

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas
The Honorable R. Scott Sprouse, Post-Conviction Relief Judge
The Honorable Steven H. John, Probation Hearing Judge

Appellate Case No. 2017-002412

STEVE YOUNG,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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ISSUE PRESENTED BY PETITIONER

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?

ISSUE PRESENTED BY RESPONDENT

Did counsel provide ineffective assistance of counsel by failing to object and to request an ability-to-pay hearing following a finding of a willful violation of probation for failing to pay his financial obligations where Petitioner's probation would have appropriately been tolled even if Counsel had objected and requested an ability-to-pay hearing because Petitioner absconded supervision from his probation by his willful criminal conduct and voluntary guilty plea, where willfulness is not a requirement of tolling probation, and where Petitioner's failure to pay was the result of his own willful conduct?

STATEMENT OF THE CASE

Newberry County Guilty Plea

In September 2011, a Newberry Grand Jury indicted Petitioner for attempted murder (2011-GS-36-623). Charles Verner, Esquire, represented Petitioner. On December 1, 2011, Petitioner appeared before the Honorable Frank Addy, Jr. and pled guilty to the lesser included offense of first degree assault and battery. Judge Addy sentenced Petitioner to ten years of imprisonment provided upon the service of time-served, the balance was suspended with four years' probation to follow. A special condition of Petitioner's probation was that his probation would terminate upon payment of his financial obligations in full. Petitioner did not appeal his plea or his sentence.

Union County Guilty Plea

In August 2012, after serving nearly nine months on probation in Newberry County, Petitioner pled guilty in Union County to reckless homicide (2011-GS-44-234) and leaving the scene of an accident (2011-GS-44-235). Petitioner was sentenced to imprisonment for ten years. The Union County offenses occurred before Petitioner was placed on probation in Newberry County.

Probation Hearing

On November 1, 2013, Petitioner's probation agent brought his case before the Honorable Steven H. John for review and made a motion to request tolling of Petitioner's probation during his incarceration for the Union County offenses. Elizabeth Fullwood, Esquire (hereinafter Counsel) represented Petitioner. During the hearing, Counsel objected to the motion arguing Petitioner had not "done anything to violate the terms and conditions of his probation." (App. 8.)

Counsel further argued the tolling of Petitioner's probation is inappropriate under State v. Miller¹ and requested instead that Petitioner's probation be terminated and his restitution be converted into a civil judgment. (App. 8.) At that point, Judge John inquired as to whether Petitioner's payments were current on his fees and restitution. (App. 8-9.) The probation agent stated Petitioner was in arrears as to his restitution, drug testing fees, public defender fund contribution, and supervision fees. (App. 8-9.) Based upon that information, Judge John found Petitioner to be in willful violation of his probation and ordered that his probation be tolled while he was incarcerated on the Union County charges. (App 10.)

Petitioner filed a notice of appeal from Judge John's order tolling his probation. After briefing and oral argument, this Court affirmed the circuit court's decision by way of an unpublished opinion filed July 15, 2015. State v. Young, Op. No. 2015-UP-345 (Ct. App. Filed July 15, 2015). On July 23, 2015, Petitioner filed a petition for rehearing, which was denied by written order filed August 20, 2015. Thereafter, Petitioner filed a petition for writ of certiorari to the South Carolina Supreme Court, which was denied on February 16, 2016. The remittitur was issued February 25, 2016.

Petitioner filed his application for post-conviction relief on March 17, 2016, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:

- a. "Counsel was ineffective for not objecting when the trial judge found that [Petitioner] violated his probation by failing to pay"; and
- b. "Counsel was ineffective for not informing him of the revocation hearing; and not informing him he had the right to object on the record."

On October 12, 2017, an evidentiary hearing was held before the Honorable R. Scott

¹ State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013). The transcript indicates "State v. Meller," but that is believed to be a scrivener's error.

Sprouse. Petitioner was represented by Carson Henderson, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter of the South Carolina Attorney General's Office. At the evidentiary hearing, Mr. Henderson clarified the sole allegation on which Petitioner was going forward was Counsel's failure to object to the financial obligations being the basis for tolling Petitioner's probation. Petitioner and Counsel testified during the post-conviction relief hearing. By order filed November 7, 2017, Judge Sprouse denied Petitioner's application in its entirety finding that Petitioner had not established any constitutional violations or deprivations that would require the court to grant his post-conviction relief application. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari with the Supreme Court of South Carolina. Respondent filed its Return to Petition for Writ of Certiorari on November 16, 2018. This case was transferred to this Court on November 27, 2018. This Court granted Petitioner's petition on May 4, 2020.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Counsel did not provide constitutionally ineffective assistance of counsel by failing to object and to request an ability-to-pay hearing following a finding of a willful violation of probation for failing to pay fees where Petitioner's probation would have appropriately been tolled even if Counsel had objected and requested an ability-to-pay hearing because Petitioner absconded supervision from his probation by his own willful criminal conduct and voluntary guilty plea, where a finding of willfulness is not required for tolling probation, and where Petitioner's failure to pay was the result of his own willful conduct?

Petitioner asserts Counsel was ineffective in her representation because she failed to object to the lower court's finding that Petitioner was in willful violation of his probation for being in arrears on payments required by the terms of his probation, and for failing to request a hearing regarding his ability-to-pay. However, Petitioner's probation would have appropriately been tolled even if Counsel had objected to the court's finding that Petitioner was in willful violation of his probation, as Petitioner was unable to comply with several standard conditions of probation required for him to be supervised by Newberry County due to his incarceration, and because not tolling Petitioner's probation would allow him to benefit from his own willful misconduct. Moreover, a finding of willfulness is not necessary for the tolling of probation, as opposed to the revocation of probation. Even assuming for the sake of argument willfulness is required, Petitioner's non-payment resulted due to his own willful misconduct and voluntary guilty plea, and therefore, Petitioner's violation was willful. Therefore, this Court should affirm the post-conviction relief court's denial of post-conviction relief.

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the

[proceeding] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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., 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

With respect to probation counsel, the Strickland standard applies. A probationer has a right to counsel, though not a Sixth Amendment one. Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009); see also Gagnon v. Scarpelli, 411 U.S. 778 (1973). Nonetheless, “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.”

Turner, 384 S.C. at 455, 682 S.E.2d at 794; United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988). The right to counsel attaches in probation revocation hearings. Salley v. State, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Tolling of Probation, Generally

"In South Carolina parole and probation are governed by statute." State v. Crouch, 355 S.C. 355, 360, 585 S.E.2d 288, 291 (2003). Statutory law authorizes the circuit court to suspend the imposition or the execution of a criminal sentence and place the defendant on probation, except for crimes punishable by death or life imprisonment. S.C. Code Ann. § 24-21-410. "Probation is a form of clemency." Id. "Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant's 'term of imprisonment[,]' as is actual incarceration, parole, and the suspended portion of a sentence[.]" Thompson v. S.C. Dep't of Public Safety, 335 S.C. 52, 55-56, 515 S.E.2d 761, 763 (1999).

The appellate courts of South Carolina have recognized the court's authority to toll probation. In State v. Dawkins, the Supreme Court of South Carolina tolled the defendant's probation until after the defendant successfully completed his mandatory two-year term of service in a community supervision program pursuant to S.C. Code Ann. § 21-24-569. 352 S.C. 162, 573 S.E.2d 783 (2002). In State v. Crouch, this Court generally observed tolling could be appropriate

in certain circumstances, including when the defendant absconds supervision. 355 S.C. at 359 n. 2, 585 S.E.2d at 290 n. 2.² In State v. Hackett, this Court found the defendant’s probation could be tolled during the period the defendant absconded from supervision. 363 S.C. 177, 609 (Ct. App. 2005). This Court noted that it could not give the defendant credit against his probation period for the time he absconded because doing so would “lead to an absurd result” as it would allow the defendant to be “free and clear of all consequences, as long as he manages to elude apprehension for a set amount of time.” Id. at 181-82. “It would be unreasonable to conclude that a probationer could violate conditions of probation and keep the clock running at the same time, thereby annulling both the principle and purpose of probation.” Id. at 182-83, 609 S.E.2d at 556. “The general rule applied in most jurisdictions is that the tolling of probation is appropriate where the authorities could not supervise the defendant due to the defendant’s wrongful acts.” State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013).

Petitioner’s Probation Would Have Been Tolled Even if Counsel Had Objected

Petitioner cannot prove he was prejudiced by any alleged deficiency, even assuming Counsel was deficient, as Petitioner’s probation clearly would have been tolled even if Counsel had objected and requested a hearing regarding Petitioner’s ability-to-pay. See Strickland, 466 U.S. 688 at 670 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”). This conclusion is supported by the controlling law in South Carolina, including Miller. This Court recognized this in upholding the lower court’s decision in Petitioner’s direct appeal. Had the

² However, the court ultimately held that it need not determine whether probationary sentences could be tolled as it determined the probation revocation arrest warrants in that case were a nullity. Crouch, 355 S.C. at 362, 585 S.E.2d at 291.

probation court not tolled Petitioner's probation, Petitioner would benefit from his additional and voluntary criminal behavior, which is contrary to the Court's intent in Miller.

This Court reviewed Petitioner's case on direct appeal and affirmed the lower court's decision finding Petitioner's probation was properly tolled. In the unpublished opinion, the court held in part, "[Petitioner] was imprisoned for voluntarily committing criminal offenses. [Petitioner] should not be allowed to profit from his own misconduct by having his probationary term continue to run while he is not under probationary supervision. Therefore the circuit court's decision to toll his probation complied with the supreme court's holding in Miller." State v. Young, Op. No. 2015-UP-345 (Ct. App. Filed July 15, 2015) (internal citations omitted)³.

Petitioner essentially asserts the PCR court erred in finding Petitioner's probation would have inevitably been tolled. However, the lower court's decision is supported by this Court's analysis of Petitioner's case. The Supreme Court of South Carolina stated, "[T]he general rule in most jurisdictions is that tolling is appropriate when authorities cannot supervise the probationer due to his wrongful acts[.]" Miller, 404 S.C. at 37, 744 S.E.2d at 538, (citing 24 C.J.S. Criminal Law §2153 (2006) ("The period of probation is tolled while the probationer is a fugitive from justice or serving a sentence imposed by another court.")). The Supreme Court of South Carolina also determined in Miller, "tolling was appropriate [when] 'probationer has generally committed some affirmative act to violate the conditions of probation.'" Miller, 404 S.C. at 537, 744 S.E.2d at 36. Here, Petitioner voluntarily pled guilty to criminal charges in Union County, which resulted in a lengthy prison sentence ultimately preventing Petitioner from being available for probation

³ The determination of probation matters lies within the sound discretion of the trial court. An appellate court will reverse the trial court's decision where there has been an abuse of discretion." Id. at 33, (citing State v. Ellis, 397 S.C. 576, 726 S.E.2d 5 (2012); State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006)).

supervision in Newberry County. Although the conviction itself was the result of conduct occurring before probation commenced, the effect of those wrongful acts is that Petitioner could not be supervised. Petitioner's voluntary actions have caused his unavailability and tolling was appropriate in this case. A court not ordering tolling in those circumstances would allow Petitioner to benefit from his "wrongful acts," which is in direct conflict with what the court of appeals held was appropriate in this case.

Petitioner relies on Miller to show past conduct should not be the basis of tolling a probation sentence. However, there are two important distinctions between Young and Miller. First, the probationer in Miller was *involuntarily* committed, whereas here, Petitioner was imprisoned for *voluntarily* committing criminal offenses and *voluntarily* pleading guilty. This voluntariness distinction is important because failing to toll Petitioner's probation for his voluntary actions would allow him to benefit from his own misconduct, which is clearly not the intent of this Court based on the holding in Miller. Second, the probationer in Miller was involuntarily committed for mental health counseling for the Sexually Violent Predator (SVP) program, which is a civil, non-punitive treatment program. The court in Miller held, "traditionally, a civil commitment...does not give rise to tolling[.]" Id. at 537. Here, however, Petitioner voluntarily pled guilty to *criminal* charges in Union County, which appropriately would toll his Newberry County probation since he is serving a sentence imposed by another court. Criminal commitment is an entirely different circumstance from civil commitment. When affirming Petitioner's tolling on direct appeal, this Court specifically noted the distinction between a civil commitment and a criminal commitment.

It is clear from the analysis above that probation is appropriately tolled in cases where a probationer is unable to be supervised because of his or her own voluntary actions. Regardless of

whether Counsel objected to the probation court's finding of willfulness in regard to the financial violations, Petitioner would still be incarcerated in Union County where he would be unable to be supervised and meet the other conditions of his probation, and failing to toll Petitioner's probation would have caused Petitioner to benefit from his own wrongful acts. Therefore, the lower court appropriately tolled Petitioner's probation. Consequently, the post-conviction relief court properly denied relief, and therefore, this Court should affirm the PCR court's denial of relief.

Willfulness is Not Required for Tolling of Probation and Petitioner's Violation Was Willful

Petitioner also cannot prove prejudice as willfulness is not a requirement when tolling probation, but rather only a requirement when revoking probation based upon failure to pay financial obligations. Even assuming *arguendo*, willfulness is a requirement to toll probation, Petitioner's violation was willful, as he was incarcerated for a year-and-a-half prior to his probation hearing, and therefore, unable to pay any financial obligations due to his own willful criminal misconduct.

First, Petitioner's reliance on Hamilton to support his contention that probation should not have been tolled because the Court did not properly find Petitioner *willfully* violated his probation, is improper. State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (1999). Hamilton dealt with probation revocation, not the tolling of probation. Id. Similarly, Barlet v. State only prohibits the *revocation* of probation for non-willful failure to pay financial obligations. 288 S.C. 481, 343 S.E.2d 620 (1986). Barlet is silent on other measures that the court may take in order to see that the offender pays these obligations, including tolling. Id. In fact, the court is expected to review restitution cases that have fallen into arrears regardless of willfulness. "The department, through its agents, must initiate legal process to bring every probationer, whose restitution is six months in arrears, back to court, regardless of willful failure to pay. The judge shall make an order addressing the

probationer's failure to pay." S.C. Code Ann. §17-25-322(C).

Moreover, even if this Court determines willfulness is a requirement to toll probation, Petitioner's violation was willful, as he was incarcerated due to his Union County charges. Petitioner voluntarily entered a guilty plea to his criminal charges in Union County knowing it would result in a term of imprisonment. Thereafter, Petitioner's probation hearing took place on November 1, 2013. (App. 1). Petitioner was incarcerated between the time of his guilty plea for the Union County crimes and his probation revocation hearing. Therefore, Petitioner could not make payments toward his financial obligations, due to his own willful criminal misconduct. This case is substantially different than the case relied upon by Petitioner, State v. Spare. 374 S.C. 264, 647 S.E.2d 706 (2007).

In Spare, the Petitioner was employed at the time of his probation hearing, and slowly making payments toward his financial obligations. Id. at 270. Spare was employed full time. Id. Spare had to pay for housing at a local motel and pay the IRS for back taxes, in addition to making payments toward his court-ordered financial obligations. Id. Based upon this information, this Court found that the judge failed to make the requisite findings about Spare's ability to pay, and that "from all indications" it appeared Spare's violation was not willful, as he was making payments, albeit slowly. Id. at 270. Spare and Petitioner have one key distinguishing factor: Petitioner was not and could not be employed at the time of his probation hearing due to his incarceration resulting from his own voluntary criminal misconduct and voluntary guilty plea. Therefore, unlike Spare, Petitioner was not making any payments toward his financial obligations at the time of his probation hearing due to his incarceration resulting from his own willful criminal

misconduct.⁴ (App. 16, l. 19-21; 109, l. 25 – 110, l. 2). Accordingly, the fact that he was making minimal payments toward certain financial obligations during his probation prior to the commencement of his incarceration for his Union County charges is irrelevant. Petitioner's probation would have been tolled even if Counsel specifically objected to the lower court's findings and requested an ability-to-pay hearing, and therefore, this Court should affirm the PCR court's denial of post-conviction relief.


CONCLUSION

For the foregoing reasons, this Court should affirm the PCR court's Order denying post-conviction relief.

Respectfully submitted,

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⁴ Any assertion that Petitioner was paying financial obligations through alternative financial means would be without merit as Petitioner testified he was the sole individual who paid his financial obligations. He testified no other individual ever gave him money to help him pay his financial obligations. (See App. 10-11).