

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

HECTOR CAMO VILLAFUERTE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000830

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 5

CONCLUSION 10

STATEMENT OF AUSTIN QUESTIONS 11

ISSUE PRESENTED

Whether the PCR court erred in denying Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner spoke no English at the time of his plea, suffered from an illness which resulted in memory problems, and repeatedly attempted to file *pro se* appeals, where Petitioner may not have been provided a copy of the Order of Dismissal from his first PCR, and where Petitioner never knowingly and intelligently waived his right to appellate review following the denial of his first PCR action?

STATEMENT

Petitioner was indicted by a Lexington County grand jury in August 2008 for assault and battery with intent to kill, criminal sexual conduct in the first degree, and kidnapping. App. 121 – 126. Petitioner pleaded guilty to assault and battery with intent to kill before the Honorable William Henry Seals, Jr. on or about May 26, 2009.¹ He was sentenced to twenty years' incarceration on that charge, with the sentence crafted to run concurrently to the other charges, criminal sexual conduct and kidnapping. In total, he received eighty years' imprisonment. Elizabeth Fullwood represented Petitioner at his plea. App. 60 l. 18 – App. 63 l. 18. She recalled him communicating exclusively in Spanish. She testified that Petitioner's file from her office had been destroyed. Id. Petitioner could have sent her a letter asking her to file an appeal, but she could neither remember nor consult the file. Id.

Petitioner filed a *pro se* direct appeal with the South Carolina Court of Appeals soon thereafter. App. 18 – 24. The Court of Appeals sent Petitioner a letter on June 22, 2009, in English, which advised him that he had failed to serve the Notice of Appeal on opposing counsel. App. 16 – 17. Because Petitioner never provided the Court of Appeals with proof of service showing that the Notice of Appeal was timely served on opposing counsel, his appeal was dismissed on or about July 22, 2009. App. 22. Petitioner signed a proof of service which was dated and notarized July 24, 2009. App. 24. However, no Petition for Reinstatement was filed, so the Remittitur was issued on August 10, 2009. App. 25.

Petitioner then filed an application for post-conviction relief on November 13, 2014. App. 1 – 27. Through his filing, Petitioner claimed that his plea was not entered voluntarily,

¹ The transcript of that plea is not available. App. 37 ll. 3 – 10.

knowingly, or intelligently. App. 3. Through attachments, he also contended that none of the three interpreters he relied on met statutory requirements. App. 8 – 10. He indicated that he did not understand what had occurred at his guilty plea. Id. Petitioner also declared that he did not knowingly waive his right to appeal his guilty plea. App. 11 – 13. Through handwritten attachments to his PCR application, Petitioner noted that he does not speak English. Id.

The state filed its Return and Motion to Dismiss All Claims Beyond Austin Review on or about July 7, 2015. App. 28 – 33. An evidentiary hearing took place on November 8, 2016 before the Honorable R. Keith Kelly. App. 34. Aimee Zmroczek represented Petitioner; Johanna Valenzuela appeared on behalf of the state. Petitioner and plea counsel testified at the hearing. Judge Kelly took the matter under advisement. App. 55 ll. 19 – 22. An Order of Dismissal was filed on December 28, 2016. App. 58 – 65. The PCR court found that Petitioner did not speak English well but denied relief on the belated appeal ground because Petitioner did not explicitly state that the language barrier was the reason for his alleged failure to complete his appeal. App. 61. All of Petitioner’s remaining allegations were dismissed for failure to file the application within one year. App. 62.

A Notice of Appeal was not filed by PCR counsel, so Petitioner filed a second application for post-conviction relief on November 16, 2017. App. 66 – 77. An attachment to the application plainly stated that Petitioner told PCR counsel he wanted to appeal the denial of his PCR application. App. 69. Petitioner indicated that a letter he had received from Judge William Keesley notifying him that his PCR had been dismissed was the “only information that he has received concerning his first PCR [a]pplication.” App. 69. Petitioner requested that Spanish-speaking counsel be appointed in his case. Id. The state filed an Amended Return and Motion to Dismiss on or about January 17, 2019. App. 78 – 85.

An evidentiary hearing was held before the Honorable Walton J. McLeod, IV on April 1, 2019. App. 86. Ashley McMahan represented Petitioner; Megan Jameson appeared on behalf of the state. Petitioner and prior PCR counsel testified at the hearing. The PCR court took the matter under advisement. App. 10 ll. 15 – 17. An Order of Dismissal was filed on May 15, 2019. App. 112 – 120. The PCR court found that Petitioner failed to establish he was entitled to Austin relief, “as he knowingly and voluntarily waived his right to appeal his prior post-conviction relief action.” App. 116.

This petition follows.

ARGUMENT

The PCR court erred in denying Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner spoke no English at the time of his plea, suffered from an illness which resulted in memory problems, and repeatedly attempted to file *pro se* appeals, where Petitioner may not have been provided a copy of the Order of Dismissal from his first PCR, and where Petitioner never knowingly and intelligently waived his right to appellate review following the denial of his first PCR action.

Relevant facts

PCR counsel never mailed Petitioner a copy of the Order of Dismissal from his first PCR action. App. 93 ll. 12 – 14; App. 105 ll. 2 – 6. Petitioner recalled speaking with PCR counsel Zmroczek at his first evidentiary hearing but the conversation ended with PCR counsel suggesting that she was going to write Petitioner. App. 93 ll. 12 – 18. Petitioner indicated that he never received the Order of Dismissal from PCR counsel or the PCR judge. App. 92 l. 25 – App. 94 l. 7. Petitioner never had a conversation with PCR counsel Zmroczek about appealing his PCR. He remembered receiving a letter from her after a previously scheduled evidentiary hearing had to be continued, but he never received any correspondence about appealing. App. 95 ll. 6 – 23.

Petitioner reiterated on cross-examination at the second evidentiary hearing: he was never informed by PCR counsel Zmroczek that his first PCR action was dismissed. App. 96 ll. 12 – 22. Further, she never discussed filing an appeal with him. App. 97 ll. 3 – 5. Additionally, the PCR judge never mentioned Petitioner's right to appeal or any applicable deadlines at the hearing; the matter was taken under advisement. App. 55 ll. 19 – 22.

When asked if he ever told PCR counsel Zmroczek that he wanted to appeal the denial of his PCR, Petitioner responded in the negative but explained that he was wholly unaware of the appellate process. App. 97 ll. 15 – 19. Petitioner proved his desire to appeal, however, with a *pro se* attempt to appeal the PCR. App. 97 ll. 24 – 25. He explicitly confirmed his wish to appeal the PCR when asked by counsel for the state. App. 102 ll. 6 – 8.

Before his first PCR hearing, Petitioner had never conversed with prior PCR counsel Zmroczek in English. App. 43 ll. 8 – 20. Although an interpreter was available and eventually used for the first hearing, Petitioner attempted to testify briefly in English at the outset. He offered detailed testimony on how the language barrier had affected his case since the beginning. Petitioner testified that the translator at his guilty plea could not explain the charges to him very well. App. 44 ll. 12 – 25. He recalled writing his plea attorney in Spanish. *Id.* Notably, Petitioner advised the PCR court that he has an illness which affects his memory. App. 45 l. 24 – App. 46 l. 6. When asked why no appeal was filed following his plea, Petitioner suggested his faulty memory coupled with his belief that plea counsel was going to file the appeal resulted in his initial inaction. He further explained his inability to perfect the appeal *pro se* was based on a lack of resources while incarcerated. App. 46 ll. 7 – 23.

When asked about whether she had advised Petitioner of his right to appeal the first PCR dismissal, PCR counsel Zmroczek testified to her “typical course and habit” which was to explain it at the evidentiary hearing. She claimed to have sent Petitioner a letter in English and Spanish advising him of his right to appeal the denial of his PCR action. App. 104 ll. 9 – 13. However, PCR counsel Zmroczek admitted that she did not send Petitioner a copy of the Order of Dismissal. App. 105 ll. 2 – 6. She mistakenly suggested that the PCR was dismissed from the bench when in fact it was taken under advisement. App. 105 ll. 7 – 20. The evidentiary hearing

took place on November 8, 2016; the Order of Dismissal was signed on December 21, 2016 and filed on December 28, 2016. App. 58 – 65.

Axiomatically, Petitioner was therefore destined to be denied his PCR appeal. If he was only sent a letter advising him of his right to appeal but never provided a copy of the Order of Dismissal, he would not have known either to request that an appeal be filed or attempt to do it himself. Moreover, PCR counsel Zmroczek's testimony at the second evidentiary hearing contradicted the sworn statement contained in her affidavit, offered by the state. App. 109 – 111. The affidavit suggested that the PCR court took the matter under advisement and requested a proposed order from the state. The affidavit correctly noted that Judge Kelly's Order of Dismissal advised Petitioner of the thirty-day requirement for appealing. However, that deadline began when counsel received the Order. Because the Order was never forwarded to Petitioner, he was altogether unaware of any applicable filing deadlines.

The affidavit, again seemingly in conflict with PCR counsel Zmroczek's testimony at the evidentiary hearing, suggested that she mailed Petitioner a copy of the Order of Dismissal. The testimony, therefore, is incompatible. There is no way to accurately discern whether Petitioner knowingly waived his right to appeal the denial of his PCR. His numerous, albeit unsuccessful, attempts to navigate an appeal *pro se* demonstrate his desire for appellate review.

Discussion

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).

"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.

In South Carolina, "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. Id. This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. Id., 337 S.C. at 261, 523 S.E.2d at 755-56. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. Austin, 305 S.C. at 455, 409 S.E.2d at 396.

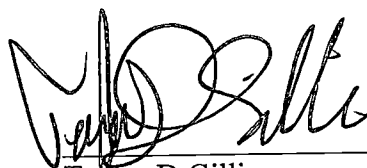
“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct 1019, 1023, 82 L.Ed. 1461, 1466 (1938). A defendant makes an intelligent waiver when he “knows what he is doing and his choice is made with eyes open.” Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268, 275 (1942).

Petitioner’s background, experience, and conduct all suggest he never intentionally waived his PCR appeal. He never abandoned his right; rather, through a language barrier it was likely misunderstood. As evidenced by Petitioner’s history of filing *pro se* appeals, he has always sought appellate review, beginning with his direct appeal following the imposition of an eighty year sentence. The present PCR action was filed in order to secure review of his prior PCR. Based upon his conduct alone, he has always desired appellate review. Likewise, his background and experience, in the form of Spanish as his primary language and general unfamiliarity with the American legal system, suggest that he never intentionally abandoned his right to appeal.

Petitioner never received his complete “bite at the apple” because no PCR appeal was filed on his behalf. He was not informed by the PCR court at the hearing of his right to appeal, and the question remains whether he received the Order of Dismissal.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant certiorari, reverse the PCR court's determination that Petitioner is not entitled to belated review, and allow briefing on the Austin questions.

A handwritten signature in black ink, appearing to read 'Taylor D Gilliam', written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of January, 2020.

STATEMENT OF AUSTIN QUESTIONS

I. Whether the PCR court erred in denying relief, where Petitioner did not knowingly, voluntarily, and intelligently waive his right to direct appeal following his guilty plea?

II. Whether the PCR court erred in summarily dismissing Petitioner's remaining allegations for failure to file his PCR application within one year, where Petitioner was denied a direct appeal of his plea due to ineffective assistance of counsel?

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HECTOR CAMO VILLAFUERTE,

PETITIONER

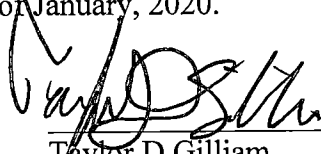
V.

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 has 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 on Hector Camo Villafuerte, #334926, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 6th day of January, 2020.



Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 6th day of January, 2020.

 (L.S)
Notary Public for South Carolina

My Commission Expires: May 12, 2027.