

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Charleston County

Roger E. Henderson, Circuit Court Judge

QUENTIN JENKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002181

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

KATHRINE H. HUDGINS
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ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1. Did the first PCR judge err in refusing to find counsel ineffective in failing to provide the discovery material to Petitioner?

2. Did the judge err in refusing to rule on Petitioner's subsequent allegation of ineffective assistance of appellate counsel for failing to raise an issue in regard to juror misconduct and in failing to include in the record on appeal transcripts of two post trial hearings in regard to the allegation of juror misconduct when appellate counsel filed an Anders brief raising an issue in regard to an instruction to the jury?

STATEMENT

In April of 2007, the Charleston County Grand Jury indicted Petitioner Jenkins for two counts of murder and two counts of possession of a firearm during the commission of a violent crime, indictments #2007-GS-10-4660, 4661, 4662, 4663. On February 4, 2008, Petitioner proceeded to jury trial before the Honorable Deadra L. Jefferson. William Runyon represented Petitioner at trial. Nathan Williams and Kim Steele prosecuted the case. The jury found Petitioner guilty as charged. Judge Jefferson sentenced petitioner to forty (40) years concurrent for each count of murder and five (5) years concurrent for each weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. Joseph L. Savitz, III, represented Petitioner on appeal and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On February 24, 2010 the South Carolina Court of Appeals dismissed the appeal. State v. Jenkins, Op. No. 2010-UP-147 (S.C.Ct.App. filed February 24, 2010).

On October 27, 2010, Petitioner filed an application for post conviction relief [PCR], 2010-CP-10-8981. The State filed a return on February 10, 2011. On November 18, 2011, an evidentiary PCR hearing was held before the Honorable Kristi Harrington. Mark Peper represented Petitioner at the PCR hearing. Matthew J. Friedman represented the State. In a written order signed December 16, 2011, Judge Harrington denied relief and dismissed the application. On October 12, 2012, Petitioner filed a *pro se* petition for a belated writ of certiorari. October 23, 2012, counsel for Petitioner filed an untimely notice of intent to appeal. On November 5, 2012, the South Carolina Supreme Court dismissed the notice of intent to appeal noting that the dismissal was without prejudice to the right Petitioner may have to seek relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

On December 7, 2012, Petitioner filed a second application for post conviction relief, 2012-CP-10-7980. On June 6, 2013, Petitioner filed an amended second application for post conviction relief. On January 30, 2015, the State filed a return and partial motion to dismiss. On February 6, 2015, the Honorable R. Markley Dennis signed a conditional order of dismissal, dismissing in part and ordering a hearing solely on the issue of a belated Austin appeal. On July 20, 2015, an evidentiary PCR hearing was held before the Honorable Roger E. Henderson. Rodney D. Davis represented Petitioner at the PCR hearing. J. Rutledge Johnson represented the State. In an order signed August 20, 2015, Judge Henderson found that Petitioner was entitled to a belated appeal of his first denial of post conviction relief pursuant to Austin v. State but denied all other grounds. A timely notice of intent to appeal was served on October 16, 2015. On November 25, 2015, Judge Henderson signed an amended order which omitted an erroneous reference to White v. State, 263 S.C.110, 108 S.E.2d 35 (1974) included in the original order. This Austin petition and a separately filed petition for writ of certiorari follow.

ARGUMENTS

1. The first PCR judge erred in refusing to find counsel ineffective in failing to provide the discovery material to Petitioner.

During the PCR hearing Petitioner testified that trial counsel did not share the State's evidence with Petitioner prior to trial and did not mail a copy of the discovery material to Petitioner while he was in pre-trial detention at the jail, as requested. (App. p. 886, lines 4-9; p. 887, lines 4-7; p. 891, lines 11-25). Trial counsel admitted that he did not hand deliver any documents to petitioner at the jail and did not mail Petitioner everything while he was in pre-trial detention at the jail. (App. p. 915, line 15 – p. 916, lines 1-6).

In the order of dismissal the PCR judge wrote:

This court further finds counsel adequately conferred with Applicant, reviewed the discovery with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This court finds that counsel's representation did not fall below an objective standard of reasonableness. This court finds that counsel properly reviewed the discovery with Applicant and prepared for trial. Counsel testified that he updated Applicant throughout his investigation, and he discussed the fingerprint evidence and the co-defendant's statements with Applicant as they came in. Counsel testified that he believed Applicant knew what each witness would testify to at trial.

(App. p. 928). The PCR judge erred. Trial counsel was ineffective in failing to provide Petitioner with a copy of the discovery material. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the

applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective in failing to provide the discovery material to Petitioner. If trial counsel had provided the information, as requested by Petitioner, there is a reasonable probability that the result of the proceedings would have been different. The PCR judge erred in refusing to grant relief.

2. The judge erred in refusing to rule on Petitioner’s subsequent allegation of ineffective assistance of appellate counsel for failing to raise an issue in regard to juror misconduct and in failing to include in the record on appeal transcripts of two post trial hearings in regard to the allegation of juror misconduct when appellate counsel filed an Anders brief raising an issue in regard to an instruction to the jury.

After PCR counsel failed to file a timely notice of intent to appeal, Petitioner filed a second application for post conviction relief on December 7, 2012, requesting a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. pp. 931-937). On June 6, 2013, Petitioner filed an amended application for post conviction relief alleging, “Ineffective assistance of appellate counsel in that counsel failed brief the issue on appeal, ‘That trial court erred in not granting a mistrial after evidence after trial revealed that a jury member had discussed the case with

his wife.” (App. p. 938). The ineffective assistance of appellate counsel claim was not raised in the first post conviction relief application or hearing. Petitioner, however, citing Martinez v. Ryan, -- U.S.--, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), alleged that PCR counsel was ineffective in failing to raise the ineffective assistance of appellate counsel claim. (App. p. 939). In the return and partial motion to dismiss the State argued that any claims other than for a belated appeal pursuant to Austin v. State should be dismissed as untimely and successive. (App. pp. 945-946). The State argued that “the ruling in Martinez had no bearing on his ability to raise ineffective collateral counsel claims in a subsequent, successive state PCR application.” (App. pp. 946-947).

On February 6, 2015, the Honorable R. Markley R. Markley Dennis signed a conditional order of dismissal, dismissing in part and ordering a hearing solely on the issue of a belated Austin appeal. (App. pp. 951-958). In the order Judge Dennis wrote:

Martinez has no application to successive state PCR actions, as the fundamental “cause and prejudice” standard on which *Martinez* relies is exclusive to federal habeas corpus actions. *Id.* at 1320. Further, the *Martinez* Court specifically noted that their decision was not addressing ineffective assistance of counsel claims raised in subsequent state PCR actions, opining, “This is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a constitutional matter.” *Id.* at 1315.

Additionally, *Martinez’s* interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina’s interpretation and application of its PCR statutes. *See* S.C. code Ann. §17-27-10 to 160 (2014). Therefore, the South Carolina Supreme Court’s opinion in *Aice v. State* still applies to claims raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. *See* 305 S.C. at 451, 409 S.E.2d at 394 (“The contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under 17-27-90.”) The South Carolina Supreme Court recognized, “The holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Applicant’s contention that *Martinez* allows him to bring this untimely and successive state PCR application is misguided and erroneous.

(App. p. 956).

During the evidentiary hearing on the second PCR application, counsel for Petitioner only raised the belated appeal issue and failed to challenge Judge Dennis' findings on the other issues stating, "I wish I had found some arguments that we could dig into some of the issues that were not previously raised. I don't believe I have the grounds to do that based on Judge Dennis' conditional order, and that is why I am not raising any issues on that." (App. p. 964, lines 4-8). Petitioner's first PCR attorney was ineffective in failing to raise the issue of ineffective assistance of appellate counsel for failing to raise an issue in regard to juror misconduct and in failing to include in the record on appeal transcripts of two post trial hearings in regard to the allegation of juror misconduct when appellate counsel filed an Anders brief. Petitioner's second PCR attorney was ineffective for not challenging Judge Dennis' dismissal of the ineffective assistance of appellate counsel claim.

Post trial, Petitioner moved for a new trial based on juror misconduct. On March 7, 2008, the trial judge held the first hearing in regard to the allegation of juror misconduct. (App. pp. 729-791). During the hearing a lawyer unrelated to the case testified that while at physical therapy on February 7, 2008, between 7:30 AM and 8:10 AM she overheard a physical therapist say that her husband was serving on the jury and "that he was upset after one of the days when I guess family members had testified. I heard her say that it was a case about a crime at a McDonald's and I heard her say I guess after being asked by one, one of her friends or somebody else, I don't know if it was a patient or another physical therapist, I heard her say that he is probably going to vote guilty." (App. p. 765, line 16 – p. 766, lines 1-4). As a result of overhearing this conversation, the lawyer, who was acquainted with one of the prosecutors, e-mailed to prosecutor. (App. p. 762, lines 7-22). When asked by the trial judge what prompted her to e-mail the prosecutor, the witness answered, "It

was more as a friend to say, you know, that someone thought she was doing a good job.” (App. p. 767, lines 7-10).

The judge held a second hearing on March 14, 2008. (App. pp. 792-856). During the hearing the husband/ juror was questioned by the trial judge. (App. pp. 800-804). When asked if he had discussed the case with his wife the juror testified, “The only thing I said to her was some of the images we were seeing are disturbing. I did not go into detail about any of the images.” (App. p. 801, line 25 – p. 802, lines 1-2). When further questioned the juror testified, “Except for again that the images we were seeing were disturbing. She had asked me why I was kind of quite and I said that, you know, it hasn’t been easy, the last few days haven’t been easy.” (App. p. 802, lines 10-13). The judge then individually questioned all of the jurors. (App. pp. 805-831). The juror’s wife was not called as a witness. After hearing arguments, the trial judge denied the motion for a mistrial, relying on State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). (App. pp. 844-855).

Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), raising the issue of whether the trial judge committed reversible error by refusing to instruct the jury on accessory after the fact. The South Carolina Court of Appeals dismissed the appeal. State v. Jenkins, Op. No. 2010-UP-147 (S.C.Ct.App. filed February 24, 2010). The transcripts from the two post trial motions in regard to the allegations of juror misconduct were not included in the record on appeal. The South Carolina Court of Appeals never had the opportunity to rule on the issue, pursuant to the Anders procedure, because the post trial hearing transcripts were not included in the record on appeal filed with the Court of Appeals.

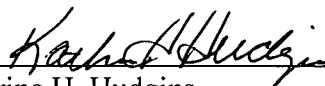
Judge Dennis erred in refusing to rule on Petitioner’s subsequent allegation of ineffective assistance of appellate counsel for failing to raise an issue in regard to juror misconduct and in failing to include in the record on appeal transcripts of two post trial hearings in regard to the

allegation of juror misconduct when appellate counsel filed an Anders brief raising an issue in regard to an instruction to the jury. In Kelly v. State, 404 S.C. 365, 365, 745 S.E.2d 377 (2013) this Court wrote, “Like other states, we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” The South Carolina PCR statute, however, provides ground for relief in this case. S.C. Code §17-27-45(C) provides, “If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.” Due to no fault of Petitioner, the issue in regard to the ineffective assistance of appellate counsel was not previously presented to the Appellate Court. The issue of alleged juror misconduct is a material issue which should be litigated. The Court of Appeals, however, did not have the opportunity to rule on the issue of juror misconduct because the post trial motion transcripts were not included in the record on appeal. This Court should remand the case to the PCR court to determine the ineffective assistance of appellate counsel claim.

CONCLUSION

Based on the argument presented in issue one, this Court should grant the petition for writ of certiorari and order further briefing on the issue. Based on the argument presented in issue two, this Court should remand the case to the PCR court to determine the issue in regard to the ineffective assistance of appellate counsel.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of June, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
ROGER E. HENDERSON, CIRCUIT COURT JUDGE

QUENTIN JENKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002181

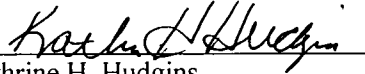
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Quentin Jenkins states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on July 20, 2015. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Quentin Jenkins.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of June, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Roger E. Henderson, Circuit Court Judge

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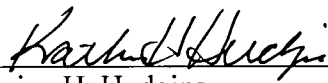
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002181

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 J. Rutledge Johnson, Esquire and Quentin Jenkins, #326584, at Broad River Correctional Institution this 14th day of June, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of June, 2016.


(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.