

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge

JONTA GREEN,

ORIGINAL
RECEIVED
PETITIONER

v.

JUL 10 2018

STATE OF SOUTH CAROLINA,

S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2018-000004

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to address in the order of dismissal all of the issues raised during the PCR hearing and included in the motion pursuant to Rule 59(e)?

STATEMENT

In January of 2009, the Charleston County Grand jury indicted Petitioner, Jonta Green with murder and possession of a weapon during the commission of a violent crime, indictments #2009-GS-10-113, 116. On April 19, 2010, Petitioner proceeded to jury trial before the Honorable Deadra L. Jefferson. Demal Mattson represented Petitioner at trial. Rutledge Durant and Peter McCoy prosecuted the case. The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and the weapon charge. Judge Jefferson initially sentenced Petitioner to twenty-three (23) years for the voluntary manslaughter charge but that sentence was later amended to twenty (20) years. (App. p. 920). Judge Jefferson sentenced Petitioner to five years concurrent for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On January 30, 2013, the South Carolina Court of Appeals dismissed the appeal. State v. Green, Op. No. 2013-UP-46 (S.C. Ct.App. filed January 30, 2013).

On October 28, 2013, Petitioner filed an application for post-conviction relief [PCR], 2013-CP-10-6337. The State filed a return on December 22, 2014. On February 18, 2015, an evidentiary hearing was held before the Honorable Eugene Griffith. James K. Falk represented Petitioner at the PCR hearing. Ashleigh R. Wilson represented the State. In a written order signed July 1, 2015, Judge Griffith denied relief and dismissed the application. On July 23, 2015, Petitioner filed a timely motion to reconsider pursuant to Rule 59(e), SCRPC. On July 29, 2015, Judge Griffith denied the motion. A notice of intent to appeal was not filed.

On December 9, 2015, Petitioner filed a second PCR application, 2015-CP-10-6633. The State filed a return on August 11, 2016. On December 4, 2017, the parties entered into a consent agreement to seek a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. pp. 1015-1019). Christopher L. Murphy represented Petitioner. Megan Harrigan

Jameson represented the State. The Honorable Deadra L. Jefferson signed the order. A timely notice of intent to appeal was served on December 19, 2017. This Austin petition and the accompanying separately filed petition for writ of certiorari follow.

ARGUMENT

The PCR judge erred in refusing to address in the order of dismissal all of the issues raised during the PCR hearing and included in the motion pursuant to Rule 59(e).

In the order of dismissal the PCR judge acknowledges the issues raised at the PCR hearing writing, “At the hearing, Applicant proceeded solely on the allegations of ineffective assistance of counsel for the following reasons:

1. Ineffective assistance of counsel.
 - a. Failure to investigate witnesses.
 - b. Failure to call Shonda Gennings.
 - c. Stipulating about the gun turned in by the Applicant at trial.
 - d. Failure to object to Dr. Schandl’s hearsay testimony of Dr. Shjeld’s medical examination report.
 - e. Failure to advise the Petitioner of serious medical issues from brain surgery.

(App. p. 987). In the body of the order, however, the PCR judge only addresses two issues: 1.) the stipulation about the gun (App. pp. 992-993); and 2.) the failure to call witnesses (App. pp. 993 – 994). The order does not address the failure to investigate witnesses, the failure to object to Dr. Schandl’s hearsay testimony of Dr. Shield’s medical examination report or the failure to advise the Petitioner of serious medical issues from brain surgery. In the order the PCR judge found that all other allegations were abandoned. (App. p. 994).

Petitioner filed a timely motion pursuant to Rule 59(e). (App. pp. 996-997). In paragraph three (3.) of the motion counsel for Petitioner lists the issues raised at the PCR as follows:

- a. Failure to investigate witnesses.
- b. Failure to call Shonda Gennings.
- c. Stipulating about the gun turned in by the Applicant at trial.
Failure to object to Dr. Schandl’s hearsay testimony of Dr. Shjeld’s medical examination report.
- d. Failure to advise the Petitioner of serious medical issues from brain surgery.

(App. pp. 996-997). In the motion Petitioner specifically notes that the PCR judge failed to rule on the issues involving the failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report and the failure to advise the Petitioner of serious medical issues from brain surgery. (App. p. 997). Additionally, in paragraph six (6.) counsel for Petitioner writes, "Counsel for Applicant respectfully contends that the evidence regarding all issues was presented at the PCR hearing and that none of the issues described in numerical paragraph 3 above were abandoned." (App. p. 997). This would include the allegation that trial counsel failed to investigate witnesses. The failure to investigate witnesses allegation is not addressed in the order of dismissal. The issue addressed in the order is the failure to **call** witnesses rather than the failure to investigate witnesses. The PCR judge, however, denied the Rule 59(e) motion. The PCR judge erred.

In Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007), the South Carolina Supreme Court, "Pursuant to S.C.Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues. Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992)." The order of the PCR judge in this case fails to address three allegations raised by Petitioner at the PCR hearing: 1. failure to investigate witnesses; 2. failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report; and 3. failure to advise the Petitioner of serious medical issues from brain surgery.

Additionally in Marlar the Court wrote:

We take this opportunity to reiterate our admonition that "[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and

the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCF, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCF.” Pruitt v. State, 310 S.C. at 256, 423 S.E.2d at 128.

375 S.C. at 410, 653 S.E.2d at 267. Counsel for Petitioner followed the rule of Marlar, filed a Rule 59(e) motion noting that the order of dismissal failed to address three issues. After the omissions were brought to the attention of the PCR judge in the Rule 59(e) motion, the PCR judge failed to correct the order of dismissal and address the omitted issues.

All three of the omitted issues were raised during the PCR hearing. In regard to the allegation that trial counsel was ineffective for failing to investigate witnesses, trial counsel admitted at the PCR hearing that he did not ask one of the character witnesses who testified on Petitioner’s behalf, George Thomas, if he had a prior criminal record. (App. p. 967, line 8 – p. 968, 969, lines 1-2). Counsel admitted that he was surprised when the State questioned the witness about a burglary conviction from fourteen years ago. (App. p. 969, lines 3-6; pp. 492-493).

In regard to the allegation that trial counsel was ineffective in failing to object to Dr. Schandl’s testimony about Dr. Shield’s autopsy report, trial counsel was questioned about whether he considered moving to exclude the report. (App. pp. 955-964). In regard to the allegation that trial counsel was ineffective in failing to advise the Petitioner of serious medical issues from brain surgery, trial counsel testified about having brain surgery fifteen years ago to remove a tangerine size tumor. (App. p. 975, line 5 – p. 976, lines 1-7). The PCR judge failed to address all three of the above issues raised at the PCR hearing and included in the Rule 59(e) motion. The issues are not preserved for appellate review because the judge failed to address the issues. In this unusual situation, a remand is necessary.

CONCLUSION

Counsel for Petitioner respectfully asks this Court to vacate the order of dismissal and remand the case to the circuit court for the issuance of an order that addresses, in addition to the issues included in the original order, the three issues omitted from the order of dismissal yet raised at the PCR hearing and in the Rule 59(e) motion.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Eugene C. Griffith, Circuit Court Judge

JONTA GREEN,

PETITIONER

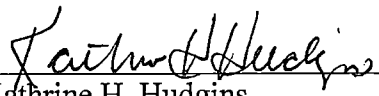
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

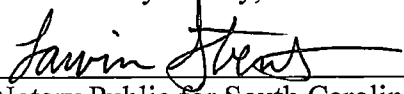
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State in the above referenced case has been served upon Megan Harrigan 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 pursuant to Austin v. State has been served on Jonta Green, #340485, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 10th day of July, 2018.



Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 10th day of July, 2018.



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