

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

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AUG - 1 2016

The Honorable James R. Barber, III, Circuit Court Judge **SC SUPREME COURT**

Appellate Case No.: 2015-002249

Brysen Carson.....Petitioner

v.

State of South Carolina.....Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ALICIA A. OLIVE
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ATTORNEYS FOR RESPONDENT

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 The PCR court correctly held that probation revocation counsel was not ineffective for not challenging the probation revocation judge's determination that Petitioner was required to comply with the standard sex offender conditions of probation where Petitioner was required to register as a sex offender, received a probationary sentence, knew he was subject to the sex offender conditions of probation, and violated those conditions.....6

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QUESTION PRESENTED

Did the PCR court correctly hold that probation revocation counsel was not ineffective for not challenging the probation revocation judge's determination that Petitioner was required to comply with the standard sex offender conditions of probation where Petitioner was required to register as a sex offender, received a probationary sentence, knew he was subject to the sex offender conditions of probation, and violated those conditions?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner waived presentment to the Spartanburg Grand Jury for two charges of assault and battery of a high and aggravated nature (2012-GS-42-4010, and -4011). Andrew Johnston, Esquire represented Petitioner. On July 25, 2012, Petitioner pleaded guilty pursuant to North Carolina v. Alford¹ before the Honorable J. Mark Hayes, II. Pursuant to a negotiated sentence, Judge Hayes sentenced Petitioner to confinement for concurrent terms of ten years, suspended to five years of probation on the service of time-served. Petitioner did not appeal his conviction or sentence.

On April 26, 2013, Petitioner appeared at a probation revocation hearing. Timothy Ray, Esquire, represented him at that proceeding.² The Honorable Gordon Cooper revoked Applicant's probation and sentenced him to serve a term of seven years. Petitioner did not appeal his probation revocation.

Petitioner subsequently filed an application for post-conviction relief on December 23, 2013, and amendment filed April 11, 2014. Respondent filed a Return on October 23, 2014. A hearing was convened into the matter on September 2, 2015. By order filed October 9, 2015, the Honorable James R. Barber, III, issued an order denying and dismissing Petitioner's application.

¹ 400 U.S. 25 (1970).

² The probation transcript incorrectly reflects that Andrew Johnston represented Petitioner at the probation revocation hearing.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court likewise "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

- I. The PCR court correctly held that probation revocation counsel was not ineffective for not challenging the probation revocation judge's determination that Petitioner was required to comply with the standard sex offender conditions of probation where Petitioner was required to register as a sex offender, received a probationary sentence, knew he was subject to the sex offender conditions of probation, and violated those conditions.**

Petitioner contends probation revocation counsel ("Counsel") was ineffective for failing to object to non-judicially imposed conditions of probation. Specifically, he alleges that Counsel was ineffective for failing to argue to the probation revocation judge that although Petitioner was required to register as a sex offender, he should not have been placed on Standard Sex Offender Conditions of Probation because they were not specifically included on the sentencing sheets, and therefore his probation could not be revoked for violating such conditions. The PCR judge correctly found Petitioner failed to satisfy his burden of proving Counsel was ineffective.

Where a PCR applicant alleges ineffective assistance of counsel as a ground for relief, the applicant has the burden of proving 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) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

The same standard applies with respect to probation revocation counsel. See Turner v. State, 384 S.C. 451, 457, 682 S.E.2d 792, 795 (2009). Pursuant to Rule 602(a), SCACR, the right to counsel attaches to probation revocation proceedings. Bartlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986) (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)). As such, “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 [revocation] counsel.” Turner, 384 S.C. at 455, 682 S.E.2d at 794. However, because a probation revocation hearing is not a formal adversarial proceeding, “the Court must review counsel’s performance in light of the particular type of proceeding involved.” United States v. Wren, 682 F.Supp. 1237, 1242 (S.D.Ga. 1988). See also United States v. Cates, 402 F.2d 473, 474 (4th Cir. 1968) (noting probation revocation hearings are informal proceedings).

Petitioner argues that though he was required to register as a sex offender, he was not subject to sex offender conditions of probation, because those specific conditions were not listed on his sentencing sheets and were therefore not judicially imposed.

At the probation revocation, Counsel stated:

in my experience with Judge Hayes's Orders, he writes on there "sex offender conditions of probation." That is not on this order. It is on the order that there would be sex offender registration, but he did not indicate sex offender conditions of probation. So I don't know that he's properly at this point on sex offender probation, or if that is something that Your Honor could correct and ad that for clarification but my concern is I don't know looking at the written Order if that was actually ordered that way.

(App. p. 7).

The probation officer stated at the probation revocation hearing that Petitioner was aware of the conditions of his probation and that he went over them with him one by one. (App. p. 9, lines 2-3; lines 11-15). The officer further stated that "typically if they are ordered to register then they have those conditions to abide by." (App. p. 10, lines 1-3). Likewise, Counsel testified

at the PCR hearing that in his experience, if a judge orders a defendant to register as a sex offender, and suspends his sentence to probation, the defendant would normally be on sex offender probation. (App. p. 54, lines 16-21). Petitioner testified at the PCR hearing that the probation officer went over the Standard Sex Offender conditions of probation with him after his sentencing. (App. p. 51, lines 7-16). Petitioner also testified that he signed off on those sheets. (App. p. 51, lines 13-18). The PCR judge found that Applicant failed to satisfy his burden of proving ineffective assistance of probation revocation counsel because Petitioner was clearly required to register as a sex offender, he signed the Standard Sex Offender Conditions of Probation, he knew he was subject to those conditions, and he violated those conditions.

Section 24-21-430 of the South Carolina Code of Laws provides that "To effectively supervise probationers, the [Department] shall develop policies and procedures for imposing conditions of supervision on probationers. These conditions may enhance but must not diminish court imposed conditions." Petitioner argues that pursuant to State v. Stevens, 373 S.C. 595, 646 S.E.2d 870 (2007), the Standard Sex Offender Conditions of Probation were not judicially imposed and that therefore, he was not subject to those conditions, and as a result, Counsel was ineffective for failing to argue that his probation could not be revoked for failure to comply with those conditions. However, in Stevens, the Department of Probation, Parole, and Pardon Services (DPPPS) entered into a completely separate agreement with the defendant, whereas here, Petitioner was required to register as a sex offender *as one of the terms of his plea agreement* and the judge sentenced him to a probationary sentence. Further, Petitioner stated that an agent from probation went over the Standard Sex Offender conditions of probation with him and he signed off on those conditions. There is no indication that any non-standard conditions were placed on Petitioner. Therefore, the record indicates that Petitioner, who was clearly required to register as

a sex offender, was fully aware that he was required to comply with the Standard Sex Offender Conditions. In addition, Counsel *did* raise the issue of whether Petitioner was actually subject to those conditions to the probation revocation judge, and the judge found that because Petitioner was required to register as a sex offender, he was "also required to abide by the conditions relating to the sex offender, probation guidelines which [Petitioner] signed." (App. 12, lines 17-21). Petitioner did not appeal that ruling. Accordingly, there is evidence of probative value in the record to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving that Counsel's performance was deficient or that he was prejudiced by the deficiency.

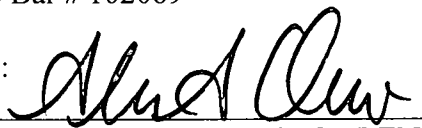
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
SC Bar # 102089

By: 
ATTORNEYS FOR RESPONDENT

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August 1st, 2016.

STATE OF SOUTH CAROLINA
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Appeal from Spartanburg
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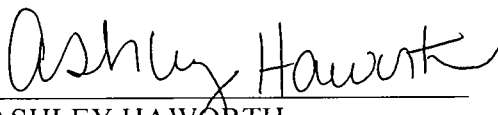
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **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:

**Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211**

This 1st day of August, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Brysen Carson v. State of South Carolina
Appellate Case No.: 2015-002249

Dear Mr. Shearouse:

Enclosed for filing are the original and one bound copy 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,

Alicia A. Olive
Assistant Attorney General
SC Bar No. 102089

AAO/ah
Enclosures

cc: Wanda H. Carter, Esquire