

STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Case No.: 2020-001435

Cassie Cunningham, #362287,

Petitioner,

vs.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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RECEIVED

Feb 21 2023

S.C. SUPREME COURT

STATEMENT OF ISSUES ON APPEAL

1. Did the post-conviction relief court err in finding that plea counsel's failure to utilize and present mitigating evidence, when the sentencing judge clearly took her prior history into consideration, was not ineffective assistance of counsel?

STATEMENT OF THE CASE

Petitioner was indicted by the York County Grand Jury in June 2014 for felony driving under the influence resulting in death. She was represented by retained counsel, James Boyd, Esquire, and Solicitor Kevin Brackett prosecuted the case. Petitioner appeared before the Honorable Brian M. Gibbons and entered a plea of guilty without negotiations or recommendations on December 1, 2014. She was sentenced to 23 years' imprisonment and a \$15,000 fine.

Petitioner filed an application for post-conviction relief (PCR) on November 25, 2015. It proceeded to a merits hearing before the Honorable J. Mark Hayes on February 1, 2017 in York, South Carolina. Petitioner was represented by James P. Craig, Esquire, and the State was represented by Assistant Attorney General Justin Hunter, Esquire. The allegations before the court were:

1. Ineffective Assistance of Counsel
 - a. Failing to properly advise the Defendant of all options available to her prior to entry of plea of guilt.
 - b. Failing to enter plea negotiations with the solicitor prior to the Defendants plea of guilty.
 - c. Failing to fully investigate and challenge the Defendant's DUI conviction.
 - d. Failing to properly and fully explain the circumstances of the Defendant's DUI 1st conviction at the Defendant's sentencing hearing.
 - e. In developing and implementing a totally ineffective defense strategy of hiring and relying upon the testimony of psychologist Dr. Goldsmith, who was the brother of the sentencing judge's predecessor; that is to say that the Defendant's trial attorney based his defense on the anticipated leniency of the trial judge because the trial judge's predecessor in office's brother as to testify on behalf of the Defendant.
 - f. In making an ineffective presentation of the Defendant's medical condition and other mitigating factors at the Defendant's sentencing hearing.
 - g. In advising the Defendant that she had no grounds for an appeal.

Judge Hayes denied relief on all grounds.

Petitioner filed a second application for PCR on March 31, 2021. The State filed a return and motion to dismiss on July 20, 2021, requesting a hearing only on whether Petitioner was

entitled to a belated appeal of the denial of her first PCR action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Petitioner was represented by Tommy A. Thomas, Esquire, and the State was represented by Lillian Meadows, Esquire. This issue was resolved via consent order between the parties and signed by the Honorable Edward W. Miller on September 1, 2022. This Petition for Writ of Certiorari follows.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-181, 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. Smalls, at 180-181, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR 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

1. The post-conviction relief court erred in finding that plea counsel's failure to utilize and present mitigating evidence, when the sentencing judge clearly took her prior history into consideration, was not ineffective assistance of counsel.

In his representation of Petitioner, plea counsel went to efforts to investigate her personal history, the circumstances of her prior DUI conviction, and the details of the accident in her instant case. App. p.120, line 3 – p.121, line 17. However, at the time of plea entry, plea counsel used none of this evidence to support his client. He admitted at the PCR merits hearing that, "I thought it was important to let the judge know this wasn't a place that somebody was out partying, drank too much and killed somebody. This was a situation where somebody was drinking because of some deep rooted causes in that." App. p.121, lines 1-5. However, he also admitted in the same hearing that the circumstances of her prior DUI were not brought out in court. App. p.128, lines 9-11.

It is clear from the testimony of both Petitioner and Plea Counsel that this case was always going to be a guilty plea due to the severity of the crime and Petitioner's obvious involvement. Therefore, as stated by plea counsel, "it became a situation of trying to get the best plea for you that was possible and present the best mitigation possible." App. p.119, lines 10-12. Plea Counsel further testified that the Solicitor's Office refused to make an offer. Petitioner's testimony at the hearing was that she thought Plea Counsel was failing to negotiate on her behalf when he did not present her with offers, but explained they would only offer something like twenty years and he felt he had a better chance going forward without a negotiation. App. p.108, lines 12-22.

Regarding mitigation, Plea Counsel testified that he hired an accident reconstruction expert to review the Highway Patrol's MAIT report, but he found no errors. His next idea was to

explore Petitioner's history of abuse and drinking, and hired Dr. Goldsmith for an evaluation. He testified that his goal was to present testimony from Dr. Goldsmith that showed Petitioner would be better served by treatment options than a prison sentence. He believed that the entire presentation, between his words and Dr. Goldsmith's, were successful. App. p.122, lines 10-11; lines 17-10. However, he admitted that it did not have the desired effect on the sentencing judge, but he did not believe it harmed her. App p.122, lines 20-23.

This is in stark contrast to Petitioner's testimony, the trial transcript, and the results. Petitioner testified that she met with Dr. Goldsmith one time for 1.5 hours and was very uncomfortable doing so, but powered through to help her case. App. p.111, lines 4-18. She never saw a copy of his evaluation and, when she asked plea counsel what Dr. Goldsmith would say, was told that he was not sure, but it would be helpful. App.p.28, lines 5-7. Instead, both he and Plea Counsel stated that Petitioner has bipolar disorder, which led to substance abuse issues. Petitioner adamantly testified that she has never been diagnosed as bipolar and does not need mental health medications. App. p.113, lines 12-13; p.114, lines 2-3. Petitioner also testified that she never attempted suicide, despite Dr. Goldsmith's testimony she had made eight attempts. App.p.112, lines 19-25.

Petitioner also testified that she believed part of her defense strategy was influenced by the fact that Dr. Goldsmith is the brother of the sentencing judge's predecessor. She stated that Plea Counsel told her he preferred that judge and was aware he knew of Dr. Goldsmith. App. p.114, line 24 – p.115, line 4. Petitioner avers that this relationship and knowledge thereof changed Plea Counsel's mitigation strategy from focusing on the unusual circumstances of Petitioner's life to a poor understanding of her abuse and mental health.

In order to provide effective assistance of counsel in compliance with the Sixth Amendment, attorneys are not required to “investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case.” Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004). However, when investigation is undertaken, it must be comprehensive and properly presented. Id. In Van Dohlen, the South Carolina Supreme Court cited Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), for similar ideas regarding investigations, including the idea that if there is a reasonable probability even one juror would had been swayed by a better mitigation presentation, prejudice pursuant to Strickland¹ had been shown.

Though there were no jurors in this instance, it is clear from the sentencing judge’s imposition of sentence that a modified mitigation presentation would have swayed him. In particular, he was very affected by Petitioner’s prior DUI conviction. As evidenced through testimony, Plea Counsel had researched and prepared statements on the unusual nature of the earlier conviction, such that Petitioner was arrested at home after a tip was called in, and she believed the tip to be from her abusive ex-husband. Instead, Plea Counsel played on political connections and focused on the poor results of an evaluation he thought may weigh in his favor.

The sentencing judge specifically state that petitioner “had a death wish that day as well. Subconsciously you may – this may have been another suicide attempt to drive that recklessly on one of the busiest roads in Rock Hill on a Monday afternoon.” App. p.39, lines 19-22. He further stated, “It’s very hard for me, Ms. Cunningham, to be that compassionate with you with the prior DUI that you had.” App. P.39, lines 3-5. These comments show that the sentencing judge took


¹ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

seriously Petitioner's prior conviction and, with effective mitigation regarding the same, there is a reasonable probability that he would have sentenced Petitioner to with greater leniency.

The PCR court had to presume that "counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, *supra*. In proving this, Petitioner has shown that Plea Counsel's performance, specifically failure to present an appropriate mitigation case, was deficient. She has also shown that there was a reasonable probability that, but for this error, the outcome of the proceeding would have been different. Specifically regarding the fact that this was a guilty plea, Petitioner's testimony credibly showed her understanding of the anticipated mitigation defense. She testified that she knew she was guilty and deserved to serve time in prison, but this does not excuse Plea Counsel's errors. Despite her intention to plead guilty from the start, Petitioner would have made attempts not to go forward had she known Plea Counsel was going to present the mitigation evidence that he did. The appropriate remedy is to vacate Petitioner's conviction and sentence for future proceedings in light of the failure of Plea Counsel to effectively represent Petitioner.

CONCLUSION

This Court must vacate Petitioner's conviction and return the charge to York County.



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February 21, 2023