

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CLARENDON )  
 )  
 )  
 )  
 Virginia Burgess, #266452, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 THIRD JUDICIAL CIRCUIT

06-CP-14-86

ORDER OF DISMISSAL  
 WITH PREJUDICE

2007 AUG 30 PM 12:37  
 BEULAH G. ROBERTS  
 CLERK OF COURT  
 CLARENDON COUNTY, SC

CERTIFIED TRUE COPY  
 OF ORIGINAL FILED IN THIS OFFICE  
 DATE 8/30/07  
 Beulah G. Roberts  
 CLERK OF COURT  
 CLARENDON COUNTY, SC

*Ricci Land Welch, Esq. appearing for the Applicant.*

*Lance S. Boozer, Esq., Assistant Attorney General, appearing for the Respondent.*

This is a post-conviction relief (PCR) matter. The Applicant alleges in her PCR application filed February 22, 2006, that she is being held in custody unlawfully due to the ineffective assistance of trial counsel. An evidentiary hearing was convened at the Sumter County Courthouse on March 21, 2007.

**I. PROCEDURAL BACKGROUND**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Clarendon County. The Applicant was indicted at the October 1998 term of the Clarendon County Grand Jury for Murder and Possession of a Weapon during the Commission of a Violent Crime (98-GS-14-403). She was represented by Harry Devoe, Esquire. On May 16-18,

2000, the Applicant underwent trial by jury pursuant to which she was found guilty as charged. On May 18, 2000, she was sentenced by the Honorable Marc Westbrook to confinement for a period of thirty (30) years for Murder and five (5) years for Possession of a Weapon during the Commission of a Violent Crime, both sentences to run concurrent.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Burgess, Op. No. 3714 (S.C. Ct. App. filed December 15, 2003). Applicant subsequently filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. By Order dated May 5, 2005, the South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari.

## II. APPLICABLE LAW

### a. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State.

The proper measure of performance is whether the attorney provided representa-

tion within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the 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 v. State; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

### III. SUMMARY OF TESTIMONY PRESENTED AT THE PCR EVIDENTIARY HEARING, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant; the Applicant's former trial counsel Harry Devoe; and drug and alcohol abuse counselor Ann Kirven testified at the PCR hearing.

The Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Ann Kirven was offered as and accepted as an expert witness by the Applicant's attorney in the area of recognizing domestic violence.

This was based on her education, training and her experience as a counselor for over 32 years. Further, this Court reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

**Allegation of ineffective assistance of counsel for failing to request a competency evaluation.**

The Applicant alleged and testified counsel was ineffective for failing to request a competency evaluation of Applicant.

Counsel testified and the trial court record reflects, counsel made a motion for a competency evaluation. However, Judge Westbrook denied Applicant's motion. The record also reveals the South Carolina Court of Appeals considered the issue of whether the trial court erred in denying Applicant's motion for a competency evaluation.

This Court finds that trial counsel's testimony was credible and the Applicant's testimony was not credible. This Court also finds trial counsel was not ineffective for failing to request a competency evaluation. It is clear from the record trial counsel requested a competency evaluation, however, Judge Westbrook denied the motion. Furthermore, the trial court's ruling on the competency evaluation was upheld on appeal. This allegation of ineffective assistance of counsel is denied.

**Allegation of ineffective assistance of counsel for failing to present a self defense claim.**

The Applicant testified trial counsel was ineffective for failing to present a self defense claim.

Trial counsel testified he met with Applicant on various occasions prior to the trial. Counsel further testified he discussed the elements of the charges and the evidence with the Applicant. Counsel indicated their theory of the case was that the Applicant was too intoxicated to have committed the crime. Counsel stated Applicant maintained that she passed out after consuming alcohol and awoke to find her husband dead. Counsel indicated because of Applicant's position that she could not remember anything after passing out, self defense was not an option to pursue at trial. Counsel further testified he presented the evidence as well as possible.

This Court finds that trial counsel's testimony was credible. Trial counsel's testimony was there was no evidence with which to pursue a self defense claim. Trial counsel also testified their theory of the case was the Applicant did not commit the crime because she was intoxicated and passed out. This Court finds this would be a matter of trial strategy and does not necessarily mean ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). Counsel's decision to argue Applicant did not commit the murder was based on Applicant's recollection of events. This Court finds this was trial strategy and not ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). This allegation of ineffective assistance of counsel is denied.

While I do not find that Trial Counsel was ineffective in failing to present a self defense claim or promote the battered spouse syndrome as a defense, I do find that the Applicant has proven by a preponderance of the evidence that she suffered domestic abuse at the hands of the victim. The Applicant testified as to the domestic abuse and that she was afraid that her husband may kill her. Ann Kirven testified that counseled both the Applicant and the victim for substance abuse and was counseling the couple on issues of domestic abuse and anger in their marriage. Ms. Kirven testified that she was aware of and had seen the evidence of the abuse on the Applicant on several occasions. Ms. Kirven described the Applicant appearing for an appointment with a cigarette burn on her arm and had bruises that the Applicant attributed to domestic abuse in the home. Ms. Kirven described making a home visit during the counseling period because she could not get in touch with the Applicant and was concerned about her. Upon visiting the home, the victim admitted to ripping the phone cord out of the wall so that the Applicant could not contact Ms. Kirven for help. Ms. Kirven further testified that at the time of the stabbing, she was working very hard with the Applicant to move her back to Bishopville to live with her family to keep her safe from the victim.

I further find that the credible evidence of domestic abuse presented at the post conviction relief hearing appears to entitle the Applicant to the opportunity to make application for early parole as set forth in South Carolina Code of Laws §16-25-90.

#### **Miscellaneous allegations**

As to any and all allegations which were or could have been raised in the

application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that the Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice.

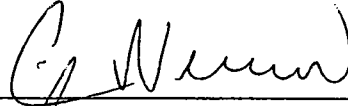
### **Applicant's Right to Appeal**

Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Appellate counsel is required to brief arguable issues in order to safeguard the right to appeal. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must file a Notice of Appeal on the Applicant's behalf. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

### **IT IS THEREFORE ORDERED THAT:**

1. The post-conviction relief application is **DENIED**.
2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.
3. The Applicant is remanded to the custody of the Respondent for the

completion of his sentence.



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Clifton Newman  
Chief Administrative Judge  
Third Judicial Circuit

Kingstree, South Carolina

August 20, 2007

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September 7, 2007

Ms. Virginia Burgess  
SCDC #266452  
Camille Griffin Graham Correctional Institution  
4450 Broad River Road  
Columbia, South Carolina 29210

RE: Virginia Burgess vs. State of South Carolina

Dear Virginia:

Enclosed please find a certified copy of the Order of Dismissal With Prejudice. By copy of this letter, I am forwarding the original Transcript of Record and Record on Appeal to Carrye Addonizio.

With warm regards, I am

Sincerely,

  
Ricci Land Welch

RLW:bmw

Enclosure

cc: Carrye Addonizio  
Sistercare  
Post Office Box 1029  
Columbia, South Carolina 29202