

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Jocelyn J. Newman, Circuit Court Judge

ALBERT L. JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000014

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation at Petitioner's probation revocation hearing where counsel failed to notice Petitioner's arrest warrant had not been signed by a judge?

STATEMENT

During the November term of 2012, a Richland County Grand Jury indicted Petitioner for strong arm robbery. App. 96 – 97. Petitioner pleaded guilty as indicted on June 19, 2013, before the Honorable Robert Hood, and he was sentenced to five years of incarceration suspended upon the service of one year in prison and three years of probation. App. 98.

On November 13, 2015, Petitioner appeared before the Honorable DeAndrea G. Benjamin for a probation revocation hearing. Petitioner was represented by Jessamine Grice (counsel). Amy West-Willis appeared on behalf of the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS). App. 1. The State alleged that Petitioner violated several conditions of his probation. App. 3, l. 16 – 6, l. 11. The circuit court ruled, “I am going to revoke 30 months, terminate, convert fines and fees to a civil judgment . . .” App. 13, ll. 6-8.

On June 13, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 15 – 21. The State made its return. App. 22 – 28. A hearing was held on the matter on January 24, 2018, before the Honorable Jocelyn Newman. Jonathan Waller represented Petitioner and Jessica Kinard represented the State. App. 29.

Petitioner testified that he possessed the original arrest warrant for his probation violation. App. 40, l. 25 – 41, l. 3; App. 53, ll. 15-20. Petitioner explained that although a probation agent signed the warrant, it was not signed by a judge. App. 41, ll. 5-10. Petitioner said he never discussed this problem with counsel because he did not notice the problem until after his revocation hearing. App. 41, ll. 11-15. Petitioner alleged that counsel “overlooked” the defective warrant. App. 44, ll. 20-23. Petitioner also explained that he believed S.C. Code Ann. § 24-21-450 required the warrant be signed by a judge. App. 45, ll. 1-3; App. 47, ll. 13-17.

The probation violation arrest warrant was entered into evidence and is located at pages 76 – 77 of the appendix. The warrant was signed on the front by a probation agent, but the back was lacking a judge’s signature on the line that read, “Signature of Judge.” App. 76 – 77.

Counsel testified that she usually receives a packet from SCDPPPS a “couple of days” prior to a probation revocation hearing. App. 55, l. 21 56, l. 2. Counsel said she did receive a copy of the probation violation report as well as the arrest warrant, but, as to the arrest warrant, she admitted, “I don’t normally scrutinize that.” App. 56, ll. 7-13. “I didn’t scrutinize that.” App. 56. However, counsel claimed the warrant was “appropriate” since it was signed by the probation agent. App. 63, ll. 9-18. Counsel alleged that because Petitioner was “taken into custody by his probation agent, they didn’t need his signature ahead of time. If he had not shown up to probation and they wanted to take him into custody, I – It’s my understanding that’s when a judge’s signature would come into play.” App. 64, ll. 2-7.

In summation, PCR counsel argued the warrant was invalid because it was not signed by a judge, and under *State v. Richburg*, 304 S.C. 162, 403 S.E.2d 315 (1991) and *Gray v. State*, 276 S.C. 634, 281 S.E.2d 226 (1981), the circuit court lacked jurisdiction to revoke Petitioner’s probation. App. 68, l. 16 – 69, l. 12. The State argued in response that the court of general sessions has jurisdiction over probation revocation hearings and that the warrant was not defective. App. 69, l. 15 – 71, l. 5.

On May 25, 2018, the PCR court issued an order of dismissal. PCR counsel filed a motion to amend pursuant to Rule 59(e), SCRCF. App. 78 – 84; App. 85 – 87. On December 17, 2019, the PCR court issued an amended order of dismissal. App. 88 – 95. The PCR court found the arrest warrant was not defective and emphasized language in § 24-21-450 which stated that a “probation agent may issue or cause the issuing of a warrant.” App. 93 – 94. The amended order

of dismissal also cited *State v. Franks*, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981), and found that the “Fourth Amendment’s requirement that a magistrate issue an arrest warrant does not apply to a warrant for violation of probation conditions.” App. 93 – 94.

As to whether the lack of a judge’s signature deprived the circuit court of jurisdiction, the PCR court found that the holding of *Richburg* did not offer Petitioner relief here, since *Richburg* did not “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.” App. 95.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation at Petitioner’s probation revocation hearing where counsel failed to notice Petitioner’s arrest warrant had not been signed by a judge.

Counsel’s performance was deficient where she failed to notice that Petitioner’s arrest warrant lacked the signature of a judge. Petitioner was prejudiced because had counsel properly reviewed the arrest warrant, she could have argued the lack of a judge’s signature left the circuit court without subject matter jurisdiction to revoke Petitioner’s probation.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced petitioner. *Id.* at 687. “Trial counsel must provide ‘reasonably effective assistance’ under ‘prevailing professional norms.’” *Putnam v. State*, 417 S.C. 252, 260, 789 S.E.2d 594, 598 (Ct. App. 2016) (quoting *Strickland*, 466 U.S. at 687-88).

“To show prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability the result of the trial would have been different.” *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “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).

S.C. Code Ann. § 24-21-450 provides, in relevant part, that,

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 agent with power of arrest, upon the request of the probation agent, may arrest a probationer. In case of an arrest, the arresting officer or agent must have a written warrant from the probation agent setting forth that the probationer has, in his judgment, violated the conditions of probation, and such statement shall be warrant for the detention of such probationer in the county jail or other appropriate place of detention, until such probationer can be brought before the judge of the court or of the court within the venue of which the violation occurs. Such probation agent must forthwith report such arrest and detention to the judge of the court, or of the court within the venue of which the violation occurs, and submit in writing a report showing in what manner the probationer has violated his probation
...

In *State v. Franks*, 276 S.C. 636, 639–40, 281 S.E.2d 227, 228 (1981), this Court explained that a “probationer’s rights are adequately protected by the requirement that his arrest for a probation violation charge be preceded by the issuance of a warrant from the court or a probation officer as provided by § 24-21-450.” “Accordingly, we hold the Fourth Amendment’s requirement that a magistrate issue an arrest warrant does not apply to a warrant for violation of probation conditions.” *Id.*

Here, although the statute allows a probation agent to issue an arrest warrant, the arrest warrant in this case plainly called for the signature of a judge. The box labeled, “Signature of Judge” was blank. *See App. 76 – 77.* Therefore, since SCDPPPS chose to employ a warrant that called for the signature of a judge, *Franks* should not control.

In *State v. Richburg*, 304 S.C. 162, 164, 403 S.E.2d 315, 317 (1991), the appellant’s probation was revoked in conjunction with his conviction for a drug charge. He contended that his probation was improperly revoked because there was no probation violation warrant, although he had agreed to waive the presentation of the warrant. *Id.* This Court found that the

circuit court was without subject matter jurisdiction to revoke probation since no probation violation warrant had been issued pursuant to S.C. Code Ann. § 24-21-450. “Failure 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.* “Furthermore, apparent waiver of the statutory requirements cannot confer jurisdiction upon the court.” *Id.* In *Gray v. State*, 276 S.C. 634, 635, 281 S.E.2d 226, 226 (1981), the trial judge revoked the appellant’s probation on motion of a probation officer when he was sentenced to life imprisonment. No probation revocation warrant had been issued. This Court held that failure to comply with the warrant procedures as set forth in § 24-21-450 deprived the trial court of subject matter jurisdiction to revoke probation. *Id.* (citing *State v. Brunson*, 274 S.C. 220, 262 S.E.2d 44 (1980)). “The revocation of probation without benefit of a warrant is a nullity.” *Id.* (citing *State v. Loftin*, S.C., 275 S.E.2d 575 (1981)).

Here, there was an arrest warrant, unlike in *Gray* and *Richburg*. However, the arrest warrant was deficient on its face since the box for the judge’s signature was blank. Therefore, this Court should apply the principles of *Gray* and *Richburg* and hold that where a probation arrest warrant calls for the signature of a judge but is not signed by a judge, the circuit court lacks jurisdiction to revoke probation.

Petitioner was prejudiced because had this argument been properly brought before the circuit court, there is a reasonable probability the outcome of the revocation hearing would have been different. *Strickland*, 466 U.S. at 687; *Patrick*, 349 S.C. at 207, 562 S.E.2d at 611.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of October, 2020.

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Counsel for Albert L. Johnson states:

1. She is 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 post-conviction relief hearing before Judge Jocelyn J. Newman, which was held on January 24, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Albert L. Johnson.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of October, 2020.

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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.”

st. Joanna K. Delany

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Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
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