STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

MABLE IRENE LEEBEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213132

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

CARMEN V. GANJEHSANI
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ISSUE PRESENTED

Did the PCR court properly grant Petitioner relief pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991) where Petitioner's prior PCR counsel conceded that she should have appealed the previous Order of Dismissal dismissing Petitioner's first PCR application and where the State consents to Petitioner's pursuit of a belated review of the denial of her first PCR application?

STATEMENT

Indictments

On July 30, 1998, Petitioner Mable Irene Leebey was indicted by the Spartanburg County Grand Jury for trafficking ten grams or more of cocaine. App. 271-272.

Trial and Sentence

On October 28-29, 1999, Petitioner appeared before the Honorable J. Derham Cole and a jury. App. 1-121. Petitioner was represented by Stephen Welch, and the State was represented by Assistant Solicitor Anthony Mabry. App. 1. The jury found her guilty of trafficking cocaine as indicted. App. 116, ll. 8-14. The State asserted, and defense counsel agreed, that Petitioner had two prior offenses - a 1992 conviction for possession of crack cocaine and a 1997 conviction for possession of twenty-eight grams of marijuana. App. 119, ll. 10-24. Judge Cole, finding Petitioner's conviction to be a third offense, sentenced her to the mandatory minimum term of twenty-five years imprisonment and a $50,000.00 fine. App. 121, ll. 3-9; S.C. CODE ANN. § 44-53-370(e)(2)(a)(3) (1999).

Direct Appeal

Petitioner timely filed a direct appeal to the S.C. Court of Appeals. Former Chief Appellate Defender Daniel T. Stacey submitted an appellant's brief on behalf Petitioner, arguing that the trial court erred when it permitted evidence of Petitioner's involvement with marijuana as such evidence irrelevantly and prejudicially put her character in evidence without any basis under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). App. 123-133. On May 21, 2002, the Court of Appeals affirmed, holding that the Lyle objection was not made at trial and was therefore not preserved for the court's review. App. 147-149.

First PCR Application and Hearing (2002-CP-42-3944)

On October 29, 2002, Petitioner filed her first PCR application requesting relief (2002-CP-42-3944). App.150-154. The State filed its Return on July 15, 2003. App. 155-158.

On January 13, 2005, an evidentiary hearing was held before the Honorable Roger L. Couch. App. 159-227. Petitioner was represented by J. Patricia Anderson, and the Respondent was represented by Assistant Attorney General Molly R. Crum. App. 159.

At the hearing, Petitioner testified that she was entitled to relief because, among other things, (1) her trial counsel did not preserve the Lyle objection for appeal; and (2) her trial attorney did not discover that her second conviction was not for possession of twenty-eight grams of marijuana, but only a conviction for simple possession of marijuana for which she pled guilty without the advice of counsel. App. 172, l. 1 – 175, l. 23; 229. Petitioner asked the court for a new trial and testified that she would also like her sentence reduced on the basis that she committed a second offense instead of a third. App. 179, ll. 2-12.

In her closing statement to the PCR court, Petitioner's counsel argued that Petitioner's trial counsel did not provide effective assistance of counsel because (1) he did not object to the other evidence of bad acts under Lyle; and (2) did not discover that the previous marijuana conviction was not a conviction for possession of twenty-eight grams, but only for simple possession to which Petitioner pled guilty without the advice of counsel which therefore cannot be used as a sentence enhancer under the principles set forth in Alabama v. Shelton, 535 U.S. 654 (2002). App. 220, l. 20 – 222, l. 25.

Order of Dismissal (2002-CP-43-3944)

On May 9, 2005, Judge Couch ruled in his Order of Dismissal that trial counsel was not ineffective for not objecting to the admissibility of the other bad acts under Lyle, agreeing with trial

counsel's position that the finger scales and marijuana evidence "would have constituted post arrest bad acts and would not have been objectionable under the Lyle case." App. 238.

Judge Couch also found that "[i]t is clear that the Trial Court was misinformed as to one of the convictions from the Applicant's criminal record." Id. at 239. Judge Couch, however, found that simple possession would have served as one of the strikes necessary for Petitioner to be sentenced as a third offender such that "the resulting sentence would not have changed and she would have still been sentenced under the statute which required a mandatory sentence of 25 years in prison and a fine of fifty thousand dollars ($50,000)." Id.

On those grounds, Judge Couch denied Petitioner's PCR application. Id.

Petitioner did not file a timely Notice of Appeal.

Second PCR Application and Hearing (2010-CP-42-1494)

On March 29, 2010, Petitioner filed a second PCR application requesting relief. (2010-CP_42-1494). App. 244-250. Petitioner requested relief to appeal Judge Couch's denial of her first PCR application. App. 245. The State filed its Return on August 12, 2010. App. 251-254.

On November 2, 2010, the Honorable J. Mark Hayes, II held a hearing on the second PCR application. App. 255-259. Petitioner was represented by John E. Rogers, II, and the Respondent was represented by Assistant Attorney General Suzanne H. White. App. 255.

At the hearing the State consented to Petitioner's request for a belated appeal under Austin v. State, 305, S.C. 453, 409 S.E.2d 395 (1991):

> Apparently Ms. Lee-Bey at one point did attempt to file a pro se notice of appeal, which was dismissed for some reason. From looking at the files, we couldn't determine, other than maybe timeliness.
>
> I've spoken with her PCR counsel, who has informed me that she should have appealed the PCR. And, therefore, again, the State would consent to the Austin appeal.

> But Ms. Lee-Bey did file, I believe, a couple of other allegations in her application. And we'd just move to dismiss all of those as based as successive and based on the Statute of Limitations other than the belated PCR appeal, which we would consent to.

App. 258, ll. 7-18.

Petitioner's second PCR counsel stated that Petitioner was willing to consent to the dismissal of her other grounds in her second PCR application provided the agreement with the State that she will be granted an appeal of her original PCR. App. 258, ll. 19-24.

Consent Order Granting Belated PCR Appeal Pursuant to Austin and Dismissing All Other Claims (2010-CP-42-1494)

On November 18, 2010, Judge Hayes found in his Order of Dismissal that Petitioner "did not knowingly and voluntarily waive her right to appellate review" where her first PCR attorney failed to file an appeal following the denial of the first PCR application. App. 262-263. Judge Hayes subsequently granted Petitioner a belated PCR appeal pursuant to Austin. Id.

Petitioner filed a Notice of Appeal of this consent order on September 26, 2012 after not receiving the order from the State until September 17, 2012.

This petition follows pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated appellate review of an Austin PCR application).

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 prior PCR counsel conceded that she should have appealed the previous Order of Dismissal dismissing Petitioner's first PCR application and where the State consents to Petitioner's pursuit of a belated review of the denial of her first PCR application.

The PCR court properly granted Petitioner belated appellate review of her initial PCR application because Petitioner was denied her right to appeal the dismissal of his first PCR application (2002-CP-42-3944). App. 258, ll. 7-13; 262-263; See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

The South Carolina Supreme Court has held that "[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). "Under the PCR rules, an appellant is entitled to a full adjudication on the merits of the original petition, or 'one bite of the apple.' 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 (internal citations omitted).

Furthermore, a petitioner is denied her right to appellate review when either: (1) she requested, yet was denied an opportunity to seek appellate review; or (2) her right to appellate review was not knowingly and intelligently waived. Id. (citing King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992)). Accordingly, when a petitioner is denied her right to appeal under either of the two circumstances, then she is entitled to belated appellate review of her initial PCR application. See, e.g., Austin, 305 S.C. at 454, 246 S.E.2d at 396.

In this case, the State informed the court at the second PCR hearing that Petitioner's first PCR counsel conceded that she should have filed an appeal of the order denying Petitioner's first PCR application. App. 258, ll. 11-13. Judge Couch properly found in his Order of Dismissal

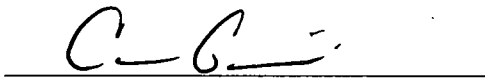
that Petitioner "did not knowingly and voluntarily waive her right to appellate review," and accordingly, properly granted Petitioner a belated PCR appeal pursuant to Austin. App. 263.

Under these circumstances, the second PCR court's decision granting Petitioner belated appellate review of her first PCR application should be upheld. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) ("The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings."). Simply stated, Petitioner is entitled to her one fair bite at the apple. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

For the foregoing reasons, Petitioner Mable Irene Leebey respectfully requests this Court to grant her petition for certiorari and affirm the PCR court's grand of belated review of Petitioner's original PCR application.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of May, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State in this case has been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of May, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day of May, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022