

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Letitia H. Verdin, Circuit Court Judge

JOHNELL PORTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001605

PETITION FOR WRIT OF CERTIORARI

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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 PCR counsel failed to serve a Notice of Appeal, and where the State consented to Petitioner's pursuit of a belated review?

STATEMENT

During its June 2007 term, a York County Grand Jury indicted Petitioner for armed robbery, entering a bank with the intent to steal, kidnapping, conspiracy to commit armed robbery, and possession of a firearm during the commission of a violent crime. App. 819 – 828. Petitioner proceeded to a four-day trial before the Honorable John C. Hayes, III and a jury beginning on July 23, 2007. He represented himself and had the assistance of Daniel D’Agostino as standby counsel. Kevin Brackett and E.B. Springs, IV prosecuted the case on behalf of the State.

At the conclusion of trial, the jury found Petitioner guilty as indicted. App. 639, ll. 3 – 16. Judge Hayes sentenced Petitioner to life without parole on the kidnapping, armed robbery, and entering a bank with the intent to steal charges, five years on the possession of a firearm charge, and five years on the conspiracy charge. App. 649 ll. 13 – 25. The sentences were imposed to run concurrently. Id.

Petitioner’s convictions and sentences were affirmed. Petitioner then filed a timely application for post-conviction relief on July 6, 2011. App. 668. It contained allegations of ineffective assistance of counsel prior to trial, violations of the Sixth and Fourteenth Amendments, and prosecutorial misconduct. App. 675. The State made its Return on or about October 24, 2011. App. 690.

An evidentiary hearing was conducted on January 21, 2014 before the Honorable Michael Baxley. App. 697. James Rutledge Johnson represented the State, and Leah Moody represented Petitioner.

Petitioner elected not to participate in the hearing, and he left the courtroom. App. 713 l. 8 – App. 174 l. 3). The State moved to dismiss the application under Rule 41(B), SCRPC, for

Petitioner's failure to prosecute. App. 714 ll. 4 – 11. Judge Baxley granted the motion. App. 717 ll. 10 – 23.

Because the Notice of Appeal arising out of Petitioner's post-conviction relief application was not served on opposing counsel, Petitioner's appeal was dismissed. App. 741. He therefore filed a subsequent application for post-conviction relief on or about April 20, 2015. App. 726. The State filed a Return and Motion to Dismiss All Claims Except Austin Review on June 30, 2015.¹ App. 761.

An evidentiary hearing was held before the Honorable Letitia Verdin on August 1, 2016. App. 769. Justin Hunter appeared on behalf of the State, and Nathan Sheldon represented Petitioner. Petitioner was not present. The State consented to allow Petitioner opportunity for relief under Austin v. State. The Court granted the motion. App 774 ll. 10 – 11; App. 776; App. 778 – App. 781. An Amended Order Granting An Appeal Pursuant to Austin v. State was filed on October 14, 2016. App. 782. A second Amended Order Granting an Appeal Pursuant to Austin v. State was filed on July 5, 2017. App. 809.

This petition for writ of certiorari pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) follows.

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 PCR counsel failed to serve the Notice of Appeal, and where 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, the Notice of Appeal from Judge Baxley’s Order Dismissing Post-Conviction Relief Application dated March 6, 2014 was not served on opposing counsel by PCR counsel until April 17, 2014. App. 741. According to an Order from this Court, PCR counsel indicated that she received written notice of entry of the Order on March 14, 2014. Id.

Therefore, because the notice of appeal had not been timely served under Rule 203(b)(1), SCACR, it was dismissed. Id.

The State's Return and Motion to Dismiss All Claims Except Austin Review, filed June 30, 2016, indicated that the State was seeking to have dismissed all of Petitioner's PCR claims from his application filed April 20, 2015, save his "claim that he was denied an appeal from the denial of his first PCR application." App. 763; App. 767.

At the evidentiary hearing before Judge Verdin on August 1, 2016, counsel for the State advised the PCR court that the notice of appeal from Petitioner's 2011 PCR was dismissed "for failure to serve opposing counsel." App. 773 ll. 3 – 18. The State consented to allow Petitioner relief under Austin, supra. The PCR court indicated that it would sign an order indicating such.

The PCR court, through its Amended Order Granting An Appeal Pursuant To Austin v. State found that Petitioner "is entitled to appeal the denial of his first post-conviction relief application." App. 813. The PCR court found that Petitioner "did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action." Id.

"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 that Petitioner was entitled to appeal the denial of his post-conviction relief application because he did not voluntarily waive his right to appeal. Petitioner did not sleep on his rights and filed a subsequent PCR application seeking a belated appeal after learning that his prior appeal had been dismissed. Therefore, this Court should grant certiorari and grant Petitioner a belated appeal from the 2011 PCR application.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests this Court grant certiorari, affirm Judge Verdin'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 19th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Letitia H. Verdin, Circuit Court Judge

JOHNELL PORTER,

PETITIONER

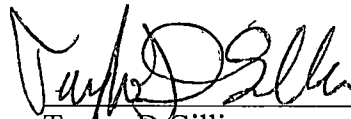
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

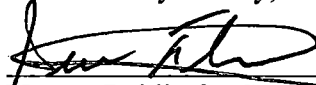
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari has been served on Johnell Porter, #240208, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 19th day of July, 2018.



Taylor D. Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 19th day of July, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022