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February 23, 2015

RECEIVED
MAR 02 2015
S.C. Supreme Court

South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

In RE: Danielle M. Bowen #334349 vs. State of South Carolina
Case #: 2010-CP-04-1002

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,

Hugh W. Welborn

HWW/sba

cc: Office of the Appellate Defense
cc: Office of the Attorney General

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE CARMEN T. MULLEN

2010-CP-04-1002

DANIELLE M. BOWEN #334349

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

MAR 02 2015

S.C. Supreme Court

NOTICE OF APPEAL

Danielle M. Bowen, #334349 appeals the denial of her Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Carmen T. Mullen, Circuit Court Judge on December 1, 2014, and Order of Dismissal issued on February 6, 2015, and filed on February 12, 2015. The Appellant received Order of Dismissal on February 23, 2015.

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Attorney for Danielle M. Bowen, #334349

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
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HONORABLE CARMEN T. MULLEN

2010-CP-04-1002

DANIELLE M. BOWEN, #334349

APPELLANT,

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on February 23, 2015, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549

Hugh W. Welborn
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Anderson, South Carolina

February 25, 2015

A TRUE COPY
FEB 12 2015
CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF ANDERSON) FOR THE TENTH JUDICIAL CIRCUIT
)
Danielle Bowen,) C.A. No. 2010-CP-04-1002
S.C.D.C. No. 334349,)
)
Applicant,)
)
v.) **ORDER OF DISMISSAL**
)
State of South Carolina,)
)
Respondent.)

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COMMON PLEAS AND
GENERAL SESSIONS

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 15, 2010. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on December 1, 2014 at the Anderson County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the April 2008 term of the Court of General Sessions for Anderson County for homicide by child abuse (2008-GS-04-0617). She was represented by Andrew Potter, Esq. On April 15, 2009, Applicant entered a guilty plea as indicted before the Honorable J. Cordell Maddox Jr. Judge Maddox accepted Applicant's plea and sentenced her to a term of twenty-five (25) years imprisonment, provided that upon the service of twenty (20) years, the remainder would be suspended with five (5) years probation. Applicant did not appeal her guilty plea or sentence.

At the PCR hearing, Applicant proceeded on the limited allegations of ineffective assistance of counsel in her assertions that she was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. failure to investigate and purse an accident theory of the case;
   b. failure to move for a GBMI plea during sentencing;
   c. failure to remain on Applicant's case because of a purported conflict of interest.

Summary of Evidence and Testimony from the PCR Hearing

Applicant testified that counsel did not adequately investigate an accident theory of the case. She testified that explained her version of the facts of the child-victim's death to counsel. In summary, Applicant told counsel that "I was chasing my nineteen month old through house and fell on my daughter." She testified that Applicant rejected her version that her conduct was accidental. Yet, Applicant testified that "there was no way to prove" her version of the facts. She was unable to explain the bruising on the child-victim's neck. She acknowledged that she did not request counsel further pursue an accident theory of the case. Applicant testified that she met with counsel on five occasions prior to the entering a guilty plea. She testified that she gave statements to law enforcement and to the Dept. of Social Services concerning the child-victim's death prior to counsel's appointment on her case.

Applicant testified that she has since spent significant time in the prison library where she has become more informed on relevant law concerning her case. In retrospect, Applicant would have proceeded to trial under an accident theory of defense. She testified that counsel and his retained mitigation expert, Dr. Schwartz-Watts, were heavy handed in their insistence that she enter a guilty plea.

Applicant testified that counsel did not advise her of the possibility of entering a Guilty But Mentally Ill (GBMI) plea. She opined that counsel's conduct here constituted an abandonment of counsel's duty as an advocate. She also testified that she believed that counsel's station as a public defender constituted a conflict of interest because "he was not paid" to represent her.

Counsel testified to his course of conduct during the representation. He provided the Court a synopsis of his career as a criminal defense attorney in addition to his general procedures and policies at the outset of a new representation. Subsequent to discussing Applicant's version of the facts, obtaining discovery disclosures from the State, and independently evaluating the State's evidence, counsel solicited an independent medical expert, Dr. Ward. Counsel noted that his course here was predicated from his concerns whether CPR could have caused the injury. Dr. Ward examined the State's evidence and phoned counsel to discuss his findings. Because Dr. Ward rendered an unfavorable opinion to the defense's case, counsel did not request an examination report on the matter.

As a result Counsel noted that the posture of the case changed to a disposition by guilty plea. Counsel apprised Applicant of the consequences and constitutional implications of forgoing a trial to enter a guilty plea and vice versa. Counsel was adamant that Applicant never told him "I didn't do this. I want to go to trial." He noted that Applicant was involved in her case and often sent correspondence to him throughout the representation. Counsel provided the Court a synopsis of his general practice in advising clients on the advising a client on the terms of a plea agreement. Counsel noted that this plea offer here was "straight up."

Counsel testified to his labor in developing a mitigation case for sentencing. He solicited an independent forensic psychologist, Dr. Schwartz-Watts, in this matter. He made the decision

to present Dr. Schwartz-Watts favorable GBMI findings without actually requesting Judge Maddox accept Applicant's plea under as GBMI. Counsel explained that Applicant was already receiving the possible benefits of that GBMI would have provided her in the Dept. of Corrections. He reasoned that his posture benefited Applicant because it would not expose her to the detriments of a GBMI sentence in Corrections.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

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. 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.

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)

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's convictions, 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 (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 reaped the benefit of exceptional assistance of counsel concerning his performance on the allegations at issue. The facts of the child-victim's death were particularly gruesome where the record refutes Applicant's version of accident. Counsel's decision to forego presenting Applicant's plea as a GBMI plea was unquestionably a product excellent trial strategy. Ultimately, the difference between guilty and GBMI was a distinction with an administrative difference. Because the Applicant was already receiving mental health treatment from one of the State's most renowned experts and practitioner, she suffered no tangible detriment.

A.

Applicant failed to meet her burden to prove that counsel's performance was either deficient or ineffective for failing to investigate and pursue an accident theory of the case. Counsel has dual investigative responsibilities recited Mickey v.Ayers, 606 F.3d 1223, 1236-37 (9th Cir. 2010) to investigate possible defenses and then to select the most appropriate one. The facts of the crime may weigh against particular defenses. Poindexter v. Mitchell, 454 F.3d 564, 575 (6th Cir. 2006) (defense of crime of passion negated by planning activity and defendant's insistence that he did not do it). For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994).

This Court finds Counsel's testimony on the matter credible and convincing. Counsel conducted a thorough evaluation of the State's evidence and made the appropriate decision to seek an advice from an independent medical expert on the matter. Simply, counsel is entitled to and can rely on reports from a qualified expert. Stokley v. Ryan, 659 F.3d 802, 814 (9th Cir. 2011). Applicant has presented no credible evidence or testimony to undercut counsel's sound performance here. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). This Court finds it significant that Applicant testified that she was unware of how one could prove an accident theory in her case. See Cannon v. Mullin, 383 F.3d 1152, 1165 (10th Cir. 2004) (where the petitioner provided no indication of what helpful information would come to fruition). Therefore, this allegation is denied and dismissed with prejudice.

B.

Applicant failed to meet her burden to prove that counsel's performance was either deficient or ineffective for failing to purse a GBMI sentence at the plea. This Court finds counsel's performance on the matter was sound and was strategically executed with precision. The purposes for the enactment of GBMI statutes are (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society's benefit while incarcerated. State v. Wilson, 306, S.C. 498, 413 S.E.2d 19 (1992). In this jurisdiction, "a defendant found GBMI is entitled to **immediate treatment** and **evaluation**." State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997) (citing S.C. Code Ann. § 17-24-70) (emphasis added). This Court agrees with counsel that Applicant reaping the benefits prior to entering her plea. Thus, counsel shielded Applicant from the administrative detriments inherent in a GBMI classification within the Dept. of Corrections while retaining the ability to present Dr. Schwartz-Watts findings in the mitigation phase of the plea hearing. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Regardless, this Court finds the allegation, as presented, is *per se* without merit. South Carolina does not recognize a diminished capacity defense, and a defendant who is found GBMI is not less guilty than a defendant who is simply found guilty. See also Gill v. State, 346 S.C. 209, 220, 552 S.E.2d 26, 32 (2001) See People v. Manning, 227 Ill. 2d 403, 422, 883 N.E.2d 492, 504 (2008) (citing Estelle v. Gamble, 429 U.S. 97 (1976)) ([T]here is virtually no difference in the treatment that defendant will receive under GBMI as opposed to a guilty plea. The eighth

amendment to the United States Constitution requires that inmates receive adequate medical care."). Therefore, this allegation is denied and dismissed with prejudice.

C.

Applicant's allegation that counsel's representation constituted ineffective assistance of counsel because of a purported conflict of interest is entirely without merit. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (citing Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. (internal citations omitted). Claiming a defense attorney is less motivated or involved in a case because she is employed by indigent defense is base. Instead, the record shows that Applicant received exceptional representation from a distinguished and accomplished attorney. Therefore, this allegation is summarily denied and dismissed with prejudice.

D.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the 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 his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his 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.

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 10 day of Feb., 2015.

CARMEN T. MULLEN
Presiding Judge
Tenth Judicial Circuit

Beaufort, South Carolina

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COMMON PLEAS AND
GENERAL SESSIONS

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