ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 19 2018
S.C. SUPREME COURT

July 19, 2018

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: McIver Feagin, Respondent v. State, Petitioner
Case No. 2015-CP-21-0055

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General

cc: Jonathan Waller, Esquire
South Carolina Department of Corrections
Florence County Clerk of Court
Solicitor E. L. Clements, III
Office of Appellate Defense
Victim Advocacy Division

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 19 2018
S.C. SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Case No. 2015-CP-21-0055

McIver Feagin, #266756 ..... Respondent,

v.

State of South Carolina, ... Petitioner.

NOTICE OF APPEAL

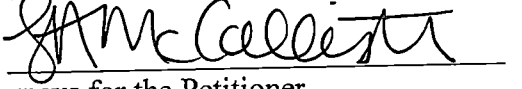
The State of South Carolina appeals the Honorable Michael G. Nettles's order granting Respondent post-conviction relief, filed December 4, 2017. The State received the order denying its motion for relief pursuant to Rule 59(e) on July 12, 2018. A copy of the Court's order is attached.

July 19, 2018

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar No. 79054
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
Attorneys for the Petitioner

Other counsel of record:
Jonathan Waller, Esquire
Waller Law Group
1116 Blanding Street, Suite 2
Columbia, South Carolina 29201
Attorney for Respondent
(803) 520-7278

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Case No. 2015-CP-21-0055

McIver Feagin, #266756 ..... Respondent,

v.

State of South Carolina, ... Petitioner.

PROOF OF SERVICE

I, Lindsey A. McCallister, Counsel for the Petitioner, 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 his attorney of record:

Jonathan Waller, Esquire
Waller Law Group
1116 Blanding Street, Suite 2
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served this 19th day of July, 2018.

LINDSEY A. MCCALLISTER
S.C. Bar. No. 79054
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE)	
)	C/A No.: 2015-CP-21-55
McIver R. Feagin, Jr., #266756,)	
)	
Applicant,)	
)	**ORDER GRANTING POST CONVICTION RELIEF**
vs.)	
)	
State of South Carolina,)	
)	
Respondent.)	

FILED
2017 DEC -4 PM 3:15
DORIS PAULOS O'HARA
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed January 8, 2015. Respondent made its Return on January 17, 2017, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire, was appointed pursuant to Rule 608, SCACR, to represent Applicant in this matter. Applicant, by and through counsel, filed an Amendment to Application for Post Conviction Relief on November 13, 2017. An evidentiary hearing was held on November 17, 2017, at the Florence County Courthouse. Applicant was present and represented by Counsel Waller. Respondent was represented by Lindsey A. McCallister, Esquire, of the South Carolina Office of Attorney General.

At the PCR hearing, Applicant's probation revocation counsel, William E. Grove, Esquire testified. The Court had before it the Florence County Clerk of Court's records, Applicant's South Carolina Department of Corrections records, the PCR Application, the Return, Applicant's Amendments, the sentencing transcript from Applicant's plea, and the probation revocation hearing transcript.

I. PROCEDURAL BACKGROUND

Applicant was indicted during the June 3, 2010 term of the Florence County Grand Jury for Burglary – First Degree (2010-GS-21-681). The parties reached a plea agreement for a

CERTIFIED: A TRUE COPY
Doris Paulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

recommendation by the State to a cap of five (5) years to the lesser-included offense of Burglary – Second Degree (Non-Violent). Applicant pled pursuant to North Carolina v. Alford.[1]

The Honorable Thomas A. Russo sentenced Applicant to fifteen (15) years imprisonment suspended upon time served (279 days) and five years probation. Judge Russo retained jurisdiction of the matter and on December 10, 2012, Applicant again appeared before Judge Russo for a probation violation hearing. Applicant was represented by William E. Grove, Esquire, for his probation hearing.[2] Judge Russo found a willful violation of the conditions of probation and revoked Applicant's probation in full, sentencing Applicant to serve the remainder of the fifteen (15) year sentence in the Department of Corrections.

A timely notice of appeal of the probation revocation was filed on Applicant's behalf, and an appeal was perfected pursuant to Anders v. California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Feagin, Op. No. 2014-UP-460 (filed on December 17, 2014). The Remittitur was issued on January 13, 2015.

Prior to the PCR hearing, Applicant, through counsel, indicated that he would only be proceeding under the allegations made in the Amendment to Application for Post Conviction Relief filed November 13, 2017. In that Amendment, Applicant made claims of "Ineffective assistance of probation revocation counsel," and "Excessive Sentence" in his Application, stating specifically that counsel failed to object to a sentence in excess of the maximum penalty authorized by statute and that Applicant was sentenced in excess of the maximum penalty authorized by statute.

II. SUMMARY OF TESTIMONY

[1] 400 U.S. 25, 91 S.Ct. 160 (1970).
[2] William E. Grove, Esquire, was not counsel for Applicant's underlying plea.

At an evidentiary hearing held November 17, 2017 at the Florence County Courthouse, probation revocation counsel, William E. Grove, testified as to the facts and circumstances surrounding Mr. Grove's representation of Applicant. Mr. Grove testified that he was appointed to represent Applicant through his duties with the Florence County Public Defender's office. Mr. Grove testified that he did not represent Applicant on the original charges and that, with respect to this case, his representation was limited to Applicant's probation revocation. Mr. Grove testified that he may have represented Applicant on an unrelated charge prior to the representation at issue. Mr. Grove testified that he became aware of the allegations of probation violations at some point prior to the day of the probation hearing. He testified that there is often a very short period of advance notice with probation violations, sometimes the day of the hearing, but that he had adequate advanced notice of Applicant's alleged violations and was able to meet with Applicant in advance of the hearing to prepare mitigation regarding the alleged violations.

Mr. Grove testified that he did not conduct any investigation into the underlying case, did not obtain a copy of the Burglary file, nor speak with plea counsel regarding Applicant's sentence. He testified that the only information he had was that Applicant pled to Burglary 2nd degree for a fifteen (15) year suspended sentence. Mr. Grove testified that as long as he has been engaged in the practice of criminal law, there has been a charge of Burglary – 2nd Degree (Non-Violent) as well as a Burglary – 2nd Degree (Violent). He testified that he assumed that a defendant with a sentence of 15 years to a Burglary – 2nd Degree, would have been the result of a Burglary – 2nd Degree (violent).

Mr. Grove testified that he is familiar with the CDR Code system and that he has researched various CDR Codes in the course of his representation of criminal clients throughout his career. He testified that he knows some CDR Codes by memory but that the CDR Code for Burglary – 2nd Degree (Non-Violent) is not one he knows from memory. Mr. Grove testified that he would not have been provided with a copy of the probation revocation sentencing sheet (DPPPS Form 9) in advance of the hearing and would only have been provided with other documents which would not have contained information regarding CDR Code numbers. Mr. Grove testified that he gave no consideration to objecting to the revocation, in full, of Applicant's sentence as he was focused on presenting mitigation as to the willfulness of the alleged violations. Mr. Grove also testified that he did not believe that the probation hearing was the appropriate venue to challenge the sentence issued in the original plea. Mr. Grove also testified that, by the date of his appointment on Applicant's probation revocation, the time to file an appeal or a motion for reconsideration of the sentence from the guilty plea had long since expired.

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance on counsel is alleged 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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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 counsel "rendered adequate assistance and made all significant decision in the exercise of reasonable professional

judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065). 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." Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625.

South Carolina Rule 602(a), SCACR requires the appointment of counsel for indigent defendants in probation revocation proceedings. The courts have used the Strickland test to evaluate claims of ineffective assistance of probation revocation counsel. See, e.g., United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988). However, since a probation revocation is not a formal adversarial proceeding, "the Court must review counsel's performance in light of the particular type of proceeding involved." Id.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The 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 sentencing portion of the plea transcript, the probation revocation 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.

Applicant argues that his sentence exceeds the maximum authorized by law. Applicant was indicted in June of 2010 for the offense of Burglary – 1st Degree for an incident that occurred in December of 2009. Applicant entered his plea to Burglary – 2nd Degree (Non-Violent) and was sentenced on September 20, 2010. On June 2, 2010 the Omnibus Crime Reduction and Sentencing Reform Act went into effect and, in part, divided the previously singular Burglary – 2nd Degree into the newly created Non-Violent penalty statute §16-11-312(C)(1), bearing CDR Code #0080 and punishable by imprisonment for not more than 10 years, and the previously enacted Violent penalty statute §16-11-312(C)(2), bearing CDR Code #0086 and punishable by imprisonment for not more than fifteen years, provided, that no person convicted of burglary in the second degree pursuant to subsection (B) shall be eligible for parole except upon service of not less than one-third of the term of the sentence. The CDR Code #0080 was created in conjunction with the new offense of Burglary – 2nd Degree (Non-Violent) and was not effective until June 2, 2010.

The State argues that the Omnibus Crime Reduction and Sentencing Reform Act contains a savings clause, which it does, and that because Applicant's offense occurred prior to the enactment of the Omnibus Crime Reduction and Sentencing Reform Act, that Applicant was prosecuted under the "old" law. A review of the record shows that the State's argument is without merit. First and foremost, if Applicant had pled as indicted, the savings clause of the Omnibus Crime Reduction and Sentencing Reform Act may apply; however, in the case at hand, Applicant was allowed to plead to a lesser offense and the record is clear that Applicant was

allowed to plead to the "new" Burglary – 2nd Degree (Non-Violent). In the plea sentencing transcript the Assistant Solicitor informs the plea judge that Applicant is pleading to Burglary – 2nd Degree (Non-Violent); the violent or non-violent provision is a distinction not made under the "old" law.[3] Further, the sentencing sheet for Applicant's plea lists the offense for which he is pleading as Burglary – 2nd Degree (Non-Violent) bearing a CDR Code of 0080.[4] The Probation Revocation sentencing sheet contains the same CDR Code #0080. Finally, no testimony or other evidence was presented by the State that could, in any way, be reasonably interpreted that Applicant pled under the "old" law.

The State offers further argument that pursuant to State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013), a change or "update" to the statute regarding the offense does not absolve a criminal defendant of a more serious offense when the act was committed prior to the change or "update." First, because Applicant pled guilty to a lesser offense, the savings clause or the Court's rulings in Brown do not apply to the case at hand. Further, Brown is factually distinguishable from the case at hand as it concerned a change or "update" of the elements of an offense; specifically an update of monetary thresholds for various levels of larceny to reflect the inflation in the value of goods that occurs with the passage of time. The elements of Burglary – 2nd Degree did not change for either §16-11-312(A) – entry into a dwelling, or §16-11-312(B) – entry into a building with an aggravating circumstance; the legislature simply created a separate penalty for

[3] The State argues the "old" law did make such a distinction, though not explicitly, and the revised statute merely changed the penalties.

[4] The State argues the CDR Code issue is most likely a scrivener's error since Applicant pleaded guilty and was sentenced shortly after the Omnibus Crime Reduction and Sentencing Reform Act took effect.

§16-11-312(A). As previously stated, because Applicant was allowed to plead to the lesser offense of Burglary – 2nd Degree (Non-Violent), under CDR Code #0080 it is clear that the State intended for the plea to occur pursuant to the newly created penalty. As such, this Court finds that Applicant was sentenced in excess of the maximum penalty authorized by statute.

Applicant argues Probation Revocation Counsel was ineffective in failing to object to the sentence of the court following its determination that he had willfully violated the conditions of his probation. In South Carolina all persons charged with probation violations have a right to counsel. Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986). To prove ineffective assistance of counsel, a petitioner must show 1) that counsel's performance was deficient; and 2) that petitioner was prejudiced by such deficiency. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The courts have used the Strickland test to evaluate claims of ineffective assistance of probation revocation counsel. See, e.g., United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988). However, since a probation revocation is not a formal adversarial proceeding, "the Court must review counsel's performance in light of the particular type of proceeding involved." Id. Probation Revocation Counsel did not object to the sentence imposed by the probation revocation judge. Counsel testified that he conducted no investigation into Applicant's underlying sentence. Counsel did not even review the file from Applicant's plea prior to the probation hearing. Counsel testified that he "knew" that Applicant had a remaining balance of fifteen (15) years of potential sentence and assumed the exposure was the result of a Burglary – 2nd Degree (Violent) conviction or a Burglary – 2nd Degree conviction prior to the Omnibus Crime Reduction and Sentencing Reform

Act. Counsel testified that at the time of the sentence, he did not recognize any error in sentencing.

Counsel had ample opportunity to meet with Applicant prior to the probation hearing. Counsel testified that he had prepared mitigation regarding the alleged violations that included text messages from the victim in the underlying offense. Applicant failed, however, to conduct even a minimal investigation into the offense for which Applicant was being supervised by probation. Counsel represented Applicant through his employment with the public defender's office, the same organization, which represented Applicant during his plea. Counsel could have reviewed the file or spoken with Applicant's prior counsel, but he chose not to do so.

The issue was, accordingly, not preserved for appeal, despite counsel filing a notice of intent to appeal on behalf of Applicant. The South Carolina Supreme Court has held that a challenge to an excessive sentence is not a question of subject matter jurisdiction, cannot be raised for the first time on appeal, and therefore must be preserved by motion or objection. State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (S.C., 1999). Applicant's appropriate remedy therefore is through the Post Conviction Relief Act. Id. Though this Court agrees with the State that the probation revocation hearing was not the appropriate forum to challenge the original sentence itself, (See Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065)), this Court also finds that Counsel's representation of Applicant fell below the standard of "reasonableness under prevailing professional norms" when he failed to object to the 15 year probation revocation sentence as greater than the 10 years that Applicant could have potentially been sentenced on the violations of probation. This Court notes that Applicant raises no claims of ineffective assistance of plea counsel, and any claims of ineffectiveness are solely related to probation revocation counsel. Applicant furthermore has met his burden of a showing

of prejudice given the fact that Applicant is incarcerated in the Department of Corrections serving a sentence five (5) years greater that is allowed by statute. The prejudice to Applicant is clear both in his sentence with the Department of Corrections as well as counsel's failure to conduct any investigation into the nature of the probationary sentence Applicant was serving.

As to any and all other allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

VI. CONCLUSION

Based upon the foregoing, the Court finds and concludes that Applicant has met his burden and shown that he was sentenced in excess of the maximum penalty authorized by statute and that counsel was deficient in his representation of Applicant during his probation revocation hearing. Applicant was prejudiced when his probation was revoked and he was sentenced to a term of imprisonment for violations of his probation in excess of the maximum penalty authorized by statute. Accordingly, Applicant's probation revocation sentence is vacated and the case is hereby remanded to the General Sessions court for further proceedings.

THEREFORE, the Applicant's Application for post-conviction relief is hereby granted and remanded to the Court of General Sessions for further proceedings consistent with this Order.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post Conviction Relief is hereby granted and Applicant's criminal case is hereby remanded to the Court of General Sessions; and

2. Applicant will be released from the South Carolina Department of Corrections and transported to the Florence County Detention Center for further proceedings consistent with this Order.

AND IT IS SO ORDERED this 1 day of December, 2017.

Michael G. Nettles
Presiding Judge

Florence, South Carolina

FILED
2017 DEC -4 PM 3:15
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

FORM 4

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

FILED
2017 DEC -4 PM 3:21
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2100055

Mciver R Feagin Jr		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ 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: _____

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)

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.

12/4/2017

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **December 4, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **December 5, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.
FLORENCE COUNTY, S.C.

Jonathan D Waller 1116 Blanding Street Suite 2B Columbia, SC 29201

Solicitor- Hand Delivered 12-4-2017
General Sessions - Hand Del 12/5/17

ATTORNEY(S) FOR THE PLAINTIFF(S)

Lindsey Ann McCallister PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - 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-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.