

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

MOSES FRASIER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RESPONDENT

APPELLATE CASE NO. 2018-000739

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
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

ORIGINAL

RECEIVED

NOV 08 2019

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT

The post-conviction relief (PCR) judge properly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). 5

CONCLUSION 7

ISSUE PRESENTED

Did the post-conviction relief (PCR) judge properly grant Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT OF THE CASE

A Charleston County grand jury indicted Petitioner on June 12, 2006 for the offense of murder. App. 746-747. His case was called to trial on October 2, 2006 before the Honorable James C. Williams, and a jury. App. 1. Assistant Solicitors Nathan Williams and Kim Steele represented the state. App. 1. Beattie Butler and Jason Mikell represented Petitioner. App. 1.

On October 5, 2006, the jury acquitted Petitioner of murder, but found him guilty of the lesser included offense of voluntary manslaughter. App. 564, l. 23 – 565, l. 6. Petitioner was sentenced to thirty years imprisonment. App. 574, ll. 4-7.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Frasier, 2009-UP-052 (S.C. Ct. App. filed January 15, 2009); App. 605.

On February 27, 2009, Petitioner filed an application for post-conviction relief (PCR). App. 607-613. The state filed a return to this application dated July 7, 2009. App. 614-620. Petitioner filed an amended application on November 5, 2009. App. 621-653. An evidentiary hearing was convened on January 9, 2012 before the Honorable R. Markley Dennis, Jr. App. 654. Assistant Attorney General Matthew Friedman represented the state, and Jeffrey Yungman represented Petitioner. App. 654. By order filed February 22, 2009, the PCR judge denied Petitioner relief. App. 687-692.

Petitioner's PCR counsel failed to timely file a notice of appeal from the order of dismissal. App. 698. He also failed to send a copy of the order to Petitioner or otherwise notify him of the court's decision. App. 698. In October 2015, Petitioner's mother contacted counsel on Petitioner's behalf inquiring into whether the PCR judge had ruled on Petitioner's application. App. 698. Counsel ultimately mailed Petitioner a copy of the order, which Petitioner received in December 2015. App. 698.

On December 17, 2015, Petitioner filed a *pro se* notice of appeal with the Supreme Court. App. 694-695. To determine the timeliness of the appeal, this Court wrote to counsel in a letter dated December 23, 2015 inquiring into the date in which counsel received written notice of the order. App. 696-697. By letter dated December 31, 2015, Yungman admitted that despite receiving a copy of the order of dismissal in February 2012, he did not file a notice of appeal nor did he send Petitioner a copy of the order until December 2015. App. 698-699. He explained that Petitioner's case was his first and only court appointed case before he found out he was exempt from any future appointments due his employment with One80 Place, a homeless shelter in Charleston. App. 698-699. Yungman further asserted, "Being a relatively new attorney and having no criminal law experience, I apparently made some incorrect assumptions at the close of this case: (1) that the court would send a copy of the order to both me and my client, (2) that my representation ended with the PCR hearing, and (3) that my client would file an appeal upon receipt of the order as he was instructed to do by Judge Dennis, who presided at the hearing." App. 698.

Because Petitioner's *pro se* notice of appeal was not timely filed given that counsel received the order of dismissal in February 2012, this Court dismissed the appeal by order dated January 6, 2016. App. 700. On January 25, 2016, Petitioner filed a second application for post-conviction relief seeking a belated appeal from the denial of his first application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 702-712. The state filed a return to this application dated June 23, 2017. App. 713-717. An evidentiary hearing was convened on February 1, 2018 before the Honorable Maite Murphy. App. 718. Assistant Attorney General Rasheeda Cleveland represented the state, and James Falk represented Petitioner. App. 718.

Petitioner testified at the hearing that the PCR judge orally denied his application at the conclusion of his first hearing. App. 722, l. 23 – 723, l. 3. When he did not receive the order of dismissal, he thought the judge “had a change of heart.” He continued to wait for a decision for three years. App. 723, l. 4.

Jeffrey Yungman, Petitioner’s original PCR counsel, never discussed with him “what would happen if the judge ruled against [him].” App. 723, ll. 5-9. They never discussed the possibility of an appeal. However, Petitioner asserted he wanted to appeal the denial of relief. App. 723, ll. 5-11. His understanding was that his counsel would file the notice of appeal. App. 723, ll. 20-24; App. 727, ll. 20-25. After three years, Petitioner had his mother reach out to counsel. Yungman ultimately mailed Petitioner a copy of the order of dismissal, which Petitioner received in December 2015. App. 724, ll. 2-13.

Jeffrey Yungman testified consistent with his letter to this Court dated December 31, 2015. He again admitted he received the order in February 2012, he did not send a copy to Petitioner, and he never filed a notice of appeal. App. 731, ll. 2-7. He assumed incorrectly that his representation was over at the conclusion of Petitioner’s hearing and that Petitioner would personally appeal the denial of relief. App. 732, ll. 1-7.

By order filed April 18, 2018, the second PCR judge granted Petitioner a belated appeal from the denial of his first application for PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 740-745. The judge found Petitioner did not knowingly and intelligently waive his right to appeal. App. 744.

This petition for writ of certiorari respectfully requesting the Court hear Petitioner’s belated appeal follows.

ARGUMENT

The post-conviction relief (PCR) judge properly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

“The right to seek appellate review of the denial of PCR is expressly authorized by state law.” *Austin v. State*, 305 S.C. at 454, 409 S.E.2d at 396 (citing S.C. Code Ann. § 17-27-100). “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) (citing *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969)). In *Austin*, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. The proper scope of review of the PCR court’s ruling is whether there is any evidence of probative value to uphold the PCR court’s findings. *Webb v. State*, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984) (citing *Griffin v. Warden*, 277 S.C. 288, 286 S.E.2d 145 (1982)).

In this case, the PCR judge properly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin*. Petitioner’s counsel admitted he failed to send a copy of the order of dismissal to Petitioner and failed to file a notice of appeal on Petitioner’s behalf. App. 731, ll. 2-7. Counsel erroneously thought his representation of Petitioner ended at the conclusion of Petitioner’s PCR hearing. App. 732, ll. 1-7; See Rule 71.1(g) of the South Carolina Rules of Civil Procedure (“A final decision entered under the [Uniform Post-Conviction Procedure] Act shall be reviewed according to the procedures specified by Rule 243, SCACR. If an applicant represented by counsel desires to appeal, counsel shall serve and file a Notice of Appeal as required by Rule 243, SCACR, and shall continue to represent the applicant on

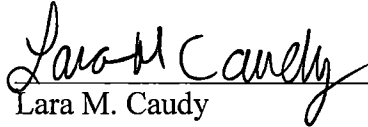
appeal unless automatically relieved under Rule 602, SCACR, or allowed to withdraw under Rule 264, SCACR. If the applicant is indigent, counsel shall assist the applicant in obtaining representation by the Division of Appellate Defense of the Office of Indigent Defense.”). While Petitioner and counsel never discussed the possibility of an appeal, Petitioner asserted he wanted to appeal the denial of relief. App. 723, ll. 5-11. His understanding was that his counsel would file the notice of appeal. App. 723, ll. 20-24; App. 727, ll. 20-25.

Consequently, the PCR judge correctly held Petitioner did not knowingly and intelligently waive his right to appeal from the order of dismissal. Respectfully, under the “any evidence” standard of review of Webb, this Court should hold the PCR judge’s ruling was correct, grant certiorari, and grant Petitioner a belated appeal from the denial of his first application for post-conviction relief.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and grant Petitioner a belated appeal from the denial of his first application for post-conviction relief.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of November, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Honorable Maite Murphy, Circuit Court Judge

MOSES FRASIER,

PETITIONER

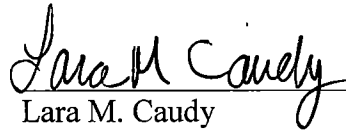
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

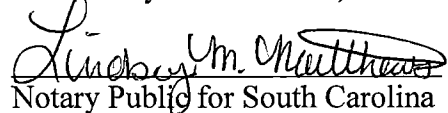
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served upon Moses Frasier, #317940, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 8th day of November, 2019.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of November, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.