

RECEIVED

MAR 26 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2014-001764

DIANE ELIZABETH BROWN, 344449,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803) 738-8622
(803) 738-1600 (FAX)

ATTORNEY FOR PETITIONER.

INDEX

Index 1

Questions Presented..... 2

Statement of the Case 3

Evidence before the Lower Court..... 4

Argument 4

Question I..... 4

Question II 8

Conclusion 11

Certificate of Service 12

QUESTIONS PRESENTED

I.

Was Plea Counsel ineffective for failing to present the sentencing judge with exhibits he planned to introduce in mitigation of sentence in a timely manner thereby depriving the Applicant of the opportunity to have the sentencing judge fully review these exhibits and take them into consideration in determining the appropriate penalty to impose in the Applicant's case?

II.

Was Plea Counsel ineffective for neglecting to research and present readily available information concerning the sentences imposed in other felony DUI cases where said statistical data would have clearly been beneficial to the sentencing judge in determining what penalty to impose on the particular facts and circumstances of Petitioner's case?

STATEMENT OF THE CASE

Petitioner was indicted during the October, 2009 term of the Sumter County Grand Jury for two counts of felony DUI; one count involved a death and the second count involved great bodily injury. See, Indictment No. 2009-GS-43-0208. She was represented on those charges by Marvin "Chip" McMillian, Esquire, of the Sumter County Bar. On January 20, 2011 Petitioner pleaded guilty as charged on both counts and was sentenced to twelve (12) years and a \$20,000.00 fine on the count involved a death and twelve (12) years and a fine of \$5,100.00 on the count involving great bodily injury. These sentences were ordered to be served concurrently.

Petitioner did not pursue a direct appeal from her judgments and sentences. The Application for Post-Conviction Relief in this matter was filed on January 20, 2012 and was amended on December 13, 2013. The State filed its Return on August 6, 2012. An evidentiary hearing was convened on December 17, 2013 at the Sumter County Courthouse. The Respondent was represented at that proceeding by Assistant Attorney General, Daniel Gourley and Petitioner was represented by Tara Dawn Shurling, Esquire, (PCR Counsel) of the Richland County Bar. In the Court of General Sessions Petitioner was represented by Marvin McMillan, Esquire (Plea Counsel).

At the outset of Petitioner's PCR hearing, the Court was advised that she wished to proceed solely on claims of ineffective assistance of Counsel in preparing for and during the sentencing phase of her guilty plea proceeding. Petitioner's allegations pertaining to Counsel's representation with regard to sentencing were set forth in her Amended Application for Post-Conviction Relief filed on December 11, 2013. Those allegations stated:

1. Plea Counsel was ineffective in that he neglected to present the sentencing judge with exhibits introduced in mitigations of sentence in a timely manner thereby depriving the Applicant of the opportunity to have the judge fully review these exhibits and take them into consideration in determining the appropriate sentence to issue in the Applicant's case.

2. Plea Counsel was ineffective for neglecting to research and present readily available information concerning the sentences imposed in other felony DUI cases involving death where said statistical data would have clearly been beneficial to the sentencing judge in determining what penalty to impose on the particular facts and circumstances of the Applicant's case.

EVIDENCE BEFORE THE LOWER COURT

In addition to the testimony presented during the PCR hearing, the PCR Court had before it a transcript of Petitioner's guilty plea proceeding, a copy of the records of the Sumter County Clerk of Court regarding these judgments and sentences, a copy Petitioner's records from the South Carolina Department of Corrections and a copy of Petitioner's Exhibits No. 1 through 6, as introduced during the evidentiary hearing convened in this matter.

ARGUMENT

QUESTION

I.

Amended PCR Application Issue 1

Was Plea Counsel ineffective for failing to present the sentencing judge with exhibits he planned to introduce in mitigation of sentence in a timely manner thereby depriving the Applicant of the opportunity to have the sentencing judge fully review these exhibits and take them into consideration in determining the appropriate penalty to impose in Petitioner's case?

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *U. S. Const. Amend. VI; Lomax v. State, 379 S.C. 93, 665 S.E.2d 164(2008)*. This right has been found to extend to the right to effective assistance of counsel in sentencing. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in her Application for Relief and at her Post-Conviction Relief hearing. *Suber v. State, 371 S.C. 554, 558, 640 S.E. 2d 884, 886 (2007); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRPC*. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Trial Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington, 466 U.S. 668 (1984); Speaks v. State, 377 S.C. 396, 399, 600 S.E.2d 512, 514 (2008)*. In other words, an applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997)*. A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011); Ard v. Cato, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007); Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002)*.

On the one hand, where Trial Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)*. In order to satisfy the first prong of the Strickland standard, a PCR applicant must show that counsel's performance fell below an objective standard of

reasonableness. *Franklin v. Catoe*, 346, S.C. 563, 570-571, 582 S.E.2d 718, 722 (2001). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

Where a PCR applicant is seeking to attack the underlying pleas resulting in her sentences she must demonstrate that, but for Counsel's errors and omissions, she would not have waived her right to trial by jury. *Hill v. Lockhart*, 474 U.S. 52 (1985). In the case before the Court, however, Petitioner did not ultimately seek to have her pleas vacated as involuntarily or unintelligently entered. Petitioner sought a finding that Counsel provided her ineffective assistance of counsel preparing for and presenting her plea in mitigation during the sentencing portion of her plea proceeding. This Honorable Court has recognized that a judge in a PCR proceeding has the authority, on appropriate facts, to remand for a new sentencing hearing only. *See, Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009).

Petitioner acknowledges that Plea Counsel is a well respected member of the bar with a sound reputation for competently representing the interests of his clients. On the facts of this case however, the record below establishes that Plea Counsel's performance, on the limited issue of his representation with regard to sentencing, fell below the objective standard of reasonableness. With the assistance of Petitioner and her husband, Plea Counsel gathered an impressive package of materials and reference letters which illustrated what a remarkable woman

Petitioner is and what her professional and personal accomplishments, and her contributions to the community, had been prior to the time of this tragic incident. These materials additionally illustrated Petitioner's medical history, including aspects of her health and the prescription medications she was taking at the time of this incident, which may have contributed to the accident which lead to her charges. Those materials were introduced by Petitioner as exhibits during her PCR hearing as Petitioner's Exhibits 1 – 4.¹ Unfortunately, the record establishes that the Plea Court was not provided these materials in time to fully review them and take their content into account in determining the appropriate penalty in the Petitioner's case. Petitioner has asserted that it simply was not reasonable to expect that a busy circuit court judge would have time to give these materials due consideration if they weren't provided to him until the morning of an afternoon plea.

During the PCR proceedings, Petitioner recognized that PCR Counsel had been thorough in his research and development of potential defenses to her charges. Her husband, Bob Brown, likewise indicated that he was aware of multiple avenues for possible defense to the underlying charges that had been explored by Plea Counsel prior to his wife making the decision to enter pleas of guilty. Both Petitioner and her husband, however, expressed disappointment with what they perceived as a rush job on Plea Counsel's preparation for the sentencing portion of the guilty plea proceeding. Petitioner and her husband gave PCR testimony in which they indicated that they were put in the position of hurrying at the last minute to put together materials to be presented to the Plea Judge prior to the hearing date. They both recalled that Counsel's staff was hurriedly putting together the materials they had provided Counsel and rushing them over to the courthouse sometime just prior to the hearing. While neither Petitioner, nor her husband, claimed to know exactly what time the materials were delivered to the Plea Judge, it was

¹ These four exhibits were in fact marked as Court's Exhibits 1 – 4 at the guilty plea proceeding. App. p. 25.

apparent from their testimony that these materials were delivered to the Court sometime before lunch on the date of the hearing which was scheduled for immediately after lunch. Petitioner's testimony establishes that despite the fact that she and her husband mailed all these materials to Plea Counsel approximately a week ahead of the court date, Plea Counsel and his staff were somewhat frantically getting the materials organized and submitted sometime immediately before court on the day of her plea. App. p. 205, ll. 12 – 21; App. p. 206, l. 16 – p. 213, l.10; App.p. 219, l. 9 – p.220, l. 4; App. p. 221, l. 13 – p. 225, l.23.

Between the other demands of the term of court over which the Plea Judge was presiding, and his own lunch break, Petitioner respectfully submits, it would have been impossible for the Plea Judge to give these important materials, approximately 132 pages in length, a thorough review and the thoughtful consideration they warranted. See, Petitioner's Exhibits No. 1 through 4 found at App. pp. 231 – 364. Petitioner would submit that while Plea Counsel's efforts at attempting to develop a defense for Petitioner were apparently thorough and organized, it is unfortunately equally obvious that his representation of Petitioner in preparation for sentencing did not reflect the same high standards.

QUESTION

II.

Amended PCR Application Issue 2

Was Plea Counsel ineffective for neglecting to research and present readily available information concerning the sentences imposed in other felony DUI cases where said statistical data would have clearly been beneficial to the sentencing judge in determining what penalty to impose on the particular facts and circumstances of Petitioner's case.?

Petitioner respectfully submits that the PCR Court erred in denying her relief in the form

of resentencing where the record demonstrates that Petitioner met her burden of proof with regard to this allegation. Petitioner has established that Plea Counsel's failure to provide the Plea Judge with information concerning sentences given in other felony DUI cases constituted deficient representation. Petitioner argues that Plea Counsel's assumption that the presiding judge would know about all the sentences imposed in other South Carolina Felony DUI cases during the time period surrounding the Applicant's case was not reasonable. There are sixteen judicial circuits, and many circuit court judges, in South Carolina. It is unrealistic to conclude that a given circuit court judge would have knowledge of all the sentences issued in any particular class of crimes across the state.

Petitioner acknowledges that there is precedent for the idea that where counsel is able to articulate valid reasons for employing a certain strategy, the courts should not find ineffective assistance of counsel based on his particular choice of tactics. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530(1992). The linchpin for examining counsel's choices however, remains reasonableness. Plea Counsel's claim of a strategy must be evaluated under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Where Plea Counsel fails to articulate a valid reason for his choices, he can not hide behind such magic words as *strategy* and *tactic* to justify an otherwise unreasonable decision. In this case, Plea Counsel has acknowledged that Petitioner was far from the typical defendant in a felony DUI case. Not only did she have no prior criminal record, but she had led an exemplary life prior to this tragic event. The records Petitioner provided the PCR Court during her PCR proceeding reflect that the sentence she ultimately received was an average sentence for a felony DUI case involving death. *See, Petitioner's Exhibits 5 and 6; App. pp. 365 – 440.* While Plea Counsel testified that he thought presenting the presiding judge with information concerning the

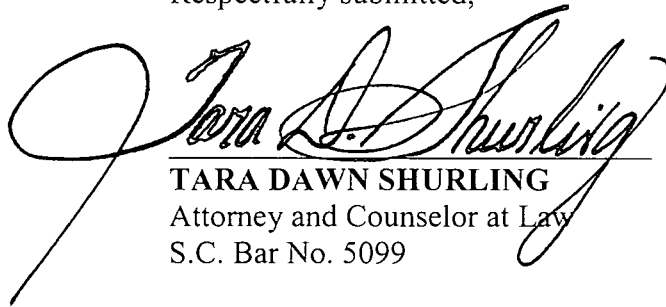
sentences given in other felony DUI cases across the state might have actually “gotten her more time”, he provided no explanation as to why such a conclusion was reasonable. App. p.180, ll. 1 – 23. He himself repeatedly acknowledged that Petitioner was most certainly not your average felony DUI defendant. He had in his possession before this plea documentation which clearly supported that conclusion. As previously noted, Petitioner had no prior record of any sort and had a remarkable history of accomplishment both in her personal and professional life. See, Petitioner’s Exhibits No. 1 - 4; App. pp. 232 – 364. Given these factors, there is simply no logical reason why providing the Court with accurate information concerning the sentences imposed in other felony DUI cases involving death would have been harmful to Petitioner. Petitioner respectfully submits that Plea Counsel was deficient for failing to demonstrate for the Court what the average sentence in similar cases had been during the time period involved in this case. By failing to establish what the average sentence in similar cases had been, Plea Counsel missed the opportunity to argue that *this defendant* was anything but typical or average and therefore, should receive a sentence below the average penalty imposed in similar cases. It clearly would have been useful for the Plea Court to know the lowest sentences imposed on the same charges in other cases.

Petitioner respectfully asks that this Honorable Court find that the PCR Court erred in concluding that Plea Counsel was not deficient for failing to supply the Plea Court with this valuable information. Petitioner submits that she was prejudiced by Plea Counsel’s omissions in this regard where the Sentencing Judge would likely have been favorably influenced by this data to give her a sentence below that she received at the time of her pleas.

CONCLUSION

Based upon all the reasons and authorities argued above, Petitioner now respectfully asks this Honorable Court to grant the writ and grant her resentencing. In the alternative, Petitioner asks that the Writ be issued and that she be afforded the opportunity to fully brief the issues summarized herein.

Respectfully submitted,



TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER

This 23 day of March, 2015.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2014-001764

DIANE ELIZABETH BROWN, 344449,

PETITIONER,

v.

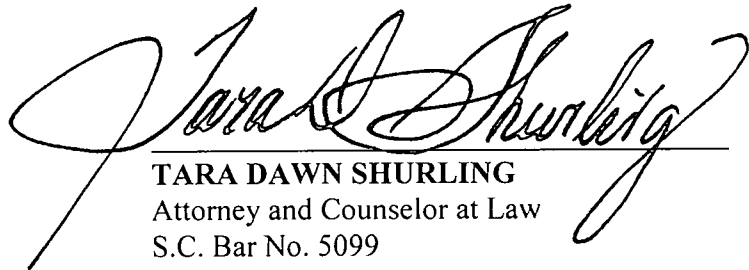
THE STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel this the ____ day of March, 2015, by depositing in the U.S. Mail, postage prepaid, one (1) copy properly addressed to:

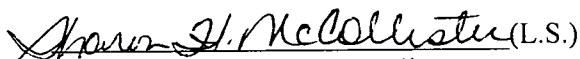
Daniel Gourley
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211



TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 23rd day
of March, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan 16, 2017

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

(Fax) (803) 738-1600

E-Mail: tDSLAW@shurlinglaw.com

March 23, 2015

RECEIVED

MAR 26 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Diane Elizabeth Brown, 344449, v. State of South Carolina;
Appellate Case No. 2014-001764

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari and the Certificate of Service in the above-captioned case. The Appendix and Certificate of Service was filed and served on March 2, 2015. I would appreciate your returning two (2) clocked copies of the Petition for Writ and the Certificate of Service in the enclosed self-addressed envelope. Thank you for your assistance in this matter. I remain,

Sincerely yours,

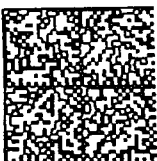
A handwritten signature in cursive script that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm

Enclosures

cc: Daniel Gourley, Assistant Attorney General (w/ enclosures)
Diane Elizabeth Brown, 344449 (w/ enclosures)
Robert Brown (w/ enclosures)



UNITED STATES POSTAGE
PITNEY BOWES
\$005.85⁰
02 1P
0000615243 MAR 23 2015
MAILED FROM ZIP CODE 29204

FIRST CLASS

Law Offices of
TARA DAWN SHURLING, PA
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204

TO:

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Diane Brown