

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
THE SIXTEENTH JUDICIAL CIRCUIT

FILED
2017 JUL -5 AM 10:59
DAVID HAMILTON
C.C.C.P. & S.S.
YORK COUNTY, SC

Johnell Porter,
S.C.D.C. No. 166280

2015-CP-46-1186

Applicant,

v.

State of South Carolina,

Respondent.

**AMENDED ORDER GRANTING AN
APPEAL PURSUANT TO
AUSTIN V. STATE¹**

This matter comes before the Court by way of an application for post-conviction relief filed April 20, 2015. Respondent made its Return on or about June 27, 2016, requesting an evidentiary hearing 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 on the matter was convened on August 1, 2016, at the Moss Justice Center in York, South Carolina. Applicant was not present but was represented at the hearing by Nathan Sheldon, Esquire. Justin Hunter, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The York County Grand Jury indicted the Applicant at the June 2007 term of General Sessions for Armed Robbery (2007-GS-46-01687), entering a bank with intent to steal (2007-GS-46-01688), kidnapping (2007-GS-46-01689), possession of a firearm during the commission of a violent crime (2007-GS-46-01690), and Conspiracy to commit armed robbery (2007-GS-46-01691). Applicant appeared pro se.

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Daniel D'Agostino served as stand-by counsel for applicant. On July 26, 2007, Applicant was convicted of these charges by a jury. The Honorable John C. Hayes, III sentenced Applicant to confinement for life for kidnapping, life for armed robbery, life for entering a bank with intent to steal, five years for Possession of a firearm during the commission of a violent crime, and five years for conspiracy to commit armed robbery, all running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. A Petition for Rehearing was filed by the Applicant and denied by the Court on July 7, 2010. A Petition for Writ of Certiorari was filed by the Applicant and denied by the Court on February 16, 2011. The Remittitur was issued on February 23, 2011.

PCR#1 2011-CP-46-2620

On July 7, 2011, Applicant filed his first application for post-conviction relief. Respondent made its Return on October 21, 2011. An evidentiary hearing into the matter was convened on January 21, 2014, at the Moss Justice Center in York County before the Honorable J. Michael Baxley. Applicant was present at the hearing and represented by Leah Moody, Esquire. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

During the PCR hearing, Applicant moved to have Ms. Moody relieved as PCR counsel. The PCR Court denied this motion. Applicant then expressed to the Court that he would refused to take the stand or testify during the hearing. The PCR Court instructed Applicant that he had a right to be present during the hearing, but Applicant elected to return to the jail holding cell. The PCR Court also found Ms. Moody well-prepared and well-versed in Applicant's allegations and found no reason to relieve her as counsel. Respondent then moved pursuant to Rule 41(b),

SCRCF, to dismiss this matter due to the Applicant's failure to prosecute. The PCR Court granted Respondent's motion and an Order of Dismissal was signed and filed March 14, 2014. Applicant filed a pro se Motion to Alter or Amend the Judgment on February 4, 2014. This motion was denied by and order filed April 18, 2014.

A notice of appeal was filed but dismissed by the South Carolina Supreme Court for failure to timely serve opposing counsel. The Remittitur was sent May 14, 2014

Current PCR Application

In his current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel under Austin v. State"
2. Newly discovered evidence

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Newly Discovered Evidence

Applicant alleges newly discovered evidence, claiming that the York County Court of General Sessions did not have proper jurisdiction because a letter from the Federal Deposit Insurance Corporation (FDIC) reveals that the Bank of York is insured by the FDIC. The letter includes four questions submitted by Applicant and the responding answers from the FDIC. The letter reads:

- (1) Is the Bank of York insured by the FDIC?
Yes, the Bank of York, York, SC is FDIC insured under FDIC Certificate #15104 and is a non-member of the Federal Reserve System.
- (2) Are all banks insured by the FDIC under federal jurisdiction?
No. State-chartered banks that are not members of the Federal Reserve System are regulated by the chartering state and the FDIC.
- (3) Does the United States District Courts have exclusive jurisdiction over all banks insured by FDIC?
No. Federal jurisdiction for bank robbery is not exclusive - bank robbery can be charged and prosecuted in State courts.

(4) Is it mandatory for the FDIC certificate to be displayed or brought to trial as evidence? When a FDIC insured bank has been robbed and a jury trial is taken place?

The federal bank robbery statute (18 U.S.C. § 2113) does require proof beyond a reasonable doubt of Federally-insured status. However proof is not limited to display or entering into evidence of the certificate of Federally-insured status. For example the proof can be accomplished by stipulation or the testimony of a witness.

Applicant's PCR Application, Letter dated June 9, 2014.

A defendant requesting a new trial based on after discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

This Court finds that Applicant's alleged evidence does not meet any of the requirements for after discovered evidence. His evidence is a letter from the FDIC in responding to questions he submitted to it. Specifically this Court finds that on its face, the letter would not change the result if a new trial was had because, as the letter indicates, "Federal jurisdiction for bank robbery is not exclusive - bank robbery can be charged and prosecuted in State courts." Before a Court will hold an evidentiary hearing, the applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Because Applicant has failed to make such a showing, This Court finds that the allegation of newly discovered evidence must be denied and dismissed.

Austin v. State

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. 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). 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. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Prior to the start of the evidentiary hearing, the State indicated to this Court that they would be consenting to the grant of an Austin appeal. Respondent explained that it was consenting based off of its discussions with prior PCR Counsel and Applicant's current PCR Counsel, and due to the fact that Applicant's prior PCR action was not properly appealed.

After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that Applicant is entitled to appeal the denial of his first post-conviction relief application (2011-CP-46-2620) 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.

III. CONCLUSION

Based upon the foregoing, this Court finds that Applicant's claim of newly discovered evidence must be dismissed. This Court also finds that Applicant should be granted an appeal of his first post-conviction relief action (2011-CP-46-2620) pursuant to Austin v. State. This Court


advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243 of the South Carolina Appellate Court Rules for the appropriate procedures for filing a belated appeal.

IT IS THEREFORE ORDERED:

1. That Applicant be granted an appeal of case 2011-CP-46-2620 pursuant to Austin v. State;
2. That all other allegations raised in this application are dismissed with prejudice; and
3. That Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 22 day of June, 2017.

Yoru, South Carolina.


LETITIA VERDIN
Presiding Judge
Sixteenth Judicial Circuit

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

FILED
2017 JUL -5 AM 10:39

CASE NO: 2015-CP-46-1186

JOHNELL PORTER, #240208

DAVID HAMILTON
C.O. #10153

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

vs.

YORK COUNTY SC

STATE OF SOUTH CAROLINA)

Defendant.)

Plaintiff's Attorney:
Johnell Porter, #240208, Pro Se.
Address:
4344 Broad River Road
Columbia, SC 29210
Phone: _____ Fax _____
E-mail: _____ Other: _____

Defendant's Attorney:
Justin J. Hunter, Bar No.
Address:
PO Box 11549
Columbia, SC 29211
Phone: _____ Fax _____
E-mail: _____ Other: _____

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiff / Defendant

June 15, 2017
Date submitted

SECTION III: Motion Fee

PAID - AMOUNT: \$ _____

EXEMPT:

(check reason)

- Rule to Show Cause in Child or Spousal Support
- Domestic Abuse or Abuse and Neglect
- Indigent Status State Agency v. Indigent Party
- Sexually Violent Predator Act Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication Motion for Execution (Rule 69, SCRPC)
- Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
- Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.

Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

MOTION FEE COLLECTED: \$ _____

CONTESTED - AMOUNT DUE: \$ _____

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4601186**

Johnell Porter		South Carolina State Of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Justin J Hunter	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

**ORDER INFORMATION
AMENDED ORDER GRANTING AN APPEAL**

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/ LETITIA VERDIN	2162	7/5/2017
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on 7/5/2017, and a copy mailed first class or placed in the appropriate attorney's box on 7/5/2017, to attorneys of record or to parties (when appearing pro se) as follows:

**Johnell Porter Perry Correctional Institution Q4A 114 430
Oaklawn Road Pelzer, SC 29669**

**Justin James Hunter PO Box 11549 Columbia, SC
29211-1549**

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
