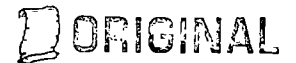


STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 ORIGINAL

Certiorari to Cherokee County

Honorable Roger L. Couch, Circuit Court Judge

RECEIVED

JUL 17 2018

JAMES DAWKINS,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001534

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
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 court properly grant Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner's first and second PCR counsel failed to file Notices of Appeal, and where in both instances the State consented to Petitioner's pursuit of a belated review?

STATEMENT

On June 10, 2010, Petitioner was indicted by a Cherokee County grand jury for assault and battery with the intent to kill. App. 84. Petitioner pled guilty as indicted before the Honorable J. Mark Hayes, II on March 14, 2011. App. 1; App. 15 ll. 6 – 8. Kim Leskanic appeared on behalf of the State, and Sean Giovanetti represented Petitioner.

The plea was made without negotiation or recommendation. App. 5 ll. 2 – 7. Judge Hayes found a substantial basis for the plea and found that the decision to plead guilty was made freely, voluntarily, and knowingly. App. 16 ll. 15 – 23. He therefore accepted the plea. *Id.* Judge Hayes sentenced Petitioner to twenty years' incarceration. App. 28 ll. 23 – 24.

Petitioner filed his first application for post-conviction relief on or about October 27, 2011. App. 31 – 37. It contained claims of ineffective assistance of counsel, including the allegation that counsel failed to challenge arrest warrants, failed to investigate Petitioner's case, and failed to file the applicable motions to preserve Petitioner's claims. App. 32 – 33. The State made its Return on or about July 17, 2012.

An evidentiary hearing was held before the Honorable J. Derham Cole on January 9, 2013. App. 43. R. Patrick Martin represented Petitioner, and Suzanne H. White appeared on behalf of the State. Petitioner and plea counsel testified during the hearing.

An Order of Dismissal, signed by Judge Cole, was filed on April 8, 2013. App. 63 – 69. A second application for post-conviction relief was filed by Petitioner on August 29, 2013. App. 70. It contained an allegation that Petitioner received ineffective assistance from PCR counsel. App. 72 – 74; App. 77. In a written attachment to the application, Petitioner indicated that he “strongly [contended] that ... he told PCR counsel to appeal his denial of his PCR.” App. 77.

He refuted the notion that he knowingly, voluntarily, or intelligently waived his right to appeal the denial of his PCR. Id.

An evidentiary hearing was held before the Honorable Roger L. Couch on March 26, 2015. Supplemental Appendix 1. Leah Moody represented Petitioner, and Suzanne White appeared on behalf of the State. Counsel for the State indicated that Petitioner's prior PCR counsel transitioned from the firm where he was working at the time of his representation of Petitioner and therefore never discussed with Petitioner his right to appeal. Supp. App. 3 ll. 17 – 22. As a result, the State consented to a belated PCR appeal. Supp. App. 3 ll. 24 – 25. The PCR court indicated that it would sign an order granting belated appeal. Supp. App. 4 ll. 6 – 12.

A Consent Order Granting an Appeal Pursuant to Austin v. State¹ was signed on or about April 20, 2015. App. 78 – 80. It was filed on or about April 23, 2015. Signed by the Honorable Roger L. Couch, the court found that the State consented to a belated appeal following discussions with PCR counsel. App. 79 – 80.

Petitioner filed his third application for post-conviction relief on May 2, 2016. App. 81. It contained allegations of "Ineffective Assistance of PCR Counsel" including a claim that "counsel missed the filing deadline for a Notice of Appeal – PCR." Supp. App. 6 – 12.

Another Consent Order Granting An Appeal Pursuant to Austin v. State was signed by the Honorable Roger L. Couch on June 15, 2017 and filed on June 26, 2017. App. 85 – 88. It contained signatures of counsel for both parties who indicated to their consent. App. 88.

¹ 305 S.C. 453, 409 S.E.2d 395 (1991).

ARGUMENT

The PCR court properly granted Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner’s first and second PCR counsel failed to file Notices of Appeal, and where in both instances the State consented to Petitioner’s pursuit of a belated review.

In King v. State, this Court set forth the procedure for cases where review is sought pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991):

(1) When the post-conviction relief judge has affirmatively found that the right to appellate review of a previous post-conviction relief order was not knowingly and intelligently waived, the petition shall raise this question along with all other questions petitioner seeks to have reviewed from that order. At the same time this petition is served, petitioner shall serve and file an Austin petition addressing the questions from the previous post-conviction relief order. The Austin petition shall comply with the requirements of Rule 227(d). The Appendix shall contain the entire records from both post-conviction relief proceedings. Respondent’s return to the petition shall address the questions from the latest post-conviction relief order, including whether the right to appellate review of the previous post-conviction relief order was knowingly and intelligently waived. At the same time this return is served, respondent shall serve and file an Austin return addressing the questions from the previous post-conviction relief order.

(2) When the post-conviction relief judge has found that the applicant is *not* entitled to an Austin v. State review, the petition shall raise the question of waiver of the right to appellate review of the previous post-conviction relief order along with all other questions petitioner seeks to have reviewed from that order. The petition shall also contain a “Statement of Austin Questions” listing the questions to be raised if an Austin v. State review is granted. An Austin petition addressing the questions will not be allowed unless certiorari is granted on the Austin v. State question.

King v. State, 308 S.C. 348, 349, 417 S.E.2d 868, 868–69 (1992).

In Petitioner’s case, his PCR counsel twice failed to file a notice of appeal. Petitioner’s second and third applications for post-conviction relief represent his desire for appellate review.


Both Consent Orders contained clear and unambiguous evidence that counsel failed to file a Notice of Appeal. Additionally, the State acquiesced in both instances.

“An indigent defendant has the right to be informed of an appeal and the manner and method for taking the appeal.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989); Austin v. State, 305 S.C. 453, 409 S.E.2d 395, 396 (1991). In Austin, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” Austin at 454, 409 S.E.2d at 396. The appropriate scope of review of the PCR court’s holding 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).

Under Austin, the PCR court correctly ruled, in both instances, that Petitioner was entitled to appeal the denial of his post-conviction relief applications because he did not voluntarily waive his right to appeal. App. 80; App. 87. Petitioner did not sleep on his rights and filed subsequent PCR applications seeking belated appeals after the time elapsed for the Notices of Appeal to be filed. Therefore, this Court should grant certiorari and grant Petitioner a belated appeal from both the 2011 PCR and 2013 PCR applications.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests this Court grant certiorari, affirm Judge Couch's determination that Petitioner is entitled to belated review, and review the Johnson petition for writ of certiorari filed pursuant to Austin.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Roger L. Couch, Circuit Court Judge

JAMES DAWKINS,

PETITIONER

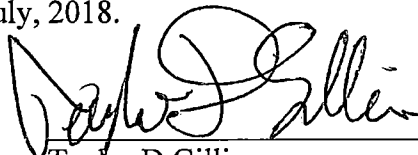
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STATE OF SOUTH CAROLINA,

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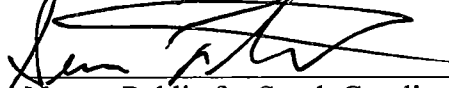
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Supplemental Appendix in the above referenced case has been served upon Jordan Cox, 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 James Dawkins, #345172, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 17th day of July, 2018.



Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 17th day of July, 2018.



Notary Public for South Carolina
My Commission Expires: 10/30/2022