

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Thomas A. Russo, Circuit Court Judge

DONTAVIOUS JACKSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001487

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
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INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court properly granted Petitioner a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and the state consented to the request for belated appellate review. 5

CONCLUSION 8

ISSUE PRESENTED

Did the PCR court properly grant Petitioner a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and the state consented to the request for belated appellate review?

STATEMENT

On November 8, 2010, a Darlington County grand jury indicted Petitioner for grand larceny (2010-GS016-1974) and burglary in the first degree (2010-GS-16-1975). App. 560-561; App. 563-564. The state, represented by Patti M. Parker and John Holt, called the case to trial before the Honorable J. Michael Baxley and a jury. App. 1. Matthew Swilley and Will Grove represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 386, l. 17 – App. 387, l. 5.

During the sentencing presentation, the state admitted Petitioner had no prior record. App. 391, l. 9. The solicitor remarked that he had no “adult record.” App. 391, l. 9. The solicitor informed the judge that Petitioner had “several pending files” in her office, however. App. 391, ll. 7-12. The solicitor then informed the judge that Petitioner had been arrested for distribution of crack cocaine, attempted armed robbery, strong armed robbery, two counts of petit larceny, assault and battery of a high and aggravated nature, burglary first degree, and possession of a firearm during the commission of a violent crime. App. 392, ll. 4-14. The local sheriff at the time added to the solicitor’s remarks by describing Petitioner and “his associates” as “literally terroriz[ing] the people of Darlington County, in the hill area, and around Hartsville.” App. 393, ll. 2-6. Although recognizing that Petitioner had no prior record, the sheriff, as the solicitor had done, emphasized Petitioner’s “numerous pending charges, and, of course, his juvenile record.” App. 393, ll. 7-10. Despite the sheriff’s knowledge that Petitioner’s juvenile record was “not admissible,” he still made the judge aware of “things that he ha[d] done before he became an adult.” App. 393, ll. 7-10.

Judge Baxley relied heavily upon the local sheriff’s commentary when he explained that based on the sheriff’s remarks, Petitioner was “a one person crime wave” in the community.

App. 400, ll. 17-19. The judge emphasized the “multiple charges” pending against Petitioner.

App. 400, l. 19. Despite Petitioner denying guilt as to those charges and his constitutional right to the presumption of innocence, the judge stated as follows:

[A]lthough you have not been convicted of any of those, it is clear that you have been involved in a substantial amount of criminal activity in this community, including this burglary for which there was ample and clear evidence that you were involved in this burglary.

App. 400, l. 24 – App. 401, l. 4. Based upon Petitioner’s “substantial criminal activity on his record,” Judge Baxley sentenced Petitioner to twenty-five years imprisonment for burglary and five years imprisonment for grand larceny. App. 401, ll. 8-12; App. 562; App. 565.

Petitioner filed a notice of appeal, which was perfected by Tristan M. Shaffer and undersigned counsel. App. 405-416. The sole issue on appeal concerned whether Judge Baxley erred in failing to grant a mistrial when a member of the jury venire announced that Petitioner was a suspect in a burglary of her parent’s home. App. 405-416. On August 1, 2012, the Court of Appeals affirmed Petitioner’s convictions and sentences. State v. Jackson, 2012-UP-476 (S.C. Ct. App. filed Aug. 1, 2012); App. 441-442. Remittitur issued on August 17, 2012. App. 443.

On February 22, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 444-453. The state’s return was dated May 29, 2014. App. 454-458. Through counsel, Lance Boozer, Petitioner amended his PCR application. App. 459-460. On July 27, 2015, the matter proceeded to an evidentiary hearing before the Honorable Thomas A. Russo. App. 461. Boozer represented Petitioner. App. 461. Joshua L. Thomas represented the state. App. 461. At the conclusion of the hearing, Judge Russo took the matter under advisement. App. 521, ll. 21-23. By an order filed October 15, 2015, Judge Russo denied Petitioner relief. App. 524-535.

On December 23, 2015, Boozer wrote to this Court asking to file a belated notice of appeal, explaining the date for filing had been calendared incorrectly. App. 536-540. The state

consented to the filing. App. 536-540. This Court denied the request on January 8, 2016. App. 541. Remittitur issued on January 26, 2016. App. 542.

On February 11, 2016, Petitioner filed a second PCR application requesting a belated PCR appeal. App. 543-549. In its return, the state agreed that Petitioner's request for a belated appeal of his PCR application was meritorious. App. 550-555. The state confirmed that Petitioner's prior PCR counsel inadvertently missed the deadline to file the notice of appeal. App. 550-555. Thus, the state concluded Petitioner "did not knowingly and intelligently waive his right to appellate review of his PCR hearing." App. 550-555. The state consented to a belated review of the denial of his prior PCR application. App. 550-555. By an order filed March 16, 2017, the Honorable Roger E. Henderson granted Petitioner a belated appeal of his PCR application. App. 556-559.

On July 6, 2017, Petitioner received written notice of the entry of the order granting him relief. With the assistance of the Chief Appellate Defender, Petitioner served his notice of appeal on July 7, 2017. Petitioner now files this petition for writ of certiorari.¹

¹ Pursuant to this Court's instructions in King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), Petitioner is also filing a petition for writ of certiorari pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

ARGUMENT

The PCR court properly granted Petitioner a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) where Petitioner did not knowingly and intelligently waive the right to appellate review of his previous PCR application and the state consented to the request for belated appellate review.

The PCR court properly granted Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application. In fact, the state consented to the grant of relief. App. 550-555; App. 556-559; see *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). In South Carolina, “[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application.” *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. Id. This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. Id. at 261, 523 S.E.2d at 755-56. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. *Austin*, 305 S.C. at 455, 409 S.E.2d at 396.

This Court held that the procedures prescribed by *Anders v. California*, 386 U.S. 738 (1967) applied in PCR matters. *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1998). Thus, appellate counsel is required to engage in a conscientious investigation of the possible grounds of appeal and brief arguable issues before appellate counsel may ask to withdraw. *Anders*, 386 U.S. at 744. The United States Supreme Court held: “The constitutional requirement of substantial equality and fair

process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.” Id.

In his second PCR application, Petitioner explained that he was seeking an appeal from his first PCR application because “Prior PCR counsel admits he inadvertently and incorrectly calendared [Petitioner]’s appeal date. Counsel attempted to file the claim out of time with the Attorney General’s consent, however, the request was denied. [Petitioner]’s appeal was dismissed without prejudice.” App. 545. Petitioner’s desire for an appeal was evident in prior PCR counsel’s attempt to file a belated notice of appeal. App. 536-540. The state recognized that Petitioner did not knowingly and voluntarily waive his right to an appeal, and that his appeal was not perfected simply due to an error by prior PCR counsel concerning calendaring the dates. App. 550-555. Based upon this recognition, the state “consent[ed] to a belated review of the denial of [Petitioner]’s prior PCR application.” App. 550-555.

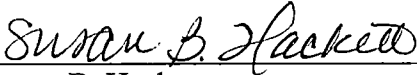
Judge Henderson agreed. Judge Henderson reviewed the pleadings and the “circumstances surrounding the waiver of [Petitioner]’s right to appeal the denial of his post-conviction relief application.” App. 556-559. Judge Henderson found prior PCR counsel “inadvertently missed the deadline to file and serve a notice of appeal of [Petitioner]’s PCR application.” App. 556-559. Thus, the judge concluded Petitioner “did not voluntarily waive his right to appeal the post-conviction relief court’s denial and dismissal of his prior post-conviction relief action.” App. 556-559. Judge Henderson ultimately concluded Petitioner was “entitled to appeal the denial of his post-conviction relief application (2011-CP-17-153) pursuant to Austin v. State.” App. 556-559.

Under these circumstances, the PCR court’s decision granting Petitioner belated appellate review of his first PCR application should be upheld. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)(“The appropriate scope of review of this Court is that ‘any evidence’

of probative value is sufficient to uphold the PCR judge's findings."). Simply stated, Petitioner is entitled to his one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR judge's conclusion that Petitioner is entitled to a belated appeal of the denial of post-conviction relief.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of March, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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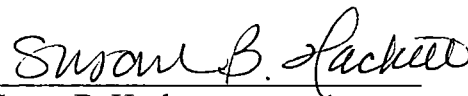
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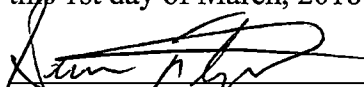
CERTIFICATE OF SERVICE

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 Johnny Ellis James, Jr., 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 Dontavious Jackson, #343868, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of March, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of March, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.