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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Daniel D. Hall, Circuit Court Judge

BOBBY GOODE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001484

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to ask the probation revocation judge to give Petitioner credit for 375 days served on electronic monitoring between the time he was released from prison on probation and the time his probation was revoked?

STATEMENT

In March of 2015, the Spartanburg County Grand Jury indicted Petitioner, Bobby Dewayne Goode, for criminal sexual conduct with a minor, third degree. (App. pp. 16-17). On December 15, 2015, Petitioner appeared before the Honorable J. Derham Cole and pled guilty as indicted. Michael Sarratt represented Petitioner at the plea. Megan Moricle prosecuted the case. Judge Cole sentenced Petitioner to fifteen years provided upon the service of ten years the balance suspended with five years of probation. (App. p. 18).

On September 10, 2021, a probation revocation hearing was held before the Honorable J. Mark Hayes. Brendan Delaney represented Petitioner at the revocation hearing. Judge Hayes revoked the probation in full. (App. p. 23). On March 11, 2022, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 25-34). The State filed a return and partial motion to dismiss on June 28, 2022. (App. pp. 35-44). On August 9, 2022, an evidentiary hearing was held before the Honorable Daniel D. Hall. Rodney W. Richey represented Petitioner at the PCR hearing. Chelsey F. Marto represented the State. In a written order signed October 14, 2022, Judge Hall denied relief and dismissed the application. (App. pp. 54-59). A timely notice of intent to appeal was served on October 19, 2022. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to ask the probation revocation judge to give Petitioner credit for 375 days served on electronic monitoring between the time he was released from prison on probation and the time his probation was revoked.

It appears that upon release from prison on probation Petitioner was placed on electronic monitoring as required by S.C. Code §23-3-540(A). (App. p. 18). S.C. Code § 23-3-540(A) provides:

> Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

In the PCR application Petitioner wrote, "The Applicant respectfully moves this court to add 375 days of sentencing credit for electronic monitoring of house arrest that the revocation judge the Honorable Mark Hayes did not apply at Applicant's revocation hearing for probation violation and sentencing." (App. p. 32). Counsel who represented Petitioner at the revocation hearing failed to ask the judge to give credit for the 375 days of electronic monitoring. S.C. Code §24-13-40 provides that credit "may be given for any time spent under monitored house arrest."

During the PCR hearing Petitioner alleged that counsel was ineffective for failing to ask for credit for 375 days served on electronic monitoring. (App. p. 48, lines 12-25). The lawyer who represented Petitioner at the revocation hearing testified at the PCR hearing that he recalled that Petitioner was on electronic monitoring at the time of the revocation hearing. (App. p. 50, lines 10-14). Counsel testified that credit for electronic monitoring was discretionary but

admitted that he never asked the judge to give Petitioner credit for that time. (App. p. 50, lines 17-22). When asked if it was typical to receive credit for time served on electronic monitoring counsel testified, "I have found that more times than not folks in his position will get that credit." (App. p. 50, line 25 – p. 51, line 1). When asked on cross examination if the revocation judge found that Petitioner was not entitled to credit for time served on GPS monitoring, counsel testified, "Well, I guess I've more implied it. I don't know if there's necessarily anything in the official record. Obviously, on the sentencing sheet that the judge fills out, he did not give him the credit. So I hate that, but it happens." (App. p. 51, lines 17-20). The judge never had an opportunity to give Petitioner credit for the time served on electronic monitoring because counsel never asked for it.

In the order of dismissal the PCR judge wrote:

> This Court finds Counsel was not ineffective on this ground. The Court was not required to give Applicant credit for time spent on GPS monitoring. *See* S.C. Code Ann. § 24-13-40 (2013)(rendering credit for time spent on monitoring discretionary). Additionally, this Court finds that the GPS monitoring was a collateral consequence of the underlying criminal infraction, not a term of release specifically. Additionally, this Court finds Counsel did not act unreasonably in failing to request this time, or that a different outcome would have resulted had Counsel made the request. Accordingly, relief is denied on this ground.

(App. pp. 58-59). The PCR judge erred. Counsel was ineffective in failing to ask the judge to give Petitioner credit for 375 days served on electronic monitoring. There is a reasonable probability that if counsel had requested credit, the judge would have given Petitioner credit for time served on electronic monitoring.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117,

386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Counsel failed to ask the judge to give Petitioner credit for the 375 days Petitioner served on electronic monitoring. Under an objective standard of reasonableness, counsel's representation was deficient. Petitioner was prejudiced by counsel's deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. While credit for time served on electronic monitoring is discretionary, counsel testified that more times than not, credit is given. Petitioner is entitled to a new revocation hearing so that credit can be requested.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2023.