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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
Hon. Daniel D. Hall, Circuit Court Judge
Appellate Case No. 2022-001484

Bobby Goode, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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STATEMENT OF QUESTIONS PRESENTED

I. The PCR Court correctly concluded revocation counsel was not ineffective for failing to request credit for time Petitioner spent on electronic monitoring. First, there is no indication he was under house arrest and, as a result, he cannot qualify for credit for time served because it is only allowed in the discretion of the court for "monitored house arrest" under section 24-13-40 of the South Carolina Code. Further, he was not released on monitored house arrest while awaiting determination of his probation revocation, any monitoring was as a collateral result of his initial conviction, and so it would not qualify in the calculation of time on the new sentence related to his probation revocation.

STATEMENT OF THE CASE

Procedural History

In March 2015, Petitioner was indicted for criminal sexual conduct with a minor in the third degree. (App.16-17). He pled guilty in December 2015 as charged and was sentenced to fifteen years in prison, suspended upon service of ten years in prison and five years' probation. (App.18). After being released on probation, a probation revocation hearing was held before the Honorable J. Mark Hayes on September 10, 2021. After Petitioner tested positive for methamphetamines and the court found other violations, the court revoked his sentence in full. (App.12-13).

On March 11, 2022, Petitioner filed an application for post-conviction relief. (App. pp. 25-34). On August 9, 2022, an evidentiary hearing was held before the Honorable Daniel D. Hall. 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.

ARGUMENT

I. **The PCR Court correctly concluded revocation counsel was not ineffective for failing to request credit for time Petitioner spent on electronic monitoring. First, there is no indication he was under house arrest and, as a result, he cannot qualify for credit for time served because it is only allowed in the discretion of the court for "monitored house arrest" under section 24-13-40 of the South Carolina Code. Further, he was not released on monitored house arrest while awaiting determination of his probation revocation, any monitoring was as a collateral result of his initial conviction and so it would not qualify in the calculation of time on the new sentence related to his probation revocation.**

The PCR Court correctly found revocation counsel was not ineffective for failing to request Petitioner receive credit for time served for the period of time he was on electronic monitoring while out on probation prior to his revocation hearing. Counsel could not have been deficient because Petitioner was not entitled to receive credit for the time he spent on electronic monitoring while out on probation prior to having his probation revoked because he was not under "monitored house arrest" and was not entitled to receive credit for the time related to the collateral consequence of his original conviction when he was not on monitored house arrest while awaiting his probation revocation.

Standard of Review

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the

PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter *de novo* and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Standard Applicable to Ineffective Assistance of Trial Counsel

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.").

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990)

(characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining "the rules governing ineffective-assistance claims must be applied with scrupulous care" (citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689.

Ineffective Assistance of Counsel for Failing to Seek Credit for Electronic Monitoring

Counsel could not have been deficient for failing to ask for credit for the period of time Petitioner was on electronic monitoring as part of his probation under section 23-3-540 of the South Carolina Code, because Petitioner was not entitled to credit for the time under section 24-13-40 of the South Carolina Code because there is no evidence he was under "monitored **house arrest**" nor could he obtain credit for the time he was on probation from his original conviction and not awaiting consideration of the revocation of his probation.

Most significant, there is no evidence presented to the PCR court that Petitioner was on "monitored **house arrest**" while on probation. The only indication is that he was on electronic monitoring pursuant to section 23-3-540 as a result of his conviction for CSCM 3rd degree. Nothing in the statute requires Petitioner be confined to house arrest. While there is no doubt he was being monitored through electronic monitoring, that is not enough under the statute to be entitled to consideration by the sentencing judge for credit. The individual must be on "monitored **house arrest**" and Petitioner simply failed to provide any evidence he was on house arrest while being monitored. Because he was not on "monitored house arrest" the revocation court did not have authority to consider the time for credit and counsel could not have been deficient for failing to ask for something it was impossible for Petitioner to obtain.

Additionally, Petitioner was not entitled to credit for any time because he was not on "monitored house arrest" as a result of his release pending his revocation. Instead, as the PCR court found, he was on electronic monitoring as a collateral consequence of his prior conviction for CSCM 3rd degree. As noted by Blakeney v. State, 339 S.C. 86, 88, 529 S.E.2d 9, 10–11 (2000) and Crooks v. State, 326 S.C. 171, 485 S.E.2d 374 (1997), Petitioner would only be entitled to credit for the time he was in pre-trial confinement or on ordered "monitored home

arrest" prior to his probation revocation after he was served with the warrants. As he was never ordered to "monitored home arrest" as a condition of release prior to his probation revocation hearing, he is not entitled to any credit for time served even if his monitoring that occurred pursuant to section 23-3-540 required him to also be on home arrest.

Accordingly, because Petitioner could never be entitled to credit for time served while on probation under electronic monitoring, revocation counsel could not have been deficient—much less ineffective—for failing to request consideration of credit Petitioner could not receive.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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August 7, 2023