STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Mark Hayes, Circuit Court Judge

WILLIAM PATRICK DEATON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001883

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether the PCR court erred in denying Petitioner's request to file a belated appeal of the denial of his prior PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner did not receive first PCR counsel's letter enclosing the Order of Dismissal and instructing Petitioner to respond if he wanted to appeal such that Petitioner did not knowingly and intelligently waive the right to appeal?

II.

Whether the PCR court erred in ruling that Petitioner's request to file a belated appeal of the denial of his prior PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), was barred by the equitable doctrine of laches where the state failed to plead the affirmative defense of laches?

STATEMENT OF THE CASE

Indictment and Guilty Pleas

On October 12, 2009, the Lexington County Grand Jury returned separate indictments against Petitioner William Deaton for unrelated counts of first-degree burglary and armed robbery. App. 196 – 199. With respect to both offenses, Deaton was represented by Sara Hahn, and the state was represented by assistant solicitor Angela Garrick. App. 1; App. 65.

On January 27, 2010, Deaton appeared for trial before the Honorable R. Knox McMahon and jury. App. 3. However, following selection of the jury, Deaton entered a plea of guilty to armed robbery. App. 30 – 52. Judge McMahon sentenced Deaton to sixteen years. App. 62, ll. 19-24; App. 201. Judge McMahon subsequently granted the defense's motion to modify his sentence, reducing it to twelve years. App. 108, ll. 21-25; App. 119, l. 23 – 120, l. 5.

On January 29, 2010, Deaton appeared before Judge McMahon again and entered a guilty plea to first-degree burglary. App. 67 – 75. Judge McMahon deferred sentencing in order to allow Deaton an opportunity to cooperate with police in the recovery of some of the stolen items. App. 75 – 80. Judge McMahon later sentenced Deaton to a current term of fifteen years. App. 200.

First PCR Application, Hearing, and Order (2010-CP-32-05311)

On December 4, 2010, Deaton filed his application for post-conviction relief ("PCR"). App. 82. The State filed its return on March 1, 2011. App. 89. On August 15, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young. Deaton was represented by Aimee Zmroczek, and the state was represented by assistant attorney general Kaelon May. App. 96. On January 14, 2013, Judge Young filed an order of dismissal denying Deaton's PCR application. App. 123.

***Pro Se* Attempt to Appeal**

On April 12, 2013, Deaton filed a *pro se* notice of appeal in this Court. App. 129. This Court sent a letter to Zmroczek, notifying her of the filing and instructing her to respond with the date on which she received written notice of the entry of the order of dismissal. App. 131. On April 22, 2013, Zmroczek filed a letter with this Court, indicating that she received the order of dismissal on January 15, 2013. App. 133. She enclosed three items of correspondence: (1) her January 15, 2013 letter to Deaton enclosing the order of dismissal and instructing him to "let her know" if he wants to appeal; (2) a letter from Deaton to Zmroczek dated March 7, 2013, inquiring about the status of his PCR case; and (3) Zmroczek's response letter to Deaton dated March 27, 2013, stating that she had sent the order of dismissal on January 15, 2013 and that the time to appeal had passed such that "there is nothing that can be done."[1] App. 134 – 139.

On May 29, 2013, this Court dismissed the notice of appeal because it was not timely served. App. 140. On June 10, 2013, Deaton filed a motion to reconsider, to which he attached an SCDC inmate request and response dated April 2, 2013, reflecting that he had no incoming attorney mail from January 2, 2013 to February 2, 2013. App. 141. On July 11, 2013, this Court denied the motion to reconsider without prejudice to Deaton's right to seek Austin relief and the Clerk issued the remittitur. App. 144; App. 145.

Second PCR Application and Hearing (2013-CP-32-02614)

On August 2, 2013, Deaton filed an application for post-conviction relief, alleging that PCR counsel failed to notify him of the issuance of the order of dismissal and failed to file the notice of appeal. App. 146. On January 21, 2014, he filed an amendment to his PCR application. App. 154. The state filed its return on May 21, 2014. App. 160. On January 14,

[1] Zmroczek did not mention the potential to pursue a belated appeal under *Austin*.

2016, an evidentiary hearing was held before the Honorable J. Mark Hayes. Deaton was represented by Anna Good, and the state was represented by assistant attorney general Patrick Schmeckpeper. App. 165. Both Deaton and Zmroczek testified at the hearing.

Deaton testified that the Zmroczek told him that she would put in for an appeal at the end of his PCR hearing. App. 170, l. 10-18. In a letter to Zmroczek on September 6, 2012, Deaton expressed his dissatisfaction with the PCR hearing and inquired about its resolution. App. 171, l. 17 – App. 172, l. 25; App. 188. He wrote:

> I thought you said you would let me know as to the judgment, and also file the proper paperwork, if the decision was not in my favor. It's been 21 days now and I haven't heard from you as to any of this? I know there's only an allotted amount of time concerning all of this and hope to know what's happened soon.

App. 188. Deaton testified that "the proper paperwork" meant a Rule 59(e) motion[2] or an appeal. App. 175, ll. 17-21.

On March 5, 2013, Deaton again wrote to Zmroczek inquiring about his case, writing: "It's been seven months since we went to P.C.R. Court, have you heard anything as of yet?" App. 173, ll. 1-19; App. 185. Deaton first learned that Judge Young issued the PCR Order of Dismissal on January 14, 2011 when Zmroczek responded to his letter on March 27, 2013. App. 169, l. 20 – 170, l. 24; App. 173, ll. 20-24; App. 186. After he received Zmroczek's letter, Deaton filed a *pro se* notice of appeal, hoping to get his appeal reinstated. App. 170, l. 25 – 171, l. 4; see App. 129.

Deaton also sent a request to the prison mailroom, asking if he had any incoming attorney mail during the relevant time period. App. 171, ll. 5-15; App. 174, l. 8 – 175, l. 1; App. 187. On April 1, 2013, he wrote:

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[2] Rule 59(e), SCRCP (motion to alter or amend judgment).

> Hi, I received legal mail from my lawyer this evening. (A.J.Z. Law Firm) She's saying I received legal mail from her in January (15^{th}-18^{th}), it was a very important letter that was for me to decide about putting in for a[n] appeal, which I had 30 days to file. I never received any legal mail from her concerning any of this. Can I have a copy of incoming legal mail I've received to show the courts, to prove I never received any mail from the A.J.Z. Law Firm. Sincerely, William Deaton

App. 187. The following response, dated April 2, 2013 and signed by S. Jones, was in the "disposition by staff member" section of the form:

> **Checked logs from Jan. 2, 2013 thru Feb. 2, 2013. Cannot find anything.** Cannot give you copies of legal log even if we did find something, must be requested to HQs [headquarters] by atty [attorney] or subpoenaed by the courts.

App. 187 (emphasis added). The state did not object to the admission of the inmate request form and response, nor did it attack its authenticity in cross-examination or argument. App. 174, ll. 8-19; App. 175, ll. 13-23; App. 182, l. 19 – 183, l. 2.

Aimee Zmroczek testified that she was appointed to Deaton's PCR case as a contract attorney. She "specifically remembered Mr. Deaton because . . . he [was her] first ever ODC complaint." App. 177, ll. 1-14. Zmroczek said that Deaton had complained about "this same issue" and that the complaint was subsequently dismissed. App. 177, ll. 14-15. She said: "My problem, and I've tried to tell him this, is that since I'm on the appointment list for PCRs, if I am found ineffective, I get taken off that list." App. 177, ll. 15-18.

Zmroczek said that she handles a lot of PCR cases and the "probably about fifty percent [of her clients] ask to do an appeal."[3] App. 177, l. 23 – 178, l. 2. She said that once the order comes in "and the person has asked to file an appeal," her paralegal has a system to automatically generate the notice that Zmroczek signs. App. 178, ll. 3-10. Zmroczek claimed

[3] This "statistic" is surprising in light of the fact that a PCR applicant is entitled to assistance of counsel in an appeal from the denial of relief. If the applicant is indigent, which any of Zmroczek's appointed clients would be, they would be represented at no cost.

that she had never seen Deaton's September 6, 2012 letter to her, but said that had she received such a letter, she "would have certainly filed a 59(e) when we got the order dismissing." App. 177, ll. 18-22; App. 178, ll. 11-20. She said that filing a 59(e) was "no extra work on [her] part" because her paralegal generates it.[4] App. 180, ll. 1-4. Zmroczek further claimed that the first time she heard from Deaton after the PCR hearing was April 19, 2012, when she received the ODC complaint. App. 179, ll. 17-20. Zmroczek claimed that Deaton did not mention wanting an appeal at the PCR hearing. App. 179, ll. 21-23; App. 180, l. 24 – 181, l. 4.

On cross-examination, Zmroczek admitted that she had heard from Deaton prior to his filing of the ODC complaint, when he wrote to her in March. App. 181, ll. 5-23. Zmroczek also testified that she changed her practice since Deaton's case, such that she now asks her clients at the hearing if they want her to file an appeal if the ruling is not in their favor. App. 180, ll. 18-21. When asked if it was possible that Deaton simply did not receive her January letter with the Order of Dismissal at the prison, Zmroczek responded: "Probably just as likely. I don't know if he's a poor victim of the mail circumstances, just as I don't recall ever receiving a letter in September. I have no idea whether or not it's -- I know I have that problem with SCDC occasionally." App. 182, ll. 4-10. When asked if she had that problem with her own clients, she responded: "Oh, yeah." App. 182, ll. 11-12.

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[4] Zmroczek appears to confuse a Notice of Appeal under Rule 203, SCACR, and a Motion to Alter or Amend under Rule 59(e), SCRCP. While a Notice of Appeal is a simple document easily generated by a member of counsel's support staff, a Rule 59(e) motion would take considerably more effort for a lawyer. The purpose of such a motion in the PCR context is to ask the PCR judge to make specific findings of fact and conclusions of law on allegations not addressed in the original order of dismissal. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007). A motion to alter or amend is not necessary in every case, so long as the allegations were ruled upon in the Order of Dismissal, but the motion would have to be filed and ruled upon before the filing of a notice of appeal.

Order Denying *Austin* Review

In denying Austin review, the PCR court ruled that Deaton's claim for relief was barred by laches. App. 191. The court further ruled that Deaton failed to meet his burden of proof. App. 191; App. 193. It found Zmroczek's testimony that Deaton did not request an appeal following the PCR hearing more credible.[5] App. 193. The court also found that the exhibits submitted by Deaton were "unpersuasive." The court wrote:

> The uncorroborated and, frankly, unauthenticated note from "Mrs. Jones" (Applicant's Exhibit 3) – while in evidence – does not assist the Applicant in meeting his burden. In addition to unanswered questions this Court has about its authenticity, Applicant has failed to provide any context necessary for a determination that a letter from PCR counsel was never delivered.

App. 193. Thus, the Court denied Deaton's request for relief. App. 193.

This petition for writ of certiorari follows, seeking review pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated review of an Austin PCR application) and pursuant to Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002) (establishing the procedure when seeking review of a finding for the state on both a laches defense and Austin claim).

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[5] Despite Petitioner's disagreement with the PCR court's assessment of the testimony, in light of this Court's deferential standard of review, Petitioner is not appealing because Deaton "requested, yet was denied an opportunity to seek appellate review." See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999); Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994). Rather, Petitioner is appealing because he did not knowingly and intelligently waive his right to appeal. See Odom v. State, 337 S.C. at 261, 523 S.E.2d at 755.

ARGUMENT

I. The PCR court erred in denying Petitioner's request to file a belated appeal of the denial of his prior PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner did not receive first PCR counsel's letter enclosing the Order of Dismissal and instructing Petitioner to respond if he wanted to appeal such that Petitioner did not knowingly and intelligently waive the right to appeal.

The PCR court properly recited the law applicable to belated appellate review of the denial of post-conviction relief, writing: "Under *Austin*, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal." App. 191 (citing Odom, *infra*). However, the court erred in its application of the law to Deaton's case, improperly focusing only upon the first avenue for relief whereby a defendant requested and was denied an opportunity to seek appellate review. Deaton also presented evidence that he was entitled to belated review because **he did not knowingly and intelligently waive the right to appeal.** To the little extent that the PCR court's order discussed that evidence, it erred in finding the SCDC document was unpersuasive due to problems with its authenticity and in finding that Deaton "failed to provide any context necessary for a determination that a letter from PCR counsel was never delivered." See App. 193. Deaton presented ample evidence to support a finding that he did not make a knowing and intelligent waiver and is accordingly entitled to a belated appeal of Judge Young's order dismissing his original PCR application.

Under the PCR rules, an applicant is **entitled** to a full adjudication on the merits of the original petition, or "one bite at the apple." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (quoting Aice v. State , 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991)) (emphasis added). 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. "The right to seek appellate review of the denial of PCR is expressly authorized by state law." Austin, 305 S.C. at 454, 409 S.E.2d at 396 (citing S.C. Code Ann. § 17-27-100 (1985)).

Furthermore, in Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005), this Court established an affirmative requirement that PCR counsel "advise an applicant of the right to appellate review of the denial of PCR." 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.** Odom, 337 S.C. at 261, 523 S.E.2d at 755 (citing King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992)) (emphasis added). 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.

Here, Deaton did not knowingly and intelligently waive his right to seek appellate review of Judge Young's January 14, 2013 order of dismissal. There was no indication that Deaton ever received the copy of the order of dismissal purportedly mailed to him by Zmroczek on January 15, 2013. On the contrary, Deaton provided the PCR court with a copy of his SCDC inmate request and response, indicating that there was **no incoming legal mail for him from January 2, 2013 through February 2, 2013**. App. 171, ll. 5-15; App. 174, l. 8 – 175, l. 1; App. 187. The PCR court's finding that the document was "unpersuasive" because it was "uncorroborated and frankly, unauthenticated" is not supported by the evidence. App. 193.

Notably, the state did not object to the document's admission or question its authenticity at the PCR hearing. App. 174, ll. 8-19; App. 175, ll. 13-23; App. 182, l. 19 – 183, l. 2. Had such an objection been made, PCR counsel could have pointed the court to Rule 901, SCRE, which

provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The requirement of authentication can be satisfied by "[t]estimony that a matter is what it is claimed to be." Rule 901(b)(1), SCRE. Deaton could, and did, testify that the document was "the staff request [he] sent to the mailroom where Ms. Jones had stated that [he] didn't get any legal mail." App. 174, ll. 8-13; see also App. 171, ll. 12-15. While Deaton could not testify that he reviewed the mail logs himself, it was reasonable for him to rely upon the review conducted by the prison employee in charge of handling such matters.

Regarding the finding that Deaton failed to "provide any context necessary for a determination that a letter from PCR counsel was never delivered," Deaton's testimony and inquiry to the mailroom reflect the prison's failure to log and deliver the January letter from Zmroczek. Deaton testified that there is a registry in which the prison logs any legal mail that comes through the institution and which the inmate signs to show receipt of legal mail. App. 171, ll. 5-12. Further, it is hardly a secret that mail sent through the prison system is not always properly delivered. In addition to the failings experienced in the regular U.S. mail system, mail sent to prisons goes to a central mailroom before being delivered to the individual inmates. That process lends itself to further error, including accidental destruction, improper return to sender, misfiling, or even the intentional withholding of inmate mail. **Even Zmroczek admitted that it was possible that her letter never made it to Deaton and that she has had problems with the prison's mail system in the past with other clients.** App. 182, ll. 4-12.

Moreover, Deaton's actions following Zmroczek's March letter were consistent with someone who wanted to pursue an appeal. The April 1, 2013 request to the mailroom reflects that he filed it the same day that he received Zmroczek's March letter. App. 187; see also App.

129. His *pro se* notice of appeal was dated April 12, 2013 and received by this Court on April 18, 2013. App. 129. Additionally, Zmroczek testified that Deaton filed a complaint against her with the Office of Disciplinary Counsel on April 19, 2013. App. 179, ll. 17-20. Following this Court's order dismissing the notice of appeal on May 29, 2013, Deaton sent a motion to reconsider promptly on June 3, 2013 and received by this Court on June 10, 2013. App. 140; App. 141. The motion to reconsider was denied on July 11, 2013, and Deaton promptly filed his second PCR application pursuant to Austin on August 2, 2013. App. 144; App. 146.

Thus, there was credible evidence to show that Deaton's first notice of the order of dismissal was Zmroczek's March letter. Deaton's prompt filing of a *pro se* notice of appeal reveals that once aware of the ruling, he wanted to appeal it. As such, Deaton met his burden of proving that he did not make a knowing and intelligent waiver of his right to appeal. The PCR court's finding that Deaton failed to meet his burden of proof was in error. Deaton is accordingly entitled to a file a petition for certiorari pursuant to Austin v. State from Judge Young's order to complete his one fair bite at the apple.

II. The PCR court erred in ruling that Petitioner's request to file a belated appeal of the denial of his prior PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), was barred by the equitable doctrine of laches where the state failed to plead the affirmative defense of laches.

The PCR court ruled, *without explanation*, that Deaton's claim for relief was barred by laches. App. 132. "Laches is an equitable doctrine, which arises upon the failure to assert a known right." Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." Bray v. State, 366 S.C. 137, 140–41, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. at 219, 574 S.E.2d at 202)).

In Whitehead, this Court held that while laches may raised as a defense to an Austin PCR, it is an affirmative defense that "**must be pleaded**." 352 S.C. at 220, 574 S.E.2d at 202 (citing Rule 8(c), SCRCP) (emphasis added). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Id. Thus, this Court ruled that because the state failed to raise laches in its return to Whitehead's second PCR application or in its motion to dismiss that application, it had waived its right to raise the affirmative defense of laches in the case. Id.

The state's return, filed May 21, 2014, noted that the sole claim alleged in Deaton's second PCR application was the denial of his right to appeal the dismissal of his previous post-conviction relief application. App. 162. However, the state failed to assert the affirmative defense of laches in its return and never filed a motion to dismiss. App. 160 – 164. Thus, the PCR court erred in finding that Deaton's application was barred by laches, where any such defense was waived by the state. See App. 132; Whitehead, supra.

STATEMENT OF *AUSTIN* QUESTION

Pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), the issue to be raised in a belated petition for certiorari is provided as follows:

Whether the PCR court erred in finding that plea counsel was effective where she failed to seek to enforce the state's plea offer?

CONCLUSION

For the reasons set forth herein, Petitioner Brian Keith Stephens respectfully requests this Court grant certiorari, reverse Judge Hayes' determination that petitioner is not entitled to belated review of Judge Young's order, and order the filing of an *Austin* petition from Judge Young's order.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Mark Hayes, Circuit Court Judge

WILLIAM PATRICK DEATON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on William Patrick Deaton, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 13th day of February, 2017.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of February, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.