

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post-Conviction Relief

J. Derham Cole, Circuit Court Judge

CASE NO: 2018-000328

Ricardo Hernandez #348548,..... Petitioner,

vs.

State of South Carolina,Respondent.

PETITION FOR WRIT OF CERTIORARI

Tommy A. Thomas
S.C. Bar: 5536
Attorney for Petitioner
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Irmo, SC 29063
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Counsel for Respondent:
Jordan A. Cox, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549

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JUN 29 2018

S.C. SUPREME COURT

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TABLE OF CASES

Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)

QUESTION PRESENTED

Did the Post-Conviction Relief Judge properly find that the Petitioner did not knowingly and intelligently waive his right to Appellate review of the denial of his first Application for Post-Conviction Relief?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. In February, 2011, the Spartanburg County Grand Jury indicted Applicant for trafficking cocaine – over 400 grams (2011-GS-42-0420). The charge resulted from Applicant’s participation in a cocaine deal that was set up by a confidential police informant where a package of 1001.80 grams of powder cocaine was recovered. Robert Newton, Esq., represented Applicant. Assistant Solicitor Ryan McCarty represented the State.

On November 7, 2011, Petitioner pled guilty to the lesser included offense of trafficking cocaine – 28 to 100 grams before the Honorable Roger L. Couch. Janet Chavez served as Applicant’s interpreter at the guilty plea hearing. Pursuant to a negotiated sentence, Judge Couch sentenced Applicant to imprisonment for twelve years for trafficking cocaine – 28 to 100 grams. Applicant did not appeal his conviction or sentencing.

STATEMENT OF THE FACTS

The Petitioner filed a post-conviction relief, on January 6, 2012, Petitioner alleged that he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. “My attorney failed to investigate my case and had lied [tatt] I would be sentenced under ten years.”
 - b. “He took my hard earned money, \$3000.00 as down payment and did not perform in my defense at getting the best possible results in violation of my Sixth Amendment right to effective assistance of counsel and my Fourteenth Amendment right to due process.”

2. “Plea not knowingly and voluntarily entered.”
 - a. “I believed I was pleading [guilty] to conspiracy.”

- b. “[Plea Counsel] informed [Applicant’s] that he would get very little time if convicted, since counsel acknowledged or knew [Applicant].”
- c. “This [Applicant’s] very first drug offense, to his second, third, etc.”

3. “Due Process violations” (App. p. 35-46)

Respondent filed a Return on November 29, 2012. An evidentiary hearing into the matter was convened on January 11, 2013, at the Spartanburg County Courthouse before the Honorable J. Derham Cole. Applicant was present at the hearing and represented by John Kevin Owens, Esq. Suzanne H. White, Esq. of the South Carolina Attorney General’s Office, represented Respondent. Marie Bustamante served as interpreter for Applicant. On July 10, 2013, Judge Cole issued the order of dismissal denying Applicant’s application for post-conviction relief.

Applicant did not appeal the denial of post-Conviction relief. On July 25, 2014, Applicant was notified that John Kevin Owens, Esq. had been suspended from the practice of law and that Applicant should seek other counsel. On August 3, 2014, Applicant petitioned for Appointment of substitute counsel.

The Petitioner filed an application for a second post-conviction relief, Applicant alleges that he was being held in custody unlawfully for the following reason:

1. “Applicant would respectfully request a belated appeal from his post-conviction relief action hearing on January 11, 2013.”
 - a. “Applicant was represented by John Kevin Owens (PCR Counsel).
 - i. The Applicant believed that counsel filed an appeal of his post-conviction relief action on his behalf.”
 - b. “On July 25, 2014, Applicant received notification from the S.C. Supreme Court that his PCR Counsel had been suspended from the practice of law. During this period, Applicant believed that an appeal had been filed and that his rights were being protected by a trustee appointed by the South Carolina Bar.”
 - c. “Applicant did not knowingly and voluntarily waive his right to appeal.”
2. Ineffective Assistance of PCR Counsel
 - a. “Applicant is informed and believes that he did not receive any type of effective representation from {PCR} counsel.” (App. p.71-84)

The Petitioner alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application because his prior PCR counsel, John Kevin Owens, Esq. was suspended from the practice of law shortly after his PCR hearing and never filed his notice of appeal. Pursuant to Austin v. State, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

The Respondent consented to a belated review of the denial of his PCR Application (2012-CP-42-0056). After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of his post-conviction relief application, the PCR Court found that Applicant did not knowingly and voluntarily waive his right to appeal his first PCR Application. Accordingly, the Court granted Applicant a belated review of the denial of post-conviction relief pursuant to Austin v. State. The Petitioner's Appeal follows:

ARGUMENT

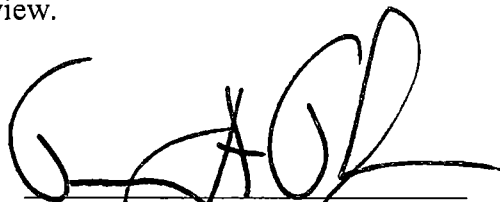
Did the Post-Conviction Relief Judge properly find that the Petitioner did not knowingly and intelligently waive his right to Appellate review of the denial of his first Application for Post-Conviction Relief?

The Petitioner filed a Subsequent Application for Post Conviction Relief on August 11, 2017. In that Application for relief, the Petitioner attached an Affidavit. (App. p. 71-78, 82-83) The Petitioner states in his Affidavit, that he was born in Mexico and that his native language is Spanish. That he did not understand English very well. That immediately after his Post-Conviction Relief hearing, he spoke with his attorney, John Kevin Owens. Mr. Owens told him that an Appeal of the decision would be filed. Petitioner was later notified by the Court on July 25, 2014, that the South Carolina Supreme Court has suspended Mr. Owens from the practice of law. (App. p. 79-81)

The Petitioner did not knowingly or intelligently waive his right to Appellate review. In fact, he asserted his desire to seek an appeal.

CONCLUSION

Therefore, based upon the foregoing the Court properly found Petitioner did not knowingly or intelligently waive his right to Appellate review.

A handwritten signature in black ink, appearing to read 'T. A. Thomas', written over a horizontal line.

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June 28, 2018

Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post-Conviction Relief

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J. Derham Cole, Circuit Court Judge

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S.C. SUPREME COURT

Ricardo Hernandez #348548,..... Petitioner,

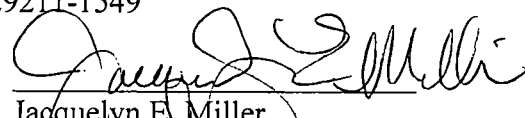
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Petition for Writ of Certiorari, Petition for Writ of Certiorari Pursuant to Austin v. State and Appendix with postage prepaid and the return address clearly shown on said envelope to Jordan A. Cox, Esq. of the Attorney General's Office, at:

Jordan A. Cox, Esq.
Attorney General's Office
P.O. Box 11549
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June 28, 2018

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JUN 29 2018

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S.C. SUPREME COURT

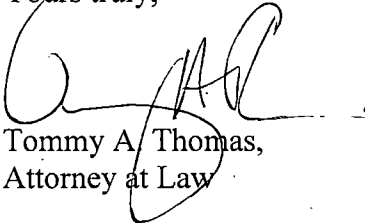
RE: Ricardo Hernandez #348548 v. State of South Carolina
Appellate Case No.: 2018-000328

Dear Sir or Madam:

Enclosed please find for filing an original and six copies of a Petition for Writ of Certiorari, Petition for Writ of Certiorari Pursuant to Austin v. State and an original and two copies of the Appendix as well as a Certificate of Service in the above referenced matter.

Kindly return the clocked copies to me in the enclosed envelope. Please feel free to contact me should you have any questions.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem

cc: Jordan A. Cox, Esq.
Richardo Hernandez #348548