

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

WILLIAM ANDREW LEE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002238

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court properly grant Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), since there was testimony Petitioner requested an appeal and his attorney did not file one?

STATEMENT

A Spartanburg County Grand Jury indicted petitioner at the May 2008 term for murder and attempted armed robbery. App. 481-486. Petitioner was represented by S. Frank Adams and the state was represented by Derrick Balsa. App. 1. On February 3, 2009, Petitioner proceeded to trial, where he was convicted of the charges by a jury. App. 320, ll. 10-18. The Honorable Thomas A. Russo sentenced Petitioner to confinement for thirty-five years for murder and a consecutive term of ten years for attempted armed robbery. App. 325, ll. 17-25. The South Carolina Court of Appeals affirmed the conviction in *State v. Lee*, Op. No. 2011-UP-369 (S.C. App. Filed July 14, 2011). App. 356-357.

On February 27, 2012, Petitioner filed his first application for post-conviction relief (PCR). App. 359. The state filed a return to this application on February 26, 2013. App. 369. The matter proceeded to an evidentiary hearing on June 27, 2013, before the Honorable R. Lawson McIntosh. App. 377. Suzanne White represented the state and Kenneth Shabel represented Petitioner. App. 377. By order dated September 25, 2013, Judge McIntosh denied Petitioner relief. App. 428-436. PCR counsel Shabel did not file a Notice of Appeal.

On June 26, 2014, Petitioner filed a second application for post-conviction relief seeking the right to a belated appeal of the denial of his original application. App. 437-443. The state filed a return to this application and partial motion to dismiss on November 22, 2016. App. 450-455. The matter proceeded to an evidentiary hearing on February 1, 2017, before the Honorable Edward W. Miller. App. 456-472. Alicia Olive represented the state, and Rodney Richey represented Petitioner. App. 456. By order dated September 28, 2017, Judge Miller granted Petitioner a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 473-477.

This petition for writ of certiorari asking the Court to grant a belated appeal follows.

ARGUMENT

The PCR court properly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), since there was testimony Petitioner requested an appeal and his attorney did not file one.

Relevant Facts

Petitioner testified that at the conclusion of his first PCR hearing while still in the courtroom, he asked his counsel, Kenneth Shabel, to file an appeal. App. 465, ll. 8-13. Petitioner said: "I had asked him if he was going to file me an appeal." App. 465, ll. 8-11. Petitioner asserted that he gave Shabel some paperwork that he, Petitioner, had written and asked Shabel to file an appeal. App. 465, ll. 8-10.

After he did not hear anything from his attorney about an appeal, Petitioner began writing letters to Shabel asking about the status of his case. App. 465, l. 24 – 466, l. 16. Petitioner also wrote letters to the clerk of court about the matter. App. 466, l. 12. Petitioner was adamant that he requested an appeal, explaining: "I would never not want to appeal the case." App. 466, l. 22. He said: "I'm serving 45 years. I've got kids. I want to get home." App. 466, l. 21-22.

Shabel testified that he did not file an appeal, and did not remember if Petitioner ever told him he wanted to appeal. App. 459, l. 23 – 460, l. 6. However, Shabel said that he did discuss Petitioner's appellate rights with him at the conclusion of the hearing. App. 5, ll. 16-18. Shabel acknowledged that he received written communication from Petitioner asking about the status of his case after the PCR hearing and prior to Judge McIntosh issuing the order. App. 460, ll. 9-15. Shabel remembered that he had a discussion with Judge McIntosh during the PCR hearing and that the judge voiced that Shabel had preserved a particular issue for appeal. App. 460, ll. 21-23.

Discussion

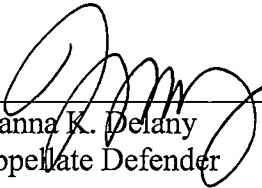
The PCR court properly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin v. State*. In *Austin*, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. The proper scope of review of the PCR court’s ruling is whether there is **any evidence** of probative value to uphold the PCR court’s findings. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984).

Here, there is ample evidence to support the PCR court’s finding that Petitioner desired to appeal, told his counsel he wanted to appeal, and no appeal was filed. Petitioner’s sworn testimony that he asked his attorney to file an appeal is evidence of probative value to uphold the PCR court’s findings. Moreover, counsel did not dispute Petitioner’s assertion that he requested counsel file an appeal, and admitted that he discussed Petitioner’s appellate rights with him at the end of the hearing. Petitioner and counsel both testified that Petitioner wrote to counsel and to the clerk of court enquiring about the status of his case after the PCR hearing. Counsel testified that he did attempt to preserve issues for appeal during the PCR hearing, and that Petitioner was present in court to hear counsel’s discussion with the judge about appellate preservation.

In *Austin*, this Court recognized that the right to seek appellate review of the denial of PCR is expressly authorized by S.C. Code Ann. § 17-27-100. *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. Under *Austin*, the PCR court correctly ruled that Petitioner’s desire for an appeal was communicated to PCR counsel and no appeal was filed. Respectfully, under the “any evidence” standard of review of *Webb*, this Court should hold that the PCR court’s ruling was correct, grant certiorari, and grant Petitioner a belated appeal from the denial of his original application for post-conviction relief.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for a writ of certiorari and grant Petitioner a belated appeal from the denial of his original application for post-conviction relief.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2018.

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PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Megan Jameson, 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 William Andrew Lee, #313779, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 29th day of March, 2018.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of March, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.