

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

RECEIVED
AUG 23 2016
SC SUPREME COURT

PERRY H. GRAVELY, CIRCUIT COURT JUDGE
2014-CP-32-1177

Carrie Callaham,.....Petitioner.

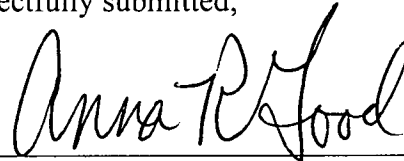
vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Carrie Callaham appeals the Honorable Perry H. Gravelly's August 8, 2016 Order of Dismissal. Undersigned counsel received notice of entry of the order on August 18, 2016. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Good
Law Office of Anna Good, LLC
PO Box 7284
Columbia, South Carolina 29202
Telephone: (803) 661-6758
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Attorney for the Petitioner.

August 23, 2016.

OTHER COUNSEL OF RECORD:

Johanna Valenzuela, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29211-1549

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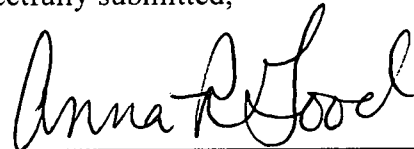
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PROOF OF SERVICE

I, Anna Good, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Johanna Valenzuela, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 23rd day of August 2016.

Respectfully submitted,



Anna R. Good, Esquire
Law Office of Anna Good, LLC
PO Box 7284
Columbia, South Carolina 29202

ORIGINAL

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) 2015 AUG 12 A 11:00 AM FOR THE ELEVENTH JUDICIAL CIRCUIT

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Carrie Callaham,
S.C.D.C. No. 328469,

Applicant,

v.

C.A. No. 2014-CP-32-1177

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 21, 2014, and amended on or about November 13, 2015. Respondent made its return on or about August 18, 2015. An evidentiary hearing was held on April 19, 2016, at the Lexington County Courthouse. Applicant was present and represented by Anna Good, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented Respondent.

Applicant; her trial counsel, Bennett Casto, Esquire; and her appellate counsel, Kathrine Hudgins, Esquire, testified at the hearing. The Court had before it Applicant's trial transcript, the Lexington County Clerk of Court records, Applicant's appellate records, the South Carolina Department of Corrections records, the PCR application, the PCR amendments, and the Return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted by the May 2012 term of the Lexington County Grand Jury for burglary, first degree (2012-GS-32-

1216) and armed robbery (2012-GS-32-1218). Applicant was represented by Robert Madsen, Esq., and Bennet Casto, Esquire. On May 29, 2014, the Applicant proceeded to trial before the Honorable George C. James, Jr. and a jury. She was found guilty as indicted. Judge James sentenced Applicant to a term of fifteen (15) years imprisonment for burglary, first degree, and to a term of fifteen (15) years imprisonment for armed robbery. These sentences were to be served concurrently.

A timely notice of appeal was filed and perfected on Applicant's behalf. Kathrine Hudgins, Esq., represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Callaham, Op. No. 2014-UP-035 (S.C. Ct. App filed January 29, 2014). The Remittitur was issued on February 25, 2014.

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

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) (citing SCRCP 71.1(e)). Where the application alleges ineffective assistance of counsel as a ground for relief, 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 442, 334 S.E.2d at 814.

First, the applicant must show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984) (“[T]he defendant must show that counsel’s representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (“PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant’s case.”).

And “where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Watson v. State, 370 S.C. 68, 72,

634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992))). “Counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). “Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

This Court will now address each allegation of ineffective assistance of counsel:

Applicant alleged trial counsel failed to properly prepare for trial with the defendant, including not reviewing discovery with her; failed to properly advise her as to testifying in her Jackson v. Denno hearing and failed to call her to testify as to her voluntariness; failed to properly object to hearsay with witnesses Abdul Bargas and Sergeant Robert McIntyre; and failed to poll the jury. As to appellant counsel, Applicant alleges she failed to properly appeal the issue of witness Marcello Prado’s testimony admissibility.

I. Alleged failure to properly prepare and review discovery

Applicant claims she met with her trial counsel twice and only to do an introduction, get advice to plead, and for roll call. Trial counsel testified he met with Applicant at least two times and that they were long meetings. Trial counsel also noted he had significantly lengthy calls with

Applicant prior to trial. Trial counsel said he reviewed evidence and what to expect at trial.

This Court finds Applicant has failed to meet her burden of establishing trial counsel was ineffective and failed to establish any prejudice from trial counsel's strategy.

II. Jackson v. Denno Hearing

Applicant asserts she was intoxicated the night of her arrest and when she gave her statement to police. Applicant states she had taken ecstasy, marijuana, and wine before she spoke to detectives. Applicant claims to have smoked "a blunt" around midnight of that night and claims she informed law enforcement she was drunk that night. Applicant also says she told trial counsel she was intoxicated as well. Applicant argues she should have testified at her Jackson v. Denno hearing about the voluntariness of her statements based on her intoxication.

On cross-examination, Applicant admitted she was arrested that night while driving a vehicle, that she was not given any field sobriety tests, and that she was not charged with driving under the influence that night. Trial counsel also explained there were several factors that did not lead him to believe her claim of intoxication would be credible: (1) there was a delay from the traffic stop to the interview with law enforcement and (2) the night she was arrested, she had the foresight and ability to give police a false name (Trial Tr. p. 157, l. 22 – p. 158, l. 4) and change one digit in her social security or driver's license number. Additionally, no officer stated he smelled alcohol and there was not a driving under the influence charge.

This Court finds Applicant has failed to meet her burden of establishing trial counsel was ineffective and failed to establish any prejudice from trial counsel's strategic decision regarding Applicant's credibility and how to address the Jackson v. Denno hearing.

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III. Failure to properly object based on hearsay to portions of Abdul Bargas and Sgt. Robert McIntyre's testimony

Applicant argues trial counsel should have objected to portions of Abdul Bargas and Sgt. McIntyre's testimony that allowed each of those witnesses to talk about what a neighbor saw. Trial counsel agreed he did not make any objections at the specific instances noted by PCR counsel. Trial counsel did, however, object at other points in those witnesses' testimony, (Trial Tr. p. 128, l. 7 – p. 129, l. 5) specifically to hearsay when the witness stated he only heard something instead of observing it on his own (Trial Tr. p. 108, ll. 18-25.) Trial counsel explained he does not like to overly object in front of a jury for strategic reasons.

It was also noted that based on the statements being made as events occurred or shortly thereafter, the objection may have been overruled based on the excited utterance exception. Appellate counsel also noted that she would not have appealed the hearsay issue.

After reviewing the transcript and hearing the testimony, this Court finds Applicant failed to meet her burden of proving trial counsel was ineffective or that she suffered any prejudice.

IV. Marcello Prado

Appellate counsel testified that she appeals her strongest issues because she has found that to plead every single issue can dilute the strength of the main issues you want the court to review. Appellate counsel stated that pursuant to State v. Nicholson, 366 S.C. 568, 579, 623 S.E.2d 100, 105 (2005) ("The State . . . is not required to provide its witness list to a criminal defendant . . .") the State does not even have to produce a witness list; so, she did not think it was a strong argument to appeal the addition of Marcello Prado to the witness list.

Handwritten signature or initials in black ink, appearing to be 'PWR'.

After reviewing the transcript and hearing the testimony, this Court finds Applicant failed to meet her burden of proving appellate counsel was ineffective or that she suffered any prejudice.

V. Failed to poll the jury

Applicant argues trial counsel failed to poll the jury. Trial counsel explained that he did not poll the jury, in part because the jury rendered a verdict so quickly. No evidence was presented as to the potential prejudice caused by failure to poll the jury.

This Court finds Applicant has failed to meet her burden of establishing plea counsel was ineffective or that the ineffectiveness caused her prejudice.

All Other Allegations

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

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during her trial or her appeal. Trial and Appellate counsel were not deficient in any manner, and Applicant was not prejudiced by their representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises 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

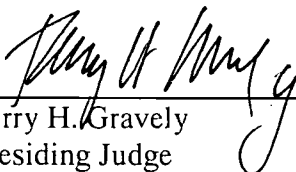


for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 8th day of August, 2016.



Perry H. Gravely
Presiding Judge
Eleventh Judicial Circuit

Greenville, South Carolina.

FILED
2016 AUG 12 A 11:00
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC