ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

G. Edward Welmaker, Circuit Court Judge

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JAN 13 2015

S.C. Supreme Court

JOHN WILLIAM DIXON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002193

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

1.

Was the PCR court correctly held that petitioner was entitled to a *White v. State* belated appeal of his probation revocation hearing where his attorney admitted he did not appeal because he did not think petitioner had meritorious issues where petitioner had a meritorious issue, and because petitioner did not knowingly and intelligently waive his right to appeal?

2.

Was probation revocation counsel, in the alternative to White v. State brief, ineffective for failing to present sufficient evidence for the probation revocation judge to rule on the issue of petitioner's entitlement for time served in a Florida prison, after he had served his Florida sentence, because a "hold" was placed on him by South Carolina probation officials, since petitioner was entitled to credit for this time served?

STATEMENT OF FACTS

Petitioner was indicted at the December 7, 2007 term of the York County Grand Jury for the offense of threatening the life of a public official. App. 77. Petitioner appeared on June 20, 2008 before the Honorable R. Knox McMahon. Gary Lemel represented petitioner. Rebecca Taylor was the assistant solicitor. App. 1.

Petitioner entered an Alford[1] plea to the charge of threatening the life of a public official. App. 5, ll. 11-22. At the conclusion of the plea proceeding Judge McMahon sentenced petitioner to five years imprisonment suspended on the service of five years probation. App. 18, l. 23 – 19. l. 7.

Two subsequent probation violation hearings were held. The first probation revocation hearing was on March 8, 2010 before the Honorable John C. Hayes, III. Judge Hayes revoked petitioner's probation for ninety days, and continued him on probation. App. 67.

The second probation revocation hearing, the subject of this PCR action, was held on May 7, 2012 before the Honorable John C. Hayes, III. Mark McKinnon represented petitioner at this revocation hearing. Supp.App. 1. Judge Hayes revoked petitioner's probation in full and terminated him from probation. Supp. App. 6, l. 1 – 7, l. 13; App. 67.

Judge Hayes ruled that petitioner was only entitled to credit for time served in South Carolina, and by omission denied him credit for time served in Florida while a "hold" was placed on him based on the South Carolina probation revocation warrant. Defense counsel argued petitioner was entitled to 300 days credit, and the judge ruled he was only entitled to the 90 days he served in South Carolina. Supp. App. 6, l. 1 – 7, l. 13; App. 79.

Petitioner filed an application for post-conviction relief on December 12, 2012. App. 21-27. The state filed a return on March 21, 2013. App. 29-33.

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[1] North Carolina v. Alford, 400 U.S. 25 (1970).

An evidentiary hearing was held on August 12, 2013 before the Honorable G. Edward Welmaker. Nathan Sheldon represented petitioner. Joshua Thomas and J. Rutledge Johnson were the Assistant Attorneys General. App. 35.

Petitioner testified he was incarcerated for a probation violation that occurred following his guilty plea for threatening the life of a public official. App. 39, ll. 11-21. While on probation petitioner was subsequently arrested "on or about June 8, 2011 on other charges in Florida." App. 40, ll. 22-24. He was served with the South Carolina probation arrest warrant "at the end of June or sometime in July [2011]" "via fax through the county from South Carolina." App. 41, ll. 12-17. The arrest warrant was dated July 22, 2012. App. 43, ll. 10-21. It was notarized and issued on July 6, 2011. App. 43, l. 18 – 44, l. 9; App. 83. The warrant was filed with the Clerk of Court on December 13, 2012. App. 83.

Petitioner subsequently entered an Alford plea in Florida which resulted in a "time served" sentence of "11-month and 29-day." App. 45, l. 21 – 46, l. 20; App. 85-86. This "time served" sentence was imposed in Florida on March 15, 2012. App. 85-86.

Petitioner testified he was not able to "just walk out of the Florida jail" after receiving his time served sentence on March 15, 2012 because "there was a hold on me from here [South Carolina]" for a probation violation hearing. App. 46, l. 15 – 47, l. 7. Petitioner testified he returned to South Carolina on April 20, 2012. App. 47, ll. 8-10.

As seen, petitioner's probation violation revocation hearing was not held until May 7, 2012. Supp. App. 1. Consequently, petitioner's submission in his belated direct appeal brief is that he was entitled to time served also from March 15, 2011 until his probation revocation hearing on May 7, 2012. That was the time he served in Florida and South Carolina prisons prior to his hearing.

At the PCR hearing counsel McKinnon testified that he told petitioner he would ask the judge to also give petitioner credit for the time he served in Florida from "the date the hold was put on him." Defense counsel noted this would have entitled petitioner to three hundred days "time-served credit." App. 58, ll. 5-16. McKinnon testified *"sometimes judges will be nice and do that. But that's my understanding of the law."* App. 58, l. 24 – 59, l. 7. (emphasis added).

On cross-examination defense counsel admitted he did not research the time served issue in this case but relied on his memory from prior cases. He again repeated that sometimes judges were "in a good mood" or just wanting to "give the defendant a break," and the judge would give credit for time served. App. 60, ll. 5-20.

Defense counsel McKinnon also said he did not recall discussing an appeal with petitioner but stated in his opinion there was no meritorious issue to appeal. App. 58, l. 19 – 59, l. 7.

Judge Welmaker ruled petitioner was entitled to a White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) appeal pursuant to the procedures of Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1996).

ARGUMENT

1.

The PCR court correctly held that petitioner was entitled to a *White v. State* belated appeal of his probation revocation hearing where his attorney admitted he did not appeal because he did not think petitioner had meritorious issues where petitioner had a meritorious issue, and because petitioner did not knowingly and intelligently waive his right to appeal.

The PCR court correctly found petitioner was entitled to a White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) appeal of the rulings issued during his probation revocation hearing. There was evidence to support the PCR court's ruling, and it should be affirmed under the "any evidence" standard. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (2014).

Further, there is no evidence petitioner knowingly waived his right to a direct appeal of this time served issue. Moreover, probation revocation counsel was incorrect in his belief that there was no meritorious issue to appeal where he simultaneously admitted he did not research the issue.

The legal issue

The PCR record here reveals that petitioner was held in a Florida jail pursuant to a "hold" from South Carolina based on a South Carolina probation arrest warrant. App. 83-86. Petitioner entered his guilty plea and received his time served sentence in Florida on March 15, 2012. App. 85-86.

Consequently, there was no legal reason for the judge to only give petitioner credit for time served in South Carolina, and denying petitioner time served for the time he served in a Florida prison based on the South Carolina detainer. The statute in point is:

24-13-40. Computation of time served by prisoners.

The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a

prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.[2]

Neither exception (1) nor (2) to the statute is applicable. The geographic fact that petitioner was held in a Florida jail after he had finished his Florida sentence is no basis for the court's ruling. He was held in Florida pursuant to a South Carolina detainer.

The opinion in State v. Dozier, 263 S.C. 267, 210 S.E.2d 255 (1974) underpins petitioner's position. The court's limitation to time served in South Carolina is thus in error. This Court should respectfully issue an order granting petitioner credit for time served in Florida as a result of this White v. State pending appeal, or based on revocation counsel's failure to adequately present the issue to Judge Hayes at the revocation hearing.

Finally, if this Court finds this record is insufficient to determine exactly how many days credit petitioner is entitled to from his jail service in Florida then this case should be remanded for that purpose of determining how much time served petitioner is entitled to in this case.

[2] The hearing in this case was held on May 7, 2012. However, the house arrest provision of the 2013 amendment is not at issue, and this statute controls.

2.

Probation revocation counsel was, in the alternative ineffective for failing to present sufficient evidence for the probation revocation judge to rule on the issue of his entitlement for credit for time served in Florida prisons while a "hold" was placed on him by South Carolina probation officials.

In the alternative, if this court finds plea revocation counsel did not sufficiently present sufficient available evidence in support of petitioner receiving credit for time served in Florida following the "hold" in Florida being placed on him to the revocation judge, it respectfully should rule that defense counsel was ineffective. The PCR record shows petitioner was entitled to credit for the additional time he served in Florida after the "hold" was placed on him until he was returned to South Carolina and had his five year suspended sentence revoked.

The applicable dates are March 15, 2011 when the time served sentence was imposed in Florida on the Florida charges, and petitioner then was only held in Florida because of the South Carolina detainer, and May 7, 2012 when Judge Hayes revoked petitioner's probation in full. Petitioner was entitled to this time served.

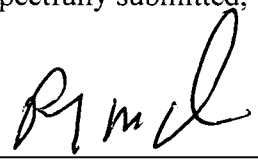
The failure to provide the revocation judge with sufficient information to show petitioner was entitled to this time served in Florida fell below the standard reasonably effective assistance under prevailing norms. What "mood" the judge was in that day, or whether he felt like "giving a defendant a break" was not dispositive of petitioner's right to time served in Florida on this South Carolina detainer. Petitioner was clearly prejudiced by his counsel's ineffective performance because he would have been given credit for this time served. See Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) *citing* Strickland v. Washington, 466 U.S. 668, 687 (1984).

Finally, petitioner submits that the interests of judicial economy dictate that this credit for time served in another state as a result of a South Carolina detainer issue should be ruled upon now by this Court regardless of any procedural abnormality. Further, since this issue of entitlement for time served in another state pursuant to a South Carolina detainer is capable of repetition, and evading review unless ruled upon by this Court it not is moot. In re Care & Treatment of McCracken, 346 S.C. 87, 90, 551 S.E.2d 235, 237 (2001); Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n, 336 S.C. 174, 180, 519 S.E.2d 567, 570–71 (1999).

CONCLUSION

By reason of the foregoing arguments, petitioner is entitled to a White v. State review of his time served issue. Further, petitioner is entitled to an order from this court awarding him credit for the time he served in Florida after the probation revocation warrant detainer was placed on him in the Florida correctional facility after his guilty plea in Florida if this Court rules counsel was ineffective in presenting the White v. State issue to the revocation judge.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of January, 2015.

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JOHN WILLIAM DIXON,

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari, a copy of the appendix, and the supplemental appendix in this case have been served on J. Rutledge Johnson, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 13th day of January, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of January, 2015.

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