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STATE OF SOUTH CAROLINA)
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COUNTY OF CHALRESTON)
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Kandy Gilliard,)
SCDC No. 275605,)
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Applicant,)
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v.)
)
State of South Carolina,)
)
Respondent.)
)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2005-CP-10-0619

**ORDER OF DISMISSAL
WITH PREJUDICE**

FILED
2007 JUL 23 PM 1:02
CLERK OF COURT

William Runyon, Esq. appearing for the Applicant.

Jeanette Van Ginhoven, 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 15, 2005, that she is being held in custody unlawfully due to the ineffective assistance of trial counsel. An evidentiary hearing was convened at the Charleston County Courthouse on March 14, 2007.

I. PROCEDURAL BACKGROUND

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2000 term of the Charleston County Grand Jury for murder (00-GS-10-2467) and strong arm robbery (00-GS-10-2468). She was represented by Melissa Gay, Esquire. On June 1, 2001, the Applicant proceeded to trial after which she was found guilty as indicted. She was

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sentenced by the Honorable James E. Lockemy to confinement for a period of her natural life and ten years concurrent.

A timely notice of appeal was filed on Applicant's behalf. Applicant's appellate counsel, Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Gilliard, Op. No.2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The Applicant subsequently filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied the Applicant's petition for rehearing.

On March 14, 2007, this Court started the Applicant's PCR hearing. The Applicant called Melisa Gay as a witness. After Ms. Gay's testimony, PCR counsel stated that the Applicant was crying and that he was not sure if she was competent to go forward. By Order dated March 29, 2007, this Court ordered that the Applicant be evaluated by the South Carolina Department of Mental Health. The Applicant was evaluated on May 22, 2007, by Dr. Michael Cross. Dr. Cross found that the Applicant possessed the capacity to understand the proceedings against her and to assist in her appeal. This Court continued the Applicant's PCR hearing on June 14, 2007. The Applicant and State did not present witnesses at this hearing but did introduce Dr. Cross' evaluation as part of the record.

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), SCRCP; 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 representation 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 AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

The only witness called during the PCR hearing was trial counsel. The Applicant did not testify. The Applicant claims trial counsel was ineffective for failing to bring to the trial court's attention that the Applicant had a mental break and was no longer assisting in her own defense during the trial. The Applicant fully admits that trial counsel adequately prepared for trial and



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that her performance was reasonable under professional norms except for the fact that she did not bring to the trial court's attention that the Applicant could not assist in her own defense because she was tired after the three day trial.

Trial counsel testified that she has practiced law for sixteen years. Trial counsel testified that the Applicant was difficult to communicate with because she did not seem to grasp the seriousness of her charges. Trial counsel had the Applicant evaluated by Dr. Wong. Dr. Wong performed a psychological exam. Dr. Wong found that the Applicant was competent to understand the proceedings and assist in her own defense. Dr. Wong found that the Applicant did not suffer from a mental disorder. Trial counsel testified that she did not have a basis to assert a mental defense. Trial counsel testified that the Applicant's behavior was bizarre before and during trial. Trial counsel testified that after the co-defendant testified, that the Applicant was no longer able to assist in her own defense. Trial counsel testified that she was tired after this three day trial which is why she did not bring this fact to the trial court's attention.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the testimony presented at the evidentiary hearing, observed the witness presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. 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, and the transcripts. 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.

To be competent to stand trial or continue trial, a defendant must have "a rational, as well



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as a factual, understanding of the proceedings against him and the ability to consult with his lawyer with a reasonable degree of rational understanding. Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). A defendant must prove that he is incompetent to stand trial by a preponderance of the evidence. Id. The Supreme Court of South Carolina has found that a PCR judge erred in granting relief on the basis that the defendant was not competent to stand trial when: (1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not affect his mental state. Id.

In this case, trial counsel testified that she could communicate with the Applicant but that she did not seem to appreciate the seriousness of the charges. Trial counsel later testified that at some point after the co-defendant testified, the Applicant had a "mental break" and could no longer assist in her own defense. However, the trial transcript refutes this assertion.

The trial court questioned trial counsel and the Applicant as to whether they had discussed the Applicant testifying at trial, plea negotiations and sentence exposure. (T. pp. 576-582). The Applicant understood the questions and responded in an appropriate manner. The trial judge instructed trial counsel to advise the Applicant regarding her right to testify a second time. (T. p. 582). Trial counsel then informed the trial court that the Applicant wished to testify but told the trial court they would discuss it again during the lunch break. (T. p. 663). The trial court again went over the Applicant's right to testify and the Applicant again understood the questions and answered in an appropriate manner. (T. pp. 691-693). The Applicant testified during the trial informing the jury of her involvement in the murder. The Applicant testified



during trial that the co-defendant came to the store but she did not know why. She let the co-defendant into the store and he said he was going to rob the store and that she was going to help him. She testified that he had a monkey wrench and she was afraid if she didn't help him that he would harm her. Throughout the Applicant's testimony during trial, she is appropriately answering trial counsel's questions and the State's questions.

Trial counsel testified that prior to the trial, she had the Applicant evaluated by Dr. Wong. Dr. Wong found that the Applicant's mental health issues did not affect her competency. Dr. Cross, who evaluated the Applicant, after the first PCR hearing, diagnosed the Applicant with depressive disorder, not otherwise specified. Dr. Cross also found that there was no evidence that the Applicant had significant problems with her mood, thinking, reality testing, communication, or behavior.

I find the Applicant has failed to prove by a preponderance of the evidence that she lost competency to stand trial during her trial. It is clear from the trial transcript that trial counsel was adequately prepared for trial. In fact, the Applicant admits that trial counsel was not ineffective in preparing for trial or actually conducting the trial except for failing to bring to the trial court's attention that the Applicant could not assist in her own defense. I believe that counsel's testimony at the post-conviction relief hearing is an attempt to "fall on the sword" for a young client who received a life sentence. However, the trial record, viewed as a whole and with an objective eye finds that at no point did the Applicant act in such a way as to indicate a lack of cognitive or volitional abilities during the course of her trial such that indicates she lacked capacity to understand what was going on or to assist her attorney. Therefore, this Court finds that trial counsel was not ineffective.

The State argues that even if trial counsel was ineffective, the Applicant has failed to

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carry his burden in this action and cannot show prejudice. I disagree. If the Applicant became incompetent during trial, the court should have continued the trial or declared a mistrial until such time as Applicant became competent. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). However, because I find that Applicant failed to show her counsel was ineffective, this cannot be considered the basis for a grant of relief.

CONCLUSION

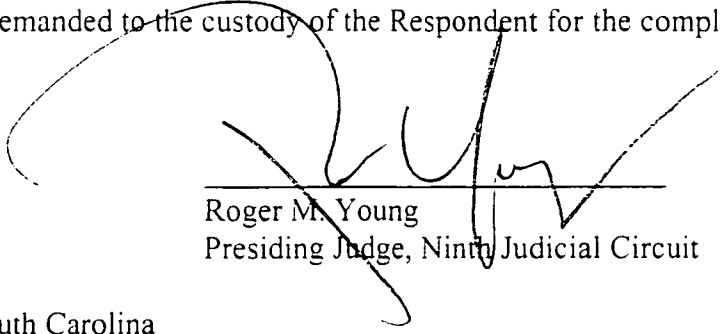
Based on the specific findings above, this Court concludes that the Applicant failed to carry her burden of proof to show that her trial counsel's representation fell below reasonable professional norms. The Applicant's former trial counsel rendered reasonably effective assistance under prevailing professional norms and demonstrated a normal degree of skill, knowledge, and professional judgment that is expected of an attorney in a criminal case. Strickland v. Washington; Cherry v. State.

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 her burden of proof regarding them. Accordingly, they are denied and dismissed with prejudice.

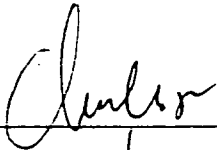
IT IS THEREFORE ORDERED THAT:

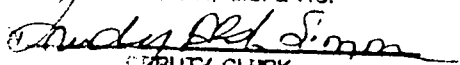
1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**.
2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court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

3. The Applicant is remanded to the custody of the Respondent for the completion of her sentence.



Roger M. Young
Presiding Judge, Ninth Judicial Circuit


_____, South Carolina
7/20, 2007

BEFORE A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.

DEPUTY CLERK