STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable Brooks P. Goldsmith, Circuit Court Judge

SHAQUAN A. THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001121

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether plea counsel was constitutionally ineffective by mistakenly telling the trial judge that appellant could not receive credit for time served on home detention even though the statute allowing such credit was amended to allow credit before petitioner was sentenced and petitioner was entitled to the benefit of the amendment under the rule of State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992)?

STATEMENT

On February 19, 2013, an Anderson County grand jury indicted petitioner for armed robbery. App. 48. On April 23, 2014, petitioner pled guilty to the lesser-included offense of attempted armed robbery before the Honorable J. Cordell Maddox, Jr. App. 1. App. 3, ll. 2 – 5. Bruce Byrholdt represented petitioner. App. 1. Catherine Huey represented the State. App. 1. Judge Maddox accepted the plea and sentenced petitioner to eight years' imprisonment with credit for 38 days' time served. App. 9, l. 22 – 10, l. 4.

On December 3, 2014, petitioner filed a PCR application. App. 12. On February 9, 2016, a hearing was held before the Honorable Brooks P. Goldsmith. App. 28. Hugh Welborn represented petitioner. App. 28. Patrick Schmeckpeper represented the State. App. 28. Judge Goldsmith denied petitioner's application from the bench. App. 39, ll. 11 – 14. On May 17, 2016, the PCR court entered a formal order denying petitioner's application. App. 41. This petition follows.

ARGUMENT

Plea counsel was constitutionally ineffective by mistakenly telling the trial judge that appellant could not receive credit for time served on home detention even though the statute allowing such credit was amended to allow credit before petitioner was sentenced and petitioner was entitled to the benefit of the amendment under the rule of *State v. Varner*, 310 S.C. 264, 423 S.E.2d 133 (1992).

Plea counsel made a mistake of law during petitioner's guilty plea hearing that deprived petitioner of his opportunity for the judge to consider crediting him for time served on home detention after a favorable change in the relevant statute. App. 3, ll. 6 – 21. At the outset of petitioner's plea, Judge Maddox asked whether petitioner had spent time in jail. App. 3, l. 6. Plea counsel informed the court that petitioner spent "36 days in custody and 112 days on electronic monitoring." App. 3, ll. 7 – 8. The following colloquy then occurred:

THE COURT: After the law changed?

MR. BYRHOLDT: Yes.

MS. HUEY: When did that change, Judge?

THE COURT: I don't know, but that's what I'm dealing with.

MR. BYRHOLDT: He was putting on monitoring last year.

MS. HUEY: This is from November 2012, Your Honor.

MR. BYRHOLDT: *Then he's not eligible for it* but the 38 days, he is eligible for that.

THE COURT: Yes. When that law changed, that was [a] disaster.

App. 3, ll. 9 – 21 (emphasis added). Judge Maddox, relying on plea counsel's advice that petitioner was not eligible for time spent on home detention, only gave petitioner credit for 38 days against his eight-year sentence. App. 9, l. 22 – 10, l. 4.

Approximately ten months before petitioner's plea, the Legislature amended section 24-13-40 of the South Carolina Code to allow prisoners to receive credit for time spent on house arrest. See 2013 South Carolina Laws Act 34 (H.B. 3193). The law states that it "takes effect upon approval by the Governor." Id. The amendment was approved on June 7, 2013. Id. Petitioner's plea occurred the next year, in April 2014. App. 1.

Petitioner was entitled to the beneficial change in sentencing law because it took effect before he was sentenced by the circuit court. State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992). "In the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." Id. at 265, 423 S.E.2d at 133. "Thus, a criminal defendant receives the benefit of punishment mitigated by legislative amendment only when the amendment becomes effective before sentence is pronounced. Id., 423 S.E.2d at 134 citing State v. Addington, 18 S.C.L. (2 Bail.) 516 (1831). Therefore, under an easy application of Varner, petitioner would be eligible for discretionary credit under the Home Detention Act because it took effect ten months before his sentencing.

The PCR court found that appellant had 112 days of time spent on house arrest, but denied relief. App. 44-45. The court first erroneously found that petitioner was challenging the Department of Corrections' computation and his claim did not fall under the PCR Act, but instead under Al-Shabazz v. State, 338 S.C. 354, 367 S.E.2d 742 (2000). This determination was incorrect. Petitioner alleged not an error by the Department of Corrections, but ineffective assistance of counsel under

the Sixth Amendment. U.S. Const. amends. VI, XIV. Strickland v. Washington, 466 U.S. 668, 687 (1984). S.C. Code Ann. § 17-27-20(A)(6). Plea counsel performed deficiently when he mistakenly informed Judge Maddox that petitioner was not eligible for credit under the Home Detention Act.

Furthermore, Al-Shabazz does not apply because the question of credit for house arrest is discretionary with the trial judge, not the Department of Corrections. S.C. Code Ann. § 24-13-40. Section 24-13-40 states that full credit for time served "must be given for time served prior to trial and sentencing, and **may be given** for any time spent under monitored house arrest." Id. (emphasis added). "The requirement that a prisoner receive credit for time served is mandatory." Hayes v. State, 413 S.C. 553, 559, 777 S.E.2d 6, 10 (Ct. App. 2015). While the Department of Corrections must give credit for the mandatory portion, it lacks authority to change petitioner's sentence where Judge Maddox could not exercise his discretion to award credit for time spent on house arrest. See Tant v. South Carolina Dep't Corrs., 408 S.C. 334, 759 S.E.2d 398 (2014) (holding that the Department of Corrections could not consider a letter sent by the sentencing judge over two years after sentencing in determining whether a prisoner's sentences were concurrent or consecutive).

The error petitioner asks this Court to correct was not made by the Department of Corrections and could not be fixed by the Department, therefore the PCR court erred in concluding that Al-Shabazz applied. Petitioner seeks to have a sentencing judge determine, in the first instance, whether he may receive credit for time spent on house arrest. Only a judge can make this determination, not an administrative agency. State v. Warren, 392 S.C. 235, 237-38, 708 S.E.2d 234, 235 (Ct. App. 2011) ("The authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge.").

The PCR court also violated the rule in Varner by concluding that petitioner was ineligible for credit because his time spent on house arrest was before the change in the law. This concern is irrelevant and flatly contradicted by Varner. Nothing in this statute requires the house arrest time to be served after the effective date of the law. Indeed, the Legislature often sets conditions and savings clauses making changes in sentencing statutes only prospective. See State v. Dawson, 402 S.C. 160, 740 S.E.2d 501 (2013).

In Dawson, the defendant claimed she was entitled to a reduced sentence because the Omnibus Crime Reduction and Sentencing Reform Act of 2010 took effect after she committed her crime, but before she was sentenced. Dawson at 161-62, 740 S.E.2d at 501-02. The Omnibus Act contained a savings clause. Id. at 163-64, 740 S.E.2d at 502-03. The Court determined the rule in Varner did not apply because the savings clause "unambiguously states its sentencing amendments do not apply to actions arising under the amended laws." Id. at 164-65, 740 S.E.2d at 503.

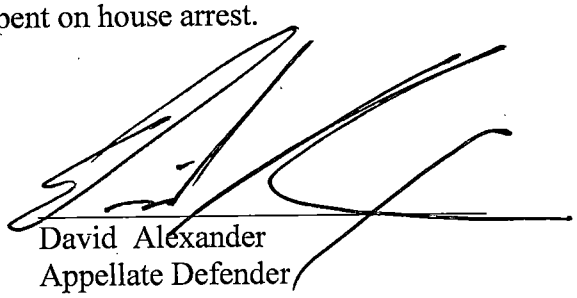
No such savings clause mandating prospective relief exists for section 24-13-40. The absence of any such language in the statute means Varner applies and petitioner was entitled to be considered for credit at his sentencing. Furthermore, the rule of lenity requires application of section 24-13-40 to petitioner absent any contradictory language. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant."). Had the Legislature intended the statute not to apply to time served on house arrest prior to its enactment, it would have been easy for it to specifically state this intent.

Plea counsel performed deficiently in not informing the plea judge that petitioner was eligible for credit under section 24-13-40. Plea counsel's ineffective assistance prejudiced

petitioner because Judge Maddox was never able to consider whether petitioner was entitled to receive credit. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). Petitioner never had his "bite at the apple" because plea counsel's error meant that Judge Maddox never had an opportunity to exercise his discretion. This Court should grant certiorari and remand this case to the circuit court to determine whether petitioner is entitled to credit for time spent on house arrest.

CONCLUSION

This Court should grant certiorari and remand this case to the circuit court to determine whether petitioner is entitled to credit for time spent on house arrest.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Shaquan A. Thompson, #359747, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 19th day of January, 2017.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of January, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.