

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

Honorable Edward W. Miller, Circuit Court Judge

VICTOR ANTHONY JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002239

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in denying Petitioner relief, where counsel provided ineffective assistance by failing to notify the plea court of prior periods of incarceration served by Petitioner, where Petitioner was entitled to credit for such time?

STATEMENT

During its February 2013 term of court, a Saluda County grand jury indicted Petitioner for armed robbery (2013-GS-41-076). App. 733 – 734. Previously, he had also been indicted for armed robbery in February 2011 (2011-GS-41-0150). App. 735 – 736.

He proceeded to trial on the 2011 charge on October 30, 2012 before the Honorable William P. Keesley and a jury. App. 1. Benjamin A. Stitely represented Petitioner, and Ervin J. Maye served as the Assistant Solicitor. After a four-day trial, the jury found Petitioner guilty as indicted. App. 606 ll. 7 – 15. Judge Keesley sentenced Petitioner to eleven years' incarceration. App. 618 ll. 17 – 24.

Following the filing of an Anders brief, Petitioner's direct appeal was dismissed on February 5, 2014.¹ App. 652.

On February 14, 2013, Petitioner pled guilty to the lesser-included offense of strong armed robbery stemming from the 2013 armed robbery indictment. App. 621; App. 630 ll. 16 – 22; App. 631 ll. 12 – 17; App. 634 ll. 20 – 25. With the same attorneys involved, Petitioner appeared before the Honorable Thomas. A. Russo who accepted Petitioner's plea. App. 636 ll. 12 – 20. Subject to plea negotiations, Petitioner was sentenced to a five year sentence, to be served consecutive to the 2011 armed robbery charge. App. 640 ll. 16 – 22; App. 637 l. 20 – App. 638 l. 4.

Petitioner filed an application for post-conviction relief on or about October 31, 2013 following his conviction of the 2011 armed robbery charge. App. 655. It contained allegations of ineffective assistance of counsel, including claims that trial counsel provided ineffective representation. App. 657. The State made its Return on or about June 19, 2014. App. 662 – 667.

¹ Anders v. California, 386 U.S. 738 (1967).

An Amended Application for Post Conviction Relief was filed through counsel on November 25, 2014. App. 669. Petitioner's application was amended to include three additional grounds for relief: that trial counsel was ineffective for advising Petitioner of his right to testify, that counsel improperly persuaded Petitioner not to testify at trial, and that counsel failed to investigate. Id.

A Second Amended Application for Post-Conviction Relief withdrew Petitioner's prior claims of ineffective assistance of counsel for "Indictment 2011-GS-41-1150" and added the claim that "[t]rial counsel failed to ensure that the Court awarded [Petitioner] credit for time served as statutorily required." App. 739 – 741.

An evidentiary hearing was conducted on August 1, 2016 before the Honorable Edward Miller. App. 671. Kristy G. Goldberg represented Petitioner, and Johanna C. Valenzuela appeared on behalf of the State. Petitioner and trial counsel testified during the hearing.

Following the evidentiary hearing, a Consent Order Regarding Credit for Time Served was filed on September 12, 2016. App. 722. The parties agreed that Petitioner was entitled to 110 days of pre-trial incarceration credit towards his sentence on Indictment 2013-GS-41-076. App. 724.

An Order of Dismissal was then issued on October 16, 2017. App. 725. The PCR judge dismissed Petitioner's application and denied him relief based upon a finding that Petitioner's application did not collaterally attack the validity of his conviction or sentence. App. 730.

This Petition follows.

ARGUMENT

The PCR court erred in denying Petitioner relief, where counsel provided ineffective assistance by failing to notify the plea court of prior periods of incarceration served by Petitioner, where Petitioner was entitled to credit for such time.

At the evidentiary hearing, PCR counsel summarized the procedural history and requested relief:

Mr. Jones originally went to trial on an armed robbery indictment. Later he pled guilty to a strong armed robbery charge, received a consecutive five year sentence. All of our arguments today are going to involve credit that ... should apply to that consecutive five year sentence only. So we are not making any arguments regarding the original ... sentence.

App. 676 ll. 9 – 16.

Counsel for Respondent provided the PCR court with Cooper v. State, 338 S.C. 202, 525 S.E.2d 886 (2000). It was argued that “PCR is not the right venue for this to be heard.” App. 674 l. 23 – App. 675 l. 21. That claim notwithstanding, a consent order was filed regarding 110 days of pre-trial incarceration credit which PCR counsel successfully argued Petitioner was owed. Additionally, PCR counsel couched the claims as ineffective assistance of counsel:

[C]ounsel in this case should have and could have, one, clarified this information to the sentencing judge so the sentencing judge could make their sentence clear, and two, could have provided the sentencing judge with additional information about time that may be discretionary where the judge may have decided to give him or not.

App. 676 l. 21 – App. 677 l. 4.

Trial counsel recalled that Petitioner had several charges pending during the period of his representation. App. 679 ll. 3 – 15. Counsel indicated that Petitioner pled guilty on the second charge to prevent strikes from going on Petitioner’s record. App. 680 ll. 3 – 8.

Regarding the 2011 indictment, trial counsel testified that the charges originally stemmed from conduct in 2009, which can also be seen from the indictment. App. 680 l. 22 – App. 684, l. 3; App. 734. The 2009 indictments included conspiracy, possession of a firearm during the commission of a violent offense, and armed robbery. *Id.* Those additional charges were *nolle prossed* on the date of Petitioner’s plea, February 14, 2013. App. 684 ll. 4 – 8.

Because the plea judge was different than the trial judge in Petitioner’s matters, neither judge nor the South Carolina Department of Corrections would have been aware that Petitioner had already spent time in jail related to warrants for the alleged conduct that took place in 2009. App. 684 l. 4 – App. 685 l. 22. When asked whose responsibility it would have been to notify the sentencing judge of the prior incarceration, trial counsel testified that he did not recall advising the court accordingly. App. 685 l. 23 – App. 687 l. 18.

Counsel admitted that he was aware of the periods during which Petitioner was incarcerated. App. 689 l. 18 – App. 692 l. 7. Petitioner provided a detailed history of his charges and incarceration periods. App. 700 l. 14 – App. 706 l. 1.

Following testimony, the PCR court heard argument from counsel. PCR counsel partitioned the periods of time for which trial counsel was ineffective for requesting credit. App. 706 l. 13 – App. 711 l. 11.

The first period was 110 days and was addressed by the consent order. App. 706 l. 14 – App. 708 l. 7. The second period dealt with the service of the bench warrant on May 18, 2012 through November 9, 2012 when Petitioner was sent to SCDC. App. 708 l. 8 – 709 l. 13. The third period of time was while Petitioner was incarcerated for his parole revocation. App. 709 l. 18 – 711 l. 11.

With only the second and third blocks of time now in question, Petitioner challenges the conclusion that he received effective assistance of counsel regarding those sections of time to which he was entitled credit.

The second block of time for which Petitioner is entitled to relief following ineffective assistance of counsel stems from his bench warrant. As articulated by PCR counsel, Petitioner was arrested for missing court dates related to multiple charges:

The problem is that his court dates he was going to were for all charges and when he missed a court date, he missed the court date for all charges. The bench warrant should have reflected all pending charges on the bench warrant. It did not. I assume there's some sort of ease of paperwork or laziness by the Solicitor's Office here by them only listing one indictment number. So my argument is that out of fairness he should be entitled to that time between the bench warrant at least when he went to SCDC or his plea because he should have been serving time on that bench warrant as well. He had missed those court dates. It was the exact same court dates and that document have been clear. That is the second block of time, Your Honor.

App. 708 l. 8 – App. 709 l. 13.

The third block of time for which Petitioner averred that he received ineffective assistance for trial counsel's failure to request credit is related to Petitioner's probation violation:

[T]he argument is [that Petitioner received] ineffective assistance of counsel because Mr. Stitely could have presented that information to the sentencing judge and allow[ed] the sentencing judge to consider it in sentencing just as he did during the jury trial. He didn't present any of this detailed information at the time of sentencing to the five years, not the original time that I think he definitely is entitled to and not either of the other which I think is discretionary.

App. 709 l. 18 – App. 710 l. 11.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). Appellate courts 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). When reviewing a PCR court's decision, a reviewing court "is concerned only with whether any evidence of probative value exists to support the decision." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Near the conclusion of the plea, counsel informed the court that there was "probably" some time served for the underlying charge. App. 632 ll. 17 – 24. Counsel speculated that SCDC automatically applies credit. Id.

Counsel provided ineffective representation when he failed to notify the plea judge in Petitioner's case of the previous incarceration periods for which Petitioner was entitled credit towards his sentence. Had counsel done just that, there is a likelihood that Petitioner would have received credit from the times during which he was incarcerated. The resulting prejudice

manifested itself in the time which he is currently serving without receiving the credit to which he is entitled.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of May, 2018.

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V.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Victor Anthony Jones states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Edward W. Miller, which was held on August 1, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve him as counsel for Victor Anthony Jones.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of May, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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Appellate Defender

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ATTORNEY FOR PETITIONER

This 7th day of May, 2018.

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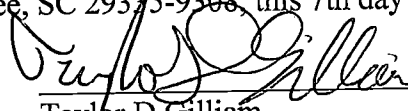
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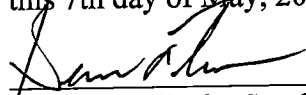
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Kelly Oppenheimer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Victor Anthony Jones, #337908, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29375-9308, this 7th day of May, 2018.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of May, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.