

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Debra R. McCaslin, Circuit Court Judge

Case No. 2019-CP-32-03140

Dishshi R. Young, #311120, Petitioner,

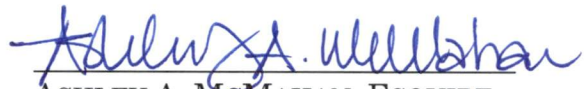
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Dishshi R. Young, appeals the order of the Honorable Debra R. McCaslin, dated and filed May 3, 2021, and received by the undersigned on May 17, 2021.

May 17, 2021



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MAY 20 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED
2021 MAY -3 PM 3:03
IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Dishshi Rodrickus Young, #311120,

JUDGE
M. COMER
CLERK OF COURT

Case No. 2019-CP-32-3140

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of an application for Post-Conviction Relief filed by Dishshi Young (“Applicant”) on August 6, 2019. The State (“Respondent”) filed its return on March 6, 2020, wherein it moved to partially dismiss Applicant’s claims and requested an evidentiary hearing to resolve the remaining claim. An evidentiary hearing in this matter was held on April 28, 2021, with the parties appearing by WebEx due to the ongoing COVID-19 pandemic.¹ At the hearing, Applicant was represented by Ashley A. McMahan, Esquire, and Assistant Attorney General Taylor Z. Smith represented Respondent. Applicant testified on his own behalf, and Assistant Public Defender Kebra N. Simpson testified as a witness for Respondent. Based upon a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief and therefore denies the application with prejudice.

PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. On June 7, 2019, Applicant appeared before the Honorable Frank R. Addy, Jr., for a probation hearing because Applicant had violated the terms of probation imposed upon him by the Honorable

¹ Applicant expressly waived his right to an in-person hearing and agreed to proceed over WebEx.

Thomas W. Cooper, Jr., on March 29, 2017, after Applicant pleaded guilty to second-degree domestic violence (2017-GS-32-1412), and had violated the terms of probation imposed upon him by the Honorable Edgar W. Dickson on November 6, 2018, after Applicant pleaded guilty to two counts of forgery, under \$10,000 (2018-GS-38-196; -197).^{2, 3} At the June 7, 2019, probation revocation hearing, Probation Agent Lisa Baker stated that there had already been two determinations that Applicant had violated the terms of probation. Prob. Tran. 4. Agent Baker informed Judge Addy that Applicant had again violated the terms of probation, and provided the following recitation of facts:

On W-32-19-0064, [Applicant] changed his residence without his agent's permission. I spoke to his wife. She is the victim. And she confirmed that he left the residence on 2/9/19. Was refrained from the use of illegal substances. He tested positive on 1/18/19 for marijuana and he tested positive and voluntarily admitted to using amphetamines, methamphetamines, and marijuana on 1/25/19.

He failed to pay his monies. Then on the W-32-19-0138, he failed to report to group on 3/19/19 and an office visit that day. He changed his residence to an unknown location in Greenville.

He failed to allow his agent to do a home visit; he absconded supervision; he violated the special conditions of domestic violence offenders by failing to report and changing his residence without permission.

He was also terminated from the domestic anger counseling. This is the third time he's tried. The victim on the above case . . . came into the office on 3/27/19 and signed an affidavit.

....

She came to the office on 3/27/19 and signed an affidavit in which he threatened to hurt her. She also said he took her phone so she couldn't call for assistance. She stated he had also threatened to set her on fire and break every bone in her face and

² Although the two forgery convictions were from Orangeburg County, the two probation cases from Orangeburg County were transferred to Lexington County.

³ McMahan stated that Applicant was not raising any post-conviction relief claims in this matter regarding the two forgery convictions from Orangeburg County (2018-GS-38-196; -197) or the domestic violence conviction from Lexington County (2017-GS-32-1412) because the statute of limitations would serve as a procedural bar to such claims.

that will be a good reason for him to go to jail.

Prob. Tran. 5-6. Judge Addy revoked the probation for the domestic violence charge and the forgery charges in full, with the two forgery sentences running concurrent to one another but consecutive to the domestic violence sentence, gave Applicant credit for time served, and ordered that Applicant be screened for the Addiction Treatment Unit and for batterer's treatment.

On June 21, 2019, Applicant filed a *pro se* notice of appeal with the South Carolina Court of Appeals. In an order issued on August 9, 2019, the Court of Appeals dismissed the appeal because Applicant did not serve his *pro se* notice of appeal on the South Carolina Department of Probation, Parole, and Pardon Services and did not serve the notice of appeal within ten days of the probation revocation hearing. The remittitur was issued on August 29, 2019.

CURRENT PROCEEDING

In his application for post-conviction relief, filed on August 6, 2019, Applicant alleges that his counsel at his guilty plea hearing before Judge Cooper was constitutionally ineffective in multiple respects and that he did not knowingly and voluntarily waive his right to direct appellate review of his conviction and sentence. On April 10, 2020, Applicant filed an amended application, raising the claim that Applicant was denied the right to counsel at his probation revocation hearing. On April 13, 2021, Applicant filed a second amended application, raising the claim that Simpson was constitutionally ineffective for not arguing that Applicant should get sentencing credit against his criminal domestic violence sentence in Lexington County for the time that he served in the detention center in Orangeburg County. At the start of the evidentiary hearing before this Court, McMahan stated that Applicant would be proceeding upon two claims only: (1) that Simpson was constitutionally ineffective for not arguing that Applicant should get sentencing credit against his criminal domestic violence sentence in Lexington County for the time that he served in the detention center in Orangeburg County and (2) that Applicant did not knowingly and voluntarily

waive his right to direct appellate review of his three probation revocations. This Court finds that Applicant has waived all other claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The record before the Court includes: the records of the Lexington County Clerk of Court regarding Applicant's conviction and sentence for domestic violence; the three probation revocation orders issued by Judge Addy; the transcript from Applicant's guilty plea hearing before Judge Cooper; the transcript from Applicant's probation revocation hearing before Judge Addy; Applicant's records from the South Carolina Department of Corrections; the parties' filings in this matter; and the exhibit admitted into evidence at the evidentiary hearing. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary, as required by S.C. Code Ann. §17-27-80 (1985).

Summary of the testimony presented at the evidentiary hearing.

Applicant testified on his own behalf at the hearing, and testified that, prior to his probation revocation hearing, he was with his wife in Columbia. Applicant testified that he was arrested in Orangeburg. He further testified that the probation revocation hearing before Judge Addy concerned his probation from the Lexington County case and the cases from Orangeburg County. Applicant testified that he wanted to challenge all three of those probation revocations in this case. He further testified that his probation cases from Orangeburg County were transferred to Lexington County and that he was reporting to a probation agent in Lexington County for all three cases.

Applicant testified that he was meeting with Hallie Willm and that they discussed all of the issues of his case and the probation revocation. He further testified that he first saw Simpson at the Lexington County Courthouse right before his probation revocation hearing began. Applicant testified that he and Simpson had talked on the phone once before that for about ten minutes, discussing what would happen at the probation revocation hearing. Applicant testified that he

wanted to get his hearing date pushed back in order to avoid having to appear before Judge Addy, but he does not remember what Simpson said in response to that request.

Applicant testified that he did not have a conversation with Simpson after the probation revocation hearing, except that she told him about the amount of time that he would have to serve. He further testified that he is angry that he was sentenced to eighteen months' imprisonment for a probation violation. Applicant testified that he filed his own appeal afterwards.

On cross-examination, Applicant denied that Simpson told him that he had only ten days in which to appeal the probation revocations.

Simpson testified before this Court for Respondent. Simpson testified that she was admitted to practice law in November of 2017, with all of her work since then had been devoted to the field of criminal law. She further testified that she became involved in Applicant's case after he was arrested on April 3, 2019. Simpson testified that someone from the public defender's office interviewed Applicant by videoconferencing technology on April 11, 2019. She further testified that she had her first meeting with Applicant on April 18, 2019.

Simpson testified that she did not know what county Applicant was in when he was arrested. She testified she met with Applicant in April of 2019 for about an hour, talked with Applicant by phone for about fifteen minutes on May 13, 2019, and then met with Applicant in person for about forty-five minutes on June 4, 2019. She testified that all of those conversations or meetings took place before Applicant's probation revocation hearing was held. She testified that she met with Applicant for about ten or fifteen minutes on the day of the probation hearing before it began.

Simpson testified that she does not know if Applicant spent any time in the detention center in Orangeburg County due to a hold being placed upon him by Lexington County. She testified

that Applicant did not mention his spending time at the detention center in Orangeburg due to his Lexington County probation violation. She testified that she was not aware of any reason that Applicant would be entitled to sentencing credit against his Lexington County sentence for any time spent in the detention center in Orangeburg County.

Simpson testified that she told Applicant immediately after his probation revocation hearing that he had the right to appeal and that he would have to let her know within ten days. She testified that the conversation was memorable to her because Applicant was the only client she has ever represented who was given consecutive sentences for probation violations. She testified that Applicant told her during that conversation that he needed to think about it. She testified that she received a letter from Applicant on June 21, 2019, in which Applicant stated that he wanted to appeal the probation revocations. She testified that the letter was dated June 16, 2019, but that Applicant's signature on the letter had been notarized on June 17, 2019. She testified that she sent a reply to Applicant by mail on the same day on which she received his letter, telling him that it was too late for her to appeal. She testified that she would have appealed on Applicant's behalf if he had requested that she do so within the ten-day window.

On cross-examination, Simpson testified that Applicant never told her that he had been in the detention center in Orangeburg County. She testified that Applicant was arrested after a warrant was issued for his arrest in April of 2019.

Simpson testified that she did not discuss with Applicant that he had already been on probation in his domestic violence case for eighteen months. She testified that Applicant's wife called the probation agent to threaten them, but then retracted her threats.

Simpson testified about her conversations with Applicant about his wife and the probation agent's position on Applicant's revocation. She testified that she told Applicant that his wife was

not present for the revocation hearing and that the agent was going to ask for a full revocation of his probation. She testified that Applicant told her that it was unfair because he needed drug treatment. She testified that she informed Applicant that Judge Addy could make him serve consecutive sentences. She testified that, had Applicant's wife shown up at the revocation hearing, she would have used her as mitigation, but she could not do so and Applicant's wife never returned her phone call.

On-redirect, Simpson testified that she did not know if Applicant's probation for domestic violence had ever been extended. She testified about the ways in which Applicant violated his probation. An exhibit was admitted into evidence at Respondent's request. It was a probation revocation order issued on December 14, 2017. Simpson testified that she recognized the signature of the issuing judge, and agreed that the order extended the length of Applicant's probation to thirty months.

Applicant has failed to prove that Simpson was constitutionally ineffective for not arguing that Applicant should get sentencing credit against his criminal domestic violence sentence in Lexington County for the time that he served in the detention center in Orangeburg County.

Applicant argues that he is entitled to sentencing credit against his Lexington County sentence for time that he spent in the detention center in Orangeburg County. Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." *Strickland*, at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance

was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Counsel is 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). Applicant must overcome this presumption to receive post-conviction relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

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*, at 670. Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of this Court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. *Id.* at 690.

In *Turner v. State*, 384 S.C. 451, 455-56, 682 S.E.2d 792, 794 (2009), the South Carolina Supreme Court held that defendants have the right to counsel in probation revocation hearings, thereby allowing defendants to raise claims that they received the ineffective assistance of counsel from the lawyers who represented them in the revocation proceedings. When those claims are raised in a post-conviction relief application, the courts are to determine whether the lawyers were constitutionally ineffective under the South Carolina Supreme Court's *Strickland* jurisprudence. *Id.* Thus, this Court will consider Applicant's argument that Simpson was ineffective in light of the foregoing authorities.

The Supreme Court has previously affirmed a post-conviction relief court's order that an applicant was entitled to credit against a sentence in one county for time served in another county if the applicant was being held in the second county at the request of the first county or because the first county had issued an arrest warrant for the applicant. *Blakeney v. State*, 339 S.C. 86, 88-89, 529 S.E.2d 9, 11 (2000). In this case, however, Applicant has failed to prove that he is entitled to such relief. Applicant did not present any evidence that he was held for any length of time at the detention center in Orangeburg County due to a hold being placed upon him by Lexington County or the issuance of an arrest warrant for him by Lexington County, as was the case in *Blakeney*. Applicant testified that he had been in the detention center in Orangeburg County for some months, but he presented no evidence linking that time to his Lexington County case. He further testified that he was arrested in Orangeburg County, but did not link that arrest to his Lexington County domestic violence case. Applicant also testified that, prior to his probation revocation hearing, he had been with his wife in Columbia. Thus, Applicant's testimony failed to prove that he spent any length of time in the detention center in Orangeburg County due to his Lexington County case. Simpson's testimony did not support Applicant's claim, either. She did not know if Applicant

spent any time in Orangeburg County due to the Lexington County case, and she testified that Applicant did not tell her that he had spent time in Orangeburg County due to his Lexington County case and that she had no reason to think that he was entitled to that kind of cross-county sentencing credit. Applicant has not proven any deficiency in Simpson's performance because he has not established that she should have asked for cross-county sentencing credit, and even if he had done so, Applicant has failed to establish any resulting prejudice because he has not established that he would have received such credit if Simpson had asked for it. This claim is therefore denied and dismissed with prejudice.

Applicant has failed to prove that he did not knowingly and voluntarily waive his right to direct appellate review of his probation revocations.

Applicant claims that he did not knowingly and voluntarily waive his right to direct appellate review of his probation revocations. When an applicant raises this claim against his probation revocation lawyer, the post-conviction relief court must determine whether the lawyer was constitutionally ineffective under the South Carolina Supreme Court's *Strickland* jurisprudence. *Turner*, at 455-56, 682 S.E.2d at 794. "Probation revocation counsel is not required to inform a probationer of the right to an appeal absent extraordinary circumstances. *Fleming v. State*, 399 S.C. 380, 381, 731 S.E.2d 889 (2012) (per curiam) (citing *Turner v. State*, 384 S.C. 451, 455-56, 682 S.E.2d 792, 794 (2009)). When a defendant requests an appeal, but counsel fails to file a notice of appeal, counsel is deficient and the defendant is entitled to a belated appeal without having to show that the appeal likely would have had merit. *Fleming*, at 381, 731 S.E.2d 889 (citations omitted).

After hearing the testimony presented at the hearing, this Court finds that Simpson informed Applicant of his right to appeal the probation revocations. Applicant denied that Simpson informed him of his right to appeal and of the ten-day deadline for filing a notice of appeal, but in

light of the other testimony present, finds that his testimony at the hearing was not credible. Simpson credibly testified that she informed Applicant of his right to appeal immediately after the conclusion of his probation revocation hearing, and that Applicant told her that he needed to think about it. Applicant was warned that the appeal would have had to be undertaken within ten days of his hearing. Judge Addy revoked Applicant's probation at the hearing on June 7, 2019. Simpson received a letter from Applicant on June 21, 2019, requesting an appeal; however, at that point it was already too late for Simpson to appeal on Applicant's behalf. When Applicant had the opportunity to notify Simpson that he wanted to appeal, he did not take advantage of that opportunity. By the time that he changed his mind and notified Simpson of that fact, it was too late. This Court finds that Applicant knowingly and voluntarily waived his right to a direct appeal. This claim is denied and dismissed with prejudice.

CONCLUSION

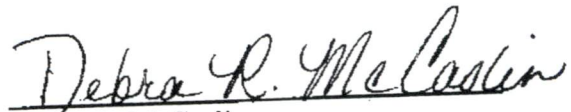
Based on all the foregoing, this Court finds that Applicant has failed to prove any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal, through counsel, within thirty days from the receipt of this order to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an applicant has a right to the assistance of appellate counsel in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that, if the applicant wishes to seek appellate review, he must serve and file a notice of appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

IT IS SO ORDERED this 3 day of May, 2021.


Debra R. McCaslin
Presiding Judge

Lexington, South Carolina