

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Clifton Newman, Circuit Court Judge

RECEIVED

AUG 21 2012

S.C. Supreme Court

ANTHONY TUCKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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Attorney General

South Carolina Commission on Indigent
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Division of Appellate Defense
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ATTORNEYS FOR RESPONDENT

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF KERSHAW) COURT OF GENERAL SESSIONS
10-CP-28-1189

3
4 State of South Carolina,)
5 Plaintiff,)
6 vs.) TRANSCRIPT OF RECORD
7 Anthony Tucker,)
8 Defendant.)

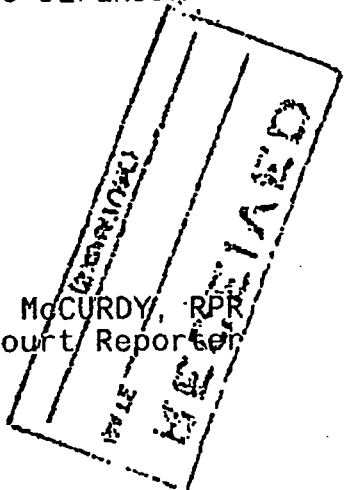
9 January 28, 2010
10 Camden, South Carolina

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12
13 B E F O R E :
14 THE HONORABLE G. THOMAS COOPER, JUDGE.

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16
17 A P P E A R A N C E S :
18 KERSHAW COUNTY PROBATION OFFICE
19 Appearing for the Plaintiff
20 JASON D. KIRINCICH, ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

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23
24
25

DEBORAH M. McCURDY, RPR
Official Court Reporter



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INDEX OF WITNESSES

(WHEREUPON, no witnesses were called during these proceedings.)

EXHIBITS

(WHEREUPON, no exhibits were introduced during these proceedings.)

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JANUARY 28, 2010

THE PROBATION AGENT: Anthony Tucker.

(Defendant sworn by clerk.)

THE COURT: All right.

THE PROBATION AGENT: Your Honor, this is Anthony Tucker. You may recall Mr. Tucker. You have seen him twice before in recent months. October 27th you revoked 90 days and continued Mr. Tucker. December 17th, placed him on GPS. Six days after that he was arrested for petit larceny, which occurred at the Chestnut Street laundromat, which is right across the street from Boykin Park near a playground, which is another violation.

Based on the incident reports and the reports that I got right after the incident, there is probable cause to believe he committed that offense. He was there all afternoon and was seen leaving the area walking along the railroad track by GPS right after the incident occurred.

And, Your Honor, like I said, he just committed a lot of violations in a very short period of time.

I just spoke to him a little bit ago. He agrees that he is not a good candidate for probation, that he can't do probation. I agree

1 with that. I don't feel he can either. I feel
2 like if he was continued he would just be back here
3 next month and the month after that. He is just
4 not cut out for it, Your Honor.

5 THE COURT: Okay. Mr. Kirincich?

6 MR. KIRINCICH: Your Honor, I talked to Mr.
7 Tucker. I think one of the main violations we're
8 looking at is that arrest on December 22nd.

9 Mr. Tucker is telling me that he was supposed
10 to go to court yesterday in the City of Camden and
11 somehow that charge was dismissed because the
12 victim didn't show up.

13 I've called the City of Camden. They didn't
14 have a record of him going to court yesterday.
15 Ms. Blackmon didn't have anything in her file,
16 which she said she would check on when I guess she
17 got back to the detention center. It is just his
18 word right now that happened.

19 I guess I would find it odd that he would be
20 in jail from -- they said his court date was
21 February 24th when it was scheduled. I guess I
22 would just find it odd that they would schedule a
23 court date 60 days past an incident for something
24 that carries up to 30 days. I don't know if that
25 lends credence to his story.

1 Mr. Tucker is 39 years old. He is disabled,
2 which is one of the reasons the Court waived the
3 fee condition for the GPS monitoring.

4 I think he is trying to do probation. I
5 talked with him when he was put on GPS about it was
6 going to make it harder for him. I don't know if
7 being at a business within a thousand feet of a
8 park really constitutes loitering within a thousand
9 feet of a park. I think loitering is out and about
10 the business, not at the business. I'm not sure it
11 fits the definition of loitering.

12 As far as the curfew goes on the 17th and
13 22nd, the 22nd I believe was the day he was
14 arrested so he wouldn't have been meeting curfew on
15 that day. And I just don't know what time the 17th
16 says he violated his curfew.

17 THE DEFENDANT: The 17th was like 6:25. On
18 the 22nd it was like I was home at three minutes to
19 seven, 7:00 o'clock.

20 MR. KIRINCICH: Your Honor, you were actually
21 the sentencing judge on this case. Mr. Tucker
22 received ten years suspended on five and two years
23 probation. So he has got five years hanging over
24 his head right now.

25 Being that Mr. Tucker is not a great candidate

1 for probation, if the Court would consider a short
2 revocation and then terminate his probation it may
3 be agreeable to all parties, although I think he
4 would like to go home. I think we all agree it
5 would be a problem if he continued on probation.

6 THE COURT: This was in all likelihood was
7 pled down?

8 THE PROBATION AGENT: Well, this was not
9 against a child. This was an incident, a woman was
10 sitting outside a bench at the Kershaw County
11 Medical Center. And Mr. Tucker came up and exposed
12 himself and actually -- I wouldn't call it a sexual
13 assault, but in a way it was. He touched her very
14 inappropriately with -- it is hard to put that into
15 words, Your Honor, but that is what happened.

16 THE COURT: With his penis?

17 THE PROBATION AGENT: Sir?

18 THE COURT: With his penis he did something?

19 THE PROBATION AGENT: Yes, sir.

20 THE COURT: Touched her with it?

21 THE PROBATION AGENT: Yes, he did. And he
22 actually masturbated onto her while she was sitting
23 there on the bench. So I believe ABHAN was, I
24 think he was charged with CSC --

25 THE COURT: It must have been CSC.

1 THE PROBATION AGENT: And pled down to ABHAN.
2 So I believe he was already a registered sex
3 offender before that anyway. And the victim is
4 incarcerated right now on a Family Court charge,
5 but I have spoken with her.

6 THE COURT: Which victim?

7 THE PROBATION AGENT: The case he is on
8 probation for.

9 THE COURT: Oh.

10 THE PROBATION AGENT: Her name is Angel
11 Bailey. I have spoken with her previously. She
12 said she didn't wish to appear in court, but she
13 does ask for a full revocation.

14 THE COURT: She's in jail?

15 THE PROBATION AGENT: Yes, sir. And just for
16 your information, Mr. Tucker, he has some criminal
17 sexual conduct charges that he's been charged with
18 recently that occurred while he was in -- and I
19 haven't violated him based on that, just based on
20 the facts I didn't see there was enough evidence to
21 even based on a preponderance of the evidence to
22 violate probation, but that is still pending.

23 THE COURT: Oh. So there is a pending
24 warrant?

25 MR. KIRINCICH: Your Honor, I believe those

1 came about after Mr. Tucker was put in the
2 detention center. I haven't seen them. Solicitor
3 Moak may have mentioned them earlier.

4 THE COURT: Is there a warrant?

5 MR. KIRINCICH: I don't know if there is a
6 warrant or just --

7 THE PROBATION AGENT: He's been served, he's
8 been charged with five or six counts of CSC and one
9 count of contraband in jail. But, again, I don't
10 see that is a violation at this point. I will just
11 wait and see what happens to those. That is just
12 for your information.

13 THE COURT: Okay. Revoke in full.

14 MR. KIRINCICH: Thank you.

15 (WHEREUPON, the proceedings were concluded.)
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17
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22

23 (END OF TRANSCRIPT)
24
25

548P

FORM 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of Richland

2010-CP-28-1189

Anthony Tucker

Full name and person number (if any) of Applicant

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
Two Wiscay Highway, Florence, South Carolina
2. Name and location of Court which imposed sentence Richland County
Court of General Sessions
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 011-65-28-424
(b) _____

ATTEST: True, Correct & Certified
Copy of Original on file in this
Court
[Signature]
Clerk of Court Richland County

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 1-28-10 4yrs., 9 months

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) I was never informed that I had a constitutional right to appeal

(b) _____

2011 OCT 20 AM 11:48
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
RECORDS SECTION

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Attached sheet

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? N/A

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

FILED FOR RECORD
2010 OCT 28 AM 11:48
SOUTH CAROLINA
COURT SYSTEM

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

2013 OCT 28 AM 11:48
 THE CLERK OF COURT
 DISTRICT COURT
 S.C.
 INFORMATION RECORD

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) See Attach Sheet.
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? _____
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Jason Kirinovich
1121 Broad St. Camden, S.C. 29020
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. _____
 - ii. _____
 - iii. _____

FILED FOR RECORD
 2010 OCT 28 AM 11:48
 CLERK OF COURT
 JUSTICE COUNTY, S.C.

19. State clearly the relief you seek in filing this application:

~~Vacate Sentence~~ Vacate Conviction

20. Are you now under sentence from any other court that you have not challenged?

No

FILED FOR RECORD
2010 OCT 28 AM 11:48
CLERK OF COURT
RICHMOND COUNTY, S.C.

STATE OF SOUTH CAROLINA)
County of Richland)

VERIFICATION

I, Anthony T. Tice, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Anthony T. Tice

SWORN to and subscribed before me this 4 day of Oct, 2010.

Diana Jones (L.S.)
Notary Public

My Commission Expires: 11-4-2013

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

FILED FOR RECORD
2019 OCT 28 AM 11:48
CLERK OF COURTS
HARRIS COUNTY TEXAS

I, Anthony Tucker, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Anthony Tucker
Applicant

SWORN or affirmed to and subscribed before me this

4 day of Oct, 2019.

Debra Susan
Notary Public

My Commission Expires: 11-4-2015

page 3 cont.

11(a) Applicant's Probation was violated because of an alleged criminal offense. However, trial counsel failed to object to Applicant's probation violation because Applicant was never convicted for the alleged criminal offense.

2010 OCT 28 AM 11:48
CLERK OF COURT
WESLEYAN COUNTY, S.C.

page 5 cont.

16(a) Trial counsel failed to inform the Applicant that his probation revocation hearing can be reviewed by an Appellate Court. Trial Counsel also failed to comply with the S.C. Rules of Professional Conduct when he failed to appeal the trial judge's decision.

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

TUCKER Anthony V -
00258678,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010CP2801189

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed October 28, 2010, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was represented by Jason Kirincich, Esquire. On November 6, 2007, the Applicant pled guilty and was sentenced by The Honorable G. Thomas

¹

<http://publicindex.sccourts.org/kershaw/publicindex/PICaseDetails.aspx?County=28+&Casenum=2010CP2801189&CourtType=G&CaseType=Civil&CourtAgency=28002>

Cooper, Jr.. The Applicant had been indicted and/or pled guilty to the following:

ABHAN - (2007-GS-28-0424).²

<u>Offender Type</u>	Adult-straight Sentence
<u>Offense</u>	Assl&battery-high&agg Nat
<u>Sentence Start Date</u>	12/22/2009
<u>Sentence Length</u>	4 YRS, 7 MOS, 23 DYS
<u>Admission Date</u>	02/04/2010
<u>Committing County</u>	Kershaw
<u>Location</u>	Lee
<u>Projected Release Date</u>	10/22/2012
<u>Projected Parole Date</u>	02/18/2011
<u>Supervised Furlough Eligibility</u>	Not Eligible
<u>Sex Offender Registry</u>	Yes

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

For the purposes of this Return, the Respondent interprets each of the Applicant's unspecified allegations to be claims that he received ineffective

² <https://sword.doc.state.sc.us/incarceratedInmateSearch/incarceratedInmateFaceSheet.do?id=00258678&youth=N&type=F>

assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance

must have 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, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis

that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Jeremy A. Thompson, Esquire regarding when the hearing should be set.³


Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737
bpetrano@scag.gov

February 4, 2011

³ The current PCR Roster for the 5th Circuit is available at <http://www.scattorneygeneral.com/inside/pdf/5th.pdf>

State of South Carolina)
County of Kershaw)

In the Court of Common Pleas
Fifth Judicial Circuit
2010-CP-28-1189

Anthony V. Tucker,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

Transcript of Record

February 16, 2012
Columbia, South Carolina

B E F O R E:

The Honorable Clifton B. Newman, Judge

A P P E A R A N C E S:

Jeremy A. Thompson, Esquire
Attorney for the Applicant

Rob A. Corney, Esquire, Assistant Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

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Jason Kirincich	
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Ruling of the Court	20
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<u>No.</u>	<u>Description</u>	<u>Page No.</u>
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No Exhibits Introduced.

1 MR. CORNEY: May it please the court, Your Honor?

2 THE COURT: Yes, sir.

3 MR. CORNEY: Your Honor, the first case we're going
4 to call this morning is Anthony Tucker. It's docket number
5 2010-CP-28-1189. Mr. Tucker was true bill indicted at the
6 April 2007 term of the Kershaw Grand Jury for assault and
7 battery of a high and aggravated nature.

8 There may have been some other charges at that time
9 with the Kershaw County clerk -- based on the Kershaw
10 County clerk's online records. And that assault and
11 battery of a high and aggravated nature seems to have
12 started maybe as a CSC charge. But the only indictment
13 that I have in the packet before you is for that particular
14 assault and battery of a high and aggravated nature charge.
15 I'm not sure if the online records are incorrect or where
16 the inconsistency is.

17 But Mr. Tucker pled guilty November 6, 2007, before
18 Judge G. Thomas Cooper as indicted. He received a ten-year
19 sentence suspended to service of five years and two years'
20 probation. Mr. Tucker appeared on January 28, 2010, before
21 Judge Cooper for a probation revocation hearing, at which
22 time his probation was revoked in full.

23 Mr. Tucker filed a timely PCR application on October
24 20, 2010, in reference to that probation revocation, and
25 he's represented today by Mr. Jeremy Thompson in this.

1 THE COURT: We're here for the probation violation
2 hearing?

3 MR. CORNEY: Yes, Your Honor.

4 THE COURT: All right.

5 MR. CORNEY: That's, and that's what the application
6 was filed on, and that's, the state would submit, that's
7 the only thing that's timely on it. It's not timely on the
8 original pleas. So, I believe that's what he intends to
9 move forward on.

10 THE COURT: All right.

11 MR. THOMPSON: May it please the court, Your Honor?

12 THE COURT: Yes, sir.

13 MR. THOMPSON: For the record, my name is Jeremy
14 Thompson; I am the applicant's current counsel of record.

15 He would allege that he received ineffective
16 assistance of counsel at his probation revocation hearing
17 in violation of -- I'm going to do a laundry list here --
18 his Fifth, Sixth, and Fourteen Amendments, constitutional
19 rights. I believe technically the right to counsel at
20 probation revocation hearing, the right to effective
21 assistance of counsel arises under the due process clause
22 as opposed to the Sixth Amendment. Regardless, the inquiry
23 is the same, as well as ---

24 THE COURT: Is that documented in any case other than
25 the constitution itself?

1 MR. THOMPSON: Yes. I don't have the case offhand,
2 but I'm pretty sure that it ---

3 MR. CORNEY: And as far as, as far as the standard for
4 a probation revocation ineffective assistance of counsel
5 claim, Your Honor, I will concede that under the case law,
6 it's the same standard as under *Strickland vs. Washington*
7 to show deficiency and prejudice essentially.

8 THE COURT: All right.

9 MR. THOMPSON: Just by way of brief factual
10 background, Your Honor, my client, as the attorney general
11 stated, was on probation for assault and battery of a high
12 and aggravated nature. He had five years hanging over his
13 head at the time of his probation revocation hearing.

14 During the hearing, reference was made to a number of
15 pending charges that my client had: one petit larceny, and
16 then a number of pending criminal sexual conduct charges.
17 And Judge Cooper at the conclusion of that hearing revoked
18 the probation in full and sentenced my client to five years
19 in prison, the remaining five-year term. And we would
20 allege the defense counsel was ineffective for failing to
21 ask for a continuance since the major violations of the
22 probation were due to pending charges.

23 In support of that, I do have a case on this one, Your
24 Honor, I'd like to hand up. That's *State vs. Allen*, 370
25 S.C. 886, 634 S.E. 2d 653, assigned 2006. Actually an

1 opinion by Acting Justice Manning, and in particular,
2 footnote 1 references what trial courts should do to
3 postpone probation revocation hearings when there are
4 pending charges.

5 And with that background in mind, Your Honor, we would
6 call the applicant as his own first witness.

7 THE COURT: Say that again?

8 MR. THOMPSON: The footnote in this decision, Your
9 Honor, basically sets forth the requirement that trial
10 courts, when faced with probation revocations that are
11 based primarily on pending charges -- that that's the
12 violation -- that they should be continued until the
13 pending charges have been resolved.

14 THE COURT: And is based primarily on pending charges?

15 MR. THOMPSON: Yes.

16 THE COURT: And that's the sole basis of the
17 violation?

18 MR. THOMPSON: Yes.

19 THE COURT: All right. Okay.

20 ANTHONY TUCKER, BEING DULY SWORN,
21 TESTIFIES AS FOLLOWS:

22 BAILIFF: State your full name for the record.

23 WITNESS: My name is Anthony Tucker.

24 THE COURT: The case you handed up to me, this was
25 affirmed about the revocation, affirmed.

A. TUCKER - DIRECT EXAMINATION BY MR. THOMPSON

7

1 MR. THOMPSON: Yes.

2 THE COURT: All right, but you are relying on some
3 language from the case?

4 MR. THOMPSON: Yes. In particular, that footnote 1
5 from the decision. This case is different from that in
6 that the revocation -- all the probation revocation agent
7 talks about during the proceeding is Mr. Tucker's pending
8 charges.

9 THE COURT: All right.

10 DIRECT EXAMINATION BY MR. THOMPSON:

11 Q. Mr. Tucker, I'd ask that you speak up and speak
12 clearly. The nice lady sitting right next to you has to
13 take down everything that you say, and she needs to be able
14 to understand everything that you say today, okay?

15 A. Yes, sir.

16 Q. Who represented you at your probation revocation
17 hearing?

18 A. Gentleman right there.

19 Q. Mr. Kirincich?

20 A. Kirincich, yeah.

21 Q. Kirincich. Mr. Kirincich represented you?

22 A. Yeah.

23 Q. Was he appointed or retained? Did you hire him, or
24 was he appointed?

25 A. He was appointed.

A. TUCKER - DIRECT EXAMINATION BY MR. THOMPSON

8

1 Q. Where was he working at the time?

2 A. At the public defender's office.

3 Q. In what county?

4 A. Kershaw County.

5 Q. And did -- prior to this revocation hearing, did you
6 meet with Mr. Kirincich?

7 A. No. I, I met with him in the courtroom.

8 Q. You met with him in the courtroom, but no discussions
9 of what was going on outside the courtroom?

10 A. Right.

11 Q. And why was the probation agent seeking to revoke your
12 probation?

13 A. Because I had pending charges, petit larceny.

14 Q. Did you have other pending charges as well?

15 A. Yeah, CSC.

16 Q. How many CSC charges did you have?

17 A. Five.

18 Q. And are those still pending?

19 A. Yeah.

20 Q. Had you violated your probation before?

21 A. No.

22 Q. You had not violated your probation?

23 A. Yeah. I violated one time before.

24 Q. And so this was not your first revocation hearing?

25 A. Right.

A. TUCKER - DIRECT EXAMINATION BY MR. THOMPSON

9

1 Q. During the revocation hearing, did your defense
2 attorney ask that the case be continued since all the
3 allegations were related to these pending charges?

4 A. No.

5 Q. Did you know -- would you have wanted him to do that?

6 A. Yes.

7 Q. Would you have preferred to not have had that
8 five-year sentence imposed on you?

9 A. No.

10 Q. And in the, in the transcript, does the probation
11 officer reference both the pending petit larceny charge and
12 the CSC charges?

13 A. Yeah. At first it was, but when he find out it was a
14 conflict of interest, so he took him off my case. I got
15 another lawyer.

16 Q. Say that again?

17 A. At first he was, but they found out he represent the
18 victim. Then it was a conflict of interest. Then they
19 gave me another lawyer.

20 Q. I think we're misunderstanding each other here. Are
21 you saying Mr. Kirincich was representing you on those CSC
22 charges, and then he got relieved?

23 A. Yeah.

24 Q. Yes. Okay. During your probation revocation hearing,
25 did the probation agent talk about your petit larceny

A. TUCKER - DIRECT EXAMINATION BY MR. THOMPSON

10

1 charge and your criminal sexual conduct charge?

2 A. Yes.

3 Q. Did -- was, was the discussion about the CSC charges
4 the first thing out of the probation agent's mouth?

5 A. Yes.

6 Q. It was?

7 A. Yeah.

8 Q. Did you see a change in Judge Cooper's demeanor?

9 A. Yeah.

10 Q. After those charges were mentioned?

11 A. Yeah. He revoke everything soon as he heard that.

12 Q. As soon as he heard you had pending CSC charges, he
13 revoked everything?

14 A. Yeah.

15 Q. And did your attorney ever object or move for a
16 continuance based on the fact that they were seeking that
17 revocation?

18 A. No, he didn't.

19 Q. And is that something you would have wanted him to
20 do?

21 A. Yes.

22 Q. All right, Mr. Tucker, I think that's, that's just
23 about everything that we have discussed to go over, but
24 this is your one and only shot at a PCR hearing. So, if
25 there's anything else that you want to let the judge know

A. TUCKER - CROSS-EXAMINATION BY MR. CORNEY

11

1 about Mr. Kirincich's representation of you and the
2 problems that you had with him, I'd ask that you tell him
3 now. Was there anything else wrong?

4 A. He was ineffective. He was ineffective.

5 Q. How was he ineffective?

6 A. Because he didn't object to wait until the charge was
7 resolved.

8 Q. Could you repeat that again?

9 A. Because he couldn't -- he, he, he, he ain't objected.
10 He couldn't wait until the pending charge being resolved.

11 Q. He didn't object to the pending charges.

12 MR. THOMPSON: No further questions.

13 MR. CORNEY: Very brief, Your Honor.

14 CROSS-EXAMINATION BY MR. CORNEY:

15 Q. All right, in regard to these petit larceny charges,
16 you were arrested for those on December 22, 2009?

17 A. Yes.

18 Q. Okay, and you went to court for that in Camden, right,
19 for that charge?

20 A. Yeah.

21 Q. Yes. You appeared in court in Camden just before this
22 probation revocation hearing on that ---

23 A. No, no.

24 Q. --- petit larceny charge? You didn't? Okay. That
25 charge was ultimately dismissed, though, that petit

A. TUCKER - CROSS-EXAMINATION BY MR. CORNEY

12

1 larceny?

2 A. Yeah.

3 Q. Do you recall why it was dismissed?

4 A. The victim didn't show up.

5 Q. The victim didn't show up, okay, but you, you don't
6 contest that you did have five, six CSC charges pending
7 against you at the time of this revocation?

8 A. Yeah.

9 Q. Okay, and when your probation agent spoke at this
10 revocation hearing, he actually said there was a couple
11 reasons that he was terminating it. That you had violated
12 some other terms of your probation as well. Is that
13 correct?

14 A. Well, what they had said I did -- I locked up. I
15 couldn't violate it.

16 Q. Okay. What about, what about being near a playground,
17 in within proximity of a playground?

18 A. That, that's the same time. That the same thing, the
19 same time it happened.

20 Q. Okay. Well, being just in proximity of a playground,
21 that was against the terms of your probation, wasn't it?

22 A. No, it wasn't.

23 Q. And your probation agent said that that was a
24 violation at the revocation hearing?

25 A. That what he said.

A. TUCKER - CROSS-EXAMINATION BY MR. CORNEY.

13

1 Q. Okay, and I think your probation agent also said that
2 you have committed a bunch of violations in a very short
3 period of time, and he didn't think you were a good
4 candidate for probation, right?

5 A. That what he said.

6 Q. Okay. In fact, he said that when he had spoken with
7 you, you even agreed that you didn't think you were a good
8 candidate for ---

9 A. No, I didn't agree. He didn't give me a chance to say
10 nothing.

11 Q. All right. You had violated curfew, is that correct,
12 too?

13 A. No, I didn't.

14 Q. Two separate days, the 17th and the 22nd?

15 A. 22nd I got locked up. So, how could I violate
16 probation?

17 Q. Okay. On the 22nd you were locked up, and that's why
18 you violated. What about the 17th? You had violated your
19 curfew as a term of your probation at that time also,
20 hadn't you?

21 A. After -- yeah.

22 Q. Okay. So, there were, there were a couple other
23 potential violations of your probation other than just
24 these pending CSC charges?

25 A. He said always he violating me as -- for the petit

A. TUCKER - CROSS-EXAMINATION BY MR. CORNEY

14

1 larceny. I haven't been found guilty of the petit larceny.

2 Q. Okay. Do you remember your probation agent saying at
3 that hearing that he wasn't revoking your probation based
4 on this assault and battery of a high and aggravated nature
5 charge from the CSC? Do you remember him saying that?

6 A. No. No, I don't know that, no. Only thing I remember
7 him saying, that he violating me on a petit larceny. But
8 if I ain't been to court on petit larceny -- they say he
9 couldn't violate me. So, they, they went on with the case.

10 MR. CORNEY: Okay, and Your Honor, I'll just point the
11 court's attention to page 8. It's a very short transcript,
12 page 8, where the probation agent talks about not violating
13 him based on the CSC charges. That's all the questions I
14 have, Your Honor.

15 THE COURT: All right. Any else?

16 MR. THOMPSON: Nothing further, Your Honor.

17 THE COURT: All right, you can step down.

18 (THE WITNESS EXITS THE STAND.)

19 MR. THOMPSON: The applicant would call Jason
20 Kirincich.

21 JASON KIRINCICH, BEING DULY SWORN,

22 TESTIFIES AS FOLLOWS:

23 BAILIFF: If you'd state your name for the record

24 WITNESS: First name is Jason. Last name is

25 Kirincich. That's K-i-r-i-n-c-i-c-h.

1 DIRECT EXAMINATION BY MR. THOMPSON:

2 Q. How you doing this morning, Mr. Kirincich?

3 A. Doing well, thank you.

4 Q. Do you recall your representation of Mr. Tucker?

5 A. I do.

6 Q. And do you specifically have recollection of this
7 probation revocation?

8 A. I can't remember the exact conversation, but I do
9 remember the revocation hearing.

10 Q. And what were the, what were the main allegations for
11 why they were looking to revoke Mr. Tucker?

12 A. This time, this was in January for the December 22nd
13 -- I think that's when the warrant was issued. There was
14 loitering near a park. It was Boykin Park in Camden.
15 There was the petit larceny charge which was for a
16 laundromat which is directly across the street from Boykin
17 Park. I, I think that that may have been in this, and then
18 the two violations. I'm sorry, he was on GPS and he had
19 violated twice, one being the 17th, the other being the
20 22nd. The 22nd, I think I pointed out that he was in jail.
21 So, that shouldn't be held against him.

22 Q. And did the probation agent bring up the fact that he
23 was charged with multiple counts of criminal sexual conduct
24 during the hearing?

25 A. Yeah. At the end of the hearing, he did.

J. KIRINCICH - DIRECT EXAMINATION BY MR. THOMPSON

16

1 Q. And to the best of your knowledge, are those charges
2 still pending?

3 A. Those charges are still pending, yes.

4 Q. Do you know what happened with that petit larceny
5 charge? Did you ever get confirmation it was dismissed?

6 A. I remember Mr. Tucker, and I looked at the transcript
7 and, and what was sent to me regarding this PCR. I
8 remember Mr. Tucker told me he had been to court either the
9 day before or two days before.

10 We called the clerk of court for Camden. That's
11 Belinda Davis. She said she didn't have a record of him
12 going to court, and she said it was actually scheduled for
13 February. So, I remember that we, we followed up on Mr.
14 Tucker's story that he had been to court and it was
15 dismissed because the victim didn't show up.

16 Q. So, either it was dismissed, or it was still pending?

17 A. Correct.

18 Q. At the time of probation?

19 A. Correct.

20 Q. Did you consider objecting or moving for a continuance
21 based on the fact that the primary revocation was a CSC
22 charge -- I mean, the, the petit larceny charge?

23 A. No, I didn't.

24 Q. And did a number of the other charges, a number of
25 violations stem from the fact that he got arrested for

1 petit larceny?

2 A. You talking about the loitering?

3 Q. Yeah.

4 A. As well? I think that, that the loitering came about
5 because he was at the laundromat across the street for a
6 large amount of time that day. And I think I pointed out,
7 or at least tried to advocate that that shouldn't be held
8 against him because he was at a legitimate business. He
9 wasn't loitering near the park. And the GPS violation
10 obviously occurred because he was in custody.

11 Q. And when the, when the probation agent -- the
12 probation agent did say: I'm not trying to seek to revoke
13 him on the CSC charges. Right?

14 A. Right.

15 Q. But you didn't still -- did you consider objecting at
16 that point to introducing something so, I guess,
17 prejudicial in that he had been, he had been charged with
18 five more counts of criminal sexual conduct? Did you
19 consider objecting at that point to those charges being
20 brought up?

21 A. No. I think the truth of the matter is that Judge
22 Cooper already knew that he had those charges pending. And
23 I believe this, this warrant was filed, the violation
24 warrant was filed prior to him obtaining those charges.
25 Judge Cooper may have set bond that week on those charges.

J. KIRINCICH - CROSS-EXAMINATION BY MR. CORNEY

18

1 Q. But still you did not ask for an -- ask -- object or
2 ask for a continuance or anything along those lines to
3 continue the case?

4 A. No. At the time, the agent and I had talked to Mr.
5 Tucker and, you know, the agent said he was not going to
6 bring those up, and I, and I don't remember how the
7 conversation was, was -- got to that point where he did
8 bring them up. But, you know, he said I'm not using this
9 as a basis for the violation.

10 MR. THOMPSON: Beg the court's indulgence.

11 (A PAUSE.)

12 MR. THOMPSON: No further questions of this witness,
13 Your Honor.

14 MR. CORNEY: Very briefly, Your Honor.

15 CROSS-EXAMINATION MR. CORNEY:

16 Q. So, only one of the two curfew violations was
17 something you were able to try to explain away with the
18 judge based on his arrest?

19 A. The 22nd I didn't think was fair to Mr. Tucker because
20 he was in custody at the time.

21 Q. Okay, but there was still another one on the 17th that
22 was a violation that you really -- there was no basis to,
23 to offer any explanation for?

24 A. That's, that's right.

25 Q. Okay, and that would have been a violation of his

1 probation to, obviously, to go against his curfew?

2 A. That's right.

3 Q. Okay, and you said something about the GPS and him
4 being in the laundromat close to a park?

5 A. Right.

6 Q. All right, and that was a violation of his probation
7 as well I think you said a minute ago?

8 A. They, they charged him with loitering, or at least
9 that's what the language -- rather, it was loitering near a
10 park or a place where kids congregate. And I tried to
11 explain that Mr. Tucker was, was there at the laundromat,
12 which is across the street from the park, and being at a
13 business I didn't think was loitering.

14 Q. Okay. During your conversations with Mr. Tucker, were
15 you able to review the terms of his probation with him?

16 A. I think on this particular probation violation, we
17 were appointed in court. And it was something we handled,
18 if we got appointed that morning, we handled later that
19 morning or the afternoon.

20 I had time to check on his story, at least for the
21 petit larceny. But I had represented Mr. Tucker on a -- on
22 the prior violent where he was put on GPS. So, I've had a
23 longer conversation with him then about the terms of his
24 probation. And I also spoke with his sister at that time
25 regarding what was required of him.

J. KIRINCICH - CROSS-EXAMINATION BY MR. CORNEY

20

1 Q. Okay, and during your discussions with him in
2 preparation for this hearing, did he ever mention to you
3 that he didn't think he was a good candidate for probation,
4 or thought that maybe he wasn't going to succeed on
5 probation?

6 A. He did. Unfortunately, I think at some point -- I
7 mean, I think Mr. Tucker was probably targeted by
8 probation. He was given a violation the day after he was
9 released from jail, and, and this was his third violation
10 that he had had since October 1st. He agreed that he was
11 not going to make it on probation, and I think that's why
12 we had asked for a short revocation and a termination.

13 And all the violations and sentence were done in front
14 of Judge Cooper. So, Judge Cooper was very familiar with
15 him as well.

16 MR. CORNEY: That's all the questions I have, Your
17 Honor.

18 THE COURT: Anything else?

19 MR. THOMPSON: Nothing further, Your Honor.

20 THE COURT: All right, you may step down.

21 (THE WITNESS EXITS THE STAND.)

22 THE COURT: Any further witnesses?

23 MR. THOMPSON: No further witnesses, Your Honor.

24 RULING OF THE COURT:

25 THE COURT: All right. The court -- the lawyer

1 Kirincich represented Mr. Tucker properly, and the judge
2 acted appropriately in revoking his probation. There is no
3 evidence that the sole, primary basis for revoking
4 probation were pending charges. I deny the PCR.

5 MR. CORNEY: Thank you, Your Honor.

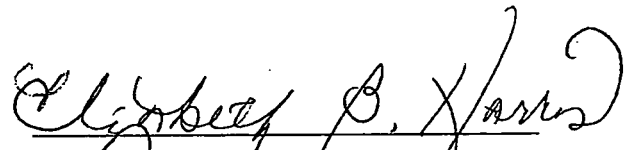
6 MR. THOMPSON: Thank you, Your Honor.

7 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR KERSHAW COUNTY, SOUTH CAROLINA, ON
THE 16TH DAY OF FEBRUARY, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.


ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

JUNE 21ST, 2012

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2010-CP-28-01189

Anthony Tucker, # 258678,

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

FILED FOR RECORD
2012 MAR 28 AM 11:15
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 28, 2010. The Respondent made its Return on February 8, 2011. An evidentiary hearing into the matter was convened on Thursday, February 16, 2012, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Jeremy Thompson, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's probation revocation counsel, Jason Kirincich, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Kershaw County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. The Applicant was indicted at the April 2007 term of the Kershaw

ew
1 of 6

ATTEST True, Correct & Certified
Copy of Original on File in this
Court.
Joyce McDonald
Clerk of Court Kershaw County

County Grand Jury for Assault and Battery of a High and Aggravated Nature (2007-GS-28-0424). On November 6, 2007, Applicant appeared before The Honorable G. Thomas Cooper at which time he pled guilty as indicted and was sentenced to ten (10) years imprisonment suspended to service of five (5) years and two (2) years probation. Applicant did not appeal the plea or sentence. On January 28, 2010, Applicant appeared before Judge Cooper again for a probation revocation hearing, at which time his probation was revoked in full.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1102(a) Applicant's Probation was violated because of an alleged criminal offense. However, trial counsel failed to object to Applicant's probation violation because Applicant was never convicted for the alleged criminal offense. EW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

A probationer has a right to counsel, though not a Sixth Amendment one. Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009). Nonetheless, "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." Id. at 455, 682 S.E.2d 794.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

Improper Probation Revocation Based On Additional Charges

Applicant alleges counsel was ineffective in failing to request a continuance pending the outcome of additional charges for which his probation was being revoked on. Applicant testified

at the time of this probation revocation, he was had five (5) pending Criminal Sexual Conduct charges against him that he had neither pled to nor been convicted of. Applicant alleges because these charges were merely pending against him at the time, they were improperly used as a violation sufficient to terminate his probation. Applicant conceded that he had once previously violated his probation for which he had gone through a hearing before.

Counsel testified at the PCR that he recalled representing Applicant on the probation revocation and stated he recalled the grounds for the termination to be several violations of the terms of Applicant's probation including loitering near a park, GPS violations and curfew violations. Counsel went on to say the notice of Applicant's violation was served prior to the Criminal Sexual Conduct warrants being issued on the pending charges and that they did not serve as a basis for the revocation. Counsel testified the probation agent did mention the Criminal Sexual Conduct charges at the revocation hearing after having said he would not, but noted it made no difference in the result of the hearing as Judge Cooper already knew about the charges pending against Applicant. Counsel stated he did not consider requesting a continuance to await the outcome of the pending charges.

Based on the testimony presented at the hearing in conjunction with a thorough review of the plea transcript, this Court finds Applicant failed to carry his burden in proving counsel was ineffective in this regard. Further, this Court finds counsel's testimony to be credible while finding Applicant's testimony to be wholly incredible. Applicant has mischaracterized the facts before this Court in alleging the basis for his revocation was the pending Criminal Sexual Conduct charges. In fact, according to the record, the probation agent specifically notes at the close of the hearing that the violation brought before the Court was not based on the pending charges, but rather several other areas in which Applicant had violated the terms of his probation

(i.e. curfew violation, loitering near a park, etc). Therefore, counsel had no reason to request a continuance and did not act deficiently in failing to do so. While counsel had grounds upon which he could have argued against one of the curfew violations, Applicant was still facing several other violations sufficient to revoke his probation. I find no deficiency in this regard.

Further, this Court finds Applicant has failed to prove resulting prejudice based on this alleged deficiency. The testimony before this Court shows the revocation judge was well aware of the pending charges prior to the probation agent's reference to such during the hearing, but in no way used those charges as the basis for Applicant's termination. Even if counsel had requested a continuance to await the outcome of the pending charges, it would not have changed the outcome of this hearing as this revocation was based on several other violations which Applicant cannot refute. Therefore, this Court finds Applicant also failed to prove he suffered prejudice as a result of counsel's alleged deficiency.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably

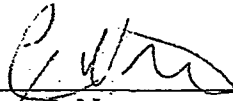
inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59; 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

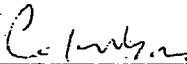
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27 day of March, 2012.


 Clifton B. Newman
 Presiding Judge
 Fifth Judicial Circuit

 South Carolina.

DOCKET NO. 2007-GS-28-0424

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

WITNESSES

Corey, CAPD

The State of South Carolina

County of Kershaw

Defendant:

COURT OF GENERAL SESSIONS

April TERM 2007

I hereby appear in my own proper person and plead guilty to the within indictment or to:

ARREST WARRANT NUMBER

1132792

THE STATE
vs.

Defendant

Witness:

C.C.C. PLS. AND G.S.

Anthony Vincent Tucker

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

APR 04 2007

VERDICT

Indictment for

ASSAULT AND BATTERY
OF A HIGH AND
AGGRAVATED NATURE

SC Code: 17-25-30 C/L

CDR Code: 0013

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Kershaw County

ATTEST True, Correct & Certified
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Court

[Signature]
Clerk of Court Kershaw County

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

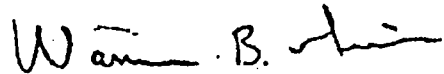
INDICTMENT

At a Court of General Sessions, convened on April 4, 2007, the Grand Jurors of Kershaw County present upon their oath:

ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE

That Anthony Vincent Tucker did in Kershaw County on or about February 7, 2007, commit an assault and battery upon the victim, Angel Bailey, constituting an unlawful act of violent injury to the person of the said victim, accompanied by circumstances of aggravation, all in violation of the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



WARREN B. GIESE, SOLICITOR