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STATE OF SOUTH CAROLINA

Jul 19 2023

IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable Daniel D. Hall, Circuit Court Judge

HAROLD JONES, III,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000152

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that counsel was not ineffective for failing to secure a continuance where counsel failed to adequately argue that a continuance was necessary for Petitioner to avoid serving consecutive sentences on his state and federal charges?

STATEMENT OF THE CASE

Petitioner was indicted during the March 2018 term of the Spartanburg County grand jury for one count each of driving under suspension, failure to stop for a blue light, reckless driving, domestic violence of a high and aggravated nature, and possession of a weapon during the commission of a violent crime. App. 34-41. The charges arose from an incident that occurred on March 5, 2018, when Tina Gary (Gary) called 911 to report that she and her boyfriend, Petitioner, had gotten into a fight during which he had pulled out a knife and threatened to kill her. Gary had a mark on her arm and provided a recording of the argument between herself and Petitioner to law enforcement. As police had arrived on scene, they noted a black Chevy Tahoe leaving the apartment complex which was being driven by Petitioner. Officers followed Petitioner who did not stop when signaled with a blue light. After a chase, Petitioner was arrested and found to be driving on a suspended license. App. 25, l. 22-App. 26, l. 19.

Petitioner was also indicted during the May 2018 for one count each of distribution of cocaine, distribution of cocaine within one-half mile of a school or park, and possession of cocaine base. App. 42-47. The two distribution charges arose from a controlled drug buy that was conducted by Investigator Joya on August 22, 2017. Joya employed a confidential informant who met with Petitioner and exchanged recorded funds for cocaine. The controlled drug buy occurred within one-half mile of Hillandale Park. The possession of cocaine base charge arose from a traffic stop that occurred on November 15, 2017. Investigator Lachika observed a vehicle with no tags following too closely, the driver of the vehicle was Petitioner. Petitioner did not have a driver's license and during a search incident to his arrest Lachika found cocaine base on his person. App. 27, ll. 4-25.

On October 31, 2018, Petitioner appeared with his public defender, Suzanne White, before the Honorable Grace Gilchrist Knie to enter a guilty plea to the charges as indicted. The State was represented by Barry Barnette and Sydni Kallam. App. 1. Pursuant to a negotiated¹ plea agreement, Petitioner would receive the maximum sentence on each offense suspended to seven months incarceration with credit for time served and three years of probation. Additional terms of the plea agreement included dismissal of the weapons charge, a permanent restraining order barring any contact by Petitioner with Gary, and a STROPFA² order. App. 15, ll. 20-App. 17, l. 7; App. 55-57. Judge Knie accepted Petitioner's guilty plea and sentenced him to an aggregate sentence of fifteen years incarceration suspended upon the terms of the plea negotiations with special conditions of probation being that Petitioner abide by the DV probation rules, submit to random drug and alcohol testing, and attend substance abuse counseling. App. 30, l. 4-App. 31, l. 3; App. 48-54.

A probation violation hearing was held via WebEx on September 11, 2020, before the Honorable R. Keith Kelly. The State was represented by Barry Barnette and Petitioner was represented by retained counsel Jimmy Hatcher. App. 58; App. 60, ll. 13-16. After being placed under oath, the circuit court asked Petitioner "[i]s it true what they say about you violating your probation?" to which Petitioner responded "[y]es, sir." App. 60, ll. 20-22. Counsel Hatcher then informed the circuit court that he was requesting a continuance of the probation revocation hearing. He informed the court that Petitioner had been arrested by the State in July 2019 for weapons charges, but the case had been taken over by the federal government and was now

¹ An affidavit not to prosecute signed by Gary was the reason for the plea negotiations. A copy of the affidavit was entered at the plea as Court's Exhibit 1. App. 16, ll. 26-19; App. 33.

² STROPFA is a shorthand reference to S.C. Code Ann. § 16-25-30 which states that it is unlawful for a person convicted of DVHAN to Ship, Transport, Receive or Possess a Firearm or Ammunition.

pending in federal court. He argued that the “meat of the violation” was the arrest for the now federal weapons charges, that Petitioner had pled not guilty to those charges, and that the probation matter should be continued until the federal prosecution was concluded. App. 61, ll. 1-25.

Petitioner’s probation agent responded that Petitioner had been on probation “quite a few times before” and knew the conditions he had to follow. He stated Petitioner had four previous violations prior to the July 2019 arrest and that five probation violation warrants had been issued on Petitioner for various reasons ranging from “victim contact to new DV,” failure to report, and failure to come to court. The probation agent requested that the court proceed and fully revoke Petitioner’s probation. App. 62, ll. 1-17. Solicitor Barnette then interjected to inform the court that the “federal thing was continued based off this probation hearing” and explained that the DV charges were dismissed because Gary had died from reasons unrelated to the case. He stated that the State charges had not yet been dismissed and that bench warrants had issued because Petitioner had not come to court, so the cases were currently in failure to appear status. Solicitor Barnette stated that Petitioner had obviously violated his probation and requested the court move forward with the revocation. App. 62, l. 23-App. 64, l. 6.

Counsel Hatcher replied that the bulk of the violations surrounded the weapons charges Petitioner was facing, that he had maintained his innocence on those charges, and that while “we may all be in agreement that Harold’s a bad person, I do think that the process should be respected here and that Harold should have his day in court” on the federal weapons charges. Counsel Hatcher clarified that the only delay at the federal level was the arraignment, that he did not believe Petitioner would be granted a bond on the federal charges and that he would remain in custody. He again requested that matter be continued. App. 64, l. 9-App. 65, l. 1. The circuit

court found that Petitioner had violated his probation, had admitted to violating his probation, had failed to come to court, and had bench warrants issued. Therefore, the court was revoking his probation in full. App. 65, ll. 2-5; App. 67-71.

Petitioner filed a notice of appeal which was dismissed on February 8, 2021, for failure to comply with Rule 203, SCACR. Petitioner timely filed a PCR application on May 8, 2021. App. 72-79. The State filed a return and motion for a more definite statement on May 31, 2022. App. 80-90. The State then filed an amended return and partial motion to dismiss on June 24, 2022, arguing that any allegations against plea counsel were untimely and Petitioner should only be allowed to proceed on ineffective assistance claims against Probation Counsel Hatcher. App. 91-99. PCR Counsel Susannah Ross filed an amended PCR application alleging ineffective assistance of probation counsel for failing to contact Petitioner's federal lawyer and inform them of the probation hearing, failure to prepare for the hearing and failure to obtain a continuance as promised, failure to object to references to allegations that were not convictions, and failure to argue the violation was 85%. App. 100, App. 104, l. 21-App. 106, l. 5.

On August 9, 2022, the parties convened before the Honorable Daniel D. Hall for an evidentiary hearing. The State was represented by Chelsea Marto and Petitioner was represented by Counsel Ross. App. 101. Petitioner testified that his federal lawyer, Erica Soderdahl, had told him to have his probation revocation counsel contact her so that she could appear at the probation hearing to assist in getting that matter continued. He testified that Counsel Hatcher did not contact Soderdahl. Petitioner testified that Counsel Hatcher told him if he hired him, he would get the case continued. App. 106, l. 15-App. 107, l. 12. Petitioner stated his federal charges were still pending and he could not be released to the Bureau of Prisons to start serving any federal time until he completed his fifteen-year sentence from his state level probation

violation. App. 108, l. 8-App. 109, l. 8. On cross-examination, he confirmed that his main complaint was that Counsel Hatcher had failed to secure the continuance of the probation matter after saying he would get the case continued. App. 109, l. 25-App. 110, l. 16.

Counsel Hatcher testified that prior to the probation hearing he discussed the case with Petitioner and Petitioner's primary concern was the pending federal charges. He admitted that it would have benefited Petitioner to have the case continued until the federal matter was resolved. He testified that he promised Petitioner he would try to get the case continued but that Judge Kelly denied the request. He maintained that he spoke with Petitioner's federal lawyer over the phone, and she explained where things stood with Petitioner's federal case. Both agreed it would be best to have the probation matter continued. He spoke with her after Petitioner's probation was revoked and she asked him if he would approach the solicitor about working out an arrangement that would allow Petitioner to serve his time in federal custody, but the solicitor declined to accommodate the request. App. 113, l.7-App. 115, l. 11.

An order of dismissal was filed on January 3, 2023. App. 118-127. The PCR court found Petitioner's allegations against Counsel Hatcher were without merit. Regarding the continuance, the court ruled that Counsel Hatcher was not ineffective because he had requested a continuance, but it was denied by the judge. Further, the PCR court ruled that Petitioner had failed to show what more Counsel Hatcher could have done to secure the continuance or how securing the continuance would have impacted the results of the proceedings. App. 124.

ARGUMENT

The PCR court erred in finding that counsel was not ineffective for failing to secure a continuance where counsel failed to adequately argue that a continuance was necessary for Petitioner to avoid serving consecutive sentences on his state and federal charges.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). A probationer's right to counsel does not arise under the Sixth Amendment but is derived from court rules and case law. See Rule 602(a), SCACR; Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009). Accordingly, because a probationer has a right to counsel under state law, claims of ineffective assistance of probation counsel are analyzed under the framework set forth in Strickland v. Washington. Turner at 455-456, 682 S.E.2d at 794.

Pursuant to Strickland, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry at 117-118, 386 S.E.2d at 625 (1989) (quoting Strickland, 466 U.S. at 688).

Counsel Hatcher provided deficient performance by not adequately arguing the motion for continuance to the circuit court. At no point during the brief probation revocation hearing did

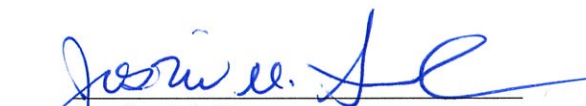
Counsel Hatcher argue that failing to continue the revocation hearing would subject Petitioner to lengthy consecutive sentences because he would not receive credit for any federal sentence while serving time in state custody. This was not reasonable under prevailing professional norms as the main reason to continue the probation revocation hearing was so that Petitioner could be sentenced on the federal charges prior to being revoked by the state court. Counsel Hatcher was also deficient for failing to ensure that Petitioner's federal public defender appeared at the revocation hearing to emphasize the necessity of continuing the case until the federal charges were resolved.

Petitioner was prejudiced by this performance because he is now subject to lengthy consecutive sentences. His federal sentence will not begin to run until he is finished with his state sentence and can be transferred to federal custody. Currently, Petitioner is scheduled to be released from SCDC in 2033 at which point he would presumably be taken into federal custody to serve the ten-year sentence³ on the federal charges. See Larios v. Madigan, 299 F.2d 98, 99-100 (9th Cir.1962) (holding that the prisoner's federal sentence commenced, at the earliest, when he was finally released by state authorities and physically delivered to federal officials to await transportation to the federal facility where he was to serve his federal sentence). By failing to secure a continuance, Petitioner will now serve over twenty years between the state and federal prison sentences and will also be subjected to supervised release by both the state and federal government. If the probation matter had been continued and the federal charges resolved first, he could have served time on both sentences while in federal custody. Counsel Hatcher's failure to secure the continuance was ineffective assistance of counsel.

³ Petitioner appears to have pled guilty in federal court. He was sentenced to 120 months followed by five years of supervised release. USA v. Jones, 7:19CR00935

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on this issue.


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of July, 2023.

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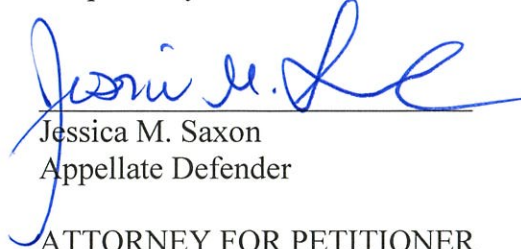
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Harold Jones 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 Daniel D. Hall, which was held on August 9, 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 Harold Jones.

Respectfully Submitted,



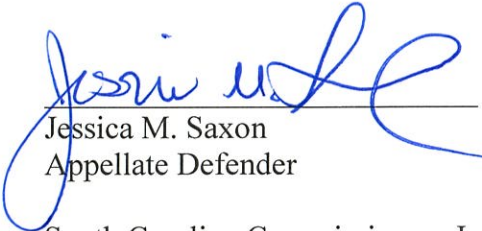
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of July, 2023.

CERTIFICATE OF COUNSEL

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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This 19th day of July, 2023.