

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Thomas A. Russo, Circuit Court Judge

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Oct 10 2022

S.C. SUPREME COURT

Opinion No. 2021-UP-372 (S.C. Ct. App. filed November 3, 2021)

Lower Court Case Nos.
2014-GS-10-03141 and 2017-CP-10-0901

ALLEN STONE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000052

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Allen Stone, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2018-001847

ON WRIT OF CERTIORARI

Appeal From Charleston County
Thomas A. Russo, Circuit Court Judge

Unpublished Opinion No. 2021-UP-372
Submitted October 1, 2021 – Filed November 3, 2021

REVERSED

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Megan Harrigan
Jameson, both of Columbia, for Petitioner.

Appellate Defender David Alexander, of Columbia, for
Respondent.

PER CURIAM: After the circuit court revoked Allen Stone's probation in full, the post-conviction relief (PCR) court granted relief for ineffective assistance of counsel on three grounds. The law requires us to reverse the PCR court's order.

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). However, "[w]e do not defer to a PCR court's rulings on questions of law." *Id.*

"In South Carolina . . . all persons charged with probation violations have a right to counsel and must be informed of this right pursuant to court rules and case law." *Turner v. State*, 384 S.C. 451, 454, 682 S.E.2d 792, 793 (2009). South Carolina courts apply the *Strickland* test to evaluate claims of ineffective assistance of probation counsel. *Id.* at 456, 682 S.E.2d at 794. "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514.

Administrative Hearing Officer's Recommendation

The PCR court found revocation counsel was ineffective for failing to advise the revocation court that an administrative hearing officer recommended Stone's probation be revoked for one year rather than revoked in full. The State's lead argument is that the PCR court ignored testimony that Stone made a strategic decision not to mention this recommendation because Stone wished to avoid even a one-year revocation. The State also argues that the record reflects the revocation court was aware of the hearing officer's recommendation.

We agree with both arguments. First, Stone's revocation counsel testified at the PCR hearing that the reason she did not initially point the revocation court to the hearing officer's recommendation was because Stone sought to receive a sentence of less than a year. Stone's desire for a "lighter" sentence is a valid strategy for not specifically referencing the recommendation. *See McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) ("Where trial counsel articulates a valid reason for employing a certain trial strategy, counsel will not be deemed ineffective."); *Council v. State*, 380 S.C. 159, 175, 670 S.E.2d 356, 364 (2008) ("Counsel's

strategy will be reviewed under 'an objective standard of reasonableness.'" (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002))).

Second, the record reflects that the revocation court had a report containing the hearing officer's recommendation and that revocation counsel emphasized the recommendation at the hearing on Stone's motion to reconsider his full revocation. We hold that revocation counsel was not deficient because counsel provided the revocation court with the administrative hearing summary, articulated a valid reason for not specifically referencing the administrative hearing officer's recommendation at the revocation hearing, and emphasized the recommendation at the reconsideration hearing. *See Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984))).

We find Stone cannot show prejudice because the revocation court denied Stone's motion to reconsider after revocation counsel repeatedly brought the hearing officer's recommendation to the court's attention. *See Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 102 (2013) (holding that to establish prejudice, an applicant must show that "but for counsel's error, there is a reasonable probability the result of the proceedings would have been different"); *id.* ("A reasonable probability is a probability sufficient to undermine confidence in the outcome." (quoting *Strickland*, 466 U.S. at 694)).

Felony Charges

The PCR court ruled that revocation counsel was ineffective for failing to advise the revocation court Stone had not been arrested for any felony charges while on probation. The State argues this ruling is erroneous and not supported by the evidence. Here as well, we agree.

First, we hold revocation counsel was not deficient. Although revocation counsel did not emphasize at the revocation hearing that Stone's arrest for third-degree burglary arose from events that occurred before Stone began probation, the State accurately described the sequence of events—the State told the court that Stone had been rearrested for third-degree burglary but based on preprobation conduct.

Second, we hold Stone failed to show he was prejudiced. Stone specifically told the revocation court at the reconsideration hearing that he did not commit a felony while on probation, and Stone's probation arrest warrant confirmed Stone was originally arrested for third-degree burglary on October 11, 2013—before Stone began probation. Stone's counsel correctly informed the revocation court that Stone had been rearrested for third-degree burglary while on probation. The court was informed those charges stemmed out of preprobation conduct, but it nevertheless revoked Stone's probation in full and denied his motion to reconsider that sentence.

Court Absences

The PCR court's third basis for relief was that revocation counsel was ineffective for failing to explain Stone's court absences. The State argues the record refutes this finding. As above, we agree.

First, revocation counsel was not deficient. At the first hearing—the revocation hearing—revocation counsel specifically noted Stone had been living in "Tent City," traveling anywhere was difficult for Stone, Stone suffered from various mental and physical health issues, and Stone had financial issues. Revocation counsel also noted Stone had been "in and out" of the hospital since 2015 and was receiving treatment. What is more, at the reconsideration hearing, counsel reiterated Stone's history of alcoholism and depression. Although revocation counsel did not specifically connect these circumstances to Stone's failure to appear in court, counsel sufficiently conveyed to the revocation court the hardships—both financial and medical—Stone faced regarding his ability to appear in court. Accordingly, revocation counsel was not deficient.

Second, Stone failed to show he was prejudiced by revocation counsel's alleged deficiency. Here, revocation counsel conveyed to the revocation court Stone's physical health, mental health, and financial hardships, which helped to explain his charges for failure to appear for court. Thus, Stone cannot show prejudice because the revocation court was made aware of Stone's physical, mental, and financial hardships, which impacted his ability to appear in court. Accordingly, the evidence does not support the PCR court's finding that revocation counsel was ineffective for failing to provide the revocation court an explanation as to why Stone failed to appear in court on two occasions, resulting in Stone's arrest.

Stone's evidence suggested he would benefit more from treatment than incarceration, and revocation counsel even came to the reconsideration hearing

armed with a letter from the victim in Stone's underlying robbery explaining that the victim did not oppose a reduction in Stone's sentence as long as Stone received alcohol treatment. Still, we do not see a legal basis for granting relief. The revocation court possessed the disputed evidence, the evidence was emphasized to the court on reconsideration, and reconsideration was denied. Therefore, the PCR court's order is

REVERSED.¹

KONDUROS, HILL, and HEWITT, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 2021-UP-372

ALLEN STONE,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2018-001847

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, respondent Allen Stone (“Stone”) requests that this Court grant rehearing. This Court misapplied the standard of review. Under the highly deferential standard of review for PCR cases, the grant of PCR relief to Stone should be affirmed.

All Stone seeks is a new probation revocation hearing with effective counsel. The Honorable Kristi Lea Harrington revoked Stone’s probation in full partly based on an arrest for a serious crime that predated Stone’s conviction in this case. App. 59, ll. 6 – 15. App. 19. Judge Harrington also did not hear from Stone’s attorney at the initial revocation hearing that the hearing officer recommended a one-year revocation. App. 52 – 59. App. 190, l. 13 – 191, l. 13. The

Honorable Thomas A. Russo granted Stone a new probation revocation hearing from the bench after the hearing and later entered a formal written Order. App. 192, l. 21 – 193, l. 17. App. 196. Even the Attorney General at the PCR hearing admitted that Judge Harrington’s full revocation seemed “unduly harsh.” App. 189, ll. 6 – 8.

This Court held that revocation counsel had a valid strategic reason for not informing Judge Harrington of the hearing officer’s revocation. This finding on appeal does not comport with the deferential standard of review. This Court must uphold the PCR judge’s ruling if there is any evidence in the record to support it. See Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Revocation counsel did claim the strategy referenced by the Court at the PCR hearing. However, Judge Russo’s holding is more nuanced and requires deference. While revocation counsel may have had that strategy entering the hearing, Judge Russo found that at the point that the agent asked Judge Harrington to revoke in full it became necessary to inform the judge of the hearing officer’s recommendation. App. 190, l. 13 – 191, l. 13. Judge Russo recognized that, in the fluid and rough process that often characterizes revocation hearings, revocation counsel needed to react quickly and emphasize this point to Judge Harrington. Relying on the fact that the hearing officer’s recommendation was in a stack of paperwork sitting on the bench was not a valid strategy at that point in the hearing.

This Court also erred in finding that because revocation counsel brought the one-year recommendation to Judge Harrington’s attention at the reconsideration hearing, Stone cannot show prejudice. This determination by the Court undermines its earlier finding of a valid trial strategy and shows that Judge Russo was correct. If revocation counsel felt the need to emphasize the one-year recommendation at the reconsideration hearing, then the same logic applies to the initial hearing once it became apparent that Judge Harrington might revoke in full. Revocation counsel

cannot have it both ways. Judge Russo found that had counsel performed effectively at the first hearing, it would have made the mitigation presentation more effective and reduced the likelihood of a full revocation. App. 193, ll. 5 – 24. This finding by the PCR judge is entitled to deference.

This Court also erred in applying the standard of review to the PCR court’s findings concerning the failure of revocation counsel to stress to Judge Harrington that Stone’s felony arrest was for pre-conviction conduct. The PCR judge found that Solar performed deficiently when she failed to clarify a mistake made by the probation agent at the revocation hearing. App. 201 – 02. The agent told Judge Harrington that “**since being on probation**, [Stone] was arrested eight times.” App. 53, ll. 19 – 21 (emphasis added). The agent then listed the arrests. App. 53, l. 19 – 54, l. 5. By far, the most serious arrest listed by the agent was for third-degree burglary. App. 53, l. 19 – 54, l. 5. The agent listed the dates for each arrest and when she got to the burglary, she said, “November 13th of 2015, for burglary third charge, which he was originally arrested for back in October 11th of 2013.” App. 53, l. 19 – 54, l. 5.

The original arrest date for the burglary charge was in 2013, which was before Stone pled guilty in 2014. App. 19. Therefore, Stone had not been arrested for a crime that he allegedly committed “since being on probation” and the inclusion of this arrest in the agent’s list likely gave Judge Harrington a false impression. Revocation counsel did nothing to correct this error.

At the end of the hearing, Judge Harrington asked, “He’s had some arrests then?” and the agent responded, “Yes, he’s had several arrests.” App. 59, ll. 6 – 7. Judge Harrington then asked revocation counsel if she had anything further, giving her another opportunity to correct this mistake, but she failed to do so. App. 59, ll. 8 – 9. Judge Harrington then revoked Stone in full. App. 59, ll. 10 – 15. At the reconsideration hearing, Stone attempted to clarify this fact for Judge Harrington. App. 66, ll. 1 – 11. However, revocation counsel did not tell the judge that Stone’s

assertions were accurate. Without revocation counsel confirming this fact for the judge, the court was only left with Stone's claims that went unverified by his attorney. Stone was an alcoholic with mental health problems and Judge Russo correctly found that revocation counsel needed to be a strong advocate on this crucial point during the hearing and could not leave it to her client to convince the judge. These facts and findings by Judge Russo are entitled to deference and this Court should reexamine them in light of the standard of review.

Finally, as to the portion of this Court's Opinion addressing Stone's court absences, it is clear from the record in this case that the PCR court was primarily concerned with the first two deficiencies. Even if this finding is incorrect, the remainder of the PCR Court's Order is still entitled to deference and provides sufficient support for granting relief. This Court may affirm a PCR judge's ruling for any grounds appearing in the record. See Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 391 (1991). Judge Russo's ruling is supported by the evidence. This Court should grant rehearing and allow Stone to keep his new revocation hearing with effective counsel.

s/David Alexander
Appellate Defender

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ATTORNEY FOR RESPONDENT

This 18th day of November, 2021.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Thomas A. Russo, Circuit Court Judge

ALLEN STONE,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2018-001847

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Megan Harrigan Jameson, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Allen Stone, #267003, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 18th day of November, 2021.

s/David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

Allen Stone, Respondent;

v.

State of South Carolina, Petitioner.

Appellate Case No. 2018-001847

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

U. Ke J.

D. Martin J.

Bl J.

Columbia, South Carolina

cc:

Megan Harrigan Jameson, Esquire

David Alexander, Esquire

Alan McCrory Wilson, Esquire

Allen Stone, 267003

The Honorable Thomas A. Russo

FILED
Dec 16 2021