

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Horry County

John C. Hayes, III, Circuit Court Judge

NEARIM BLACKWELL-SELIM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000020

BRIEF OF PETITIONER

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ISSUE PRESENTED

Remand appellate counsel erred on appeal by attacking the sufficiency of the additional early parole eligibility evidence presented during the remand hearing instead of raising the question of whether the trial judge erred in denying early parole eligibility to petitioner based on the original evidence presented by petitioner because an analysis of the original evidence was the sole issue ordered for appellate review by the South Carolina Supreme Court in its reversal and remand handed down in the case.

STATEMENT

Petitioner Nearim Blackwell-Selim pled guilty to voluntary manslaughter¹ during the January 2007 term of the Horry County General Sessions Court before Judge Steven H. John. App. 1- 13. On February 27, 2007, petitioner was sentenced by Judge John to imprisonment for a period of twenty years without early parole. App. 15-51. See S.C. Code Ann. § 16-25-90.² Petitioner was represented by Barbara Blaine-Olds at the guilty plea and sentencing proceedings. Assistant Solicitor Bradley C. Richardson appeared at both of these proceedings on behalf of the State.

Petitioner appealed Judge John's denial of early parole eligibility in the case. On September 15, 2009, the South Carolina Court of Appeals upheld Judge John's parole eligibility ruling in State v. Blackwell-Selim, 385 S.C. 394, 684 S.E. 2d 208 (Ct. App. Sept 15, 2009). Supp. App. 69-73. However, on March 21, 2011, the South Carolina Supreme Court reversed and remanded the case for the sole purpose of requiring Judge John to "make specific findings of fact on the record as to whether [petitioner] suffered domestic violence at the hands of (her) boyfriend for the purpose of early parole eligibility." App. 53 – 55. See State v. Nearim Blackwell-Selim, 392 SC1, 707 S.E.2d 426 (S.C. March 21, 2011). Supp. App. 110-113. Celia M. Robinson, Esquire, formerly of the South Carolina Office of Appellate Defense, represented petitioner on direct appeal.

A remand hearing was held on May 11, 2011, before Judge John. Petitioner was represented by Orrie E. West and Ronald Hazzard at the remand hearing, and Assistant Solicitor Bradley Coy

¹ On March 15, 2011, petitioner was indicted for murder on June 3, 2005 by the Grand Jurors of Horry County. App 169-170.

² Section 16-25-90 of the South Carolina Code (Supp.2008) provides pertinent part: notwithstanding any other provision of law, 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 at the time pled guilty to, nolo contendere to, or was convicted of an offense against the household member, or in post-conviction proceedings

Richardson appeared on behalf of the state. App. 56-120. At the close of the remand hearing, Judge John found petitioner ineligible for early parole under S.C. Code 16-25-90. App. 118, l. 23 - p. 119, l. 5.

Petitioner appealed Judge John's remand hearing ruling regarding the denial of early parole eligibility, but the Court of Appeals affirmed Judge John's ruling on appeal. See State v Nearim Blackwell-Selim, Op. No. 2012-UP-566 (S.C. Ct. App. filed October 24, 2012). Supp. App. 124 - 126. Robert M. Pachak, Esquire, of the Office of Appellate Defense, represented petitioner on her remand appeal. Supp. App. 114-123.

On September 5, 2013, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 122-128. The respondent filed a return dated June 6, 2014, requesting that a PCR hearing be held in the case. App. 129-133.

A PCR hearing was convened on October 29, 2014, at the Horry County Courthouse before Judge John C. Hayes. App. 135-160. On November 16, 2014, Judge Hayes issued an Order denying post-conviction relief to the petitioner. App. 162-168.

Petitioner appealed Judge Hayes' Order and filed a petition for writ of certiorari on June 29, 2015, which was followed by the filing of a return by the respondent on August 10, 2015. On February 12, 2016, this Court granted petitioner's petition for writ of certiorari. This brief of petitioner follows.

pertaining to the plea or conviction, presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member.

ARGUMENT

Remand appellate counsel erred on appeal by attacking the sufficiency of additional early parole eligibility evidence presented during the remand hearing instead of raising the question of whether the trial judge erred in denying early parole eligibility to petitioner based on the original evidence presented by petitioner because an analysis of the original evidence was the sole issue ordered for appellate review by the South Carolina Supreme Court per its reversal and remand handed down in the case.

The only case fact submitted by the solicitor at the guilty proceeding was that the petitioner used a knife to stab her live-in boyfriend Kenneth Ali Selim, who later died from the stab wound. App. 11,1.10 – p.12,1.4. During the sentencing hearing held thereafter, petitioner presented evidence of a history of domestic violence perpetrated upon her by the deceased and requested early parole eligibility as a result per S.C. Code Ann. § 16-25-90, but Judge John ruled against petitioner and denied her early parole request. App. 51, lines 9 – 25.

Petitioner appealed Judge John’s denial of early parole eligibility in the case. Appellate counsel raised the following issue to the appellate court on direct appeal:

The circuit court judge erred as a matter of law in deciding that appellate had failed to present credible evidence of a history of criminal domestic violence sufficient to satisfy the requirement of 16-25-90. Supp. App. 21-36.

The Court of Appeals upheld Judge John’s denial of early parole eligibility to petitioner via the rationale that either petitioner failed to produce credible evidence in support of early parole or petitioner did not meet the preponderance of the evidence standard in the presentation of her case for early parole eligibility. Supp. App.69-73. It is noteworthy to recognize that Court of Appeals acknowledged the lack of findings in the case and went on to note in its opinion that the “trial judge

made no explanation” for denying parole eligibility and emphasized the predicament of the case as follows:

We recognize that [petitioner] argues her past violent behavior toward her late husband should not bar her from eligibility for early parole. We do not imply by our holding that [petitioner] is barred from eligibility because of this behavior. Rather, we simply find that based on our standard of review, the record supports the ultimate conclusion of the trial court under either rational: i.e., either (1) [petitioner] failed to present credible evidence she suffered criminal domestic violence at [the deceased’s] hands or (2) the evidence she presented, whether credible or not, did not satisfy the preponderance of the evidence burden. Supp App. 73

Appellate counsel appealed the Court of Appeals’ decision to the South Carolina Supreme Court and raised the following question in a petition for writ of certiorari:

Did the Court of Appeals erroneously approve and affirm the Circuit Court’s conclusion that petitioner had failed to submit credible evidence of a history of domestic violence at the hands of her deceased household member as required by S.C. Code Ann. Section 16-25-90 (2003) where that finding was unsupported by the record evidence and where the erroneous ruling was due to the Court’s failure to apply that statute as written? Supp. App. 85-109

The South Carolina Supreme Court reversed the Court of Appeals’ decision in the case because the trial judge failed to make the required specific findings of fact on the record in support of the ruling denying early parole eligibility to petitioner and ordered a “remand to the circuit court to make such findings.” App. 53-56. Specifically, the South Carolina Supreme Court held as follows:

We find that the Court of Appeals erred in reviewing the plea judge’s finding petitioner was not eligible for early parole under 16-25-90 because the plea judge failed to make specific findings of fact to support his ruling. Thus, that was nothing for the Court of Appeals to review. [State v.] Winkler, 388 S.C. at 583, 698 S.E. 2d at 601; Laney, 367 S.C. at 643, 627 S.E. 2d at 729. The circuit court must make specific findings in ruling on parole eligibility or ineligibility under 16-25-90. See e.g. [State v.] Grooms, 343 S.C. 248, 540 S.E.

2d 99. Therefore, we vacate the opinion of the Court of Appeals and remand the matter to the circuit court to make specific findings in fact regarding the ruling that petitioner was not entitled to early parole eligibility pursuant to 16-25-90. App. 54-55.

A remand hearing was convened on May 11, 2011. App. 56 – 120. During this hearing, Judge John stated that this was not a de novo hearing and that he would listen to, but not consider additional domestic violence evidence presented by petitioner. App. 63, l. 11 – p. 64, l. 7. Judge John explained as follows:

In reading the Order and Decision of the South Carolina Supreme Court, the purpose of this hearing is for the Circuit Court to make findings, specific findings of fact regarding my ruling that the Petitioner was not entitled to early parole eligibility. I find that to be the only purpose of this hearing. It is not by directions of the South Carolina Supreme Court, nor by Section 16-25-90, and the Appellate Court Rules to conduct a new hearing, to conduct a de novo hearing in this matter. I find specifically that I was directed by the South Carolina Supreme Court to make specific findings on the record as to my previous decision that I rendered on February 27th, 2007. App. 60, l. 21 – p. 61, l. 7.

At the remand hearing, petitioner's attorneys submitted petitioner's original evidence, i.e., the identical domestic violence material and documentation presented at the first sentencing hearing. Below is a list of the documents comprising the original evidence in question presented at the remand hearing:

1. February 9, 2002 - Middleton Connecticut - police report of Kenneth had beaten petitioner.
2. December 19, 2002 incident report - beating of petitioner by Kenneth (cuts – back/elbow)
3. December 21, 2002 newspaper write up of beating of petitioner
4. January 5, 2003 report of beating of petitioner by Kenneth (punched in the face)

5. April 2004 – hospital report of petitioner beaten by Kenneth
 6. June 2004 – hospital treatment for injuries
 7. January 22, 2005 – police report petitioner beaten by Kenneth
 8. Affidavits from Pam Wilson, Sandra Leclair, Francis Blackwell and Donald Blackwell who were eyewitnesses to Henneth beating petitioner; and
 - 9.) Testimony of Jerri Sanders (petitioner’s friend) and Dr.M. Loring.
- App. 34-45; Supp. App. 1-20.

Also, during the remand hearing, petitioner’s attorneys presented additional evidence of a long history of domestic violence petitioner suffered at the hands of the deceased in support of her request for early parole. App. 69, l. 1 – p. 107, l. 2.

At the close of the remand hearing, Judge John denied early parole eligibility to petitioner on the ground that per the preponderance of the evidence standard, the petitioner did not carry her burden of proof of credible evidence of a history of domestic violence warranting early parole eligibility under 16-25-90. Judge John outlined his specific findings as follows:

I took into consideration the facts of this case, how the crime occurred, the criminal record of the defendant, the medical examiner’s report in this particular case, I took the facts as presented by the Defense, record of the victim, the matters that were presented.

Again, hearing all the matters presented by the Defense, based upon my evaluation of the evidence, my personal observations, the mannerism, the tenor of voice, how the matters were stated [and] to personal observations...I used this information to judge the credibility, the believability, and the reliability of the matters presented by the Defense, and also the matters presented by the State. I took all the facts for and against...into consideration in my decision, that based upon the preponderance of the evidence standard, and the matters that were in the record, as presented , that there should be no finding of parole eligibility pursuant tom 16-25-

90. I found at that time to be proper sentence and finding by this Court on [the initial sentencing hearing]... and I, again, reaffirm, and find that to be correct. App. 117, l. 17 – p. 119, l. 5.

On appeal, remand appellate counsel raised the following issue:

Whether the trial court erred in failing to make specific findings of fact on the record concerning new evidence that was brought forward by appellant that presented credible evidence of a history of criminal domestic violence so as to make her eligible for parole after serving one-fourth of her sentence? Supp. App. 114-121.

The Court of Appeals affirmed the remand ruling per the following holding:

[Petitioner] appeals only the circuit court's lack of specific factual findings as to the additional evidence presented at the second sentencing hearing. [Petitioner] does not challenge the evidence originally presented at the first sentencing hearing, the merits of the ruling based on the original evidence.

Whether or not a trial court may consider additional evidence on remand depends on the purpose of the remand. State v. Frey, 362 S.C. 511, 514, 608 S.E.2d 874, 876 (Ct. App.2005). When an appellate court remands a case to a trial court to address issues not fully developed during the trial, it is appropriate for the trial court to consider new evidence. *Id.* However, when a remand is not for this purpose, a party should not be allowed a “second” evidentiary hearing.” *Id.*

In this case, the Supreme Court remanded the case to the circuit court “to make specific findings of fact regarding the ruling the petitioner was not entitled to early parole eligibility pursuant to (section) 16-25-90.” Blackwell-Selim, 392 at 4, 707 S.E.2d at 428. There were no issues that were not fully addressed and developed during the original sentencing hearing; instead the remand was for a determination of specific findings on the evidence already presented. Thus, there was no requirement that the circuit court consider or make specific findings of fact as to new evidence. Supp. App. 124 – 126.

In the PCR application, petitioner’s complaint was broad and generic to the extent that she referenced her inability to have gained early parole and named the attorneys who represented her in the matter. App -122 - 128.

After a PCR hearing was held in the case, the PCR judge denied post-conviction relief to petitioner on the following grounds:

In [petitioner's] appeal, the Court of Appeals observed that [petitioner] "does not challenge the evidence originally presented at the first sentencing hearing" or "the merits of the ruling based on the original evidence." See 2012 WL 10862830.

The [PCR court] undersigned finds that the opinion of the Court of Appeals closes the door on her [PCR] current complaint. At her first opportunity to challenge the evidence from her first sentencing hearing by the sentencing judge, she did not raise and issue of concern as to the evidence of lack of evidence considered by the Court.

As stated below, [petitioner] challenges the trial court's ruling relative to her parole eligibility pursuant to S.C. Code Ann. § 16-25-90. This issue has already been visited and decided. See WL 10867830. App. 163-165.

The only issue in this case that was of any concern to petitioner and the South Carolina Supreme Court was whether the original evidence presented at the sentencing hearing, which was reproduced at the remand hearing, constituted sufficient proof under the preponderance of the evidence standard that a history of criminal domestic violence occurred in the case in support of petitioner's request for early parole eligibility under S.C. Code Ann. § 16-25-90. Clearly, the only evidence ordered to be reviewed by Order of the South Carolina Supreme Court was the original evidence presented at the initial sentencing hearing (which was also reproduced at the remand hearing). The South Carolina Supreme Court did not issue an order for findings on additional or new evidence. Therefore, when remand appellate counsel challenged on appeal the trial judge's failure to review or consider the additional or new evidence at the remand hearing regarding the early parole determination as the only issue raised on appeal, this foreclosed the appellate court's review of the trial judge's decision on the original evidence presented at the sentencing hearing and

reproduced at the remand hearing, which was the core of petitioner's entire case and the only matter of inquiry required for the South Carolina Supreme Court to conduct its appellate review in the case.

Since remand counsel failed to raise the only issue in the case as directed in effect by the South Carolina Supreme Court as the only entertainable issue in the remand appeal, petitioner never received appellate review of the core issue that was central to the case which was whether Judge John abused his discretion in denying early parole to petitioner because the original evidence presented established sufficiently a history of criminal domestic violence endured by petitioner from the deceased as proved by a preponderance of the evidence in the matter. Again, the South Carolina Supreme Court asked **not** for a review of additional or new evidence connected to petitioner's request for relief under 16-25-90. Thus, remand appellate counsel erred in raising the additional or new evidence issue as the question for consideration on the remand appeal.

Under South Carolina Code Ann. 16-25-90 one who is convicted of an offense against a household member is eligible for parole after serving one-fourth of his or her prison term if the person presents credible evidence of a history of criminal domestic violence.

In State v. Grooms, 343 S.C. 248, 540 S.E.2d 99 (2000), the Court upheld the trial judge's denial of relief to the defendant under S.C. Code Ann. 16-25-90, where the only evidence of a history of criminal domestic violence provided was the testimony of the defendant, her psychologist, her sister's guardian ad litem, and an investigator. By contrast, compare State v. Hawes, 399 S.C. 211, 730 S.E.2d 904 (2012), where the Court upheld the trial judge's grant for relief to the defendant under S.C. Code Ann. 16-25-90, where the defendant presented evidence that was sufficient proof under the preponderance of the evidence standard that a history of

domestic violence existed in the case. In Hawes, the following evidence was presented for relief under S.C. Code Ann. 16-25-90:

1. A 1996 municipal court conviction in which Hawe’s wife pled guilty to CDV against Hawes. Hawes was also convicted of CDV against her for the same incident.
2. A separate CDV indictment [that was] pending at the time of the 1996 incident in which Hawes’ wife allegedly struck and kicked him.
3. A July 2006 CDV indictment stating she did “willfully or unlawfully cause or offer or attempt to cause physical harm or injury to his family or household member, to wit: Alonzo Craig Hawes, with apparent present ability under circumstances reasonably creating fear of imminent peril.”
4. A November 2006 incident report stating Hawes called the police complaining about a domestic disturbance in which his wife had a knife. When the police arrived, Hawes was gone, and his wife denied anything “other than a verbal altercation” occurred.
5. A 2007 incident in which Hawes claimed his wife stabbed his hand. Hawes sought treatment at a hospital and told the doctor his wound resulted from a dirt bike accident.
6. Recording of voicemail messages Hawes’ wife left on his cell phone and numerous arguments and conversations between them.
7. The testimony of Brittany Roundtree, Hawes’ stepdaughter and his wife’s daughter, that Hawes and her mother argued a lot after her mother discovered him cheating on her. She said Hawes was the primary instigator of violence in the relationship and he “sometimes” “put his hand on” her mother.

8. The testimony of an expert in forensic psychiatry that Hawes described a history of mutual violence, “that he had certainly abused (his wife) in the past and she had also physically abused him in the past.”

The Court ruled that a history of criminal domestic violence was proved in the Hawes case and affirmed the trial judge’s ruling granting early parole eligibility to Hawes.

Similarly, in the case at bar, petitioner’s original evidence as listed on pages 7-8 of this petition included the testimony of friend Jerri Sanders and Dr. Mary Loring, and four affidavits from four eyewitnesses to the violence perpetrated upon petitioner by the deceased, and seven incident/newspaper reports summarizing the domestic violence perpetrated upon petitioner by the deceased. For example, Sanders explained at length about who petitioner talked to and wrote letters to regarding the physical abuse she suffered at the hands of the deceased. App. 33, l. 11 – p. 35, l. 9. Moreover, Dr. Loring evaluated petitioner upon request of the Public Defender’s Office and testified that after three interviews and conversations with witnesses such as petitioner’s daughter, it was certifiable that there was a history of domestic violence that petitioner suffered through and led to her trauma and state of disassociation. App. 35, l. 14 – p. 45, l. 8. Clearly, petitioner, like the defendant in the Hawes case, established a history of criminal domestic violence by a preponderance of the evidence.

Remand appellate counsel erred in failing to challenge the trial judge’s denial of early parole eligibility based on the original (not new or additional) evidence presented at the initial sentencing hearing, which was reproduced during the remand hearing, as the original evidence was the only of merit raised in the case on direct appeal and in the South Carolina Supreme Court’s opinion reversing and remanding the case for findings consistent with its order for a proper evaluation on the record regarding an analysis of the original evidence presented by petitioner for early parole.

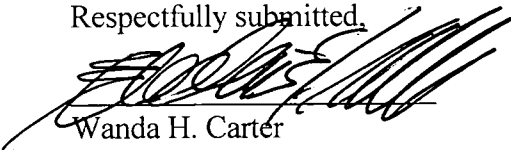
A defendant has a constitutional right under the Due Process Clause of the Fourteenth Amendment to receive effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985); Southerland v. State, 337 S.C. 810, 524 S.E.3d 833 (1990). Ineffective assistance of appellate counsel is proved if appellate counsel failed to raise a meritorious issue and the failure to do so was objectively unreasonable to the extent that but for the error, the case would have been reversed on appeal. See Southerland v. State, *supra*.

Remand appellate counsel's error as outlined in the above argument violated petitioner's right to effective assistance of appellate counsel on her remand appeal per the Fourteenth Amendment. The prejudice is obvious in that but for remand appellate counsel's error, the case would have been reversed per the remand appeal.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition for writ of certiorari and allow for the filing of a substitute remand appellate brief on the issue of the question of the sufficiency of the original evidence for early parole eligibility presented in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 14th day of March, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

John C. Hayes, III, Circuit Court Judge

NEARIM BLACKWELL-SELIM,

PETITIONER,

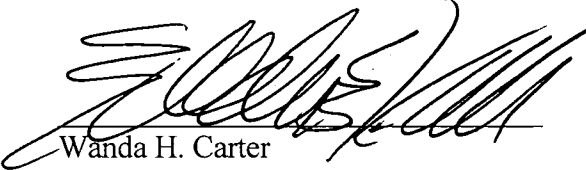
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

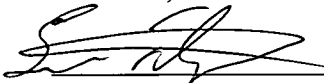
I certify that a true copy of the brief of petitioner, in this case has been served on Joshua L. Thomas, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Nearim G. Blackwell-Selim #320359, at Leath Correctional Institution 2809 Airport Road, Greenwood, SC 29649, this 14th day of March, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of March, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.