

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable G.D. Morgan, Jr., Circuit Court Judge

JERRY DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000856

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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Jan 12 2023

S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err finding counsel was not ineffective for failure to adequately prepare for petitioner's probation revocation hearing resulting in his probation being fully revoked?

STATEMENT

On March 21, 2019, a Cherokee County Grand Jury indicted petitioner for domestic violence in the first degree. App. 57-58. On June 17, 2019, petitioner appeared before the Honorable Grace Gilchrist Knie for a guilty plea hearing. Petitioner was represented by Matthew Craft and the state was represented by Toria Smith. The court sentenced petitioner to ten years of imprisonment suspended upon the service of one hundred- and fifty-six-days' time served and three years of probation. App. 47.

On March 26, 2020, petitioner appeared before the Honorable R. Keith Kelly for a probation violation hearing. Clay Allen and Andrea Price represented petitioner. An unnamed probation agent represented the state. App. 1. The court revoked petitioner's probation in full. App. 13.

Thereafter, petitioner filed an application for PCR. App. 14-20. An evidentiary hearing was held on April 19, 2022, before the Honorable G.D. Morgan, Jr. Petitioner was represented by Rodney Richey and the state was represented by assistant attorney general, Chelsey Marto. App. 29-46.

On June 8, 2022, Judge Morgan signed an order denying PCR. App. 47-54. The court found petitioner's allegation that defense counsel was ineffective because she failed to adequately prepare for his probation revocation hearing was without merit. The court found probation counsel credibly testified that she had sufficient time to prepare and found petitioner failed to show how more time spent in preparation would have changed the result of the proceedings. App. 52.

This petition follows.

ARGUMENT

The PCR court erred finding counsel was not ineffective for failure to adequately prepare for petitioner's probation revocation hearing resulting in his probation being fully revoked.

Relevant facts

Petitioner was alleged to have violated the conditions of his probation by being arrested on additional charges and by failing to enroll in "batterers treatment" [sic]. App. 4, ll. 3-6; 8, ll. 23-24. The probation agent, present at the revocation hearing, claimed that as to petitioner's new domestic violence charge, "I've shown the defense all the photos [complainant's bruise] and the text messages where he even admits to hitting her with a belt." App. 8, ll. 18-22. The agent also alleged that petitioner "hasn't done anything really on probation." App. 9, ll. 6-8. In response to questioning by the judge, petitioner admitted that he violated his probationary requirements. App. 3, ll. 12-25.

However, defense counsel moved for a continuance, so that petitioner could both "have an admin[istrative] hearing, and I can get some discovery . . ." App. 4, ll. 10-21. A bench conference was held off the record, and when the parties went back on the record, the court recognized that probation-related administrative hearings had been cancelled due to the coronavirus emergency. Nevertheless, the court denied the continuance motion and ruled, "whereas here you have admitted the violations with able counsel, and also [defense counsel] himself [is] standing there next to you. I don't see any violation of due process." App. 4, ll. 1-14. "I don't know of any statute that guarantees you a . . . preliminary hearing or an administrative hearing." App. 5, ll. 3-9. Petitioner then stated that he wished to go forward with the revocation hearing. App. 10, ll. 19-24.

The court revoked petitioner's probation in full. App. 11, ll. 1; 13.

At petitioner's evidentiary hearing he testified that his defense counsel, Andrea Price, was unprepared at his probation revocation hearing, which resulted in his probation being fully revoked. App. 34, ll. 5-25. Petitioner maintained that had counsel spent adequate time on his case, she could have argued more effectively regarding a continuance, and he would have received the routine administrative hearing, instead of the matter being immediately heard in circuit court. App. 35, l. 14-36, l. 17. Petitioner contended, contrary to the transcript of the hearing, he *had* enrolled in batterers treatment during his probation and that all the charges that were alleged to have violated his parole were ultimately dismissed. App. 36, ll. 17-24; 38, ll. 12-23.

Petitioner's counsel, Andrea Price, testified that petitioner's case was her first when she began working at the Gaffney public defender's office on March 16, 2020. App. 39, l. 18-40, l. 3. Counsel said she met with petitioner in the county detention center on March 23, 2020, in advance of his March 26, 2020, hearing to discuss the alleged bases for the revocation. App. 40, ll. 6-18. She said during that discussion she told petitioner she would request the court continue the hearing at a later time. App. 42, ll. 5-8. Counsel acknowledged she thought it was odd that this hearing was held before an administrative hearing. App. 40, ll. 11-23. She claimed two of the three charges that were pending were dismissed but she thought petitioner pled guilty to one other charge. App. 41. Counsel testified that petitioner's failure to attend the batterers classes was not the initial basis for revoking his probation but did not specify what the basis were she merely said "there were other [] violations." App. 41, l. 19-42, l. 1. Counsel maintained she "felt" she had enough time to prepare based on the allegations but restated that she had never seen "a hearing prior to the administrative hearing." App. 43, ll. 7-10.

Discussion

Defense counsel was ineffective where she failed to adequately prepare for petitioner's probation revocation hearing due to time constraints which resulted the court revoking petitioner's probation in full which meant petitioner would serve a ten-year sentence. Petitioner testified during the evidentiary hearing regarding the basis for his revocation. He stated that he was in fact attending the batterers classes as proscribed by the terms of his probation and he also insisted that the new charges against him were ultimately dismissed. Defense counsel agreed that two of the additional charges got dismissed and was unsure if there was another charge where he ultimately pled guilty. Defense counsel testified that there were "other violations" but never specified what the other bases were.

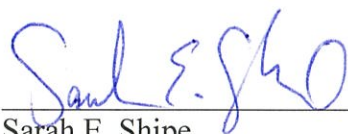
Where ineffective assistance of counsel is alleged, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 669 (1984). Though this case did not involve trial defense counsel's failure to adequately prepare due to lack of time resulted in petitioner not receiving an administrative hearing as was normal and ultimately his probation was fully revoked.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the state." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citing *Nance v. Ozmint*, 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006)). Investigation in the context of a probation revocation hearing should include reviewing the alleged probation violations, a discussion with client in advance of any hearing, gathering any evidence that contests the alleged violations in order to present it to the court.

Here, defense counsel failed to adequately prepare for and successfully execute petitioner's probation revocation hearing where she testified that she had only just begun working at the public defender's office and met only once with petitioner, three days in advance of his hearing. Counsel did not offer any testimony regarding why she was not more prepared and in fact testified that she believed she had adequate time to prepare. Counsel's lack of preparation, regardless of the explanation was unreasonable. *See Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (Recognizing that strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation.").

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be granted to allow full briefing on the issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of January, 2023.

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Counsel for Jerry Jerome Davis states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge G.D. Morgan, Jr., which was held on April 19, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Jerry Jerome Davis.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of January, 2023.

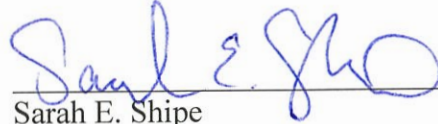
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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