

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE Perry H. Gravley

FEB 29 2016

S.C. SUPREME COURT

CA No. 2015-CP-23-0241

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2016 FEB 25 PM 3 36

ELVIRA LYNN SEAY,

APPELLANT,

vs.

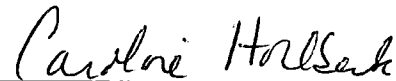
STATE OF SOUTH CAROLINA

RESPONDENT.

NOTICE OF APPEAL

Appellant ELVIRA LYNN SEAY, appeals from the Order of the Honorable Perry H. Gravely, Circuit Court Judge clocked February 2, 2016.

Respectfully submitted,



Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: February 25, 2016

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

RECEIVED

Elvira Lynn Seay,)
)
Appellant,)

C.A. No. 2015-CP-23-0241

FEB 29 2016

S.C. SUPREME COURT

-vs-

CERTIFICATE OF SERVICE

State of South Carolina,)
)
Respondent.)

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, SC 29211

Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



Caroline M. Horlbeck

Greenville, South Carolina

Feb. 25, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Elvira Lynn Seay,)
 S.C.D.C. No. 299405,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2015-CP-23-0241

FILED-CLERK OF COURT
 GREENVILLE CO., S.C.
 PAUL B. H. KENSINGER
 2016 FEB 2 PM 1 59

ORDER OF DISMISSAL

ENTERED COMPUTER

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 13, 2015. The Respondent made its return on June 3, 2015. An evidentiary hearing was held on December 15, 2015 at the Greenville County Courthouse. The Applicant was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on her own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, John K. Erwin, Jr., Esquire. The Court had before it the guilty plea and sentencing transcripts, the Greenville County Clerk of Court records, the South Carolina Department of Corrections-records, the PCR application, and the return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the April 2012 term of the Greenville County Grand Jury for murder (2012-GS-23-2898, count 1) and possession of a weapon during commission of a violent crime (2012-GS-23-2898, count 2). She was represented by John K. Erwin, Jr., Esquire.

On May 15, 2013, the Applicant pled guilty to the lesser-included charge of voluntary manslaughter before the Honorable Letitia H. Verdin. Sentencing was deferred. On March 4, 2014, the Applicant was sentenced by the Honorable Robin B. Stilwell to 25 years imprisonment. The Applicant did not appeal.

ALLEGATIONS

In her application, the Applicant alleges she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. Failure to file appeal.
 - b. Failure to bring up abuse suffered at hands of victim.
 - i. Illegal in states – deported 3 times.
 - ii. Psychiatric evaluation.
 - iii. Failure to bring up 16-25-90.
 - iv. Victim's arrest history.
 - c. Failure to present mitigating circumstances.
 - i. Failure to bring up past mental health problems.
 - ii. Failure to bring up past rape and molestation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges she received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

PTC

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted).

The Applicant stated plea counsel did not argue to the plea judge that she was mentally and physically abused by the victim. The Applicant stated she had gone to the hospital several times for injuries she sustained. The Applicant admitted, however, that she told hospital personnel during these visits that her injuries resulted from accidents. The Applicant stated she discussed both the history of abuse and her medical history with plea counsel. The Applicant stated she called police 3-4 times about the victim. The Applicant stated she had witnesses to support her allegations of abuse but she did not tell plea counsel to contact them. The Applicant stated she decided to plead guilty because plea counsel said a trial was not in her best interest. The Applicant stated she asked plea counsel to file an appeal because he failed to present mitigation evidence.

Plea counsel testified he discussed the discovery materials with the Applicant and reviewed the elements and sentencing ranges for the charges, as well as the Applicant's version of events. Plea counsel testified they also discussed the victim's prior abuse of the Applicant.

Plea counsel testified he obtained some of the Applicant's medical records, but that they did not have any information to support a battered woman defense. Plea counsel testified he did not recall whether the Applicant asked him to contact any potential witnesses. Plea counsel testified it was very difficult to get information from the Applicant that he could use to corroborate her story of abuse. Plea counsel testified a battered woman defense was pursued in this case but he was not provided enough details by the Applicant to make a complete defense and that it turned into a dead end. Plea counsel testified he would have explained the risks and advantages of a both a guilty plea and a trial to the Applicant. Plea counsel testified the Applicant was evaluated by a psychiatrist (Dr. Veronen) but that he reviewed the report and was not confident there was a case to be made for a battered woman defense. Plea counsel testified he referenced Dr. Veronen's report during his mitigation argument at the plea hearing. Plea counsel testified he did not recall if the Applicant asked him to file an appeal but stated that would file an appeal if a client asked for him to do so. Plea counsel testified he did not believe there were any appealable issues from the proceedings.

Initially, this Court notes the Applicant told the plea judge she pled guilty to the charge and agreed with the assistant solicitor's recitation of the facts. (Plea transcript, p.10; p.17). The Applicant also told the plea judge that she understood the trial rights she was waiving in pleading guilty, was satisfied with plea counsel, and had not been coerced in any way. (Plea transcript, pp.7-8).

This Court finds the Applicant failed to meet her burden of proving plea counsel did not properly investigate and present a mitigation case. Plea counsel testified the Applicant told him about prior abuse from the victim. Plea counsel testified, however, that it was difficult to find information to corroborate the Applicant's story. Plea counsel testified, for example, that he



received some medical records, but they were not useful in developing a battered woman defense. Plea counsel also testified that he obtained an evaluation for the Applicant but that Dr. Veronen's report was not helpful in advancing a battered woman defense. This Court finds plea counsel's testimony is credible. This Court finds plea counsel conducted a proper investigation in an attempt to formulate a battered woman defense. This Court finds plea counsel was unable to do so based, in part, upon the vague information provided by the Applicant. Regardless, the Applicant failed to present any evidence at the PCR hearing (though documentation, lay or expert witness testimony) that would support her argument that a compelling battered woman defense could have been made at the trial level – thus affecting her parole eligibility. See S.C. Code Ann. § 16-25-90 (2003) (“an inmate who was convicted of, or pled guilty or nolo contendere to, an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate . . . in post-conviction proceedings pertaining to the plea or conviction, presented credible evidence of a history of criminal domestic violence . . . suffered at the hands of the household member”); see also Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, “it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense”); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, “any finding of prejudice is merely speculative”); Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court finds the Applicant failed to meet her burden of proving she requested plea

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counsel file an appeal in this case. The Applicant was clearly aware that she had the right to file an appeal, as the plea judge advised her of such during the plea colloquy. (Plea transcript, p.10). Plea counsel testified that he did not recall the Applicant asking him to appeal but that he would file an appeal if a client asked him to do so. This Court finds plea counsel's testimony is credible. This Court finds plea counsel would have filed a notice of appeal if the Applicant had made such a request. This Court finds the Applicant was aware of her appellate rights and chose not to exercise them.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that she was prejudiced by plea counsel's performance. This Court concludes the Applicant has not met her burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during her guilty plea and

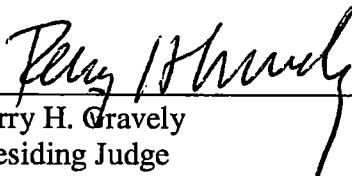
sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that she must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if she wants to secure appropriate appellate review. Her attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25th day of January, 2016.



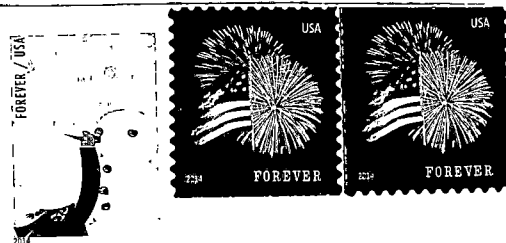
Perry H. Gravely
Presiding Judge
Thirteenth Judicial Circuit

Orrenville, South Carolina.

CAROLINE M. HORLBECK

Attorney At Law

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