ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

JUN 17 2013

S.C. Supreme Court

Certiorari to Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

ASHLEY RAY HARDIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212395

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

I. Probation revocation counsel was ineffective in failing to present mitigating evidence concerning the nature of the allegations in petitioner's underlying charge because the underlying conduct had been decriminalized by the legislature prior to the probation revocation hearing?

II. The PCR judge erred in denying petitioner's allegation that probation counsel was ineffective because he failed to appeal the case despite repeated requests to do so.

STATEMENT

Procedural History

Defendant Ashley Ray Hardin pled guilty to second degree criminal sexual conduct with a minor and receiving stolen goods during the November 2005 term of the Lexington County General Sessions Court before Judge Edward W. Miller. Petitioner was sentenced to ten years on his conviction of criminal sexual conduct and five years for receiving stolen goods, both of which sentences were suspended during probation. App 1-31. Robert. T. Williams represented petitioner at the plea proceeding. Petitioner did not enjoy the benefit of a direct appeal in the case.

On August 28, 2008, a probation revocation hearing was held at the Chester County General Sessions Court before Judge Roger L. Couch. App. 33-43. Petitioner's probation sentence was revoked and his aggregate ten year sentence was revived. Tyree Lee represented petitioner at his probation revocation hearing. Petitioner did not enjoy the benefit of an appeal of his probation revocation.

On November 17, 2008, petitioner filed a PCR application with the Lexington County Clerk of Court. App. 45-51. The respondent filed a return and motion to dismiss on July 7, 2009, on the ground that the PCR action was untimely filed. App. 52-55. On September 13, 2011, the respondent filed an amended return requesting that a hearing be held in response to petitioner's collateral allegations emanating from his probation revocation proceeding. App. 56-62.

A PCR hearing was convened at the Lexington County Courthouse before Judge Eugene C. Griffith. Petitioner was present at the hearing and represented by Tristan M. Shaffer. App. 64-137. On May 9, 2012, Judge Griffith issued an order of dismissal denying petitioner's

allegations of ineffective assistance of probation revocation counsel. App. 139-156. Petitioner appealed Judge Griffith's order. This action follows.

Factual History

In 2003, petitioner, then seventeen years-old, was living with his fourteen year-old girlfriend, hereinafter the prosecutrix, and her mother, hereinafter "mother", in Lexington County. The petitioner and the prosecutrix were engaged a sexual consensual relationship. App. 113, l. 4 – 51, l. 5. Mother decided to report the sexual relationship to law enforcement. App. 68, ll. 9-12. The prosecutrix did not want to prosecute. App. 121, l. 19 – App. 122, l. 2.

In November 2005, petitioner received a ten years suspended sentence for second degree criminal sexual conduct with a minor for his consensual sexual relationship with the prosecuctrix. On July 1, 2006, the second degree criminal sexual conduct statute was amended to include the following language:

> [A] person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in illicit but consensual sexual conduct with another person who is at least fourteen years of age. In addition, mistake of age may be used as a defense.

S.C. Code § 16-3-654 (B) (2008).

In 2008, petitioner tested positive for marijuana. He was told to appear for a probation revocation hearing. The day before the hearing, petitioner's girlfriend[1] gave him a ride from his home in Chester County to Wagener. Petitioner went to Wagener to visit his brother and sister who were living with petitioner's grandmother. While in Wagner, petitioner and his girlfriend got into an argument. The argument resulted in the girlfriend leaving petitioner at his grandmother's house. App. 116, ll. 10-16. There were minor children at petitioner's

[1] Not the prosecutrix.

grandmother's home. The next day petitioner was told that he would likely go to jail for staying at his grandmother's home so he fled, but was soon apprehended. App. 117, ll. 3-25.

Prior to the probation hearing, probation counsel did not request the original discovery or any other information concerning the facts of the underlying conviction because he viewed the information as immaterial in a probation hearing. App. 92, ll. 6-11.

During the probation hearing, probation counsel's only goal was to attempt to present mitigation evidence. App. 100, ll. 3-12; App. 37, ll. 5-7. Probation counsel's mitigation evidence focused on excuses for why petitioner did not successfully complete probation rather than his criminal conduct. App. 100, l. 12 – 38, l. 16.

The probation revocation court stated the following:

> According to the information before me, you were sentenced to, for criminal sexual conduce with a minor, victim under the age of 16, second degree, receiving stolen goods valued over a thousand but less than 5,000, Judge Miller sentenced you to ten years suspended upon time served with three years of probation.

App. 35, l. 23 – 36, l. 5. No other information was provided concerning the underlying charge. Petitioner's probation sentence was revoked in full. App. 43, l. 1.

After the probation hearing, probation counsel did not speak to petitioner again. App. 99, ll. 12-13. Petitioner tried to speak to probation counsel after the hearing, but probation counsel was too busy to speak with petitioner. App. 120, ll. 13-14. About six days after the hearing, petitioner tried to mail probation counsel a letter to ask him about an appeal; however, that letter was returned. App. 120, l.15 – 121, l. 10.

ARGUMENT I

Probation counsel was ineffective in failing to present mitigating evidence concerning the nature of the allegations in petitioner's underlying charge because the underlying conduct had been decriminalized by the legislature prior to the probation revocation hearing.

Sentences imposed during probation revocations are punishment for the underlying criminal conduct and not for failing to complete probation. See State v. Franks, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981) where the Court held that the penalty imposed upon a finding of violation of probation conditions is a forfeiture of the act of grace extended and re-imposition of the unserved portion of the original sentence. As such, when it has been determined that a probationer failed to comply with the conditions of probation, the probationer should be sentenced for the underlying charge "as if there had been no probation or suspension of sentence." See S.C. Code Ann. § 24-21-460. Clearly, courts should look at the underlying facts of a crime when determining the punishment for that crime.

The decriminalization of petitioner's underlying criminal conduct would have been strong mitigation evidence for the probation court. The 2008 reinstatement of petitioner's ten year sentence was punishment for his consensual sexual relationship with the prosecutrix in 2003. Petitioner was seventeen at the time of the sexual relationship and prosecutrix was fourteen. However, had the same conduct occurred in 2008 it would have been legal under §16-3-655(B). Although courts are not required to give a defendant the benefit of new legislation when the act contains a savings clause,[2] the fact that the conduct is no longer illegal would be strong evidence of mitigation.

Probation counsel was deficient in failing to inform the probation court about the underlying facts surrounding petitioner's charge. Counsel can be ineffective in failing to

investigate and present mitigation evidence. See Council v. State, 380 S.C. 159, 670 S.E.2d 256 (2008); cf. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Note that [probation counsel] testified that the facts of the underlying criminal case to which [petitioner] pled [did not constitute] a matter for a probation revocation hearing." App.153. However, the probationer was not being punished for failing to comply with the terms of probation, but rather, the revocation was merely the "reinstitution" of a punishment for the initial crime. See Franks, supra If the probation court is to reinstate punishment for the underlying offense, it seems that the nature of the underlying offense would be beneficial information.

Although the PCR court found that Petitioner failed to establish prejudice, it noted that the probation court had exercised its discretion, but "perhaps" the result could have been different in front of another judge, and that "*informing the trial court may have be helpful in front of some judges*, however failure to do so does not rise to the level of ineffective assistance of counsel." App. 136, lines 5-6. App. 153 (emphasis added).

There is a reasonable probability that petitioner would have received a shorter sentence had probation counsel made the court aware of the facts of the underlying charge. The PCR judge's ruling indicated that there was evidence to support a finding that petitioner would have received a shorter sentence had the mitigation been submitted. Probation counsel's error in failing to present the mitigating evidence in question during petitioner's probation revocation hearing was a violation of due process via the Fourteenth Amendment. See Turner v. State, 384 S.C. 451, 682 S.E.2d 451 (2009) citing to Duckson v. State, 355 S.C. 596, 586 S.E.2d 576 (2003), and Gagnum v. Scarpelli, 411 U.S. 778 (1973).

---

[2] *See Peirce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000).

ARGUMENT II

. The PCR Judge erred in denying petition's allegation that probation was ineffective because he failed to appeal the case despite repeated requests to do so.

On November 16, 2005, petitioner was charged and convicted of receiving goods stolen from a burglary committed by another individual. Petitioner was also charged and convicted of having sex at the age of seventeen with someone who was fourteen years of age. App 21, l. 17-p. 24, l. 14. Petitioner's aggregate ten-year sentence was suspended during probation.

Petitioner's probation sentence was revoked on August 25, 2008, for various violations such as failing a drug test and spending the night at an unapproved residence. App. 37, l. 12.-p. 43, l. 2. Petitioner did not enjoy the benefit of an appeal of his probation revocation.

During the PCR hearing held in the case, petitioner testified in effect that he sent a letter to probation counsel requesting an appeal of his probation revocation. App. 126, lines 1-13. PCR counsel in effect argued that even though petitioner's letter requesting the appeal was returned to him, nonetheless, petitioner desired an appeal and took steps to obtain an appeal of his probation revocation by sending the letter. App. 132, l. 16-p. 133, l. 25; App. 99, l. 22-p. 100, l. 6. Probation counsel testified that the petitioner never asked him to file an appeal of his probation revocation. App 107, l.24-p.108, l. 11.

The PCR judge ruled that there was nothing in the record indicating to counsel that petitioner was interested in appealing, and that under such circumstances, probation counsel's failure to file an appeal of the probation revocation at issue was not unreasonable. App 154.

As a rule, probation counsel is not required to inform a probationer of his right to appeal absent extraordinary circumstances. Bullis v. State, 382 S.C. 195, 675 S.E. 2d 734 2009); Turner v. State 384 S.C. 451, 682 S.E. 2d 792 (2009). However, when a criminal defendant requests an appeal from a probation revocation, but counsel fails to file an appeal, counsel is deemed deficient; and in such a case, said defendant is entitled to a belated appeal without a showing that the appeal would likely have merit. Fleming v. State, 399 S.C. 380, 731 S.E. 2d 889 (2012).

Probation counsel's error in failing to appeal petitioner's probation revocation violated petitioner's right to effective assistance of probation counsel via the due process clause of the Fourteenth Amendment per Turner v. State, 384 S.C. 451, 682 S.E. 2d 792 (2009), citing to Duckson v. State, 355 S.C. 596, 586 S.E. 2d 576 (2003), and Gagnum v. Scarpelli, 411 U.S. 778 (1973).

CONCLUSION

Based on the foregoing arguments, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of June, 2013.

STATEMENT OF ISSUE ON APPEAL

The probation court erred in revoking petitioner's probation on an underlying charge that had since been decriminalized.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

ASHLEY RAY HARDIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Ashley Ray Hardin, #330300, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 17th day of June, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of June, 2013.

(L.S.)

Notary Public for South Carolina
My Commission Expires: November 16, 2022.