

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2016-001721

STANLEY L. BUTLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

- I. **Did the PCR court err in denying Petitioner's subsequent PCR application without conducting a reconstruction hearing to determine if the record from Petitioner's initial PCR action could be reconstructed, where Petitioner never moved for reconstruction?**

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. During its May 1996 term, the Greenville County Grand Jury indicted Petitioner for four counts of kidnapping (1996-GS-23-3380, -3382, -3383, -3384), armed robbery (1996-GS-23-3381), and possession of a weapon during commission of a violent crime (1996-GS-23-3386). John Rollins, Jr., Esquire represented Petitioner. On July 23, 1996, Petitioner proceeded to trial before the Honorable C. Victor Pyle, Jr. and a jury. The jury convicted Petitioner of all the charges. Judge Pyle sentenced Petitioner to concurrent terms of twenty years imprisonment for the four counts of kidnapping, thirty years imprisonment for the armed robbery, and five years imprisonment for the possession of a weapon during commission of a violent crime.

Petitioner filed a timely notice of appeal which was perfected by Chief Appellate Defender Robert M. Dudek, Esquire of the South Carolina Commission of Indigent Defense-Office of Appellate Defense. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Butler, Op. No. 97-UP-640 (S.C. Ct. App. filed Dec. 10, 1997).

Thereafter, on June 26, 1998, Petitioner filed a timely application for post-conviction relief. Respondent made its return on March 9, 1999, requesting an evidentiary hearing be held. An evidentiary hearing was held on April 12, 2000 at the Greenville County Courthouse before the Honorable James E. Brogdon, Jr. Petitioner was present and represented by William G. Yarborough, Esquire. Kevin Tierney, Esquire, of the South Carolina Office of the Attorney General represented Respondent. Following the evidentiary hearing, Judge Brogdon denied Petitioner's application by written order dated July 16, 2001. Petitioner did not file an appeal.

More than a decade later, on June 29, 2012, Petitioner filed a second application for post-

conviction relief. On September 11, 2012, Respondent filed a return and motion to dismiss, arguing the application should be summarily dismissed because Petitioner application was successive and outside of the statute of limitations. On September 19, 2012, the Honorable G. Edward Welmaker, acting in his capacity as Chief Administrative Judge, signed a Conditional Order of Dismissal provisionally dismissing the application with prejudice and giving Petitioner twenty days in which to respond. On September 25, 2012, Petitioner submitted an amendment to his application raising, for the first time, ineffective assistance of PCR counsel for failing to appeal the denial of his previous application pursuant to Austin v. State¹. On January 13, 2013, Judge Welmaker issued a Final Order dismissing the matter with prejudice, specifically finding that Applicant's Austin claim was barred by the equitable doctrine of laches.

Petitioner filed a timely notice of appeal. In his petition for writ of certiorari, Petitioner argued the court erred in dismissing his application pursuant to laches because he was not at fault in delaying appellate review of the denial of his first PCR application. By order filed January 1, 2015, the Court of Appeals granted certiorari on a single, unraised issue: "whether the PCR court committed an error of law when it denied and dismissed Applicant's PCR application based on the doctrine of laches when the State did not plead laches as an affirmative defense?" Respondent filed a motion to certify the matter to the Supreme Court of South Carolina on May 5, 2015, arguing the Court of Appeals deviated from the South Carolina Appellate Court Rules in directing the parties to address an unraised question and "any other issue of arguable merit." That motion was subsequently withdrawn, and Respondent and Petitioner ultimately consented to remand the matter to Circuit Court for a new hearing via a motion dated June 29, 2015. In an order filed September 1, 2015, the Court of Appeals vacated the PCR court's final order and

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (allowing belated appeal from the denial of post-conviction relief where failure to file a notice of appeal was the result of counsel's ineffective assistance).

remanded the case back to Circuit Court for an evidentiary hearing. Respondent filed an amended return and motion to dismiss dated December 4, 2015. (Supp.App.p.17-23).

A new evidentiary hearing was held on April 20, 2016, at the Greenville County Courthouse before the Honorable R. Knox McMahon. Petitioner was present and represented by Brian Johnson, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Office of the Attorney General represented Respondent. At the hearing Respondent argued Petitioner's merit claims should be dismissed because they were successive to a previous application and outside the statute of limitations. Additionally, Respondent argued Petitioner's claim that his PCR was ineffective for failing to file an appeal was barred by laches. Petitioner argued laches did not apply in the in this case with respect to his Austin claim because of the doctrine of res judicata. During the hearing Petitioner, Petitioner's original PCR counsel and Petitioner's mother testified. Petitioner testified he was asking the court to consider allowing him to be granted an Austin review. (App.p.461). Additionally, he testified he did not speak to his PCR counsel after the hearing. (App.p.458). Petitioner's PCR counsel testified that he remembered the applicant, but was unable to remember in what capacity he represented him. (App.p.465). He further testified that he did not know whether he was ever asked to file an appeal. (App.p.465-466). Finally, he testified if Petitioner had requested he file an appeal he would have done so. (App.p.466). Petitioner's mother offered testimony which was contradictory. On direct examination she testified she attempted to contact PCR counsel after her son's PCR case was denied, but was unable to make contact with counsel. (App.p.469-470). On cross-examination, she testified that she did not remember the date that she tried to contact PCR counsel, and did not attempt to contact counsel after the hearing. (App.p.470-471). Following the evidentiary hearing, Judge McMahon denied Petitioner's application by written order dated July 29, 2016. Petitioner filed a

timely notice of appeal. This return to petition for writ of certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. **The PCR court did not err in denying Petitioner's subsequent PCR application without conducting a reconstruction hearing to determine if the record from Petitioner's initial PCR action could be reconstructed, where Petitioner never moved for reconstruction.**

Petitioner asserts the PCR court erred in applying laches as a defense to deny Petitioner's second PCR action where he requested an Austin appeal of his first PCR action without first conducting a reconstruction hearing of the first PCR hearing in order to test the memories of all parties who participated in the hearing of his original PCR application, which would have been a more thorough evaluation than questioning his first PCR attorney only, because without such a reconstruction PCR hearing it would have been impossible to properly assess whether the delay in the filing of the second PCR action resulted in prejudice to the respondent. This argument is without merit.

In denying Petitioner's second application for post-conviction relief, the PCR court found Petitioner's claim was barred by the equitable doctrine of laches. (App.p.479). Additionally, after hearing all the evidence presented at the evidentiary hearing, the PCR court found Petitioner had failed to meet his burden finding Petitioner did not ask for an Austin review of his first PCR application. (App.p.482). In determining that Petitioner's claim was barred by laches, the PCR court noted *res judicata* did not preclude Respondent from raising laches as a defense. Furthermore, in determining Petitioner's claim should be dismissed because of laches, the PCR court found that Petitioner's delay in filing his second application prejudiced Respondent. The PCR court found the transcript of Petitioner's first PCR hearing is now unavailable and Petitioner's original PCR counsel has little memory of his representation of Petitioner (App.p.481) Moreover, the PCR court found Petitioner's lack of diligence in processing his

claim for relief warranted dismissal of his application given the nearly eleven year delay in filing his second PCR application. (App.p.482). In finding that Petitioner failed to meet his burden in concerning his Austin claim, the court found that Petitioner did not ask for an appeal of his original PCR. Additionally, the PCR court noted Petitioner's original PCR counsel testified that if Petitioner had requested he file an appeal he would have done so.

In Whitehead v. State, this Court held the doctrine of laches may be raised as defense to Austin post-conviction relief claims that an applicant's counsel was ineffective for failing to seek review of denial of post-conviction relief application. Whitehead v. State. 352 S.C. 215, 574 S.E.2d 200 (2002). In that case, the Whitehead's first PCR application was denied in 1992 following an evidentiary hearing, and there was no appellate review of his case. He then filed a second application in which he alleged, among other things, he was entitled to an Austin review of his first PCR action because his first PCR counsel failed to file an appeal of his first application. He then received an evidentiary hearing in which the PCR court granted his request for a belated appellate review finding his testimony credible. He then filed a petition for certiorari and, while preparing the appendix, his counsel discovered the transcript from the 1992 evidentiary hearing was unavailable. Petitioner petitioned the Court to remand the matter back to circuit court for a reconstruction hearing. This Court denied that motion and ordered the parties to brief the issue of "whether, in an instance such as this, a PCR applicant may be barred from seeking Austin review by the doctrine of laches." This Court ultimately decided four things. First, laches may be raised as a defense to an Austin claim. Whitehead, 352 S.C. at 219, 574 S.E.2d at 202. Second, laches is an affirmative defense that must be plead and the failure to plead an affirmative defense is deemed a waiver of the right to assert it.² Whitehead, 352 S.C. at

² The Court found the state neither raised laches in its return to petitioner's second PCR application nor in its motion to dismiss thus waving the right to raise the defense of laches in the case.

220, 574 S.E.2d at 202. Third, in cases where laches is properly waived as a defense to an Austin claim, the PCR court will hear evidence on the defense and at the same time hear the Applicant's Austin claim on the merits. Whitehead, 352 S.C. at 219, 574 S.E.2d at 202. The Court required the PCR court to make specific findings on the laches issue as well as specific finding on the Austin claim. It then laid out the following procedure to be followed depending on the nature of the PCR court's ruling.

- 1) If the PCR judge finds for the applicant on both the Austin claim and the laches defense:
 - a) the applicant shall proceed according to the procedure outlined in King v. State
 - b) the State may cross-petition for review of the laches ruling;
- (2) If the PCR judge finds for the State on both the laches defense and the Austin claim:
 - a) petitioner shall file a petition for certiorari addressing both rulings on their merits, and shall include a list of the issues that would be raised were an Austin review granted;
- (3) If the PCR judge finds for the State on the laches defense and for petitioner on the Austin claim:
 - a) petitioner shall raise the laches issue on the merits in his petition for writ of certiorari, in addition to following the procedure outlined in King v. State; and
- (4) If the PCR judge finds for petitioner on the laches defense and for the State on the Austin claim:
 - a) petitioner shall follow the King v. State procedure;
 - b) the State may cross-petition for review of the laches ruling.

Fourth and finally, this Court granted Whitehead's motion for reconstruction of the record and remand the case back to circuit court. Whitehead, 352 S.C. at 221, 574 S.E.2d at 203

In the present case, Petitioner argues the PCR court erred when it applied laches as a defense without first conducting a reconstruction hearing. In its amended return and motion to dismiss, Respondent pleaded laches as an affirmative defense and also raised it at the evidentiary hearing. (Supp.App.p.17-23). Furthermore, during Petitioner's initial petition for writ of

certiorari, the only issue presented to this court by Petitioner was whether he was entitled to a review of his initial PCR action pursuant to Austin. Petitioner moved the court for reconstruction of his initial PCR hearing. Petitioner simply asked for a new PCR hearing. Furthermore, the order from the Court of Appeals remanding the case back to the circuit court did not order the PCR court to conduct a reconstruction hearing, but simply instructed the circuit court to hold an evidentiary hearing on the allegations contained in Petitioner's PCR application and motion to amend. The PCR court did exactly as instructed by the Court of Appeals. (App.p.439). At the remand PCR hearing, Petitioner's new PCR counsel said to the PCR court, "Now for clarification, at this time, it's not the applicant's goal to reconstruct the record." (App.p.448) Moreover, because Petitioner never moved for a hearing he waived it. "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. Waiver, p. 1063 (1955)).

Furthermore, PCR court found Petitioner failed to meet his burden of establishing he was entitled to an Austin review. Under Austin, an applicant can appeal a denial of a PCR application after the statute of limitations has expired if the applicant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal. Odom v. State, 337 S.C. 256, 259-60, 523 S.E.2d 753, 754-55 (1999). The primary issue is whether an applicant requested appellate review of his prior PCR action or did not knowingly and intelligently waive the right to it. Therefore, only Petitioner and prior PCR counsel are needed to testify to the facts surrounding this issue. Moreover, PCR counsel testified he remembered the applicant, but was unable to remember in what capacity he represented him. (App.p.483.) He testified he did not know whether he was ever asked to file an appeal.

(App.p.483.). Additionally, he testified looking at the dates, his health and troubles³ started about four months after Petitioner's PCR hearing was held. Finally, he testified if Petitioner had requested he file an appeal, he would have done so. (App.p.483.) The PCR court found Petitioner had failed to meet his burden while concluding that PCR counsel's testimony that he would have filed an appeal had Petitioner asked him to was credible. Additionally, the PCR court noted Petitioner did not testify at any point during the evidentiary hearing that he actually wanted to appeal the original PCR court's decision until he learned about the possibility of an Austin claim several years later. Here, a full reconstruction hearing was unnecessary because the PCR court correctly found Petitioner failed to meet his requisite burden of establishing he was established to Austin review of his initial PCR proceeding.

Based on the foregoing, the post-conviction relief court did not err in denying and dismissing Petitioner's second application for post-conviction relief.

CONCLUSION

³ Counsel was placed on incapacity inactive status on September 1, 2000, and subsequently disbarred for conduct unrelated to this case. In re Yarborough, 342 S.C. 387, 536 S.E.2d 870 (2000); 343 S.C. 316, 540 S.E.2d 462 (2000). Counsel has since been reinstated. 403 S.C. 365, 744 S.E.2d 499 (2013).

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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