

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J.D. Morgan, Jr., Circuit Court Judge

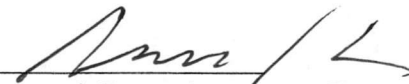
2018-CP-23-5662

Ronne C. Swofford, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR, Ronne C. Swofford appeals the Honorable Perry H. Gravely's Order of Dismissal filed on January 7, 2016. Mr. Swofford further appeals the ruling that issues other than those regarding appeal rights were successive in Honorable J.D. Morgan, Jr.'s November 18, 2021, Order Granting Belated PCR Appeal.

This 6 day of December, 2021.


Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Taylor Zane Smith, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

RECEIVED
DEC 10 2021
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Ronnie Cleveland Swofford, Jr.,)
 S.C.D.C. No. 218281,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2014-CP-23-3763

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO, S.C.
 PAUL B. WICKENSCHMIDT
 2015 JAN 7 PM 2 45

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 8, 2014. The Respondent made its return on January 13, 2015. An evidentiary hearing was held on October 21, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Terry Stephens and one of the Applicant's trial attorneys, Andrew Johnston, Esquire.¹ The Court had before it the trial transcript, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application and subsequent amendment, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the November 2009 term of the Greenville County Grand Jury for first-degree burglary (2009-

¹ The Applicant's second trial attorney, Gerald Wilson, Esquire, was also present but did not testify.

1
 PAK

GS-23-9403), assault and battery with intent to kill (ABWIK) (2009-GS-23-9404, count 1), possession of a weapon during commission of a violent crime (2009-GS-23-9404, count 2), possession of a pistol by a person convicted of a violent crime (2009-GS-23-9405) and at the September 2011 term for assault with intent to kill (AWIK) (2011-GS-23-7263). He was represented by Andrew Johnston, Esquire and Gerald Wilson, Esquire.

After the State called the case to trial, the Applicant was found guilty. On May 17, 2012, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of life imprisonment without parole for first-degree burglary, life imprisonment without parole for ABWIK,² 5 years for possession of a pistol by a person convicted of a violent crime, and 10 years for AWIK.

A notice of appeal was filed at the South Carolina Court of Appeals. The Applicant's motion to relieve LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense was denied by order filed February 15, 2013. The Applicant indicated he wished to withdraw and the Court of Appeals filed an order on June 28, 2013 dismissing the appeal. The remittitur was sent on July 24, 2013.

The Applicant filed a pro se motion for a new trial based on after-discovered evidence pursuant to Rule 29(b), SCRCrimP on July 23, 2013. By order filed December 9, 2013, the Honorable Letitia H. Verdin denied the motion. On December 31, 2013, Judge Verdin filed an order denying the Applicant's motion to reconsider. The Applicant filed a notice of appeal at the South Carolina Court of Appeals. After the Applicant indicated his desire to withdraw, the Court of Appeals dismissed the matter on June 23, 2014. The remittitur was sent on July 9, 2014.

² The Applicant was not sentenced on the possession of a weapon during commission of a violent crime conviction because he received the life imprisonment without parole sentence.

ALLEGATIONS

In his PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
2. Due process violation.
3. Confrontation clause violation.
4. Newly discovered evidence.

In a pro se "Amended Application to Applicants P.C.R. Application" filed August 12, 2014, the Applicant made the following allegations:

1. Ineffective assistance of trial counsel:
 - a. Failed to investigate facts of the crime and the crime scene and failed to present an adequate defense based on the facts.
 - b. "[D]amaging opening arguments . . . lied to the jury and bolstered the States case."
 - c. Failed to impeach victim's testimony and credibility with victim's medical records.
 - d. Failed to employ a forensic psychologist to impeach identification testimony by the victim.
 - e. Failed to cross-examine the State's DNA expert Gibson "on the blood test on the section of the law, and the processing of a hair w/ possible root."
 - f. Failed to effectively cross-examine the State's DNA expert Hefney "in testing the hair w/ possible root."
 - g. Failed to cross-examine or impeach forensics witnesses about processing and preserving evidence.
 - h. Failed to move to suppress "section of the wall evidence" due to failure to follow chain of custody procedures.
 - i. Failed to object to "false testimony regarding evidence by the victim referencing blood on a bullet in the wall."
 - j. "Repetitive inquires of 'false evidence' in reference to blood of Applicant that does not exist."
 - k. Failed to request a curative instruction "to disregard testimony of false evidence regarding blood of the Applicant."
 - l. Failed to request a jury charge that jurors are not to accept opening and closing arguments by attorneys as evidence.
 - m. Failed to impeach victim's contradictory statements with evidence seized by police.
 - n. Failed to object to prejudicial remarks by the prosecutor in closing arguments.

- o. Failed to consult with a medical expert regarding the reliability of the witness/victim identification, "witness memory was obviously impacted by medical trauma."
 - p. Failed to move to suppress "all testimony in reference to blood belonging to the Applicant."
 - q. Failed to object to prosecutor's comments on the Applicant's assertion of the right to remain silent.
 - r. Failed to object to hearsay evidence from Rikki Edwards.
 - s. Failed to include the Applicant in the investigation in developing the facts and preparing the case.
 - t. Failed to object when the Applicant was not properly served notice of intent to seek life imprisonment without parole.
2. Due process violation:
- a. Prosecutor knowingly solicited and failed to correct false statements and evidence.
 - b. Prosecutor obtained a conviction through misinformation and failing to produce all material evidence at trial.
 - c. Prosecutor made prejudicial comments during closing argument.
 - d. Forensics experts failed to properly process evidence and maintain a proper chain of custody.
 - e. Trial judge failed to give a jury charge that jurors are not to accept opening and closing arguments by attorneys as evidence.
 - f. Trial judge interjected himself into the process during a proffer hearing by telling the prosecutor what questions to ask and telling the detective how to answer those questions.
 - g. Jury was exposed to extrinsic evidence.
 - h. Prosecutor intended to seek a life sentence if the Applicant did not take a plea bargain solely to punish him for exercising his right to a jury trial.
 - i. Witness Rikki Danielle Edwards was not at the trial.
 - j. Trial court admitted testimonial hearsay statements of Rikki Danielle Edwards (who was not at trial).
 - k. State failed to properly serve notice of intent to seek life imprisonment without parole upon the Applicant.
3. Confrontation clause violation:
- a. Trial court admitted "testimonial hearsay evidence made by Rikki Danielle Edwards."
4. Newly discovered evidence:
- a. "Mr. Terry Stephens (eye witness) states he was at the crime scene and gave a sworn affidavit . . . and has agreed to testify at the hearing."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the

PKZ

testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

A.

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).”

B.

The Applicant stated trial counsel had his case for 2.5 years but that he never reviewed the pictures and evidence. The Applicant stated he told trial counsel he was not at the victim’s house on the day in question but that he had been shot accidentally when he was there 5-6 days

before. The Applicant stated he had witnesses and photographs to demonstrate he was injured before the day in question. The Applicant acknowledged trial counsel argued an alibi defense at trial. The Applicant also acknowledged tissue and hair from the scene was matched to him but argued there was no blood evidence linking him to the scene and that trial counsel should have brought this to the jury's attention. The Applicant argued trial counsel should have attacked the hair evidence under the exclusionary rule. The Applicant stated trial counsel failed to argue Rikki Edwards' testimony should not have been allowed at trial because it was hearsay and a violation of the confrontation clause. The Applicant argued he was never served with notice of the State's intention to seek a sentence of life imprisonment without parole (LWOP). The Applicant argued the State's reply witness - Deborah Martinez - was not part of the jury voir dire. The Applicant argued trial counsel should have attacked the victim's credibility.

Andrew Johnston (hereinafter "trial counsel") was the Applicant's lead counsel. Trial counsel testified he and Gerald Wilson handled the Applicant's case. Trial counsel testified he filed discovery motions, received full discovery, and reviewed it with both Wilson and the Applicant. Trial counsel testified he read all of the documents aloud to the Applicant and showed him all of the photographs. Trial counsel testified they also reviewed the charges, the elements of the charges, and the sentence ranges for the charges. Trial counsel testified they also reviewed the forensic reports. Trial counsel explained the State's evidence was: the victim's identification of the Applicant, the forensic evidence on the wall of the victim's home, the jacket of the bullet on the victim's floor, and the projectile under the victim's sink. Trial counsel testified some of the genetic material at the scene matched the Applicant. Trial counsel testified the defense theory was that the genetic material was from the Applicant's accidental shooting at the victim's house the week prior and that the Applicant had an alibi. Trial counsel testified he

was served with the notice of the State's intent to seek a sentence of LWOP and that the Applicant knew this was an LWOP trial. Trial counsel said the State called a witness in reply (Martinez) in order to discredit testimony from the Applicant's girlfriend.

C.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have challenged the blood and hair evidence. While the Applicant argued the blood evidence was not actually blood and the type and location of the hair evidence should have been challenged, this Court does not find these arguments persuasive. The SLED expert witness testified a swab of tissue from the victim's kitchen floor and a hair taken from the victim's wall both matched the Applicant. (Trial transcript, p.264; pp.267-68). Trial counsel's defense theory was that this genetic material was from a prior accidental shooting (of the Applicant) at the victim's house and that he had an alibi for the time the victim was shot. In presenting this defense at trial, this Court finds trial counsel properly questioned the State's expert witnesses and then argued to the jury in closing argument that the State's forensic evidence was not dispositive. The Applicant has failed to prove trial counsel were deficient. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (finding in a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to testimonial statements from a non-testifying witness - Rikki Edwards. This Court notes several witnesses mentioned Edwards at trial (and statements she had made). These statements, however, were clearly allowable as exceptions to the hearsay rule. See Rule 803(1), SCRE (defining present sense impression as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately

thereafter"); Rule 803(2), SCRE (defining excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). As such, trial counsel were not deficient in not making an objection.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued that he was never served with the LWOP notice. Initially, this Court does not find credible the Applicant's assertion that he was not served with the LWOP notice. When the assistant solicitor noted at sentencing that he had been served on May 23, 2011, the Applicant did not object. (Trial transcript, p.722). Trial counsel also confirmed he had been served with the LWOP notice and stated he had no recollection of the Applicant saying that he had not been served. Regardless, this Court finds credible trial counsel's testimony that the Applicant knew the trial in his case would be an LWOP trial.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have challenged Deborah Martinez being called as a State's reply witness. Martinez was called in order to rebut testimony from defense witness (and the Applicant's girlfriend) Shannon Lawter. While Martinez was not listed as a potential witness during the jury voir dire, the Applicant has failed to demonstrate he suffered any resulting prejudice. Trial counsel did not testify he was ill prepared for this witness. Further, the Applicant failed to present any evidence from either Martinez or a juror that Martinez was known to any members of the jury. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have better challenged the victim's credibility. This Court has reviewed the trial transcript and finds the victim was thoroughly cross-examined about his account of the shooting. This Court also notes the victim was impeached with details from his first statement. (Trial transcript,

pp.106-07). This Court finds the Applicant has failed to identify an alternate line of questioning that would have been more successful in attacking the victim's credibility. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

D.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Newly-Discovered Evidence

The Applicant argued trial counsel should have called Terry Stephens as a defense witness at trial.

Terry Stephens stated he used to work with the Applicant and had also been incarcerated with him at one time. Stephens stated he was at the victim's house and saw the victim come outside and shoot three times. Stephens admitted he did not know the date of this occurrence. Stephens also admitted he did not see who shot the victim. Stephens stated the Applicant had a bandage on his arm on his birthday (which was the same day as the Applicant's birthday). Stephens stated he did not tell either police or trial counsel about the shooting incident. Stephens stated the Applicant had wanted him to testify that he had a bandaged arm on his birthday but that he did not want to testify at the trial and risk a parole violation.

Trial counsel testified he spoke to Stephens before trial and that he could have been used as an alibi witness except he had a prior record, so he did not call him at trial. Trial counsel testified Stephens had not indicated prior to trial that he was present at a shooting incident at the victim's house. Trial counsel testified he had not heard this story until after the Applicant's trial.

This Court notes that, for an applicant to be granted post-conviction relief based on newly-discovered evidence, he must show the alleged evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983) (citation omitted) (emphasis added). This Court finds the Applicant has failed to prove any of the five elements necessary to substantiate a claim of newly-discovered evidence. This Court also finds this claim is barred by res judicata, as the issue of Stephens' alleged witnessing of a shooting at the victim's house was the subject of the Applicant's unsuccessful Rule 29(b), SCRPC motion. See Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992) (finding res judicata prohibits subsequent actions by the same parties on the same issues); see also Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 190-91, 427 S.E.2d 918, 919 (Ct. App. 1993) (holding a final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action). As such, the Applicant has failed to meet his burden of proving the existence of newly-discovered evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to

PH

present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

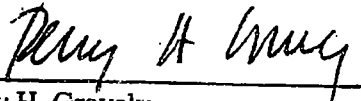
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel were not deficient and the Applicant was not prejudiced by counsels' representation. Further, the Applicant has failed to meet his burden of proving the existence of newly-discovered evidence. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30th day of December, 2015.


Perry H. Gravely
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

RECEIVED
DEC 10 2021
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 RONNIE C. SWOFFORD,)
 S.C.D.C. No. 218281,)
)
 Applicant,)
 v.)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

~~2007-CP-23-1322~~
 2018 CP 230566 2

**ORDER GRANTING
AUSTIN V. STATE
 BELATED PCR APPEAL**

FEDERAL CLERK OF COURT
 PAUL D. WOODRUM
 701 NOV 23 PM 2:33
 CE 2 41 27 NOV 2021

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 6, 2018. An evidentiary hearing into the matter was convened on November 8, 2021, via CISCO WEBEX virtual platform in the Thirteenth Judicial Circuit. The Applicant was present via video and telephonic audio and was represented by Susannah C. Ross, Esquire. Assistant Attorney General Taylor Z. Smith represented the Respondent.

PROCEDURAL HISTORY

The Applicant is presently confined in Tyger River Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the November 2009 term of the Greenville County Grand Jury for first-degree burglary (2009-GS-23-9403), assault and battery with intent to kill (2009-GS-23-9404 count 1), possession of a weapon during the commission of a violent crime (2009-GS-23-9404 count 2), and possession of a pistol by a person convicted of a violent crime (2009-GS-23-9405). In its September 2011 term, the Applicant was indicted for assault with intent to kill (2011-GS-23-7263). Andrew Johnson, Esquire, and Gerald Wilson, Esquire, represented the Applicant on the charges. After Assistant Solicitor Kris Hodge called the case to trial before the Honorable Edward W. Miller, the Applicant was found guilty as indicted and

10-2-2021

sentenced to concurrent terms of life without parole for burglary first degree and assault and battery with intent to kill, five years for possession of a pistol by a person convicted of a violent crime, and ten years for assault with intent to kill. Due to the life sentence for count one, the judge did not sentence the Applicant for possession of a weapon during the commission of a violent crime (2009-GS-23-9404 count 2).

A timely notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. The appeal was dismissed at the Applicant's request after his motion to relieve LaNelle DuRant, Esquire, of the South Carolina Office of Appellate Defense was denied. The Applicant then filed a pro se motion for a new trial which was subsequently dismissed as was the appeal of its dismissal. The Remittitur was issued July 9, 2014.

The Applicant filed a PCR application on July 8, 2014 (2014-CP-23-3767). An evidentiary hearing was convened on October 21, 2015 at the Greenville County Courthouse before the Honorable Perry H. Gravely. Mills Ariail, Esquire represented the Applicant and Assistant Attorney General Karen Ratigan represented the State. The PCR court denied relief on December 30, 2015, by Order filed January 7, 2016. The Applicant filed an untimely Applicant's Motion for Reconsideration on February 2, 2016, which Judge Gravely denied February 18, 2016. The Applicant then filed a notice of appeal which was dismissed for being untimely by Swofford v. State, Supreme Court Order filed September 27, 2018.

ALLEGATIONS

In his current PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of PCR counsel for failure to timely file an appeal from the Order filed on January 7, 2016, denying post-conviction relief.

Applicant further requests to argue issues as to the chain of custody of DNA evidence as outlined in his Motion for Reconsideration so that that may be adequately preserved for the appellate record.

ARGUMENT AND TESTIMONY PRESENTED

An evidentiary hearing for the Applicant's current PCR application was convened on November 8, 2021, via CISCO WEBEX virtual platform in the Thirteenth Judicial Circuit. At the outset of the hearing, the State moved to exclude testimony by Attorney John Reckenbeil regarding problems with chain of custody regarding fungible DNA evidence that was presented in the Applicant's trial. Respondent said the testimony amounted to hybrid representation and was improper expert opinion testimony under Green v. State, Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318 (2002). The Applicant argued that Mr. Reckenbeil had been retained to review the transcript and discovery in the case and his testimony would clarify issues that the Applicant had brought up in his first PCR but may not have been properly preserved in the record due to the untimely filing of the Applicant's Motion for Reconsideration.

Citing Austin v. State and Aice v. State, Respondent argued that all issues beyond whether the Applicant's appeal rights were violated were successive and procedurally barred because they could have been raised at the first PCR. Austin v. State, 305 S.C. 453, 409 SE2d 392 (1991); Aice v. State, 302 S.C. 448, 409 SE2d 392 (1991). Respondent further argued that since the issues were not newly discovered evidence they were inadmissible. The Applicant stated that this issue was not "successive" because there was sufficient reason to consider the testimony since was not raised properly in the original PCR due to the untimely filing of the Applicant's Motion for Reconsideration. Aice, 302 S.C. at 450, 409 SE2d at 394. The Applicant argued further that the testimony should be allowed because the Applicant has the burden to

show a meritorious issue and should be given the opportunity to fully preserve the issue that was improperly raised by original PCR counsel.

The State's motion to exclude Mr. Reckenbeil's testimony was granted and the Applicant's objection was noted. The Applicant then proffered Mr. Reckenbeil's testimony that he had reviewed the Applicant's trial transcript and discovery materials and found irregularities with chain of custody and the trial presentation of DNA evidence. He said he prepared supportive excerpts and these materials were made a court's exhibit for purposes of the proffer over the State's objection. The Applicant then proceeded on the allegation of ineffective assistance of PCR counsel for failing to perfect a notice of appeal from the Applicant's first PCR action.

The Applicant, Ronnie Swofford testified that he made it clear to his PCR counsel, Mills Ariail, that he wanted to appeal in the event of the denial of his first PCR. He said that prior to his hearing he prepared a document for PCR counsel outlining the allegations and exhibits he wanted to be made part of the record. He said he amended that document into a SCRCP 59(e) motion with exhibits and submitted it to PCR counsel to assure the preservation of all his PCR allegations for appellate review. The exhibits included property and evidence and SLED lab reports regarding a section of wall from the kitchen which was analyzed with no blood indicated. Excerpts of the trial transcript included pages where the Solicitor in opening statement argued that the Applicant's DNA at the scene was from a spatter on the kitchen wall. Trial transcript p. 42, l. 7. It included pages in State's closing argument referencing State's Exhibit 39, a photograph of the kitchen wall and arguing that it showed fresh body tissue and blood after Investigator Christopher Miller testified as an expert rebuttal witness that State's Exhibit 39 was a photograph showing a portion of the kitchen wall with fresh blood splatters. Trial Transcript p. 685, l. 4-16.

& p. 636, l. 11. The Applicant testified that these references to fresh blood and others throughout the trial undermined his defense. He said that he had testified in his first PCR that the DNA evidence against him was not blood and would have been inadmissible had it been challenged by his trial attorney. He said he was concerned the issue was not adequately addressed in his first PCR's Order of Dismissal. Order. p. 7.

Mills Ariail testified that he represented the Applicant at his first PCR and did file a Motion for Reconsideration with the Applicant's 59(c) attached as a supporting brief. He did not recall what happened with the filing of the notice of appeal but knew it was dismissed for not being timely. The Respondent conceded that the Applicant had requested but was denied an opportunity to seek appellate review due to the circumstances in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the Applicant's allegation that he is entitled to a belated appeal due to his prior PCR attorney's failure to perfect an appeal on his behalf is not procedurally barred and is meritorious. Where a post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of post-conviction relief issues pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).¹ See also King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

This Court further finds the Applicant did not knowingly and voluntarily waive his right to appellate review and this therefore entitled to a belated review of the denial of his first PCR application. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The Applicant never received a full "bite at the apple" because he expressed his desire to seek review of the denial of

¹ Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the Applicant must petition the Supreme Court for a belated review. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

his PCR application pursuant to his state law rights set fourth in S.C. Code Ann. Sec. 17-27-100 and his appeal was never perfected. The Applicant's denial of an appeal can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State. See id.

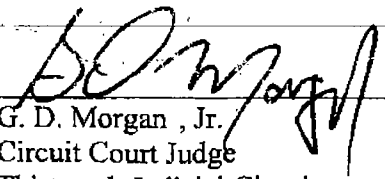
CONCLUSION

All allegations except the belated appeal pursuant to Austin v. State are barred because they are successive. The Applicant has proven by a preponderance of the evidence that he did not knowingly and voluntarily waive the appeal of the denial of his first PCR application.

IT IS THEREFORE ORDERED:

1. That the Austin claim is granted and the claim that PCR counsel failed to adequately preserve the record is denied;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 227, SCACR for the appropriate procedure for a belated appeal.

AND IT IS SO ORDERED this 18th day of November, 2021.


G. D. Morgan, Jr.
Circuit Court Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

Copy mailed to
TIS.
General / S. Recs
11 23 2021