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S.C. SUPREME COURT

December 7, 2018

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

Re: Robin Lynn Evans vs. State of South Carolina
C/A No: 2014-CP-33-00936

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Evans in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Michael G. Nettles, Circuit Court Judge

2014-CP-33-00936

Robin Lynn Evans,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Robin Lynn Evans, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 9, 2018, issued by the Honorable Michael G. Nettles, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller

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ATTORNEY FOR PETITIONER

December 7, 2018

Other Counsel of Record:

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Michael G. Nettles, Circuit Court Judge

2014-CP-33-00936

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Robin Lynn Evans,

Appellant,

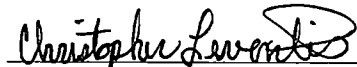
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.



Christopher Leventis

December ¹⁰~~X~~, 2018



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MARION COUNTY SC
CHRISTY H. GRAY
CLERK OF COURT

ALAN WILSON
ATTORNEY GENERAL

November 1, 2018

The Honorable Michael G. Nettles
Presiding Judge, Twelfth Judicial Circuit
South Carolina Circuit Court
180 North Irby Street, MSC-XX
Florence, South Carolina 29501

Re: Robin Lynn Evans v. State of South Carolina
2014-CP-33-936

Dear Judge Nettles:

Enclosed please find two versions of an **Order of Dismissal** in this case. Mr. Waller and I have consulted our hearing notes and discussed our recollections of your ruling several times, and while we agree on *what* you said, we have different interpretations of what your ruling *meant* in terms of appropriate findings to include in the Order of Dismissal. Essentially, we are unsure if your decision not to make a finding regarding counsel's effectiveness applied only to Mr. Evans' claim pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), or to all of his allegations. Therefore, I have prepared a proposed order for each scenario. If one of these orders meets your approval, please sign and forward to the Marion County Clerk of Court to be filed and served. If you would like me to make changes to either order or if there is anything else I can do to help resolve this situation, please let me know.

Sincerely,

Lindsey McCallister
Assistant Attorney General

LM/can
Enclosures

cc: Jonathan Waller, Esquire

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STATE OF SOUTH CAROLINA)
COUNTY OF MARION)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

2014 NOV -9 AM 9:47

Robin Lynn Evans,)
)
Applicant,)

Case No. 2013-GS-33-496

MARION COUNTY SC
CHRISTY H. BRAY
CLERK OF COURT

v.)

**ORDER GRANTING BELATED
APPELLATE REVIEW PURSUANT
TO WHITE V. STATE AND DISMISSAL
OF ALL OTHER ALLEGATIONS**

State of South Carolina,)
)
Respondent.)
_____)

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed November 10, 2014. Respondent made its Return on January 17, 2017. The Court convened an evidentiary hearing into the matter on November 16, 2017, at the Florence County Courthouse. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from probation revocation counsel, Vick Meetze, Esquire. The Court also had before it a copy of the guilty plea and probation revocation transcripts, the Marion County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the Return.

Following this Court's review of the record in its entirety and all evidence and testimony presented at the evidentiary hearing, this Court finds Applicant did not knowingly and voluntarily waive his right to appellate review of his probation revocation proceeding, and therefore, grants Applicant belated appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

However, this Court finds Applicant has failed to meet his requisite burden of proof as to all other allegations, which this Court denies and dismissed with prejudice.

I. PROCEDURAL HISTORY

Applicant was indicted at the November 2013 term of the Marion County Grand Jury for one count of stalking (2013-GS-33-00496). Scott P. Floyd, Esquire, represented him. Applicant pleaded guilty to the lesser-included charge of first-degree harassment on November 12, 2013 before the Honorable D. Craig Brown. Applicant was sentenced by Judge Brown, pursuant to the State's recommendation, to three years suspended upon time served and five years of probation. Applicant did not appeal his conviction or sentence. On May 8, 2014, Applicant again appeared before Judge Brown, who revoked his probation in full for failing to comply with the mental health treatment provision as ordered. Applicant was represented by Vick Meetze, Esquire (Counsel), at his probation revocation hearing. Applicant did not appeal. At the time of the evidentiary hearing, Applicant had completed service of his sentence and was no longer incarcerated.

II. ALLEGATIONS

In his application, Applicant alleges his conviction was unlawful for following reasons:

1. "The stalking charge was not in [the] proper jurisdiction."
 - a. "There was never any victim in the state of South Carolina."
2. "Ineffective assistance of counsel"
 - a. Failure to call witnesses or investigate
 - b. Failure to file an appeal of probation revocation
3. "Plea of guilty was not made voluntary (duress) and intelligently." (sic)
 - a. "Mispleading"
 - b. Plea was made "under extreme duress."

At the evidentiary hearing, counsel for Applicant explained Applicant filed this application within the statute of limitations for both his guilty plea and his probation revocation hearing. However, Applicant only wished to go forward with his allegations against probation revocation counsel on

failing to conduct an investigation into the willfulness of the violation. Applicant was sworn and testified he understood the implications of foregoing his allegations regarding his guilty plea, and he only wished to proceed as to the probation revocation. Therefore, this Court finds Applicant has abandoned all allegations related to his guilty plea, and those allegations are hereby denied and dismissed.

III. SUMMARY OF TESTIMONY

During the evidentiary hearing, Applicant testified his guilty plea included provisions barring him from contact with the victim and ordering him to attend mental health counseling and pay court fees. Applicant testified he was notified of violations of all three conditions. According to Applicant, he spoke with Counsel and told Counsel he had paid the fees and requested Counsel have Applicant's father present to present documentation confirming payment. Applicant testified he did not know who the specific victim was that he allegedly contacted, and Counsel never got that information from the Department of Probation, Parole, and Pardon Services (DPPS). Applicant testified the contact was not purposeful and occurred in the course of his participation in a school project. Applicant acknowledged he was able to explain these facts to the probation-revocation judge, and the violation of the no-contact condition was not the reason his probation was revoked.

Applicant also testified he was ordered to report to Pee Dee Mental Health for an evaluation and to complete any recommended treatment, which, according to Applicant, he did. Applicant testified he did not know he had been discharged from mental health treatment until the probation hearing when the judge read a letter from Applicant's doctor describing further threatening behavior towards the victim. Applicant testified the "threatening behavior" was a result of a

misunderstanding between the doctor and himself, and although he admitted he told the doctor he “had a plan” for the victim, he avers he was referring to serving her with a federal lawsuit, not threatening physical harm. Applicant further testified Counsel never contacted Pee Dee Mental Health, and Applicant did not know about the letter until the judge referred to it during the hearing.

Finally, Applicant testified he wanted an appeal and said so on the record at the end of the hearing. See Probation Tr. p. 26. According to Applicant, he attempted to file a *pro se* notice of appeal, but it was untimely.

Counsel testified he recalled representing Applicant. Counsel testified the way the Public Defender’s Office handles probation revocation case is that they review the files when DPPPS drops them off, usually a week or so before court, and then they divide them up amongst themselves on a voluntary basis. Counsel testified he did not handle Applicant’s underlying guilty plea, but he was familiar with the case and knew some of the facts. Counsel testified the State was alleging three willful violations of Applicant’s probation, and he and Applicant met at the jail to discuss the allegations.

Counsel further testified he and Applicant discussed all of the witnesses mentioned in the probation revocation hearing transcript, including that Applicant wanted his father to be present. Counsel testified he was told by jail officials that Applicant would be allowed to telephone his father to inform him of the hearing date. However, in any event, Counsel testified his understanding was Applicant wanted his father present to testify about the federal lawsuit Applicant had filed, which Counsel explained was not helpful in mitigating the violations. Counsel further testified he did not have much time to work on this case, and the primary mitigation argument he was relying on was that the victim was agreeable to Applicant continuing on probation

and was not asking for probation to be revoked. Counsel also testified the judge adjourned the hearing so all parties had time to investigate the mental health issue, and the record reflects the Public Defender's Office was able to provide the court with Applicant's records from PeeDee Mental Health. See Tr. p. 25.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003):

A. Ineffective Assistance of Counsel

A probationer has a right to counsel, though not a Sixth Amendment one. Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009). 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." Id. at 455, 682 S.E.2d 794. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use 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, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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.

This Court finds the record reflects Applicant's probation was revoked due to his failure to comply with mental health treatment as ordered. See Tr. pp. 24-25. Counsel testified the witnesses Applicant wanted Counsel to call at the hearing were not relevant to this issue. Further, Applicant made the same argument before the probation revocation judge as he presented in his testimony to this Court – that his statements to his doctor at mental health were misunderstood and he was referring to issues related to his federal lawsuit, not making a threat. See Tr. pp. 7-9. The probation revocation judge also gave Applicant additional time to confer with his attorney and for his attorney to obtain the mental health records requested by the court, which Counsel did. See pp.

24-25. Accordingly, Applicant's allegations regarding Counsel's failure to investigate the violations or call witnesses at the hearing are hereby denied and dismissed.

B. Belated Appellate Review Pursuant to White v. State

This Court finds Applicant did not knowingly and intelligently waive his right to a direct appeal, and therefore, finds Applicant is entitled to belated appellate review of his probation revocation hearing pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. Id. at 118, 208 S.E.2d at 39. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. Where the post-conviction relief judge determines the applicant did not freely and voluntarily waive his or her appellate rights, the applicant may petition the South Carolina Supreme Court for a belated review of direct appeal issues pursuant to White. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.").

In the present case, Applicant inquired of the probation revocation judge as to whether he could appeal the decision and stated on the record he wished to do so. See Tr. p. 26. Further, Applicant testified he attempted to file a *pro se* notice of appeal, which was rejected as untimely. Although this Court declines to make a ruling as to Counsel's effectiveness or ineffectiveness on this issue, leaving such determination to the appellate court, it does not appear to this Court Applicant knowingly and intelligently waived his right to appeal; therefore, he is entitled to petition the South Carolina Supreme Court for belated appellate review of issues arising from his

probation-revocation hearing pursuant to the procedure set forth in White, 263 S.C. at 118, 208 S.E.2d at 39.

V. CONCLUSION

This Court concludes Applicant is entitled to petition the Supreme Court for belated review of direct appeal issues from the probation revocation pursuant to White. The remaining allegations are denied and dismissed.

The Court notes Applicant must file and serve a notice of appeal within thirty 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), SCRCR, 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:

1. the Application for Post-Conviction Relief be denied and dismissed with prejudice as to all allegations arising from Applicant's guilty and all allegations arising from his probation revocation with the exception of the issue of appellate review;
2. within thirty days of service of this Order, counsel for Applicant must file a notice of appeal pursuant to White v. State, in addition to a notice of appeal related to the denial of his post-conviction relief if Applicant wishes to do so, to secure the appropriate review of Applicant's probation revocation.

AND IT IS SO ORDERED this 6 day of Nov, 2018.

MICHAEL G. NETTLES
Presiding Circuit Judge
Twelfth Judicial Circuit

11-6-, South Carolina
Spencer

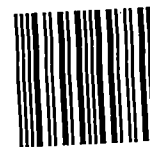
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