

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger M. Young, Circuit Court Judge

PAUL GRAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The PCR court properly ruled that petitioner did not voluntarily and intelligently waive his right to appeal his first PCR action.

STATEMENT

Petitioner Paul Gray was found guilty per jury trial of lewd act on a minor child and one count of criminal sexual conduct with a minor in the first degree during the October, 2002 term of the Charleston County General Sessions Court before Judge John Milling. Petitioner was sentenced to imprisonment for a period of eighteen years on the criminal sexual conduct conviction. Petitioner was sentenced to eight years, suspended upon the service of five years probation, consecutive, on the lewd act conviction. App. 1-236. Petitioner appealed his convictions and sentences.

On appeal, appellate counsel raised the following issue:

The court erred in admitting expert testimony concerning the late reporting of the offenses in the case, since the probative value of it was substantially outweighed by the danger of unfair prejudice to appellant.

On November 1, 2004, the Court of Appeals issued an unpublished opinion finding that the expert testimony on late reporting did not constitute error because the behavioral characteristics of sexual assault victims can be admitted to prove that a sexual crime occurred, and that the testimony regarding delayed reporting in the case was more probative than prejudicial. App. 261-265. See State v. Gray, Unpublished Opinion No. 2004-UP-552 (S.C. November 1, 2004).

On May 26, 2005, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. App. 266-272. The respondent filed a return dated October 14, 2005. App. 273-277. A PCR hearing was held on June 1, 2007, at the Charleston County Courthouse before Judge J. Derham Cole. App. 279-307. On October 3, 2008, Judge Cole issued an order of dismissal in the case. App. 309-314.

Petitioner did not enjoy the benefit of a PCR appeal of Judge Cole's order of dismissal issued in the case. See order of dismissal from the South Carolina Supreme Court with a finding that the "appellant [did not] provide a proof of service showing that the notice of appeal [had] been timely served on opposing counsel as required by Rules 227(b) and 203(b)(1) of the South Carolina Appellate Court Rules (SCACR)." App 315.

On April 22, 2009, petitioner filed a second PCR application with the Charleston County Office of the Clerk of Court requesting a belated PCR appeal. App. 316-328. The respondent filed a return admitting that this issue was worthy of receipt of a hearing. App. 325-329. On June 28, 2010, a consent order containing all parties' signatures was issued. App. 331-334. In the consent order, Judge Roger M. Young, Sr. found that "petitioner did not knowingly and voluntarily waive his right to appeal his first PCR application" and went on to grant him a belated appeal. App. 333.

Petitioner appealed Judge Young's order. This petition follows.

ARGUMENT

The PCR court properly ruled that petitioner did not voluntarily and intelligently waive his right to appeal his first PCR action.

Petitioner's pro se appeal notice of his first PCR action was not properly filed (proof of service missing), which consequently led to the dismissal of the appeal. See App. 315.

In petitioner's second PCR application, the improperly filed notice of appeal issue was summarized by petitioner as follows.

Prior to receiving notice that his prior PCR in case 05-CP-10-2277 was denied, PCR counsel, William R. Runyon, Jr., informed the Applicant that he would file notice of appeal if the PCR was in fact denied. Following denial of the Applicant's prior PCR on October 10, 2008, informed the Applicant that a "certification of merit" was required in order to appeal and that he could not make such a certification. The Applicant filed a pro-se notice of appeal. The Supreme Court, by letter dated January 9, 2009, informed PCR counsel that the Applicant had failed to include proof of service and a copy of the final order with notice of appeal, and ordered PCR counsel to provide the documents. PCR counsel failed to do so.

The Applicant contends that he requested PCR counsel file notice of appeal if his prior PCR was denied and that he did not voluntarily waive his right to appeal. The Applicant further contends that he should receive a belated appeal from the denial of his prior PCR in case 05-CP-10-2277.

App. 320.

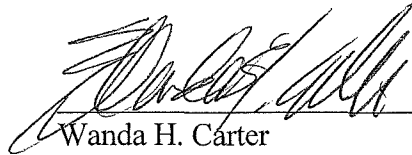
No PCR hearing was held upon the respondent's receipt of petitioner's second PCR application filed in the case. Rather, a consent order was signed and issued by Judge Young granting petitioner's belated appeal of his first PCR action per Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 331-334. Judge Young found that petitioner "did not knowingly and voluntarily waive his right to appeal his first PCR application." App. 333.

The state's attorney and petitioner's PCR counsel signed Judge Young's order consenting and conceding to petitioner's request for a belated PCR appeal, and thereafter, the PCR court granted the request for a belated first PCR appeal per the consent order. Petitioner has a right to appellate review of the denial of his first PCR action where PCR counsel failed to appeal the same. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); S.C. Code Ann. § 17-27-100. The PCR court properly ruled that petitioner did not voluntarily and intelligently waive his right to appeal his first PCR action.

CONCLUSION

Based on the foregoing argument, petitioner requests that the petition be granted in order to allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Roger M. Young, Circuit Court Judge

PAUL GRAY,

PETITIONER,

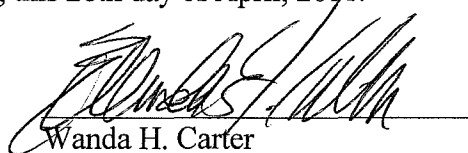
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

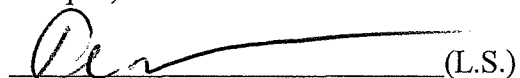
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Matthew J. Friedman, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of April, 2011.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of April, 2011.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013.