

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

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JUL 11 2018

S.C. SUPREME COURT

Appellate Case No. 2017-001487

Dontavious Jackson,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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Senior Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES 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 OF THE CASE

Summary of Procedural History

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Petitioner was indicted at the November 2010 term of the Darlington County Grand Jury for grand larceny, value more than \$1,000 but less than \$5,000 (2010-GS-16-01974); and burglary, first degree (2010-GS-16-01975). Matthew Swilley, Esq., and William Grove, Esq. represented Petitioner on the charges. Patti M. Parker, Esq. and John Holt, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. Petitioner proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Petitioner guilty as indicted on December 1, 2010. Judge Baxley sentenced Petitioner to imprisonment for concurrent terms of five years for grand larceny, and 25 years for burglary, first degree.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Susan B. Hackett, Esq., who raised the following issue:

Should Appellant's motion for a mistrial have been granted after a member of the venire announced to the court and the other potential jurors that Appellant was a suspect in the burglary of her parent's home?

By opinion decided August 1, 2012, the South Carolina Court of Appeals affirmed Petitioner's convictions by unpublished opinion. State v. Jackson, Op. No. 2012-UP-476 (S.C. Ct. App. filed Aug. 1, 2012). The Remittitur was issued on August 17, 2012.

Petitioner filed his first application for post-conviction relief on February 22, 2013 (2013-CP-16-00177). He alleged the following grounds for relief in his application (as set forth in Respondent's Return):

1. Failure to move for a continuance to further prepare;
2. Failure to object to a photograph;

3. Failure to object to a cigarette butt;
4. Failure to impeach Dylan Smothers;
5. Failure to make a motion to dismiss;
6. Failure to object to a witness' handling of evidence at trial;
7. Failure to impeach Deputy Pierre;
8. Failure to suppress the cigarette butt;
9. Failure to object to statements at sentencing;
10. Failure to object to chain of custody;
11. Failure to object to Dylan Smothers' testimony;
12. Failure to move for a change of venue;
13. Failure to renew the motion for continuance;
14. Failure to object to Dylan Smothers' testimony.

Respondent made its return on May 29, 2014, and an evidentiary hearing into the matter was convened on July 27, 2015, before the Honorable Thomas A. Russo. Petitioner was present at the hearing and represented by Lance S. Boozer, Esq. Joshua L. Thomas, Esq., of the South Carolina Attorney General's Office, represented Respondent. At the evidentiary hearing, Petitioner proceeded only on the following allegations of ineffective assistance of trial counsel:

1. Failure to object to a photograph of a fingerprint;
2. Failure to object to the introduction of a cigarette and related DNA;
3. Failure to impeach the victim with inconsistent statements;
4. Failure to challenge the search warrant that led to the discovery of the stolen items;
5. Failure to impeach the investigating officer with a video of the crime scene;
6. Failure to object to law enforcement statements at sentencing;
7. Failure to object to the jury instructions on reasonable doubt and the role of jurors.

Petitioner testified on his own behalf; Matthew Swilley, Esq., and William Grove, Esq. also testified. By written order dated October 7, 2015, and filed October 11, 2015, Judge Russo denied and dismissed the application.

By letter dated December 23, 2015, PCR counsel Boozer filed a notice of appeal on Petitioner's behalf, but acknowledged it was not timely filed due to an inadvertent calendaring error. By order filed January 8, 2016, the Supreme Court of South Carolina dismissed the appeal

as untimely filed and indicated Petitioner would have to seek relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Jackson v. State, S.C. Sup. Ct. Order filed Jan. 8, 2016. The remittitur was issued on January 26, 2016.

Petitioner thereafter filed a second application for post-conviction relief on February 11, 2016, seeking Austin relief (2016-CP-16-00080). Respondent made its return on or about February 17, 2017, consenting to Austin relief. By Order dated February 23, 2017, and filed March 16, 2017, the Honorable Roger E. Henderson granted Petitioner's request for Austin relief.

This appeal follows.

ARGUMENT

THE PCR COURT PROPERLY FOUND PETITIONER DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THE RIGHT TO APPELLATE REVIEW OF HIS PREVIOUS PCR APPLICATION, AND RESPONDENT CONSENTS TO AUSTIN REVIEW

Respondent does not contest that Petitioner is entitled to belated review of the Order of Dismissal in 2013-CP-16-00177. Accordingly, Respondent would only respectfully direct the Court's attention to the "Return to Petition for Writ of Certiorari Pursuant to Austin v. State" submitted concurrently with this return pursuant to procedures set forth in King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

CONCLUSION

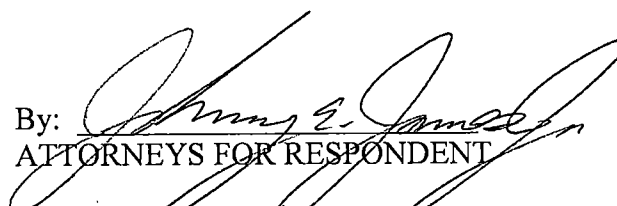
For the foregoing reasons, this Court should review the Order of Dismissal in 2013-CP-16-00177 pursuant to Austin v. State and King v. State.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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By: 
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11 July, 2018

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DONTAVIOUS JACKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
1330 Lady Street, Ste. 401
Columbia, SC 29201

This 11th day of July, 2018.



MALLORY MORRIS
Legal Assistant for Respondent



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JUL 11 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

July 11, 2018

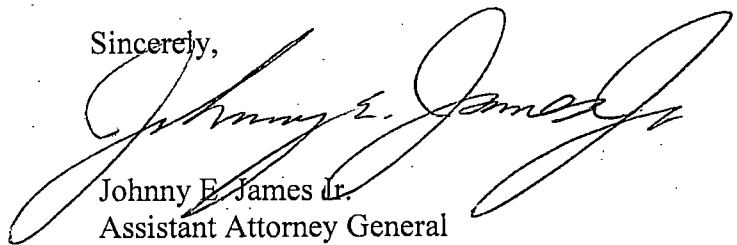
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Dontavious Jackson v. State of South Carolina
Appellate Case No. 2017-001487
Lower Court Case No. 2016-CP-16-0080

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Susan B. Hackett, Esquire