

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Sumter County

Honorable R. Knox McMahon, Circuit Court Judge

WAYNE D. COOPER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001507

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court properly granted Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner's PCR counsel twice failed to file a Notice of Appeal, and where the State consented to Petitioner's pursuit of a belated review?

STATEMENT

Petitioner was indicted by a Sumter County grand jury for murder on or about April 5, 2007. He proceeded to trial before the Honorable Howard P. King on November 10, 2008. App.

1. Arthur Wilder represented Petitioner, and Jason Corbett served as the assistant solicitor. After a four-day trial, the jury found Petitioner guilty as indicted. App. 803 ll. 1 – 7. Judge King sentenced him to forty years' imprisonment. App. 817 ll. 18 – 22.

Petitioner's conviction was affirmed. State v. Cooper, Op. No. 2011-UP-544 (S.C. Ct. App. filed December 6, 2011). On or about June 25, 2012, Petitioner filed a timely application for post-conviction relief. App. 820 – 827. It contained a handwritten addendum which articulated allegations of ineffective assistance of counsel. Id. The state made its Return on or about January 25, 2013. App. 828 – 832.

An evidentiary hearing took place before the Honorable R. Knox McMahon on October 1, 2013. App. 833. David Holler represented Petitioner, and Daniel F. Gourley appeared on behalf of the state. Trial counsel testified at the hearing. At the conclusion of the evidentiary hearing, the PCR judge requested proposed orders within thirty days. App. 942 ll. 1 – 2. On December 9, 2013, an Order of Dismissal was filed. App. 946 – 953. The PCR court found in a rather nondescript fashion, that counsel sufficiently argued in favor of an alibi defense. App. 950 – 951. A notice of appeal was not filed following the issuance of that Order.

As a result, Petitioner filed a second application for post-conviction relief, on December 8, 2014. App. 954 – 958. He requested relief in the form of an appeal from the denial of his post-conviction relief application. App. 957. The state made its Return on March 30, 2015. App. 959 – 962.

A hearing was held before the Honorable Steven H. John on July 15, 2015. App. 963. F. Casey Dale Cornwell represented Petitioner, and Daniel Gourley again appeared on behalf of the state. The state submitted that Petitioner was entitled to belated review, which the court granted. App. 967 ll. 9 – 24. An Order Granting An Appeal Pursuant to Austin v. State¹ was filed on September 7, 2015. App. 973 – 975. A notice of appeal was not filed following the issuance of this Order.

Petitioner filed a third application for post-conviction relief on January 29, 2018. App. 977 – 998. The state made its Return on June 25, 2019. App. 1000 – 1004. The state consented to the granting of Austin relief for the original PCR action. Id. An Order Granting An Appeal Pursuant to Austin v. State signed by the Honorable R. Ferrell Cothran was filed in July 2018. App. 1009 – 1012.

This petition for writ of certiorari pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) follows.

¹ 305 S.C. 453, 409 S.E.2d 395 (1991).

ARGUMENT

The PCR court properly granted Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991), where Petitioner’s PCR counsel twice failed to file a Notice of Appeal, and where the State consented to Petitioner’s pursuit of a belated review.

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).

In Petitioner’s case, the state twice consented to belated Austin review. Counsel failed to file the Notice of Appeal two times; there was no waiver by Petitioner of his right to appeal. The PCR court properly granted said relief twice.

The latter Order granting relief, from 2018, outlined the situation giving rise to relief in

Petitioner's matter:

After a review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of allegations in the Applicant's post-conviction relief application, the parties have consented to the granting of an appeal pursuant to Austin v. State of Applicant's first post-conviction relief application (2012-CP-43-1286). The parties agree that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of Applicant's application for post-conviction relief. Prior PCR counsel, David Holler, previously indicated Applicant did not freely and voluntarily waive the right to appeal his first application for post-conviction relief and that he failed to file a timely Notice of Appeal of the application.

Based upon the foregoing, this Court finds that the granting of an appeal of Applicant's first PCR (2012-CP-43-1286) pursuant to Austin v. State is warranted.

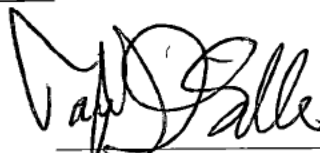
App. 1011.

"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. The appropriate scope of review of the PCR court's holding is whether there is any evidence of probative value to uphold the PCR court's findings. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

Under Austin, the PCR court correctly ruled that Petitioner was entitled to appeal the denial of his post-conviction relief application because he did not voluntarily waive his right to appeal. Petitioner did not sleep on his rights and filed two subsequent PCR applications seeking a belated appeal after the time elapsed for the Notice of Appeal to be filed. Therefore, this Court should grant certiorari and grant Petitioner a belated appeal from the 2012 PCR application.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests this Court grant certiorari, affirm Judge Cothran's determination that Petitioner is entitled to belated review, and review the petition for writ of certiorari filed pursuant to Austin.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County.

Honorable R. Knox McMahon, Circuit Court Judge

WAYNE D. COOPER,

PETITIONER

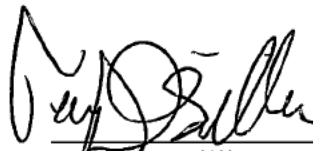
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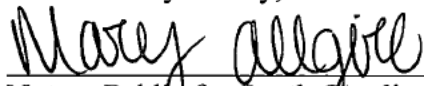
CERTIFICATE OF SERVICE

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 Janell Gregory, 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 Wayne D. Cooper, #469184, at 18701 Roxbury Rd., Hagerstown, MD 21746, this 22nd day of July, 2019.



Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 22nd day of July, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2027

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