

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

RECEIVED

Honorable Thomas A. Russo, Circuit Court Judge

JUN 20 2019

S.C. SUPREME COURT

ALLEN STONE,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2018-001847

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STANDARD OF REVIEW

The appellate court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

PETITIONER'S STATEMENT OF THE ISSUE

I. Did the post-conviction relief court err by finding probation revocation counsel was constitutionally ineffective for failing to advise the court of the administrative hearing officer's recommendation of a one-year partial revocations; failing to advise the court that Applicant was not arrested on a felony charge while on probation; and failing to supply the court with mitigating information regarding Applicant's two arrests for failure to appear because counsel provided strategic reasons for her decisions and the allegations were directly refuted by the record?

A. Did the post-conviction relief court err by granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to advise the court of the Administrative Hearing Officer's recommendation of a one-year revocation because the court refused to consider counsel's articulated strategy and this allegation is directly refuted by the record?

B. Did the post-conviction relief court err by granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to advise the court that Stone had not been arrested for any felony charges while on probation because this allegation is directly refuted by the record?

C. Did the post-conviction relief court err by granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to explain why Stone failed to appear in court, because this allegation is directly refuted by the record?

RESPONDENT'S COUNTER-STATEMENT OF THE ISSUE

Whether the PCR court's determination that counsel's deficient performance prejudiced respondent has evidentiary support where counsel failed to provide the court with all relevant information at the initial probation revocation hearing?

STATEMENT OF THE CASE

On August 11, 2014, respondent Allen Stone pled guilty to second-degree burglary before the Honorable J.C. Nicholson, Jr., in Charleston County. App. 19. Thomas Richard Waring, II, represented the State and Patricia Ann Kennedy represented Stone. App. 19. Judge Nicholson sentenced Stone to fifteen years' imprisonment suspended upon the service of five years' probation. App. 48, l. 22 – 49, l. 1.

On July 26, 2016, a probation revocation hearing was held before the Honorable Kristi Lea Harrington. App. 52. Agent Holmes appeared for the department and Kelly Kassis Solar represented Stone. App. 52. Judge Harrington revoked Stone in full. App. 59, ll. 10 – 15. Judge Harrington held a hearing on Stone's motion to reconsider on December 5, 2016, but denied the motion by written Order dated the same day. App. 61. App. 80.

On February 22, 2017, Stone filed a PCR application. App. 116. On March 1, 2018, the Honorable Thomas A. Russo held a hearing on Stone's application. App. 152. Rasheeda Cleveland represented the State and James K. Falk represented Stone. App. 152. At the conclusion of the hearing, Judge Russo granted Stone a new probation revocation hearing from the bench. App. 192, l. 21 – 193, l. 17. On June 25, 2018, Judge Russo entered a formal written Order. App. 196. On October 1, 2018, Judge Russo denied the State's motion to alter or amend and the State sought certiorari at this Court. App. 216.

ARGUMENT

The PCR court's determination that counsel's deficient performance prejudiced respondent has evidentiary support because counsel failed to provide the court with all relevant information at the initial probation revocation hearing.

It is undisputed that at respondent's probation revocation hearing, counsel failed to tell the judge that the probation department's hearing officer had recommended a one-year revocation. App. 65, ll. 2 – 14. App. 164, l. 21 – 165, l. 16. App. 201. Pet. Cert. at 10-12 (arguing counsel had a strategic reason for not informing the judge of the hearing officer's recommendation at the initial hearing). The State relies on evidence that the judge may have had this recommendation in the materials provided to her and counsel telling the judge about the recommendation at a hearing on a motion to reconsider. The State also claims counsel had a valid strategic reason for not telling the judge that the hearing officer recommended a one-year revocation at a hearing where Judge Harrington revoked appellant in full. Pet. Cert. at 10-12. However, all of this information was also before the PCR judge for his consideration and he granted relief. Under this Court's highly deferential standard of review, the PCR judge's determination that counsel's deficient performance, as a whole and especially at the critical moments of the initial revocation hearing, is supported by the evidence and therefore no reason exists to grant certiorari.

On August 11, 2014, Respondent Allen Stone ("Stone") pled guilty to second-degree burglary before Judge Nicholson. App. 19. App. 22, ll. 1 – 6. App. 34, ll. 16 – 19. Judge Nicholson sentenced Stone to fifteen years' imprisonment suspended to five years' probation. App. 48, l. 22 – 49, l. 1. Stone violated his probation and an administrative hearing was held on May 17, 2016. App. 75. Present at the hearing were Stone, Kathleen Nadobny (the

administrative hearing officer), and Christian Aulbach (the probation agent). App. 75. The hearing officer recommended revocation for one year and then continuing on probation. App. 75. App. 65, ll. 2 – 14. App. 68, ll. 13 – 16.

Approximately two months after the administrative hearing, Stone appeared before Judge Harrington for a probation revocation hearing. App. 52. The probation agent at the hearing before Judge Harrington was a different agent than the one at the administrative hearing. App. 52. After reciting the violations, this agent told Judge Harrington, “The agent is recommending a revocation and terminate.” App. 54, ll. 6 – 7. After hearing from Stone and counsel Kelly Solar (“Solar”), Judge Harrington revoked Stone’s probation in full. App. 59, ll. 10 – 15. At no point during the hearing did Solar tell Judge Harrington about the hearing officer’s recommendation of a one-year revocation. App. 52 – 59.

At the PCR hearing, Judge Russo was deeply troubled by Solar’s failure to tell Judge Harrington about the administrative hearing officer’s recommendation. App. 189, l. 14 – 193, l. 2. Judge Russo pointed out that circuit judges “have limited information in these hearings” and rely on the parties to give the court “the full picture.” App. 190, ll. 1 – 12. He noted that the probation agent does not “always agree with the hearing officer’s recommendation.” App. 190, ll. 7 – 12. Judge Russo then stated:

But as I sit on these matters I want to know the hearing officer, what the recommendation is because the hearing officer hears a lot more during those hearings than simply the agent’s position. And so the agent didn’t bother to inform the Court that there was a recommendation from the hearing officer of a one year revocation. He simply stated the agent is recommending a revocation term and give him credit for time he has served and was silent as to any recommendation from the hearing officer.

Now, I do agree with what Ms. Kennedy mentioned earlier regarding or Ms. Solar mentioned earlier with regards to the judge having the hearing officer’s report. And I’m confident she did for the probation matter. What I don’t know is

if she read it or if she saw it or sometimes things get lost in these packets that are presented and at that point when the officer—agent said that the agent recommends revocation and terminated, **I think it would have been incumbent at that point for Ms. Solar to mention the fact that there was a recommendation by the hearing officer quite different than that even though they were seeking something less than the hearing officer recommendation.**

App. 190, l. 13 – 191, l. 13 (emphasis added). Judge Russo further reasoned that even if counsel’s goal was to have Stone continue on probation, “once the other side comes out and is actually recommending a 15-year revocation, it’s incumbent at that point that you got to bring up that hearing officer’s recommendation so that the judge if he or she has not looked at that report will be aware of it.” App. 191, ll. 17 – 22.

The PCR court was also well aware that Solar made the hearing officer’s recommendation known to Judge Harrington during the reconsideration hearing. App. 192, l. 21 – 193, l. 11. Judge Russo said that “these very things that I am mentioning now were then brought up and detailed in that motion to reconsider and the judge clearly had the authority to consider it or not consider it.” App. 192, l. 21 – 193, l. 1. But bringing this up only during the reconsideration was still deemed insufficient by the PCR judge, who found that had counsel performed adequately at the first hearing, it would have made the mitigation presentation more effective and reduced the likelihood of a full revocation. App. 193, ll. 5 – 24. Even the Attorney General at the PCR hearing admitted that Judge Harrington’s full revocation seemed “unduly harsh.” App. 189, ll. 6 – 8.

In South Carolina, probationers have a right to counsel and our courts apply the familiar Strickland v. Washington, 466 U.S. 668 (1984), test for determining ineffective assistance claims. Turner v. State, 384 S.C. 451, 455-56, 682 S.E.2d 792, 794 (2009). Here, Solar’s failure to provide the relevant information necessary to challenge the agent’s request to revoke in full was deficient performance. In a case analogous to respondent’s, the Fifth Circuit

recognized that failing to challenge inaccuracies in a presentence investigation report constituted ineffective assistance. See Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993) abrogated recognized by Dale v. Quarterman, 553 F.3d 876 (5th Cir. 2008). In Spriggs, the presentence investigation report “claims that Spriggs had ‘a *long history of assaultive and aggressive behavior.*’” Spriggs, 993 F.2d at 89 (emphasis in original). The Fifth Circuit examined Spriggs’ record and determined he had no convictions for “assaultive” actions and the report improperly relied on unadjudicated criminal conduct. Id. The court held trial counsel performed deficiently for not objecting to this mischaracterization of Spriggs’ record. Id.

While Spriggs could not demonstrate prejudice—primarily because he had been convicted of a “senseless murder,” the Fifth Circuit’s analysis is instructive here. Id. at 90. Spriggs’ attorney left unchallenged an error in the sentencing information provided to the court. Here, Stone’s attorney failed to make the court aware that the probation agent was seeking something far more harsh than what had been recommended by the probation hearing officer. As Judge Russo reasoned, making sure the judge at a very quick revocation hearing knows about a favorable recommendation is critical.

As the PCR judge recognized, the speed with which probation revocation hearings are conducted does not always match the seriousness of the punishment a defendant faces. In Barber v. Nelson, 451 F.2d 1017, 1018 (9th Cir. 1971), the defendant began a probation revocation hearing *pro se*. A public defender in the courtroom “made his presence known” but “came to the hearing with no knowledge of the case save the misinformation from the probation officer that revocation would be sought because of [the defendant’s] failure to make restitution.” Barber, 451 F.2d at 1018-19. Unfortunately for the defendant, the Government sought revocation because the defendant had allegedly been beating his wife. Id. The court reasoned that when

“the revocation hearing took an entirely different turn,” counsel performed deficiently by failing to ask for a continuance and preparing for the more serious allegation. Id. at 1019. The court reversed. Id.

Barber is instructive because it shows that the claimed strategic reason for not informing Judge Harrington about the hearing officer’s recommendation was invalid. Like in Barber, Stone’s revocation hearing took an unexpected turn that made any initial strategy invalid. Barber’s counsel failed to act when the revocation hearing became much more serious for his client and he was unprepared. Stone’s attorney failed to tell the judge that the hearing officer only sought a one-year revocation after the agent sought a full revocation at the hearing. As Judge Russo reasoned at the hearing, it was “incumbent at that point that you got to bring up that hearing officer’s recommendation” to respond to the changed circumstances. App. 191, ll. 6 – 22. Solar’s failure to do so constituted deficient performance that prejudiced Stone.

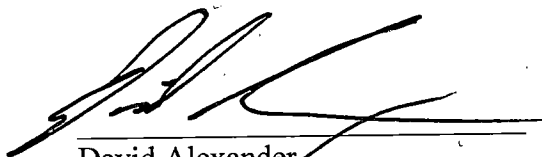
Evidence in the record also supports the PCR judge’s finding that Solar performed deficiently when she failed to clarify a mistake made by the probation agent at the revocation hearing. App. 201-02. The agent told Judge Harrington that “**since being on probation**, [Stone] was arrested eight times.” App. 53, ll. 19 – 21 (emphasis added). The agent then listed the arrests. App. 53, l. 19 – 54, l. 5. By far, the most serious arrest listed by the agent was for third-degree burglary. App. 53, l. 19 – 54, l. 5. The agent listed the dates for each arrest and when she got to the burglary, she said, “November 13th of 2015, for burglary third charge, which he was originally arrested for back in October 11th of 2013.” App. 53, l. 19 – 54, l. 5.

The original arrest date for the burglary charge was in 2013, which was before Stone pled guilty in 2014. App. 19. Therefore, Stone had not been arrested for a crime that he allegedly committed “since being on probation” and the inclusion of this arrest in the agent’s list likely

gave Judge Harrington a false impression. Solar did nothing to correct this error. At the end of the hearing, Judge Harrington asked, "He's had some arrests then?" and the agent responded, "Yes, he's had several arrests." App. 59, ll. 6 – 7. Judge Harrington then asked Solar if she had anything further, giving her another opportunity to correct this mistake, but she failed to do so. App. 59, ll. 8 – 9. Judge Harrington then revoked Stone in full. App. 59, ll. 10 – 15. At the reconsideration hearing, Stone attempted to clarify this fact for Judge Harrington. App. 66, ll. 1 – 11. However, Solar did not tell the judge that Stone's assertions were accurate. Without Solar confirming this fact for the judge, she was only left with Stone's claims that went unverified by his attorney. The PCR judge correctly found that Solar's deficient performance on this factual point prejudiced Stone.

CONCLUSION

Because evidence in the record supports the PCR court's grant of relief, this Court should deny certiorari.

A handwritten signature in black ink, appearing to read 'DAVID ALEXANDER', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of June, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Honorable Thomas A. Russo, Circuit Court Judge

ALLEN STONE,

RESPONDENT

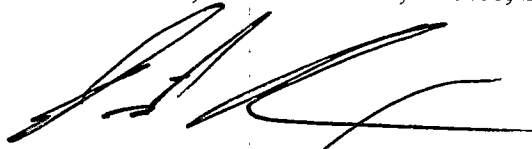
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

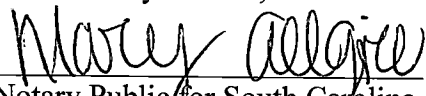
The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Allen Stone, #267003, at Tyger River Correctional Institution, 200 Prison Rd., Enoree, SC 29335, this 20th day of June, 2019.



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 20th day of June, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.