

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Calhoun County
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

2012-CP-09-00137
Appellate Case No. 2013-001789

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MICHAEL T. MCKNIGHT,

Petitioner,

S.C. Supreme Court

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ISSUES PRESENTED

Probative evidence exists to support the PCR Judge's finding that Counsel was not ineffective for failing to challenge the validity of the South Carolina Code § 23-3-540, requiring lifetime GPS monitoring.

STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. The Applicant was indicted during the April 2007 term of the Calhoun County Grand Jury for Possession with Intent to Distribute Cocaine (2007-GS-09-0042). Martin R. Banks, Esquire, represented him. On April 16, 2007, the Applicant pled guilty as indicted to Possession with Intent to Distribute Cocaine before the Honorable Diane S. Goodstein. Judge Goodstein sentenced Applicant to ten years imprisonment suspended upon the service of six months imprisonment followed by three years of probation. The sentence was to be served concurrently to Applicant's YOA parole for a previous 2004 charge and a six month sentence for a charge of Manufacture, Distribution, etc. of Cocaine Base – 1st (2007-GS-09-040). Judge Goodstein also ordered the Applicant to perform forty hours of public service employment, obtain a GED, attend substance abuse counseling, and be subject to random drug/alcohol testing. The Applicant did not appeal his conviction and sentence.

An arrest warrant was issued for the Applicant on December 15, 2010, for violating conditions of his probation by using marijuana on two separate occasions, failing to attend ordered treatment, possessing a dangerous weapon, failing to work, and failing to pay fees. Martin R. Banks, Esquire, represented Applicant at the violation hearing. On January 24, 2011, the Honorable Edgar W. Dickson partially revoked the Applicant's probation, requiring him to serve six months of his original sentence. Judge Dickson also instructed that any new convictions would be viewed as a new violation of probation.

A probation citation was issued on July 26, 2011, following Applicant's subsequent conviction for Assault and Battery – Second Degree (2011-GS-09-0041). Applicant was

represented by Martin R. Banks, Esquire, for both the probation violation and the Assault and Battery charge. Judge Dickson ordered that Applicant continue with his probation and complete anger management counseling with CASA or Calhoun County Mental Health. Upon completion of his GED and anger management counseling, Judge Dickson would consider the case for termination.

A third and final probation citation was issued on September 23, 2011, as a result of Applicant cutting off his GPS tracking device,¹ failing to refrain from drug use, absconding from his address, failing to pay supervision fees, and facing additional convictions in Magistrate's Court. Martin R. Banks, Esquire, represented him for his probation revocation hearing. The Honorable R. Ferrell Cothran, Jr., revoked Applicant's suspended sentence and sentenced him to serve the remaining five years of his sentence.

Thereafter, Petitioner filed a timely application for PCR on July 9, 2012, alleging that he was being held in custody unlawfully. Respondent made its return on February 21, 2013, requesting that an evidentiary hearing be held on Petitioner's application.

On May 20, 2013, an evidentiary hearing on the matter was convened before the Honorable Edgar W. Dickson at the Orangeburg County Courthouse. By Order dated June 27, 2013, Judge Dickson denied and dismissed Petitioner's application with prejudice. Petitioner subsequently filed a Petition for Writ of Certiorari on April 21, 2013. This Return follows.

¹ Applicant was ordered to wear a GPS tracking device as a condition of a prior charge for Lewd Act, Committing or Attempting Lewd Act Upon Child under 16 (2004-GS-09-0139).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

Probative evidence exists to support the PCR Judge's finding that Counsel was not ineffective for failing to object to the requirement that Petitioner wear a GPS monitoring device under South Carolina Code § 23-3-540.

Petitioner argues the post-conviction relief (PCR) erred in finding that Counsel was not ineffective for failing to object to Petitioner being required to wear a GPS monitoring device under South Carolina Code § 23-3-540(C). However, this argument is meritless as probative evidence supports the PCR Court's finding that Counsel was not ineffective.

In the instant case, Petitioner argues Counsel 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. In support of his argument, Petitioner relies on the recent South Carolina Supreme Court opinion State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013).² In Dykes, the South Carolina Supreme Court addressed the issue of whether S.C. Code § 23-3-540 requiring GPS monitoring violated due process. The Court found that the initial mandatory imposition of satellite monitoring for certain child sex offenders under section §23-3-540(C) did not violate due process. Id. at 508. However, the Court found the statutory requirement of lifetime monitoring without judicial review related to an assessment of risk of reoffending under section 23-3-540(H) violated due process. Id. at 508. Petitioner now argues had Counsel challenged 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 Petitioner's case would still be pending on direct appeal and the GPS monitoring requirement could be challenged.

However, Counsel stated during the evidentiary hearing, "I think I put forth his complaint about how the burden of the GPS monitoring affected [Petitioner]. I think I put forth that, you

² A Petition for Writ of Certiorari is pending in the United States Supreme Court.

know, we'd like to not have it." (App. p. 72 lines 19-25). Counsel was of the opinion that "the groundwork laid at [the] hearing was enough to appeal the issue" of whether the GPS monitoring was valid. (App. p. 73 lines 17-22). Counsel stated that he "object[ed] to the GPS in the summation of what we were saying" during the probation revocation hearing. (App. p. 74 lines 20-23). Counsel further stated that he filed a notice of appeal on the Applicant's behalf; however he was unaware of the status of the appeal. (App. p. 73 lines 10-16). As evidenced by the record, Counsel was of the opinion the he lodged an objection to the mandatory GPS tracking device.

Additionally, the Dykes opinion was not issued until several years after Petitioner's probation revocation hearing. Notably, a Petition for Writ of Certiorari is still currently pending in the United States Supreme Court. Our State Supreme Court has consistently stated, "[w]e have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). See also Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Therefore, Counsel cannot be held ineffective for failing to challenge S.C. Code § 23-3-540 as the law was valid at the time of the hearing.

Furthermore, Petitioner has failed to show any resulting prejudice. Petitioner argues had Counsel challenged 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 Petitioner's case would still be pending on direct appeal and the GPS monitoring requirement could be challenged. However, the Court in Dykes specifically held that section 23-5-340(C) does not violate due

process. Dykes, S.C. 403. at 508, S.E.2d at 510. Therefore, Petitioner can show no prejudice as a result of Counsel's alleged deficiency.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Deputy Attorney General
Bar No. 100934

By: 
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August 7, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MICHAEL T. MCKNIGHT,

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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:

Appellate Defender Katherine H. Hudgins
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 7th day of August, 2014



SARA MOORE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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August 7, 2014

S.C. Supreme Court

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

RE: Michael T. McKnight v. State of South Carolina
Lower Court Case No: 2012-CP-09-00137
Appellate Case No. 2013-001789

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 opposing counsel today.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/sbm
Enclosures

cc: Kathrine H. Hudgins (2 copies)
Trisha Allen. Victim Services (1 copy)