

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY

COURT OF COMMON PLEAS

EUGENE C. GRIFFITH, CIRCUIT COURT JUDGE

2014-CP-32-0698

RECEIVED

AUG 16 2017

S.C. SUPREME COURT

William Bruce Justice,.....Petitioner.

vs

The State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Anna Browder, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Melody Brown, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 16th day of August, 2017.

Respectfully submitted,



Anna R. Browder, Esquire
Law Office of Anna Browder, LLC
PO Box 7284
Columbia, South Carolina 29202

ORIGINAL

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2017 AUG -2 AM 11:14)
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

William Bruce Justice,
S.C.D.C. No. 084810,

C.A. No. 2014-CP-32-0698

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 26, 2014. Respondent made its return on May 29, 2015. Respondent moved to dismiss the application, and a hearing on that motion was heard on April 21, 2016, before the Honorable Perry Gravely. After hearing arguments from both Applicant and Respondent, Judge Gravely denied the motion to dismiss. Applicant then moved for discovery of the Department of Probation, Parole, and Pardon (DPPP) records, and after hearing argument from both Applicant, Respondent, and General Counsel of DPPP, Judge Miller issued an order on September 7, 2016, granting Applicant's motion for discovery in part.

After the records were produced to the parties, an evidentiary hearing was held on February 1, 2017, at the Lexington County Courthouse. Applicant was present and represented by Anna (Good) Browder, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented Respondent.

Applicant and Agent Niquita M. Cook, Applicant's parole office, testified at the hearing. The Court had before it Applicant's parole records; the Lexington County Clerk of Court

records; the South Carolina Department of Probation, Parole, and Pardon records; the PCR application; the amended application; and the Return.

PROCEDURAL HISTORY

Applicant is confined at the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted by the at the February 1989 term of the Lexington County Grand Jury for four counts of Burglary Second Degree, two counts of grand larceny, and two county of petit larceny. He was represented by Frederick I. Hall, III, Esquire. On June 28, 1989, Applicant proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Marion H. Kinon to sixty years imprisonment on the burglary charges, twenty years on the grand larceny charges and one month on each petit larceny charge. All sentences were ordered to run consecutively.

A timely Notice of Intent to Appeal was served and filed. On February 7, 1990, Assistant Appellate Defender Franklin W. Draper filed a Brief of Appellant on Applicant's behalf. Applicant raised the following ground for relief on direct appeal:

1. Did the trial court err failing to suppress the evidence seized without a warrant or appellant's consent from appellant's motel room?
2. Did appellant's poor health due to heroin withdrawal deprive him of the ability to make a knowing and voluntary statement?
3. Was it proper to impeach appellant with a conviction that did not involve moral turpitude?
4. Did the trial court err in admitting a surveillance tape with an unidentified individual portrayed?

The state filed a Brief of Respondent on March 98, 1990 App. pp. 323-46; and Applicant filed a Reply Brief of Appellant on March 19, 1990. The South Carolina Supreme Court affirmed

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Applicant's convictions and sentence in an unpublished opinion filed on July 16, 1991. State v. William Bruce Justice. 91-MO-200 (S.C.S.Ct, filed July 16, 1991.)

3:89-1232-OJ

Prior to the South Carolina Supreme Court's decision affirming his convictions, Applicant filed a pro se Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on May 15, 1989. Justice v. Bost, et al., 3:89-1232-OJ. He raised the following grounds for relief in his 1989 Petition:

1. Violation of constitutional right by illegal search and seizure.
Police using threats and coercion on "non-residence" entered the residence of the Applicant without a proper search warrant, without permission or knowledge of the Applicant, and illegally and unconstitutionally did seize personal property of the Applicant without any form of a properly executed warrant.
2. Evidence obtained pursuant to unlawful arrest.
Applicant was placed under illegal arrest following the illegal search and seizure and is still being held in illegal confinement since January 3, 1989, without ever being afforded a grand jury indictment on the charges.
3. Denied access to state court system to attack illegal and unconstitutional confinement.
Court of General Sessions refused to adhere to state statute and hear the writ of habeas corpus submitted within the time limits set forth by statute thereby denying the Applicant access to the court or right to appeal to a higher court any decision rendered.

After Respondents had filed a Motion for Summary Judgment and a Supplemental Motion for Summary Judgment, Magistrate Judge Carr filed a Report and Recommendation on November 28, 1989, in which he recommended dismissal of the 1989 Petition without prejudice because Applicant had not exhausted available state court remedies. The Honorable Matthew J. Perry filed an Order on January 22, 1990 granting the Respondent's motion for summary

judgment and dismissing the 1989 Petition without prejudice. Judgment was entered in accordance with this Order of January 24, 1990.

August 18, 1992 PCR

Applicant subsequently filed an Application for Post-Conviction Relief (PCR) on August 18, 1992. He raised the following grounds for relief in his PCR Application:

1. Ineffective assistance of counsel.
2. Applicant was denied his Fourth Amendment right because of an illegal search and seizure.
3. Abuse of discretionary powers of the trial judge.
4. Denied a fair trial.
5. Ineffective assistance of appellate counsel.
6. Unconstitutional sentence.

The State filed a Return dated October 8, 1992. The Honorable Daniel E. Martin, Sr., held a hearing into the matter on June 7, 1995 at the Lexington County Courthouse. Applicant was present at the hearing and John R. Rakowsky represented him. Assistant Attorney General Allen Bullard represented the State. Prior to the start of the hearing, Judge Martin questioned Applicant regarding whether Applicant desired to make any amendments to the PCR Application. Collateral counsel made a motion to amend the Application to include the following additional allegations of ineffective assistance of counsel:

1. Counsel failed to challenge the Applicant's oral confession to law enforcement.
2. Counsel failed to subpoena a jacket and shoes to present as evidence.
3. Counsel did not request a charge for Receiving Stolen Goods.
4. Counsel did not ask the Court to impose concurrent sentences.
5. Counsel failed to subpoena additional witnesses.
6. Counsel did not object to introduction of prior escape charge for impeachment purposes.
7. Counsel didn't move for a directed verdict on the Grand Larceny charge on Indictment 89-GS-32-325. The Applicant was charged with stealing six shears but the State only produced two at trial.

Respondent did not object to amendment of the Application, and Judge Martin granted the motion to amend. Also, prior to the commencement of the hearing, Applicant explicitly withdrew all allegations of ineffective assistance of appellate counsel Frank Draper, Esquire, and any allegation against Ms. Kathy Evatt, Esquire.

Applicant testified in his own behalf at the hearing. Testifying on behalf of the State was Frederick I. Hall, III, Esquire. On July 19, 1995, Judge Martin signed an Order of Dismissal, in which he denied relief and dismissed the Application with prejudice.

A timely Notice of Appeal was served and filed. On February 1, 1996, Assistant Appellate Defender Lesley M. Coggiola filed a Petition for Writ of Certiorari on Applicant's behalf, in the South Carolina Supreme Court. Applicant raised the following ground for relief in the certiorari petition:

Did the trial judge err in finding that Applicant received effective assistance of counsel when counsel failed to subpoena a jacket and a pair of shoes taken from his motel room by the officers who conducted a search and were different from the jacket and shoes worn by an individual who appeared on videotape the prosecution played for the jury?

The State filed a Return to Petition for Writ of Certiorari on March 11, 1996. The South Carolina Supreme Court denied certiorari on June 19, 1996 and the Remittitur was sent to the Lexington County Clerk of Court on July 8, 1996.

2:03-2281-10AJ

Applicant subsequently filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina on July 10, 2003, raising the following grounds for relief, verbatim:

Convicted obtained by use of Evidence Obtained Pursuant to an Unconstitutional Arrest. Search and Seizure.

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Self

The Petitioner herewith and herein reasserts as his First Grounds in the petition for Writ of Habeas Corpus his Number #3 Grounds, verbatim, raised for ineffective assistance of counsel in his application for post conviction relief, which read as follows:

The applicant was denied his rights protected under the Fourth Amendment of the United States Constitution by an illegal search seizure [sic] and during the suppression hearing the applicant was denied his rights protected under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by ineffective assistance of counsel, denial of the process of law, denial of equal protection of laws, abuse of discretionary powers by the trial court judge.

Respondent filed a motion for summary judgment on September 17, 2003. On September 25, 2003, Applicant was provided a copy of Respondent's order as well as a Roseboro order. On November 3, 2003, Applicant filed an affidavit and reply to Respondent's motion. On December 23, 2003, United States Magistrate Judge Robert S. Carr issued a Report and Recommendation, recommending Respondent's motion for summary judgment be granted. Applicant submitted objections to the Report and Recommendation. On February 4, 2004, Senior United States District Judge Matthew J. Perry, Jr., issued an Order approving the Report and Recommendation and dismissing Applicant's action.

Parole Revocation

On or about May 2, 2012, Applicant was granted parole by the South Carolina Probation, Parole, and Pardon Services. He was given a Certificate of Parole which outlined eleven Conditions of Supervision (signed and dated by Applicant, the Director of Parole Board Support, and a witness). On August 7, 2013, a warrant was issued for Applicant's arrest, alleging that Applicant violated Conditions 3, 7, 9, and 10 of his Parole. It was alleged that Applicant failed to follow advice and instructions of his agent by failing to pay fees, failing to refrain from

contacting his former employer Leigh Cotton and her family, failing to refrain from drinking alcohol to excess, and according to two Kershaw County arrest warrants Applicant struck two members of Ms. Cotton's family with a pole (charged with two counts of Assault and Battery Third Degree).

On August 20, 2013, Applicant was presented a Notice of Offender Rights at Hearing and Hearing Waiver Option from Parole Services. Applicant was notified his parole hearing date was set for August 27, 2013. The hearing took place at the Kershaw County Detention Center on August 27, 2013. Present at the hearing was the Administrative Officer, Applicant's parole agent, Applicant, and two agent's witnesses (Leigh Cotton and Paul Cotton, III). Applicant was found to have violated conditions 3, 7, 9, and 10, set forth in the Conditions of Supervision. Applicant's parole was revoked, and he was ordered to serve the remainder of his sentence. Applicant did not appeal his parole revocation.

Current PCR Application

Applicant subsequently filed his current and most recent Application for Post-Conviction Relief (PCR) on February 26, 2014. He raised the following grounds for relief in his PCR Application:

1. Applicant was denied the right to confront and question witnesses testifying against him that is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the South Carolina Constitution and the South Carolina Department of Probation, Parole and Pardon Services . . . therefore, Due Process was violated;
2. Applicant was denied his right protected by the Fourth Amendment of the United States Constitution and corresponding provision of the South Carolina Constitution from unlawful arrest that was based on erroneous violation of allegations that have no factual support, therefore violation Due process;

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3. Applicant was denied his right protected by the Fourth Amendment of the United States Constitution and the corresponding provisions of the South Carolina Constitution from unlawful arrest with an invalid arrest warrant that probable cause had never been established, and his sentence had expired.

SUMMARY OF THE TESTIMONY

Applicant testified he did not believe he was given due process during his parole hearing. He testified he was not allowed in the same room with the witnesses who addressed the parole board, and he was not given an attorney when he wanted one. Applicant also testified he was not allowed to address the parole board because they asked him direct questions and did not allow him to speak aside from those answers. Applicant claimed he had not violated any parole conditions. He stated he paid his fees when he was told he needed to pay them and was not behind in payment. However, Applicant did admit his parole officer expressly ordered him to have no contact, even by phone, with the victims of his alleged assault, and Applicant agreed that even after this direct order he still sent responsive text messages to the victims. Applicant agreed he had been arrested for assault charges against these victims, but Applicant noted the alleged assault occurred on his property after they came on to his property. Applicant also agreed he had been arrested for driving under the influence. Applicant claimed he had not been drinking, and he said he could not have alcohol because he suffered from Hepatitis C.

Applicant's parole officer, Agent Cook, confirmed Applicant was not allowed in the room with the witnesses when they addressed the parole board. The witnesses were victims of an assault by Applicant that had been documented by law enforcement. Agent Cook also agreed Applicant was not given an attorney because he was not entitled to one for a parole hearing. Agent Cook agreed Applicant was not allowed to speak freely aside from answering questions at

the hearing and confirmed this was standard practice. Agent Cook testified Applicant violated more than one parole condition. Agent Cook instructed Applicant to stay away from the victims and have no contact, to include telephone contact. Agent Cook was able to get copies of text messages sent by Applicant to the victim after the date of her order not to have contact with them. Additionally, there was an incident report alleging Applicant had physically attacked victims. Agent Cook also explained Applicant had been forbidden from drinking alcohol while on parole; however, not only did he have an arrest for driving under the influence, but Agent Cook personally witnessed Applicant to be intoxicated and surrounded by empty beer cans when she had made a visit to his home. Agent Cook agreed she told Applicant he could pay his fees at the end of the month and not be considered late.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRCF 71.1(e)).

A proceeding under the Uniform Post-Conviction Procedure Act may be instituted by: “Any person who has been convicted of, or sentenced for, a crime and who claims . . . [t]hat his

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sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint.” S.C. Code Ann. § 17-27-20.

In a parole context, Applicant has no Sixth Amendment right to counsel because “a parole revocation hearing . . . is an administrative rather than a criminal proceeding.” Duckson v. State, 355 S.C. 596, 598, 586 S.E.2d 576, 578 (2003).

However, an inmate’s non-collateral claim that his parole was unlawfully revoked falls squarely within the ambit of the PCR statute. Kerr v. State, 345 S.C. 183, 547 S.E.2d 494 (2001); Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). This does not, however, give the court the authority either to conduct a de novo review of the case or for this court to otherwise sit in an appellate capacity to review the Parole Board’s discretionary decision. To the contrary, the South Carolina Code specifically provides: “[t]he board shall be the sole judge as to whether or not a parole has been violated and no appeal therefrom shall be allowed.” S.C. Code Ann. § 24-21-680. The court’s review of whether Applicant’s parole was unlawfully revoked is limited to an examination of whether the revocation procedure itself was lawful.

As outlined in Morrissey v. Brewer, 408 U.S. 471, 480 (1972), “revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.” The United Supreme Court outlined the limited “minimum requirements of due process.”

They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. at 488–89.

And while “the parolee may appear and speak in his own behalf [at the hearing, and] he may bring letters, documents, or individuals who can give relevant information to the hearing officer[,] if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.” Morrissey, 408 U.S. at 487.

Furthermore, where parole is revoked on more than one ground, Applicant must successfully challenge all grounds in order to vacate the revocation. See State v. Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010) (“In this case, the Court of Appeals erred in addressing the merits of petitioner’s argument regarding the revocation of probation based on a violation of Sex Offender Conditions *because the probation revocation judge revoked petitioner’s probation on two additional grounds*, which petitioner did not challenge.” (emphasis added)).

This Court will now address each allegation:

Allegation #1: Right to Confront Witnesses

Applicant argues his due process rights were violated when he was not allowed to confront the witnesses against him. There are no tapes or transcripts of the hearing; however, both Applicant and his parole agent agree he was not allowed to be in the same room with the victims. Parole agent does not remember if there was an express finding on the record that the informants would be at risk, but parole agent was aware the witnesses were victims of an assault allegedly perpetrated by Applicant. As outlined in Morrissey, where a hearing officer determines an “informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.”

This Court finds that while it is unclear of whether there was a finding on the record of danger to the witnesses, there is testimony that the parole agent knew the witnesses had been allegedly subject to a physical attack by Applicant. And, more importantly, pursuant to Hicks, Applicant had his parole revoked **not only** for failing to follow orders and contacting these victims and the alleged assault on these victims, but also for consuming alcohol. Testimony at the hearing was that Agent Cook, who witnessed Applicant under the influence, was present at the hearing. Therefore, even if Applicant succeeded on one of his reasons for revocation, he would still be successfully revoked due to the allegations supported by Agent Cook.

Allegations #2 & 3: No Factual Support, No Probable Cause

Applicant next argues his rights were violated due to “unlawful arrest that was based on erroneous violation of allegations that have no factual support” and “unlawful arrest with an invalid arrest warrant that probable cause had never been established[.]”

Applicant is not entitled to a de novo review of the case or for this court to otherwise sit in an appellate capacity to review the Parole Board’s discretionary decision. To the contrary, the South Carolina Code specifically provides: “[t]he board shall be the sole judge as to whether or not a parole has been violated and no appeal therefrom shall be allowed.” S.C. Code Ann. § 24-21-680. The court’s review of whether the Applicant’s parole was unlawfully revoked is limited to an examination of whether the revocation procedure itself was lawful.

Further, this Court had the opportunity to observe and listen to sworn testimony from both Applicant and Agent Cook. Applicant admitted on the stand that he sent a text message to the victims after being ordered by Agent Cook not to do so, and Agent Cook testified to

personally observing Applicant under the influence of alcohol and surrounded in his home by empty beer cans.

For the reasons stated above, this Court finds Applicant has failed to meet his burden of proving his parole was unlawfully revoked and, accordingly, finds these allegations are denied.

CONCLUSION

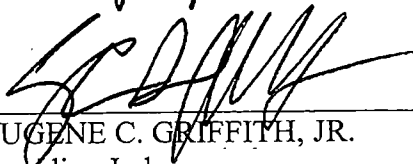
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his parole hearing. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 28th day of July, 2017.


EUGENE C. GRIFFITH, JR.
Presiding Judge
Eleventh Judicial Circuit

Nawbony, South Carolina.

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LISA M. COHER
CLERK OF COURT
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