

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

SEP 06 2016

S.C. SUPREME COURT

MICHAEL RAY ELDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000242

PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR PETITION

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ISSUE PRESENTED

Whether the PCR court was correct in ruling that Petitioner was entitled to a belated appeal from the denial of his first PCR as his first PCR attorney failed to file an appeal after Petitioner requested one?

STATEMENT

Michael Elders was charged with criminal sexual conduct with a minor first degree with his own eight year old daughter. App. In October 2009, the Lexington County Grand Jury indicted Michael R. Elders on the charge of criminal sexual conduct (CSC) with a minor first degree. In February 2011, he was indicted for committing a lewd act on a minor two counts. On March 2, 2011, Petitioner Elders proceeded to trial before the Honorable William P. Keesley and a jury. Elders was represented by William Y. Rast, Jr., and the state was represented by Debra B. Moore. App. 1.

The jury returned verdicts of guilty on the CSC with a minor charging that Elders inserted his finger into the child's vagina, and one count of committing a lewd act on a minor involving touching the genital area of the child. The jury found him not guilty of the lewd act charging that he put the child's hand on his penis. App. 417, ll. 12 – App. 418, ll. 19. The judge sentenced Elders to thirty years on the CSC with a minor first degree, and fifteen years on the lewd act charge. The sentences were concurrent. App. 424, ll. 16 – App. 425, ll. 5. Elders filed a notice of appeal which he eventually withdrew. App. 548.

On August 2, 2012, Elders filed an application for post-conviction relief (PCR). The state filed a return on March 15, 2013. An evidentiary hearing was held on August 14, 2013 before the Honorable Edgar W. Dickson. Petitioner Elders was represented by Tristan M. Shaffer, and the state was represented by J. Walt Whitmire. App. 439. At this first PCR hearing, Elders claimed that his trial attorney was ineffective for not objecting when the forensic interviewer improperly vouched for and bolstered the credibility of the minor victim. App. 453, ll. 2 -9; App. 493, ll. 6 – App. 494, ll. 11.

Elders' PCR attorney said trial counsel was ineffective for not objecting to the interviewer being qualified as an expert in forensic interviewing, and for not objecting to the hearsay statement of the SANE nurse which went beyond time and place as she said the child identified her abuser as her father. App. 482, ll. 2 – App. 483, ll. 10; Supp. App. 2-3. On April 28, 2014, Judge Dickson issued an order denying Elders' PCR application and dismissing it with prejudice. App. 503 – App. 515. Judge Dickson found that trial counsel was not ineffective for not objecting to the forensic interviewer because the "clinical professional" did not bolster the victim's testimony when she testified that she recommended therapy for the child victim. The judge also wrote: "This court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist at the time of trial." App. 510. Judge Dickson also found that trial counsel was not ineffective for not objecting to the SANE Nurse Baker testifying concerning her pre-examination interview with the minor victim. App. 510-App. 511. Elders' PCR attorney failed to file a notice of appeal due to his "switching offices." App. 531, ll. 1 – 25.

On November 7, 2014, Elders filed a second PCR application on the grounds that he was denied his statutory right to an appeal. App. 516 – App. 522. The state filed a return on March 17, 2015. An evidentiary hearing was held on April 23, 2015 before the Honorable Brooks P. Goldsmith. Elders was represented by Anna R. Good, and the state was represented by Walt Whitmire. App. 529. At this PCR hearing, PCR counsel explained to the court that the first PCR attorney, Tristan Shaffer, had written letter explaining that he had failed to timely file an appeal due to his switching offices. App. 531, ll. 22 – App. 533, ll. 11. The state consented to "Austin relief" where Elders would receive a belated appeal from his first PCR. App. 531, ll. 1 – 21.

On January 4, 2016, Judge Goldsmith issued an order granting Elders a belated appeal from his first PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The judge

found that Elders did not knowingly and voluntarily waive his right to appellate review of his first PCR order. This petition follows accompanied by a petition for a writ of certiorari pursuant to Austin v. State.

ARGUMENT

The PCR court was correct in ruling that Petitioner was entitled to a belated appeal from the denial of his first PCR as his first PCR attorney failed to file an appeal after Petitioner requested one.

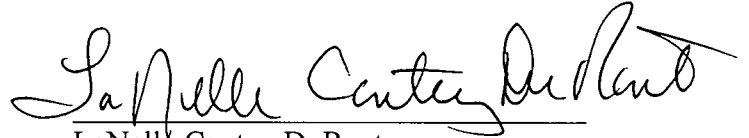
A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and the appellate court will review whether the petitioner was prejudiced by the failure to obtain appellate review. Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992). An applicant has a right to counsel's assistance in seeking review of the denial of PCR. Austin, 305 S.C. at 454, 409 S.E.2d at 396; Rule 71.1(g), SCRCP.

Elders was entitled to an appeal from his first PCR, and the state consented.

CONCLUSION

For the above reasons, the order of the PCR court granting a belated appeal from the denial of the first PCR should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath it.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of September, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable Brooks P. Goldsmith, Circuit Court Judge

MICHAEL RAY ELDERS,

PETITIONER,

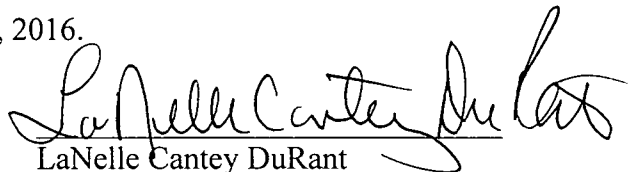
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

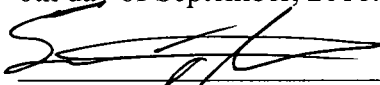
The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Patrick Schmeckpeper, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Elders, #345023, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of September, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this
6th day of September, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.