STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Newberry County

R. Scott Sprouse, Circuit Court Judge

STEVE YOUNG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002412

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did counsel provide ineffective assistance by failing to object to the probation revocation judge finding a willful violation of Petitioner's probation and by failing to present evidence to counter any suggestion that Petitioner had willfully violated the financial components of his probation where the state sought to toll Petitioner's probation while he was incarcerated, which necessarily required a finding of a violation, but the state had failed to allege any violations in its citation?

STATEMENT

On December 1, 2011, Petitioner entered a guilty plea to assault and battery in the first degree in Newberry County before the Honorable Frank Addy, Jr. App. 3, ll. 8-10. Charles Verner represented Petitioner. Judge Addy sentenced Petitioner to ten years imprisonment suspended to time served and four years on probation. App. 3, ll. 8-10. Restitution was set at $2,400 plus a 25% collection fee. App. 3, ll. 13-15. Judge Addy ordered probation terminated after two years if the restitution were paid. App. 3, ll. 12-13. Judge Addy further ordered Petitioner to complete forty hours of public service employment, attend substance abuse counseling, and be drug tested. App. 3, ll. 15-17.

After serving approximately nine months of probation, Petitioner entered a guilty plea to reckless homicide and leaving the scene of an accident in Union County in August 2012. App. 3, l. 23 – App. 4, l. 5. The presiding judge sentenced Petitioner to ten years in prison. App. 3, l. 23 – App. 4, l. 2. The Union County charge arose *prior* to Petitioner being placed on probation in Newberry County; therefore, it was *not* a violation of Petitioner's probation. App. 4, ll. 5-7.

Motion to toll probation

Nevertheless, Petitioner's probation agent issued a citation against Petitioner. App. 3, ll. 18-22; App. 140-141. On November 1, 2013, Petitioner appeared before the Honorable Steven H. John concerning the citation. App. 1. Elizabeth C. Fullwood represented Petitioner. App. 1. An agent with the South Carolina Department of Probation, Parole, and Pardon Services represented the state. App. 1. According to the agent, the purpose of the citation was to get Petitioner before a judge so that the agent could request tolling of Petitioner's probationary sentence while Petitioner was incarcerated. App. 3, ll. 18-22. In fact, the agent was clear that the state was not alleging any violation of the terms of probation. App. 3, ll. 20-21. The

probation citation read as follows: "Violations Charged. No violations charged. Motion for review of the Probation sentence imposed by Judge Addy Jr. in cause number 11-GS-36-00623 at the 12/01/2011 term of General Sessions Court holden [sic] in Newberry County, Newberry, South Carolina pursuant to statute 24-21-430." App. 140. Identically, the affidavit read as follows: "No violations charged. Motion for review of the Probation sentence imposed by Judge Addy Jr. in cause number 11-GS-36-00623 at the 12/01/2011 term of General Sessions Court holden [sic] in Newberry County, Newberry, South Carolina pursuant to statute 24-21-430." App. 141. The affidavit further explained the state sought review of the probation case due to a conviction in Union County, but explained the conviction was "not considered a violation of the the [sic] current probation case as the incident date of 1/14/2011 occurred before the begin date of supervision." App. 141. At the hearing, the probation agent requested the probationary sentence be tolled, terminated, or revoked concurrently. App. 4, ll. 14-20. Additionally, the agent asked the court to extend the probationary sentence for a year. App. 5, ll. 16-18.

Next, the judge inquired if Petitioner had abided by the terms and conditions of his probation during the eight months he was on probation. App. 6, l. 21 – App. 7, l. 4. The agent explained Petitioner could not complete the public service employment due to internal policies regarding violent offenses. App. 7, ll. 5-10. Petitioner had never failed a drug test. App. 7, ll. 16-20. Petitioner was "very cooperative" with his probation agent. App. 7, ll. 23-24.

When the judge indicated he was going to toll Petitioner's probationary sentence, counsel objected because Petitioner had not "done anything to violate the terms and conditions of his probation." App. 8, ll. 11-14. Counsel argued that "no statute" permitted tolling "under these circumstances." App. 8, ll. 14-16. Citing State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013),

counsel asked the judge "to simply terminate the probation and convert the restitution to a civil judgment." App. 8, ll. 16-19.

Thereafter, the judge asked the probation agent if Petitioner were "current on all of his fees." App. 8, ll. 20-21. Petitioner was only one payment behind on his supervision fees. App. 8, ll. 22-24. He had not paid into the public defender fund, however. App. 9, ll. 2-6. Petitioner had paid $65 toward his restitution, but he was behind on those payments. App. 9, l. 7-12. The agent explained his restitution payments would be restructured. App. 9, ll. 7-12. Petitioner was not current on his drug test fees. App. 9, l. 24 – App. 10, l. 1.

Judge John found that Petitioner "was in violation of his terms and conditions of probation." App. 10, ll. 2-5. With no evidence presented on the subject, Judge John found "those to be a willful violation." App. 10, ll. 5-6. In light of these findings, Judge John ordered Petitioner's probationary sentence be tolled while he was incarcerated. App. 10, ll. 6-11; App. 142. Additionally, Judge John extended Petitioner's probation "for an additional year to the five full years of probation." App. 10, ll. 11-13; App. 142.

After the ruling, Petitioner's counsel noted that the citation issued against Petitioner "did not make any allegations that he ha[d] violated the terms and conditions of his probation." App. 11, ll. 4-8. Judge John responded, "It's set forth on the terms and conditions of the report. It indicates it's before the Court for a review. Review would encompass all of the matters that he was on probation for, including the financial matters." App. 11, ll. 9-13.

Direct appeal

On appeal, Petitioner challenged the judge's decision to toll his probationary sentence. App. 13-25. LaNelle Cantey Durant represented Petitioner. App. 13-25. This Court affirmed the judge's decision to toll Petitioner's probation and extend the period of probation. App. 36-

38; State v. Young, 2015-UP-345 (S.C. Ct. App. filed July 15, 2015). This Court held "tolling was proper because the circuit court found [Petitioner] willfully violated the terms of his probation." App. 37. It was important to the appellate court that the "circuit court found [Petitioner] violated the terms of his probation by willfully failing to make required restitution and fee payments." App. 37.

After concluding that Petitioner's due process rights were not implicated at the hearing because it concerned tolling, not revocation, this Court noted that Petitioner's counsel "did not object to the circuit court's finding that he violated the terms of his probation by willfully failing to make required payments." App. 37-38. In light counsel's failure to object, this Court refused to entertain any arguments regarding the propriety of the judge's decision to toll Petitioner's probation based upon his finding that Petitioner willfully failed to pay fees and restitution. App. 38. Petitioner sought rehearing. App. 39-48. On August 20, 2015, this Court denied the petition. App. 53.

Thereafter, Petitioner sought review in the Supreme Court by way of a petition for writ of certiorari. App. 54-66. On February 16, 2016, the Court denied review. App. 75. Remittitur issued on February 25, 2016. App. 76.

Post-conviction relief hearing

Petitioner filed an application for post-conviction relief (PCR) on March 11, 2016. App. 77-86. On October 12, 2017, Petitioner appeared before the Honorable R. Scott Sprouse concerning his PCR application. App 93. Carson Henderson represented Petitioner. App. 93. Justin Hunter represented the state. App. 93.

Petitioner explained that while he was probation, he was working at Amick Farms, a chicken processing plant in Batesburg. App. 98, l. 22 – App. 99, l. 6. He worked approximately

forty hours a week, making minimum wage. App. 99, ll. 13-20. He and his future wife, Kimberly Young, were living together at the time. App. 99, ll. 21-25. Kimberly was pregnant and unable to work due to complications with her pregnancy. App. 100, ll. 6-13. Petitioner and Kimberly had four children together, all of whom were in the home. App. 100, ll. 21-25. The children were too young to work. App. 101, ll. 1-2. Petitioner was the sole source of financial support for his growing family. App. 101, ll. 5-7. Each month, Petitioner paid $650 in rent and approximately $200 in utilities. App. 101, ll. 12-25.

While he was on probation, Petitioner was paying his obligations to the best of his ability. App. 102, l. 25 – App. 103, l. 8. When Petitioner appeared before Judge John regarding the probation agent's request to toll his probation and extend the length of his probation, counsel did not present evidence or argument regarding Petitioner's ability to pay. App. 104, ll. 13-25. Petitioner believed "there was a reasonable chance that if [counsel] had gone into his financial ability to pay that His Honor, the Judge at that hearing may very well ha[ve] terminated [his] probation and converted it to civil judgment." App. 105, ll. 9-14. However, counsel did not discuss Petitioner's "financial ability to pay" during the hearing. App. 105, ll. 15-17.

Counsel explained that upon her review of the file, the case presented "a Miller situation and that was that." App. 108, ll. 5-7. Counsel recalled that when she objected to the judge tolling Petitioner's probation without finding a violation, which Miller prohibited, the judge then inquired about Petitioner's compliance with the terms and conditions of his probation. App. 108, ll. 9-13. Counsel was completely unprepared to present evidence or argue regarding Petitioner's ability to pay. App. 108, ll. 16-19. In counsel's view, the judge "all of a sudden made a finding that he had violated probation," which gave the judge jurisdiction to toll the probationary

sentence. App. 108, l. 21 – App. 109, l. 1. Counsel was "very surprised" by Judge John's ruling that Petitioner had willfully violated his probation by failing to pay. App. 109, ll. 3-7. Counsel admitted she should have but failed to request a hearing on his ability to pay. App. 109, ll. 7-11. Counsel explained she "was just so surprised" by the judge's ruling that she failed to request the hearing or present evidence to counter any suggestion that Petitioner willfully failed to comply with his financial obligations. App. 109, ll. 12-16. Counsel "had blinders on," and viewed the case "as a straight Miller situation." App. 109, ll. 12-16. Counsel explained that under the law, Petitioner was entitled to a hearing on whether he willfully failed to pay. App. 109, ll. 17-20.

Counsel explained that if she had made the motion requesting a hearing on Petitioner's failure to pay fees and restitution, then there was "a fair probability that the judge would have terminated the probation and converted it to a civil judgment." App. 111, l. 24 – App. 112, l. 6. Counsel further explained that the only way the judge could order tolling of Petitioner's probationary sentence would be to find a willful violation of probation. App. 114, ll. 1-6. Here, "the only violation that could possibly be found and wasn't alleged was money. And since he couldn't pay the money he couldn't be on that basis." App. 114, ll. 7-10.

Order denying relief

In an order filed November 1, 2017, Judge Sprouse denied Petitioner relief. App. 129-136. According to Judge Sprouse, counsel "was not deficient for failing to object to the probation hearing judge's finding that [Petitioner]'s failure to make his payments constituted a willful violation." App. 133. After noting that evidence was presented at the probation hearing concerning Petitioner's arrearages, the PCR judge found that "[w]ith no evidence presented at the probation hearing to contradict the probation agent … counsel did not act unreasonably in making a baseless objection." App. 133-134.

Additionally, Judge Sprouse found that Petitioner "failed to show that he was prejudiced by Counsel's actions." Two reasons supported his determination that "Counsel's failure to object to the judge's finding that [Petitioner]'s non-payment was willful would not change the outcome of the case." App. 134. The first reason was that "no evidence was presented at the probation hearing that would have changed the judge's findings had an objection been made." App. 134. In short, "[e]ven if Counsel had made an objection, the probation judge would likely have overruled the objection based on the lack of contrary evidence presented at the probation hearing." App. 134. Continuing with this reasoning, Judge Sprouse held "[i]t would be speculation" for the PCR court "to find that Counsel's objection would have been sustained because no evidence was presented at the probation hearing to challenge the probation agent's detailed testimony of [Petitioner]'s nonpayment." App. 134. Regarding Petitioner's unrefuted testimony at the PCR hearing concerning his financial situation at the time, Judge Sprouse determined "it would be improper" for the PCR court "to change the probation judge's ruling based on findings that were not presented to the probation judge." App. 134.

The second reason that Judge Sprouse relied upon to determine that counsel's failure to object was not prejudicial was his opinion that Petitioner's incarceration in the Department of Corrections mandated tolling of the probationary sentence. App. 134. It was clear to the PCR judge that Petitioner could not be "supervised on probation and incarcerated in the South Carolina Department of Corrections at the same time." App. 135. Relying upon this Court's opinion, which refused to address the propriety of the finding of a willful violation, the PCR judge determined that Petitioner's incarceration *alone* was sufficient to allow Judge John to toll his probationary sentence. App. 135.

On November 14, 2017, Petitioner served his notice of appeal. Thereafter, Petitioner filed a petition for writ of certiorari. The state filed its return. The Supreme Court transferred the case to this Court on November 27, 2018. On May 4, 2020, this Court granted certiorari on the issue presented. This brief follows.

STANDARD OF REVIEW

When an appellate reviews a PCR action, the "standard of review in PCR cases depends on the specific issue" raised on appeal. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at 180, 810 S.E.2d at 839. However, the appellate court will "will review questions of law de novo, with no deference to trial courts." Id. at 180-181, 810 S.E.2d at 839. Appellate courts give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Id. See also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

ARGUMENT

Counsel provided ineffective assistance by failing to object to the probation revocation judge finding a willful violation of Petitioner's probation and by failing to present evidence to counter any suggestion that Petitioner had willfully violated the financial components of his probation where the state sought to toll Petitioner's probation while he was incarcerated, which necessarily required a finding of a violation, but the state had failed to allege any violations in its citation.

Right to the effective assistance of counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. To prove ineffective assistance of counsel, Petitioner must establish that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 862 (1992) (applying the Strickland framework to an ineffective assistance of counsel claim in the context of a probation revocation hearing).[1]

Violations of probation

"Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions." Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-354 (2008). "The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." Id. at 179, 656 S.E.2d at 354. "[P]arole and probation revocation proceedings must comply with minimum due process requirements." Id. at 181, 656 S.E.2d at 355.

Although "[p]robation is a matter of grace," the court may revoke probation only "upon an evidentiary showing of fact tending to establish a violation of the conditions." State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999). In other words, "before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions." Id. at 648-649, 511 S.E.2d at 97. "[T]he authority of the [circuit] court to revoke [probation] may not be capriciously or arbitrarily exercised, but should always be predicated upon an evidentiary showing of fact tending to

[1] "The right to counsel attaches in probation revocation hearings." Salley v. State, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991).

establish violation of the conditions." State v. Williamson, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003).

Financial obligations – willfulness required

When the judge revokes probation based solely upon a failure to pay fines or restitution, then the judge must find the failure was willful. Hamilton, 333 S.C. at 649, 511 S.E.2d at 97. Only when a probationer willfully fails to pay fines or restitution may the circuit judge revoke his probation. Id. As explained by the United States Supreme Court, the courts may not punish a person for being poor. Bearden v. Georgia, 461 U.S. 660 (1983); see also Hamilton, 333 S.C. at 649, 511 S.E.2d at 97; Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 862 (1992); Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986). In the absence of a determination of a willful violation to make required payments of fines and fees, a defendant's due process rights are contravened by the deprivation of his constitutional freedom. Hamilton, 333 S.C. at 649, 511 S.E.2d at 97.

In order to establish a probationer's willful failure to pay, the state must show the probationer did so by means of a voluntary, conscious, and intentional omission. State v. Spare, 374 S.C. 264, 269, 647 S.E.2d 706, 708 (2007).[2] Although our courts permit an inference that the failure to pay is willful when a probationer has the ability to pay, but fails to do so, our courts require the circuit court to inquire into the reasons surrounding the probationer's failure to pay. After the inquiry, the circuit court must make a determination of whether the failure to pay was a willful choice. Id. at 269, 647 S.E.2d at 709.

[2] See also, State v. Garrard, 390 S.C. 146, 150, 700 S.E.2d 269, 272 (2010) (defining "willfully" for purposes of violation of the community supervision program to require the state prove either: (1) a voluntary and intentional act done with consciousness that the act is a violation of a term of the community supervision program, or (2) the voluntary and intentional failure to do something known to be required by a term of community supervision).

In Spare, 374 S.C. at 270, 647 S.E.2d at 709, this Court noted that the inquiry may include a "specific accounting of [the probationer]'s total earnings, living expenses, other sources of income, and potential earning capacity." This Court held the circuit court judge abused his discretion in concluding that Spare's failure to pay restitution was willful. Id. at 270, 647 S.E.2d at 709. The "judge failed to make the requisite inquiry into Spare's ability to pay, his reasons for failing to pay, and whether his failure to pay was willful." Id. The record showed "Spare was making progress, albeit slow, toward paying his restitution obligation." Id. Spare had a job, and as his counsel told the judge, Spare "was using his income from this job to pay for housing at a local motel, pay the IRS for back taxes, and to make payments toward his court-ordered financial obligation." Id. "[W]ithout a specific accounting of Spare's total earnings, living expenses, other sources of income, and potential earning capacity," it was difficult to conclude that Spare "had the ability to pay more toward his restitution but made a voluntary, conscious, and intentional decision not to pay." Id. The evidence simply failed to support the circuit court's finding of willfulness. Id.

In State v. Coker, 397 S.C. 244, 245, 723 S.E.2d 619, 620 (Ct. App. 2012), this Court explained that the Supreme Court "provided the trial bench with a roadmap for making the findings required under" the case law for a willful violation of a failure to pay. This Court delineated that (1) the state must present sufficient evidence to establish that a probationer has violated the conditions of his probation, (2) that the probationer made a willful choice not to pay, and (3) if the circuit court concluded that the probationer could not pay despite efforts to do so, the court may not imprison the probationer unless it found alternate measures were not adequate to meet the state's interests in punishment and deterrence. Id. at 245-246, 723 S.E.2d at 620. A probationer made a willful choice not to pay only when the probationer had the funds to pay and

chose not to do so or lacked the funds to pay and did not make a bona fide effort to acquire the funds. Id. at 245, 723 S.E.2d at 620. In other words, "in those cases involving the failure to pay fines or restitution, the circuit court judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness." Hamilton, 333 S.C. at 649, 511 S.E.2d at 97.

The Supreme Court Court held counsel was ineffective during a probation revocation hearing where counsel failed to object to the circuit court revoking an individual's probation where the individual indicated he failed to pay restitution because he was unemployed and had not reported to his agent because he believed he would be put in jail if he did so. Nichols, 308 S.C. at 337, 417 S.E.2d at 862. The Court explained that "[p]robation may not be revoked solely for failure to make required payments of fines and restitution without the court first making a determination on the record that a probationer has not made a bona fide effort to pay." Id. However, the only information in the record was that Petitioner failed to pay because he was unemployed – not a willful failure to pay. Id.

Tolling probation – probation violation necessary

In State v. Hackett, 363 S.C. 177, 179, 609 S.E.2d 553, 554 (Ct. App. 2005), Hackett pled guilty and received sentences suspended upon probation. His probation was transferred to Oregon. Id. Within two years, an arrest warrant was issued alleging Hackett failed to report to Oregon authorities and absconded from supervision. Id. The warrant was served three years later, which was five years after the guilty plea. Id. Thereafter, a probation citation was issued, which included an alleged violation of probation – being sentenced to prison for robbery in Oregon. Id. When Hackett appeared before the court for a hearing on the alleged probation

violation, the judge ordered the probationary period be tolled from the issuance of the warrant until the date of the hearing. Id.

Just a few months later, yet another arrest warrant was issued charging Hackett with violating the terms of his probation. Id. Over two years later, the court again continued Hackett's probation, but ordered him to attend the restitution center and ordered the probationary sentence be tolled from the date of the issuance of the warrant until the hearing date. Id. After his admission to the restitution center, Hackett absconded. Id. A warrant was issued charging him with multiple violations of probation. Id. When Hackett appeared in court on the warrant, Hackett "argued the maximum period of probation is five years and his probationary term expired" years prior. Id. at 180, 609 S.E.2d at 554. The trial court rejected his argument and revoked his probation in full. Id.

On appeal, Hackett argued the governing statute did not permit a period of probation to exceed five years, and that probation may not be extended absent a partial revocation. Id. This Court found no statutory "prohibition for *tolling* the probationary sentence under these circumstances." Id. at 181, 609 S.E.2d at 555 (emphasis in original). "[T]he trial court did not attempt to *continue* or *extend* probation beyond the five-year limit" imposed by the statute. Id. (emphasis in original). "Rather, the court tolled the probationary period from running during the time Hackett absconded from supervision." Id. In light of the statute's failure to "explicitly prohibit the tolling of time during a probationary term runs," this Court found no error. Id.

Next, this Court held that tolling under these circumstances was "proper to reflect the legislative intent." Id. This Court was convinced that the trial court "logically determined Hackett should not receive credit against the five-year probationary period when he was not under the supervision of a probation officer." Id. This Court explained its reasoning:

> Hackett habitually violated the terms of his probation, and while he may have been spared the court's harsh decision to revoke probation on two occasions, the court properly determined probation should be tolled during the time between the issuance of the probation arrest warrant … and the time Hackett actually appeared before the court on that warrant…. Clearly, Hackett was not reporting and was not under probationary supervision during this time period, and the time during which he absconded from supervision should not be included within the five-year probationary period to which he was sentenced. To allow a probationer who is initially spared from revocation of probation to then abscond from supervision and escape any further punishment, free and clear of all consequences, as long as he manages to elude apprehension for a set amount of time would lead to an absurd result.

Id. at 182, 609 S.E.2d at 555-556.

The Supreme Court addressed whether a trial court could toll a probationary sentence while an individual was committed pursuant to the Sexually Violent Predator (SVP) Act in State v. Miller, 404 S.C. 29, 32, 744 S.E.2d 532, 534 (2013). Miller was sentenced to fifteen years in prison, suspended upon the service of ten years in prison and five years of probation. Id. Instead of being released from custody at the end of the active term of his sentence, Miller was committed as a SVP. Id. Approximately five years after Miller's probation began, the probation agent issued a probation citation. Id. According to the citation, it was issued to give the court subject matter jurisdiction over the particular indictment for which probation had been given. Id. After a hearing, the trial court ordered Miller's probation be tolled while he was committed to the SVP program. Id.

On appeal, Miller challenged the trial court's authority to toll his probation. The Court explained that while the statutes governing probation made no explicit reference to tolling, South Carolina's appellate courts expressly recognized the general authority of the circuit court to toll probation. Id. at 35, 744 S.E.2d at 536. Concerning whether the circuit court properly tolled Miller's probationary sentence while he was committed as an SVP, the Court held "that the tolling of probation *must* be premised on a violation of a condition of probation or a statutory

directive." Id. at 37, 744 S.E.2d at 537 (emphasis added). More specifically, this Court held Miller's past conduct, which included an admission to a prior crime, was irrelevant to whether a court could toll the probationary sentence. Id. The Court explained Miller's past misdeeds "would not form the basis for finding a probation violation nor would it support tolling of probation because the conduct occurred before sentencing." Id.

Analysis

The PCR judge erred in finding counsel was not deficient for failing to object to the judge's finding of a willful violation of Petitioner's financial obligations and for failing to present evidence to counter any suggestion that Petitioner failed to satisfy his financial obligations willfully. Counsel was well aware of Miller, supra. Therefore, counsel was aware that any request to toll Petitioner's probation must be predicated upon a finding of a probation violation. While counsel was unaware of what violation may be sought or found because the citation lacked any mention of a violation, counsel's failure to object to the finding of a willful violation and failure to present contrary evidence was deficient.

Notably, the state made no attempt to argue that counsel's performance was anything but deficient. Instead, the state focused solely on the prejudice prong of the analysis. Instead, the state boldly argued that "Petitioner could have easily been charged with failure to report or other violations which do not require a finding of willfulness." Ret. at 8. Absolutely no evidence supports such a contention. The probation agent made clear that Petitioner had not violated the terms and conditions of his probation. It was only when counsel objected to the tolling of probation without a finding of a violation that the judge inquired as to Petitioner's financial obligations. The state's audacious claim that Petitioner "could have easily been charged" with failure to report or some other similar violation is rank speculation with no support in the record.

Counsel's deficient performance was prejudicial to Petitioner because it allowed the judge to find a violation and toll Petitioner's probation. Judge Sprouse concluded that had counsel not performed deficiently, then there was a reasonable probability that the outcome of the proceeding would have been different because there was "no evidence" "presented at the probation hearing that would have changed the judge's findings had an objection been made." App. 134. This finding seems to miss the point. It was counsel's failure to object and present evidence at the hearing that would have likely altered the outcome of the proceeding. At a minimum, Petitioner could have testified at the hearing regarding his financial ability to pay, just as he testified at the PCR hearing. Judge Sprouse also determined that it would be "improper" for the PCR court "to change the probation judge's ruling based on findings that were not presented to the probation judge." App. 134. This determination seems to miss the very essence of a PCR hearing – whether evidence that was not presented would likely alter the result of the proceeding. The PCR judge erred in determining counsel's failure to object and present evidence would not have likely changed the result of the hearing.

Additionally, there is no legal support for Judge Sprouse's determination that tolling of Petitioner's probation was inevitable in light of his incarceration. See App. 134. Judge Sprouse misconstrued case law permitting tolling when a defendant absconds from supervision to cover Petitioner, who did not abscond, but was incarcerated related to a crime occurring prior to his sentence of probation. Judge Sprouse's conclusion that Petitioner's "probation would have to be tolled while he [was] incarcerated" was incorrect as a matter of law. See App. 135.

The evidence presented during the PCR hearing demonstrated that Petitioner's failure to stay current with his financial obligations was not willful. In fact, the evidence presented during the probation hearing showed Petitioner was making progress on his financial obligations. Quite

simply, he was paying to the best of his ability, which his probation agent recognized as shown by the agent's failure to issue a citation allegation a violation for failure to pay.

Counsel's failure to object to the judge's finding of a violation of probation due to Petitioner's inability to pay his financial obligations and counsel's failure to present contrary evidence was deficient performance prejudicial to Petitioner. Counsel's conduct did not hold the state to its duty to make an evidentiary showing of facts tending to establish a violation. See State v. White, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950). Due to counsel's deficiency, the probation judge made no effort to make the necessary inquiry into Petitioner's ability to pay and willingness to pay. Had the judge done so, the judge would have been required to find that Petitioner's financial arrearages were not willful.

CONCLUSION

Petitioner respectfully requests this Court reverse the PCR court, hold counsel provided ineffective assistance, and order that Petitioner's probationary sentence cannot be tolled while Petitioner is incarcerated where there was no allegation of a violation of probation and counsel failed to object to the judge's finding of such or present evidence to counter such a finding.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of June, 2020.