

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO Horry COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-001739

Michael A. Livingston,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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S.C. SUPREME COURT

INDEX

RESPONDENT’S ISSUES PRESENTED..... ii

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 3

ARGUMENT 4

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE EVIDENCE EXISTS TO
SHOW PETITIONER KNEW OF HIS APPELLATE RIGHTS AND KNOWINGLY,
INTELLIGENTLY, AND VOLUNTARILY WAIVED THEM BY FAILING TO TIMELY
REQUEST HIS ATTORNEY FILE AN APPEAL 4

CONCLUSION..... 7

RESPONDENT'S ISSUES PRESENTED

Did the PCR Court properly deny relief pursuant to Austin v. State where Petitioner was informed of his appellate rights and never asked PCR Counsel to appeal on his behalf?

STATEMENT OF THE CASE

Summary of Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2008 term of the Horry County Grand Jury for murder (2008-GS-26-02912). Applicant was further indicted at the August 2009 term for armed robbery (2009-GS-26-02658), and possession of a weapon during the commission of a violent crime (2009-GS-26-02659).

R. Scott Joye, Esq., represented Applicant, and Jimmy A. Richardson, II, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on August 13, 2009. Judge Hyman sentenced Applicant to imprisonment for concurrent terms of life for murder, 30 years for armed robbery, and 5 years for the weapons charge.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Livingston, Op. No. 2012-UP-137 (S.C. Ct. App. file Feb. 29, 2012). The Remittitur was issued on March 16, 2012.

Applicant filed his first application for post-conviction relief on May 25, 2012 (2012-CP-26-04207). He alleged the following grounds for relief in his application (excerpted):

1. Ineffective assistance of counsel, in that:
 - a. "Trial Counsel was ineffective for not impeaching the state testimony at trial."
 - b. "Trial Counsel was ineffective for failing to interview the state's witness."
 - c. "Mr. Joy didn't [subpoena] any of the defendant's witness[es] at trial."

Respondent made its return on September 24, 2012, and an evidentiary hearing into the matter was convened on Tuesday, October 28, 2014, before the Honorable John C. Hayes. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Joshua Thomas, Esq., of the South Carolina Attorney General's Office, represented Respondent. By written order dated November 10, 2014, and filed November 17, 2014, Judge Hayes denied and dismissed the application.

Applicant filed a notice of appeal, which was served on Respondent on April 10, 2015. Upon inquiry by the Court, Counsel advised the Court that he received written notice of entry of the order on appeal on December 8, 2014. On May 8, 2015, the Supreme Court of South Carolina denied the petition by unpublished order. Livingston v. State, S.C. Sup. Ct. Order dated May 8, 2015. The Remittitur was issued on May 27, 2015.

Applicant filed his second application for post-conviction relief on March 11, 2016 (2016-CP-26-01750). He alleged the following grounds for relief in his application:

1. "Ineffective Assistance of P.C.R. Counsel"
 - a. "Counsel failed to file notice of appeal (Austin petition)."

Respondent made its return on February 28, 2017, and an evidentiary hearing into the matter was convened on Monday, May 22, 2017, before the Honorable Roger E. Henderson. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esq. Johnny Ellis James Jr., the undersigned, represented Respondent. Applicant testified on his own behalf, and attorney Fowler, also testified. By written order dated June 26, 2017, and filed July 10, 2017, Judge Henderson denied and dismissed the application.

This appeal follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). In particular, appellate courts give great deference to a PCR judge's findings where matters of credibility are involved. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE EVIDENCE EXISTS TO SHOW PETITIONER KNEW OF HIS APPELLATE RIGHTS AND KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED THEM BY FAILING TO TIMELY REQUEST HIS ATTORNEY FILE AN APPEAL

Because the record provides “any evidence” to support the PCR Court’s order, this Court should uphold the denial of relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Where an Applicant is denied an opportunity to properly appeal an adverse final ruling of a court in a post-conviction relief action, he or she may seek limited relief in a subsequent action to correct the unfairness. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). “A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived.” Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citing King v. State, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992)). If the PCR court finds an applicant was denied his or her right to appeal, the applicant can petition for certiorari and the South Carolina Supreme Court will review whether he or she was prejudiced by the failure to obtain appellate review. Id. “The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin v. State.” Id., 337 S.C. at 263, 523 S.E.2d at 756.

Petitioner first insists he requested an appeal a month and a half after the date of the evidentiary hearing in his first PCR. The Honorable John C. Hayes took Petitioner’s first PCR application *under advisement* at the end of the first evidentiary hearing on October 28, 2014. (Appx. 718, ll. 11-12). Judge Hayes shortly thereafter dated an order denying relief on November 10, 2014. (Appx. 726). At the evidentiary hearing in the present effort for Austin

relief, Petitioner did not claim he sent the letter a month and a half after the hearing date, but rather a month and a half after he was turned down:

[PCR Counsel:] Do you recall asking Mr. Fowler to appeal the PCR decision?

[Petitioner:] Yes, sir.

Q. And when do you recall asking him that?

A. Probably about a month and a half after I got turned down.

Q. I'm sorry?

A. About a month and a half after I got turned down.

Q. After the hearing date?

A. Yes, sir.

Q. Okay. And how did you ask him?

A. Letter.

(Appx. 748-49). Since Petitioner was not denied from the bench, taking his testimony at face value, he could have only sent it a month and a half after some later date.

In any event, PCR Counsel testified that on October 24, 2014, he discussed the PCR process and appeals with Petitioner. (Appx. 751, ll. 19-25). PCR Counsel denied ever receiving any such letter from Petitioner, or that Petitioner otherwise expressed a desire to appeal in a timely manner, but rather only reached out in March 2015. (Appx. 751, ll. 9-14; pp. 752-53). The PCR Court found PCR Counsel's testimony credible. See Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)) ("This Court gives great deference to a PCR judge's findings where matters of credibility are involved."). As such, the record contains evidence to show Petitioner knew of his appellate rights and did nothing to act upon them until it was entirely too late.

Petitioner insists upon the lack of explicit testimony as to waiver. “Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive.” Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)). “Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.” Id.

The very smallest iota of affirmative indication of a desire to appeal is sufficient to impose upon counsel the obligation to proceed in filing a notice of appeal. However, no such scintilla is present, but rather the record provides adequate evidence of Petitioner’s failure to insist upon his right in any way. Consequently, he waived his right to appeal by conduct.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
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Columbia, South Carolina 29211
(803) 734-3737

9 Aug, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2017-001739

MICHAEL LIVINGSTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

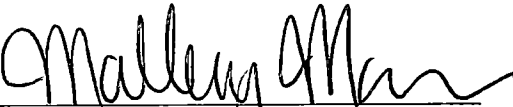
Respondent.

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:

Taylor D. Gilliam, Esquire
1330 Lady Street, Ste. 401
Columbia, SC 29201

This 9th day of August, 2018.


MALLORY MORRIS
Legal Assistant for Respondent



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AUG 09 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

August 9, 2018

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

RE: Michael Livingston v. State of South Carolina
Appellate Case No. 2017-001739
Lower Court Case No. 2016-CP-26-1750

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: Taylor D. Gilliam, Esquire