

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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DEC 15 2014

S.C. Supreme Court

DONALD W. WICHMANN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001043

JOHNSON PETITION FOR WRIT OF CERTIORARI

JOHN H. STROM
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to interview Petitioner's roommate and failed to call the roommate to testify at Petitioner's probation revocation hearing, when her testimony would have provided evidence that Petitioner did not violate the social media restrictions of his probation?

STATEMENT

Indictment and Plea Hearing

On March 28, 2007, Petitioner was indicted by the Greenville County Grand Jury for committing a lewd act upon a minor. App. 76. On June 10, 2008, Petitioner pled guilty. App. 77. Petitioner was represented by Steven J. Henry. Petitioner was sentenced by the Honorable Edward W. Miller to fifteen years, suspended to five years of probation. App. 77. Judge Miller agreed Petitioner not have to undergo lifetime GPS monitoring following release. Petitioner did not appeal.

Prior Probation Revocations

On October 22, 2008, a probation arrest warrant was issued for Petitioner. App. 12. On January 9, 2009, a probation revocation hearing was held before Judge Miller. App. 13. Petitioner was sentenced to three years imprisonment with probation to be reinstated on release and was required to enter into lifetime GPS monitoring upon his release. *Id.*

On January 4, 2011, a second probation arrest warrant was issued for Petitioner. App. 10. On February 11, 2011, a probation revocation hearing for the second warrant was held before the Honorable C. Victor Pyle, Jr. App. 11. Petitioner was sentenced to one year imprisonment with probation reinstated on release and GPS monitoring resuming. *Id.*

Final Probation Revocation

On December 9, 2011, a third probation arrest warrant was issued for Petitioner. App. 8. On February 17, 2012, a probation revocation hearing was held before Judge Miller. App. 1-5. Petitioner was represented by Robert Ianuario and the State by Probation Officer Tony Anderson. *Id.* Judge Miller found that Petitioner had violated the conditions of his probationary sentence and revoked Petitioner's probation, sentencing him to six years with probation to terminate on release. App. 9. Petitioner did not appeal the sentence.

PCR and Evidentiary Hearing

On October 25, 2012, Petitioner filed this application for post-conviction relief. App. 14-37. On May 2, 2013, Respondent filed a Return to Petitioner's application and partial motion to dismiss. App. 38-42. On February 21, 2014, an evidentiary hearing was held before the Honorable G. Edward Welmaker. App. 43-67. Petitioner was represented by Caroline Horlbeck and the State by Assistant Attorney General Karen C. Ratigan. *Id.* By an order filed on April 9, 2014, Judge Welmaker denied Petitioner's PCR Application. App. 68-74.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth Amendment rights were violated when counsel failed to interview Petitioner's roommate and failed to call the roommate to testify at Petitioner's probation revocation hearing, when her testimony would have provided evidence that Petitioner did not violate the social media restrictions of his probation.

Relevant Facts

At sentencing it was agreed that the Petitioner would not be required to enter lifetime GPS monitoring. App. 52, ll. 11-20. Instead, the terms of Petitioner's probation required him to: submit to alcohol and drug testing, pay fines, abide by the Standard Sex Offender Conditions, and attend regular meetings with his probation officer. App. 77. After his first probation violation, Petitioner was required to maintain and pay for GPS monitoring. App. 52, ll. 16-25. Additional restrictions imposed as a result of his violations required Petitioner to refrain from possessing sexually explicit material and to refrain from visiting social media websites. App. 8. Petitioner also had to make his cellular phone and other electronic devices with internet access available for inspection by probation officers pursuant to the Computer Use Agreement for Sex Offenders. *Id.*

On December 9, 2011, Agent Anderson inspected Petitioner's cell phone which revealed an explicit video of Petitioner and his adult-age girlfriend. *Id.* Further, inspection also revealed that Facebook had been accessed on Petitioner's phone. *Id.* Petitioner also allegedly failed to keep his GPS monitoring device charged and failed to respond to communications from Anderson. *Id.* Anderson further alleged that Petitioner owed \$800.00 in fees and fines related to either GPS monitoring or probation. *Id.*

Probation Revocation Hearing

At the revocation hearing Anderson submitted a report, not entered into evidence, to Judge Miller which Anderson believed showed that the above-referenced violations were willful. App. 4, ll. 8-15. Counsel presented no witnesses and Petitioner did not testify. Counsel argued that

Petitioner's violations were not crimes and that Petitioner had been cooperative regarding the investigations. App. 4, ll. 1-7. Counsel asked for five years with termination of probation on his release. App. 3, ll. 21-24. When asked by the Court about the violations, Petitioner admitted that he had violated the conditions of his probation without a "lawful reason." App. 3, ll. 6-19.

PCR and Evidentiary Hearing

Petitioner and counsel testified at the PCR hearing. Petitioner testified at the PCR hearing that, "right before I went into probation, my roommate had looked on -- I thought she was looking on North Greenville for her grades, but actually she went through Facebook. And [Anderson] realized it wasn't me, but it was on my phone." App. 50, ll. 4-8. When asked if he had discussed this issue with counsel, Petitioner stated he had, but "none of that came about through the -- during my hearing." *Id.* at 17-21. Petitioner stated he provided counsel with his roommate's contact information prior to the hearing. App. 51, ll. 3-13. Petitioner also testified to his belief that Anderson understood that Petitioner had not accessed Facebook, but that Anderson failed to testify as such at the hearing and that counsel also failed to bring it to the court's attention. App. 56, ll. 18 – App. 59, ll. 12.

Counsel testified that he did not have any notes on Petitioner's roommate. App. 59, ll. 13-22. Counsel also could not recall Petitioner providing the name of who used his phone to access Facebook. *Id.* at 19-25. Counsel further testified that, based on his notes and recollection, he had "no indication of [the Facebook user] being a roommate. It was just he let somebody borrow his phone. And I do not have a name provided." *Id.* at ll. 20-22. Petitioner's roommate was not present for the evidentiary hearing.

Order of Dismissal

In denying Petitioner's application, Judge Welmaker held that counsel was not ineffective for failing to call Petitioner's roommate as a witness. App. 72. Furthermore, Judge Welmaker noted that the Court would not speculate as to what Petitioner's roommate's testimony would have been and that Petitioner failed to establish any resulting prejudice because the roommate did not testify at the evidentiary hearing. *Id.*

Discussion

Counsel rendered ineffective assistance because his failure to interview or call Petitioner's roommate, who would have testified that she, not Petitioner, had accessed Facebook; was not objectively reasonable given the circumstances and seriousness of Petitioner's alleged violations.

A defendant on probation has a right to effective assistance of counsel. *Turner v. State*, 384 S.C. 451, 682 S.E.2d 792 (2009). Accordingly, "the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel should, by analogy, apply in PCR proceedings involving claims against probation counsel." *Id.* at 455, 682 S.E.2d at 794. To establish a claim for ineffective assistance of counsel, a PCR applicant must satisfy the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is

required to overcome the presumption that counsel was effective in order to receive relief.” *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant 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.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

Deficient Performance

In this case, counsel’s failure to interview, call, or secure Petitioner’s roommate as a witness was deficient performance, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. While counsel has the authority to make certain tactical decisions involving trial strategy; that strategy must be objectively reasonable. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness”); *see also Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (finding PCR Petitioner showed uncalled witness would have made a difference in trial because it would have cast doubt on victim’s identification of Petitioner).

Moreover, counsel has a duty to “make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (noting “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further”). This Court has also held that counsel has a duty “to discover all reasonably available mitigation evidence and reasonably available evidence tending to rebut any aggravating evidence

introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). This includes the contacting potential witnesses and securing their testimony in preparation for trial.

Counsel had a duty to, at a minimum, contact Petitioner’s roommate as her testimony could have eliminated or mitigated one of Petitioner’s alleged probation violations. Counsel was provided with her contact information and an outline of her testimony by Petitioner, but inexplicably failed to contact the roommate. App. 51, ll. 3-13, Counsel’s decision to not call Petitioner’s roommate was not an objectively reasonable trial strategy and reflected counsel’s failure to investigate Petitioner’s case. Accordingly, the PCR court erred in finding that counsel decision not to call Petitioner’s roommate as a witness was a valid trial strategy because counsel failed to adequately investigate Petitioner’s case; thus Petitioner’s performance was not reasonable “under prevailing professional norms.” *See Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. 115, 386.

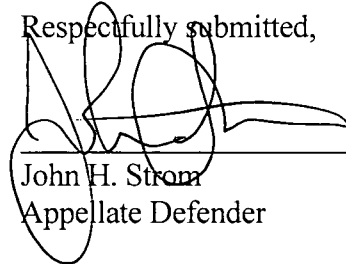
Prejudice

Petitioner was prejudiced because trial counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (*quoting Strickland*, 466 U.S. at 692). Counsel’s deficient performance adversely affected Petitioner’s right to a fair trial because counsel’s failure to interview or call Petitioner’s roommate as a witness, prevented Petitioner from presenting evidence that he had not violated the conditions of his probation related to social media. These alleged violations were a significant factor in the judge leveling a six-year sentence against Petitioner. Therefore, PCR court erred in finding trial counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” App. 72; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

Based on the foregoing reasons, Petitioner Donald Wichmann respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue presented.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line. The signature is stylized and somewhat cursive.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

DONALD W. WICHMANN,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-001043

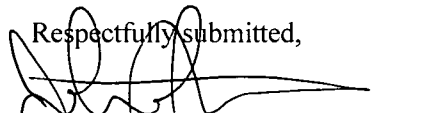
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald W. Wichmann states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 21, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Donald W. Wichmann.

Respectfully submitted,



John H. Stojn
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of December, 2014

STATE OF SOUTH CAROLINA

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Certiorari to Greenville County
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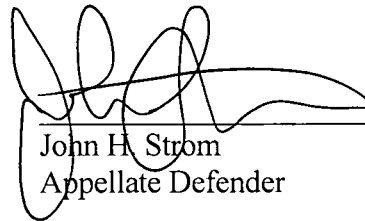
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-001043

CERTIFICATE OF SERVICE

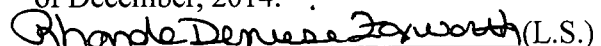
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Donald W. Wichmann, #332554, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 15th day of December, 2014.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of December, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.