

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Calhoun County

Edgar W. Dickson, Circuit Court Judge **S.C. Supreme Court**

**RECEIVED**

APR 21 2014

MICHAEL T. MCKNIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001789

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PETITION FOR WRIT OF CERTIORARI  
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**INDEX**

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 5

CONCLUSION ..... 12

### **ISSUE PRESENTED**

Did the PCR judge err in refusing to find counsel ineffective for failing to challenge the validity of South Carolina Code §23-3-540 requiring lifetime GPS monitoring when Petitioner was on probation for possession with intent to distribute cocaine, the GPS monitoring was triggered by an earlier parole violation stemming from a 2004 conviction for lewd act and one of the violations of probation was the removal of the GPS monitoring device?

## STATEMENT

In 2004, Petitioner pled guilty to lewd act on a minor and received an active sentence pursuant to the Youth Offender Act [YOA]. (App .p. 54, lines 11-25; p. 67, line 16 – p. 68, lines 1-10). Martin R. Banks represented Petitioner at the plea for lewd act. (App. p. 67, lines 16-25). On May 15, 2006, Petitioner was released on YOA parole. (App .p. 55, lines 9-12). In December of 2006, while still on YOA parole, Petitioner was arrested for possession with intent to distribute cocaine. (App. p. 11, p. 56, lines 2-12). In February of 2007, Petitioner's YOA parole was revoked as a result of the arrest in December of 2006, for possession with intent to distribute cocaine. (App. p. 56, lines 13-25).

On April 13, 2007, the Calhoun County Grand Jury indicted Petitioner for possession with intent to distribute cocaine, indictment #2007-GS-0-0042. On April 16, 2007, Petitioner appeared before the Honorable Diane S. Goodstein and pled guilty as charged. Martin R. Banks represented Petitioner at the plea. Judge Goodstein sentenced Petitioner to ten years provided upon the service of six months the balance was suspended with three years of probation. The sentence was to run concurrently to the YOA parole violation. (App. p. 12).

On February 10, 2010, Petitioner was granted a South Carolina Department of Corrections Youthful Offender Conditional Release. (App. pp. 20-21). On January 24, 2011, the Honorable Edgar W. Dickson ordered a partial six month revocation of the probation imposed on the cocaine charge. (App. pp. 22-24). Martin R. Banks represented Petitioner at the revocation hearing. (App. p. 23). On April 19, 2011, Petitioner signed a Notice of Sex Offender Accountability and Protection of Minors Act as well as a Notice of GPS Tracking program Conditions. (App. pp. 25-27). On July 26, 2011, Judge Dickson continued Petitioner on probation but added probation conditions. (App. p. 29). Martin R. Banks represented Petitioner at the revocation hearing.

On November 29, 2011, Petitioner appeared before the Honorable R. Ferrell Cothran, Jr. for a third probation violation hearing. Martin R. Banks again represented Petitioner at the revocation hearing. Judge Cothran revoked probation and ordered Petitioner to serve five years of the suspended sentence imposed on the cocaine charge. (App. pp. 1-8; p. 16). A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals dismissed the appeal. State v. McKnight, 2013-UP-101 (S.C. Ct. App. filed March 13, 2013).

On July 9, 2012, Petitioner filed an application for post conviction relief. The State filed a return on February 21, 2013. On May 20, 2013, an evidentiary hearing was held before the Honorable Edgar W. Dickson. Earnest D. O'Neil represented Petitioner at the PCR hearing. Daniel Gourly was present on behalf of the State. In a written order signed June 27, 2013, Judge Dickson denied relief and dismissed the application. A timely notice of intent to appeal was served on August 23, 2013. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to challenge the validity of South Carolina Code §23-3-540 requiring lifetime GPS monitoring when Petitioner was on probation for possession with intent to distribute cocaine, the GPS monitoring was triggered by an earlier parole violation stemming from a 2004 conviction for lewd act and one of the violations of probation was the removal of the GPS monitoring device.

On April 16, 2007, Petitioner appeared before the Honorable Diane S. Goodstein and pled guilty to possession with intent to distribute cocaine, indictment #2007-GS-0-0042.. Martin R. Banks represented Petitioner at the plea. Judge Goodstein sentenced Petitioner to ten years provided upon the service of six months the balance was suspended with three years of probation. The sentence was to run concurrently to a YOA parole violation. (App. p. 12). At the time of his arrest for possession with intent to distribute cocaine, Petitioner was on YOA parole stemming from a conviction for lewd act.

On November 29, 2011, Judge Cothran revoked probation and ordered Petitioner to serve five years of the suspended sentence imposed on the cocaine charge. (App. pp. 1-8; p. 16). During the revocation hearing the probation agent informed the judge that on September 21, 2011, Petitioner was convicted in municipal court for criminal domestic violence and, on the same date, convicted in magistrate court of assault and battery third degree. (App. p. 5, lines 15-30). The probation agent additionally informed the judge that the next day, September 22, 2011, Petitioner cut off his GPS tracking device. (App. p. 5, lines 2-9). Petitioner admitted cutting the bracelet off of his leg and moving to Philadelphia where he found work with his uncle. (App. p. 7, line 6 – p. 8, lines 1-13). Counsel failed to challenge the validity of the GPS requirement during the revocation hearing.

Petitioner filed a timely notice of intent to appeal Judge Cothran's decision to revoke probation. On June 8, 2012, a brief pursuant to Anders v. California, 386 U.S. 738 (1967) was filed on Petitioner's behalf. The Anders brief challenged the violations as not being willful. The South Carolina Court of Appeals dismissed the appeal. State v. McKnight, 2013-UP-101 (S.C. Ct. App. filed March 13, 2013).

In Petitioner's *pro se* arguments in support of post conviction relief Petitioner challenged the GPS requirement as a violation of due process and the ex post facto clause. (App. pp. 38-41). During the PCR hearing Petitioner testified that counsel should have objected to the GPS violation as a ground for the revocation of probation. (App. p. 61, line 22 – p. 62, p. 63, lines 1-11). During the PCR hearing counsel testified that he did not think the GPS law was in effect at the time of the 2007 guilty plea for possession with intent to distribute cocaine. (App. p. 70, lines 1-11). Counsel was mistaken. S.C. Code §23-3-540, the Sex Offender Accountability and Protection of Minors Act of 2006, [the Act] went into effect on July 1, 2006. (App. pp. 25-26). S.C. Code § 23-3-540(C) provides that:

A person who is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), and who violates a term of probation, parole, community supervision, or a community supervision program must be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

At the time of his guilty plea for the cocaine charge on April 16, 2007, Petitioner was given notice of sex offender registry. (App. p. 17). At the time of Petitioner's arrest on the cocaine charge, he was on parole for lewd act<sup>1</sup>. The violation of parole triggered the mandatory GPS requirement of §23-3-540(C).

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<sup>1</sup> Lewd act is now criminal sexual conduct with a minor in the third degree.

During the PCR hearing counsel was asked when he realized that petitioner was wearing a GPS tracker. (App. p. 70, lines 16-17). Counsel testified that he first thought the violation report alleging that Petitioner cut off his GPS monitor was referring to a home detention monitor. (App. p. 70, lines 18-24). Counsel then testified, “So I called up the agent and talked to Eric Reed. And he said, no, you know, the law has been applied retroactively to this violation now that it’s triggered and now he’s on GPS. I was – It was the first time that ever crossed my mind.” (App. p. 70, line 25 – p. 71, lines 1-4). It appears that counsel was unaware of the GPS requirements of S.C. Code §23-3-540 when he represented Petitioner at the guilty plea for possession with intent to distribute cocaine on April 16, 2007.

When asked at the PCR hearing if he researched the validity of the GPS requirement of §23-3-540 as applied to Petitioner counsel testified, “No. No, I didn’t do any research.” (App. p. 72, lines 4-11). Counsel testified, “I remember looking at the statute but I didn’t – the only research, you know, the only thing that – I read the statute. I talked to Eric Reed [Probation Agent]. And, again, he had extensive experience with it at that point. And looked like it applied – to me, I thought it applied.” (App. p. 72, lines 14-18). Counsel admitted, however, that at the time of the probation violation hearing there was pending litigation in regard to the GPS monitoring requirement as applied to Petitioner. (App. p. 71, lines 8-24; p. 72, line 22 – p. 73, lines 1-2). Despite counsel’s testimony at the PCR hearing, the record reflects that counsel failed to formerly object to the GPS requirement during the revocation hearing on November 29, 2011. (App. pp. 1-9).

In the order of dismissal the PCR judge wrote:

This Court finds Applicant’s allegation that he was denied effective assistance of counsel due to Counsel’s failure to object to the validity of the GPS tracking device is without merit. This court further finds that nothing in counsel’s representation fell below any reasonable professional standard. Counsel testified that he did not advise Applicant that he may be

potentially required to wear a GPS monitor as a result of his guilty plea because the statute was not in effect at the time of the Applicant's plea. (internal citation omitted).

This Court further finds Counsel thoroughly investigated the validity of the law and correctly found that the law applies retroactively. Additionally, this Court finds Counsel's testimony that there was no basis for an objection in light of the case law established at the time of Applicant's probation revocation to be correct. This Court holds that Applicant failed to meet his burden of proof in regards to this allegation, which must be denied and dismissed with prejudice.

(App. p. 90). The PCR judge erred.

First, counsel was ineffective during the guilty plea hearing in 2007, by failing to advise or even be aware of the fact that S.C. Code §23-3-540 required GPS monitoring because Petitioner was on parole for lewd act and the guilty plea constituted a violation of that parole. While S.C. Code §23-3-540 was not in effect at the time of the guilty plea to lewd act, it was in effect at the time of the guilty plea to possession with intent to distribute cocaine. Counsel represented Petitioner at both guilty pleas. Second, the PCR judge's finding that ". . . Counsel's testimony that that there was no basis for an objection in light of the case law established at the time of Applicant's probation revocation to be correct" is not supported by the record. Counsel admitted during the PCR hearing that the case law in regard to GPS monitoring was "up in the air a that point." (App. p. 73, lines 1-2). Counsel was ineffective for failing to challenge the GPS monitoring requirement.

On September 22, 2011, prior to the November 2011, probation revocation hearing in the present case, the South Carolina Supreme Court heard arguments in State v. Dykes. On May 9, 2012, the South Carolina Supreme Court issued the first opinion in State v. Dykes, 398 S.C. 351, 728 S.E.2d 455 (2012). Rehearing was sought and on July 12, 2012, the Court granted rehearing. On May 22, 2013, the Court issued the final opinion in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013). Petitioner filed a timely petition for rehearing. On July 24, 2013, the Court denied

rehearing but issued a substituted final opinion. A petition for writ of certiorari is pending in the United States Supreme Court.

In Dykes the GPS requirement of §23-3-540 was challenged on several grounds including ex post facto and due process. In In re Justin B., 405 S.C. 391, 408, 747 S.E.2d 774, 783 (2013) the Court summarized the holding in Dykes writing, “In Dykes, this Court found section 23–3–540(H) unconstitutional to the extent that the provision imposed lifetime electronic monitoring with no opportunity for judicial review. Id. at 503, 744 S.E.2d 505. Moreover, the Court held that the appellant, and other similarly situated sex offenders, must comply with the monitoring requirement mandated by section 23–3–540(C), but are entitled to ‘avail themselves of the section 23–3–540(H) judicial review process as outlined for the balance of the offenses numerated in section 23–3–540(G).’ Id. at 510, 744 S.E.2d 505.”

In Dykes, 403 S.C. 499, 521-522, 744 S.E.2d 505, 517 (2013), the South Carolina Supreme Court rejected the claim that S.C. Code §23-3-540 requiring GPS monitoring constituted an ex post facto violation because the GPS monitoring requirement was civil in nature. The dissent in Dykes found that the GPS monitoring requirement S.C. Code §23-3-540 (C) constituted a violation of substantive due process writing, “I therefore find that requiring Dykes to submit to satellite monitoring for the rest of her life without an assessment of her risk of reoffending violates her substantive due process rights. To paraphrase Blackstone, section 23–3–540(C)'s application to Dykes has the potential to decrease her natural liberty without any attendant increase in overall civil liberty. Accordingly, I would hold that subsection (C) of 23–3–540 is unconstitutional and must be stricken from the statute.” 403 S.C. at 521-522, 744 S.E.2d at 517. At the time of filing the present petition for writ of certiorari, a petition for writ of

certiorari in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) was pending in the United States Supreme Court.

Counsel in the present case was ineffective in failing to challenge S.C. Code §23-3-540(C) as a due process violation as well as an ex post facto violation. The case law in regard to the retroactive application of the statute was not settled at the time of the probation revocation hearing and remains unsettled. Petitioner pled guilty to lewd act on a minor prior to enactment of S.C. Code §23-3-540 and there was no hearing to determine if GPS monitoring was necessary in Petitioner's case. Petitioner was prejudiced by the deficient performance.

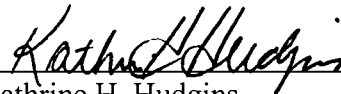
A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel 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.

Counsel was ineffective in failing to challenge GPS requirement of S.C. Code §23-3-540(C) as a due process violation as well as an ex post facto violation. There is a reasonable probability that but for counsel's deficient performance, Petitioner's case would still be pending on direct appeal and the GPS monitoring requirement could be challenged. Petitioner is entitled a new probation revocation hearing to challenge S.C. Code §23-3-540(C) as applied to Petitioner.

**CONCLUSION**

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of April, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Calhoun County

Edgar W. Dickson, Circuit Court Judge

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MICHAEL T. MCKNIGHT,

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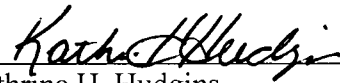
APPELLATE CASE NO. 2013-001789

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire this 21st day of April, 2014.

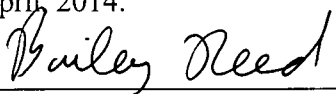


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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day  
of April, 2014.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .