

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000408

ELIVIRA LYNN SEAY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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RESPONDENT'S QUESTIONS PRESENTED

Did the PCR judge err in denying Petitioner's PCR in relation to S.C. Code Ann. §16-25-90.

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. During its April 2012 term, the Greenville County Grand Jury indicted Petitioner for murder (2012-GS-23-2898) and possession of a weapon during commission of a violent crime (2012-GS-23-2898). John K. Erwin, Jr., Esquire, represented the Petitioner. On May 15, 2013, Petitioner appeared before the Honorable Letitia H. Verdin and pled guilty to the lesser-included charge of voluntary manslaughter. Sentencing was deferred. On March 4, 2014, the Honorable Robin B. Stillwell sentenced the Petitioner to twenty-five years imprisonment. The Petitioner did not appeal.

Petitioner filed a PCR application January 13, 2015, alleging ineffective assistance of counsel. The Respondent made its return on June 3, 2015, requesting an evidentiary hearing. An evidentiary hearing was held on December 15, 2015 at the Greenville County Courthouse before the Honorable Perry H. Gravely. Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General, represented the Respondent. Testimony was taken from the Petitioner and her plea counsel, John K. Erwin, Jr. Esquire. Following the evidentiary hearing, Judge Gravely denied and dismissed the PCR application by written order filed February 2, 2016.

Petitioner filed a timely notice of appeal. Petitioner submitted a petition for writ of certiorari and appendix on February 3, 2017. This return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular

act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

PCR judge did not error in denying Petitioner's PCR as there was no prejudice to the Petitioner.

Petitioner asserts the PCR judge erred when he ruled plea counsel was ineffective for not asking the plea judge to find that Petitioner was eligible for parole pursuant to S.C. Code Ann. §16-25-90. This argument is without merit.

In filing her application for post-conviction Relief, Petitioner alleged plea counsel was ineffective for failing to bring up S.C. Code Ann. §16-25-90 during her sentencing. (App.p.46). In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet her burden of proving plea counsel did not properly investigate and present a mitigation case. (App.p.105). The court concluded plea counsel conducted a proper investigation in an attempt to formulate a battered woman defense and plea counsel was unable to do so based, in part, upon the vague information provided by the Petitioner. (App.p.106). Furthermore, the court found that the Petitioner 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. (App.p.106).

Under S.C. Code Ann. §16-25-90, a section of the Criminal Domestic Violence statute, "...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.” Here, Petitioner alleged she would have been eligible for parole pursuant to this statute had plea counsel adequately prepared for and presented evidence supporting her claims victim had a history of domestic violence towards her.

During the evidentiary hearing, there was testimony from both the Petitioner and her plea counsel. Petitioner testified she went to the hospital numerous times as a result of injuries sustained from her boyfriend, the victim in this case. (App.p.64-66). Petitioner was asked on cross-examination “Now, when you went to the hospital did you tell the medical personnel there how you had been injured?” (App.p.72). Petitioner response was she always said it was an accident. (App.p.73). Plea counsel testified he was potentially working towards a defense as a result of domestic violence. (App.p.78). Additionally, plea counsel testified he received an assortment of medical records regarding Petitioner. (App.p.79). He further testified he did not remember there being anything specific in the medical records that was terribly helpful to Petitioner in presenting a battered woman syndrome defense. (App.p.80). Moreover, he testified a private forensic psychiatrist was hired to examine the Petitioner to see if the case fit into a battered women’s syndrome defense. (App.p.81). Plea counsel testified on review of the report that the psychiatrist was not confident the situation arose to a pure battered women’s syndrome defense. (App.p.82).

On cross-examination, plea counsel testified while Petitioner provided information regarding the victim’s alleged domestic abuse there was a dearth of physical evidence to support and corroborate these allegations. (App.p.86-87).

Notwithstanding plea counsel’s admission he was unaware of S.C. Code Ann. §16-25-90, Petitioner cannot establish she was prejudiced by plea counsel’s performance. As previously

discussed, a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Pursuant to S.C. Code Ann. §16-25-90, an inmate can be potentially eligible for earlier parole if he or she meets the statutory requirements. "...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." S.C. Code Ann. §16-25-90. Petitioner argues plea counsel's lack of knowledge about this amounts to defacto prejudice. However, this argument is without merit, as Petitioner failed to meet her requisite burden of proof establishing she would have been eligible for early release pursuant to S.C. Code Ann. §16-25-90.

Moreover, the statute also provides an inmate can present credible evidence in a post-conviction proceeding establishing he or she meets the requirements of S.C. Code Ann. §16-25-90 . This Court has discussed what is required under §16-25-90 to be eligible for early parole with regards to domestic violence in State v. Blackwell-Selim, 392 S.C. 1, 3-4, 707 S.E.2d 426, 428 (2011). In Blackwell-Selim, this Court noted, "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” Blackwell-Selim. 392 S.C. at, 3-4, 707 S.E.2d at, 428.

Given the opportunity to call expert witnesses, lay witnesses, and submit new medical records or documents to support her argument that she would have been eligible for early parole under §16-25-90 at the PCR hearing, Petitioner wholly failed to present any probative evidence to support her allegations of prior domestic abuse entitling her to early release. As Petitioner failed to present any evidence, her claims are merely speculative and do not meet her requisite burden of proof. See 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”).

Accordingly, Petitioner failed to establish 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. As Petitioner failed to meet her burden of proving ineffective assistance of plea counsel, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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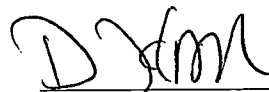
State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

**Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 19th day of June, 2017.



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