

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

LINDY LAMONT JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000975

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge correctly find that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT

In April of 2009, the Orangeburg County Grand Jury indicted Petitioner, Lindy Lamont Jones, for criminal sexual conduct with a minor second degree and lewd act on a minor, indictments #05-GS-38-1816, 1817. (App. pp. 374-375). On June 8, 2009, Petitioner proceeded to jury trial before the Honorable James C. Williams, Jr. Mary Ford and Doug Mellard represented Petitioner at trial. Bryan Jeffries and Tommy Scott prosecuted the case. The jury found Petitioner not guilty of lewd act on a minor. The jury found Petitioner guilty of assault with intent to commit criminal sexual conduct with a minor, charged as a lesser included offense of criminal sexual conduct with a minor second degree. Judge Williams sentenced Petitioner to sixteen (16) years in prison. (App. p. 376). A timely notice of intent to appeal was served and the direct appeal perfected. Petitioner argued on direct appeal that the trial judge erred in charging assault with intent to commit criminal sexual conduct with a minor as a lesser included offense of criminal sexual conduct with a minor. (App. pp. 377-389). The Court of Appeals affirmed the conviction finding the issue was not preserved for appellate review. State v. Jones, Op. No. 2011-UP-396 (S.C.Ct.App. filed August 19, 2011. (App. pp. 406-407).

On September 12, 2011, Petitioner filed an application for post-conviction relief. (App. pp. 408-414). The State filed a return on February 14, 2012. (App. pp. 415-420). On October 31, 2012, an evidentiary hearing was held before the Honorable Carmen T. Mullen. Charles Williams represented Petitioner at the PCR hearing. Megan Harrigan represented the State. In a written order signed November 29, 2012, Judge Mullen denied relief and dismissed the application. (App. pp. 448-455). Petitioner filed a *pro se* motion to alter or amend on December 28, 2012. (App. pp. 456-457). PCR counsel filed a motion to alter or amend on January 11, 2013. (App. pp. 458-475). The State filed a return on January 15, 2013, arguing that the motions to alter or amend

should be dismissed because they were not timely filed and were without merit. (App. pp. 476-480). In a written order signed February 1, 2013, Judge Mullen found that the motions to alter or amend were not timely filed and alternatively found no basis to alter or amend. (App. pp. 481-485). In the order denying the motion to alter or amend the PCR judge specifically wrote, "This Court notes that if Petitioner desires to secure appellate review of the Order and the Order of Dismissal, a notice of appeal must be served within thirty days of the service of this Order." (App. p. 485). PCR counsel served the notice of intent to appeal on February 21, 2013, within thirty days of the order denying the motion to alter or amend. (App. pp. 486-487). The South Carolina Court of Appeals, however, dismissed the appeal as untimely on March 21, 2014. (App. pp. 494-495).

On May 14, 2014, Petitioner filed a second PCR application. (App. pp. 498-504). The State filed a return and partial motion to dismiss on August 14, 2017. (App. pp. 505-511). The State did not contest Petitioner's claim pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). On December 14, 2017, an evidentiary hearing was held before the Honorable Kristi Harrington. Jonathan D. Waller represented Petitioner at the PCR hearing. Ruston Neely represented the State. The State consented to Austin review. (App. p. 517, lines 22-24).

It appears from the public index that on May 7, 2018, Judge Harrington signed a consent order granting the right to seek belated appellate review. It appears, however, that this order was not sent to the parties and could not be located. As a result, pursuant to Rule 63, SCRCP, and with the consent of the parties and a certification of familiarity with the record, on August 18, 2021, the Honorable Diane S. Goodstein signed an amended consent order granting the right to seek belated appellate review. (App. pp. 520-525). On September 2, 2021, a timely notice of intent to appeal was served. This petition for writ of certiorari and a separately filed Austin petition follow.

ARGUMENT

The PCR judge correctly found that Petitioner did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

In support of the grant of a belated appeal pursuant to Austin, the State consented to the grant of the belated appeal. (App. p. 507, p. 517, lines 22-24). PCR counsel filed the notice of intent to appeal but it was deemed untimely. The second PCR judge correctly found that Petitioner did not knowingly and intelligently waive his right to appeal the denial of his first PCR application and is entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari and allow the belated appeal.



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ATTORNEY FOR PETITIONER

This 4th day of April, 2022.