

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
THE HONORABLE G. Edward Welmaker

**RECEIVED**

MAY 14 2014

**S.C. SUPREME COURT**

CA No. 2012-CP-23-6896

DONALD W. WICHMANN,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER  
2014 MAY 9 AM 8 55

**NOTICE OF APPEAL**

Appellant DONALD W. WICHMANN, appeals from the Order of the Honorable G. Edward Welmaker, Circuit Court Judge clocked April 9, 2014.

Respectfully submitted,

*Caroline M. Horlbeck*

Caroline M. Horlbeck, Esq.  
101 Whitsett St  
Greenville, SC 29601

Date: May 8, 2014

Other Counsel of Record: Karen Ratigan, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

COUNTY OF GREENVILLE

C.A. No. 2012-CP-23-6896

Donald W. Wichmann,

Appellant,

-vs-

CERTIFICATE OF SERVICE

State of South Carolina,

Respondent.

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French  
S.C. Office of Appellate Defense  
P.O. Box 11433  
Columbia, SC 29211

Karen Ratigan, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

Caroline M. Horlbeck  
Caroline M. Horlbeck

Greenville, South Carolina

May 9, 2014

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Donald W. Wichmann, )  
 S.C.D.C. No. 332554, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-6896

**ORDER OF DISMISSAL**

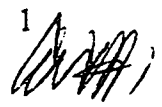
FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2014 APR - 9 P 3:06

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 25, 2012. The Respondent made its return and partial motion to dismiss on May 2, 2013. An evidentiary hearing into the matter was convened on February 21, 2014 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's probation revocation counsel, Robert Ianuario, Esquire. The Court had before it the probation revocation hearing transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, documents from the South Carolina Department of Probation, Parole, and Pardon Services, the PCR application, and the return and partial motion to dismiss.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted

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at the March 2007 term of the Greenville County Grand Jury for lewd act upon a child (2007-GS-23-2556). He was represented by Stephen J. Henry, Esquire.

On June 10, 2008, the Applicant pled guilty. He was sentenced by the Honorable Edward W. Miller to fifteen years suspended to five years probation. The Applicant did not appeal.

On February 17, 2012, the Applicant appeared in court pursuant to a probation citation.<sup>1</sup> He was represented by Robert Ianuario, Esquire. The Honorable Edward W. Miller revoked the Applicant's probation and levied a sentence of six years. The Applicant did not appeal.

### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. "Counsel was ineffective for failing to investigate case where Probation Citation and Arrest Warrant were different."
  - b. "Counsel was deemed ineffective for not objecting to the addition of mandatory GPS monitoring violating the terms of the original plea agreement."

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

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<sup>1</sup> The Applicant's probation had been partially revoked at hearings on January 9, 2009 and February 22, 2011.

### Partial Motion to Dismiss

This Court finds all issues related to the Applicant's guilty plea hearing must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina Code Ann. § 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The Applicant pled guilty to the offense he challenges in this application on June 10, 2008. In order to challenge this guilty plea, the Applicant was required to file his application before June 10, 2009. This application was filed on October 25, 2012, which was more than three years and four months after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent's partial motion to dismiss is granted.

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he

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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). Allegations of ineffective assistance of probation revocation counsel are evaluated under the Strickland standard. 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. at 1241-42.

The Applicant stated he retained counsel shortly before the revocation hearing and that they had one meeting. The Applicant stated he and counsel discussed his probation violations. The Applicant stated he gave counsel his roommate's name (who could testify that he was the one who accessed Facebook on the Applicant's phone). The Applicant stated he and counsel discussed mandatory GPS but that he did not realize it was lifetime GPS. The Applicant stated there was no evidence presented that he was at risk of reoffending and that he had no probation violations involving minors. The Applicant stated the probation agent had said he would recommend a three year revocation but that counsel said the agent changed his mind and would ask for five years.

Counsel testified he was retained on January 31, 2012. Counsel testified he received the warrant and violation report from the probation agent and reviewed them with the Applicant. Counsel testified they discussed that the Applicant was in arrears. Counsel testified they discussed that the Applicant's phone had been used to access Facebook but that he had no notes to corroborate the Applicant's assertion that he said to contact his roommate about this. Counsel testified the Applicant admitted he had a sexually explicit video on his phone and that counsel

had viewed the video. Counsel testified the probation agent planned to ask for a three year revocation until he viewed the video (which underscored the willfulness of the violation). Counsel stated he explained this to the Applicant and that the agent would ask for a five year revocation. Counsel stated there was no way to challenge the mandatory GPS.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding counsel's testimony is credible. This Court further finds counsel adequately conferred with the Applicant and was competent in his representation. The Applicant admitted his probation violations and that there was no legal reason for the violations. (Probation revocation transcript, p.3).

This Court finds the Applicant failed to meet his burden of proving counsel was ineffective. Counsel testified he and the Applicant reviewed the probation documents and discussed the violations. Counsel testified he has no notes in his file that the Applicant asked him to contact his roommate about the probation violation involving Facebook. This Court finds counsel's testimony is credible. This Court notes that it cannot speculate as to what the Applicant's roommate could have added to his case because that person did not testify at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). This Court also finds there was no basis for counsel to have challenged the probation agent's decision to recommend a five year revocation instead of a three year revocation. Counsel testified he explained the reason behind the agent's decision to the

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Applicant. Regardless, it is the judge – not the parties – who decides sentencing. See In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) (“A trial judge has broad discretion in sentencing within statutory limits.”). This Court further finds there was no basis for counsel to have challenged the imposition of mandatory GPS, as it is mandated by statute for the offense of lewd act up on a child. S.C. Code Ann. § 24-3-540(C) (Supp. 2011).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his probation revocation hearing. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel’s representation. Therefore, this PCR application must be denied and

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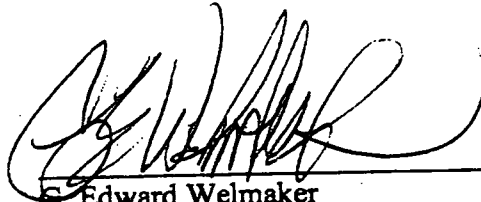

dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the Respondent's partial motion to dismiss is granted.
2. That the issues related to the Applicant's probation revocation are denied and dismissed with prejudice; and
3. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 31 day of March, 2014.



G. Edward Welmaker  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina.

CAROLINE M. HORLBECK  
ATTORNEY AT LAW

RECEIVED

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PCR

MAY 14 2014

S.C. SUPREME COURT

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GREENVILLE, SOUTH CAROLINA 29601  
horlbecklawfirm@gmail.com

May 9, 2014

**Via Regular Mail**

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

Re: DONALD W. WICHMANN v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

*Caroline M. Horlbeck*  
Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

CAROLINE M. HORLBECK

*Attorney At Law*

101 WHITSETT ST.  
GREENVILLE, SOUTH CAROLINA 29601

**Via Regular Mail**

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