

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2008-CP-04-0104

ORIGINAL

Bradley Ishman, Respondent,

v.

State of South Carolina, Petitioner.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE ON APPEAL

DID THE PCR COURT IMPROPERLY REMAND RESPONDENT'S PROBATION VIOLATIONS, WHERE THE PCR COURT DID NOT HAVE AUTHORITY TO GRANT RELIEF BASED UPON A DIRECT APPEAL ISSUE, AND WHERE THE PCR COURT MISAPPLIED THE DANGERFIELD CASE?

STATEMENT OF THE CASE

Respondent was indicted by the Anderson County Grand Jury for pointing or presenting a firearm. John Stathakis, Esquire, represented him. On September 20, 2006, Respondent pled guilty as indicted. He was sentenced by the Honorable J.C. Nicholson to confinement for five years suspended upon three years probation. Respondent did not appeal his conviction or sentence.

Respondent subsequently violated the terms of his probation. On January 19, 2007, a probation revocation hearing was convened at which Respondent was present. Respondent was represented by Andrew Potter, Esquire. The Honorable J. Cordell Maddox revoked Respondent's probation in full and sentenced him to serve five years with credit given for time already served. Respondent did not appeal his probation revocation.

Respondent subsequently filed an application for post-conviction relief on January 11, 2008. Respondent made its Return on March 6, 2008. An evidentiary hearing was convened at the Anderson County Courthouse on October 22, 2008. Respondent was present at the hearing was represented by John P. Griffith, Esquire. The Petitioner was represented by Assistant Attorney Gregory P. Jones, Jr. of the South Carolina Office of the Attorney General. Following the evidentiary hearing, the Honorable Alexander S. Macaulay granted post-conviction relief by written Order dated September 9, 2009.

This Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief (PCR) evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The reviewing Court "gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." *Id.* The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

ARGUMENT

THE PCR COURT IMPROPERLY REMANDED RESPONDENT'S PROBATION VIOLATIONS, WHERE THE PCR COURT DID NOT HAVE AUTHORITY TO GRANT RELIEF BASED UPON A DIRECT APPEAL ISSUE, AND WHERE THE PCR COURT MISAPPLIED THE DANGERFIELD CASE.

In this case, the Petitioner submits that Respondent's contention at the PCR hearing that his due process rights were violated during a probation revocation hearing was a direct appeal issue that was improperly before the PCR court. The Petitioner further submits that the PCR court did not have authority to grant PCR based upon Respondent's allegations.

Relevant Facts

On September 26, 2006, Respondent pled guilty to pointing and presenting a firearm at a person. (App. p. 1-23). Respondent was sentenced to confinement for five years suspended upon the service of three years probation. (App. p. 195). Subsequently, Respondent was accused of violating the terms of his probation.

At the revocation hearing held on January 19, 2006, Andrew Potter, Esquire, represented Respondent. At the hearing, Respondent admitted violating conditions three, five, and nine. (App. p. 27, lines 15-16). However, Respondent denied the allegation that he was in possession of a firearm. (App.

p. 27, lines 20-23). The probation agent, Amy Metcalf, announced that she had an affidavit and pictures as evidence of the possession of a firearm charge. (App. p. 28, lines 7-11). In response, Mr. Potter requested a continuance to review the affidavit and pictures, and he told the trial judge that Respondent had a witness to refute the possession of a firearm allegation. (App. p. 28, lines 13-19). The probation judge gave Respondent additional time to review the evidence against him. (App. p. 30, line 24-p. 31, line 2). After receiving additional time to review the evidence, Respondent maintained his denial of the allegation that he possessed a firearm. (App. p. 31, lines 7-20). Subsequently, the probation revocation judge found that Respondent had violated probation conditions 1, 3, 4, 5, 6, 9, 10, and special conditions. (App. p. 198).

At the PCR hearing, Respondent claimed that his due process rights were violated during his probation revocation hearing because he was unable to present his case; he did not timely receive the evidence against him; he was unable to present witnesses or confront adverse witnesses; and he did not receive a written statement of the fact-finder as to the reasons for revoking probation. (App. p. 54, line 18 - p. 55, line 3); (App. p. 55, lines 11-16). At the PCR hearing, Mr. Potter testified that, prior to the revocation hearing, he met with Respondent to discuss the probation violations. (App. p. 65, lines 22-25). Mr. Potter testified that he had enough time to discuss the case with Respondent. (App. p. 74, lines 15-18). Mr. Potter testified that Respondent's due process rights were complied with at the probation revocation hearing.

(App. p. 77, lines 1-7). Although Respondent did not speak at his probation revocation hearing, Mr. Potter testified that he conveyed to the probation judge everything that Respondent wanted to say in response to the probation violations. (App. p. 70, lines 10-15); (App. p. 78, lines 5-6). In addition, Mr. Potter testified that adverse witnesses were not cross-examined because no testimony was taken; however, Mr. Potter testified that he was able to ask the probation agent questions. (App. p. 78, lines 10-13). Moreover, Mr. Potter testified that he had adequate time to prepare Respondent's defense. (App. 78, line 19).

Subsequently, the PCR court issued an Order granting PCR dated September 9, 2009. (App. p. 182 – p. 189). The PCR court found that Respondent's alleged violations of due process were proper PCR allegations and could support the granting of post-conviction relief. (App. p. 188). The PCR court found that due to a lack of evidence presented by the State, the probation judge should not have revoked probation and imposed the suspended sentence. (App. p. 188). The PCR court **did not** making a finding that trial counsel rendered ineffective assistance.

Analysis

In South Carolina, the law is clear that an application for postconviction relief is not a substitute for appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). Trial court error does not constitute an appropriate basis for a finding of ineffective assistance of counsel. Bennett v. State, 371 S.C. 198, 638

S.E.2d 73 (2006). A Defendant is barred from raising in a petition for post-conviction relief allegations that could have been raised on direct appeal. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

In Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982), an applicant for PCR alleged that his probation revocation hearing violated due process requirements. The Stepney court held that alleged due process violations in a probation revocation hearing should have been raised by probationer on direct appeal and were not properly before the post-conviction hearing judge. Id. Moreover, in Rogers v. State, 317 S.C. 392, 453 S.E.2d 892 (1995), a PCR court erroneously granted PCR on the ground that “[t]he record did not sufficiently show that [Rogers’] attorney had the opportunity to be fully heard regarding [Rogers’] alleged violations.” Id. The Rogers court reversed the PCR court’s granting of PCR, and the court held that a PCR judge improperly remanded for a rehearing of alleged probation violations where the PCR court did not have authority to grant relief based upon direct appeal issues. Id.

Like the defendant’s in Stepney and Rogers, Respondent claimed that his due process rights were violated at his probation revocation hearing. Consistent with the holding in Stepney and Rogers, Respondent’s due process claims were not properly before the PCR court. Respondent could have addressed his due process allegations in a direct appeal. Because Respondent’s due process allegations were not properly before the PCR court, the PCR court did not have the authority to rule upon these claims, and the PCR court improperly

remanded the matter for rehearing of the probation violations. Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982); Rogers v. State, 317 S.C. 392, 453 S.E.2d 892 (1995); S.C.Code Ann. §17-27-20 (a)(6) & (b) (1976).

The PCR court in granting relief erroneously relied on Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008), in reaching a conclusion that Respondent's due process violations were properly before the PCR court. The Petitioner submits that the PCR court's reliance was erroneous because Dangerfield is limited to scenarios where a court imposes a suspended sentence **without** a hearing.

In Dangerfield, the defendant pled guilty to passing 110 fraudulent checks in July 2001. Id. A magistrate sentenced Dangerfield to thirty days imprisonment to be served consecutively (a total of nine years) on each fraudulent check, but suspended the sentence conditioned upon the payment of restitution plus court costs. Id. Dangerfield stopped making restitution payments after November 2001. Id. Thereafter, in February 2002, the magistrate court sent Dangerfield's trial counsel a copy of the order reflecting the terms of the plea agreement along with a memorandum advising counsel to contact the court or the attorney for the State "if you have any questions before bench warrants are issued." Id. Counsel did not contact Dangerfield or request a hearing about the matter. Id. In May 2003, the magistrate had bench warrants served on Dangerfield. Id. Following Dangerfield's arrest, the magistrate imposed the suspended sentence without a hearing. Id.

Dangerfield filed a PCR application alleging ineffective assistance of counsel for negotiating an unreasonable plea deal, failing to notify Respondent of the bench warrants, and failing to request a hearing. Id. The PCR court found that counsel's conduct in negotiating a plea deal was not objectively unreasonable; however, the court found that counsel's failure to notify Respondent of the bench warrants and to request a hearing amounted to ineffective assistance of counsel because it deprived Respondent of her due process rights. Id. On appeal, this Court affirmed the decision of the PCR court. Id. This Court reasoned that that the magistrate's court imposition of a suspended sentence was analogous to a probation judge revoking probation. Id. This Court further reasoned that since due process requires that a defendant be afforded notice and a hearing before a person is sentenced for a probation violation, so should due process require that a defendant be afforded notice and a hearing on the willfulness of her alleged failure to pay restitution before the imposition of a suspended sentence by a magistrate court. Id. Thus, counsel was ineffective for failing to ensure Dangerfield's due process rights.

This case is distinguishable from Dangerfield and instead is analogous to Stepney and Rogers. In Dangerfield, the PCR court based its relief on a claim of ineffective assistance of counsel for failure to protect a defendant's due process rights to obtain notice and a hearing before sentencing. In contrast to this case, Respondent's due process claims were based upon trial court error and insufficient evidence in his probation revocation hearing, as opposed to trial

counsel error. In Dangerfield, the defendant did not have sufficient notice, or a hearing, before the magistrate court sentenced her. Id. In this case, Respondent had a hearing, was present at that hearing, and was represented by counsel. Therefore, Dangerfield does not apply to this case.

Moreover, the PCR court's reversal on the basis of "insufficient evidence" is equivalent to the PCR court assuming the role of an appellate court. However, this PCR court's finding is even more egregious, because a probationer is only entitled to minimal due process. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, (1972). The PCR court has, erroneously, given Respondent more procedural safeguards than a defendant on trial receives. The Dangerfield case was not intended to allow PCR courts to usurp the authority to of the appellate court to review allegations of trial court error. Since the PCR court improperly granted relief in this case, this Court should reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

Conclusion

For the reasons stated above, this Court should reverse the PCR court's Order granting of PCR and grant the Petition for Writ of Certiorari. If this Court grants certiorari, the Petitioner requests permission under the rules to fully brief the issue discussed above. Respectfully submitted,

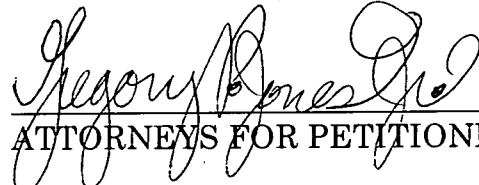
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January 8, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
HONORABLE ALEXANDER S. MACAULAY, CIRCUIT COURT JUDGE

Case No. 2008-CP-04-00104

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S.C. SUPREME COURT

State of South Carolina,

Petitioner,

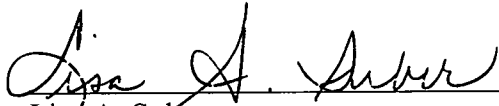
v.

Bradley Ishman,

Respondent.

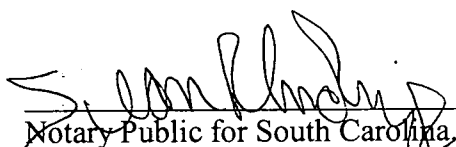
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition Of Writ Of Certiorari was served on opposing counsel, M. Celia Robinson, Esquire; Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, South Carolina 29201, by mailing two (2) copies in an envelope properly addressed with postage prepaid this 8th day of January, 2010.



Lisa A. Suber
Legal Assistant

SWORN to before me
this 8th day of January, 2010



Notary Public for South Carolina (L.S.)

My Commission Expires: January 30, 2013