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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, PCR Judge

Appellate Case No. 2019–000830

HECTOR CAMO VILLAFUERTE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

STATEMENT OF THE ISSUES

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 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?

Respondent's Counter-statement of Issue Presented

Ample probative evidence supports the PCR court's denial of *Austin* relief and finding that Petitioner knowingly and intelligently waived his right to appellate review of his first PCR action where PCR counsel met with Petitioner immediately following the hearing, advised him his action would likely be dismissed, and explained the procedure and timeline to secure appellate review; where PCR counsel sent Petitioner a letter upon receiving the order of dismissal again advising Petitioner of his right to appeal; where Petitioner admitted he never asked PCR counsel to file an appeal on his behalf; where Petitioner claimed he attempted to file a *pro se* appeal; and where no language barrier existed between PCR counsel and Petitioner, as PCR counsel is fluent in Spanish, was easily able to communicate with Petitioner, and sent Petitioner all correspondence in both English and Spanish.

STATEMENT OF THE CASE

Hector Camo Villafuerte (Petitioner) was arrested on May 5, 2008, after kidnapping, severely injuring, and violently raping his victim. During its August 2008 term, the Lexington County Grand Jury indicted Petitioner for assault and battery with intent to kill (ABWIK) (2008-GS-32-2748); first-degree criminal sexual conduct (CSC) (2008-GS-32-2749); and kidnapping (2008-GS-32-2750). (App. 121–26). Elizabeth C. Fullwood, Esquire (Counsel Fullwood), of the Eleventh Circuit Public Defender's Office, represented Petitioner.

On May 26, 2009, Applicant appeared in the Lexington County Court of General Sessions before the Honorable William Henry Seals, Jr. and pleaded guilty as indicted to all offenses.[1] Judge Seals accepted Applicant's guilty pleas and sentenced him to consecutive terms of twenty years' imprisonment for ABWIK, thirty years for first-degree CSC, and thirty years for kidnapping.

Petitioner filed a timely notice of appeal. On July 22, 2009, the Court of Appeals issued an order dismissing the appeal for failing to provide the Court with a proof of service showing the Notice of Appeal was timely served on opposing counsel as required by Rule 203, SCACR, and as requested by letter from the Court dated June 22, 2009. (App. 22; 16–17). Because no petition for reinstatement was filed, the case was returned to the circuit court on August 10, 2009. (App. 25).

A. Initial Post-Conviction Relief Action (2014-CP-32-4158)

Petitioner filed his initial post-conviction relief action on November 13, 2014, alleging he was being held in custody unlawfully based on the following:

1. My guilty plea was not entered voluntarily, knowingly, or intelligently;
2. I did not voluntarily, knowingly, and intelligently waive my

[1] By letter dated May 20, 2016, Court Administration notified the parties that the tapes from the guilty plea have since been destroyed in accordance with Rule 607(i), SCACR.

right to appeal; [and]

3. Based on (A) and (B) above I was denied affective[*sic*] assistance of counsel.

(App. 1–27).

The State made its return and partial motion to dismiss on July 7, 2015, requesting an evidentiary hearing on Petitioner's claim of ineffective assistance of plea counsel for failing to file an appeal and summary dismissal on the remaining claims as barred by the statute of limitations. (App. 28–33). On November 7, 2016, an evidentiary hearing convened before the Honorable R. Keith Kelly, circuit court judge. (App. 34–57). Petitioner was present at the hearing and represented by Aimee J. Zmroczek, Esquire (Counsel Zmroczek). Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented the State. On December 28, 2016, Judge Kelly issued an order denying the application and dismissing with prejudice. (App. 58–65). Petitioner did not appeal.[2]

B. Second and Current Post-Conviction Relief Action (2017-CP-32-04257)

Petitioner commenced his second and current post-conviction relief action on November 16, 2017, alleging he was being held in custody unlawfully based on the following:

1. The Applicant was denied his Statutory Right to appeal his denial of his first PCR Application because he told his PCR Counsel that he wanted to appeal any adverse denial of his PCR Application. Applicant files this PCR Application under Austin v. State, 409 S.E.2d 395 (1991).

(App. 66–75).

The State made its amended return and motion to dismiss on January 17, 2019, requesting summary dismissal and attached an affidavit from Counsel Zmroczek, indicating she had informed

[2] Petitioner testified he attempted to appeal the PCR court's order himself. (App. 97–98). However, Petitioner was unable to provide any documentation or clocked copies to support his testimony.

Petitioner of his right to appeal the denial of his initial post-conviction relief action and Petitioner never requested she file an appeal. (App. 78–85; 109–11). On April 1, 2019, an evidentiary hearing convened before the Honorable Walton J. McLeod, IV, circuit court judge. (App. 86–108). Petitioner was present at the hearing and represented by Ashley A. McMahan, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office represented the State. On May 15, 2019, Judge McLeod issued an order denying Petitioner's request for *Austin* relief. (App. 112–20). This appeal follows.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

Ample probative evidence supports the PCR court's denial of *Austin* relief and finding that Petitioner knowingly and intelligently waived his right to appellate review of his first PCR action where PCR counsel met with Petitioner immediately following the hearing, advised him his action would likely be dismissed, and explained the procedure and timeline to secure appellate review; where PCR counsel sent Petitioner a letter upon receiving the order of dismissal again advising Petitioner of his right to appeal; where Petitioner admitted he never asked PCR counsel to file an appeal on his behalf; where Petitioner claimed he attempted to file a *pro se* appeal; and where no language barrier existed between PCR counsel and Petitioner, as PCR counsel is fluent in Spanish, was easily able to communicate with Petitioner, and sent Petitioner all correspondence in both English and Spanish.

On appeal, Petitioner argues he was denied his "one bite at the apple" because Counsel Zmroczek failed to file an appeal following the dismissal of his first PCR action. Because the record contains ample probative evidence supporting the PCR court's conclusion that Petitioner knowingly and voluntarily waived his right to appeal, this Court should deny certiorari.

This Court has held that every PCR applicant is entitled to a full and fair opportunity to present claims in one PCR application, or one "bite at the apple." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). This "bite" includes an applicant's right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal. *Id.* at 261, 523 S.E.2d at 755–56. Accordingly, successive applications are generally disfavored "because they allow an applicant to receive more than 'one bite at the apple.' " *Id.* at 261, 523 S.E.2d at 755; *see generally Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) ("A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings.").

However, this Court has allowed successive PCR applications where the applicant has been denied complete access to the appellate process. *Odom*, 337 S.C. at 261, 523 S.E.2d at 755; *cf.* S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). *Austin*

provides for belated appellate review of the denial of a prior PCR action after the statute of limitations has expired where PCR counsel's failure to timely appeal prevented the applicant from seeking appellate review. 305 S.C. 453, 409 S E. 2d 395. *See, e.g. Hope v. State,* 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997) (permitting an *Austin* appeal where original PCR counsel failed to appeal from the first denial of PCR); *but see Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) (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).

Under *Austin*, an evidentiary hearing may be conducted on a successive PCR action to determine if (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*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King v. State*, 308 S.C. 348, 348–49, 417 S.E.2d 868 (1992)). If the PCR court finds the applicant was denied his or her right to appeal, the applicant can petition for certiorari and this Court will review whether he or she was prejudiced by the failure to obtain appellate review. *Austin*, 305 S.C. at 454, 409 S.E.2d at 396.

Alternatively, if the PCR court finds the applicant never in fact sought discretionary review, the applicant may appeal that finding, and this Court will review the appeal based on the normal "any evidence" standard. *Id*. at 455, 409 S.E.2d at 396 (citing *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (highlighting that "any evidence" of probative value is sufficient to uphold the PCR judge's factual findings on appeal)); *see generally Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (explaining that this Court "give[s] great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses").

A. Summary of the Initial Post-Conviction Relief Proceedings

At the outset of Petitioner's first PCR hearing, the State renewed its motion to dismiss all allegations, except those related to his *White*[3] claim, as barred by the statute of limitations. (App. 37). The PCR court granted the State's motion. Petitioner and Counsel Fullwood both testified at the hearing.

Petitioner recalled the plea court and Counsel Fullwood explaining to him he could file an appeal within ten days. (App. 45–46). Petitioner claimed he assumed Counsel Fullwood would file an appeal, although he did not ask her to do so. (App. 46). However, Petitioner admitted he filed his own notice of appeal in 2009 with the help of a friend. (App. 46). He was notified by the Court of Appeals that he had not served opposing counsel, but stated he could not find the money to pay someone to serve it.[4] (App. 46). The appeal was subsequently dismissed. (App. 22). Petitioner further explained that he "regained memory" in 2014, and wrote this Court a letter inquiring about his appeal. (App. 47). On October 7, 2014, the Court of Appeals mailed a letter to Petitioner, in Spanish, explaining that his appeal was dismissed in 2009. (App. 47–48).

Counsel Fullwood testified that throughout her representation of Petitioner she communicated with him in Spanish through certified courtroom translators. (App. 51). She stated she had no issues communicating with Petitioner. (App. 51). She further testified Petitioner never asked her to file an appeal following his plea. (App. 51). Had Petitioner asked, she would have filed an appeal. (App. 51). Counsel Fullwood stated she did not observe any appealable issues regarding Petitioner's plea. (App. 51).

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[3] *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) (holding that a PCR applicant who meets the burden of showing that he did not knowingly and voluntarily waive his right to a direct appeal of his trial conviction is entitled to a belated appeal)

[4] The State would note that Petitioner was instructed by the Court of Appeals in the June 2009 letter to immediately contact his trial counsel and advise them of his desire to appeal. (App. 22).

On cross-examination, Counsel Fullwood stated Petitioner's file had since been destroyed because it was outside the timeline for the Public Defender's Office to save it. (App. 37–38). Counsel Fullwood stated that when the Public Defender's Office receives letters in Spanish, they ask Counsel Zmroczek[5] or one of the courtroom certified translators to translate the letters. (App. 52). When asked whether it was possible that Petitioner had sent Counsel Fullwood a letter, she stated she did not know since the file was destroyed. (App. 52–53).

At the conclusion of the hearing, Judge Kelly took Petitioner's case under advisement. (App. 55). He then issued an order denying Petitioner's request for a belated appeal pursuant to *White* and dismissing the action with prejudice on December 28, 2016. (App. 58–65).

B. Summary of Second and Current Post-Conviction Relief Proceedings

During Petitioner's evidentiary hearing on his second and current PCR action, both he and Counsel Zmroczek testified about their communications following Petitioner's 2016 evidentiary hearing and subsequent dismissal of the action. Petitioner testified Counsel Zmroczek never mailed him a copy of the order of dismissal. (App. 93). He testified Counsel Zmroczek told him she would write to him after the evidentiary hearing but that he never heard from her again. (App. 93). However, he also testified Counsel Zmroczek sent him a letter on "how to do the processing." (App. 94). Petitioner admitted he never told Counsel Zmroczek he wanted to appeal, but stated he did not do so because she never told him he had a right to appeal and never advised him his PCR action had been denied.[6] (App. 96–97). Applicant then claimed he attempted to appeal the PCR

[5] Counsel Zmroczek explained that she had previously clerked for the Public Defender's Office prior to 2009. (App. 52–53). After she left, she would translate letters for her former colleagues at the Public Defender's Office from time to time. (App. 53). She stated she took meticulous notes for every letter she translated, but that she did not have any notes indicating she had any communication with the Public Defender's Office during Counsel Fullwood's representation of Petitioner. (App. 53, 55).

[6] The State would note that Petitioner's testimony contradicts the allegations set forth in his application, which states that "[Petitioner] told his PCR Counsel that he wanted to appeal any adverse denial of his PCR Application." (App. 69).

court's order himself. (App. 97–98). However, Petitioner was unable to provide any documentation or clocked copies to support this testimony. He also attempted to bring up his alleged mistreatment by SCDC and other civil rights issues. (App. 97–01).

Counsel Zmroczek testified she was appointed to represent Petitioner during her time as a contract attorney for post-conviction relief cases in the Eleventh Judicial Circuit. (App. 103). Counsel Zmroczek recalled advising Petitioner that his application was not timely filed. (App. 103). She explained that Petitioner only wanted to address his alleged health issues and what Petitioner believed was improper treatment by SCDC. (App. 38–39, 103). Counsel Zmroczek testified that she tried several times to advise him that these issues could not be addressed in the PCR action. (App. 103).

Because the PCR court rarely denies or grants relief from the bench, Counsel Zmroczek testified she typically confers with her clients immediately following the evidentiary hearing to discuss if they wish to appeal the case should their application get denied. (App. 103, 110). Counsel Zmrozcek stated she made sure to advise Petitioner about securing appellate review on the day of the evidentiary hearing instead of waiting until she received the order of dismissal due to the short deadlines upon which to file a post-trial motion or notice of appeal. (App. 105–06). Because Petitioner's PCR action was untimely, Counsel Zmroczek recalled advising Petitioner that his application would likely be dismissed. (App. 105). She stated she consulted with Petitioner prior to leaving the evidentiary hearing and he confirmed that he did not wish to file a notice of appeal upon receipt of the written order denying relief. (App. 103, 110). She made a note to that effect in Petitioner's file. (App. 110).

Counsel Zmroczek testified that she also mails a letter to each client upon receiving the order of dismissal, advising them again of the timeline for filing a 59(e) or notice of appeal. (App.

103, 105–06). The letter instructs them to notify Counsel Zmroczek by a certain date if they want her to file a notice of appeal on their behalf. (App. 106). Counsel Zmroczek specifically recalled submitting copies of all letters she mailed to Petitioner to the Office of Disciplinary Counsel when Petitioner filed a complaint against her. (App. 103–04). As Counsel Zmroczek is fluent in Spanish, she stated that she always sent Petitioner two letters–one in English and one in Spanish. (App. 38, 103–04). She further testified that the only letters she received from Petitioner dealt with alleged health issues and never addressed appealing the PCR court's ruling or filing an appeal. (App. 109).

C. Discussion

This petition essentially comes down to the standard of review—this Court has repeatedly held that it gives great deference to the PCR court's findings involving witness credibility since this Court lacks the opportunity to directly observe the witnesses. *See, e.g., Drayton*, 312 S.C. at 11, 430 S.E.2d at 521; *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010); *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527. Here, the PCR court found Counsel Zmroczek's testimony that Petitioner did not timely request she file an appeal on his behalf after being advised on this right and the timelines for such an appeal to be credible. Petitioner therefore waived his appellate rights, as he did not assert his right to appeal the PCR court's decision. *See Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. *Waiver*, p. 1062 (1955) ("Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.")

As an initial matter, Petitioner's contradictory testimony supports the PCR court's credibility findings. For example, petitioner stated he never received any letters from Counsel Zmroczek after the hearing. However, Petitioner then stated he received a letter from Counsel Zmroczek on "how to do the processing."

Additionally, Petitioner's repeated complaints regarding his treatment at SCDC and alleged civil rights violations, which PCR counsel explained was entirely unrelated to PCR actions, demonstrates that his litigious intent was focused elsewhere—not on an appeal from Judge Kelly's dismissal of his initial time-barred PCR action. (App. 38, 76, 100–01, 103–04). Petitioner filed a *pro se* appeal of his guilty plea and claimed he attempted to file a *pro se* appeal of the initial PCR action, which supports the inference that he is familiar with appellate proceedings. (App. 16–21; 23–24; 46–48; 97–98). Counsel Zmroczek testified she conferred with Petitioner following the evidentiary hearing, advised him his application would likely be dismissed, and he told her he did not wish to appeal. Finally, Petitioner even admitted he never asked Counsel Zmroczek to file an appeal on his behalf.

Because the record contains extensive probative evidence in support of the PCR court's conclusion that Counsel Zmroczek properly advised Petitioner of the timeline and requirements for filing an appeal and Petitioner failed to secure appellate review of his own volition, Petitioner is not entitled to *Austin* relief.

CONCLUSION

Based on the foregoing, Petitioner neither requested nor was denied the opportunity to seek appellate review of his first PCR action. Petitioner is therefore not entitled to belated appellate review pursuant to *Austin.* The State respectfully submits this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR action.

Respectfully submitted,

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