THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2013-CP-41-045

Aretha Rosser, SCDC # 298305, ... Appellant

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Aretha Rosser hereby appeals from the Order of the Honorable William P. Keesley presiding Judge for the 11th Judicial Circuit, filed June 25, 2014 and received by counsel for the Applicant on June 30, 2014 in the matter of Aretha Rosser v. State of South Carolina, Case No. 2013-CP-41-045.

June 30, 2014

Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
Columbia, SC 29201
Phone (803) 252-2299
kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Walt Whitmire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

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PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on June 30, 2014 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Walt Whitmire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

1720 Main Street, Suite 301
Columbia, SC 29201
Phone (803) 252-2299
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Walt Whitmire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

June 30, 2014

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Aretha Rosser, SCDC # 298305, vs. State of South Carolina
Appeal of Case No. 2013-CP-41-45

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Ms. Rosser as I was appointed in this matter. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

Kristy Goldberg

CC: Walt Whitmire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Aretha Rosser, SCDC # 298305
Graham (Camille Griffin) Correctional Institution
4450 Broad River Road
Columbia, SC 29210

1720 MAIN STREET • SUITE 301 • COLUMBIA, SOUTH CAROLINA 29201
PHONE (803) 252-2299 • FACSIMILE (803) 799-4059 • MOBILE (803) 315-1554

Doris B. Holmes, Clerk of Court
Saluda County Courthouse
100 East Church Street
Saluda, South Carolina 29138

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SALUDA	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Aretha Y. Rosser, S.C.D.C. No. 298305,	)	C.A. No. 2013-CP-41-045
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 6, 2013. Respondent made its Return. An evidentiary hearing into the matter was convened on April 15, 2014 at the Lexington County Courthouse. Applicant was present and was represented by Kristy Goldberg, Esquire. Respondent was represented by Assistant Attorney General Walt Whitmire.

WW #1

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Saluda County. Applicant was indicted at the August 2011 term of the Court of General Sessions for Saluda County for murder (2011-GS-41-412). She was represented by Circuit Public Defender Robert Madsen. On February 14, 2013, the Applicant pleaded guilty the lesser-included offense of voluntary manslaughter. The Honorable Thomas A. Russo sentenced her to a term of thirty (30) years imprisonment for voluntary manslaughter pursuant to S.C. Code Ann. § 16-25-90. Applicant did not appeal her conviction or sentence.

At the PCR hearing, Applicant alleged that she is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. failing to consult alterative expert witnesses;
   b. failing to properly apprise Applicant of the terms of the plea agreement;
   c. failing to properly apprise of a conflict of interest claim with the plea judge;
   d. failing to speak up for the Applicant when the victim's family spoke against her at the plea hearing;
   e. failing to object to the plea judge's improper consideration of her prior record in pronouncing her sentence;
   f. failing to file a notice of appeal on behalf of the Applicant;
   g. failing to file a post-trial motion for sentence reconsideration.

SUMMARY OF TESTIMONY

Applicant testified that she was in pre-trial detention during the pendency of her case. She stated that counsel had her submitted for three mental health evaluations. She took issue with the fact that the evaluations did not occur at a hospital. She also stated counsel should have selected a different doctor.

Applicant stated that counsel promised her that she would get a ten-year prison sentence if she pleaded guilty to voluntary manslaughter. She stated that she had no knowledge that the charge exposed her to a ceiling of thirty years of imprisonment. She stated that the solicitor told her that he would attempt to negotiate a plea agreement to involuntary manslaughter. She stated that she was uncertain if counsel ever followed through with this promise. She also stated that counsel never apprised her of the sentencing exposure that the murder charge carried. Despite her disappointment of the sentence, she did acknowledge that she is parole eligible within five years. Furthermore, she acknowledged that she wanted to plead guilty at the outset of the

representation to the Solicitor's original offer of a negotiated or recommended forty-five (45) year prison sentence for murder. She explained that she was not of sound mind when she desired to accept the Solicitor's original plea offer. She stated that she was not taking her medication. She acknowledged that counsel told her not to accept the original offer because he did not want to see her get a forty-five year sentence.

Applicant asserted that a different judge should have handled her case based upon a conflict of interest. She opined that she was treated unfairly based upon how the plea judge sentenced her. She stated that the plea judge had represented her on minor General Sessions charges when he was the Tri-County Public Defender nearly two decades in the past. She stated that she did not recognize the plea judge and had no recollection of the representation. She felt that it appeared as though he liked her and speculated that the plea judge imposed a harsher sentence than what was reasonable in order to negate the appearance of impropriety. She acknowledged that she did not show or share any concerns on this matter with counsel at the plea hearing.

She stated that counsel should have objected when the plea judge considered her prior convictions and history of misconduct in the Department of Corrections. She stated that the plea judge said that her prior record made it seem as if she was a "trouble maker." Similarly, she was upset when counsel stood idly while the victim's family spoke against her at the plea hearing. She stated that counsel told her that he could not appeal her case because she did not receive a forty-five year sentence.

Counsel testified at the PCR hearing to his course of conduct during the representation. He stated provided a brief summary of his General Sessions practice experience. He testified to the facts surrounding Applicant's murder charge. He stated that it was undisputed that Applicant

killed decedent with her car and fled the scene. Her conduct from the outset of the representation was problematic. Counsel stated that he had to make to impromptu trips to Saluda County to convince her to heed his stern advice not to plead guilty to the Solicitor's initial offer. Although, he stated that this case was expected to be a guilty plea from the beginning, he advised her that he had to finish his investigation of the case before he could advise her to enter a plea agreement.

Counsel highlighted his labor in investigating Applicant's case. He retained an expert engineer to independently evaluate the State's evidence. He submitted Applicant for three separate mental health evaluations and compiled relevant records at the request of the mental health experts. He also obtained records that showed the victim's history of Criminal Domestic Violence (CDV) against Applicant along with other women. Counsel stated that he would have utilized all of this material to present a self-defense case had Applicant desired a jury trial. However, Applicant was adamant on pleading guilty. Counsel stated that he advised Applicant of the developments in her case. Counsel stated that he was able to present the beneficial information in mitigation at the plea hearing. In a contested affair, he noted that he succeeded in getting a finding from the plea judge that Applicant was a battered woman. He stated he did not request a particular sentence but noted the exceptional benefits the plea judge's battered woman finding had upon Applicant's parole eligibility. Counsel requested leniency regarding the imposition of sentence.

WPM #4

Counsel described the plea negotiations with the solicitor as an arduous affair. He stated that for a period of time, the solicitor was not willing to agree to anything less than forty (40) years. His negotiations eventually proved fruitful and the solicitor offered the lesser-included offense of voluntary manslaughter to Applicant. He stated that this offer was made late in the representation. He opined that this plea agreement was the best possible outcome in Applicant's

case. Counsel unequivocally stated that he never promised Applicant a certain sentence. He stated that he discussed the range of prison exposure among other things when he advised her on the terms of the plea agreement. Applicant was diagnosed with Post-Traumatic Stress Disorder (PTSD). He stated that he made the strategic decision to present the favorable mental health findings to prove Applicant was a battered spouse. This strategy succeeded. He stated that he elected not to pursue a Guilty But Mentally Ill (GBMI) verdict. He stated that he did not feel that would be beneficial to his client because a GBMI verdict would ultimately place the client in a more unfavorable position.

Counsel stated that he observed no indicators that suggested Applicant was incompetent at the plea hearing or at any time when she made the final decision to plead guilty. Counsel stated that the solicitor informed him of the issue of the prior representation of the defendant by the plea judge and the possible conflict of interest issue. He relayed this information to Applicant and apprised her of his impressions of the plea judge. Specifically, he advised Applicant that it was his opinion that the plea judge was fair. He noted a prior recent case in front of the plea judge bore similarities to Applicant's case. He stated that the plea judge's disposition of that case fared well for his client. Counsel stated that Applicant waived any conflict claim and wanted to proceed forward with the plea. He stated that if Applicant had expressed concern, then he would have taken the case in front of a different plea judge. The issue is addressed properly by the judge in the transcript.

WAC #5

Counsel stated that he did not consider the plea judge's consideration of Applicant's prior record to be improper. It is customary and normal. Counsel discussed the possibility of appeal with Applicant and explained to her that the specific term of imprisonment was within the statutory guidelines and permissible. Although he shared his opinion on the unlikelihood of

success on appeal, he stated that he would have filed a notice of appeal on behalf of Applicant had she made the request. Similarly, he stated that he would have filed a post-trial motion for reconsideration of the sentence had he been asked. He saw no reason to do so, and the Applicant has presented no evidence that he should.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

WPM #6

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. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney' s performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This 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. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, 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 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant failed to meet her burden of proof on the issues presented to the Court. She has not established that counsel performed deficiently or that she was prejudiced in any way by deficient performance of counsel. This Court does not find Applicant credible. Her primary claim is that she would not have pleaded guilty had she known that she would receive more than ten years of imprisonment. The guilty plea colloquy is extensive and completely refutes Applicant's claims. The testimony at the PCR hearing from counsel demonstrates that he represented his client diligently and very effectively on these allegations. His testimony also refutes her claims. There is no showing of ineffective assistance of counsel. He pursued and obtained a determination that Applicant was a battered spouse, thus allowing her to obtain the possibility of early release for killing the victim.

A.

Applicant's allegation that counsel failed to consult other unknown mental health experts is without merit. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an

independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Counsel consulted reputable and seasoned mental health experts to evaluate Applicant. Counsel is entitled to and can rely on the reports of experts who are consulted. Stokley v. Ryan, 659 F.3d 802, 814 (9th Cir. 2011) (any error of the expert is not a basis for ineffective assistance of counsel."). In any event, Applicant's allegation relies solely on unqualified and speculative testimony. See Cannon v. Mullin, 383 F.3d 1152, 1165 (10th Cir. 2004) (where the petitioner provided no indication of what helpful information would be provided by an expert.). She presented no expert evidence to show that a different psychiatric opinion would have been available and how, if it were, it would benefit the Applicant.

Similarly, Applicant failed to prove that counsel was deficient in the manner he presented Applicant's successful mitigation case. See Jackson v. Roth, 24 F.3d 1002 (7th Cir. 1994). Her assertions in this regard are completely speculative. There is no proof of the likelihood of a different outcome.

WPM #8

There is no showing of how anything else could have or should have been presented in mitigation, and there is absolutely no proof that presenting other mitigation evidence would have been likely to change the outcome. Therefore, these allegations are denied and dismissed.

B.

Applicant failed to prove that counsel was ineffective for failing to adequately apprise Applicant of the terms of the plea agreement. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Kolle v. State, 386 S.C. 578, 588, 690 S.E.2d 73, 78

(2010). Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

This Court finds counsel's testimony credible and that he advised Applicant of the terms of the plea agreement. He explained to her the sentencing range and that the nature of a "straight-up" plea agreement. Counsel's statement that he hoped Applicant would receive a ten-year sentence does not constitute deficient performance. It was not a representation or a prediction, and certainly not a promise. See McMann v. Richardson, 397 U.S. 759, 770, 90 S.Ct. 441, 449 (1970) (A merely erroneous prediction of the sentence is not ineffectiveness.). This Court also finds counsel's testimony to be credible as it relates to there being no reason to question her competency or capacity at the plea hearing. Applicant's claims of not understanding are not credible in light of counsel's testimony and the plea transcript.

WPC #9

Applicant has failed to prove the prejudice prong. To the contrary, the record shows that counsel, through admirable efforts, obtained a favorable result and obtained a ruling that Applicant was a victim of domestic violence. See State v. Grooms, 343 S.C. 248, 540 S.E.2d 99 (2000) ("[D]efendant was required to prove by a preponderance of the evidence a history of domestic violence from the victim in order to be eligible for statutory early parole.") Therefore, this allegation is denied and dismissed.

C.

Applicant failed to meet her burden to prove counsel was ineffective for not adequately advising her on a conflict of interest related to the plea judge's prior representation of the Applicant. The opinions about what the sentencing judge was thinking and any bias on his part

are totally speculative. There has been no demonstration of an actual conflict of interest that adversely affected the Applicant. The Applicant was advised about the prior representation. She has not proven that the plea judge had anything against her, and the supposition that the plea judge actually liked her but punitively imposed his sentence in order to negate an appearance of impropriety is wild speculation. The Applicant's chief compliant here is that she did not like her sentence in hindsight, irrespective of the particular circuit court judge that sentenced her and irrespective of competent advice from counsel. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) (Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.)

Applicant failed to meet her burden to prove the existence of an actual conflict of interest. The plea transcript shows that the plea judge absolutely had no recollection of his representation in that matter that occurred in the prior millennium. The record also shows that Applicant had little recollection on the matter and was a seasoned and experienced litigant in General Sessions by 2013. Therefore, this allegation is denied and dismissed.

D.

Applicant's allegation that counsel was ineffective for not speaking up for her or objecting to the statements made by the victim's family during the solicitor presentation of its case is without merit. "A guilty pleas act as a waiver of all non-jurisdictional defects and defenses, including claims of constitutional violations." Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981). Because Applicant failed to prove that she involuntarily entered her plea, she lacks standing to assert a defacto claim that her Fifth Amendment rights had been violated here.

Applicant also failed to prove that statements made by the victim's family against her were inaccurate. Victims have a constitutional right to be heard at sentencing, and there is no indication that the attorney did anything wrong related to victim input. Therefore, this allegation is denied and dismissed. See United States v. Espinoza, 481 F.2d 553, 555 (5th Cir. 1973) (internal citations omitted) ([D]espite the broad discretion left to the trial judge in assessing background information for sentencing purposes, a defendant retains the right not to be sentenced on the basis of invalid premises.")

Applicant has failed to prove her allegation that the plea judge improperly considered her prior convictions and prior violent behavior in pronouncing her sentence. Sentencing judges are supposed to consider the prior criminal record of a defendant and her conduct since the criminal act. There is no proof that the attorney performed deficiently related to the judge's consideration of the Applicant's prior criminal record. There is no showing of prejudice. "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Applicant has offered no proof to support any challenge to the consideration of her prison records in sentencing. This allegation is denied and dismissed. See Stokley, 659 F.3d at 814.

E.

Applicant failed to meet her burden to prove counsel was ineffective for failing to file a notice of appeal on her behalf. "[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 (for example, because there are nonfrivolous grounds for appeal), or (2) that this

doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of her right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

#13

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 3rd day of June, 2014.

William P. Keesley

WILLIAM P. KEESLEY
Presiding Judge
Eleventh Judicial Circuit

Edgefield, South Carolina

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW
1720 MAIN STREET, SUITE 301
COLUMBIA, SOUTH CAROLINA 29201

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211