

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2016-002557

RECEIVED

MAY 31 2017

S.C. SUPREME COURT

Alexander Ruiz,Respondent,

v.

State of South Carolina,Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the PCR court err in granting post-conviction relief based on counsel misadvising Respondent about the potential sentence he faced upon the revocation of his probation, where Respondent did not prove prejudice because Respondent admitted violating his probation, there was no sentencing agreement for the probation revocation, Shock incarceration was not guaranteed, and Respondent was not eligible for Shock?

- II. Did the PCR court err in granting post-conviction relief based on an unjust and fundamentally unfair sentence in violation of the Due Process Clause of the V and XIV Amendments of the United States Constitution and Article I, Section III of the South Carolina Constitution where the sentence imposed did not exceed the maximum allowable by law?

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections ("SCDC") pursuant to orders of commitment of the Spartanburg County Clerk of Court. Respondent was charged with two counts of burglary, second degree (2012-GS-42-6379 and -6380). James Cheek, Esquire, represented Respondent. On December 13, 2012, Respondent waived presentment to the Grand Jury and pleaded guilty before the Honorable J. Mark Hayes, II. Based on the State's recommendation, Judge Hayes sentenced Respondent pursuant to the Youthful Offender Act¹ ("YOA") to an indeterminate sentence not to exceed 5 years, with the sentence to be suspended upon the service of imprisonment for 97 days and 3 years of probation. Judge Hayes also ordered a suspended Shock incarceration, § 24-13-1330, S.C. Code Ann. Respondent did not appeal his conviction or sentence.

Respondent was served with a probation citation issued on September 11, 2014. On March 6, 2015, Respondent appeared, along with his counsel M. Claire Hall, Esquire, at a probation revocation hearing. Respondent admitted failing to comply with probation. The Honorable J. Derham Cole revoked Respondent's probation and, pursuant to Respondent's request, activated his original YOA sentence, but not the suspended Shock incarceration sentence. Respondent did not appeal his probation revocation.

Thereafter, Respondent filed an application for post-conviction relief ("PCR"). On April 1, 2016, Petitioner made its Return and Partial Motion to Dismiss, requesting all claims against Respondent's original plea be dismissed based on failure to file within the statute of limitations and requesting a hearing be held on the claims against his probation revocation. An evidentiary hearing was held on November 7, 2016, at the Spartanburg County Courthouse before the Honorable Frank R. Addy, Jr. Susannah Ross, Esquire, represented Respondent. Alicia A.

¹ S.C. Code Ann. § 24-19-50 (2015)

Olive, Esquire, of the South Carolina Office of the Attorney General, appeared on behalf of the State. Respondent testified on his own behalf. M. Claire Hall, Esquire, also testified. Respondent proceeded on his claims that his probation counsel was ineffective and the sentence imposed upon him at the probation revocation hearing was unlawful. On November 22, 2016, Judge Addy ("the PCR judge") issued an order granting Respondent a new probation revocation hearing. On November 29, 2016, the order was filed with the Spartanburg County Clerk of Court. Thereafter, the State filed a Notice of Appeal with this Court. The PCR judge retained jurisdiction to address Respondent's appeal bond. Judge Addy issued an Order granting appeal bond on January 19, 2017 and filed January 31, 2017. This appeal follows.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the reviewing Court will reverse the PCR court where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

The decision to revoke probation is in the discretion of the circuit court judge. State v. Williamson, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003). Instead of requiring proof beyond a reasonable doubt, probation is properly revoked upon an evidentiary showing of facts tending to establish a probation violation. State v. Hill, 368 S.C. 649, 658, 630 S.E.2d 274, 279 (2006) (citing State v. White, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950)). While underlying probation violations may be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges. Id. at 658-659, 61 S.E.2d at 279. Criminal procedure rules governing disclosure of evidence in criminal cases do not apply to probation revocation proceedings; such proceedings are not criminal trials. Id. at 659, 61 S.E.2d at 280. Probation revocation hearings have a *much lower* evidentiary threshold than criminal proceedings. Id. at 658, 61 S.E.2d at 279 (emphasis added).

The determination of whether to revoke probation is within the trial court's discretion, and the authority to review such a decision is confined to correcting errors of law unless the lack of legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious. State v. Pauling, 371 S.C. 435, 639 S.E.2d 680 (2006). A revocation hearing addresses two issues: whether the probationer violated a condition of probation and whether the violation

warrants revocation. Black v. Romano, 471 U.S. 606 (1985); Morrissey v. Brewer, 408 U.S. 471 (1972). If the evidence tends to show a violation of the conditions, then revocation is an appropriate means of enforcing the probationary sentence. State v. Clough, 220 S.C. 390, 68 S.E.2d 329 (1951); State v. McCray, 222 S.C. 391, 73 S.E.2d 1 (1952).

Due the nature of the revocation hearing, the Sixth and Fourteenth Amendments does not *per se* create the right to counsel. Gagnon v. Scarpelli, 411 U.S. 778 (1973). Nevertheless, in South Carolina, Rule 602(a), SCACR, requires the appointment of counsel for indigent defendants in probation revocation proceedings. See also Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986). Because a probationer has a right to counsel, “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.” Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009).

In a PCR action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process” that the proceedings “cannot be relied upon as having produced a just result.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all

significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's 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.

ARGUMENT

- I. **The PCR court erred in granting post-conviction relief based on counsel misadvising Respondent about the potential sentence he faced upon the revocation of his probation, where Respondent did not prove prejudice because Respondent admitted violating his probation, there was no sentencing agreement for the probation revocation, Shock incarceration was not guaranteed, and Respondent was not eligible for Shock.**

Under oath, Respondent admitted violating his probation both at the probation revocation hearing and at the PCR hearing. App. p. 3, ll. 13-14; p. 28, ll. 10-24; p. 30, ll. 1-4. There was no prior agreement with or recommendation made by the State as to sentencing. Respondent requested the original, suspended YOA sentence be invoked. App. p. 4, ll. 1-3. After Respondent's request, the State agreed to the imposition of the original, suspended YOA sentence. App. p. 4, ll. 4-7. The Honorable J. Derham Cole found Respondent willfully failed to comply with probation, revoked his probation, and imposed the original, suspended sentence under the YOA. App. p. 4, ll. 8-9.

During the PCR hearing, Respondent testified Counsel told him he would be "better off if [he] took the regular "Y", which would be six to nine months, ten months" and it "might be best if [he] did it that way because [he] would have a new probation officer, at which she was talking about an [intensive supervision] officer." App. p. 27, ll. 11-18. Respondent also admitted he had six violations of his probation, including failure to report, failure to notify change of address, failure to notify of law enforcement contact, failure to notify immediately after an arrest that occurred on September 6, 2014, failure to pay fines, and failure to complete substance abuse counseling. App. p. 28, ll. 5-17. Respondent further admitted he failed to comply with the conditions of probation. App. p. 30, ll. 1-4. Respondent did not establish any defenses to the probation violations at his probation hearing or at his PCR hearing.

Counsel testified the only two options going into the probation revocation hearing were for the judge to find a willful violation of probation and activate the suspended sentence or the judge could find no willful violation and continue probation. App. p. 32, ll. 10-18. Counsel also attempted to recall if Respondent had any defenses to the alleged violations and speculated that “he may have had a defense to some, but not others[...] if the agent listed ten violations and maybe we have legitimate arguments about some of them[,] there would still be some that we didn’t have a defense to.” App. p. 33, ll. 10-14. Counsel did not recall if there was an agreement with the State, App. p. 34, ll. 10-17, nor does the transcript from the probation revocation hearing indicate there was any agreement between Respondent and the State. App. pp. 3-4.

There is no evidence in the record to support the PCR court’s finding Counsel was ineffective or Respondent is entitled to a new probation revocation hearing. Although Respondent claims his understanding at the time of his 2012 guilty plea and his probation revocation was that he would only serve ten months because that is what both plea counsel and probation revocation counsel told him, Respondent did not establish how this alleged incorrect advice prejudiced him. First, any alleged advice from plea counsel is irrelevant to this PCR action as any claims against plea counsel were barred by the statute of limitations, were not pursued at the PCR hearing nor ruled upon by the PCR court, and therefore, are not preserved for this Court’s review. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974) (holding it is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal); see also State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review). This same standard is employed on appellate review of PCR matters. See Kolle v.

State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (noting an issue that was neither raised to nor ruled upon by the PCR court is not preserved for appellate review).

Second, regardless of probation revocation counsel's advice on the amount of time Respondent may serve on his YOA sentence, Respondent was admittedly in violation of his probation. Respondent consistently admitted he was in violation of the conditions of probation and offered no possible defenses to those violations. Furthermore, Respondent presented no evidence of any sentencing agreement between Respondent and the State. Therefore, it was in the sound discretion of the probation revocation court to revoke Respondent's probation and invoke the original, suspended YOA sentence not to exceed five years. See Williamson, at 510 (holding the decision to revoke probation is in the discretion of the circuit court judge); See State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976) (holding trial judge generally has wide discretion in determining what sentence to impose). Respondent did not present any evidence that had probation counsel correctly advised him that Shock incarceration could potentially come with a shorter sentence than a regular YOA sentence and requested that the court impose the Shock sentence, the court would have obliged counsel's request and imposed the Shock sentence. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. Id.; Clark v. State, 259 S.C. 378, 192 S.E.2d 209 (1972).

Furthermore, despite the original recommendation by Judge Hayes for the Shock incarceration, Respondent was not eligible for Shock. Article 13 of Chapter 24 of the South Carolina Code of Laws regulates SCDC's Shock Incarceration Program. § 24-13-1310(1)(b), S.C. Code Ann., defines who is eligible for the Shock program. The section states, in pertinent part,

- (1) “Eligible inmate” means a person committed to the South Carolina Department of Corrections:
[...]
(b) who is eligible for release on parole in two years or less[...]

Per SCDC’s YOA minimum guidelines, offenders convicted of second degree burglary, non-violent, with an offense date after June 2, 2010, and before April 21, 2016², must serve three years of incarceration. This guideline is derived from SCDC’s long-standing interpretation of § 24-19-10(d)(iv), S.C. Code Ann., which states, in pertinent part,

- (d) “Youthful offender” means an offender who is:
[...]
(iv) seventeen but less than twenty-one years of age at the time of conviction for burglary in the second degree (Section 16-11-312). **If the offender committed burglary in the second degree pursuant to Section 16-11-312(B), the offender must receive and serve a minimum sentence of at least three years, no part of which may be suspended, and the person is not eligible for conditional release until the person has served the three-year minimum sentence;**
(emphasis added).

Respondent was convicted of second degree burglary in violation of § 16-11-312, S.C. Code Ann., with the offense having occurred on September 6, 2012. Therefore, Respondent was required to serve a three-year mandatory sentence, which rendered Respondent ineligible for parole in two years or less, as required for eligibility for Shock. S.C. Code Ann. § 24-13-1310(1)(b) (1976). SCDC does not interpret the first sentence of § 24-19-10(d)(iv) to be a limitation on the applicability of the three-year minimum mandatory sentence on youthful offenders age 22 – 25. Because the Youthful Offender Act allows participation for offenders up to the age of 25, with its goal being to afford young offenders certain opportunities not available to offenders over the age of 25 in an effort to rehabilitate youthful offenders, it is illogical to construe the legislature’s intent was to mandate a *longer* sentence for offenders age 17 – 21 than those 22 – 25 for second degree burglary.

² These dates mark amendments to the relevant Code Sections.

Additionally, § 24-13-1330, S.C. Code Ann., requires that when an “eligible inmate” is sentenced to Shock Incarceration Program, SCDC must evaluate the inmate to determine whether he is physically, psychologically, and emotionally able to participate. § 24-13-1330(F), S.C. Code Ann., states, “[p]articipation in a Shock incarceration program is a **privilege**. Nothing contained in this article confers upon an inmate the right to participate or continue to participate in the program.” (emphasis added). Because Shock is a program administered by SCDC and in SCDC’s sole discretion, Respondent was not only ineligible for Shock but was not guaranteed entry into the Shock program.

Therefore, Respondent failed to meet his burden of proof under Strickland to show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, at 117-118. Failing to prove the second prong of Strickland, the PCR court erred in finding Counsel was ineffective and Respondent was entitled to a new probation revocation hearing. Accordingly, there is no evidence supporting the PCR court’s finding that Respondent established his burden of proving prejudice.

II. The PCR court erred in granting post-conviction relief based on an unjust and fundamentally unfair sentence in violation of the Due Process Clause of the V and XIV Amendments of the United States Constitution and Article I, Section III of the South Carolina Constitution where the sentence imposed did not exceed the maximum allowable by law.

The original, suspended sentence handed down by Judge Hayes’s at the time of Respondent’s guilty plea and imposed by Judge Cole upon the revocation of Respondent’s probation was within the maximum limits prescribed by law. Furthermore, Respondent did not present any evidence the sentence was the result of partiality, prejudice, oppression, or corrupt motive. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976); Clark v. State, 259

S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no jurisdiction to correct a sentence given within statutory limits. In Clark, the Supreme Court of South Carolina held that it did not have jurisdiction to correct an allegedly excessive sentence where the sentence was “within the limits prescribed by law for the discretion of the trial judge and which is not proved to be the result of partiality, prejudice, oppression or corrupt motive.” Id. at 382. Similarly, the PCR court lacks the authority to alter the sentence imposed without any evidence that the sentence exceeds the maximum allowed by law or that it was the result of partiality, prejudice, oppression, or corrupt motive. See Id.

Respondent did not present any evidence that the sentence imposed by Judge Hayes exceeded the maximum sentence allowed by law or that it was the result of partiality, prejudice, oppression, or corrupt motive. Therefore, the PCR court erred in finding Respondent’s sentence was unjust and fundamentally unfair in violation of the Due Process Clause of the V and XIV Amendments to the United States Constitution and Article I, Section III of the South Carolina Constitution.

[Conclusion and signature block on following page]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief court's erroneous finding of error and prejudice.

Respectfully submitted,

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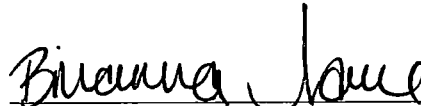
Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and Appendix**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esquire
SC Commission on Indigent Defense
PO Box 11589
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This 31st day of May, 2017.


BRIANNA ARNONE
Legal Assistant for Respondent