STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Jan 28 2022

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 2021-UP-372 (S.C. Ct. App. Filed November 3, 2021)

Lower Court Case Nos.
2014-GS-10-03141 and 2017-CP-10-0901

ALLEN STONE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000052

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

DAVID ALEXANDER
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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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 16, 2021.

QUESTION PRESENTED

In this PCR case where petitioner Allen Stone won a new probation revocation hearing, did the Court of Appeals fail to follow the standard of review when it reversed the PCR judge's determination that counsel's deficient performance prejudiced petitioner when she failed to provide the judge with all relevant information at the initial probation revocation hearing?

STATEMENT OF THE CASE

On August 11, 2014, respondent Allen Stone pled guilty to second-degree burglary before the Honorable J.C. Nicholson, Jr., in Charleston County. App. 19. Thomas Richard Waring, II, represented the State and Patricia Ann Kennedy represented Stone. App. 19. Judge Nicholson sentenced Stone to fifteen years' imprisonment suspended upon the service of five years' probation. App. 48, l. 22 – 49, l. 1.

On July 26, 2016, a probation revocation hearing was held before the Honorable Kristi Lea Harrington. App. 52. Agent Holmes appeared for the department and Kelly Kassis Solar represented Stone. App. 52. Judge Harrington revoked Stone in full. App. 59, ll. 10 – 15. Judge Harrington held a hearing on Stone's motion to reconsider on December 5, 2016, but denied the motion by written Order dated the same day. App. 61. App. 80.

On February 22, 2017, Stone filed a PCR application. App. 116. On March 1, 2018, the Honorable Thomas A. Russo held a hearing on Stone's application. App. 152. Rasheeda Cleveland represented the State and James K. Falk represented Stone. App. 152. At the conclusion of the hearing, Judge Russo granted Stone a new probation revocation hearing from the bench. App. 192, l. 21 – 193, l. 17. On June 25, 2018, Judge Russo entered a formal written Order. App. 196. On October 1, 2018, Judge Russo denied the State's motion to alter or amend. App. 216.

The State's petition for certiorari was transferred to the Court of Appeals and on November 25, 2020, the Court of Appeals granted the petition and ordered further briefing. On November 3, 2021, without oral argument, a panel of the Court of Appeals consisting of Judges Konduros, Hill, and Hewitt reversed the PCR judge's grant of relief. Stone v. State, 2021-UP-372 (S.C. Ct. App. Nov. 3, 2021). After denial of his petition for rehearing, petitioner Stone now seeks certiorari in this Court.

ARGUMENT

In this PCR case where petitioner Allen Stone won a new probation revocation hearing, the Court of Appeals failed to follow the standard of review when it reversed the PCR judge's determination that counsel's deficient performance prejudiced petitioner when she failed to provide the judge with all relevant information at the initial probation revocation hearing.

The Court of Appeals failed to follow the highly deferential standard of review for PCR cases. Appellate courts defer to a PCR judge's findings of fact and will uphold them if evidence in the record supports them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Judge Russo's grant of a new probation revocation hearing for petitioner Stone was supported by evidence and inferences below and should have been upheld on appeal.

Factual and Procedural Background

On August 11, 2014, Respondent Allen Stone ("Stone") pled guilty to second-degree burglary before Judge Nicholson. App. 19. App. 22, ll. 1 – 6. App. 34, ll. 16 – 19. Judge Nicholson sentenced Stone to fifteen years' imprisonment suspended to five years' probation. App. 48, l. 22 – 49, l. 1. Stone violated his probation and an administrative hearing was held on May 17, 2016. App. 75. Present at the hearing were Stone, Kathleen Nadobny (the administrative hearing officer), and Christian Aulbach (the probation agent). App. 75. The hearing officer recommended revocation for one year and then continuing on probation. App. 75. App. 65, ll. 2 – 14. App. 68, ll. 13 – 16.

Approximately two months after the administrative hearing, Stone appeared before Judge Harrington for a probation revocation hearing. App. 52. The probation agent at the hearing before Judge Harrington was a different agent than the one at the administrative hearing. App. 52. After

reciting the violations, this agent told Judge Harrington, "The agent is recommending a revocation and terminate." App. 54, ll. 6 – 7. After hearing from Stone and counsel Kelly Solar ("Solar"), Judge Harrington revoked Stone's probation in full. App. 59, ll. 10 – 15. At no point during the hearing did Solar tell Judge Harrington about the hearing officer's recommendation of a one-year revocation. App. 52 – 59. Revocation counsel Solar filed a motion for reconsideration which Judge Harrington heard and where Solar told the court about the initial recommendation of a one-year revocation, but Judge Harrington did not alter her ruling. App. 61 – 80.

At the PCR hearing, Judge Russo was deeply troubled by Solar's failure to tell Judge Harrington about the administrative hearing officer's recommendation at the initial hearing. App. 189, l. 14 – 193, l. 2. Judge Russo pointed out that circuit judges "have limited information in these hearings" and rely on the parties to give the court "the full picture." App. 190, ll. 1 – 12. He noted that the probation agent does not "always agree with the hearing officer's recommendation." App. 190, ll. 7 – 12. Judge Russo then stated:

> But as I sit on these matters I want to know the hearing officer, what the recommendation is because the hearing officer hears a lot more during those hearings than simply the agent's position. And so the agent didn't bother to inform the Court that there was a recommendation from the hearing officer of a one year revocation. He simply stated the agent is recommending a revocation term and give him credit for time he has served and was silent as to any recommendation from the hearing officer.
>
> Now, I do agree with what Ms. Kennedy mentioned earlier regarding or Ms. Solar mentioned earlier with regards to the judge having the hearing officer's report. And I'm confident she did for the probation matter. What I don't know is if she read it or if she saw it or sometimes things get lost in these packets that are presented and at that point when the officer—agent said that the agent recommends revocation and terminated, **I think it would have been incumbent <u>at that point</u> for Ms. Solar to mention the fact that there was a recommendation by the hearing officer quite different than that even though they were seeking something less than the hearing officer recommendation.**

App. 190, l. 13 – 191, l. 13 (emphasis added). Judge Russo further reasoned that even if counsel's goal was to have Stone continue on probation, "once the other side comes out and is actually recommending a 15-year revocation, it's incumbent at that point that you got to bring up that hearing officer's recommendation so that the judge if he or she has not looked at that report will be aware of it." App. 191, ll. 17 – 22.

The PCR court was also well aware that Solar made the hearing officer's recommendation known to Judge Harrington during the reconsideration hearing. App. 192, l. 21 – 193, l. 11. Judge Russo said that "these very things that I am mentioning now were then brought up and detailed in that motion to reconsider and the judge clearly had the authority to consider it or not consider it." App. 192, l. 21 – 193, l. 1. But bringing this up only during the reconsideration was still deemed insufficient by the PCR judge, who found that had counsel performed adequately 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. Even the Attorney General at the PCR hearing admitted that Judge Harrington's full revocation seemed "unduly harsh." App. 189, ll. 6 – 8.

The Court of Appeals' Did Not Follow the Standard of Review

In South Carolina, probationers have a right to counsel and our courts apply the familiar Strickland v. Washington, 466 U.S. 668 (1984) test for determining ineffective assistance claims. Turner v. State, 384 S.C. 451, 455-56, 682 S.E.2d 792, 794 (2009). Here, Solar's failure to provide the relevant information necessary to challenge the agent's request to revoke in full was deficient performance. Judge Russo's ruling was supported by the evidence and certiorari should be granted to correct the Court of Appeals misapplication of the deferential standard of review.

In a case analogous to respondent's, the Fifth Circuit recognized that failing to challenge inaccuracies in a presentence investigation report constituted ineffective assistance. See Spriggs

v. Collins, 993 F.2d 85 (5th Cir. 1993) abrogation recognized by Dale v. Quarterman, 553 F.3d 876 (5th Cir. 2008). In Spriggs, the presentence investigation report "claims that Spriggs had 'a *long history of assaultive and aggressive behavior.*'" Spriggs, 993 F.2d at 89 (emphasis in original). The Fifth Circuit examined Spriggs' record and determined he had no convictions for "assaultive" actions and the report improperly relied on unadjudicated criminal conduct. Id. The court held trial counsel performed deficiently for not objecting to this mischaracterization of Spriggs' record. Id.

While Spriggs could not demonstrate prejudice—primarily because he had been convicted of a "senseless murder," the Fifth Circuit's analysis is instructive here. Id. at 90. Spriggs' attorney left unchallenged an error in the sentencing information provided to the court. Here, Stone's attorney failed to make the court aware that the probation agent was seeking something far more harsh than what had been recommended by the probation hearing officer. As Judge Russo reasoned, making sure the judge at a very quick revocation hearing knows about a favorable recommendation is critical.

The Court of Appeals held that revocation counsel had a valid strategic reason for not informing Judge Harrington of the hearing officer's revocation—that Stone wanted to avoid even a one-year revocation. This finding on appeal does not comport with the deferential standard of review. If any evidence in the record supports Judge Russ's ruling, it should be affirmed. 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 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, 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.

As the PCR judge recognized, the speed with which probation revocation hearings are conducted does not always match the seriousness of the punishment a defendant faces. In Barber v. Nelson, 451 F.2d 1017, 1018 (9th Cir. 1971), the defendant began a probation revocation hearing *pro se*. A public defender in the courtroom "made his presence known" but "came to the hearing with no knowledge of the case save the misinformation from the probation officer that revocation would be sought because of [the defendant's] failure to make restitution." Barber, 451 F.2d at 1018-19. The Government was seeking revocation because the defendant had allegedly been beating his wife, not because of failure to pay restitution. Id. The court reasoned that when "the revocation hearing took an entirely different turn," counsel performed deficiently by failing to ask for a continuance and preparing for the more serious allegation. Id. at 1019. The court reversed. Id. The Barber analysis applies here to Solar's failures when the hearing "took an entirely different turn."

The Court of Appeals 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.

The Court of Appeals also erred in misapplying 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.

"[T]he authority of the court of general sessions to revoke such suspension of sentence may not be capriciously or arbitrarily exercised, but should always be predicted upon an evidentiary showing of fact tending to establish violation of the conditions." State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950). Solar's failure to inform Judge Harrington that the serious arrest was before Stone's guilty plea led to the Judge's decision to revoke in full not being based on a correct evidentiary record. "[T]he authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions." State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999).

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. 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 were entitled to deference from the Court of Appeals.

Regarding the portion of Court of Appeals' 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. The Court of Appeals ignored the rule that an appellate 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 was supported by the evidence and the Court of Appeals erred in reversing the grant of a new probation revocation hearing.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, reverse the Court of Appeals, and allow the PCR court's grant of a new probation revocation hearing stand.

Respectfully Submitted,

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2022.