STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2012-212395

Ashley Ray Hardin, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did the PCR judge correctly find Petitioner failed to meet his burden to prove counsel was ineffective for failing to present mitigation evidence that amounted to the relitigation of the underlying offense?

2. Dud the PCR judge correctly find Petitioner filed to meet his burden of prove counsel was ineffective for failing to file an appeal?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the November 2005 term of General Sessions for receiving stolen goods, more than a thousand dollars but less than five thousand dollars (2005-GS-32-4210). Petitioner waived presentment for criminal sexual conduct with a minor, second-degree (App.pp.164-7). Robert Williams, Esq., represented Petitioner.

On November 16, 2005, Petitioner pled guilty as indicted. (App.pp.1-32) The Honorable Edward W. Miller sentenced Petitioner to ten years imprisonment suspended upon the service of time served and three years probation for criminal sexual conduct, second-offense, and sentenced Petitioner to five years imprisonment suspended on the time served and probation for receiving stolen goods. (App.p.24). Petitioner did not appeal his convictions or sentences.

On August 28, 2008, Petitioner appeared before Honorable Roger L. Couch for a probation of revocation hearing. (App.pp.33-44). The trial judge revoked his probation in full. (App.pp.43-4).

Petitioner filed an application for post-conviction relief (PCR) on November 17, 2008. (2008-CP-32-4799). (App.pp.45-51). A hearing was convened at the Lexington County Courthouse on January 31, 2012. (App.pp.64-138). Petitioner was present and represented by Tristan Shaffer, Esq. Kaelon May, Esq., of the South Carolina Attorney General's Office represented Respondent. Tyree Lee, Esq., probation revocation counsel "counsel," testified at the hearing. The Honorable Eugene C. Griffith denied relief in an order dated May 11, 2012. (App.pp.139-56). This appeal follows.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is not warranted where the PCR judge correctly found Petitioner failed to meet his burden to prove counsel was ineffective for failing to present collateral mitigation evidence regarding the underlying conviction at the probation revocation hearing.

At the PCR hearing, Petitioner argued counsel was ineffective for failing to present mitigation evidence from the underlying offense regarding recent legislative action to the criminal sexual conduct with a minor statute. Petitioner testified he violated the conditions of his probation.

At the PCR hearing, Counsel testified he had practiced criminal law for twenty-five years and was the former Public Defender for Chester and Fairfield Counties in addition to managing the Office of Indigent Defense for over a decade. (App.p.73) Counsel had handled a thousand previous probation revocations cases and testified to the scope of representation and general practice regarding revocations. (App.p.75) As a matter practice, counsel testified he obtains the charging documentation and reviews the conditions of probation in conjunction with the alleged violation. Counsel explains to the client, "this is a probation hearing and what it is, is they're alleging that you either did certain things or you didn't do certain things. We want to talk about these things." (App.p.84, lines 3-6). Counsel testified he does not request discovery in probation revocation cases because they are different from the standard General Sessions case. (App.p.92). Counsel testified the purpose of a probation revocation hearing is as follows:

> its something like a rule to show cause. In other words, you have to show why the allegations are not correct or to contest the allegations. And that the allegations are made

> that you violated your probation by doing a, b, or, and you have to show either you didn't do a, b, or c. Or if there are reasons why you did them and if they have some mitigating factors, you're entitled to have a hearing and entitled to present evidence and call witnesses if it comes to that.

(App.p.75, lines 14-22).

Counsel testified he reviewed the revocation citation: Petitioner failed to pay his intensive supervision fee, failed to notify his agent when he became unemployed, failed to reside at his approved residence, and he failed to appear in court for June 16, 2008 hearing as instructed by his probation agent. (App.p.78). Counsel met with Petitioner numerous times, discussed the citation, and discussed Petitioner's version of the facts. (App.p.79; p.83; p.86; p.93). Counsel further requested Petitioner provide him the names of potential witnesses to speak on his behalf in mitigation. (App.p.87). Counsel discussed Petitioner's exposure to imprisonment during the consultations. (App.p.89).

In denying Petitioner's application for post-conviction relief, the PCR judge found counsel presented reasonable mitigation evidence under the professional norms. The PCR judge further found "[Petitioner] failed to show that had counsel advised the trial court of the change in the law, that such information would have been likely to have any outcome more favorable to the [Petitioner.] (App.p.153).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Due the nature of

the revocation hearing, the Sixth and Fourteenth Amendments does not per se allow the right to counsel. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). "Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions. See." Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008) (citing U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3)). Nevertheless, in South Carolina, Rule 602(a), SCACR requires the appointment of counsel for indigent defendants in probation revocation proceedings. Where statute or rule of practice creates such a right, the courts have used the Strickland test to evaluate claims of ineffective assistance of probation revocation counsel. See, e.g., United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988). However, since a probation hearing is not a formal adversarial proceeding, "the Court must review counsel's performance in light of the particular type of proceeding involved." Id., 682 F.Supp. at 1242. A revocation hearing addresses two issues: whether the probationer violated a condition of probation, and whether the violation warrants revocation. Black v. Romano, 471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed. 2d 636 (1985); Morrissev v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972).

Respondent submits ample evidence of probative value shows the PCR judge did not err in finding Petitioner failed to prove counsel's representation was deficient. Counsel investigated the citation of probation violations and apprised Petitioner of the time and nature of revocation hearing. Counsel discussed Petitioner's version of the facts, the implications of a full or partial revocation, potential mitigating circumstances

surrounding the undisputed violations with him. Counsel further requested Petitioner provide him names of potential witnesses to testify on his behalf. At the revocation hearing, counsel presented the migrating circumstances to explain Petitioner's violations to the trial court. (App.p.37-9). The PCR judge found counsel's testimony to be credible. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses). Furthermore, Petitioner willfully admitted he violated the conditions of probation and failed to appear at initial revocation hearing. (App.p.116).

Respondent further submits Petitioner's argument relies on an improper extension of the scope of an attorney's representation in probation revocation cases to relitigate the underlying offense. This Court in Turner v. State held that, "[a]lthough parole revocation and probation revocation are different types of proceedings, to the extent there is a constitutional right to counsel in either context, it exists only by virtue of the Due Process Clause. Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009) (internal citations omitted). This Court in Dangerfield v. State defined a probationer due process rights as:

> The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.

Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008). (referencing State v. Hill, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006)). Furthermore, Petitioner's misplaced reliance on State v. Franks is telling. This Court in States v. Franks announced,

"[w]hile the underlying violations may themselves be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges. but a more informal proceeding with respect to notice and proof of the alleged violations." State v. Franks, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981). The Franks Court further stated, "the penalty imposed upon a finding of violation of probation conditions is a forfeiture of the act of grace extended and reimposition of the unserved portion of the original sentence. No additional punishment is invoked." Id. Therefore, the PCR judge correctly limited his ineffective assistance of probation counsel inquiry to Petitioner's prosecution for failure to comply with the conditions of his probation.

In the alternative, Respondent also submits counsel had no recognized duty to present mitigation evidence from the underlying conviction. It is longstanding in this jurisdiction that an attorney is not charged with duty of clairvoyance. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Counsel has a wealth of experience and testified that alleged duty to relitigate the underlying offense was foreign to him. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms for probation revocation counsel.

Similarly, Respondent submits that Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. S.C. Code Ann. § 16-3-655(B)(2) was amended years after Petitioner's conviction and sentence in 2008 in a manner that would have precluded Petitioner's prosecution because he did not meet the statute's age requirement. However, the legislature did not intend to negate Petitioner's

guilt or excuse his violation of probation when it incorporated a savings clause in the amended legislation. See LAW ENFORCEMENT—COURTS, 2008 South Carolina Laws Act 335 (H.B. 3623) (Section 21); see also Pierce v. State, 338 S.C. 139, 526 S.E.2d 778 (2000).

Last, Petitioner was also sentenced to five years imprisonment, suspended on the service of probation for receiving stolen goods along with criminal sexual conduct with a minor, second-degree. (App.p.24). Petitioner violated numerous conditions of his probation where only one condition specifically related to the criminal sexual conduct conviction. See Chandler v. U.S., 218 F.3d 1305, 1319 (11th Cir. 2000) ("No absolute duty exists to introduce mitigating or character evidence"); see also Laws v. Armontrout, 863 F.2d 1377, 1385 (11th Cir. 1988) ("Contrary to the district court's apparent reasoning in this case, the absence of mitigating evidence does not inexorably lead to a conclusion of ineffective counsel."). Furthermore, the PCR judge commented that apprising the trial judge that the law has changed in a defendant's favor was unnecessary because "the judge already knows that." (App.p.103, lines 16-24). Additionally the circumstances of Petitioner's guilty plea and conviction would have been manifestly apparent to the sentencing judge. (App.p.113). Therefore, evidence of probative value supports the PCR judge's finding that Petitioner failed to prove he was prejudiced by counsel's representation.

II.

Certiorari is not warranted where the PCR judge correctly found Petitioner failed to meet his burden to prove counsel was ineffective for failing to file an appeal.

At the PCR hearing, Petitioner alleged counsel was ineffective for failing to file an appeal. Petitioner testified he wrote counsel a letter to request an appeal. (App.p.126). Petitioner testified the letter was returned to him. (App.p.126).

At the PCR hearing, counsel testified Petitioner never requested an appeal. (App.pp.107-8). Counsel testified that he would have filed a Notice of Appeal had Petitioner requested an appeal. (App.p.108). Counsel testified to his general practice in filing appeals post-conviction and sentencing. (App.pp.95-8).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to prove counsel was ineffective for not filing an appeal. (App.p.154).

The United States Supreme Court has held plea attorneys, for example, have a constitutionally imposed duty to consult with the defendant about an appeal **only** when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. See Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000) (emphasis added).

Evidence of probative value supports the PCR judge's finding that a rational defendant here would not have desired an appeal and that Petitioner failed to prove he demonstrated an interest in an appeal to counsel. First, Petitioner conceded he violated the conditions of his probation. Furthermore, the trial judge acted within his discretion in

revoking Petitioner's probation. State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950) ("It follows that the authority of the court of general sessions to revoke such suspension of sentence may not be capriciously or arbitrarily exercised, but should always be predicted upon an evidentiary showing of fact tending to establish violation of the conditions.").

Second, Counsel testified Petitioner never communicated his desire to appeal. Second, although Petitioner testified he mailed counsel timely correspondence on the matter, the PCR judge found his testimony not credible. See Drayton, 312 S.C. at 13, 430 S.E.2d at 522. Petitioner failed to produce the letter he at the PCR hearing. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998)("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Therefore, this Court should affirm the PCR court's finding that Petitioner failed to prove counsel was ineffective for failing to file an appeal.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

Nov 4th, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

The Honorable Eugene C. Griffith, Circuit Court Judge

ASHLEY RAY HARDIN,

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v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esq.
Post Office Box 11589
Columbia, SC 29211

This 4th day of November, 2013

Troyeshi Brailey
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

November 4, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Ashley Ray Hardin v. State of South Carolina**
Appellate case No.: 2012-212395

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: Wanda H. Carter, Esq. (2 copies with all the attachments)