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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Thomas A. Russo, Post-Conviction Relief Judge
Kristi L. Harrington, Probation Revocation Judge
Appellate Case No. 2022-000052

ALLEN STONE,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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B. Did the Court of Appeals correctly find the post-conviction relief court erred by granting relief where Stone failed to establish probation revocation counsel was ineffective for failing to advise the court that Stone had not been arrested for any felony charges while on probation when this allegation is directly refuted by the record?

C. Did the Court of Appeals correctly find the post-conviction relief court erred by granting relief where Stone failed to establish probation revocation counsel was ineffective for failing to explain why Stone failed to appear in court when this allegation is directly refuted by the record?

STATEMENT OF THE CASE

During its June 2014 term, the Charleston County Grand Jury indicted Petitioner Allen Stone for second-degree burglary (violent) (2014-GS-10-03141). The charge stemmed from an incident on January 17, 2014, wherein law enforcement officers with the North Charleston Police Department responded to a dental office at approximately 1:30 a.m. and witnessed Stone carrying a bag containing drugs and other items from inside the dental office.

On July 15, 2014, Stone appeared before the Honorable Roger M. Young, Sr., circuit court judge, and pled guilty as indicted. Judge Young sentenced Stone to fifteen years' imprisonment suspended on service of five years' imprisonment and three years of probation. Later that same day, Stone and counsel reappeared before Judge Young and requested that the plea be vacated to allow Stone time to enter a treatment program in the hope of avoiding an active term of imprisonment. Judge Young vacated the guilty plea at Stone's request to allow him to seek treatment as he requested.

On August 11, 2014, Stone appeared before the Honorable J.C. Nicholson, circuit court judge, to again enter a guilty plea. Judge Nicholson sentenced Stone to fifteen years' imprisonment suspended on the service of five years of probation, with special terms of probation to include a requirement that Stone complete an outpatient program and continue medication for various mental health conditions. Stone did not appeal his conviction.

On July 26, 2016, Stone appeared before Honorable Kristi L. Harrington, circuit court judge, for a probation violation hearing. Assistant Public Defender Kelly Solar of the Charleston County Public Defender's Office represented Stone. During the hearing, Probation Agent Keisha Holmes of the South Carolina Department of Probation, Parole, and Pardon Services (SCDPPPS) informed the court of a litany of probation violations, including that Stone had: failed to report

since December 2015, changed his address without notifying his probation agent, failed to provide proof of employment, and was arrested eight times.[1] Agent Holmes informed the court "the agent is recommending ***a revocation***[2] and terminate" along with credit for time served. (App. 54). Stone responded by acknowledging he had violated the terms of his probation. (App. 54, 56). In mitigation, counsel Solar informed the court Stone had stopped reporting (and presumably failed to update his address) because he was homeless and living in a tent city downtown. (App. 54). She also informed the court Stone had physical and mental health problems, as well as alcohol dependency. (App. 54). She informed the court Stone was seeking treatment for substance abuse. (App. 55-56). She also highlighted to the court Stone did not owe any restitution and believed he could successfully fulfill the requirements of probation if given the chance. (App. 56). Stone addressed the court and stated he knew he was in violation of the terms of his probation and he needed help for mental health and substance abuse issues. (App. 57). Agent Holmes informed the court Stone would traditionally be a "perfect candidate" for mental health court but was not eligible based on the severity of the charge. (App. 58-59). Agent Holmes also informed the court Stone did complete an inpatient program. (App. 59). With all of this information, including mitigating information provided by counsel, Stone, and the probation agent, Judge Harrington, acting within her discretion, revoked Stone's probation in full. (App. 59).

[1] More specifically, Agent Holmes detailed Stone's arrests as follows: "One by Hanahan Police Department on February 8th of 2015, for violating town ordinance. He was also arrested on June 30th for public disorderly conduct. He was arrested again on July 8th of 2015 for public drunk; on July 20th of 2015, for failure to appear for court; November 13th of 2015, for burglary third charge, ***which he was originally arrested for back in October 11th of 2013***. He was also arrested on November 15th of 2015, for failure to appear as well; and an open container on March 20th of 2016." (App. 53-54).

[2] Notably, Agent Holmes did ***not*** recommend a revocation in full, but rather, "a revocation" for some period of time.

Counsel Solar filed a timely motion to reconsider the probation revocation, and, on December 5, 2016, the parties reappeared before Judge Harrington for a hearing on this motion. Stone was again represented by counsel Solar and Agent Holmes appeared on behalf of SCDPPPS. At the hearing, counsel Solar presented the court with an affidavit from the victim stating he did not oppose a reduction of the sentence if Stone received treatment for his alcohol dependency. (App. 64). She also highlighted that SCDPPPS did not oppose the reduction and the original recommendation was a one-year revocation with credit for time served and continued probation. (App. 65). Stone highlighted to the court he did not commit any felonies while on probation but did acknowledge he had been arrested numerous times while on probation for a variety of offenses. (App. 65-66). Agent Holmes responded Stone was arrested eight times while on supervision. (App. 67-68). Counsel Solar then reminded the court ***for a third time*** that the SCDPPPS hearing officer had only recommended one year of revocation. (App. 68). The court took the matter under advisement and ultimately denied the motion for reconsideration.

On February 22, 2017, Stone filed an application for post-conviction relief, alleging ineffective assistance of plea counsel and probation revocation counsel. On August 7, 2017, the State served its return, requesting an evidentiary hearing on Stone's claims of ineffective assistance of probation revocation counsel and moving for summary dismissal of his claims of ineffective assistance of plea counsel because the application was filed beyond the one-year statute of limitations as set forth in Section 17-27-45 of the South Carolina Code of Laws.

An evidentiary hearing was convened in the Charleston County Court of Common Pleas on March 1, 2018, before the Honorable Thomas A. Russo, circuit court judge.[3] At the start of

[3] The order granting relief erroneously lists the hearing date as "during the January 29, 2018 PCR term of court for the 9th Circuit." The Honorable Maite Murphy presided over that term and Applicant's case did not proceed forward.

the hearing, Stone acknowledged his allegations of ineffective assistance of plea counsel were untimely and he did not intend to proceed forward on those grounds.

Stone and his former probation revocation counsel Solar both testified. At the conclusion of the hearing, Judge Russo orally granted relief, finding counsel Solar was ineffective in her handling of Stone's probation revocation and granted Stone a new probation revocation hearing. Judge Russo requested Stone draft a proposed order. By written order filed June 25, 2018, Judge Russo granted post-conviction relief, vacated the revocation of Stone's probation, and remanded the matter to the Charleston County Court of General Sessions for a probation revocation hearing before a different circuit court judge after finding probation revocation counsel was ineffective for failing to advise the Court of the administrative hearing officer's recommendation of a one-year partial revocation, failing to advise the court Stone was not arrested on a felony charge while on probation, and failing to supply the court with mitigating information regarding Stone's two arrests for failure to appear. The State received a copy of the order on June 27, 2018, and on July 9, 2018, filed its motion to reconsider the grant of post-conviction relief pursuant to Rule 59(e), SCRCP, arguing the post-conviction relief court erred in refusing to consider counsel's articulated strategic decisions and ignored the lower court record that directly refuted these allegations. On October 1, 2018, Judge Russo issued a summary order denying the motion without a hearing.

The State sought appellate review, arguing the post-conviction relief court's grant of relief was based on errors of law and fact that required reversal. Following the submission of the State's petition for writ of certiorari and Stone's return to the petition, this Court transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR. Following briefing, the Court of Appeals reversed the post-conviction relief court's grant of relief by

unpublished opinion. Stone v. State, 2021-UP-372 (Ct. App. filed Nov. 3, 2021).

Stone filed a timely petition for rehearing, which was denied by the Court of Appeals on December 16, 2021. Stone filed his petition for a writ of certiorari and appendix with this Court on January 28, 2022. Following the State's return, this Court granted certiorari and ordered further briefing.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The Court of Appeals' properly reversed an erroneous grant of post-conviction relief because the Court of Appeals correctly determined the post-conviction relief court erred by finding probation revocation counsel was ineffective for failing to advise the court of the administrative hearing officer's recommendation of a one-year partial revocation, failing to advise the court that Stone was not arrested on a felony charge while on probation, and failing to supply the court with mitigating information regarding Stone's two arrests for failure to appear because counsel provided a reasonable strategic basis for her decisions and the record directly refutes these allegations.

In reversing the post-conviction relief court, the Court of Appeals properly reviewed the entire record, applied the applicable standard of review and case law, and determined the post-conviction relief court erred as a matter of law and fact when granting Stone a new probation revocation proceeding. This decision was correct and should stand.

In granting relief, the post-conviction relief court erroneously found probation revocation counsel was ineffective for failing to advise the court of the administrative hearing officer's recommendation of a one-year partial revocation, failing to advise the court that Stone was not arrested on a felony charge while on probation, and failing to supply the court with mitigating information regarding Stone's two arrests for failure to appear. However, these findings are premised on a flawed legal analysis where the post-conviction relief court disregarded the Strickland[4] standard requiring an analysis of both deficiency and prejudice, ignored counsel's strategic basis for her decisions, and disregarded uncontroverted evidence in the record directly refuting the grounds on which relief was granted. Rather than giving the record and counsel's articulated strategic basis the deference and weight required under the standard of review for collateral proceedings and longstanding case law, Judge Russo, finding ***he*** would have acted differently had the probation revocation hearing been before ***him*** rather than Judge Harrington,

[4] Strickland v. Washington, 466 U.S 668 (1984).

reached incorrect legal conclusions that are inconsistent with the Strickland standard while acknowledging on the record when granting relief that uncontroverted evidence in the record refuted these allegations. Thus, in granting relief, Judge Russo essentially acknowledged relief was not supported by the record but nonetheless granted relief anyway based on his determination that he would not have acted in the same manner as a different circuit court judge. This grant of relief was erroneous and was not supported by the record or law.

The Court of Appeals recognized this and corrected these errors of law and fact when it reversed the post-conviction relief court. The Court of Appeals properly conducted a review of the record in its entirety (which the post-conviction relief court was required but nonetheless failed to do) and came to the only logical conclusion—that the post-conviction relief court erred in determining counsel was constitutionally ineffective, as Stone failed to establish either deficiency of counsel or prejudice. The Court of Appeals was correct in its reversal of the lower court.

Stone, like all post-conviction relief applicants, had the burden of proving the allegations in his application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRCP. "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) (citing Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 621 (1986); Rule 602(a), SCACR). Although a probationer does not have a Sixth Amendment right to counsel, the same traditional Strickland standard applies, requiring an applicant asserting his probation revocation counsel was ineffective to establish both that counsel's performance was deficient and that he was prejudiced by this deficiency. Turner, 384 S.C. at 455, 682 S.E.2d at 794 ("We now hold

that because a probationer has a right to counsel, albeit not a Sixth Amendment right, the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel should, by analogy, apply in PCR proceedings involving claims against probation counsel."). Under Strickland, an applicant must first prove that counsel's performance was deficient as measured by its "reasonableness under professional norms." Id. Second, an applicant must establish that counsel's deficient performance prejudiced the applicant such that "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).

As explained in Strickland,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

466 U.S. at 689 (citations omitted). Therefore, counsel's strategic decisions will not be found to be deficient performance if he or she articulates a valid reason for employing the strategy. E.g., Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017); Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

In granting relief, the post-conviction relief court ignored counsel's strategic reason for her actions and disregarded uncontroverted evidence in the record conclusively refuting these allegations. As Stone failed to establish deficiency or prejudice, the post-conviction relief court's grant of relief was without legal or evidentiary support and required reversal. The Court of Appeals did not err.

A. The Court of Appeals correctly found the post-conviction relief court erred by granting relief where Stone failed to establish probation revocation counsel was ineffective for failing to advise the court of the Administrative Hearing Officer's recommendation of a one-year revocation because the court refused to consider counsel's articulated and reasonable strategy and this allegation is directly refuted by the record.

In reversing the post-conviction relief court's grant of relief for failing to advise the revocation court of Administrative Hearing Officer's recommendation of a one-year revocation, the Court of Appeals found the post-conviction relief court ignored counsel's articulated strategy and clear evidentiary support showing the revocation court was already aware of the Administrative Hearing Officer's recommendation. These findings are correct.

In its order granting relief, the post-conviction relief court found, "Attorney Solar failed to advise the Court at Applicant's probation revocation hearing that the administrative Hearing Officer recommended a partial one-year revocation and that Applicant thereafter continue on probation. At the July 26, 2016, hearing, Agent Holmes of South Carolina's Office of Probation, Parole and Pardon advised the Court that *the agent is recommending a revocation and terminate*. (July 26, 2018 transcript p. 3 1. 6-7). Neither Agent Holmes nor Attorney Solar advised the Court of the Hearing Officer's substantially more lenient recommendation." (App. 201) (emphasis in original).

Initially, this ruling was legally erroneous because it failed to consider the reasonable strategic decision made by counsel—specifically made at Stone's request—which removes any possibility that her conduct was deficient. See Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (emphasizing reviewing courts should not second-guess counsel's reasoned strategic decisions and if counsel provides a reasonable strategic basis, such conduct will not be deemed deficient performance). At the evidentiary hearing, counsel Solar testified Stone specifically asked her not to inform the court of the Administrative Hearing Officer's recommendation because Stone wanted a time-served sentence rather than the one year of active incarceration as was recommended by the Administrative Hearing Officer. Counsel Solar testified:

> I did not -- *I didn't intentionally* --I did not tell her that for two reasons. No. 1, she gets all the paperwork in front of her so she gets a copy of the administrative hearing summary. The reason I think that I would not have mentioned is because we were not asking for a year. We were asking for just a continuation of probation. He did not want to -- I asked him would you be willing to say we have agreed upon the year. *He said no, see if we can get less than a year.* Time served and continue. So I didn't necessarily want the year so I didn't mention it. But it was right there in front of her. She had the paperwork in front of her and when you give a probation violation, the packet you get, the violation report, the administrative hearing summary, the judge also get records. So it was there in front of her. But I didn't tell her that.

(App. 164-65) (emphasis added).

> That's why I wouldn't – didn't necessarily mention it. Because if we were agreeing to a year I would tell the judge, Judge, the recommendation is one year. We are in agreement, everybody is in agreement and we would ask that you go along with it. I didn't necessarily mention it because we were asking for a continuance, just to have his probation continued. In addition, she has the recommendation in front of her. It's not that she wouldn't have known it. Obviously the judge would have looked through the violation report and the administrative hearing. It is right in front of her so she would have had that recommendation.

(App. 170).

Despite this clear strategy articulated by counsel to avoid *any* term of imprisonment at the express request of her client, the post-conviction relief court erroneously refused to consider counsel's reasonable strategic decision and judgment in not informing the court of this recommendation. "A PCR court's analysis of counsel's strategic decisions must be 'highly deferential to counsel's judgment, and "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Buckson v. State, 423 S.C. 313, 320-21, 815 S.E.2d 436, 440 (2018) (citing Strickland) (internal citations and quotations omitted). By refusing to consider counsel's reasonable strategic decision, the post-conviction relief court erred as a matter of law. The Court of Appeals correctly recognized the evidence and the law required reversal on this ground and properly reversed the post-conviction relief court.

Moreover, the Court of Appeals also appropriately determined the post-conviction relief court's finding counsel was constitutionally ineffective was also incongruent with the record directly refuting this allegation. As counsel Solar mentioned numerous times at the evidentiary hearing, Judge Harrington had a full copy of Stone's records, including the administrative hearing report that recommended terminating one year and continuing with probation. (App. 164-65, 170). Judge Harrington also explicitly stated she knew there was a one-year recommendation at the time of the revocation hearing based on the paperwork. (App. 65). Perplexingly, Judge Russo acknowledged Judge Harrington had this information before her, but nevertheless disregarded this evidence directly refuting this allegation by erroneously speculating as to whether Judge Harrington had read the report, essentially assuming that another circuit court judge failed to do her due diligence and read the information provided to her—basic

aspects of her job as a circuit court judge. App. 189-91. Instead of giving weight to the uncontroverted evidence that established Judge Harrington was provided with the recommendation for a one-year revocation and had reviewed this information before making her decision, Judge Russo based his ruling on his wants and preferences rather than the record. See e.g., App. 190 ("But as I sit on these matters I want to know the hearing officer, what the recommendation is because the hearing officer hears a lot more during those hearings than simply the agent's position."). Despite his "confidence" that Judge Harrington had the report before her, Judge Russo astonishingly still granted relief on the basis that counsel failed to make Judge Harrington aware of the very information it was "confident" she already had, and that Judge Harrington stated she already had. App. 190-91. The Court of Appeals again correctly reviewed the record, applied proper law, and determined reversal was necessary.

Additionally, the Court of Appeals properly determined Stone cannot establish any prejudice from counsel's strategic decision not to highlight the one-year revocation recommendation, as counsel informed the court *three* times that the Administrative Hearing Officer only recommended one year of revocation at the reconsideration hearing. (App. 65, 68). Despite repeatedly informing the court of this recommendation—which Judge Harrington was not bound to accept—Judge Harrington nevertheless elected not to alter the probation revocation, which was within her discretion to do. See State v. Green, 337 S.C. 67, 71, 522 S.E.2d 602, 604 (Ct. App. 1999) (noting the State's sentence recommendation is not binding on the trial judge). Accordingly, the post-conviction relief court erroneously ignored the transcript of the motion to reconsider hearing directly refuting any prejudice. See Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) ("In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.").

In conclusion, the Court of Appeals rightly determined the post-conviction relief court's finding that counsel was deficient for failing to inform the court of the Administrative Hearing Officer's recommendation was not supported by the record which conclusively established not only that Judge Harrington had this very information already, but also that counsel informed the court numerous times during a subsequent hearing of this information. Moreover, the Court of Appeals correctly found counsel had a reasonable strategic basis for not informing the court of the recommendation, which was at the direct instruction of her client. Finally, the Court of Appeals properly found Stone could not establish prejudice, as counsel explicitly told the court of the one-year recommendation multiple times at the subsequent motion to reconsider hearing and the result of the proceeding was the same—revocation in full. Accordingly, the Court of Appeals properly reversed the post-conviction relief court's erroneous grant of relief based on multiple errors or law and fact.

B. The Court of Appeals properly found the post-conviction relief court erred by granting relief where Stone failed to establish probation revocation counsel was ineffective for failing to advise the court that Stone had not been arrested for any felony charges while on probation because this allegation is directly refuted by the record.

In reversing the post-conviction relief court's grant of relief for failing to advise the revocation court that Stone had not been arrested for any felony charges while on probation, the Court of Appeals found the post-conviction relief court ignored clear evidentiary support showing the revocation court was already aware of this information both at the initial hearing and the motion to reconsider hearing. These findings are correct.

In its order granting relief, the post-conviction relief court found, "Attorney Solar was ineffective for failing to clarify to the Court that Applicant was not arrested for a felony charge while he was on probation." (App. 201). This ruling is erroneous, as the record directly refutes

this allegation. A clear reading of the unambiguous transcript from the probation revocation hearing establishes the court was aware Stone was originally arrested for third-degree burglary on October 11, 2013—ten months before he was placed on probation. (App. 53-54). Because the court was correctly advised that the original arrest occurred well before Stone was on probation, counsel cannot be deemed deficient for failing to advise the court of something of which it was already aware. Additionally, Stone cannot establish prejudice, as there is no reasonable probability the outcome would have been different because the court was already aware the third-degree burglary arrest was based on conduct occurring before he was placed on probation during the revocation hearing. Simply put, there is nothing in the record to support a finding of deficiency or prejudice as to this allegation.

Moreover, Stone also cannot establish prejudice because he highlighted to the court during the motion to reconsider hearing that he was not arrested for any felonies while on probation and his revocation remained the same. See App. 66 ("There was another felony charge that I had prior to that probation that was brought up to you and said that — stated that I committed that while I was on probation, which it didn't happen. It happened prior. . . . So — 'so I didn't commit no felonies during my probation period, Your Honor.").

In reversing the grant of relief, the Court of Appeals properly determined the post-conviction relief court overlooked or ignored the record directly refuting the allegations.

C. The Court of Appeals properly found the post-conviction relief court erred by granting relief where Stone failed to establish probation revocation counsel was ineffective for failing to explain why Stone failed to appear in court where this allegation is directly refuted by the record.

In reversing the post-conviction relief court's grant of relief for failing to explain to the revocation court why Stone failed to appear, the Court of Appeals found the post-conviction

relief court again disregarded evidence in the record clearly refuting this claim. Specifically, the Court of Appeals found revocation counsel "sufficiently conveyed to the revocation court the hardships—both financial and medical—Stone faced regarding his ability to appear in court," thereby defeating deficiency of counsel or any resulting prejudice. These findings are correct, and the Court of Appeals correctly reversed the lower court.

In its order granting relief, the post-conviction relief court found, "Attorney Solar also failed to provide the Court with an explanation of why Applicant failed to appear in Court on the two occasions leading to his arrest on those charges. The Court is satisfied that Applicant's failure to appear was the result of either his incarceration on other charges or his hospital admissions related to his alcoholism." (App. 202). Yet again, the post-conviction relief court erred in granting relief where this allegation is conclusively refuted by the record.

During the probation revocation hearing, counsel informed the court that Stone had stopped reporting (and presumably failed to update his address) because he was homeless, living in a tent city downtown, and had substantial physical, mental, and substance abuse problems:

> He was sentenced in 2014. He did report for over a year, but did stop reporting last November. He was living downtown at Tent City. It was very difficult for him to go anywhere.
>
> He also has health problems, mental health problems, post-traumatic stress. He takes medications and goes to Charleston Mental Health when he can afford it. He also has physical problems, head trauma. He was hit by a car in March and he also has financial issues.
>
> Since December of 2015, he's been in and out of the hospital because of alcohol withdrawals. He relapsed. He's also been to M.U.S.C in the Charleston Center. He has a history of alcoholism and also bipolar. He has depression.

(App. 54-56). The record conclusively establishes counsel informed the court in detail as to why he had failed to appear, explicitly mentioning his homelessness, hospitalizations, and litany of

physical and mental health issues.[5] Accordingly, there is no evidentiary support for the post-conviction relief court's findings, as counsel did exactly as the post-conviction relief court found she should have done. The Court of Appeals appropriately reversed the post-conviction relief court's erroneous grant of relief.

Despite the clear lack of legal or factual support for the post-conviction relief court's grant of relief, Stone attempts to assign error to the Court of Appeals' reversal by relying on Nichols v. State, 308 S.C. 334, 417 S.E.2d 860 (1992), which he asserts is analogous to his case. However, Nichols is distinguishable from Stone's case for key reasons. First, Nichols probation was revoked solely on his failure to make restitution payments. Id. at 336, 417 S.E.2d at 861 ("On July 20, 1989, the petitioner was taken before Judge Frank Eppes in the Court of General Sessions for Aiken County for a probation revocation hearing on a warrant asserting he had failed to make restitution payments."). Here, Stone's probation was revoked based on a laundry list of violations with evidentiary support (including numerous arrests while on probation), a far cry from what occurred in Nichols. Second, counsel in Nichols failed to do any independent investigation or present any evidence to support Nichols claim that he did not appear because he did not have a job and could not pay restitution, a fact that was crucial to the Court's determination that counsel was ineffective:

> Other than the following exchange between the court and defense counsel, the hearing record reflects no other testimony, evidence, statements or arguments by petitioner's counsel or counsel for the state nor findings of fact by the court. After the petitioner's statement, the court inquired and received the following response from defense counsel:

[5] Stone appears to acknowledge that the post-conviction relief court's grant of relief was questionable at best as to this issue, stating that the lower court was clearly focuses on the first two issues more but that relief was still proper nevertheless as to this issue based on "deference" and "sufficient support." (BOP 11-12).

> The Court: Mr. Yarborough, did you find out any unusual thing about him?
> Mr. Yarborough: That's basically what he tells me, Your Honor. That he didn't go see him because he couldn't find a job and it just got to be a---

Whereupon the court issued its order revoking petitioner's probation.

Id. In the present case, the record is full of the mitigation presented by counsel, Stone, and even the probation agent explaining Stone's problems with homelessness, substance abuse, and mental health concerns in an attempt to obviate a finding that he was in willful violation of the terms of his probation, again a far cry from what occurred in Nichols. Third, in Nichols, the post-conviction relief court was not presented with any strategic basis for why counsel acted in the manner he did, nor can one be gleaned from the record. In Stone's case, counsel provided a well-articulated, objectively reasonable strategic basis for her actions based on her independent conversations with Stone prior to the hearing. Fourth and finally, in Nichols, the hearing appeared to be very brief and lack any evidentiary support, whereas the present case consisted of two longer hearings and the presentation of argument and statements from all the involved parties, including the victim. In conclusion, Nichols is readily distinguishable from the present case and does not support the erroneous findings of the post-conviction relief court.

In summation, the Court of Appeals properly reviewed the record in its entirety, applied the correct standard of review, and reversed the erroneous grant of relief based on a lack of legal and factual support.

CONCLUSION

In reversing the post-conviction relief court, the Court of Appeals correctly applied the law, reviewed the record, and determined the grant of relief was without evidentiary or legal support. This Court should affirm the Court of Appeals.

Respectfully submitted,

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