STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Steven H. John, Circuit Court Judge

DERRICK D. HARRIOTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002610

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court properly grant Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner's first PCR counsel failed to file a Notice of Appeal from the first PCR court's Order of Dismissal and the State consented to Petitioner's pursuit of a belated review of the denial of his first PCR application?

STATEMENT OF THE CASE

Procedural History

On February 21, 2008, the Sumter County Grand Jury indicted Petitioner Derrick Harriott for murder and possession of a firearm during the commission of a violent crime, related to the shooting death of Harriott's girlfriend, Quanna Cooper (hereinafter "the Decedent"). App. 231, l. 14 – 232, l. 2; App. 578 – 579. Prior to trial, Harriott was evaluated by two forensic psychiatrists, Dr. Richard L. Frierson and Dr. Pamela M. Crawford, both of whom opined that Harriott was criminally responsible but was unable to conform his conduct to the requirements of law due to his mental disease or defect.[1] App. 566; App. 572.

On November 10 through 13, 2008, Harriott appeared for trial before the Honorable George C. James, Jr. and a jury. Harriott was represented by William Ceth Land and the State was represented by assistant solicitor Harry Connor. App. 1.

Harriott's aunt, Joyce Witherspoon, who had raised him since he was nine years old, said that Harriott was in special education classes from elementary through high school and received a certificate rather than a diploma. App. 228, l. 19 – 230, l. 21. In March 2007 she saw a change in Harriott in that he was "sleeping a lot." App. 232, ll. 12-16. Just a few weeks prior to the murder, Harriott went to his employer and friend, Eugene Finkdeiner, "very distraught and upset" and crying. App. 208, l. 6 – 209, l. 4; App. 216, ll. 6-24. Harriott told Finkdeiner that he believed that the Decedent was drugging him and that she videotaped him being raped by "some guys" while under the influence of the drugs. App. 217, ll. 1-8; App. 217, l. 20-25. The trial judge instructed the jury that the testimony was not being offered to establish that any drugging

[1] Dr. Crawford did not testify at Harriott's trial, but her letter to trial counsel was admitted into evidence at the second PCR hearing. See App. 572.

or sexual assault actually occurred but rather as evidence of Harriott's state of mind. App. 217, ll. 9-16; see also App. 278, ll. 3-22. Finkdeiner said that Harriott became withdrawn and distant around the time of their conversation. App. 218, ll. 1-15.

Dr. Richard Frierson, the forensic psychiatrist from the Department of Mental Health conducted an evaluation of Harriott. App. 242, l. 13 – 245, l. 16. Harriott scored a 69 on prior I.Q. testing, which falls in the range of "mild mental retardation." Dr. Frierson agreed that Harriott's cognitive and intellectual abilities are limited. However, he opined that, because of his high functioning, Harriott "falls in the range of borderline intellectual functioning, which is not retarded but certainly well below what would be considered average." App. 248, 19 – 250, l. 1.

Dr. Frierson described the delusions that Harriott was having at the time of the offense as "a fixed false belief," which Harriott believed to be true even though it was not based in reality. He said that the delusions were a very common symptom of severe mental illness. App. 253, l. 23 – 254, l. 8. His delusions included that the Decedent was drugging him and allowing men to come into his room at night and sexually assault him. Harriott believed that the Decedent was filming it and placing the videos on the internet. He believed that the police were involved and that people in North Carolina and around town in Sumter knew about it and would laugh at him. App. 253, ll. 11-22. Dr. Frierson said Harriott had asked his employer to drug test him so that he could prove what was happening, but he would not have believed the negative results. App. 254, ll. 12-20. Harriott's delusions are primarily "persecutory" meaning that he believes someone is out to harm him. App. 255, l. 14 – 256, l. 2; App. 270, ll. 9-20. Harriott also had a prostate infection which caused pain in the rectal area, which fed his delusions. App. 256, l. 15 – 257, l. 9; App. 263, ll. 7-22.

When asked about malingering, Dr. Frierson said that Harriott was not intelligent enough to fake his delusions. App. 256, ll. 3-15. Dr. Frierson ultimately opined that Harriott was capable of distinguishing right from wrong, evidenced by his statement after the shooting to call the police. App. 258, l. 21 – 259, l. 2. However, Dr. Frierson said that Harriott's mental disease or defect prevented him from conforming his conduct to the requirements of the law. App. 259, ll. 5-10. Harriott could not stop himself from shooting the Decedent in the midst of their argument, particularly when his sexual performance was brought up. App. 251, l. 11 – 253, l. 6; App. 259, l. 13 – 260, l. 11; App. 268, ll. 8-14; see also App. 566 – 572.

Several neighbors testified that at approximately 5:20 p.m. on March 16, 2007, they heard several gunshots in the Orchard Place apartment complex located in Sumter, South Carolina. Three neighbors saw Harriott come out of the Decedent's apartment and throw his gun down on the ground. They heard him say "Someone call the police." Though none of them wrote it in their statements, they also claimed at trial that Harriott said "I shot the bitch." App. 45, l. 9 – 46, l. 17; App. 52, l. 2 – 53, l. 19; App. 54, l. 21 – 55, l. 17; App. 56, ll. 7-10; App. 56, ll. 2-6; App. 59, l. 22 – 60, l. 8; App. 63, l. 25 – 64, l. 24; App. 67, ll. 2-12. Another neighbor could not hear what Harriott was saying but described him as "ranting and raving." App. 73, l. 24 – 74, l. 7.

When officers arrived, Harriott was standing outside of the apartment. Harriott took off his shirt and "did a 360" to show that he did not have any weapons on him. He then lay on the ground, facedown, as he was instructed to do. App. 78, l. 19 – 79, l. 15. Officer Heath Gardner said that while he was handcuffing Harriott, he kept saying over and over "I know what I did. I know I shot her." App. 79, l. 17 – 80, l. 9. While officer William Lyons was escorting Harriott to the patrol car, he said "I did it. I know what I did. I did what I had to do." He "kept just repeating it." App. 84, ll. 1-15. Harriott was cooperative with police. App. 82, ll. 4-5.

Officers found the Decedent at the bottom of the staircase inside of the apartment with multiple gunshot wounds. App. 86, l. 1 – 87, l. 17; App. 92, l. 19 – 93, l. 24. Ballistics confirmed that several of the bullet fragments removed from the Decedent and casings found in the apartment were fired from Harriott's semiautomatic rifle. Other items collected were unsuitable for testing or the results inconclusive. App. 167, l. 6 – 176, l. 5. The forensic pathologist testified that there were fourteen gunshot wounds to the Decedent's body, all of which entered on the front of her body. App. 192, ll. 2-11; App. 196, ll. 16-18. Gunshot residue was found on the hands of the Decedent and Harriott. App. 181, l. 13 – 183, l. 6.

The jury returned a verdict of guilty but mentally ill as to both charges. App. 368, l. 1 – 369, l. 5. Judge James sentenced Harriott to life without the possibility of parole.[2] No sentence was issued on the weapons charge pursuant to S.C. CODE ANN. § 16-23-490. App. 388, l. 23 – 389, l. 1; App. 580 – 581.

On direct appeal, Harriott was represented by appellate defender Joseph L. Savitz, III. App. 392. Savitz filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), in which he raised the issue of whether the trial judge committed reversible error by failing to instruct the jury on the defense of insanity. App. 392. Upon consideration of the brief prepared by counsel and the *pro se* brief submitted by Harriott, the Court of Appeals dismissed the appeal pursuant to Anders. App. 403; App. 441. The remittitur was issued on August 3, 2012. App. 443.

First PCR Application and Hearing (2013-CP-43-168)

On January 31, 2013, Harriott filed an application for post-conviction relief. App. 444. On June 12, 2013, the State filed its Return. App. 455. An evidentiary hearing was held before the

[2] Harriott had no prior criminal record in General Sessions Court and was twenty-nine years old at the time of sentencing. App. 375, ll. 6-11.

Honorable R. Ferrell Cothran on May 29, 2014. App. 460. Harriott was represented by Fulton Casey Dale Cornwell, and the State was represented by assistant attorney general Daniel Gourley.[3] App. 460; App. 490. Harriott and his trial attorney, William Land, testified at the PCR hearing.

Harriott testified that the State originally offered him thirty years in exchange for a plea, but he decided to go to trial. App. 474, ll. 2-4; App. 479, ll. 1-6. Land told Harriott that he should cooperate with a mental health evaluation, which ultimately resulted in a finding that Harriott was suffering from a mental disease of defect. App. 474, ll. 5-17. At trial, the jury was given only three options on the verdict sheet – guilty, not guilty, or guilty but mentally ill. Land did not request a charge on insanity. App. 474, l. 18 – 476, l. 5. Land advised Harriott that a verdict of guilty but mentally ill was the same as a verdict of guilty as far as "the time and everything" but that Harriott would get treatment in the Department of Corrections. App. 476, ll. 9-14. Harriott said that Land "mainly discussed" trying to get a charge on voluntary manslaughter. App. 478, ll. 3-8. Notably, the trial judge refused to instruct the jury on voluntary manslaughter. App. 282, l. 4 – 291, l. 22; App. 297, l. 21 – 303, l. 11.

Land testified that Harriott's case was never about whether he shot the victim or trying to get a not guilty verdict. App. 480, l. 18 – 481, l. 7. While Land originally hoped to use an insanity defense, he said that both of the mental health evaluators found that Harriott knew the difference between right and wrong. App. 481, ll. 10-18. Land said that he had no evidence to support an insanity charge, so he could not request that it be included on the verdict form. App. 482, ll. 12-17; App. 483, ll. 7-17. Their strategy at trial was "to try to get voluntary manslaughter." App. 481, ll.

[3] The cover page of the transcript erroneously lists "L. Boozer" as PCR counsel at the first PCR hearing. App. 460; but see App. 490.

8-10; App. 484, ll. 2-6. Ultimately, the judge would not charge voluntary manslaughter, so it was not an option on the verdict form either. App. 481, l. 19 – 482, l. 3.

Order of Dismissal (2013-CP-43-168)

On July 11, 2014, Judge Cothran filed an Order of Dismissal denying Harriott's PCR application. App. 490 – 500. Regarding the allegation that trial counsel was ineffective in failing to request a charge on the defense of insanity, the Court ruled that Harriott's allegation was without merit and that he failed to allege sufficient evidence of prejudice. App. 495 – 496. Specifically, the Court wrote:

> In the instant case, Trial Counsel explained that Applicant was having delusions about his girlfriend (hereinafter "Victim") drugging and raping him and filming the rape. Trial Counsel stated Applicant was actually suffering from rectal problems, which was tending to corroborate Applicant's delusions. Trial Counsel stated Applicant was evaluated by two separate doctors and was found criminally responsible and competent to stand trial. Based on the foregoing, this Court finds Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

App. 495 – 496.

Second PCR Application and Hearing (2014-CP-43-2334)

On November 3, 2014, Harriott filed a second PCR application, with attachments. App. 501. On January 6, 2015, the State filed its Return and Motion to Dismiss all claims beyond Austin[4] review. App. 525. On July 1, 2015, Harriott filed a First Amendment to his PCR application. App. 529.

On July 14, 2015, an evidentiary hearing was held before the Honorable Steven H. John. App. 531. Harriott was represented by Lance Boozer, and the State was represented by Daniel Gourley. App. 531. Based on the State's conversations with PCR counsel Cornwall and letters

[4] Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991).

indicating Harriott's desire to pursue an appeal, the State consented to an Austin appeal. App. 535, l. 4 – 537, l. 9.

Order Granting Belated PCR Appeal Pursuant to Austin (2014-CP-43-2334)

On September 17, 2015, Judge John issued an Order granting Harriott an appeal pursuant to Austin. App. 573 – 577. Harriott filed a timely Notice of Appeal.

This petition follows pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated appellate review of an Austin PCR application). Additionally, Harriott is filing his Johnson petition for writ of certiorari on today's date.

ARGUMENT

The PCR court properly granted Harriott belated appellate review of his initial PCR application because Harriott was denied his right to appeal the dismissal of his first PCR application. App. 539, l. 25 – 540, l. 2; App. 542, ll. 1-3; App. 573 – 577; see Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The State consented to Harriott's request for a belated appeal of the Order of Dismissal. App. 536, ll. 1-4.

The South Carolina Supreme Court has held that "[a]ll 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). "Under the PCR rules, an appellant is entitled to a full adjudication on the merits of the original petition, or 'one bite of the apple.' This '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 (internal citations omitted).

Furthermore, a petitioner is denied his right to appellate review when either: (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. (citing King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992)). Accordingly, when a petitioner is denied his right to appeal under either of the two circumstances, then he is entitled to belated appellate review of his initial PCR application. See, e.g., Austin, 305 S.C. at 454, 246 S.E.2d at 396.

In this case, the AAG Gourley stated that he spoke with PCR counsel Cornwell, who confirmed that he never filed a notice of appeal on Harriott's behalf. App. 535, ll. 20-22. He also noted various letters that Harriott attached to his second PCR application asking the Court about the status of his appeal. App. 535, ll. 22-25; see also App. 536, l. 7 – 537, l. 3. One of the letters was a copy of the letter dated July 30, 2014 from Harriott to first PCR counsel requesting

that he filed a notice of appeal. App. 513. Harriott's letter was sent well within the thirty days for filing a Notice of Appeal, since the Order of Dismissal in the first PCR case was filed on July 11, 2014. See App. 490. AAG Gourley then said: "[B]ased off of that and my discussions with Mr. Cornwell, I do believe Mr. Harriott is entitled to an Austin appeal and so, Your Honor, the State would consent to that." App. 536, ll. 1-4. Thus, the second PCR court properly found that Petitioner was entitled to file a belated Notice of Appeal from the Order of Dismissal in the first PCR action. App. 539, l. 25 – 540, l. 2; App. 542, ll. 1-3; App. 573 – 577.

Under these circumstances, the second PCR court's decision granting Harriott belated appellate review of his first PCR application should be upheld. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) ("The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings."). Simply stated, Harriott is entitled to his one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

Based on the foregoing, Petitioner Derrick D. Harriott respectfully requests this Court grant his petition for certiorari and affirm the PCR court's grant of belated review of Petitioner's original PCR application.

Respectfully submitted,

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2016.

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CERTIFICATE OF SERVICE

I certify that a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State and a copy of the Appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Derrick D. Harriott, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of July, 2016.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day of July, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.