STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

MACKAIL DAWKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000367

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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ISSUES PRESENTED

I. Whether evidence existed to support the PCR court's finding that probation counsel had no valid objection to the probation court's conclusion that Petitioner's probation sentence was intended to run simultaneously with his existing YOA parole where neither the PCR court nor the probation court analyzed the facts and circumstances surrounding Petitioner's original sentencing.

II. Whether evidence existed to support the PCR court's finding that probation counsel was not required to advise Petitioner about an appeal of his probation revocation where a genuine appellate issue existed.

STATEMENT

When Petitioner appeared at his probation hearing before the Honorable Clifton Newman on September 16, 2011, he was serving sentences for two separate incidents. App. 1. On March 11, 2008, he had pled guilty before the Honorable Judge Casey Manning to one count of criminal conspiracy, one count of grand larceny, and two counts of strong armed robbery. Ap. 34, ll. 13-20. Judge Manning sentenced him to fifteen years suspended on the service of five years with three years of probation for the robbery charge and five years concurrent for each of the other two charges. App. 34, l. 21 – App. 35, l. 2. At the same time, Petitioner was already on parole under the Youthful Offender Act (YOA)[1] for a charge of possession with intent to distribute crack cocaine. App. 37, l. 24 – App. 38, l. 3. As a result of the March 11, 2008 plea, Petitioner's YOA parole was revoked; he served additional time on his YOA sentence at the youth facility in Turbeville, South Carolina, was re-released on parole, and began serving the second sentence at Stevenson Correctional Facility. App. 38, l. 16 – App. 39, l. 10. Petitioner was released from incarceration on the suspended second sentence in October of 2010. App. 39, ll. 14-24.

Petitioner was at the subsequent probation revocation hearing on September 16, 2011 because he had been stopped at a traffic stop in August of 2011 when it was discovered he had an outstanding warrant for violating his YOA parole.[2] App. 41, ll. 18 – 42, ll. 2. He had also been served a warrant for violating his probation on August 19, 2011. App. 44, l. 23-25.

At the probation revocation hearing, Agent Toyya Williams represented the South Carolina Department of Probation, Parole, & Pardon Services; Constantine Pourmaras represented Petitioner. *Id.* Ms. Williams informed the court that Petitioner had failed to report to her since April of 2011.

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[1] S.C. Code Ann. § 24-19-10 *et seq.*

[2] Petitioner attended a parole revocation hearing on August 29, 2011; however, because his parole term was nearly over, his parole was allowed to continue and expire. App. 43, ll. 5-23.

App. 3, ll. 14-19. He also had not made any probation payments since the probation allegedly began after his release from the Stevenson facility. App. 6, ll. 4-6. Ms. Williams requested that the court revoke his probation. App. 11, ll. 21-22.

Petitioner explained exactly why he failed to meet his probation terms despite good faith efforts: "[W]hen I first came home and when I reported, I asked the agent was they running together, and Ms. Graham [said] the probation was going to start after the parole because the parole was serious." App. 7, ll. 1-4. "[W]hen I first reported for the intake, I asked her. . . . And she was, like, well, right now you just doing the parole . . . because its more serious. We'll talk about the probation once you finish the parole." App. 9, ll. 20-25. Thus, he understood that he had to have his parole formally closed before his probation requirements would officially begin. App. 41, ll. 3-17. Nevertheless, the court concluded that Petitioner's probation was already running, and Petitioner therefore willfully violated his probation; the court revoked and terminated the remaining probation term. App. 12, ll. 11-13.

On December 27, 2011, Petitioner filed an application for post-conviction relief, arguing that he was denied effective assistance of counsel at the probation revocation hearing in part because his probation term should not have started until his YOA parole ended. App. 17-23. The State filed a return on January 10, 2012. App. 24-29. On September 11, 2012, the Honorable J. Earnest Kinard heard Petitioner's case. App. 32. E. Deon O'Neil represented Petitioner and Robert D. Corney represented the State. *Id.* Petitioner testified that he had the same agent for his parole and probation. App. 54, l. 21 – App. 55, l. 12. He admitted he did fail to report to the agent in person during June and July, but noted that he and his girlfriend had checked reported over the phone because Petitioner was working. App. 56, ll. 1-15. His understanding was that his agent was

logging his calls as check-ins for parole but not for probation purposes. App. 60, ll. 2-9. He again attempted to explain his understanding of the running of the parole and probation:

> [M]e not knowing how the probation and the parole run together exactly and the place and the new reporting, so I was looking – so they told me that the parole was more serious, we are just going to focus on that because it is intensive supervision, and then the probation will follow after that.

App. 54, ll. 10-17. He reiterated this understanding multiple times. App. 58, l. 10 – App. 60, l. 7. Petitioner also testified that probation counsel never advised him of his right to appeal. App. 101. In closing, PCR counsel asked the court "to grant the PCR and give [Petitioner] a new probation revocation hearing in light of the legal arguments . . . that would have tended to prove that he was not on probation at the time of the these alleged violations." App. 86, ll. 8-14.

On February 6, 2013, the PCR court issued an order dismissing Petitioner's claim. App. 92-103. The court concluded Petitioner did not show probation counsel was ineffective for failing to object to the improper simultaneous imposition of parole and probation. App. 98. The court found that his probationary sentence "was set . . . to run concurrently with his previous YOA sentence." App. 98-99. Therefore, probation counsel had no valid objection to raise. App. 99. The court also found that while the evidence showed probation counsel did not advise Petitioner of his right to appeal, no extraordinary circumstances existed warranting the advisement and that no issue was preserved for appellate review. App. 101-102.

This petition for writ of certiorari follows.

ARGUMENT

I. The evidence in the record does not support the PCR court's findings that Petitioner's probationary sentence was intended to run simultaneously with his parole sentence and that probation counsel was not therefore ineffective for failing to object to the probation court's finding to the contrary.

The evidence in the record does not support the PCR court's findings that Petitioner's probationary sentence was intended to run simultaneously with his parole sentence and that probation counsel was not therefore ineffective for failing to object to the probation court's finding to the contrary. A defendant on probation has a right to effective assistance of counsel. *Turner v. State*, 384 S.C. 451, 682 S.E.2d 792 (2009). "[T]he 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 at 794. The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

"A trial judge may impose a term of years but provide for a suspension of a part of the imprisonment, and place the defendant on probation after a designated portion of the term of imprisonment is served. *State v. Ellis*, 397 S.C. 576, 579, 726 S.E.2d 5, 7 (2012). "'Probation, a suspension of the period of incarceration, is clearly a part of a criminal defendant's "term of imprisonment," as is actual incarceration, *parole*, and the suspended portion of a sentence.'" *Id.* (quoting *Thompson v. S.C. Dep't of Pub. Safety*, 335 S.C. 52, 515 S.E.2d 761 (1999).

When a defendant faces multiple sentences, whether they run concurrently is a mixed question of law and fact. *See, e.g., State v. DeAngelis*, 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971) ("There remains for determination the question of whether the sentence imposed in this case runs concurrently or consecutively with the three year sentence imposed in May. The intent of the

trial judge is controlling."); *Finley v. State*, 219 S.C. 278, 282, 64 S.E.2d 881, 882 (1951) ("The rule of law is well settled that two or more sentences of a defendant to the same place of confinement run concurrently, in the absence of specific provisions in the judgment to the contrary, and, where a defendant is already in execution on a former sentence, and the second sentence does not state that the time is to commence at the expiration of the former, the sentences will run concurrently, in the absence of a statute providing for a different rule."). Thus, a judge generally may order that a probationary period to begin upon a defendant's release from incarceration on a separate charge as a result of parole by making a specific order to that effect. *See Ellis* at 583, 726 S.E.2d at 8-9. Otherwise, an order setting probation "upon completion of a term of imprisonment" would generally take effect after parole or supervised release terminates. *Id.*

Here, both the probation court and the PCR court summarily concluded that Judge Manning set Petitioner's probationary sentence to run concurrently with his previous YOA sentence. The PCR court failed to make any specific finding as to Judge Manning's intent in originally sentencing Petitioner for the conspiracy, larceny, and robbery charges. Indeed, nothing in the record even suggested that Judge Manning intended for the sentence to run concurrent with the YOA sentence rather than beginning upon its termination. The PCR court simply assumed as much because Judge Manning did not expressly order a specific time for the sentence to begin. To the contrary, the principle espoused in *Finley v. State* suggests that this very assumption is improper when a defendant's second sentence does not involve the *same place of confinement*. Thus, in this case, both the probation court and the PCR court improperly concluded that Petitioner's sentences to the Turbeville and Stevenson facilities were intended to run concurrently. That decision required a deeper analysis of the facts and applicable law. Accordingly, probation counsel had a valid objection to the probation court's conclusion that parole and probation ran concurrently. By failing

to make the objection, Petitioner was denied effective assistance of counsel, and this Court should reverse the PCR court's decision.

II. The PCR court's finding that probation counsel was not required to advise Petitioner about an appeal was incorrect because probation counsel raised at the hearing a sound argument whether Petitioner's sentences were intended to run concurrently.

The PCR court's finding that probation counsel was not required to advise Petitioner about an appeal was incorrect because probation counsel raised at the hearing a sound argument whether Petitioner's sentences were intended to run concurrently. To waive a direct appeal from a probation hearing, a defendant must make a knowing and intelligent decision not to pursue the appeal. *See Clark v. State*, 396 S.C. 164, 168, 719 S.E.2d 708, 710 (Ct. App. 2011) (quoting *Simuel v. State*, 390 S.C. 267, 269, 701 S.E.2d 738, 739 (2010)). Following a probation determination, a defendant must be advised about the right to appeal when extraordinary circumstances exist. *Turner v. State*, 384 S.C. 451, 456-57, 682 S.E.2d 792, 794 (2009).

In this case, extraordinary circumstances existed because, as discussed above, the probation court failed to analyze whether the probationary sentence was intended to run concurrently with the YOA sentence. This failure and the incorrect finding that sentences did run concurrently supported a meritorious appeal by which Petitioner could have had his revocation reversed. Additionally, the issue was in fact preserved for appellate review because Petitioner specifically argued the issue at the probation hearing.

STATEMENT OF ISSUE ON APPEAL

Whether the probation court erred in concluding that Petitioner's probation sentence ran simultaneously with his existing YOA parole where the court never analyzed the facts and circumstances to determine the sentencing judge's intent.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

MACKAIL DAWKINS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000367

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mackail Dawkins states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 11, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Mackail Dawkins.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of August, 2013

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire. at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mackail Dawkins, #316343, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 29th day of August, 2013.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of August, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.