

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

GREGORY DANIEL PRICE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001684

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT

The post-conviction relief court erred by denying Petitioner’s post-conviction relief application for ineffective assistance of counsel because plea counsel requested Petitioner receive 446 days credit for time served when Petitioner was actually entitled to 741 days of time served for the time he served in Maryland3

Relevant Facts3

Discussion.....4

CONCLUSION.....10

ISSUE PRESENTED

Whether the post-conviction relief court erred by denying Petitioner's post-conviction relief application for ineffective assistance of counsel because plea counsel requested Petitioner receive 446 days credit for time served when Petitioner was actually entitled to 741 days of time served for the time he served in Maryland?

STATEMENT

Petitioner was indicted for possession of cocaine base and two counts of distribution of cocaine base by the Spartanburg County Grand Jury. App. 122 - 129. Petitioner secured release on bond February 16, 2009. App. 112.

On August 4, 2015, Petitioner pled guilty to cocaine possession and cocaine distribution charges. App. 12, l. 4 – 14, l. 24. Petitioner waived presentment and pled guilty to two forgery charges from December 12 and 15, 2009. App. 3, l. 24 – 4, l. 3. The guilty plea hearing was held in front of the Honorable L. Casey Manning. App. 1. Assistant Solicitor Grady B. Anthony represented the state and James A. Cheek represented Petitioner. Id. Petitioner received five years for each forgery charge, five years for possession of cocaine base, and seven years for cocaine distribution. App. 30, ll. 19 – 24.

Petitioner filed a timely post-conviction relief (PCR) application on July 6, 2016. App. 33 – 43. Petitioner alleged ineffective assistance of counsel because counsel erred when he requested only partial credit for Petitioner's time served. App. 36. The state made its Return on or about May 1, 2017. App. 46 – 51. Petitioner had his PCR hearing on June 26, 2017 before the Honorable Robin B. Stillwell. App. 53. Susannah C. Ross represented the state and Johnny E. James represented the Petitioner. Id. On July 28, 2017 the Honorable Robin B. Stillwell filed his order denying Petitioner relief. App. 111 - 119. This petition follows.

ARGUMENT

The post-conviction relief court erred by denying Petitioner's post-conviction relief application for ineffective assistance of counsel because plea counsel requested Petitioner receive 446 days credit for time served when Petitioner was actually entitled to 741 days of time served for the time he served in Maryland.

Relevant Facts

On October 20, 2008 and December 17, 2008, Petitioner sold cocaine to a confidential informant. App. 24, ll. 3 – 6; 24, ll. 14 – 17. On January 13, 2009, Spartanburg County SWAT forced entry into Petitioner's home, found crack cocaine in his possession, and arrested him. App. 25, ll. 1 – 11. Petitioner was indicted for possession of cocaine base and two counts of distribution of cocaine base by the Spartanburg County Grand Jury. App. 112. Petitioner secured release on bond and thereafter left the state. Id. Petitioner failed to appear in court and a bench warrant was issued for his arrest on February 8, 2012. App. 102.

On July 24, 2013 Petitioner was arrested in Maryland on unrelated charges. App. 74. The Maryland charges were dismissed on May 19, 2014. App. 2 – 4. Petitioner waived extradition on May 20, 2014. App. 112.

On August 4, 2015, Petitioner pled guilty to the cocaine possession and cocaine distribution charges. App. 12, l. 4 – 14, l. 24. Petitioner waived presentment and pled guilty to two forgery charges from December 12 and 15, 2009. App. 3, l. 24 – 4, l. 3.

During the guilty plea hearing, plea counsel requested the court to give Petitioner credit for 446 days of time served, which was the time period from when Petitioner signed the extradition waiver to the date of the guilty plea. App. 26, ll. 16 – 19. Plea counsel failed to request the court to give Petitioner credit for the 295 days of time he served in Maryland from

July 24, 2013 to May 20, 2014. The judge relied on plea counsel's calculation of time served credit and awarded 446 days. App. 30, ll. 23 – 24.

Petitioner filed a timely PCR application. App. 33 – 43. During his PCR hearing on June 26, 2017, Petitioner argued that his counsel provided ineffective assistance because plea counsel erred on the time served issue. App. 67, l. 15 – 68, l. 1. Petitioner also testified that he would not have taken the plea deal if not for counsel's assurance that he would get credit for his time served awaiting extradition in Maryland. App. 68, ll. 6 – 9.

At PCR, the state argued that plea counsel's calculation of credit for time served was correct and that Petitioner should not receive credit for time served until he was extradited to South Carolina. App. 97, l. 20 – 98, l. 11. The PCR judge agreed with the state, and plea counsel, and denied Petitioner's request for relief. App. 99, l. 8 – 100, l. 2. This was an error and that error prejudiced Petitioner.

Discussion

The proper standard for appellate review of a PCR court's grant of relief is whether, "any evidence of probative value," exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If any probative evidence exists to support the PCR court's decisions, the ruling *must* be upheld. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). The reviewing court must give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064. An attorney's performance is measured against prevailing professional norms. Id. at 688

104 S.Ct. at 2065. Petitioner pled guilty therefore in order to be prejudiced by counsel's deficient performance, Petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985).

Plea counsel's assurances to Petitioner that he would receive full credit for all the time he served in South Carolina *and Maryland* induced Petitioner to plead guilty. App. 68, ll. 2 – 9. If not for plea counsel's deficient performance in his request for 446 days of time served credit instead of the full 741 days, Petitioner would have insisted on going to trial.

The interpretation of a statute is a question of law. Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524; 642 S.E.2d 751, 753 (2007)). This Court is "free to decide a question of law with no particular deference to the circuit court." Id. at 524, 642 S.E.2d at 753. However, this Court has held it is imperative to interpret a statute based on legislative intent. "A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself." State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The current version of the statute for computation of time served by prisoners is:

The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the

date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial *was an escapee* from another penal institution; or (2) *when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense* in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense. S.C. Code Ann. § 24-13-40 (2013) (emphasis added)

The legislature specifically prohibited prisoners that were *escapees* or prisoners *serving a sentence and awaiting a second sentence in South Carolina* from receiving credit for time served. A plain reading of the statute shows that to be precluded from credit for time served you must either have escaped from a penal institution or be convicted of a first offense and be awaiting trial for a second offense. Petitioner was not an escapee and was not convicted of a first offense. The charges from his Maryland arrest were dismissed. Therefore, Petitioner should be awarded credit for time served towards his South Carolina conviction for the period he spent incarcerated in Maryland.

At his guilty plea, plea counsel requested for 446 days of time served for the period in which Petitioner spent incarcerated in South Carolina. Petitioner's plea counsel noted that 446 days was calculated from when Petitioner, "signed waiver extradition papers out of the state of Maryland." App. 26, ll. 16 – 19. The plea judge relied on plea counsel's request for time served credit when he sentenced Petitioner. App. 30, l. 2 - 24.

The PCR court relied on the plea judge's determination and on the precedent set in Robinson v. State, 329 S.C. 65, 495 S.E. 2d 433 (1998) when it denied Petitioner's allegation of ineffective assistance of counsel regarding time served issue. App. 99, ll. 1 – 22. However, the PCR judge misinterpreted the controlling case.

In Robinson v. State, 329 S.C. 65, 495 S.E.2d 433 (1998), this Court held that a prisoner subject to incarceration in another jurisdiction is eligible for time served on his South Carolina conviction when the prisoner is in South Carolina custody or in constructive custody via detainer. Id. at 71, 495 S.E.2d at 436-437. The Robinson Court noted one way a prisoner incarcerated in another jurisdiction can initiate a South Carolina detainer on himself is to notify the South Carolina Department of Corrections (SCDC) that he is unable to personally submit to South Carolina custody to commence the service of his sentence. Id. at 71, 495 S.E.2d at 436. The Court explained that notifying SCDC would begin the time served calculation because South Carolina would then put a detainer on the prisoner and have, “constructive custody,” over him. Id. at 71, 495 S.E.2d at 437.

Subsequent decisions from this Court have shown that the notification of SCDC in Robinson is not the crux of the inquiry when determining credit for time served. In Delahoussaye v. State, 369 S.C. 522, 633 S.E.2d 522 (2006) this Court elaborated on the decision in Robinson, “while a convict is subject to a South Carolina detainer, he is constructively in South Carolina custody. As a result, a convict will receive credit for time spent in another jurisdiction while subject to a South Carolina detainer.” Id. at 572, 633 S.E.2d at 161. Thus, once a prisoner is subject to a South Carolina detainer, regardless of how the detainer is initiated, he is under South Carolina custody and should receive credit for time served from that point.

A detainer is defined by the United States Supreme Court in Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401 (1985) as, “a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either *to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.*” (emphasis added) Id. at 719, 105 S.Ct. at 3403. This means that the time served calculation should begin running once South

Carolina contacts the other jurisdiction to either hold the prisoner for South Carolina or to notify South Carolina when release of the prisoner is imminent.

The PCR judge misinterpreted the notification language in Robinson. In Robinson, notification of SCDC is an example of how Robinson could have initiated constructive custody at the outset of his incarceration, not an exhaustive list, “a convict **may** also receive credit for time served in another jurisdiction by notifying the [South Carolina Department of Corrections] that he is unable to personally submit to South Carolina custody...” Robinson, 329 S.C. at 71, 495 S.E.2d at 436. (emphasis added) Moreover, Robinson’s time served credit started when, “he was admitted to, but deemed absent with leave from, the South Carolina Department of Corrections.” Robinson, 329 S.C. at 67, 495 at 434. Nothing in the Robinson opinion indicated that he ever notified SCDC of his federal incarceration, yet his time served calculation began running when South Carolina took constructive custody over him via the detainer.

In the order of dismissal the PCR judge relied on the holdings in Delahoussaye v. State, 369 S.C. 522, 633 S.E.2d 158 (2006) and Oglesby v. Leeke, 263 S.C. 283, 210 S.E.2d 232 (1974), to dismiss Petitioner’s allegation of ineffective assistance of counsel. However both of those cases are distinguishable from Petitioner’s.

This Court denied credit for time served in Delahoussaye and Oglesby because the petitioners were *escapees* from South Carolina Custody. Delahoussaye, at 530, 633 S.E.2d at 162; Oglesby, at 288, 210 S.E.2d at 234. A plain reading of the statute supports these decisions, an escapee is not entitled to credit for time served for his South Carolina convictions while incarcerated in another jurisdiction. S.C. Code Ann. § 24-13-40 (2013). Petitioner is not an escapee, and thus the holdings Delahoussaye and Oglesby do not apply to him.

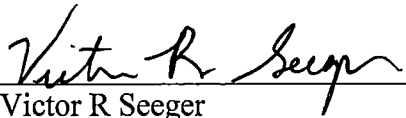
Petitioner's case is more akin to Allen v. State, 339 S.C. 393, 529 S.E.2d 541 (2000), where this Court found Allen was entitled to time served from his first arrest. Allen, at 396, 529 S.E.2d at 542. This Court examined the statute and held, "Section 23-13-40 mandates a prisoner be given credit for all time served prior to trial unless one of two exceptions exist: 1) either the prisoner was an escapee or 2) the prisoner was already serving a sentence on one offense. Here, neither exception applies as Allen was neither an escapee nor was he serving any sentence at the time of his June 26th arrest." Id. at 395, 529 S.E.2d at 542. In the instant case, Petitioner was neither an escapee nor was he serving a sentence at the time of his arrest on July 24, 2013 in Maryland. Therefore, Petitioner is entitled to credit for his time served from the date of his July 2013 arrest.

Some jurisdictions have precedent that states the possibility of contesting extradition prevents the prisoner from being in constructive custody until after the extradition contest is decided. South Carolina is not among those jurisdictions. South Carolina case law specifically states that where a non-escapee is imprisoned in another state while contesting extradition, he is entitled to credit on any subsequent sentence given by a South Carolina court. State v. Dozier, 263 S.C. 267, 273-274, 210 S.E. 2d 225, 227 (1974). Thus, the date Petitioner signed the extradition waiver was erroneous and was not the point at which South Carolina began constructive custody.

Constructive custody over Petitioner began when South Carolina put a detainer on him. Therefore, the PCR court erred when it denied Petitioner's PCR application because plea counsel provided ineffective assistance when he requested only 446 days of credit for time served rather than the entire 741 days that Petitioner was entitled to, and that deficiency prejudiced Petitioner because he would not have pled guilty but for counsel's deficient performance.

CONCLUSION

By reason of the foregoing arguments, Petitioner requests that the Court grant his application for post-conviction relief due to ineffective assistance of counsel and grant Petitioner full credit for his time served.


Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

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GREGORY DANIEL PRICE,

PETITIONER


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE
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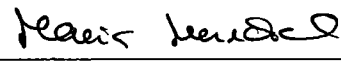
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Gregory Daniel Price, #240729, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 16th day of January, 2018.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of January, 2018.



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