STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Pickens County

Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2019-000354

SUSAN HENDRICKS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's 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 pleaded guilty but mentally ill to four murder charges following numerous diagnoses of mental illness including multiple personality disorder, where competency was not established at the time of the alleged out-of-court appeal waiver, and where Petitioner therefore did not knowingly and intelligently waive the right to appellate review of a PCR order of dismissal?

Respondent's Issue Presented

Did the PCR court properly find there was genuine issue of material fact that Petitioner knowingly and voluntarily waived her right to appeal the denial of her initial application for post-conviction relief when PCR counsel properly advised Petitioner of her right to appeal and the procedures therefore, and when Petitioner acknowledged she mailed a letter to PCR counsel clearly and concisely stating she did not want to appeal the denial and informing counsel he need not contact her again?

A. Petitioner's PCR counsel mailed a letter to Petitioner that appropriately advised her of her right to appeal the denial of her initial application for post-conviction relief.

B. Petitioner's letter to PCR counsel demonstrated that she knowingly and voluntarily waived her right to appeal the denial of post-conviction relief because it explicitly expressed her desire to abandon her appeal and avoid further contact from counsel.

C. Petitioner has not preserved for appellate review the claim that she was not mentally competent to waive her right to pursue post-conviction relief at the time she wrote the letter to her PCR counsel and, notwithstanding her failure to preserve this issue for appellate review, has failed to show any basis for questioning her competency at the time.

STATEMENT OF THE CASE

During its February of 2012 term, the Pickens County Grand Jury indicted Petitioner for four counts of murder and four counts of possession of a weapon during the commission of a violent crime for the fatal shooting of her two sons, ex-husband, and stepmother. John I. Mauldin, Esquire, and Teal Johnson, Esquire, represented Petitioner, and Thirteenth Circuit Solicitor William W. Wilkins, III, prosecuted the case. On April 26, 2013, Petitioner appeared before the Honorable Letitia H. Verdin and pleaded guilty but mentally ill to the four counts of murder in exchange for a sentence of imprisonment for life without the possibility of parole and the dismissal of the four counts of possession of a weapon during the commission of a violent crime, in accordance with negotiations with the State. Petitioner's defense counsel presented testimony from a licensed clinical and forensic psychologist who had evaluated Petitioner. The psychologist testified Petitioner was competent to stand trial and that she knew right from wrong at the time she committed the murders, but was not capable of conforming her behavior to the requirements of the law. Judge Verdin accepted the four pleas and sentenced Petitioner to life without the possibility of parole.

On April 10, 2014, Petitioner filed a pro se "Notice of Intent to Appeal Pursuant to S.C.R.C.P. Rule 59(e) S.C.A.C.R. Rule 203", "Motion for a Writ of Certiorari under Federal SCRCP Rule 59E", and "The Appellant's Brief" with the South Carolina Supreme Court. On April 28, 2014, the Supreme Court dismissed the notice of appeal without prejudice and advised Petitioner she could seek a belated appellate review of her guilty pleas in a post-conviction relief proceeding pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). State v. Hendricks, S.C. Sup. Ct. Order dated April 28, 2014. The Remittitur was issued on May 14, 2014.

Petitioner then filed a pro se application for post-conviction relief on April 16, 2014, alleging therein that she was entitled to relief because her plea counsel had been constitutionally ineffective for failing to "give [her] the help which [she] needed . . . ," she had after-discovered evidence indicating that she had not received a mental evaluation at a facility other than the county jail, and she was voluntary intoxicated at the time of the four murders. Respondent made its return on October 8, 2014, requesting an evidentiary hearing be held. Thereafter, Petitioner retained Jeremy Thompson, Esquire, to represent her in her PCR action. Petitioner was evaluated by Doctor Donna Schwartz-Maddox, a forensic psychiatrist, in order to ascertain whether Petitioner was criminally insane at the time of the murders. Dr. Maddox issued a report concluding Petitioner was criminally responsible and competent, and suffering from severe mental illness. An evidentiary hearing was held before the Honorable R. Knox McMahon on April 21, 2016. Petitioner presented testimony at the hearing and called Dr. Maddox as a witness. Respondent presented testimony from Petitioner's plea counsel Mauldin. Judge McMahon later denied and dismissed the application with prejudice.

Petitioner did not timely file a notice of appeal; however, Petitioner filed a pro se document dated May 24, 2017, with the Supreme Court on May 30, 2017, which the Court construed as a notice of appeal. The Court dismissed the notice of appeal because Petitioner did not timely serve the notice on Respondent as required by Rules 243(b) and 203(b)(1) of the South Carolina Appellate Court rules. Hendricks v. State, S.C. Sup. Ct. Order dated June 19, 2017. The Remittitur was issued on July 7, 2017.

Petitioner then filed a successive application for post-conviction relief on August 30, 2017, alleging her counsel in the earlier PCR action had been constitutionally ineffective for

failing to file a notice of appeal of the PCR court's denial of relief and that she was entitled to belated appellate review of the PCR court's order in accordance with Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Respondent made its return, moving therein for the dismissal of the application pursuant to S.C. Code Ann. § 17-27-70, arguing Petitioner had failed to allege a genuine issue of material fact upon which post-conviction relief could be granted. Respondent attached to and incorporated in its return a letter received by Petitioner's former PCR counsel from Petitioner, in which Petitioner wrote that she "[did] not wish to go any further with an appeal . . . . There is not any reason to visit me!" (emphasis in original). The Honorable Perry H. Gravely, acting in his capacity as Chief Judge for Administrative Purposes for the Court of Common Pleas in the Thirteenth Judicial Circuit, issued a conditional dismissal on November 26, 2018, finding the record conclusively refuted Petitioner's allegation that she did not knowingly and voluntarily waive her right to appeal the denial of her first application for post-conviction relief, and, accordingly, that there was no genuine issue of material fact, and that Respondent was entitled to the summary disposition of the application. The conditional order allowed Petitioner twenty days from the date of its service to provide specific reasons why the dismissal should not become final. On January 22, 2019, Petitioner, through newly appointed PCR counsel, filed a reply to the conditional order, arguing Petitioner never intended to waive her right to appeal the denial of her initial application for post-conviction relief, but that, rather, Petitioner wanted to pursue an appeal through different counsel After reviewing the reply and the record as a whole, Judge Gravely dismissed the application with prejudice, finding the letter Petitioner sent to her former PCR counsel established that Petitioner knowingly and voluntarily

waived her right to appeal and that Petitioner had failed to demonstrate any reason that the condition dismissal should not have become final. This appeal follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Summary dismissal without a hearing is appropriate only when it is apparent on the fact of the application that a hearing is not needed for the development of a factual record and the applicant is not entitled to relief. Mose v. State, 420 S.C. 500, 505, 803 S.E.2d 718, 720 (2017) (citing Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)). The circuit court, in considering a motion for summary dismissal without the holding of an evidentiary hearing, must assume the facts presented by an applicant for post-conviction relief as true and view them in the light most favorable to the applicant. Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (citing McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013)). Pure questions of law will be reviewed de novo without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found there was no genuine issue of material fact that Petitioner knowingly and voluntarily waived her right to appeal the denial of her initial application for post-conviction relief because PCR counsel properly advised Petitioner of her right to appeal and the procedures therefore, and Petitioner acknowledged she mailed a letter to PCR counsel clearly and concisely stating she did not want to appeal and informing him he need not contact her again.

Petitioner argues the PCR court erred in erred in finding Petitioner knowingly and voluntarily waived her right to belated appellate review of the denial of her first application for post-conviction relief pursuant to Austin because her mental competency has not been established to show that she had the ability to knowingly and intelligently waive the right, particularly since she has been diagnosed with multiple mental illnesses throughout the proceedings in the courts below. Petitioner's argument fails, as there was no genuine issue of material fact and Respondent was entitled to the summary dismissal of Petitioner's second application for post-conviction relief, because Petitioner's lack of mental competency to stand trial was not shown in her underlying criminal case or her first PCR action, despite the evidence that she suffered from mental illness, PCR counsel adequately informed Petitioner of her right to appeal the denial of post-conviction relief, to which she clearly and unequivocally indicated in writing her desire to forego the appeal, and because Petitioner has failed to show any basis for questioning her competency when she wrote the letter to PCR counsel.

The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. 305 S.C. 453, 409 S.E.2d 395 (1991). Austin provides for a belated appeal where prior post-conviction relief counsel fails to timely appeal the denial of the

application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). But Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394.[1] Pursuant to Austin, an evidentiary hearing may be conducted in regards to a successive post-conviction relief application "on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." Austin, 305 S.C. at 454, 409 S.E.2d at 396. "If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding." Id. at 455, 409 S.E.2d at 396. Austin, therefore, allows an applicant to petition the Supreme Court of South Carolina for discretionary review of the dismissal of his initial post-conviction relief application through a subsequent PCR action. Pursuant to S.C. Code Ann. § 17-27-70(c), the Court may summarily dispose of an application if there is no genuine issue of material fact in the "pleadings, depositions and admissions and agreements of fact . . ." and the movant is entitled to judgment as a matter of law.

A. Petitioner's PCR counsel mailed a letter to Petitioner that appropriately advised her of her right to appeal the denial of her initial application for post-conviction relief.

Petitioner's former PCR counsel filed a letter with this Court in which he informed the Court he had mailed a letter to Petitioner on August 23, 2016, in which he notified Petitioner of her right to appeal Judge McMahon's denial of post-conviction of relief, the date by which a notice of appeal would have to be filed, and the fact that Petitioner would have to complete an (included) affidavit of indigency if Petitioner wished to be represented on appeal by the Office of

[1] Aice was issued in conjunction with Austin, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

Appellate Defense. In a letter to this Court dated June 9, 2017, and filed on June 12, 2017, Petitioner acknowledged receiving the letter from Jeremy Thompson. Furthermore, Petitioner included with her letter a copy of the letter she received, which indicated PCR counsel would file a notice of appeal, even if he did not receive an affirmative request from Petitioner that she desire him to do so, unless he received instruction from Petitioner in writing that he not do so. The letter shows that PCR counsel also informed Petitioner of the process of filing a motion to alter or amend the judgment in order to preserve issues for appeal, the expected length of the appeals process, and the consequences should Petitioner be successful on appeal, and encouraged her to contact him if Petitioner had any questions or concerns. Thompson's letter to Petitioner undeniably informed her of her right to appeal and the manner for her exercise of that right, and communicated to her all of the information she needed in order to make an informed decision whether or not to appeal. Judge Gravely recognized the letter from PCR counsel to Petitioner properly advised her concerning her right to appeal the denial of relief, and the Court properly concluded there was no genuine issue that Petitioner was aware of her right. App. 172-73.

B. Petitioner's letter to PCR counsel demonstrated that she knowingly and voluntarily waived her right to appeal the denial of post-conviction relief because it explicitly expressed her desire to abandon her appeal and avoid further contact from counsel.

Petitioner argues the PCR court erred in summarily dismissing the application for post-conviction relief because the letter from Petitioner to PCR counsel, which informed PCR counsel that Petitioner did not want to go any further in appealing the denial of post-conviction relief and that there was no reason for PCR counsel to visit Petitioner, inartfully conveyed Petitioner's intent, which was to pursue an appeal while being represented by a different attorney.

Petitioner's argument fails because the letter clearly and unequivocally indicated Petitioner did not want to seek appellate review of Judge McMahon's denial of relief.

In her letter to PCR counsel, Petitioner wrote that she "[did] not wish to go any further with an appeal . . . . There is not any reason to visit me!"[2] The letter thanked PCR counsel for his help in representing Petitioner and asked him for referral to another who would aid white inmates in the South Carolina Department of Corrections in a lawsuit against the agency for "reverse-racism". In her reply to the PCR court's conditional dismiss, Petitioner admitted sending the letter to PCR counsel. As Petitioner identified her purpose in writing the letter as notifying PCR counsel that she wished to discontinue her appeal, the letter is clearly responsive to the letter PCR counsel mailed to Petitioner, in which he instructed her that she had to notify him in writing if she did not want him to file a notice of appeal. Petitioner thanked PCR counsel for his help and representing her "in the past", which demonstrated she desired his representation of her to be at an end. Petitioner's concluding question to PCR counsel about finding counsel for a lawsuit against SCDC demonstrates that her litigious intention was focused elsewhere, not on an appeal from Judge McMahon's denial of post-conviction relief. Petitioner's failure to include any questions about her application for post-conviction relief or an appeal from the denial thereof, though specifically encouraged by PCR counsel in his letter to Petitioner, demonstrates Petitioner understood counsel's explanations about the appeals process. Petitioner's failure to complete the affidavit of indigency and return it to PCR counsel with her responsive letter supported the thrust of the letter that Petitioner was abandoning her pursuit of post-conviction relief rather than seeking other counsel. Likewise, Petitioner's pro se letter to this Court, dated

[2] Petitioner underlined the individual words in this fashion in her letter.

June 9, 2017, showed that she had an understanding of the appeal procedures and was looking for a new attorney.

The PCR court found Petitioner failed to make a prima facie showing that her instruction to PCR counsel that she did not want to appeal the denial of relief and did not want to be further contacted by him about her application did not evince the intelligent and voluntary nature of her waive of the right to appeal the denial of her first application for post-conviction relief and failed to show that there was a genuine issue of material of fact on the successive application. The PCR court's findings were proper as Petitioner's present allegations did not put forth any credible, genuine, or plausible issues that should allow Petitioner to depart from the clear, unequivocal expression in her letter to PCR counsel of her desire to end her pursuit of post-conviction relief. Judge Gravely was correct in finding the letter left no genuine issue of material fact as to the voluntariness and intelligence in Petitioner's waiver of the right to appeal, as was articulated in Thompson's letter to Petitioner. App. 172.

C. Petitioner has not preserved for appellate review the claim that she was not mentally competent to waive her right to pursue post-conviction relief at the time she wrote the letter to her PCR counsel and, notwithstanding her failure to preserve this issue for appellate review, has failed to show any basis for questioning her competency at the time.

Petitioner argues the PCR court erred in denying and dismissing with prejudice the present application for post-conviction relief because the PCR court did not establish Petitioner's mental competency to waive her right to pursue post-conviction relief at the time she wrote the letter to PCR counsel. Petitioner did not claim in her application for post-conviction relief that she lacked the mental competency to waive her right to pursue post-conviction relief. App. 145-51. In her response to the PCR court's conditional dismissal, Petitioner did not claim she lacked

the mental competency to waive her right to pursue post-conviction relief. App. 166-67. Petitioner questions her mental competency at the time she wrote the letter for the first time now before this Court. "A party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

Notwithstanding this preservation concern, Petitioner wrongly applies the procedure for determining mental competency articulated in Hughes v. State, 367 S.C. 389, 626 S.E.2d 805 (2006), to this matter because Hughes involved a particular scenario easily distinguishable from the case at bar. This Court articulated a rigorous procedure for a competency determination in Hughes because, as Hughes had been sentenced to death, the Court had the grave responsibility of issuing a notice authorizing his execution following the exhaustion of all of his avenues of relief in state and federal court or his knowing and voluntary waiver of those avenues of relief. Id. at 395, 626 S.E.2d at 808 (citations omitted). The Court explicitly described the procedure as one to be followed "[w]hen considering a request by an appellant who has been sentenced to death to waive the right to appeal or pursue PCR, and to be executed forthwith . . . ." Id. This Court should not require the PCR court to evaluate Petitioner's mental competency in line with Hughes as that standard is not required in this case since Petitioner has not been sentenced to death.

Petitioner has failed to show there is any basis for doubting her mental competency at the time she wrote the letter. In order for a defendant to be competent to stand trial, he must have "sufficient present ability to consult with his lawyer with a reasonable degree of relational understanding . . ." and must have a "rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam) (internal quotations

omitted); Ramirez v. State, 413 S.C. 351, 366, 776 S.E.2d 101, 110 (S.C. Ct. App. 2015) (citing Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992)), rev'd on other grounds, Ramirez v. State, 419 S.C. 14, 22, 795 S.E.2d 841, 845 (2017). A defense attorney may reasonably rely upon his own perceptions in determining whether a mental competency evaluation is required. Jeter, at 233, 417 S.E.2d at 596. Petitioner's explanation for the letter to PCR counsel is that she failed to convey her real intention to appeal Judge McMahon's denial of relief due to poor word choices. App. 166. Petitioner's explanation for her failure to take any indication to either file a notice of appeal or express to PCR counsel her desire to appeal the denial is that she attempted but failed to secure other private PCR counsel. App. 166-67. Petitioner's explanations leave no room for her now to cast doubt upon her mental competency following Judge McMahon's denial of relief because they indicate she was behaving competently and rationally. Although Petitioner did state in her reply to the PCR court's conditional dismissal that she suffered from mental illness, she did not allege that her mental illness caused her to send a letter to PCR counsel stating her intention to forego an appeal, indicating Petitioner did not see a causal connection between her mental state and her instructions to PCR counsel at the time of the PCR court's summary dismissal of this successive application for post-conviction relief. Furthermore, Petitioner's argument now that "[i]t is impossible to know [Petitioner's] frame of mind or which personality wrote the letter [to PCR counsel informing him that she did not want to appeal]", which, if true, forecloses Petitioner's ability to argue Petitioner's mental illness deprived her of the requisite competency to knowingly and voluntarily waive her right to appeal Judge McMahon's denial of relief. This Court should not allow Petitioner to assert for the first time on appeal that she lacked the mental competency to waive her right to appeal, particularly when she would require the

PCR court to follow a competency determination procedure not required in this case, and has given no reason to doubt her competency when she wrote the letter to PCR counsel.

CONCLUSION

The PCR court properly granted Respondent's motion for summary dismissal because there was no genuine issue of material fact and Respondent was entitled to judgment as a matter of law because Petitioner's letter to her PCR counsel explicitly conveyed her desire to be finished with her pursuit of post-conviction relief, PCR counsel properly informed Petitioner of her right to appeal the denial of post-conviction relief and the procedures thereto, and Petitioner has shown no reason why her mental competency following the denial of post-conviction relief should now be called into question. This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I, Judy A.C. Carey, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 16th day of January, 2020.

JUDY A.C. CAREY
Legal Assistant

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