

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Honorable Maite Murphy, Circuit Court Judge

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LONTRE J. WISE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000514

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JOHNSON PETITION FOR WRIT OF CERTIORARI
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Sep 11 2024

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether probation counsel was ineffective for failing to argue there was an insufficient evidentiary basis to establish Petitioner had violated the conditions of his probation since the only alleged violation was Petitioner's arrest on new charges in December 2022 and the state failed to present any evidence to support the underlying allegations of the pending charges?

STATEMENT OF THE CASE

On July 3, 2018, law enforcement executed a search warrant at the Star Motel in Columbia based on numerous complaints of narcotics being distributed from various rooms at the motel. Police raided a room in which Petitioner was the sole occupant. On a table in the room, officers found two cigarette boxes with “crack rocks” inside. Petitioner allegedly “claimed ownership of the drugs.” App. 23, l. 19 – 24, l. 1.

A Richland County grand jury indicted Petitioner on May 14, 2019 for trafficking crack cocaine, more than 28 grams but less than 100 grams, third or subsequent offense. App. 98-99. On June 24, 2021, Petitioner waived presentment to the grand jury and pled guilty to the lesser offense of possession with intent to distribute crack cocaine, second offense, before the Honorable Robert Bonds. App. 1-3. Assistant Solicitor Stephanie Taylor represented the state. Justin Kata represented Petitioner. App. 1. In addition to permitting Petitioner to plead to the lesser charge, the state recommended a sentence of ten years imprisonment suspended upon the service of three years probation. The state also agreed to dismiss Petitioner’s other pending charges. App. 12, ll. 14-22. Judge Bonds accepted Petitioner’s plea and followed the sentencing recommendation, thereby sentencing Petitioner to ten years imprisonment suspended upon the service of three years probation. App. 26, l. 23 – 27, l. 6.

Petitioner did not appeal his conviction or sentence. On December 23, 2022, Petitioner was charged with possession of a firearm by a convicted felon, possession of a weapon during the commission of a violent crime, trafficking crack cocaine, and possession with intent to distribute marijuana after a search warrant was executed at a residence. Based solely on Petitioner’s arrest, he was charged with violating the conditions of his probation.¹ App. 29.

¹ Petitioner was also in arrears on his supervision and court fees. App. 29.

On March 31, 2023, Petitioner appeared before the Honorable Robert Hood for a probation revocation hearing. Probation Agent Desmond Bradley represented the Department of Probation, Parole, and Pardon Services. Jennie Rischbieter represented Petitioner. App. 30. At the beginning of the hearing, the agent alleged Petitioner violated his probation by failing to “refrain from violating federal, state, or local laws” as evidenced by Petitioner’s arrest on December 13, 2022, and by failing to pay his supervision and court fees. The agent recommended the court revoke Petitioner’s probation and impose a five year sentence. App. 32, l. 16 – 33, l. 17.

Petitioner’s counsel, Jennie Rischbieter, indicated that she also represented Petitioner on his pending charges and confirmed the charges were still pending at the time of the hearing. She stated that she “had hoped to resolve” Petitioner’s pending charges and his alleged probation violation “together” but, unfortunately, that was not possible. She asked the court to consider revoking only three years of Petitioner’s suspended sentence because of his poor health. App. 4, l. 18 – 5, l. 22.

The revocation court found there was “sufficient evidence to go forward with the violation” even though the charges were still pending since “according to the incident report, the crack cocaine was found in his [Petitioner’s] underwear.” The court revoked five years and gave Petitioner credit for 426 days time served. App. 35, ll. 15-24.

On June 23, 2023, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 40-46. The state filed a return to this application on August 22, 2023. App. 47-58. An evidentiary hearing was convened on January 11, 2024 before the Honorable Maite Murphy. App. 59. Assistant Attorney General Talida Balaj represented the state. Timothy Griffith represented Petitioner. App. 59.

Petitioner testified at the hearing that the probation revocation court found he violated his probation based solely on his arrest for various offenses on December 13, 2022. However, at the time of the PCR hearing, those charges were still pending and Petitioner had not been found guilty. Petitioner expressed concern that he could be found in violation of his probation based solely on allegations that he violated the law. App. 68, l. 6 – 72, l. 3.

Jennie Rischbieter, Petitioner's probation revocation counsel, testified that she advised Petitioner that he could be found in violation of his probation based solely on his arrest on December 13, 2022, even though the charges were still pending at the time of the revocation hearing. App. 74, ll. 4-20.

Because Petitioner's right to the effective assistance of counsel at his probation revocation hearing was violated, this petition for writ of certiorari follows.

ARGUMENT

Probation counsel was ineffective for failing to argue there was an insufficient evidentiary basis to establish Petitioner had violated the conditions of his probation since the only alleged violation was Petitioner's arrest on new charges in December 2022 and the state failed to present any evidence to support the underlying allegations of the pending charges.

Probation counsel was ineffective for failing to argue there was an insufficient evidentiary basis to establish Petitioner had violated the conditions of his probation since the only alleged violation was Petitioner's arrest on new charges in December 2022 and the state failed to present any evidence to support the underlying allegations of the pending charges. If counsel had properly argued there was insufficient evidence Petitioner had violated his probation, there is a reasonable probability the probation revocation court would have continued Petitioner on probation.

A probationer's right to counsel arises as a matter of due process rather than the Sixth Amendment. However, the same analysis for violations of the Sixth Amendment right to counsel in other PCR proceedings involving claims against counsel applies in PCR proceedings involving claims against probation counsel. Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009); See Gagnon v. Scarpelli, 411 U.S. 778 (1973); Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

Probation counsel was ineffective for failing to argue there was insufficient evidence Petitioner violated the terms and conditions of his probation since the only alleged violation was Petitioner’s arrest on new charges in December 2022 and these charges were still pending at the time of Petitioner’s revocation hearing.² See State v. Gleaton, 172 S.C. 300, 304-05, 174 S.E. 12, 14 (1934) (stating that, when issue is whether probationer has committed a later crime which should result in revocation of probation, trial court may determine probationer’s guilt on the charge, or impanel a jury to decide the issue, or hold the revocation matter in abeyance until the probationer is tried on the charge in the usual course, with the final option as the preferred and safest course to pursue).

“Probation is a matter of grace; revocation is the means to enforce the conditions of probation.” State v. Williamson, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003)

² The probation revocation court did not find that Petitioner’s failure to pay his supervision and court fees was willful, so Petitioner’s probation could not have been revoked on that ground. See Hamilton, 333 S.C. at 649, 511 S.E.2d at 97 (“Probation may not be revoked solely for failure to make required payments of fines or restitution without the circuit judge determining on the record that the probationer has failed to make a bona fide effort to pay. In the absence of such a determination, a defendant’s due process rights are contravened by the deprivation of his constitutional freedom. Therefore, in those cases involving the failure to pay fines or restitution, the circuit judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness.”); See also State v. Williamson, 356 S.C. 507, 510 n.2, 589 S.E.2d 787, 788 n.2 (Ct. App. 2003).

(quoting State v. Hamilton, 33 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999)) (internal quotation marks omitted). “However, the authority of the court to revoke probation may not be capriciously or arbitrarily exercised, but should always be predicated upon an evidentiary showing of fact tending to establish violation of the conditions.” Id. (citing State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950)). “Before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions.” Id. (quoting Hamilton, 333 S.C. at 648–49, 511 S.E.2d at 97) (internal quotation marks omitted).

In Williamson, the defendant was arrested for criminal domestic violence of a high and aggravated nature. As a result of his arrest, he was charged with violating the conditions of his probation. The trial court, relying largely on the complainant’s affidavit and photographs of her injuries, found Williamson had violated his probation and revoked a portion of his suspended sentence. Id. at 509, 589 S.E.2d at 788. Williamson argued on appeal that there was an insufficient evidentiary basis to establish that he had violated the conditions of his probation because he had not been convicted of the criminal domestic violence charge. Id. at 509-10, 589 S.E.2d at 788. This Court disagreed.

The Court held the trial court did not abuse its discretion when it revoked Williamson’s probation because there was a sufficient evidentiary basis to support the finding that Williamson committed an act of violence against his mother. In support of its holding, this Court emphasized that during the revocation rehearing, the state introduced the mother’s affidavit, her voluntary statement, and photographs of her injuries. In the documents, the mother stated Williamson had cut her on the arm with a knife. Id. at 510-11, 589 S.E.2d at 788-89.

In this case, Petitioner's only alleged violation was his arrest for various offenses on December 13, 2022. At the time of Petitioner's revocation hearing, Petitioner had not been convicted of the charges. They were still pending. In fact, they were still pending at the time of Petitioner's PCR hearing. Consequently, probation counsel was ineffective for failing to argue there was an insufficient evidentiary basis to establish Petitioner violated the conditions of his probation.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the probation revocation court would have continued Petitioner on probation rather than revoking five years of his suspended sentence if counsel had properly objected.

Respectfully, this Court should hold probation counsel was ineffective and remand for a new probation revocation hearing.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

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Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of September, 2024.

STATE OF SOUTH CAROLINA
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lontre J. Wise states:

1. She is an 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, which was held on January 11, 2024 before the Honorable Maite Murphy, 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 Lontre J. Wise.

Respectfully Submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of September, 2024.


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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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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ATTORNEY FOR PETITIONER

This 11th day of September, 2024.