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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

2022-CP-04-01024

Justin A. Armstrong, ... Appellant,

v.

The State, ... Respondent.

NOTICE OF APPEAL

Justin A. Armstrong appeals the Honorable Kristi F. Curtis's Order of Dismissal filed February 3, 2025.

This seventh day of February, 2025.

s/ Susannah Ross
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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
Justin A. Armstrong, #327868, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2022–CP–04–01024 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Kristi F. Curtis
Applicant's Attorney:	Susannah C. Ross, Esq.
Respondent's Attorney:	Ryan T. Kowalski, Esq.
Plea Counsel:	Robert J. Opperman, Esq.
Probation Counsel:	Timothy Matthew Bradley, Esq.
Date of Hearing:	September 16, 2024
Court Reporter:	Tara T. Scott

This matter comes before the Court by way of Justin A. Armstrong's application for post-conviction relief (PCR) filed on May 4, 2022, challenging his conviction for Possession of Methamphetamine, first offense, and Shoplifting. Respondent, the State of South Carolina, made its Return and partial motion to dismiss on February 15, 2024, requesting an evidentiary hearing to resolve the claims as set forth in the application. On April 1, 2024, Applicant, through counsel, filed an Amended Post-Conviction Relief Application asserting additional claims of ineffective assistance of counsel.

An evidentiary hearing was convened on September 16, 2024, at the Anderson County Courthouse before the Honorable Kristi F. Curtis. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Ryan T. Kowalski represented Respondent. At the hearing, Applicant proceeded on the claims set forth in his original and amended applications. In support of these claims, Applicant testified on his own behalf, and

Respondent presented testimony from Robert J. Opperman, Esquire (Plea Counsel) and Timothy Matthew Bradley, Esquire (Probation Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During its December 2018 term, the Anderson County Grand Jury indicted Applicant for Shoplifting (2018-GS-04-03247). During its March 2019 term, the Anderson County Grand Jury indicted Applicant for Possession of Methamphetamine (2019-GS-04-01500).

On June 18, 2019, Applicant appeared before the Honorable R. Scott Sprouse and pleaded guilty to Possession of Methamphetamine, first offense, and Shoplifting. Robert J. Opperman, Esquire (Plea Counsel), represented Applicant. Assistant Solicitor Catherine T. Huey prosecuted the case. Judge Sprouse sentenced Applicant to concurrent terms of ten years for Shoplifting and three years for Possession of Methamphetamine, both sentences to be suspended to 89 days' time served and five years' probation.[1]

Applicant did not appeal his sentences or convictions.

[1] Judge Sprouse ordered special conditions of probation under the same conditions concurrent herein: (a) Applicant to pay restitution in the amount of $479.00, (b) Applicant to attend inpatient drug treatment, subject to a mental health screening, random drug and alcohol testing, and (c) opportunity to PTUP Applicant's probation after three years upon successful completion of the above-listed conditions.

PROBATION REVOCATION AND SUBSEQUENT APPEAL

On June 14, 2021, Applicant appeared before the Honorable R. Lawton McIntosh concerning revocation of his probation for violation of his conditions. Applicant was represented by Timothy Matthew Bradley, Esquire. Agent Edge represented the State. Judge McIntosh revoked Applicant's probation in full for willfully failing to report, failing to complete inpatient substance abuse treatment, and falling behind on his restitution payments. (Prob. Rev. Tr. p. 11). Judge McIntosh gave Applicant credit for time served. (Prob. Rev. Tr. p. 11).

On June 18, 2021, Timothy Matthew Bradley, Esquire, filed a notice of appeal on behalf of Applicant concerning his probation revocation. Appellate Defender Jessica M. Saxon represented Applicant on his appeal. On November 17, 2021, Applicant notified the Court of Appeals of his intention to withdraw his appeal, signing an affidavit stating he freely, voluntarily, and knowingly waived his right to appeal and wished to proceed with PCR. The Court of Appeals returned the Remittitur on December 29, 2021.

FACTS ADDUCED AT THE GUILTY PLEA HEARING

The facts giving rise to Applicant's conviction were articulated by the State at Applicant's plea hearing, as follows:

> Your honor, as to the shoplifting, that occurred on October 22nd of 2018. The defendant was ID'd on a video leaving the JC Penney here at the mall in Anderson City without having paid for that – paid for the Kitchen Aid mixer which was valued at around 400-and-something dollars, your Honor, which is what he is signing up for restitution for. Also, as to the possession of meth, that occurred on March 22, 2019, at 2509 West Whitner Street. Deputies responded due to a disturbance. They found this defendant acting belligerently. They placed him under arrest for breach of peace, and search incident yielded just about a gram of meth, your Honor, in his pocket.

(Plea Tr. pp. 5, ll. 22-25 – 6, ll. 1-10).

CURRENT APPLICATION

In his original application, Applicant alleges he is being held in custody unlawfully based on the following:

1. Ineffective Assistance of Counsel; Attorney of Record Mr. Robert Joseph Opperman.[2]
   a. Applicant claims he was "denied the right to an appeal of the underlying convictions because [he] neither knew could appeal nor did [his] attorney properly advise [him] of the right to an appeal."
   b. Applicant claims, counsel "never informed [him] of his right to an appeal after plea agreement."
2. Probation Arbitrarily and Unlawfully Revoked.
   a. Applicant claims, "probation was arbitrary revoked [because] he had secured Bedspace in Solutions recovery in Greenville, SC [and] Judge should have allowed [him] to go instead of revoking probation."
   b. Applicant claims, "until probation was violated [he] did not know was being held unlawfully."

Applicant requested relief as follows:

> "Continue probation and revoke prison sentence."

On April 1, 2024, Applicant, through PCR Counsel, filed an amended application alleging the following:

1. Ineffective assistance of counsel for failure to:
   a. Object to the probation agent mentioning seventeen arrests, none of which resulted in conviction, during the Applicant's probation revocation hearing; and
   b. Failing to clarify at the revocation hearing that the arrests resulted from Applicant's uncle placing him on trespass notice at his grandmother's house.

Before this Court are the Anderson County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the probation revocation

[2] Respondent interprets this allegation as a request for belated review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

hearing transcript, records from Applicant's direct appeal, and records from this Post-Conviction Relief action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[3] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> 2. That the court was without jurisdiction to impose sentence;
> 3. That the sentence exceeds the maximum authorized by law;
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a

[3] S.C. Code Ann. §§ 17-27-10 to -160.

question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986);

cf. 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).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. *Strickland*, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; *see Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result

must be *substantial*, not just conceivable." *Richter*, 562 U.S.at 112.

Finally, the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea. *Hill v. Lockhart*, 474 U.S. 52 (1985), extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). The analysis of counsel's performance under the first prong of *Strickland* remains unchanged, the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in

criminal cases. *Hill*, 474 U.S. at 58-59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the range of competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58-59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. 357, 367 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

A probationer's right to counsel arises as a matter of due process rather than under the Sixth Amendment, but "the same analysis for [violations of the Sixth Amendment right to counsel] ... appl[ies] in PCR proceedings involving claims against probation counsel." *Turner v. State*, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009). Under this analysis, the PCR applicant must prove "(1) counsel failed to render reasonably effective assistance under prevailing professional norms,

and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008).

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

This Court finds applicable the strong presumption that at all stages of Plea Counsel and Probation Counsel's representation of Applicant, they rendered adequate assistance and exercised reasonable professional judgment in their representation. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689; *see Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF PLEA COUNSEL

Allegation: **Plea Counsel Failed to Advise Applicant of his Right to Appeal**

Applicant alleged Plea Counsel was ineffective for failing to advise him of his right to appeal his guilty plea, denying Applicant his right to appeal. This Court finds this allegation to be without merit.

Generally, there is no constitutional deprivation in not being advised of the right to appeal from a guilty plea absent extraordinary circumstances, such as when there is a reason to think a rational defendant would want to appeal—where a non-frivolous ground exists to appeal—or defendant reasonably demonstrated an interest in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995). Like a guilty plea, probation counsel is not required "to inform a probationer of his right to an appeal absent extraordinary

extraordinary circumstances." *Turner v. State*, 384 S.C. 451, 456–57, 682 S.E.2d 792, 795 (2009) (finding "probation counsel is not held to a higher performance standard than that imposed upon plea counsel.").

At the evidentiary hearing, on direct examination, Applicant testified that he did not know he had the right to appeal his guilty plea, and that he would have wanted to appeal if he had known about his right to an appeal. (PCR Tr. p. 7).

On cross-examination, Applicant testified that he did not know he had to ask Plea Counsel to file an appeal on his behalf. (PCR Tr. p. 12). Applicant testified he did not know what questions to ask because he did not know the law, and Plea Counsel should have advised him of his right. *Id.*

On direct examination, Plea Counsel testified that he had enough time to meet and speak with the Applicant and that he explained his options to him (PCR Tr. p. 21). Plea Counsel also testified that he did not see any non-frivolous grounds for an appeal, and that Applicant never asked him to file an appeal. (PCR Tr. p. 22).

On cross-examination, Plea Counsel testified that he probably did not advise Applicant that he could appeal his guilty plea and that he did not believe that they spoke after court. (PCR Tr. p. 22).

This Court finds Applicant has failed to meet his burden to show extraordinary circumstances existed that would have required Plea Counsel to appeal on his behalf, and thus, Plea Counsel was not deficient, and Applicant suffered no prejudice. Plea Counsel **credibly** testified Applicant did not advise him he wished to appeal his guilty plea. Notably, Applicant testified on direct and cross that he did not request Plea Counsel file an appeal on his behalf. Additionally, Plea Counsel **credibly** testified that there were no non-frivolous issues that would

have prompted Plea Counsel to appeal on Applicant's behalf. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

INEFFECTIVE ASSISTANCE OF PROBATION COUNSEL

Allegation: Probation Counsel Failed to Object to Mention of Arrests

Applicant alleged that Probation Counsel was ineffective for not objecting to the mention of Applicant's recent arrests during his probation revocation hearing. This Court finds this allegation to be without merit.

Ultimately, the "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." *United States v. Nguyen*, 379 F. App'x 177, 181 (3d Cir. 2010); *see Humphries v. Ozmint*, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under *Strickland.*"); *cf. Bergmann v. McCaughtry*, 65 F.3d 1372, 1380 (7th Cir.1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (internal quotation marks omitted); *cf. Sallie v. State of N.C.*, 587 F.2d 636, 640 (4th Cir. 1978) (*Strickland* standard was not "intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness"). Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *see Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be

wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel).

At the evidentiary hearing, on direct examination, Applicant testified that the seventeen arrests involving Applicant being present at his grandmother's house did not result in any convictions, and that the mention of the arrests was the deciding factor at his revocation hearing. (PCR Tr. pp. 10-11). Applicant testified that Probation Counsel did not object to the mention of these arrests. (PCR Tr. p. 11). Applicant testified that his uncle would call the police each time Applicant would go to his Grandmother's house, and that none of the arrests resulted in convictions and his Grandmother never pressed charges. (PCR Tr. p. 10). Applicant testified that those prior arrests should not have been mentioned at his probation revocation hearing unless he was convicted of the charges. (PCR Tr. pp. 11, 13).

On direct examination, Probation Counsel testified that if he had objected to the mention of Applicant's seventeen arrests, the outcome of the probation revocation hearing would not have changed, since the arrests were already before Judge McIntosh in the violation report. (PCR Tr. p. 25). Probation Counsel also testified that the way the arrests were couched in the violation report was that Applicant had failed to notify his agent of the arrests. (PCR Tr. p. 25). Probation Counsel testified that he told Judge McIntosh that the charges were mostly magistrate and lower-level offenses. (PCR Tr. pp. 26-27).

On cross-examination, Probation Counsel testified that, at the time of the probation revocation hearing, the charges stemming from the seventeen arrests were still pending. (PCR Tr. p. 28).

This Court finds Applicant has failed to articulate a basis for a valid objection to the mention of his seventeen arrests. *See State v. Hutchinson*, 215 W. Va. 313, 323, 599 S.E.2d 736,

746 (2004) (citing *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir.1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."). First, the arrests were properly before the probation revocation court, as arrests—even which have not resulted in convictions—are a violation of the conditions of Applicant's probation.

Further, Probation Counsel **credibly** testified that the outcome of Applicant's probation revocation hearing would not have changed had he objected to the mention of the arrests, as they were in the record before the probation revocation court. When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000). The Applicant has failed to articulate a basis for a valid objection to the mention of his arrests. *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Notably, the transcript of the probation revocation hearing shows that Judge McIntosh listed his reasons for revoking Applicant's probation, specifically, for failing to report, failing to complete substance abuse treatment, and being behind on restitution. (Prob. Rev. Tr. p. 11). Therefore, Applicant has failed to show that Probation Counsel's performance was deficient and or that his conduct prejudiced Applicant. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

Allegation: Failure to Meet Prior to Probation Revocation

Applicant alleged Probation Counsel was ineffective for failing to meet with him prior to his revocation hearing. Applicant testified that he met with Probation Counsel for the first time on the day of his revocation hearing. (PCR Tr. p. 8). Applicant testified that Probation Counsel

"hardly did anything" and that he "probably said two words the whole time". (PCR Tr. pp. 8-9). This Court finds this allegation to be without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. *Campbell v. Polk*, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. *See Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing *Easter*) ("First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."). Mere speculation and conjecture are not insufficient to substantiate an allegation that counsel's deficient performance was prejudicial. *See Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all

significant decisions in [his] case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*). Probation Counsel's **credible** testimony indicates he had a phone conversation with the Applicant and met with him the day of the probation revocation hearing, and that he explained to Applicant how the hearing worked, the allegations against him, and what he would be asking for. (PCR Tr. p. 24). Applicant failed to present "any evidence of how additional preparation or communication would have resulted in a different outcome." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012); *see Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (explaining that, where an applicant failed to present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial, applicant failed to show his counsel's lack of preparation prejudiced him); *Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (finding that, when there is evidence counsel met with a defendant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court further finds Applicant has failed to meet his burden of showing Probation Counsel was constitutionally ineffective for failing to meet with Applicant a sufficient number of times. *See Campbell*, *Olson*, and *Easter*, *supra*.

Accordingly, Applicant's claims pertaining to Probation Counsel's failure to meet with him a sufficient number of times are **DENIED** and **DISMISSED.**

PROBATION UNLAWFULLY REVOKED

Allegation: **Applicant's Probation was Arbitrarily Revoked Where Applicant Did Not Violate the Terms of His Probation and He Had Secured a Bed Space at Solutions Recovery.**

Applicant alleged that his probation was arbitrarily revoked where he had secured a bedspace at Solutions Recovery, and the judge should have permitted him to enter Solutions Recovery for rehabilitation rather revoking his probation. Applicant also testified that he was calling in every month and that he felt like he was doing what he needed to do on probation "for the most part." (PCR Tr. p. 8). This Court finds this allegation to be without merit.

The revocation of probation is not a stage of criminal prosecution. However, a probationer "has a constitutionally protected liberty interest and cannot be denied due process simply because probation has been described as an act of grace." *State v. Allen*, 370 S.C. 88, 634 S.E.2d 653 (2006); *Morrissey v. Brewer*, 408 U.S. 471, 480–90 (1972) (holding that minimum requirements of due process in parole revocation proceeding include "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.")). Revocation of probation is within the discretion of the court, but it may not be revoked arbitrarily. *In re Whitney*, 421 F.2d 337 (1st Cir. 1970); *State v. Hamilton*, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999)

("before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions.")).

The transcript of the probation revocation hearing shows that Applicant agreed with the probation revocation court that he violated his probation by failing to report. (Prob. Rev. Tr. pp. 4-5). Since Applicant's original sentence on June 18, 2019, Applicant had been arrested seventeen times, and though not a violation of his probation on its own, evidenced that Applicant was not a good candidate for probation. (Prob Rev. Tr. pp. 6-7). Probation Counsel informed Judge McIntosh that Applicant had been accepted into Solutions Recovery and asked that Applicant be allowed to complete that program. (Prov. Rev. Tr. pp. 10-11). Judge McIntosh listed his reasons for revoking Applicant's probation, specifically, for failing to report, failing to complete substance abuse treatment, and being behind on restitution. (Prob. Rev. Tr. p. 11).

On direct examination, Applicant testified that he was calling in every month. (PCR Tr. p. 8). Applicant testified he felt like he did what he needed to do on probation. (PCT Tr. p. 8). Applicant testified he was arrested seventeen times because his uncle would call the police when he saw Applicant at his grandmother's house helping her. (PCR Tr. pp. 9-10). Applicant testified that he still has a bed space available for him at an inpatient treatment facility after he gets out. (PCR Tr. p. 11). Applicant testified that the deciding factor for his probation revocation was the mention of the seventeen arrests. (PCR Tr. p. 11).

During *sua sponte* questioning by this Court, Applicant testified that he left rehabilitation at Haven of Rest to go to Labor of the Fields, an inpatient program. (PCR Tr. pp. 14-15). Applicant testified he began drinking again during his time at Labor of the Fields and did not complete any rehab program. (PCR Tr. pp. 15, 17). Applicant testified that he was also arrested for assault and battery in the third degree, public disorderly conduct, possession of a controlled substance,

malicious injury to personal property, and charged with trespass after notice in addition to his arrests for trespassing. (PCR Tr. pp. 15-16). Applicant testified he failed to appear for his first probation violation hearing on April 5, 2021, because he was incarcerated, and they did not transport him. (PCR Tr. p. 16). Applicant testified that his newer probation agent said he failed to report beginning on March 3, 2020, because he was reporting to the older probation agent at the time, and that they switched his probation agents about three times. (PCR Tr. p. 17). Applicant testified that he was behind on his fees and fines and had been rearrested seventeen times. (PCR Tr. p. 17).

On cross-examination, Probation Counsel testified that Applicant told him he had been accepted into Solutions Recovery, and that in his experience practicing, an acceptance letter was not required at the hearing. (PCR Tr. p. 27).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove that his probation was revoked arbitrarily. *See In re Whitney*, *Hamilton*, *supra*. The fact Applicant had a bedspace at Solutions Recovery does not prohibit the probation revocation court from revoking his probation. Further, Applicant's contention he did not violate probation is **not credible**. The probation court had sufficient evidence before it to revoke Applicant's probation, including Applicant's own admission that he had violated the conditions of his probation. Further, when questioned by this Court, Applicant admitted he had violated his probation. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

CONCLUSION AND SIGNATURE ON FOLLOWING PAGE

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant his application for post-conviction relief. This Court finds that neither Plea Counsel nor Probation Counsel were deficient in any manner, Applicant was not prejudiced by their representation, and Applicant's probation was not arbitrarily revoked. Therefore, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED this 24 day of Jan., 2025.

'25 FEB 3 PM2:30:00
Anderson, SC COC, CP/GS

Kristi Curtis

KRISTI F. CURTIS
Presiding Judge
Tenth Judicial Circuit

A TRUE COPY
FEB - 3 2025
C. Reena Thomason
CLERK OF COURT

Sumter, South Carolina