

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

JUSTIN TYLER YOUNG,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2023-001577

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The post-conviction relief judge correctly granted relief and ordered a new probation revocation hearing based on ineffective assistance of probation counsel for failing to clarify for the probation judge that the original sentences were ordered to be served concurrently and failing to argue that any probation revocation should be limited to the five years remaining on the suspended twenty-year sentence for burglary first, for which Respondent completed an active fifteen-year sentence, instead of an additional full fifteen year sentence on the other concurrent charges.6

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief judge reversibly err by finding – in a legally erroneous manner and without factual support -- probation counsel was constitutionally ineffective for failing to clarify to the probation revocation judge that Young would receive a fifteen-year term of imprisonment if his probation was revoked in full when the record conclusively demonstrated the probation revocation judge was indeed fully aware of that fact and expressly intended to require Young to serve a fifteen-year term of imprisonment for violating his probation, which mean Young could not have been prejudiced by the purported deficiency under the circumstances involved?

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief judge correctly grant relief and order a new probation revocation hearing based on ineffective assistance of probation counsel for failing to clarify for the probation judge that the original sentences were ordered to be served concurrently and failing to argue that any probation revocation should be limited to the five years remaining on the suspended twenty-year sentence for burglary first, for which Respondent completed an active fifteen-year sentence, instead of an additional full fifteen year sentence on the other concurrent charges?

STATEMENT OF THE CASE

In June of 2006, the Spartanburg County Grand Jury indicted Respondent, Justin Tyler Young, for burglary first degree, three counts of armed robbery and grand larceny, indictments #06-GS-42-2059, 2060, 2061, 2062. (App'x pp. 1-10). On May 7, 2007, Respondent appeared before the Honorable J. Cordell Maddox, Jr. and pled guilty as charged.¹ On the burglary charge Judge Maddox sentenced Respondent to twenty (20) years provided that upon the service of fifteen (15) years the balance is suspended with probation for five (5) years. (App'x p. 13). On the armed robbery charges Judge Maddox sentenced Respondent to fifteen (15) years suspended with probation for five (5) years. (App'x pp. 11, 12, 15). On the grand larceny charge Judge Maddox sentenced Respondent to ten (10) years suspended with probation for five (5) years. (App'x p. 14). Judge Maddox ordered that all sentences were to be served concurrently.

Respondent served eighty-five (85%) percent of the active fifteen-year sentence for burglary and was released from the Department of Corrections. In May of 2020, and February of 2021, arrest warrants were obtained for Respondent for violation of community supervision for the burglary indictment and violation of probation for the other indictments. (App.'x pp. 22-29). On October 18, 2021, Respondent appeared before the Honorable Steven H. John for a probation revocation hearing. Scott A. Graustein represented Respondent at the hearing. At the end of the brief hearing Judge John stated, "What – obviously, this gentleman is not a good candidate for probation. What we're going to do is revoke the rest of the sentence, terminate the case, turn any amounts owed to a civil judgment and recommend ATU." (App'x p. 33, line 25 – p. 34, lines 1-3). Judge John did not address community supervision during the hearing. Judge John signed written orders requiring the service of an additional fifteen (15) years concurrent for the armed

¹ The transcript of the guilty plea hearing is not included in the Appendix prepared by Petitioner and is presumably no longer available.

robbery charges, and ten (10) years concurrent for the grand larceny charge. (App'x pp. 36-39). Although not addressed at the hearing, Judge John signed a continuation order for community supervision on the burglary charge that carried a sentence of twenty (20) years provided that upon the service of fifteen (15) years the balance is suspended with probation for five (5) years. (App'x p. 40). Respondent did not file a notice of intent to appeal².

In July of 2022, Respondent filed an application for post-conviction relief [PCR]. (App'x pp 41-47). The State filed a return on October 12, 2022. (App'x pp. 48-53). On November 28, 2022, an evidentiary hearing was held before the Honorable H. Steven DeBerry, IV. (App'x pp. 54-93). Steven Fowler represented Respondent. Chelsey Marto represented the State. In a written order signed July 12, 2023, Judge DeBerry granted relief in the form of a new probation revocation hearing. (App'x p. 94). The State filed a motion to alter or amend on July 27, 2023. (App'x pp. 95-109). Judge DeBerry denied the motion in a written order signed August 31, 2023. On October 12, 2023, the State filed a petition for writ of certiorari. This return follows.

² The harsh nature of the revocation sentence that in effect changed the plea judge's sentences from concurrent to consecutive constitutes an extraordinary circumstance requiring probation counsel to file a motion to reconsider and then a notice of intent to appeal. See Turner v. State, 384 S.C. 451, 456–57, 682 S.E.2d 792, 795 (2009) (We hold that probation counsel is not required to inform a probationer of his right to an appeal absent extraordinary circumstances.). This allegation of ineffective assistance of counsel was not addressed at the PCR hearing.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

REASON WHY CERTIORARI SHOULD BE DENIED

This Court should deny the petition for writ of certiorari because there is evidence in the record to support the PCR judge's finding that probation counsel was ineffective. Probation counsel failed to clarify for the probation judge that the original sentences were ordered to be served concurrently with active time only imposed on the burglary charge and failed to argue that any revocation was limited to the five (5) years remaining on the sentence for burglary first for which Respondent received a sentence of twenty (20) years provided that upon the service of fifteen (15) years the balance is suspended with probation for five (5) years. The sentencing judge clearly indicated on the sentencing sheets that the suspended sentences were to be served concurrently. (App'x pp. 11-15). As a result of probation counsel's deficient performance, the original sentences were changed from concurrent sentences to consecutive sentences. Respondent is entitled to a new revocation hearing.

ARGUMENT

The post-conviction relief judge correctly granted relief and ordered a new probation revocation hearing based on ineffective assistance of probation counsel for failing to clarify for the probation judge that the original sentences were ordered to be served concurrently and failing to argue that any probation revocation should be limited to the five years remaining on the suspended twenty-year sentence for burglary first, for which Respondent completed an active fifteen-year sentence, instead of an additional full fifteen year sentence on the other concurrent charges.

Guilty Plea

On May 7, 2007, Respondent pled guilty to burglary first degree, three counts of armed robbery and grand larceny. The sentencing judge sentenced Respondent to twenty (20) years provided that upon the service of fifteen (15) years the balance is suspended with probation for five (5) years. (App'x p. 13). On the armed robbery the judge sentenced Respondent to fifteen (15) years suspended with probation for five (5) years. (App'x pp. 11, 12, 15). On the grand larceny charge the judge sentenced Respondent to ten (10) years suspended with probation for five (5) years. (App'x p. 14). Respondent was given credit for fourteen (14) months of time served on each charge. Importantly, the sentencing judge clearly indicated on the sentencing sheets that the suspended sentences were to be served concurrently. (App'x pp. 11-15).

Revocation Hearing

Respondent completed eighty-five percent (85%) of the active fifteen (15) year sentence for burglary and was released on probation on all five charges in addition to community supervision for the burglary charge. A revocation hearing was held on October 18, 2021. (App'x pp. 30-35). The agent advised the probation judge of the original charges and sentences. (App'x p. 32, lines 3-14). The agent did not advise the probation judge that the sentences were ordered to be served concurrently.

At the revocation hearing Respondent admitted to violating the terms of his probation for a conviction in Florida in November 2020, for possession of drug paraphernalia and trespass for which Respondent received a time-served sentence of thirteen (13) days. (App’x pp. 32-33). Respondent also admitted to drug arrests in Atlanta in March of 2021. (App’x pp. 32-33). Counsel for Respondent told the judge, “And, Your Honor, he has asked that I request that his - - the Court consider continuing him on probation with a special condition of - - for drug and alcohol treatment. And more, and if the Court deems it necessary to violate him for a shorter, less than full revocation, I would ask that his probation be continued to - - in order for him to get the treatment he obviously needs.” (App’x p. 33, lines 17-23). Counsel failed to advise the probation judge that the original sentences were ordered to be served concurrently. Counsel failed to argue that any probation revocation should be limited to the five years remaining on the suspended twenty-year sentence for burglary first. Counsel made no mention of community supervision.

At the end of the brief hearing the judge stated, “What – obviously, this gentleman is not a good candidate for probation. What we’re going to do is revoke the rest of the sentence, terminate the case, turn any amounts owed to a civil judgment and recommend ATU.” (App’x p. 33, line 25 – p. 34, lines 1-3). The judge did not address community supervision during the hearing. The judge signed written orders requiring the service of an additional fifteen (15) years concurrent for the armed robbery charges, and ten (10) years concurrent for the grand larceny charge. (App’x pp. 36-39). Although not addressed by the judge or counsel for Respondent at the hearing, the judge signed a continuation order for community supervision on the burglary charge that carried a sentence of twenty (20) years provided that upon the service of fifteen (15) years the balance is suspended with probation for five (5) years. (App’x p. 40).

PCR Hearing

During the PCR hearing Respondent testified, “So my public defender was telling me on the phone that, you know, you could be facing the remainder of the 20-year sentence, which he said was seven years. I remember specifically he said seven, when actually it should have been 85 percent of five years, because I served 85 percent of 15. So the remainder of the sentence would have been five years, 85 percent.” (App’x p. 62, lines 14-21). When Respondent arrived at the reception and evaluation center at Kirkland Correctional, after the revocation hearing, he learned that his max-out date was in the year 2034. (App’x p. 63, lines 7-9). The records from the South Carolina Department of Corrections show a projected max out date of March 11, 2034. (App’x p. 16). The projected max out date of 2034, appears to reflect service of 85% of the fifteen (15) year suspended sentences for armed robbery. Although all of the sentences were ordered to be served concurrently at the original sentencing hearing, this fifteen (15) year active sentence on the armed robbery revocations is in addition to the fifteen (15) year active sentence Respondent served on the burglary charge. The original sentences have been unlawfully converted from concurrent sentences to consecutive sentences.

Probation counsel testified at the PCR hearing that he learned about Respondent’s probation case the morning of the revocation hearing. (App’x p. 83, lines 13-22). Counsel candidly testified that he did not have time to talk with Respondent, that Respondent was at the J. Reuben Long Detention Center and counsel was at the courthouse so they spoke by phone. (App’x p. 87, lines 7-14). When asked what he understood the sentence to be, probation counsel testified, “My understanding at the time – because all I was provided at the time was the probation violation report, and I discussed this with Mr. Young, that he had received a 20-year sentence, suspended to 15 years, and then five years probation on a burglary charge. We

discussed that. I believed at the time that the 15-year sentences all ran concurrent, so at the time I was thinking that the 15 years he did would apply to all of the sentences.” (App’x p. 83, line 1 – p. 84, lines 1-9). Probation counsel, however, never argued this to the judge. Probation counsel testified, “In complete candor with the Court, I didn’t see as far as the sentences and that he might have 15 years. I did not bring that up to the Court, and if I had noticed that, I most certainly would have mentioned it to the judge in mitigation . . .” (App’x p. 87, line 23 -p. 88, lines 1-2). When asked if the judge was aware of “it,” presumably referring to the concurrent sentences, probation counsel testified, “He did not bring it up, and I don’t want to go into what his thinking was, but in my notes, I said that he violated him for the remainder of the sentence.” (App’x p. 89, lines 5-8). Probation counsel failed to argue that the remainder of the sentence should only be the remainder of the suspended portion of the burglary sentence.

PCR counsel asked, “And that, perhaps, would be different if you had mentioned the proper credits and the 15 years already served, correct?” (App’x p. 89, lines 9-11). Probation counsel answered, “I think I should have brought it up, because I think it would have affected, to some degree, what his violation sentence would have been.” (App’x p. 89, lines 12-14). Probation counsel was ineffective for failing to clarify for the probation judge that the original sentences were concurrent and failing to argue that any probation revocation should be limited to the five years remaining on the suspended twenty-year sentence for burglary first.

Order Granting Relief in the Form of a New Revocation Hearing

In the order granting relief and ordering a new revocation hearing the PCR judge wrote, “In the underlying probation hearing, Graustein [probation counsel] failed to make clear to the presiding Judge that the Applicant would receive an active sentence of 15 years in the South Carolina Department of Corrections (hereinafter “SCDC”) if Applicant’s probation was

revoked.” (App’x p. 94). There is evidence in the record to support the finding by the PCR judge. Neither the agent present at the revocation nor probation counsel advised the probation judge that the original sentences were concurrent. The probation judge never clearly stated on the record that he intended to revoke the full fifteen years on the armed robbery charges. Instead, he stated, “What we’re going to do is revoke the rest of the sentence, terminate the case, turn any amounts owed to a civil judgment and recommend ATU.” (App’x p. 33, line 25 – p. 34, lines 1-3). A reasonable reading of the judge’s statement is that by “revoke the rest of the sentence” he meant the remaining sentence on the burglary charge. Signing the orders revoking probation and continuing community supervision does not clarify the probation judge’s intention, especially when he never mentioned concurrent or consecutive sentences and never mentioned community supervision during the hearing. Respondent was prejudiced by counsel’s deficient performance because the revocation structure unlawfully converted the original sentences from concurrent to consecutive.

Ineffective Assistance of Probation Counsel

In Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009), the South Carolina Supreme Court wrote, “We now hold that because a probationer has a right to counsel, albeit not a Sixth Amendment right, 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.” 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

proper 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.

The PCR judge correctly found that probation counsel was ineffective in failing to make clear to the probation judge that Respondent would receive an additional active sentence of 15 years if Applicant's probation was revoked. (App'x p. 94). Probation counsel was ineffective in failing to advise the probation judge that the original sentences were concurrent and failing to argue that any probation revocation should be limited to the five years remaining on the suspended twenty-year sentence for burglary first. Probation counsel testified that he believed the fifteen years served on the burglary charge would apply to all of the charges. (App'x p. 83, line 1 – p. 84, lines 1-9). Probation counsel, however, failed to argue this to the probation judge. Probation counsel admitted that he should have made the judge aware of the fifteen years already served. (App'x p. 89, lines 9-14). The PCR judge correctly found ineffective assistance of probation counsel.

Prejudice

The PCR judge correctly found that Respondent was prejudiced by probation counsel's deficient performance. As a result of probation counsel's failure to clarify exposure based on the concurrent nature of the original sentences and argue that exposure was limited to the five years remaining on the burglary sentence, Respondent's sentences were illegally converted from

concurrent sentences to consecutive sentences. Consecutive sentences were not the intent of the original sentencing judge who clearly ordered the sentences to run concurrently. (App'x pp. 11-15). The probation judge would not have checked the box on the revocation orders and filled in the fifteen years of "initial SCDC time" served on the burglary charge as he was not advised by probation counsel that the sentences on the other charges were concurrent.

S.C. Code Ann. § 24-13-40 provides:

The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense; (3) when the prisoner commits a subsequent crime while out on bond; or (4) has bond revoked on any charge prior to trial or plea.

Part (b) of the statute providing that when the commencement of the service of the sentence follows the revocation of probation the computation of the time served must be calculated from the date of the commencement of the service of the sentence should apply to straight probationary sentences and not split concurrent sentences as in the present case. In the present case the commencement of the service of the sentences started when Respondent began serving the active portion of the burglary sentence, concurrent to the other charges. Reliance on

Gates v. Wallace, 278 S.C. 214, 294 S.E.2d 41 (1982), is misplaced as that case involved computation of parole eligibility for time served prior to revocation of the suspended sentence rather than a split sentence running concurrently to suspended sentences as in this case.

Respondent's revocation resulted in consecutive rather than concurrent sentences. In Tant v. S.C. Dep't of Corr., 408 S.C. 334, 342, 759 S.E.2d 398, 402 (2014), the South Carolina Supreme Court wrote, "Although the intent of the judge is controlling in determining whether sentences run concurrently or consecutively, "[a]mbiguity or doubts relative to a sentence should be resolved in favor of the accused." State v. DeAngelis, 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971)." The intent of the original sentencing judge is clear based on the sentencing sheets showing that the sentences were all concurrent. (App'x pp. 11-15). If the original sentencing judge had intended for Respondent to serve an additional fifteen-year sentence upon the revocation of probation, he would have ordered one of the suspended sentences to run consecutively. Any possible ambiguity in the original sentencing judge's order should be resolved in favor of Respondent. The revocation should have been limited to the five (5) years remaining on the sentence for burglary first. Even if the probation judge intended the harsh outcome that resulted in converting the concurrent sentences to consecutive sentences, such a result was not the intent of the original sentencing judge and should have been challenged below and, if needed, raised to the appellate courts. The PCR judge correctly found deficient performance and prejudice requiring a new probation revocation hearing.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." S.C.A.C.R. 220(c). The record supports the PCR judge's finding of deficient performance and prejudice. Probation counsel was ineffective in failing to advise the probation judge that the original sentences were concurrent and failing to

argue that any probation revocation should be limited to the five years remaining on the suspended twenty-year sentence for burglary first. Respondent was prejudiced by the deficient performance. Respondent's revocation resulted in consecutive rather than concurrent sentences. There is a reasonable probability that, but for probation counsel's deficient performance, the outcome of the proceeding would have been different.

CONCLUSION

Based on the above argument, this Court should deny the petition for writ of certiorari.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT

This 9th day of February, 2024.