ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
FEB 03 2017
S.C. SUPREME COURT

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

ELVIRA LYNN SEAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000408

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 3

CONCLUSION 9

ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for not asking the judge to find that Petitioner was eligible for parole pursuant to S.C. Code §16-25-90 when Petitioner proved, by a preponderance of the evidence, a credible history of domestic violence committed against Petitioner by the deceased?

STATEMENT

In In April of 2012, the Greenville County Grand Jury indicted Petitioner, Elvira Lynn Robinson Seay, with murder and possession of a weapon during the commission of a violent crime, indictment #2012-GS-23-2898. On May 15, 2013, Petitioner appeared before the Honorable Letitia H. Verdin and pled guilty to voluntary manslaughter. Jake Erwin represented Petitioner at the plea. Leigh Paoletti prosecuted the case. Sentencing was deferred. On March 4, 2014, Petitioner appeared before the Honorable Robin B. Stilwell for sentencing. Jake Erwin again represented Petitioner and Leigh Paoletti again represented the State. Judge Stilwell sentenced Petitioner to twenty-five (25) years in prison. Petitioner did not file a notice of intent to appeal.

On January 13, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on June 3, 2015. On December 15, 2015, an evidentiary hearing was held before the Honorable Perry H. Gravely. Carolina Horlbeck represented Petitioner at the PCR hearing. Karen Ratigan represented the State. In a written order signed January 25, 2016, Judge Gravely denied relief and dismissed the application. A timely notice of intent to appeal was served on February 25, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for not asking the judge to find that Petitioner was eligible for parole pursuant to S.C. Code §16-25-90 when Petitioner proved, by a preponderance of the evidence, a credible history of domestic violence committed against Petitioner by the deceased.

Petitioner pled guilty to voluntary manslaughter in the shooting death of her abusive live in boyfriend. During the sentencing hearing Petitioner, as mitigation, introduced the report of Dr. Lois Veronen, a clinical psychologist. (App. pp. 39-42). Dr. Veronen's report documents Petitioner's history of abuse at the hands of the deceased. During the guilty plea the prosecutor told the judge, "There is some evidence, Your Honor, that the victim was abusive towards the defendant in the past and, perhaps, even that night, but the evidence in this case is that he was shot twice in the chest and one in the back and was on his bed when he was shot and killed." (App. p. 17, lines 3-8). During the sentencing hearing defense counsel discussed the abuse Petitioner suffered at the hands of the deceased and referenced Dr. Vernonen's report. Defense counsel, however, did not ask the judge to find that Petitioner was entitled to early parole eligibility pursuant to S.C. Code §16-25-90.

S.C. Code Ann. §16-25-90 provides that " . . . 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 he pled guilty to, nolo contendere to, or was convicted of an offense against the household member, or in post-conviction proceedings 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."

In State v. Blackwell-Selim, 392 S.C. 1, 3–4, 707 S.E.2d 426, 428 (2011), the South Carolina Supreme Court, discussing the proof required to be eligible for early parole pursuant to S.C. Code §16-25-90, wrote:

> Such a history must be proven by a preponderance of the evidence. State v. Grooms, 343 S.C. 248, 254, 540 S.E.2d 99, 102 (2000). Therefore, mere production of evidence does not automatically result in earlier parole eligibility; instead, the defendant must persuade the judge by presenting proof which leads the trier of fact to find that the existence of the contested fact is more probable than its nonexistence. Id. at 253–54, 540 S.E.2d at 101–02 (citing 2 McCormick on Evidence § 339 (5th ed.1999)). Moreover, use of the term "credible evidence" indicates the legislature intended the defendant's evidence to be, in fact, trustworthy, not simply plausible. Id. at 253, 540 S.E.2d at 101. The defendant must persuade the judge her evidence is reliable. Id.

During the PCR hearing plea counsel admitted that at the time of the plea he was not aware of S.C. Code §16-25-90. (App. p. 88, lines 7-16). Plea counsel testified, "And I realize that now, that that might have been something that I should have been aware of. And I'm a little embarrassed to admit I didn't know anything about that section." (App. p. 88, lines 12-16). Plea counsel went on to testify, "If I'd known about that section, we definitely would have made sure as part of the plea to hit the necessary points that we needed to, to convince the judge to make a finding under that section and give her early parole eligibility. If. I didn't know about that and so we didn't tailor presentation to that section." (App. p. 89, lines 1-8). Plea counsel admitted that he did not subpoena emergency room records from Parkway at Pelham despite the fact that Petitioner told him she went to the emergency room as a result of physical abuse. (App. p. 79, lines 1-8; p. 91, line 24 – p. 92, lines 1-16). Plea counsel admitted that he was aware of some witnesses to the abuse inflicted on Petitioner by the deceased but failed to interview those witnesses. (App. p. 80, lines 8-17). Plea counsel admitted that Petitioner told him that the police were called to the house at least once in regard to domestic violence. (App. p. 89, line 17 – p. 90, p. 91 lines 1-2). Plea counsel admitted that he did not thoroughly investigate the prior

police involvement. (App. p. 90, lines 7-20). When asked if the information provided by petitioner was not detailed enough, plea counsel testified, "You know, I think that probably was my thinking at the time. And it's easy to second guess stuff like that now. I'm sitting here today listening to her testify and I'm already thinking of, you know, ways I could have investigated that better, you know. But at the time I remember thinking about it was somewhat of a dead-end." (App. p. 91, lines 7-14).

During the PCR hearing Petitioner testified about the mental and physical abuse she suffered at the hands of the deceased. (App. pp. 60-70). Petitioner testified that the deceased hit her in the head causing a hematoma and mild concussion. (App. p. 63, line 25 – p . 64, lines 1-5; p. 65, lines 1-4). Petitioner testified that she was seen in the emergency room at Parkway at Pelham as a result of being struck in the head by the deceased. (App. p. 64, lines 13-21). Petitioner testified that the deceased cut her arm requiring stitches. (App. p. 65, line 11 – p. 66, lines 1-7). She was again treated in the emergency room at Parkway at Pelham. (App. p. 66, lines 1-7). Petitioner testified that the deceased hit her with a golf club, fracturing her ankle. (App. p. 66, lines 13-19). Petitioner was again treated in the emergency room at Parkway at Pelham. (App. p. 66, lines 20-24).

At the close of testimony PCR counsel asked that the record remain open so that she could obtain Petitioner's medical records from the emergency room at Parkway at Pelham. (App. p. 94, line 5 – p. 95, 96, lines 1-16). Counsel mistakenly believed that plea counsel obtained the records but did not introduce them at sentencing. (App. p. 94, lines 5-8). Plea counsel obtained records from Patrick Harris but not Parkway at Pelham. (App. p. 79, lines 1-22; p. 91, line 24 – p. 92, lines 1-16). The judge denied the request finding that ". . . all of the mitigating

circumstances were brought forth at the plea and considered – in fact, considered by the judge." (App. p. 100, lines 1-4).

In the order of dismissal the PCR judge wrote:

> 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 [sic] 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).

(App. p. 106). The PCR judge erred. First, plea counsel did not testify that he was unable to present evidence, pursuant to §16-25-90, based on vague information provided by Petitioner. Instead, plea counsel admitted that he was unaware of §16-25-90 providing for early parole. . (App. p. 88, lines 7-16). Plea counsel admitted that he should have done a better job investigating and documenting the domestic violence in order for Petitioner to qualify for early parole pursuant to the statute. (App. p. 89, lines 1-8; p. 91, lines 7-14).

Second, despite being unaware of the early parole statute, plea counsel, in mitigation, admitted Dr. Veronen's report documenting domestic abuse of Petitioner by the deceased. Although Petitioner did not present documentation or other lay or expert witnesses at the PCR hearing, Petitioner presented credible evidence of a history of domestic violence through the prosecutor's statement during the guilty plea that there was some evidence of domestic abuse, Dr. Veronen's report from the sentencing hearing and Petitioner's testimony at the PCR hearing. When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Petitioner did not argue that a compelling battered woman **defense** could have been made at the trial level, as stated in the order of dismissal. Petitioner does not challenge the guilty plea. Instead, Petitioner challenges the fact that she was not considered to be eligible for early parole pursuant to S.C. Code §16-25-90. Plea counsel was unaware of the early parole statute and failed to ask the judge to find that Petitioner was entitled to early parole. If counsel had asked the judge to find that petitioner was eligible for early parole, the judge would have erred in failing to find that she qualified for early parole. The history of abuse was established by the credible statement of the prosecution, at the guilty plea, that there was some evidence of domestic violence, Dr. Veronen's report and Petitioner's testimony. Considering the entire record, the history of abuse inflicted upon Petitioner by the deceased was proved by a preponderance of the evidence.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

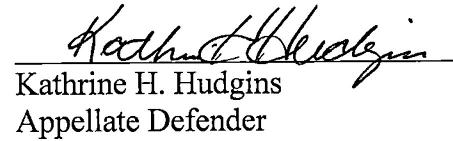
In Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010) the trial judge orally pronounced a twenty-year sentence from the bench but signed a sentencing sheet imposing a thirty-year

sentence. This Court found that counsel was deficient in failing to move for clarification and/or failing to move to conform the sentence to the oral pronouncement. This Court found the Petitioner in Boan was prejudiced by counsel's mistake. Additionally, this Court found that there was a reasonable probability that Petitioner would not have been sentenced to an additional ten years if counsel had brought the error to the trial judge's attention. As a result, this court remanded the case for resentencing.

In the present case counsel was deficient in failing to ask for early parole pursuant to S.C. Code §16-25-90. Petitioner was prejudiced by counsel's deficient performance. There is a reasonable probability that the judge would have found that Petitioner was entitled to early parole, if plea counsel had raised the issue. Petitioner is entitled to relief in the form of a remand for a hearing to determine parole eligibility pursuant to S.C. Code §16-25-90. See Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) ("This Court has previously held that post-conviction relief may be tailored to remedy the precise prejudice resulting from trial counsel's deficient performance. Rolen v. State, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) (citing United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) (recognizing that the remedy for a violation of the Sixth Amendment right to counsel "should be tailored to the injury suffered from the constitutional violation")).

CONCLUSION

Based on the above argument, this Court should remand Petitioner's case for a hearing to determine parole eligibility pursuant to S.C. Code §16-25-90.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

ELVIRA LYNN SEAY,

PETITIONER

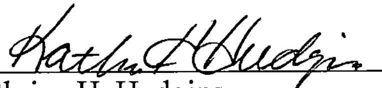
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Elvira Lynn Seay, #299405, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 3rd day of February, 2017.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of February, 2017.

(L.S)

Notary Public for South Carolina
My Commission Expires: March 1, 2026