

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-001132
Lower Court Case No. 2015-CP-43-2810

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OCT 24 2016

S.C. SUPREME COURT

DEVAN DWYER, #302693,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

JEREMY A. THOMPSON
Attorney and Counselor at Law

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ATTORNEY FOR PETITIONER.

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QUESTION PRESENTED

I.

Whether there is any probative evidence to support the PCR court's conclusion that the Petitioner should receive a belated appeal from the denial of his first PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT OF THE CASE

The Petitioner, Devan Dwyer, was charged in Sumter County for first-degree burglary, armed robbery, two counts of assault and battery with intent to kill, and possession of a firearm during the commission of a violent offense. On April 13-14, 2009, the Petitioner proceeded to trial on these charges. The Petitioner was represented at his trial by Lauren B. Stevens, Esquire. At the conclusion of the trial, the jury found the Petitioner guilty as charged on all counts. The Honorable R. Ferrell Cothran, Jr., presiding circuit judge, sentenced the Petitioner to thirty years' imprisonment for the burglary charge, twenty-five years' imprisonment on the armed robbery charge, twenty years' imprisonment on one ABWIK charge, fifteen years' imprisonment on the second ABWIK charge, and five years' imprisonment on the firearm charge. Judge Cothran ordered that the sentences run concurrently.

The Petitioner timely appealed his convictions and sentences to the South Carolina Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed his convictions and sentences. State v. Dwyer, Op. No. 2011-UP-010 (S.C. Ct. App. filed January 24, 2011); App. pp. 333-334. The remittitur was issued on February 10, 2011. App. p. 335.

On December 22, 2011, the Petitioner filed his first Application for Post-Conviction Relief with the Sumter County Clerk of Court. An evidentiary hearing into the matter was convened on December 17, 2014, before the Honorable J. Cordell Maddox, Jr., presiding circuit judge. The Petitioner was represented at this proceeding by Willie H. Brunson, Esquire. On May 15, 2015, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims. App. pp. 432-448.

By letter dated July 10, 2015, the Petitioner attempted to file a *pro se* notice of appeal with this Court. App. pp. 453-454. On July 20, 2015, this Court instructed PCR counsel to provide proof

of service of the notice of appeal and a written statement regarding the date on which PCR counsel received the Order of Dismissal. App. pp. 455-456. On September 30, 2015, this Court dismissed the appeal due to PCR counsel's failure to comply with these instructions. App. p. 457. The remittitur was issued on October 16, 2015. App. p. 458.

On December 22, 2015, the Petitioner filed his second PCR application with the Sumter County Clerk of Court. The State served its Return and Motion to Dismiss all Claims Beyond Austin Review on February 2, 2016. An evidentiary hearing was convened on March 17, 2016, before the Honorable Brooks P. Goldsmith, presiding circuit judge. The Petitioner was represented at this proceeding by Jeremy A. Thompson, Esquire. On April 21, 2016, the PCR court filed an Order Granting an Appeal Pursuant to Austin v. State. App. pp. 483-486. The Petitioner served its Notice of Appeal from this order on May 25, 2016, and this Court received the notice on May 27, 2016.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

ARGUMENT

I. The second PCR court properly granted belated review of the Petitioner's first PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

In Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), this Court permitted PCR applicants to file a successive PCR application where “PCR counsel was ineffective in failing to seek appellate review of the denial of PCR.” 305 S.C. at 454, 409 S.E.2d at 396. “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.” Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999).

The Petitioner attempted to appeal the denial of his first PCR, and filed for Austin review based on PCR counsel's failure to file the appeal. See App. p. 463 (“PCR counsel failed to properly perfect the appeal from the denial of the first Application for Post-Conviction Relief by failing to properly serve the notice of appeal or notify the Supreme Court when he received the order of dismissal.”) At the proceeding below, the State consented to the grant of Austin review because “[w]e've spoken to his prior PCR counsel, Mr. Brunson” and “were in agreement” that the Petitioner was entitled to Austin relief. App. p. 477, lines 6-9. The PCR court granted Austin review based on PCR counsel's representation to the State and found that the Petitioner “did not voluntarily waive his right to appeal to the post-conviction relief court's denial and dismissal of his prior post-conviction relief action. App. p. 485.

The PCR court's ruling is supported by probative evidence, given PCR counsel's representation to the State that he failed to file the appeal on the Petitioner's behalf. Accordingly,

this Court should grant Austin review and should review the merits of the appeal from the Petitioner's first PCR.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on this issue.

Respectfully submitted,



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This 20th day of October, 2016.

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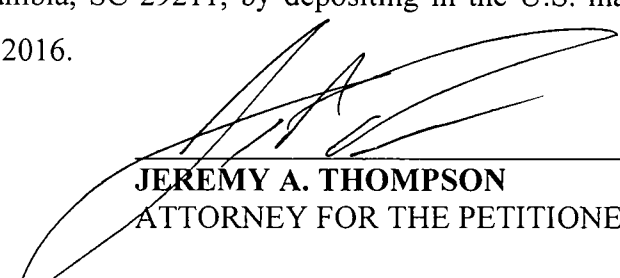
v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies each of the Petition for Writ of Certiorari and the Petition for Writ of Certiorari Pursuant to Austin v. State in the above-entitled case have been served upon opposing counsel, Julie Coleman, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 20th day of October, 2016.



JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 20th day
of October, 2016.



Notary Public for South Carolina (L.S.)

My Commission Expires: 2/22/18

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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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