



RECEIVED

OCT 16 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 16, 2018

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

Re: Allen Stone, #267003 v. State of South Carolina
Case No. 2017-CP-10-00901

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the aforementioned post-conviction relief case. The transcript from the evidentiary hearing is being requested on today's date. Enclosed are the following:

1. Copies of the orders to be challenged on appeal; and
2. Proof of service of notice of appeal on counsel of record for Respondent.

Please let me know if I can provide anything additional.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

MHJ/jaj

cc: James K. Falk, Esquire
South Carolina Department of Corrections
Charleston County Clerk of Court
The Honorable Scarlett A. Wilson
Office of Appellate Defense
Victim Advocacy Division

RECEIVED

OCT 16 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY S.C. SUPREME COURT
Court of Common Pleas
Thomas A. Russo, Post-Conviction Relief Court Judge

Case No. 2017-CP-10-00901

Allen Stone, SCDC # 267003 Respondent,
v.
State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Thomas A. Russo's order granting post-conviction relief filed June 25, 2018. The State filed a timely motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCR, which was denied by Judge Russo by writing order filed on October 1, 2018, and received by Respondent on October 16, 2018. Copies of the order granting post-conviction relief and the order denying the State's motion to reconsider, alter, or amend are attached hereto.

October 16, 2018

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: Megan Hagan Jameson
Attorneys for Petitioner

Other counsel of record:
James K. Falk, Esquire
Post Office Box 1058
Charleston, South Carolina 29402
(843) 606-6007
Attorney for Respondent

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Thomas A. Russo, Post-Conviction Relief Court Judge

Case No. 2017-CP-10-00901

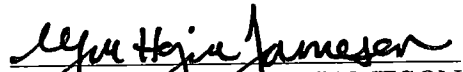
Allen Stone, SCDC # 267003Respondent,
v.
State of South Carolina,Petitioner.

PROOF OF SERVICE

I, Megan Harrigan Jameson, 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:

**James K. Falk, Esquire
Post Office Box 1058
Charleston, South Carolina 29402**

I further certify that all parties required by Rule to be served have been served this 16th day of October, 2018.


MEGAN HARRIGAN JAMESON
S.C. Bar. No. 100108
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 ALLEN STONE, SCDC No. 267003,)
)
 Applicant,)
)
 v.)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)
)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO. 2017-CP-10-0901

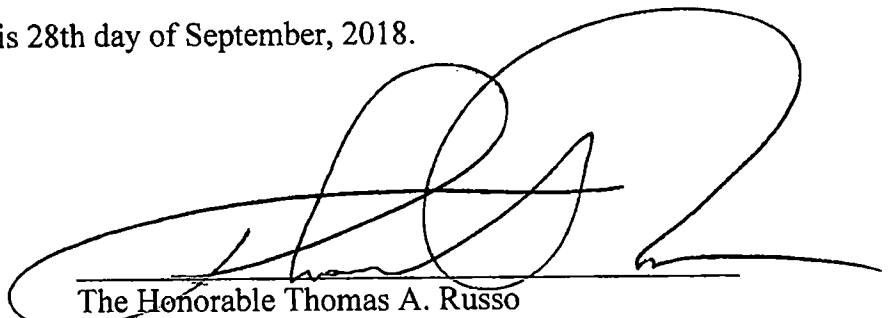
**ORDER DENYING RESPONDENT'S
 MOTION TO RECONSIDER, ALTER,
 OR AMEND**

23
 FILED
 2018 OCT 1 PM 12:03
 CLERK OF COURT

THIS MATTER comes before the Court on Respondent's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRPC.

Having considered all the facts and circumstances surrounding this case, the relevant law, the testimony elicited at the evidentiary hearing, and the brief of the Respondent pursuant to SCRPC 59(f), the Court is not persuaded to reconsider, alter, or amend its original Order granting post-conviction relief as to Mr. Allen Stone.

AND IT IS SO ORDERED this 28th day of September, 2018.



The Honorable Thomas A. Russo
 Presiding Judge, Ninth Judicial Circuit

Florence, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
))
Allen Stone, SCDC # 267003)
))
Applicant)
v.)
))
State of South Carolina)
Respondent)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2017-CP-10-901

ORDER GRANTING
POST-CONVICTION RELIEF

FILED
2018 JUN 25 PM 12:17
JULIE J. ADAMS, CLERK OF COURT
BY _____

The above captioned matter comes before this court via an application for post-conviction relief (PCR) filed by Allen Stone. This Court convened an evidentiary hearing during the January 29, 2018 PCR term of court for the 9th Circuit. Applicant was present at the hearing and represented by James K. Falk, Esq., Rasheeda Cleveland, Esq. of the South Carolina Attorney General's Office, represented Respondent. For the reasons set forth below, the application for Post-Conviction Relief is GRANTED.

I. PROCEDURAL HISTORY

During its June, 2014 Term of Court, the Charleston County Grand Jury indicted Applicant for Burglary, 2nd Degree, Violent (2014-GS-10-03141). Applicant was represented by Patricia Kennedy, Esquire. On July 15, 2014, Applicant appeared before The Honorable Roger Young and pled guilty as indicted. Judge Young sentenced Applicant to fifteen years in the South Carolina Department of Corrections, suspended on service of five years in the Department of Corrections and three years of probation. That plea was vacated. On August 11, 2014, Applicant pled guilty in front of the Honorable J.C. Nicholson and was sentenced to fifteen years in the South Carolina Department of Corrections, suspended on five years of probation. Applicant did not appeal his conviction.

On March 21, 2016 an arrest warrant was issued against Applicant alleging various violations of Applicant's probationary sentence. An administrative hearing was convened May 17, 2016. Christian Aulbach was Applicant's probation agent who described Applicant's alleged probation violations. The administrative Hearing Officer, Kathleen Nadobny, found that Applicant: 1) failed to report as instructed; 2) moved without the consent of his agent; 3) failed to work diligently at a lawful occupation; 4) failed to immediately contact his probation agent after his release following five separate arrests; and, 5) failed to pay his supervision fee, drug test fee, and fine(s). The Hearing Officer recommended a partial one year revocation and thereafter that Applicant continue on probation.

On July 26, 2016, Applicant appeared before Honorable Kristi Harrington for a probation violation hearing. Kelly Solar, Esquire represented Applicant. Agent Aulbach was not present at the revocation hearing and instead the State was represented by Agent Keisha Holmes. Judge Harrington revoked Applicant's probation in full and Applicant was given credit for the time he had already served.

On December 5, 2016, and on Applicant's motion, Applicant appeared in front of the Honorable Kristi Harrington for a reconsideration of the sentence previously imposed as a result of the probation violation. The Court denied Applicant's motion to reconsider.

On February 22, 2017 Applicant filed his motion for Post-Conviction Relief. In his application for relief, Applicant alleged the following instances of ineffective assistance ^{AS TO} his _^ probation revocation counsel: 1) Counsel purposefully failed to mention the SCPPP administrative hearing officers recommendation at the July 26th, 2016 Probation Revocation Hearing; 2) Counsel re-scheduled the initial Probation Revocation Hearing to an earlier date than originally planned, for Counsel's own benefit, which caused the originally scheduled probation agent to be replaced

with a different agent; 3) Counsel failed to inform Applicant's witnesses of the rescheduled court date; 4) Counsel failed to object when the probation agent listed offenses that occurred prior to Applicant being on probation as occurring during the probationary period; 5) Counsel failed to object when Agent Kescia Holmes alleged untruths about Applicant's attendance at the Turning Leaf program; 6) Counsel failed to communicate with client about the victim in the case offering mitigating information; 7) Counsel Failed to read the letter she had previously requested from Applicant's group counselor; 8) Counsel was ineffective for failing to appeal the Applicant's probation revocation after the July 26th, 2016 hearing; 9) Counsel failed to subpoena and enter in as evidence the mental health records of applicant, including those showing Applicant's in-patient hospital and psychiatric facility stays; 10) Counsel failed to introduce evidence of attempted compliance with his probation requirements; 11) Counsel failed to convey to the Court the reason for Applicant's arrest; 13) Counsel failed to review Applicant's underlying conviction; 14) Counsel told Applicant an untruth; 15) Counsel conveyed to Applicant that Counsel believed Judge Harrington usually accepted recommendations; 16) Counsel failed to convey to the Court at the July 26th, 2016 the procedural posture in the Applicant's case; 17) Counsel did not provide Applicant his discovery; 18) Counsel told Applicant to participate in the DAODAS program at the jail, which resulted in a negative effect in his case; 19) Counsel failed to ensure Applicant received appropriate credit for time served; and, 20) Counsel failed to have Applicant sign necessary paperwork which caused an irregularity in the process.

The evidentiary hearing in Applicant's Post-Conviction Relief action was held January 31, 2018 before this court. At the hearing, the Court heard testimony from Applicant and Applicant's probation revocation counsel, Kelly Solar, Esq. The Court also heard arguments from counsel for both the State of South Carolina and Applicant. After considering the witnesses' testimony, the

transcript from the July 26, 2016 and December 5, 2016 hearings before Judge Harrington, and arguments from Counsel, this Court makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973) the United States Supreme Court recognized that even though a probation revocation hearing is not part of a criminal prosecution, a probationer at a revocation hearing faces a possible loss of liberty and therefore probationers must be accorded due process at a revocation hearing. Id., 93 S.Ct at 1759. Although the Court in Gagnon declined to rule that all indigent probationers in every revocation hearing have a right to court-appointed counsel, the Court stated that *counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.* Id., at 93 S.Ct 1764. Although under the United States Constitution, a probationer does not have an absolute right to counsel, such an absolute right is afforded to all probationers in South Carolina State courts. Rule 602(a) of the South Carolina Appellate Court Rules provides in part: *every person charged with the violation of a probationary sentence shall be taken as soon as practicable before the Clerk of the Court of General Sessions in the county where the charges are preferred, or such other officer or officers as may be designated by the resident judge of the circuit, for the purpose of securing to the accused the right to counsel.* The effectiveness of probation revocation counsel should be measured by the same Strickland test as used in evaluating claims of ineffective assistance of trial counsel. See U.S. v. Wren, 682 F.Supp.

1237 (S.D. Ga 1988) (applying test adopted in Strickland v. Washington to a claim of ineffective assistance of probation revocation counsel in Federal Court).

Under Strickland, there is a two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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. Therefore, the Applicant must overcome this presumption in order to receive relief. Strickland v. Washington; Cherry v. State.

Under the second prong of the Strickland test, Applicant must show that his trial 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the 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. Id.; Strickland 104 S. Ct. at 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Kelley Solar, Esq. represented Applicant before Judge Harrington on July 26, 2018 and again on December 5, 2018. Counsel provided Applicant with ineffective assistance by failing to

make the Court aware of the following material facts and considerations before the Court rendered its decision to revoke Applicant's probation;

1. Attorney Solar' failed to advise the Court at Applicant's probation revocation hearing that the administrative Hearing Officer recommended a partial one year revocation and that Applicant thereafter continue on probation. At the July 26, 2016 hearing, Agent Holmes of South Carolina's Office of Probation, Parole and Pardon advised the Court that *the agent is recommending a revocation and terminate.* (July 26, 2018 transcript p. 3 l. 6-7). Neither Agent Holmes nor Attorney Solar advised the Court of the Hearing Officer's substantially more lenient recommendation.

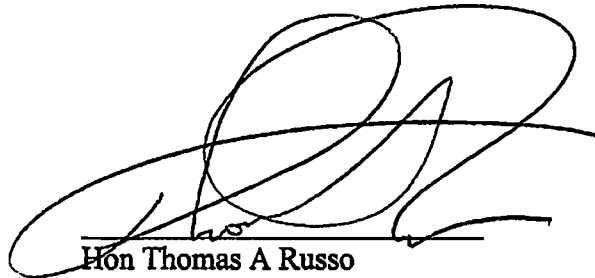
2. At the July 26, 2016 hearing, the Court asked Agent Holmes whether Applicant had any arrests and the agent advised that Applicant had several arrests. (July 26, 2018 transcript p. 8 l. 6-7). Earlier in the hearing, Agent Holmes described Applicant's arrests since the imposition of Applicant's probationary sentence. In describing Applicant's arrests, Agent Holmes stated the following: *...on July 20th of 2015, for failure to appear for court; November 13th of 2015, for burglary third charge, which he was originally arrested back in October 11th of 2013* (July 26th transcript p. 2 l. 25- p. 3 l. 3). It is reasonable to conclude that Agent Holmes's description of Applicant's post-conviction arrests may have caused the Court to believe that Applicant was arrested on a felony charge, Burglary 3rd, while he was on probation. As described in the Hearing Officer's report, Applicant was arrested 5 times on misdemeanor charges since Applicant's August 11, 2014 sentencing date: twice for failure to appear in court, twice for Public Drunkenness, and once for Disorderedly Conduct. On November 13, 2015 Applicant was convicted for Burglary 3rd; however, he was originally arrested on this charge on September 11, 2013, which was before he was put on probation. Attorney Solar. was ineffective for failing to clarify to the Court that Applicant was not arrested for on a felony charge while he was on probation.

3. Attorney Solar also failed to provide the Court with an explanation ^{of} why Applicant failed to appear in Court on the two occasions leading to his arrest on those charges. The Court is satisfied that Applicant's failure to appear was the result of either his incarceration on other charges or his hospital admissions related to his alcoholism.

III. CONCLUSION AND ORDER OF THE COURT

The Court finds that, but for attorney Solar's failure to advise the Court of the administrative Hearing Officer's recommendation of a one year partial revocations; failure to advise the court that Applicant was not arrested on a felony charge while on probation; and failure to supply the court with mitigating information regarding Applicant's two arrests for failure to appear, it is likely that Judge Harrington would not have revoked Applicant's probation in full. The appropriate remedy for Applicant therefore is that he be granted a new probation revocation hearing before a different Circuit Court Judge.

IT IS SO ORDERED!



Hon Thomas A Russo
Presiding Judge, Charleston Common Pleas

Date: 6/18/18
Florence, SC