

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County
Court of Common Pleas
The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2016-000242
Lower Court Case No. 2014-CP-32-4072

MICHAEL RAY ELDERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

- I. Whether the PCR Court was correct in ruling Petitioner was entitled to a belated PCR appeal from the denial of his first PCR where his first PCR counsel failed to file an appeal after Petitioner requested one?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Petitioner was indicted at the October 2009 term of the Court of General Sessions for Lexington County for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677). (App. p. 540.) Petitioner was then indicted at the February 2011 for lewd act upon a minor (2011-GS-32-0364). (App. p. 543.) Petitioner was also indicted for committing a lewd act upon a child (2011-GS-32-00365). (App. p. 418, ll. 5-8.) He was represented by William Rast, Esq. On March 2, 2011, Petitioner proceeded to trial where he was found guilty as indicted on criminal sexual conduct with a minor in the first degree and on one count of lewd act upon a minor. (App. pp. 542, 545.) Petitioner was found not guilty of incitement 2011-GS-32-00365, "committing a lewd act upon a child involving the defendant putting the child's hand upon the penis." (App. pp. 418, ll. 5-9.) He was sentenced by the Honorable William P. Keesley to a thirty year term of imprisonment for criminal sexual conduct with a minor, first-degree, and to a fifteen year term of imprisonment for lewd act upon a minor. (Id.) The sentences were to be served concurrently. (Id.)

A timely Notice of Appeal was filed on Petitioner's behalf. Petitioner was represented by Elizabeth Franklin-Best, Esq., of the Office of Appellate Defense. The appeal was subsequently withdrawn. (App. pp. 548-49.)

Petitioner filed his first post-conviction relief application on August 2, 2012, and the State filed its Return on March 15, 2013. (App. pp. 427-38.) An evidentiary hearing was held on August 14, 2013, before Judge Dickson. Petitioner was represented by Tristan Shaffer, Esquire. (App. p. 439.) Judge Dickson denied the application through an order filed May 2, 2014. (App. pp. 503-515.) Petitioner did not appeal that order.

On November 7, 2014, Petitioner filed a second PCR application, alleging he had been denied his statutory right to appeal his first PCR. (App. p. 516.) On March 17, 2015, Respondent filed its Return, and an evidentiary hearing was held on April 23, 2015. (App. pp. 524, 529.) Petitioner was represented by Anna Good, Esquire. PCR Counsel explained that Tristan Shaffer, Petitioner's first PCR counsel, had written a letter that explained he had failed to timely file an appeal due to switching offices. (App. pp. 531-32.) Respondent, through Assistant Attorney General Walt Whitmire, consented to relief pursuant to Austin v. State, 305 S.C. 453, 545, 409 S.E.2d 395, 396 (1991). (App. p. 532.)

ARGUMENT

- I. **Based upon the representations made by PCR counsel that he failed to file the appeal due to his moving offices at the time the final order was filed and served, Respondent consented to relief at the PCR hearing and does not oppose the PCR Court's decision now.**

Tristan Shaffer, Petitioner's first PCR counsel, wrote a letter that explained he had failed to timely file an appeal due to switching offices. (App. pp. 531-32.) Respondent, through Assistant Attorney General Walt Whitmire, consented to relief pursuant to Austin v. State, 305 S.C. 453, 545, 409 S.E.2d 395, 396 (1991). (App. p. 532.) Respondent does not oppose the PCR Court's finding that Petitioner "did not knowingly and voluntarily waive his right to seek appellate review." (App. p. 538.)

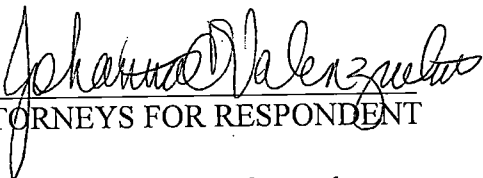
CONCLUSION

For the foregoing reasons, the order of the PCR Court granting Petitioner a belated PCR appeal should be affirmed.

Respectfully submitted,

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February 8, 2017

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THE STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle C. Durant, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
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This 8th day of February, 2017.


BRIANNA ARNONE
LEGAL ASSISTANT