

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable John C. Hayes, Circuit Court Judge

JESSIE JAMES ROBINSON,


PETITIONER

V.

JAN 11 2018

STATE OF SOUTH CAROLINA,

S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2017-001688

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether there was any evidence to support the post-conviction relief judge granting petitioner an Austin review of questions from the first post-conviction relief order?

STATEMENT

On March 22, 2012, petitioner appeared before the Honorable Michael G. Nettles in York County and pled guilty but mentally ill to burglary in the first degree. A fifteen (15) year sentence was imposed. B.J. Barrowclough, Esq. was plea counsel.

Petitioner filed an application for post-conviction relief on July 18, 2013. (App. p. 1- p. 7). Respondent filed a return dated October 2, 2013. (App. p. 42- p. 45). An evidentiary hearing was held on December 10, 2013, before the Honorable John C. Hayes, III. Petitioner was present and was represented by W. Michael Hemlepp, Esq. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 46- p. 81).

On December 11, 2013, Judge Hayes issued an order denying and dismissing the application for post-conviction relief. (App. p. 82- p. 88). There was no appeal.

Petitioner filed a second application for post-conviction relief on April 16, 2015. He alleged he was entitled to an Austin review of the denial of his first application for post-conviction relief. (App. p. 89- p. 95). Respondent filed a return and motion to dismiss all claims except for the Austin review. Respondent requested an evidentiary hearing to determine if petitioner was entitled to a review pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. p. 96- p. 100).

On January 19, 2016, an evidentiary hearing was held on the Austin issue. (App. p. 102- p. 105).

In July of 2017, Judge Burch issued an order granting the Austin review of the dismissal of petitioner's first application for post-conviction relief. (App. p. 107- p. 109).

In accordance with King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) the issue of granting a belated review of the previous post-conviction order shall be raised. Petitioner will also serve a separate Austin petition addressing questions from the first post-conviction relief order.

ARGUMENT

There was evidence to support the post-conviction relief judge's decision granting petitioner an *Austin* review of questions from the first post-conviction relief order.

The Court has repeatedly held that it must uphold the findings of the PCR judge if there is any evidence of probative value to support them. *Roberts v. State*, 361 S.C. 1, 602 S.E.2d 768 (2004); *Caprood v. State*, 335 S.C. 103, 525 S.E.2d 514 (2000); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624; *Sosebee v. Lekee*, 293 S.C. 531, 362 S.E.2d 22 (1987); *Pringle v. State*, 287 S.C. 409, 339 S.E.2d 127 (1986); *Knight v. State*, 284 S.C. 138, 325 (1985); *Daniel v. State*, 282 S.C. 155, 317 S.E.2d 746 (1984); *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984).

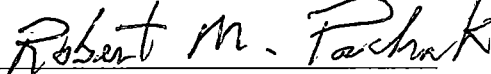
There was no appeal of the denial of petitioner's first post-conviction relief action. He raised the issue in his second application for post-conviction relief. He argued that he was entitled to an *Austin* review. (App. p. 89- p. 94). Respondent agreed in his return that petitioner was entitled to a hearing on the *Austin* review. (App. p. 98- p. 99).

At the evidentiary hearing on the *Austin* issue, the second PCR attorney said that he talked to Mike Hemlepp, Esq. and that attorney had a family emergency and could not make it to the hearing. He spoke with Hemlepp and he said it was his custom to file a notice of appeal after a PCR dismissal. He said petitioner did ask for an appeal but he did not properly file one. The current PCR counsel also noted that respondent consented to an *Austin* review. (App. p. 104, line 22- p. 105, line 6).

In the order granting an appeal pursuant to *Austin*, Judge Burch found that petitioner was entitled to appeal the denial of his first post-conviction relief application pursuant to *Austin*. He found that petitioner did not voluntarily waive his right to appeal.

CONCLUSION

The decision of the PCR judge to grant petitioner a belated appeal should be upheld.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of January, 2018.

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STATE OF SOUTH CAROLINA,


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CERTIFICATE OF SERVICE
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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 Justin J. Hunter, 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 Jessie J. Robinson, #166280, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 10th day of January, 2018.


Robert M. Pachak
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 11th day of January, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.