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Nov 18 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 2021-UP-372

ALLEN STONE,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2018-001847

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, respondent Allen Stone (“Stone”) requests that this Court grant rehearing. This Court misapplied the standard of review. Under the highly deferential standard of review for PCR cases, the grant of PCR relief to Stone should be affirmed.

All Stone seeks is a new probation revocation hearing with effective counsel. The Honorable Kristi Lea Harrington revoked Stone’s probation in full partly based on an arrest for a serious crime that predated Stone’s conviction in this case. App. 59, ll. 6 – 15. App. 19. Judge Harrington also did not hear from Stone’s attorney at the initial revocation hearing that the hearing officer recommended a one-year revocation. App. 52 – 59. App. 190, l. 13 – 191, l. 13. The

Honorable Thomas A. Russo granted Stone a new probation revocation hearing from the bench after the hearing and later entered a formal written Order. App. 192, l. 21 – 193, l. 17. App. 196. Even the Attorney General at the PCR hearing admitted that Judge Harrington’s full revocation seemed “unduly harsh.” App. 189, ll. 6 – 8.

This Court held that revocation counsel had a valid strategic reason for not informing Judge Harrington of the hearing officer’s revocation. This finding on appeal does not comport with the deferential standard of review. This Court must uphold the PCR judge’s ruling if there is any evidence in the record to support it. See Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Revocation counsel did claim the strategy referenced by the Court at the PCR hearing. However, Judge Russo’s holding is more nuanced and requires deference. While revocation counsel may have had that strategy entering the hearing, Judge Russo found that at the point that the agent asked Judge Harrington to revoke in full it became necessary to inform the judge of the hearing officer’s recommendation. App. 190, l. 13 – 191, l. 13. Judge Russo recognized that, in the fluid and rough process that often characterizes revocation hearings, revocation counsel needed to react quickly and emphasize this point to Judge Harrington. Relying on the fact that the hearing officer’s recommendation was in a stack of paperwork sitting on the bench was not a valid strategy at that point in the hearing.

This Court also erred in finding that because revocation counsel brought the one-year recommendation to Judge Harrington’s attention at the reconsideration hearing, Stone cannot show prejudice. This determination by the Court undermines its earlier finding of a valid trial strategy and shows that Judge Russo was correct. If revocation counsel felt the need to emphasize the one-year recommendation at the reconsideration hearing, then the same logic applies to the initial hearing once it became apparent that Judge Harrington might revoke in full. Revocation counsel

cannot have it both ways. Judge Russo found that had counsel performed effectively at the first hearing, it would have made the mitigation presentation more effective and reduced the likelihood of a full revocation. App. 193, ll. 5 – 24. This finding by the PCR judge is entitled to deference.

This Court also erred in applying the standard of review to the PCR court's findings concerning the failure of revocation counsel to stress to Judge Harrington that Stone's felony arrest was for pre-conviction conduct. The PCR judge found that Solar performed deficiently when she failed to clarify a mistake made by the probation agent at the revocation hearing. App. 201 – 02. The agent told Judge Harrington that "**since being on probation**, [Stone] was arrested eight times." App. 53, ll. 19 – 21 (emphasis added). The agent then listed the arrests. App. 53, l. 19 – 54, l. 5. By far, the most serious arrest listed by the agent was for third-degree burglary. App. 53, l. 19 – 54, l. 5. The agent listed the dates for each arrest and when she got to the burglary, she said, "November 13th of 2015, for burglary third charge, which he was originally arrested for back in October 11th of 2013." App. 53, l. 19 – 54, l. 5.

The original arrest date for the burglary charge was in 2013, which was before Stone pled guilty in 2014. App. 19. Therefore, Stone had not been arrested for a crime that he allegedly committed "since being on probation" and the inclusion of this arrest in the agent's list likely gave Judge Harrington a false impression. Revocation counsel did nothing to correct this error.

At the end of the hearing, Judge Harrington asked, "He's had some arrests then?" and the agent responded, "Yes, he's had several arrests." App. 59, ll. 6 – 7. Judge Harrington then asked revocation counsel if she had anything further, giving her another opportunity to correct this mistake, but she failed to do so. App. 59, ll. 8 – 9. Judge Harrington then revoked Stone in full. App. 59, ll. 10 – 15. At the reconsideration hearing, Stone attempted to clarify this fact for Judge Harrington. App. 66, ll. 1 – 11. However, revocation counsel did not tell the judge that Stone's

assertions were accurate. Without revocation counsel confirming this fact for the judge, the court was only left with Stone's claims that went unverified by his attorney. Stone was an alcoholic with mental health problems and Judge Russo correctly found that revocation counsel needed to be a strong advocate on this crucial point during the hearing and could not leave it to her client to convince the judge. These facts and findings by Judge Russo are entitled to deference and this Court should reexamine them in light of the standard of review.

Finally, as to the portion of this Court's Opinion addressing Stone's court absences, it is clear from the record in this case that the PCR court was primarily concerned with the first two deficiencies. Even if this finding is incorrect, the remainder of the PCR Court's Order is still entitled to deference and provides sufficient support for granting relief. This Court may affirm a PCR judge's ruling for any grounds appearing in the record. See Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 391 (1991). Judge Russo's ruling is supported by the evidence. This Court should grant rehearing and allow Stone to keep his new revocation hearing with effective counsel.

s/David Alexander
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ATTORNEY FOR RESPONDENT

This 18th day of November, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Megan Harrigan Jameson, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Allen Stone, #267003, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 18th day of November, 2021.

s/David Alexander
Appellate Defender

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ATTORNEY FOR RESPONDENT