

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
R. Scott Sprouse, Circuit Court Judge

 ORIGINAL

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S.C. SUPREME COURT

DONOVAN DESHAWN WILLIFORD,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2018-001836

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was Petitioner's counsel ineffective where counsel failed to inform him or the court he was ineligible for the shock incarceration program so that the court could craft a sentence that would more accurately reflect its intent to sentence Petitioner to between 90 days and six months rather than three years?

STATEMENT

On April 15, 2015, Petitioner waived presentment to the grand jury for one count of first-degree burglary and pled guilty before the Honorable Letitia H. Verdin to the lesser included offense of second-degree burglary, non-violent. App. 55. Herverly Young, Esquire, represented Petitioner. App. 55. Upon the State's recommendation, Judge Verdin sentenced him pursuant to the Youthful Offender Act (YOA) to a term of imprisonment not to exceed five years, suspended to three years' probation. App. 55–56.

On April 7, 2016, a warrant was issued for Petitioner's arrest for violating the terms of his probation by failing to report on April 5, 2016, and because there was probable cause to believe he had committed another offense. App. 56. During its June 2016 term, the Anderson County Grand Jury indicted Petitioner for third-degree assault and battery by mob. App. 67–68. Jennifer L. Johnson, Esquire, represented Petitioner on the charge, and Assistant Solicitor Al Andrew Means represented the State. App. 56.

On March 13, 2017, Petitioner appeared before the Honorable J. Cordell Maddox, Jr., for a probation revocation hearing with his counsel Jennifer Johnson. App. 1. Judge Maddox revoked Petitioner's probation and recommended him for the shock incarceration program. App. 10. Petitioner appeared again before Judge Maddox on March 16, 2017, and pled guilty to third-degree assault and battery by mob, for which he was sentenced to 134 days with credit for time served. App. 26.

Petitioner did not appeal his plea, his sentence, or his probation revocation. App. 26.

Petitioner then filed an application for post-conviction relief (PCR) on August 29, 2017. App. 15–24. The Honorable R. Scott Sprouse presided over an evidentiary hearing on August 20, 2018. App. 31. Assistant Attorney General Kelly Oppenheimer represented the State, and

Linda V. Whisenhunt, Esquire, represented Petitioner. App. 31. By an order filed on October 16, 2018, Judge Sprouse denied Petitioner relief from his conviction and sentence. App. 55–63. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's counsel was ineffective where counsel failed to inform him or the court he was ineligible for the shock incarceration program so that the court could craft a sentence that would more accurately reflect its intent to sentence Petitioner to between 90 days and six months rather than three years.

Relevant Facts

At the probation revocation hearing, the judge reviewed the fact that Petitioner had been previously sentenced by Judge Verdin to a five-year YOA sentence with three years' probation. App. 2. He then questioned Petitioner and his counsel regarding the new arrest for assault and battery by mob. App. 2-4. Counsel explained to the judge that Petitioner was scheduled to plead to that charge the following Thursday. App. 2. The probation agent, Tilie Gilgore, asked the court to terminate Petitioner's probation and invoke the YOA sentence. App. 4. Counsel expressed concern about Petitioner's getting revoked and going to YOA camp, and the judge suggested, "Or he could get boot camp." App. 5-6. Counsel replied, "He could but, again, that total would take about six months because there is an evaluation period prior to being placed in the shock incarceration program." App. 6. The judge said, "Well, here is what I can do: I can continue the hearing, I don't continue the hearing, or I revoke the YOA and order shock. It would be six months, max. Probably more like four or five." App. 9.

At that point, counsel asked for time to discuss this with her client. App. 9. After a recess, counsel told the judge that Petitioner had "indicated that probation revocation with a shock incarceration recommendation is the way he wants to go." App. 10. The judge then revoked the YOA and ordered shock incarceration. App. 10.

During the PCR hearing, the State began by explaining that Judge Maddox had revoked Petitioner's probation and recommended the shock incarceration program at his probation revocation hearing. App. 35, lines 17–22. PCR counsel then explained that when Petitioner arrived at the YOA facility, he was told he was not eligible for shock because the underlying charge was second-degree burglary. He was told that instead he would have to serve the entire three-year sentence. App. 37, lines 1–10.

PCR counsel called Petitioner to the stand and asked him about the probation revocation hearing. He indicated that he spoke to his counsel about the 90-day shock sentence at the time the judge was giving the sentence. App. 41, lines 3–14. He testified that his counsel told him he could be serving three years. App. 41, lines 15–20. He stated that counsel did not ever bring to the court's attention that that sentence could not be given on his underlying charge. App. 42, lines 6–9.

The State then cross-examined Petitioner, clarifying that he was aware he could be serving three years. App. 42, lines 20–22. He agreed that he knew that regardless of what happened at the hearing the three-year sentence was always a possibility because that was how much time he was sentenced to on probation. App. 42, lines 23–App. 43, line 2. Further, he agreed that the judge never guaranteed he would get shock probation and he understood it was just a recommendation. App. 44, lines 6–15.

PCR counsel made clear during redirect that Petitioner's counsel had never told him that even though the judge was going to recommend shock, he could not do it because it would be a sentence he could not serve. App. 44, line 21–App. 45, line 4. Next, PCR counsel called counsel Jennifer Johnson to the stand. App. 45. Johnson explained that she told Petitioner that he could serve up to six years on the YOA because it was an indeterminant sentence. App. 46,

lines 16–24. She recalled that Judge Maddox was the one who raised the issue of shock. App. 46, line 25–App. 47, line 4. When asked whether at any time she had told Petitioner that even though the judge was recommending it, he would not be able to get it, she said she had not. App. 47, lines 5–12. She further explained:

I mean, frankly, it wouldn't be the first time that we've gotten an illegal sentence, but SCDC has always told us in that case that they follow the judge's order. So there would be no benefit for correcting the [c]ourt on that point. Although, I will freely admit, I did not realize that the underlying offense, being a burglary second, it was – there was a period of time when they changed the law regarding burglary second with violent to allow them into the Youthful Offender Act program. But all burglary second degree, whether violent or nonviolent, had this three-year mandatory minimum sentence, which obviously Mr. Williford's original plea was during that time when – when the fact that it was a nonviolent. I think the law has since changed that it wouldn't – it would not fall under that provision, but at that time of this original underlying sentence, he fell into the three-year mandatory sentencing.

App. 47, line 12–App. 48, line 6. PCR counsel then asked, “So at the time you met him, you didn't know that he fell in that window?” to which she replied, “No.” App. 48, lines 7–9. Counsel agreed that she was hopeful that SCDC would actually follow the judge's order. App. 48, lines 10–12.

The State then cross-examined counsel, asking her if she made any guarantees to Petitioner that he would be accepted into the shock program, to which she replied, “No.” App. 48, line 25–App. 49, line 2. Counsel also clarified that she made him fully aware that he could serve between three and six years on the YOA sentence. App. 49, lines 3–5. Counsel testified that she explained to Petitioner that whether he gets shock is not a decision that is up to her or the court but that the Department of Corrections makes that determination. App. 49, line 23–App. 50, line 3.

PCR counsel reiterated in her closing argument that counsel did not know Petitioner fell into that window of time where he would not be eligible for shock and that if she had known, she could have brought it to the court's attention and the court may have been able to fashion a sentence that was more in line with its intent. App. 51, lines 8–16. Instead, Petitioner expected to enter the shock program but now must serve a much longer period of time, which was not the intention of the judge, nor what counsel or Petitioner predicted. App. 51, lines 17–25.

The State argued that counsel fully explained that it was not her decision to make, nor the judge's, but that SCDC would determine whether Petitioner was accepted into the shock program. App. 52, lines 8–14. Further, she pointed out that counsel made no guarantees to Petitioner and made him very aware that he could be serving three to six years of the YOA sentence and, thus, no deficiency had been shown. App. 52, lines 15–20. The State argued there was no prejudice because there was no indication the result of the proceeding would have been any different, arguing the only thing Judge Maddox could do was revoke probation because it was a clear violation. App. 52, line 21–App. 53, line 10.

The PCR judge filed an Order of Dismissal denying relief. App. 55–63. The PCR judge found Petitioner's testimony with respect to the issue of whether his counsel was ineffective in failing to secure his acceptance in the shock incarceration program to be not credible. App. 61. However, he found counsel's testimony very credible. App. 61. The PCR judge found Petitioner failed to establish that counsel was deficient because counsel explained the shock program to Petitioner, made no guarantees that he would be accepted, and informed him that acceptance was up to the Department of Corrections. App. 61. Additionally, counsel made Petitioner aware that he could serve between three and six years. App. 61. Likewise, the PCR

judge found no prejudice based on the fact that Petitioner was ineligible for the shock program because he pled guilty to a violent crime in 2015. App. 62.

Discussion

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, 117–18, 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). 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 687–88.

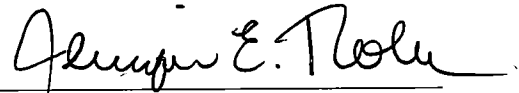
"In South Carolina . . . all persons charged with probation violations have a right to counsel and must be informed of this right pursuant to court rules and case law." *Turner v. State*, 384 S.C. 451, 454, 682 S.E.2d 792, 793 (2009) (citing *Barlet v. State*, 288 S.C. 481, 483, 343 S.E.2d 620, 621 (1986); Rule 602(a), SCACR). This Court held in *Turner* "that because a probationer has a right to counsel, albeit not a Sixth Amendment right, 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.2E at 794.

As Petitioner explained at the PCR hearing, he did understand that he could face a possibility of three years at the probation revocation hearing because that was the amount of probation he got when he pled guilty. App. 44, lines 2–5. However, once the judge recommended the shock program, it was not explained to him that the crime he pled guilty to made him ineligible for the program. Petitioner’s counsel should have known that the crime to which he pled guilty disqualified him from being eligible for the shock program. She was ineffective in not knowing or informing Petitioner or the court of this. A judge at a probation revocation hearing can revoke in full or in part. *See State v. Williamson*, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003) (“The decision to revoke probation is in the discretion of the circuit court judge.”).

Had the judge been informed by counsel that Petitioner would not qualify for the 90-day program he was trying to give him, he might have revoked in part and crafted a sentence between 90 days and six months, which was his clear intent based on the record. Counsel was ineffective for not giving the judge the opportunity to give Petitioner the sentence he intended. Furthermore, there is clear prejudice because the sentence Petitioner ended up with is three years, rather than the intended sentence of between 90 days and six months.

CONCLUSION

Petitioner respectfully requests this Court grant the petition and order full briefing on the issue presented.



Jennifer E. Roberts
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donovan Williford states:

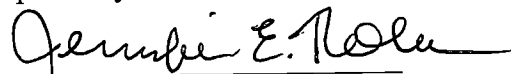
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's probation revocation hearing before the Honorable J. Cordell Maddox, Jr., on March 13, 2017, and the PCR hearing before the Honorable R. Scott Sprouse on August 30, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new hearing.

3. Pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Donovan Williford.

Respectfully Submitted,



Jennifer E. Roberts

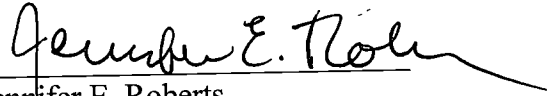
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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ATTORNEY FOR PETITIONER

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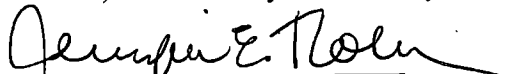
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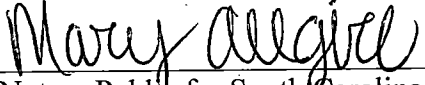
RESPONDENT.

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 Donovan Deshawn Williford, #371832, at Turbeville Correctional Institution, P.O. Box 252, Turbeville, SC 29162, this 12th day of February, 2019.


Jennifer E. Roberts
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of February, 2019.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2027