

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

DISHSHI YOUNG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000528

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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¹ 263 S.C. 110, 108 S.E.2d 35 (1974)

ISSUES PRESENTED

I.

Did the PCR court err in denying Petitioner a belated appeal pursuant to *White v. State*² where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal?

II.

Did the PCR court err in finding probation counsel effective where counsel failed to ensure that Petitioner received credit for the time that he served in the Orangeburg County Detention Center while awaiting his Lexington County probation revocation hearing?

² 263 S.C. 110, 108 S.E.2d 35 (1974)

STATEMENT OF THE CASE

On March 29, 2017, Petitioner Dishshi Young entered a guilty plea³ to domestic violence second degree before the Honorable Thomas Cooper, Jr. App. 4; App. 14. Petitioner was sentenced to eighteen months imprisonment suspended to time served and eighteen months on probation. App. 109. The following year, during the March 2018 term of the Orangeburg County⁴ grand jury, Petitioner was indicted for two counts of forgery, less than \$10,000. App. 112-115. On November 6, 2018, Petitioner appeared before the Honorable Edgar W. Dickson and pled guilty to the two forgery charges. Petitioner was sentenced to four years imprisonment suspended to time served and two years of probation on each count, sentences to run concurrently. App. 4; App. 116-117.

Petitioner did not appeal any of his convictions or sentences. On June 7, 2019, Petitioner appeared before the Honorable Frank R. Addy, Jr. on multiple probation violations. App. 14-21. Petitioner was represented by Kebra Simpson. Agent Lisa Baker from the Department of Probation, Pardon and Parole Services appeared on behalf of the State. App. 1. During the hearing the circuit court was made aware of Petitioner's prior violations of the domestic violence probation, as well as the current violations of both the domestic violence probation and forgery probation. App. 4-5. Petitioner's more recent violations included failing to refrain from using illegal substances, changing his residence without notifying his probation agent, failing to pay monies, failing to report, failing to allow his probation agent to complete a home visit,

³ Petitioner was initially charged with domestic violence of a high and aggravated nature. He waived presentment to the Grand Jury on the lesser included charge of domestic violence second degree and entered a guilty plea. App. 106-108.

⁴ Petitioner's probation in Orangeburg was subsequently transferred to Lexington where he was already under supervision on the domestic violence charge. App. 19; App. 64, ll. 7-20.

absconding supervision and being terminated from domestic anger counseling for a third time. App. 5, ll. 1-19.

Agent Baker recommended a partial revocation of ninety days followed by reinstatement of probation on all of Petitioner's cases. Additionally, Agent Baker recommended the following special conditions: Petitioner would remain incarcerated until admitted into an inpatient drug treatment program, probation would be extended for one year, Petitioner would have no contact with the victim of the domestic violence⁵ charge for the duration of supervision, refer Petitioner to transitional housing, require Petitioner to attend aftercare, zero tolerance for further termination from the domestic abuse counseling, and restructure all fees, fines, and restitution. App. 6, l. 19-App. 7, l. 8.

Petitioner, through Counsel Simpson, admitted he had violated the terms and conditions of his probation. App. 7, l. 24-App. 8, l. 1. Counsel Simpson informed the court that she had Petitioner screened through the Lexington/Richland Alcohol and Drug Abuse Council (LARDAC) due to his drug problems. LARDAC had recommended Petitioner enter Morris Village for addiction treatment. App. 8, ll. 3-8. Petitioner also asked the court to send him to treatment. App. 9, ll. 7-16.

The court found that Petitioner's violations were "abysmal", and that Petitioner was "the worst probation candidate, perhaps, ever." App. 11, ll. 10-13. The court revoked Petitioner's probation in full on all three charges. The court ordered that the two four-year forgery conviction sentences would be run concurrent to one another but consecutively to the eighteen-month domestic violence sentence. The court further recommended that Petitioner be screened

⁵ The victim in the domestic matter was Petitioner's wife. Agent Baker informed the court that Mrs. Young reported that Petitioner had threatened her by saying he would "set her on fire and break every bone in her face and that will be a good reason for him to go to jail." She further reported that Petitioner had taken her phone so that she could not call for help. App. 6, ll. 8-13.

for the Addiction Treatment Unit and batterer's treatment while incarcerated. Counsel Simpson informed the court that Petitioner was entitled to sixty-six days of time served credit. App. 11, l. 14 - App. 12, l. 16.

Petitioner filed a *pro se* notice of appeal that was eventually dismissed as untimely. App. 45-52. Petitioner then filed the present PCR application alleging ineffective assistance of his original plea counsel and raising a White v. State⁶ claim. App. 22-31. The State filed a return and partial motion to dismiss for failure to comply with the statute of limitations. App. 32-39. Appointed counsel for Petitioner, Ashley McMahan, subsequently filed an amended PCR application clarifying that Petitioner was challenging his probation revocation, not his original guilty plea, and alleging that Petitioner had been denied the right to counsel during the probation revocation hearing. App. 40-52. Counsel McMahan filed a second amended PCR application alleging ineffective assistance of counsel for failure to argue that Petitioner was entitled to credit for the time he served in Orangeburg County prior to the revocation hearing. App. 53-55. An evidentiary hearing was convened on April 28, 2021, via WebEx, before the Honorable Debra R. McCaslin. The State was represented by Taylor Smith. Petitioner was represented by Ashley McMahan. App. 56.

At the hearing Petitioner testified he had wanted to appeal the revocation because he believed he had gotten too much time, but that Counsel Simpson had not informed him about the appeal process. App. 62, ll. 10-15; App. 70, ll. 3-6. Petitioner admitted he had filed a notice of appeal. App. 69, ll. 18-22. However, he stated that it was another inmate, not Counsel Simpson, who had told him about the appeal process. App. 89, l. 25-App. 90, l. 15. Petitioner also testified that he had completed the eighteen months of domestic violence probation and should

⁶ 263 S.C. 110, 108 S.E.2d 35 (1974)

not have been revoked on that charge. App. 68, ll. 4-9. Additionally, Petitioner had served time in the Orangeburg County Detention Center prior to the probation revocation, and he believed he was entitled to credit of roughly four months. App. 68, l. 17-App. 69, l. 7. Petitioner admitted that he did not recall having a conversation with Counsel Simpson about the time he served in Orangeburg County and testified that he had only spoken with Counsel Simpson for ten minutes prior to the revocation hearing. He stated that after the hearing the only thing he spoke with Counsel Simpson about was the amount of time he received. App. 67, ll. 1-19; App. 69, ll. 8-17.

Counsel Simpson testified that Petitioner was interviewed by her office on April 11, 2019, approximately a week after his arrest. She had her first meeting with him on April 18, 2019, which lasted about an hour. Counsel Simpson had notes that reflected a fifteen-minute phone call with Petitioner on May 13, 2019, as well as another in person meeting with him on June 4, 2019, that lasted forty-five minutes. She also spoke with Petitioner directly before his probation revocation hearing for ten to fifteen minutes. App. 72, l. 20-App. 73, l. 19.

Counsel Simpson confirmed that Petitioner did not tell her that he had spent any time in the Orangeburg County Detention Center prior to the revocation hearing in Lexington County. App. 73, l. 24 – App. 74, l. 7. Counsel Simpson also stated that Petitioner did not discuss with her that he believed he had completed the eighteen months of domestic violence probation. App. 78, ll. 3-7. She further testified that she knew she had informed Petitioner of his right to appeal because he was the first client of hers to get consecutive time. Counsel Simpson stated that Petitioner told her he wanted to think about appealing. Petitioner eventually sent Counsel Simpson a letter expressing his desire to appeal his sentence but by then the time to file an appeal had passed. App. 74, l. 8-App. 76, l. 15.

In response to Petitioner's argument that he had finished the domestic violence probation, the State entered an order from a revocation hearing that occurred in December 2017. That order extended Petitioner's probationary term to thirty months. App. 93. Counsel Simpson did not have any knowledge that Petitioner's probation had been extended and Petitioner did not recall the hearing stating he did not always pay attention during his court appearances. App. 85, ll. 1-3; App. 89, ll. 1-6.

An order of dismissal was filed on May 3, 2021. App. 94-105. The PCR court found that Petitioner had failed to establish that he was entitled to sentencing credit from the time he spent in Orangeburg County Detention Center and that he could not show prejudice from any alleged failure of Counsel Simpson to request the credit. App. 102-103. The PCR court also found that Counsel Simpson informed Petitioner of the right to appeal and the filing deadline but stated that Petitioner failed to inform Counsel Simpson of his desire to appeal in a timely manner. The court ruled this constituted a knowing and voluntary waiver of his right to a direct appeal. App. 103-104.

ARGUMENT

I.

The PCR court erred in denying Petitioner a belated appeal pursuant to *White v. State*⁷ where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal.

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Roe v. Flores–Ortega*, 528 U.S. 470, 480 (2000). In *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) this Court held that a defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. Since then, this Court has announced two distinct standards for evaluating ineffective assistance of counsel claims for failure to file an appeal.

For convictions following a trial this Court has held that “all defendants who have been found guilty of a crime have a right to be informed of the possibility of appeal and the method for taking an appeal.” *Frasier v. State*, 306 S.C. 158, 161, 410 S.E.2d 572, 574 (1991). For guilty pleas, this Court has held that “absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.” *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). In *Turner v. State*, 384 S.C. 451, 682 S.E.2d 792 (2009) this Court applied the guilty plea standard to appeals from probation revocations writing,

⁷ 263 S.C. 110, 108 S.E.2d 35 (1974)

We hold that probation counsel is not required to inform a probationer of his right to an appeal absent extraordinary circumstances. This holding is in accord with counsel's duties at a plea hearing. In our view, a probationer should not be afforded additional protections in a probation revocation hearing, a proceeding that is not a stage of criminal prosecution and that occurs after sentencing, which are not constitutionally mandated in a guilty plea hearing. In other words, probation counsel is not held to a higher performance standard than that imposed upon plea counsel.

Turner at 456-57, 682 S.E.2d at 795 (2009). “However, when a criminal defendant requests an appeal, but counsel fails to file an appeal, counsel is deemed deficient. In such a case, the defendant is entitled to a belated appeal without showing the appeal would likely have had merit.” Fleming v. State, 399 S.C. 380, 381, 731 S.E.2d 889 (2012) *citing* Roe v. Flores-Ortega, 528 U.S. 470 (2000); Rodriguez v. United States, 395 U.S. 327 (1969).

There is no evidence in the record to support a finding that Petitioner made a *knowing and intelligent decision* not to pursue an appeal. The PCR court found Counsel Simpson’s testimony that she informed Petitioner of his right to an appeal credible. However, there must still be probative evidence of a knowing waiver, even considering a PCR judge’s credibility findings. See Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). In the present matter Petitioner filed a *pro se* notice of appeal and wrote to counsel requesting she file an appeal. The notice of appeal, though untimely, was probative evidence of Petitioner’s desire to appeal his probation revocation and supported a finding that Petitioner was entitled to a belated direct appeal.

II.

The PCR court erred in finding probation counsel effective where counsel failed to ensure that Petitioner received credit for the time that he served in the Orangeburg County Detention Center while awaiting his Lexington County probation revocation hearing.

A probationer's right to counsel does not arise under the Sixth Amendment but is derived from court rules and case law. See Rule 602(a), SCACR; Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009). Accordingly, because a probationer has a right to counsel claims of ineffective assistance of probation counsel are analyzed under the framework set forth in Strickland v. Washington⁸. Id. Pursuant to Strickland, the PCR applicant must prove that (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case.

The prevailing professional norm when dealing with sentencing credits is to inform the court of the amount of time a defendant should be credited so that the information can be included on the sentencing sheet. It is imperative that a sentencing sheet, or Form 9 in probation matters, contain unambiguous directions for SCDC to follow in entering a prisoner's sentence as SCDC is generally confined to the face of the sentencing sheet in determining the length of a sentence. See Tant v. South Carolina Dept. Corrections, 408 S.C. 334, 759 S.E.2d 398 (2014).

Counsel Simpson informed the court that Petitioner was entitled to sixty-six days credit time served based on the amount of time he spent in the Lexington County Detention Center. However, Petitioner had been held in Orangeburg County prior to being transferred to Lexington County and Counsel Simpson did not inform the court of this fact. Admittedly, Petitioner did not inform Counsel Simpson that he had been held in Orangeburg County on probation warrants

⁸ 466 U.S. 668 (1984).

directly prior to his transfer to Lexington County. However, counsel has a duty to conduct a reasonable investigation into the facts and circumstances surrounding a case. See Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); see also Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007).

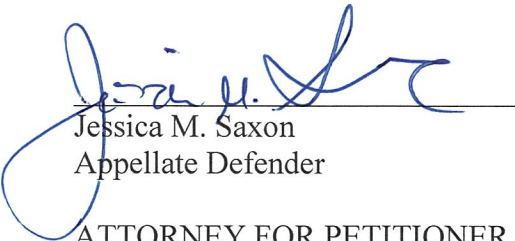
South Carolina law requires that a prisoner be given full credit for any time served prior to trial and sentencing. S.C. Code Ann. 24-13-40. For a probationer the prior time can be in the form of pre-trial, prior revocations, and pre-revocation hearing detention. See DPPPS Form 9. Considering that a probationer can receive multiple forms of time served credit it is not only reasonable but necessary that counsel for a probationer investigate the amount of time that a probationer has served. This did not occur in Petitioner's case. Counsel Simpson only knew about the amount of time Petitioner has served in the Lexington County Detention Center. Petitioner had served time in Orangeburg Detention Center and had also served time on prior revocations. This was not communicated to the court and constituted deficient performance by counsel.

STATEMENT OF ISSUE ON APPEAL

Did the circuit court judge abuse his broad discretion in revoking Petitioner's probation in full and running the sentences consecutively where the probation agent recommended only partial revocation, drug treatment, and continued probation?

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 21st day of January, 2022.

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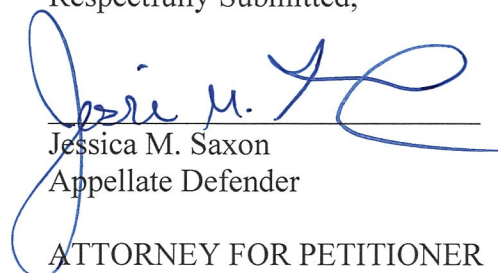
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dishshi Young 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 Debra R. McCaslin, which was held on April 28, 2021, 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 Dishshi Young.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 21st day of January, 2022.

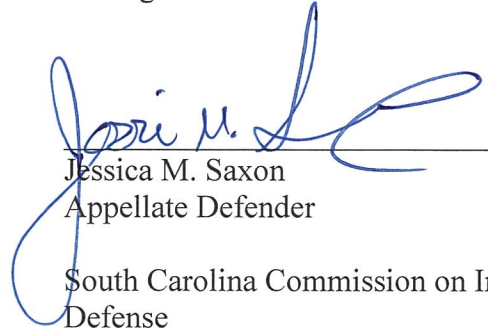
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CERTIFICATE OF COUNSEL

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."



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This 21st day of January, 2022.