



December 23, 2019

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

RECEIVED
JAN 03 2020
S.C. SUPREME COURT

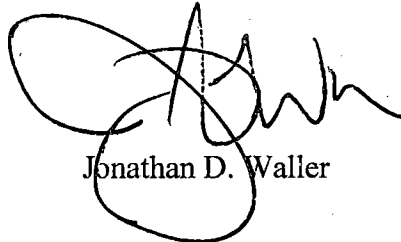
Re: Albert L. Johnson vs. State of South Carolina
C/A No: 2016-CP-40-03440

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. Johnson in this matter and am also enclosing a copy of the Amended 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 RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

RECEIVED
JAN 03 2020
S.C. SUPREME COURT

Albert L. Johnson,

Appellant,

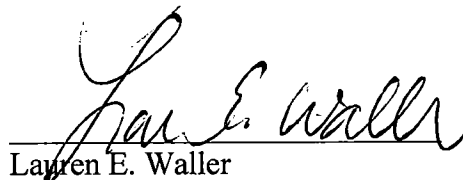
v.

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.


Lauren E. Waller

December ³⁰~~23~~, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

RECEIVED
JAN 03 2020
S.C. SUPREME COURT

Albert L. Johnson,

Appellant,

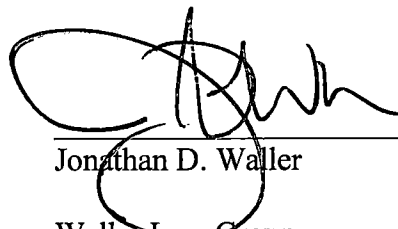
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Albert L. Johnson, appeals the Amended Order of Dismissal denying his Application for Post-Conviction Relief filed December 17, 2019, issued by the Honorable Jocelyn Newman, Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller

Waller Law Group
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ATTORNEY FOR PETITIONER

December 23, 2019

Other Counsel of Record:
Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-40-03640

ALBERT L. JOHNSON

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: NEWMAN, J.

Attorney for : Plaintiff Defendant
or
 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- 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:

RICHLAND COUNTY
FILED
2019 DEC 17 PM 1:55
JENNIFER W. GORRIDE
C.C.P., G.S., & F.C.

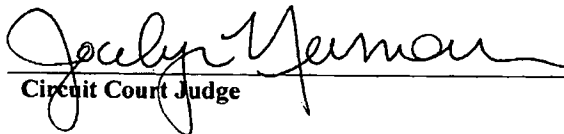
ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

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.


Circuit Court Judge

2757
Judge Code

December 12, 2019
Date

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Albert L. Johnson,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-40-03640

AMENDED ORDER OF DISMISSAL

RICHLAND COUNTY
FILED
2019 DEC 17 PM 1:56
JEANETTE M. MCENIDE
C.C.P., S.S., & F.C.

This matter came before the Court upon Application for Post-Conviction Relief (“PCR”) filed by Applicant Albert L. Johnson (“Applicant”) on June 13, 2016. Respondent filed its Return on June 29, 2017. On January 24, 2018, a hearing was conducted at the Richland County Judicial Center. Applicant was present along with his counsel, Jonathan D. Waller, Esquire. The State was represented by Jessica Kinard, Esquire.

This Court issued its Order of Dismissal on May 25, 2018, denying the Application for Post-Conviction Relief and dismissing this matter with prejudice. On June 7, 2018, Applicant filed a “Motion Pursuant to Rule 59(e), SCRPC, to Amend” in which he contends that the Order of Dismissal failed to address certain arguments.

In GRANTING Applicant’s motion, in part, the Court AMENDS its Order of Dismissal as follows:

FACTUAL AND PROCEDURAL HISTORY

Applicant is no longer confined in the South Carolina Department of Corrections. He was indicted at the November 2012 term of the Richland County Grand Jury for Common Law Robbery



Page 1 of 8

Amended Order of Dismissal

Albert L. Johnson v. State, 2016-CP-40-03640

(indictment 2012-GS-40-05356). Pursuant to Applicant's guilty plea to the charge on June 19, 2013, he was placed on probation.¹

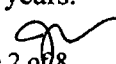
Upon the completion of one year imprisonment, Applicant began his three-year probation period. During this probation period, Applicant failed to follow certain conditions of his probation.² On September 23, 2015, a probation officer issued an arrest warrant pursuant to S.C. CODE ANN. §24-21-450 (1991), charging Applicant with various violations of his probation conditions. On November 13, 2015, the Honorable DeAndrea G. Benjamin revoked Applicant's probation and sentenced him to thirty months' incarceration. Applicant was represented at this hearing by Jessamine L. Grice, Esquire ("Probation Revocation Counsel").

Applicant filed an application for PCR on June 13, 2016, in which he alleged he was being held in custody unlawfully due to ineffective assistance of counsel stating the following reasons: (1) "Whether Applicant was denied due process during probation revocation hearing while represented by Jessamine Grice because trial court lacked jurisdiction to revoke applicants probation although warrant had been served the issuing judge never signed probation arrest warrant;" (2) "Whether Applicant was deprived of his conditional freedom, without the finding of a judge unsigned probation arrest warrant and affidavit violated his Fourteenth Amendment due process requirement;" and (3) "Constitutional violation-Fourth Amendment."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety 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

¹ He was sentenced to five years' imprisonment provided that, upon the service of one year, the balance was suspended with probation for three years.

² See Arrest Warrant dated September 23, 2015. 

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).

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant 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 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814.

First, the applicant must show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have 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 to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

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.” *Id.* at 117-18, 386 S.E.2d at 625; *see Strickland*, 466 U.S. at 688, 692 (“[T]he defendant must show that counsel’s representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”); *see also Porter*

v. *State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (“PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant’s case.”).

“Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992)). “Counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690). “Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. U.S.*, 564 F.2d 1071 (4th Cir. 1977)).

I. Applicant’s Testimony

During the evidentiary hearing, Applicant testified that Probation Revocation Counsel was appointed to represent him. Applicant stated he reported to his assigned probation office and was told to come back the next day. Upon returning to the probation office the following day, Applicant testified that he was arrested pursuant to a probation arrest warrant; however, he contends that the arrest warrant was not signed by a magistrate judge. Applicant further testified that he had been assigned three different probation agents through his period of probation and that George Jimenez, Applicant’s assigned agent at the time of the arrest, was anxious to arrest him. According to Applicant, Probation Revocation Counsel never discussed the arrest warrant with

him.

Applicant testified that he was in jail for approximately fifty-five days and met with Probation Revocation Counsel on two occasions. He stated that he could not recall which arguments Probation Revocation Counsel made on his behalf at the probation revocation hearing. Applicant further testified that he and Probation Revocation Counsel might have overlooked the deficiency in the probation arrest warrant, but that he believed that Probation Revocation Counsel did nothing wrong and her representation was done well. Applicant contends that his arrest was improper because it was not signed by a magistrate judge, depriving the court of jurisdiction to revoke his probation; therefore, he received ineffective assistance of counsel.

II. Testimony of Probation Revocation Counsel

Probation Revocation Counsel also testified at the evidentiary hearing and corroborated many of Applicant's allegations. Specifically, she admitted that she did not discuss with Applicant statutes involving arrest for violation of terms of probation or probation agents' authority to arrest. While Probation Revocation Counsel testified that she did discuss with Applicant his alleged probation violations and the circumstances surrounding his arrest, she conceded that she overlooked the fact that the probation arrest warrant was not properly signed.

III. Due Process

Applicant alleges that his Fourteenth Amendment due process rights were violated when a probation officer issued an arrest warrant pursuant to S.C. CODE ANN. §24-21-450, charging Applicant with various violations of his probation conditions. These allegations are without merit.

Section 24-21-450 clearly provides for the issuance of an arrest warrant by a probation officer when, in his judgment, a violation of probation conditions has occurred. Specifically, the statute provides:

At any time during the period of probation or suspension of sentence the court, or the court within the venue of which the violation occurs, or the probation agent *may issue or cause the issuing of a warrant* and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer.

S.C. CODE ANN. §24-21-450 (1991) (emphasis added).

In *State v. Franks*, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981), the South Carolina Supreme Court determined that “probation is an act of grace extended to one already convicted of a crime ... providing the full protection of due process of law. A proceeding for the revocation of this privilege of probation is more in the nature of an extension of the original proceedings than it is a separate criminal prosecution.” *Id.* Further, the Court stated that “while the underlying violations may themselves be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges.” *Id.* The Court reasoned that a probation hearing is more of an informal proceeding with respect to notice and proof of the alleged violations but not a hearing imposing additional punishment. *Id.* Therefore, “the penalty imposed upon a finding of violation of probation conditions is a forfeiture of the act of grace extended and reimposition of the unserved portion of the original sentence.” *Id.*

Because the rights of an offender are different in a probation revocation hearing than in the trial of the original offense, the Supreme Court determined that those rights extended in the trial of the original offense are not extended to the offender by the United States Constitution in a probation revocation hearing. *Id.* at 639. Thus, a person convicted of a crime and subject to various probation conditions “does not enjoy the same unfettered constitutional privileges available to those not so confined.” *Id.*

Therefore, this Court agrees with the rationale utilized by the *Franks* Court that a probation officer is authorized by law to issue an arrest warrant for a probation violation, and it is not necessary that such a warrant be issued by a magistrate judge. Further, Applicant has not suffered constitutional deprivation with respect to his probation revocation and the arrest preceding his probation revocation. In considering the statutory powers given to probation officers, as well as the fact that a probation revocation hearing is an extension of the original proceedings, this Court concludes that the Fourth Amendment's requirement that a magistrate issue an arrest warrant does not apply to a warrant for violation of probation conditions.

The Court's conclusion is unchanged by Applicant's complaint that the probation agent lacked firsthand knowledge of the alleged violations. The law allows "the probation agent [to] issue or cause the issuing of a warrant and cause the defendant to be arrested for violating any of the conditions of probation..." S.C. CODE ANN. §24-21-450 (1991). There is no requirement – in the South Carolina Code or otherwise – that a warrant be issued only upon the firsthand knowledge of the affiant. In fact, the opposite is true; and arrest warrants are issued every day where there is no eyewitness to a criminal act, but the affiant, upon information and belief, attests that probable cause exists to effect the arrest. Thus, this argument is without merit.

IV. Subject Matter Jurisdiction

Applicant also contends that the probation arrest warrant was so defective that the Court was deprived of jurisdiction to revoke his probation. The Court disagrees.

Applicant's reliance on *State v. Richburg*, 304 S.C. 162, 403 S.E.2d 315 (1991) is misplaced, as that case is factually distinctive. It is clear that "[f]ailure to comply with the warrant procedures set forth in Section 24-21-450 deprives the trial court of subject matter jurisdiction to revoke probation." *Id.* at 164, 403 S.E.2d at 317 (citing *Gray v. State*, 672 S.C. 634, 281 S.E.2d

226 (1981)). However, the *Richburg* court discussed the law's requirement that an arrest warrant be issued in order to confer subject matter jurisdiction upon the Circuit Court. *Id.* at 164-65, 403 S.E.2d at 317. *Richburg* did not, however, concern deficiencies of a warrant when one has been issued, as was the case for Applicant. Here, the Court has found the arrest warrant not to be defective; therefore, Applicant's challenge to subject matter jurisdiction must fail as well.

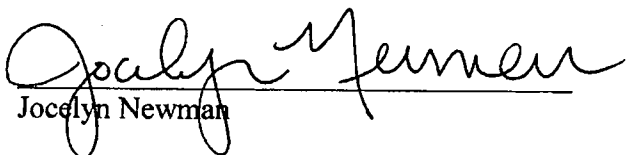
CONCLUSION

Having weighed the credibility of the testifying witnesses and having considered the admissions and explanations offered, this Court cannot find that probation revocation counsel was not "a reasonably competent attorney" or that her advice was not "within the range of competence demanded of attorneys in criminal cases." Similarly, Applicant has failed to offer competent or sufficient evidence to support his claims of ineffective assistance of counsel. The Court finds no professional errors on the part of probation revocation counsel; therefore, no prejudice could have resulted from her representation. Finally, the Court finds Applicant's challenge of subject matter jurisdiction to be without merit.

IT IS THEREFORE ORDERED that Applicant's "Motion Pursuant to Rule 59(e), SCRPC, to Amend" is GRANTED to the limited extent that set forth above.

IT IS FURTHER ORDERED that the Application for Post-Conviction relief is DENIED and DISMISSED with prejudice.

AND IT IS SO ORDERED.


Jocelyn Newman

December 12, 2019
Columbia, South Carolina.

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

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