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AUG 17 2016

SC SUPREME COURT

THE BOOZER LAW FIRM, LLC

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August 15, 2016

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

The Honorable Beulah G. Roberts
Clerk of Court
P.O. Box 136
Manning, SC 29102

RE: Eric Q. Tindal, #243834, v. State of South Carolina
2015-CP-14-345

Dear Mr. Shearouse and Ms. Roberts:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order Granting Austin Review which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Tindal in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Tindal in this appeal.

Yours very truly,



Lance S. Boozer

Enclosure

cc: Daniel Gourley, AAG
Loriene French, OAD
Eric Q. Tindal, #243834

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AUG 17 2016

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Case No. 15-CP-14-345

Eric Q. Tindal, #243834.....Petitioner,

v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Now comes the Petitioner, by and through his undersigned and appointed Attorney, stating Petitioner's Notice of Appeal should be heard pursuant to the Final Order of the Honorable Tanya A. Gee which granted an *Austin* review of the Honorable R. Ferrell Cothran's Final Order dated January 21, 2011, in Case No. 2011-CP-14-595. The Petitioner received written notice of the Final Order granting an *Austin* review on August 11, 2016. A copy of the Final Order is attached herewith.

Respectfully submitted,



Lance S. Boozer
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807 Gervais Street, Suite 203
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Tele: 803-608-5543

Columbia, South Carolina
August 15, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Case No. 15-CP-14-345

Eric Q. Tindal, #243834.....Petitioner,

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Daniel Gourley, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 15th day of August, 2016.



Lance S. Boozer
The Boozer Law Firm, LLC
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Tele: 803-608-5543

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Eric Q. Tindal, #243834,

2015-CP-14-345

Applicant,

ORDER GRANTING AN APPEAL
PERSUASION TO AUSTIN V. STATE

vs.

CERTIFIED COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 8/18/16

State of South Carolina,

Respondent,

Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
JAN - 6 2:45

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated July 15, 2015. The Respondent made its Return and Motion to Dismiss on September 23, 2015. An evidentiary hearing on the matter was convened on November 18, 2015, at the Sumter County Courthouse. The Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Daniel Gourley, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

The Court had before it the guilty plea transcript, the Clarendon County Clerk of Court's records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return and Motion to Dismiss, and the South Carolina Court of Appeals records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Applicant was true bill indicted during the January 2011 term of the Clarendon County Grand Jury for Attempted Murder and Burglary, First (2011-GS-14-39). Scott Robinson, Esquire, represented him. Following a guilty plea, he was sentenced by the Honorable Howard P. King to twenty-two

106 4 JAG

(22) years concurrent for Attempted Murder and Burglary, First. The Applicant did not appeal his plea or sentence.

The Applicant subsequently filed an application for post-conviction relief (PCR) on November 22, 2011 (C.A. No. 2011-CP-14-595). An evidentiary hearing into the matter was convened on December 14, 2012, at which the Applicant was present and represented by James Brian O'Connor, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of trial counsel.
 - a. Failure to investigate.
2. Involuntary guilty plea.

The Honorable R. Ferrell Cothran denied and dismissed Applicant's application with prejudice by written Order dated January 21, 2011. Applicant submitted a pro se motion to alter or amend the order of dismissal pursuant to Rule 59(e) SCRCP. Judge Cothran denied and dismissed the motion by order filed January 8, 2014. No appeal was filed.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of Counsel
 - a. PCR counsel was ineffective for failing to file an appeal/certiorari of the denial of Applicant's PCR. Applicant advised PCR counsel to file both a Rule 59 motion to alter or amend before filing "notice of appeal."

Respondent made its Return and Motion to Dismiss on September 23, 2015, requesting an evidentiary hearing be held solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing was held to solely address whether or not the Applicant freely and voluntarily waived his right to appeal the denial of his application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. The Court heard testimony from Applicant, who testified that he requested his prior post-conviction relief counsel to file an appeal upon the denial of his prior action and produced correspondence requesting an appeal. Testimony from both the Applicant and prior PCR counsel indicated Applicant requested an appeal, however, it was not filed.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that the Applicant is entitled to appeal the denial of his first post-conviction relief application (2012-CP-14-00132) pursuant to Austin v. State. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

However, this Court summarily dismisses the Applicant's allegation that his prior PCR Counsel was ineffective for failing to file a 59(e) and thereby entitling him to a belated 59(e) of his first PCR application, as this claim is outside the scope of PCR. This Court notes the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). This Court finds that the contention that prior PCR counsel was ineffective for failing to file a 59(e) is non justiciable. Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

308 4 JAC

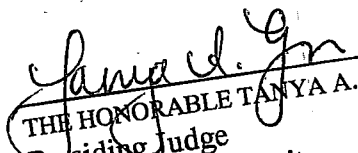
Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" Aice, 305 S.C. at 452, 409 S.E.2d at 394. Applicant invites this Court to extend Austin's holding to include a claim of ineffective assistance of PCR counsel for failing to file a motion to alter or amend judgment pursuant to rule 59(e) SCRCP. However, this Court finds Austin does not contemplate such reasoning and declines to extend Austin's specific exception to ineffective assistance of post-conviction relief counsel to include a claim of ineffective assistance of PCR counsel for failing to file a rule 59(e) SCRCP.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action (2011-CP-14-595) pursuant to Austin v. State is warranted. All other allegations are denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. That the Applicant be granted an appeal of case 2011-CP-14-595 pursuant to Austin v. State; and
2. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 29th day of December, 2015.


THE HONORABLE TANYA A. GEE
Presiding Judge
Third Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF (Select one.)

COMMON PLEAS FAMILY COURT
THIRD JUDICIAL CIRCUIT

ERIC Q. TINDAL,
Plaintiff(s),
-vs-

) CASE NO.: 2015-CP-14-345
) APPOINTMENT OF COUNSEL OR GAL
) (Select one.)

STATE OF SOUTH CAROLINA,
Defendant(s).

) ORDER
) AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- | | | |
|--|--|--|
| <input checked="" type="checkbox"/> Post-Conviction Relief (PCR)/habeas case | <input type="checkbox"/> Adoption | <input type="checkbox"/> Juvenile |
| <input type="checkbox"/> SVP case | <input type="checkbox"/> Custody and/or Visitation | <input type="checkbox"/> Abuse and Neglect |
| <input type="checkbox"/> Minor Name Change | <input type="checkbox"/> Other: | |

It appears that ERIC Q. TINDAL, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained _____, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other:

Therefore, it is ordered that LANCE BOOZER, hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that _____, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 24TH DAY OF JULY, 2015.

Beverly B. Roberts
 Circuit Judge Clerk of Court

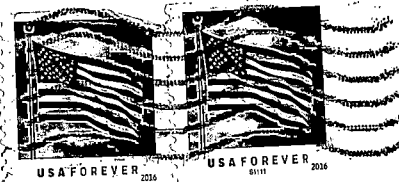
NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

THE BOOZER LAW FIRM, LLC

807 Gervais Street, Suite 203
Columbia, SC 29201

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15 AUG 2016 PM 3 L



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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