

LAW OFFICE

THE HENDERSON LAW FIRM, P.C.

Carson M. Henderson

ATTORNEY AND COUNSELOR AT LAW

109-B Oak Avenue
Greenwood, South Carolina 29646

Telephone: (864) 229-8000
Facsimile: (864) 229-8001

November 14, 2017

Honorable Daniel E. Shearouse
Clerk of Court
S.C. Supreme Court
1231 Gervais Street
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

NOV 22 2017

S.C. SUPREME COURT

Re: Steve Young (#265045) v. State of South Carolina
Newberry C/A No. 2016-CP-36-165

Dear Clerk Shearouse:

Please file the enclosed Notice of Appeal and Proof of Service and return clocked copies of both documents to me and the S.C. Commission on Indigent Defense, Appellate Division in the enclosed envelopes provided for your convenience. Also enclosed is Circuit Judge R. Scott Sprouse's Order of Dismissal dated October 30, 2017.

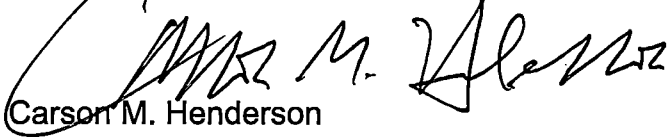
My email address is carson@carsonhendersonlawfirm.com.

Thank you for your assistance and cooperation in this matter.



Cordially yours,

THE HENDERSON LAW FIRM, P.C.


Carson M. Henderson

CMH/lhc

Enclosures as indicated

Cc: Justin J. Hunter, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

S.C. Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, S.C. 29201

Steve Young (#265045)
Livesay Correctional Institution
P.O. Box 580
Una, S.C. 29378

#2

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

R. Scott Sprouse, Presiding Circuit Judge – Newberry County

C/A No. 2016-CP-36-165

STEVE YOUNG (#265045),

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

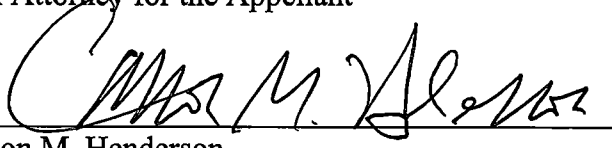
RECEIVED
NOV 22 2017
S.C. SUPREME COURT

NOTICE OF APPEAL

Steve Young appeals the Order of Dismissal issued by the Honorable R. Scott Sprouse on October 30, 2017. This matter was heard in Laurens County on Thursday, October 12, 2017. The Appellant's trial counsel received the Order of Dismissal from the Newberry County Clerk of Court on Monday, November 6, 2017.



THE HENDERSON LAW FIRM, P.C.
Trial Attorney for the Appellant

By: 

Carson M. Henderson
109-B Oak Avenue
Greenwood, S.C. 29646
Phone: (864) 229-8000
Fax: (864) 229-8001

Greenwood, South Carolina

November 14, 2017

Other Counsel of Record:

Justin J. Hunterl, Esquire
S.C. Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211

S.C. Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, S.C. 29201

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

R. Scott Sprouse, Presiding Circuit Judge – Newberry County

RECEIVED
NOV 22 2017
S.C. SUPREME COURT

C/A No. 2016-CP-36-165

STEVE YOUNG (#265045),

Appellant,

v.

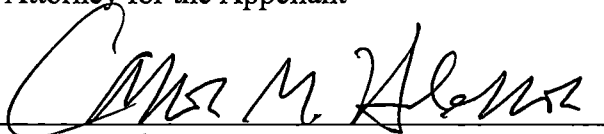
STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent, State of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on November 14, 2017, addressed to its attorney of record, Justin J. Hunter, Esquire, S.C. Attorney General's Office, P.O. Box 11549, Columbia, S.C. 29211, with a copy also being mailed to S.C. Commission on Indigent Defense, Appellate Division, 1330 Lady Street, Suite 401, Columbia, S.C. 29201.

THE HENDERSON LAW FIRM, P.C.
Trial Attorney for the Appellant

By: 

Carson M. Henderson
109-B Oak Avenue
Greenwood, S.C. 29646
Phone: (864) 229-8000
Fax: (864) 229-8001

Greenwood, South Carolina

November 14, 2017



STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP3600165

| | | | |
|-------------|--|------------------------|--|
| Steve Young | | South Carolin State Of | |
|-------------|--|------------------------|--|

| | |
|---------------|---|
| PLAINTIFF(S) | DEFENDANT(S) |
| Submitted by: | Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant |

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk:

ORDER OF DISMISSAL

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
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| | | |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/R SCOTT SPROUSE
Circuit Court Judge

2752
Judge Code

10/30/2017
Date

For Clerk of Court Office Use Only

This judgment was entered on **NOVEMBER 1 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **NOVEMBER 2 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Carson McCurry Henderson 109-B Oak Ave. Greenwood,
SC 29646

Justin James Hunter PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

ELIZABETH P FOLK (MRV)

Court Reporter

Elizabeth P. Folk - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCF.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
 COUNTY OF NEWBERRY)
 Steve Young,)
 S.C.D.C. No. 265045,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 OF THE EIGHTH JUDICIAL CIRCUIT
~~2015~~²⁰¹⁶-CP-36-165

ORDER OF DISMISSAL

FILED
 NEWBERRY COUNTY
 2017 NOV - 1 AM 11:06
 ELIZABETH P. FOLK
 CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 17, 2016. Respondent made its Return on or about May 15, 2017. An evidentiary hearing into the matter was convened on October 12, 2017, at the Laurens County Courthouse. Applicant was present at the hearing and represented by Carson Henderson, Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General’s Office represented the Respondent. At the hearing, Applicant testified on his own behalf. Elizabeth Fullwood, Esquire, also testified. This Court also had before it a copy of the records of the Newberry County Clerk of Court regarding the subject convictions, Applicant’s records from the South Carolina Department of Corrections, Applicant’s relevant probation records, Respondent’s Return, and the probation revocation hearing transcript.

I. PROCEDURAL HISTORY

Newberry County Guilty Plea

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the September 2011 term of the Newberry County Grand Jury for Attempted Murder (2011-GS-36-623). Applicant was represented by Charles Verner, Esquire. On December 1, 2011, Applicant pled guilty before the Honorable Frank Addy, Jr., to the lesser

055

included offense of assault and battery (first degree). He was sentenced to imprisonment for ten years provided upon the service of time-served, the balance was suspended with four years' probation to follow. The probation was to be terminated upon payment after two years if the restitution was paid. Applicant did not appeal his plea or sentence.

Union County Guilty Plea

Applicant was placed on probation for the Newberry County charges in December 2011. In August of 2012, after serving almost nine months on probation, Applicant pled guilty in Union County to reckless homicide (2011-GS-44-234) and leaving the scene of an accident (2011-GS-44-235). He received a sentence of ten years' incarceration. The Union County offenses occurred before Applicant was placed on probation for the Newberry offense, so the conviction and sentence was not a violation of that probation.

Probation Tolling Hearing

On November 1, 2013, Applicant's probation agent brought him before the Honorable Steven H. John and made a motion to request a tolling of his probation during his incarceration on the Union County offenses. The hearing was not a revocation hearing. Applicant was represented by Elizabeth Fullwood, Esquire. Applicant's attorney objected to the probation agent's motion; however, Judge John granted the request and tolled his probation. Judge John further found that Applicant violated probation because he was behind on his supervision fees, three payments behind on restitution, and had not paid into the Public Defender Fund or his drug test fees.

Applicant filed a notice of appeal from Judge John's order tolling his probation. After briefing and oral argument, the South Carolina Court of Appeals affirmed the circuit court's decision by an unpublished opinion filed July 15, 2015. State v. Steve Young, Op. No. 2015-UP-

345 (Ct. App. Filed July 15, 2015). Applicant filed a Petition for Rehearing on July 23, 2015. This petition was denied by an order filed August 20, 2015. Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Supreme Court denied the petition on February 16, 2016. The remittitur was sent February 25, 2016.

PCR Application

In his application, Applicant alleged he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Counsel was ineffective for not objecting when the trial judge found that Applicant violated his probation by failing to pay"
 - b. "Counsel was ineffective for not informing him of the revocation hearing; and not informing him he had the right to object on the record"

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "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." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies 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 an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the 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.

With respect to probation counsel, the Strickland standard applies. A probationer has a right to counsel, though not a Sixth Amendment one. Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009); see also Gagnon v. Scarpelli, 411 U.S. 778 (1973). Nonetheless, "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, 384 S.C. at 455, 682 S.E.2d at 794; see e.g., United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the probation hearing transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Relevant Facts

Applicant alleged that Counsel was ineffective for not objecting when the trial judge found that Applicant violated his probation by failing to pay.

At the probation hearing, the State asked the presiding judge to toll Applicant's probation while he was incarcerated in the Department of Corrections for his Union County convictions. Judge John indicated that he would grant the agency's request, but gave Counsel the opportunity to respond. Counsel argued that the court was not allowed to toll Applicant's probation because Applicant had not violated the terms and conditions of his probation. The probation judge then asked the probation agent if Applicant was current on all of his fees. The probation agent indicated that Applicant was one payment behind on his supervision fees, had not paid into the public defender fund, was \$960 behind on his restitution payments, and had not paid his drug testing fees. The probation judge concluded the following:

Based on his actions on probation during the time that he was out on probation and not under arrest for the other charge, he was in violation of his terms and conditions of probation, a willful violation. I do find those to be I do find, therefore, it is proper to toll the time period since he was not current, he was not doing what he was supposed to be doing under probation at the time he was arrested for the charges that apparently had occurred prior to him being placed on probation; therefore, we will toll the time period and I'm going to extend his probation for an additional year to the five full years of probation.

Probation Hearing transcript p. 10, ll. 2-13.

Applicant testified at the PCR hearing that he was working while on probation and was trying his best to make his payments but was unsuccessful. Counsel testified that she argued to the judge that tolling Applicant's probation was improper but did not make the proper objection to the judge's finding that Applicant's nonpayment was a willful violation.

Findings

This Court finds that Counsel was not deficient for failing to object to the probation hearing judge's finding that Applicant's failure to make his payments constituted a willful violation. Evidence was presented at the probation hearing that Applicant was one payment behind on his supervision fees by the time he was incarcerated, three payments (\$960) behind on

his restitution, had not paid into the public defender fund, and had not paid any of his drug testing fees. With no evidence presented at the probation hearing to contradict the probation agent, this Court finds Counsel did not act unreasonably in making a baseless objection.

Furthermore, Applicant has failed to show that he was prejudiced by Counsel's actions. This Court finds Counsel's failure to object to the judge's finding that Applicant's non-payment was willful would not change the outcome of the case for two main reasons:

First, no evidence was presented at the probation hearing that would have changed the judge's findings had an objection been made. The judge made his findings based on the unrefuted and unchallenged testimony from the probation agent that outlined in detail Applicant's failure to make his required payments. Even if Counsel had made an objection, the probation judge would likely have overruled the objection based on the lack of contrary evidence presented at the probation hearing. It would be speculation for this Court to find that Counsel's objection would have been sustained because no evidence was presented at the probation hearing to challenge the probation agent's detailed testimony of Applicant's nonpayment. Although Applicant testified at the PCR hearing that he had a paying job and was trying, but struggling, to make payments, it would be speculation for this Court to say that Applicant's current testimony would have changed the probation judge's ruling. Furthermore, it would be improper for this Court to change the probation judge's ruling based on findings that were not presented to the probation judge.

Second, this Court finds that Applicant's probation would have had to be tolled, regardless of whether Counsel objected to the judge's finding of willful nonpayment, because of Applicant's incarceration in the Department of Corrections. Tolling a defendant's probation is appropriate when a defendant absconds from supervision. See State v. Hackett, 363 S.C. 177,

609 S.E.2d 553 (Ct.App.2005). Although Applicant did not abscond in this case, this Court finds that he was placed into a situation that prevented his supervision by his own wrongful acts – those being his Union County convictions for reckless homicide and leaving the scene of an accident where death was involved. The South Carolina Supreme Court has held:

“The general rule applied in most jurisdictions is that the tolling of probation is appropriate where the authorities could not supervise the defendant due to the defendant’s wrongful acts. It is based on the principle that a defendant should not be allowed to profit from his own misconduct which prevents supervision by probationary authorities.”

State v. Miller, 404 S.C. 29, 37, 744 S.E.2d 532, 537 (2013). In the instant case, the probation judge appropriately found that Applicant had violated his probation based on the unrefuted and detailed testimony from the probation agent that Applicant was substantially behind on several of his financial obligations. Most importantly, because of Applicant’s incarceration due to his own wrongdoing, this Court finds he was unlikely to be able to become current before the expiration of his probation. It is clear that Applicant cannot be on supervised on probation and incarcerated in the South Carolina Department of Corrections at the same time. The Court of Appeals found that “[Applicant] should not be allowed to profit from his own misconduct by having his probationary term continue to run while he is not under probationary supervision.” State v. Steve Young, Op. No. 2015-UP-345 (Ct. App. Filed July 15, 2015). This Court agrees and finds that Applicant’s probation would have to be tolled while he is incarcerated, regardless of whether Counsel objected to the judge’s finding of willful nonpayment. As such, Applicant cannot show that he was prejudiced by Counsel’s actions, and his PCR application must be dismissed.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel’s performance was unreasonable under prevailing

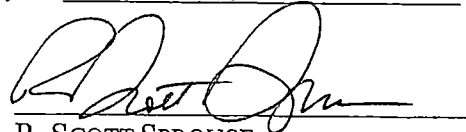
professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

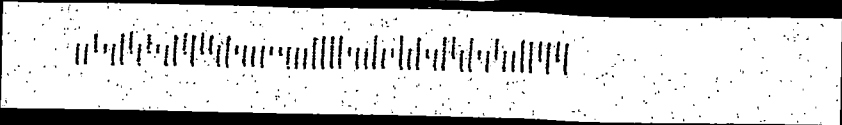
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 30 day of October, 2017.



R. SCOTT SPROUSE
Presiding Judge
Eighth Judicial Circuit

Walla, South Carolina



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NOV 27 2011
S.C. SUPREME COURT

The Henderson Law Firm, P.C.
109-B Oak Avenue
Greenwood, S.C. 29646

Honorable Daniel E. Shearouse
Clerk of Court
S.C. Supreme Court
1231 Gervais Street
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