

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
James R. Barber, III, Circuit Court Judge

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APR 15 2016

SC SUPREME COURT

BRYSEN CARSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002249

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Petitioner's probation revocation attorney erred in failing to object to the non-judicially imposed sex offender probation conditions added by the revocation judge, who revoked petitioner's probation based on violations of the added sex offender conditions, because only the standard conditions of probation had been placed upon petitioner by the plea judge.

STATEMENT

Petitioner Brysen Carson pled guilty to two counts of aggravated assault and battery during the July 2012 term of the Spartanburg County General Sessions Court before Judge J. Mark Hayes and was sentenced to ten years, suspended upon the service of five years probation. On April 26, 2013, petitioner's probation was revoked by seven years per a probation revocation hearing held before Judge Gordon G. Cooper. Timothy Ray represented petitioner at the probation revocation hearing. App. 1-13. Petitioner did not appeal his guilty plea conviction and sentence or his probation revocation sentence.

On December 2013, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 15- 21. The respondent filed a return requesting that a PCR hearing be held in the case. App. 22- 27.

A PCR hearing was convened on September 2, 2015, at the Spartanburg County Courthouse before Judge James R. Barber, III. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General Alicia Olive appeared on behalf of the state. App. 30- 66.

On October 2, 2015, Judge Barber issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of probation revocation counsel in the case. App. 68 – 74.

Petitioner appealed. This brief follows.

ARGUMENT

Petitioner's probation revocation attorney erred in failing to object to the non-judicially imposed sex offender conditions of probation added by the revocation judge, who revoked petitioner's probation based on violations of the added sex offender conditions, because only the standard conditions of probation had been placed upon petitioner by the plea judge.

In 2012, petitioner was sentenced to ten years, suspended upon probation for five years, per his guilty pleas on two counts of aggravated assault and battery. In 2013, petitioner's probation was revoked by seven years. Petitioner alleged in his PCR action that he did not violate the conditions of his probation issued by the plea judge, and that his probation revocation attorney erred in failing to argue at the probation revocation hearing that he was not responsible for the additional non-judicially imposed sex offender conditions of probation that he was found to have violated because the plea judge listed only the standard conditions of probation for non-sex offenders on his sentencing sheets. Note that petitioner's sentencing sheets listed three conditions of probation: required mental health counseling, no contact with the victim, and sex offender registration as conditions of probation. App. 79-80. Note further that the probation revocation orders issued by the revocation judge reflected SCDC sex offender program as "**additional conditions ordered by the court.**" App. 81-82.

During the PCR hearing, PCR counsel argued that petitioner's plea sentencing sheets revealed that the plea judge did not list sex offender probation conditions per the plea, but rather placed petitioner under the standard (non-sex offender) conditions of probation. For example, the sentencing sheets included sex offender registration, mental health treatment if needed and no contact with the victim as conditions of probation, all of which were conditions that petitioner

abided by per the plea judge's order. App. 34, l. 23 – 37, 8, l. 5; App. 44, lines 14 – 25; App. 46, lines 13 – 17. The PCR judge understood and summarized petitioner's position as follows:

PCR Judge: I think [petitioner's] position is that the [plea judge] did not specifically find him a sex offender....so he would not be subject to any sex offender conditions of probation. App. 64, l. 5 – 10.

Petitioner testified during the PCR hearing and explained that probation revocation counsel erred in failing to object to the added sex offender conditions of probation imposed upon him by the revocation judge because the added conditions were non-judicially imposed as the plea judge assigned only the standard conditions of probation to him, which in turn meant that he had not violated any conditions of probation in his case. App.. 47, l. 5 – 14; App.47, lines 22 – 24; App. 43, lines 7 – 12; App. 39, l. 24 – 25. Petitioner stated that:

My basis was counsel [rendered] ineffective assistance of counsel [in] fail[ing] to inform the court [that the alleged violations sprang from]....alter[ed] or amend[ed...conditions created by] the judge.¹
App. 39, lines 10 -18.

Petitioner stated that counsel failed to argue that Judge Hayes would usually specifically order defendants to comply with sex offender probation if he intended to do so, but that Judge Hayes did not so order on his sentencing sheets. App. 43, lines 4 – 24. Petitioner concluded that “had my attorney adequately brought this (prohibition of added conditions of probation that were not judicially imposed) to the [revocation judge's] attention, [then] the result of his [probation revocation] hearing would have been different.” App. 39, lines 20 – 23; App. 47, lines 5 – 18.

¹ The sentencing sheets listed sexual offender registration, no contact with the victim, and mental health treatment if needed as standard conditions of probation. App. 44, lines 19 – 21.

Probation revocation counsel testified during the PCR hearing and stated that petitioner's defense at the revocation hearing was that the plea judge did not place petitioner on sex offender probation. App.53, l. 16 – p. 54, l. 22. According to probation counsel's testimony, petitioner's defense was that he did not realize that he was under sex offender probation, and he did not realize that he needed a psychosexual evaluation. App. 56, lines 14 – 22; App. 57, lines 15 – 19. Counsel admitted that the conditions that petitioner allegedly violated were the standard conditions of probation issued by the plea judge. App. 58, lines 8 – 17.

The PCR judge ruled that probation revocation counsel was not ineffective in the case because “the sentencing sheet[s] [were] clear...that [petitioner] was required to comply with the standard sex offender conditions, and [that petitioner]violated those conditions and was properly revoked.” App. 73.

During the probation revocation hearing, probation revocation counsel argued initially that Judge Hayes did not put “sex offender conditions of probation” on petitioner's sentencing sheets and that Judge Hayes usually [did] that when he intend[ed] to do so do, which meant that Judge Hayes did not intend to place petitioner on sex offender probation. However, later on during the hearing, counsel nullified this defense in effect by stating subsequently that “if he is going to be on sex offender conditions of probation that it's unclear if he was supposed to be on that at this point, but if Your Honor sees fit then that could be **added now**.” App. 6, l. 13 – p. 7, l. 14.

Probation counsel erred during the revocation hearing by suggesting that additional non-judicially imposed sex offender conditions of probation could be placed upon petitioner. In other words, petitioner was revoked on violations of added sex offender conditions that were not attached to his case, such as psychosexual treatment and having pictures of minors on his

phone/facebook/Instagram. App.7, l. 9 – p. 10, l. 6. Counsel erred in allowing the same. Petitioner was not guilty of violating the plea judge’s conditions of probation.

In State v. Stevens, 373 S.C. 595, 646 S.E.2d 870 (2007), the Court reversed where the defendant’s probation was revoked based on an added condition of probation that was not judicially imposed. In Stevens, *supra*, the Court held that DPPPS’s unilaterally imposed GPS monitoring agreement on the defendant was not a condition of his probation. Clearly, there are a set of separate conditions of probation that are standard conditions for non-sex offenders and a separate set of conditions of probation that apply to sex offenders. See State v. Hicks, 382 S.C. 370, 675 S.E.2d 769 (2009), and State v. Hicks, 387 S.C. 378, 693 S.E.2d 919 (2010). Petitioner pled guilty to aggravated assault and battery and the standard conditions of probation for non-sex offenders were imposed thereafter. Thus, probation revocation counsel erred in failing to explain and argue that petitioner was not in violation of probation via the added sex offender conditions of probation, because they were added non-judicially imposed conditions placed upon him during the revocation hearing which were prohibited and not enforceable. Petitioner could only be held responsible for violating the standard conditions of probation listed on his sentencing sheets by the plea judge. Hence, but for counsel’s failure to object to the issuance of added non-judicially imposed probation conditions for sex offenders, then the outcome of his revocation hearing would have been different.

In Turner v. State, 384 S.C. 451, 682 S.E.2de 792 (2009), the Court held that a probation revocation defendant “has a right to counsel, albeit not a Sixth Amendment right,” but rather a right to counsel guaranteed under Rule 602(a), SCACR, and Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986); [and that] “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”...[and that in such cases] “we must determine whether, under our

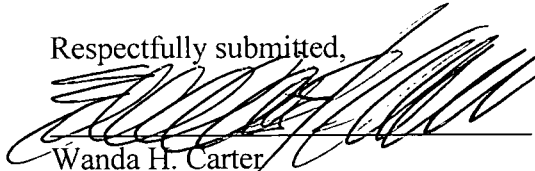
Strickland² jurisprudence [there was ineffectiveness of] probation counsel.” The Turner Court did not find probation revocation counsel ineffective on the question of whether the probationer had a right to be informed of the right to appeal his probation revocation.

However, in the case at bar, counsel erred in arguing at first that petitioner was not bound by sex offender conditions of probation not appearing on his sentencing sheets, but then conceding subsequently that the revocation judge could add sex offender conditions of probation, when such additions are clearly prohibited, as this paved the way for the revocation judge to find that petitioner violated the terms of his probation, i.e. the added conditions of probation that should not have been added and allowed in his case. Petitioner’s probation revocation counsel’s error in this regard violated his right to effective assistance of counsel within the meaning of Strickland³, and but for counsel’s error as outlined above, a reasonable probability exists that the outcome of petitioner’s probation revocation hearing would have been different.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition on the above-raised issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of April, 2016.

² Strickland v. Washington, 466, U.S. 668 (1984).

³ Strickland v. Washington, 466, U.S. 668 (1984).

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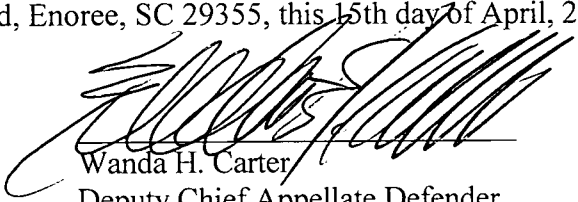
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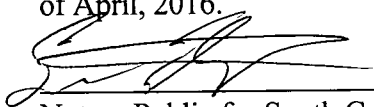
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Brysen Carson #355174, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355, this 15th day of April, 2016.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of April, 2016.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.