenable since she believed she one hour and fifteen minute between the two events

was enough time for Petitioner to reach Columbia from Orangeburg. App. 55, l. 20 - 58, l. 17. Unanswered by defense counsel's slapdash travel calculations is why and how Petitioner was shot in the first place as none of the witnesses reported a burglar being shot. App. 118 - 124. Oddly, Petitioner's gunshot wound went unmentioned at the guilty plea. App. 11, l. 2 - 12, l. 17.

Defense counsel's failure to competently investigate Petitioner's alibi constituted deficient performance. No prints or other forensic evidence were recovered from Miles' apartment. The State's case was reliant on the unreliable testimony of a former co-defendant and lineup identifications conducted by law enforcement following Petitioner's arrest. An alibi defense that showed it was impossible or, at minimum, highly unlikely that Petitioner participated in the burglary would have materially weakened the State's case.

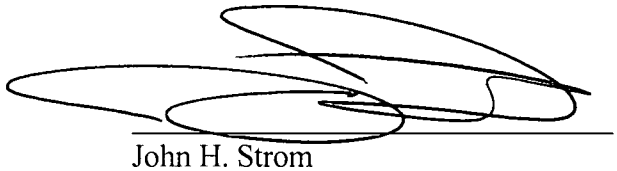
The State would have had to contend that, in an hour and fifteen minutes, Petitioner managed: (1) to commit a burglary, (2) to shoot Miles, (3) to escape the apartment, (4) to be shot himself in an apparently unrelated incident, and (5) to then travel to two different Columbia area hospitals for treatment. *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (an alibi's potency as a defense stems from the fact that it involves the physical impossibility of the defendant's presence at the crime scene).

Petitioner's decision to plead guilty did not relieve plea counsel of her duty to conduct a reasonable, thorough, and independent investigation into Petitioner's alibi. *See Praylow*, 761 F.2d 179. Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when "there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pled guilty and would have insisted on going to trial." App. 102 - 105; *Hill*, 474 U.S. at 57-59.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
MAITE MURPHY, CIRCUIT COURT JUDGE

TONY LEE BELTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001875

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tony Lee Belton states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May, 1, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Tony Lee Belton.

Respectfully submitted,

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of April, 2016

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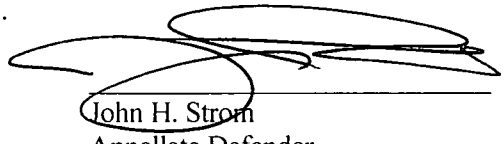
CERTIFICATE OF SERVICE

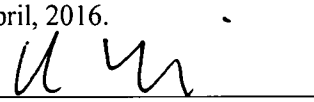
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire and Tony Lee Belton, at 4310 Rockbridge Road Columbia, SC 29206 this 28th day of April, 2016.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day of April, 2016.



(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.