

Law Office of Leah B. Moody, LLC

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RECEIVED

JUL 29 2016

SC SUPREME COURT

July 25, 2016

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

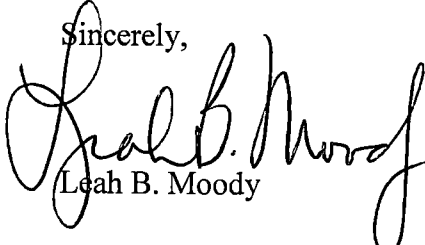
RE: Braquette Walton, #353118 v. State of South Carolina
Case No.: 2015-CP- 46-0889

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Braquette Walton in her Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal and Proof of Service in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the Order Dismissing Post-Conviction Relief Application.

Thank you for your assistance with this matter.

Sincerely,


Leah B. Moody

Enclosures

Cc Braquette Walton
Justin Hunter, Esq.
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

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JUL 29 2016

SC SUPREME COURT

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM YORK COUNTY
Court of Common Pleas**

The Honorable Frank R. Addy, Jr., Presiding in York County

Case No. 2015-CP-46-0889

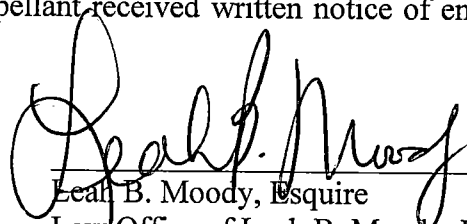
Braquette Walton, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Braquette Walton appeals the order of the Honorable Frank R. Addy, Jr., dated May 4, 2016 and mailed on July 14, 2016. Appellant received written notice of entry of the final order on July 18, 2016.



Leah B. Moody, Esquire
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Other Counsel of record:
Justin Hunter, SC Attorney General's Office
Attorney for Respondents
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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 29 2016

60 SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Presiding in York County

Case No. 2015-CP-46-0889

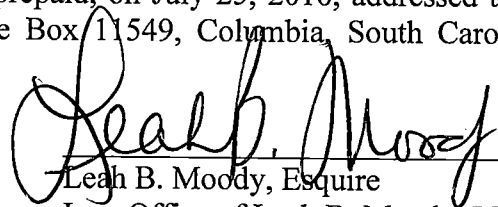
Braquette Walton, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Justin Hunter by depositing a copy of it in the United States Mail, postage prepaid, on July 25, 2016, addressed to its attorney of record, Justin Hunter, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



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July 25, 2016

Cc Braquette Walton
Justin Hunter, Esq.
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

Braquette Walton,)
)
S.C.D.C. No. 353118,)
)
Applicant,)

v.)

State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE SIXTEENTH JUDICIAL CIRCUIT

2015-CP-46-889

ORDER OF DISMISSAL

FILED-RECEIVED
2016 JUL 13 PM 3:45
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 24, 2015. Respondent made its Return on or about August 6, 2015. An evidentiary hearing into the matter was convened on April 19, 2016, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Leah Moody, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on her own behalf. Applicant's trial counsel, Phil Smith, Esquire, also testified. This Court had before it a copy of Applicant's records from the York County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application, and Respondent's Return.

I. PROCEDURAL HISTORY

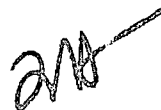
Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. On February 16, 2012, a York County grand jury indicted Applicant for murder (2012-GS-46-865), exploitation of a vulnerable adult (2012-GS-46-866), four counts of forgery and uttering (2012-GS-46-868, -869, -870, -871), and abuse or neglect of a vulnerable adult resulting in death (2012-GS-46-883). On August 16, 2012,

the grand jury indicted Applicant for four additional counts of forgery and uttering (2012-GS-46-867, -3016, -3017, -3018) and burglary in the first degree (2012-GS-46-3015).

The State called the case for trial on October 29, 2012 before the Honorable John C. Hayes, III and a jury. Phil Smith and Ashley Anderson, Esquires, represented Applicant. The jury found Applicant guilty on all counts. Judge Hayes sentenced Applicant to life imprisonment for murder, to thirty years' imprisonment for burglary, to five years' imprisonment on each count of forgery and uttering, and to five years' imprisonment for exploitation of a vulnerable adult. He ordered all of the sentences to run concurrently.

Following the trial, Applicant made a motion concerning the legality of the conviction for abuse or neglect of a vulnerable adult resulting in death. On November 5, 2012, Judge Hayes reconvened the matter to consider Applicant's motion concerning the conviction of abuse or neglect of a vulnerable adult resulting in death. Judge Hayes denied Applicant's motion and determined that she could be convicted and sentenced for both murder and death of a vulnerable adult based on abuse and neglect. Thereafter, Judge Hayes sentenced Applicant to thirty years' imprisonment for abuse or neglect resulting in death of a vulnerable adult and ordered the sentence to run concurrently with all other sentences.

Applicant timely filed a notice of appeal and the appeal was perfected by Appellate Defender Susan B. Hackett filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Applicant filed a pro se response. By an unpublished opinion filed November 5, 2014, the South Carolina Court of Appeals dismissed Applicant's appeal. 2014-UP-377. The Remittitur was sent November 21, 2014.



PCR Application

On March 24, 2015, Applicant filed an application for post-conviction relief, alleging the following grounds:

1. Ineffective Assistance of Counsel
 - a. "Failure to research law."
 - b. "Failure to submit or object jury charge."
 - c. "Failure to develop and present defense."
 - d. "Failure to make proper motions."
 - e. "Ineffective agreement."
2. Newly Discovered Evidence
3. Failure to grant change of venue

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the 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, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any

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." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel

Trial Counsel was ineffective for failing to research Applicant's case.

Applicant testified that she met with Counsel seven to ten times before trial for about thirty minutes each time. She testified that she went over the discovery by herself and asked Counsel questions. Applicant testified that she was never told the elements of her burglary first-degree charge. She testified that she was not aware that she was being charged with neglect of a vulnerable adult resulting in death. She further testified that Counsel should have researched the Victim's medical history because her medication was on a time-release that would have helped determine a time of death. She testified that she did not discuss this with Counsel before or



during trial. Applicant also testified that Counsel failed to investigate an issue with her time card, because her time card was not a card that would give her access to the facility.

Counsel testified that he received the full discovery as it came in and believed that Applicant understood the evidence against her. He testified that he checked on the issue of Applicant's time card but it was not a pertinent issue. He testified that he went over the elements of burglary first-degree and abuse or neglect of a vulnerable adult resulting in death. Counsel further testified that the time-release medication concern was not an issue in Applicant's case and would not have helped. Counsel testified that he discussed the pros and cons of Applicant's case with her and she got upset.

This Court finds that Counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court finds that Counsel took all the necessary steps to ensure that Applicant was well-informed of the State's case against her and of the elements of the charged crimes. This Court finds that Counsel reviewed discovery and conducted proper investigation to aid in Applicant's defense. Applicant has failed to meet her burden of proving that Counsel's performance was deficient in this regard. Additionally, Applicant has failed to show that the outcome of her trial would have been different had Counsel researched Applicant's case in a different manner. Accordingly, this allegation must be dismissed.

Trial Counsel was ineffective for failing to object to the jury selection process.

Applicant testified that Counsel was ineffective for failing to object to the jury selection because six of the twelve jurors had family in assisted living facilities. She further testified that

one juror told the court that he could not be fair. Applicant testified that she did not tell Counsel about this issue at the time.

Counsel testified that one juror that Applicant had an issue with was stricken from the jury and another juror who could not be fair or impartial was also stricken from the jury pool. He testified that all seated jurors were appropriately seated under the law. The record reflects that only one juror who had family in an assisted living facility said that she could not be fair or impartial and that juror was excused. See Trial Transcript 26, ll.1-8. Additionally, nine jurors who indicated that they had family in an assisted living facility and could be fair and impartial were part of the final jury list and Counsel used a strike on four of them. No jurors who could not be fair or impartial were seated.

This Court finds that Counsel was not deficient in regard to the jury selection process. This Court finds that no juror was seated who indicated that he or she could not be fair or impartial. "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Palacio v. State, 333 S.C. 506, 517 S.E.2d 68 (1999). To the extent that Applicant alleges that Counsel should have used strikes on certain jurors, this Court finds that Applicant has failed to meet her burden of showing that Counsel was ineffective. See Id. (Jury selection is a process that inherently falls within the expertise of counsel and trial counsel is not ineffective for failing to exercise peremptory strike as instructed by applicant).

This Court also finds that Applicant has failed to show that she was prejudiced by Counsel's actions regarding jury selection. "In PCR proceedings, a defendant must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." Id. Applicant has not provided any credible evidence and this allegation must be dismissed.

Trial Counsel was ineffective for failing to present a defense.

Applicant testified that Counsel failed to present a timeline of her whereabouts around the time of the crime. She testified that she gave this timeline to Counsel but he did not check on it. She testified that she was in the vicinity of the nursing home but not on the premises. She also testified that Counsel should have presented a better timeline of her interaction with the Victim. Applicant further testified that Counsel did not discuss a defense strategy with her and that their meetings were only to collect information. She testified that Counsel should have presented a better defense concerning the fact that a handprint and piece of hair found at the scene was not attributable to her. Applicant further testified that Counsel should have found out exactly to whom the handprint and hair belonged.

Counsel testified that he spoke to all witnesses that Applicant provided to him and checked her alibi timeline. He testified that there was a hole in her alibi timeline which made the witnesses she provided not actually alibi witnesses. He testified that he relayed this information to Applicant. Counsel testified that he reviewed the discovery with Applicant and explained to her the difficulties in her case. He testified that Applicant would get frustrated but that he never thought that she did not understand what was going on in her case. Counsel testified that the handprint and hair was found not to be attributable to Applicant and his defense was that there were no forensics tying Applicant to the crime scene.

This Court finds that Counsel was not ineffective in failing to present a defense. This Court finds, and the record reflects, that Counsel investigated Applicant's case, the potential witnesses, and her timeline of events. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v.

State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Applicant has failed to show that any of Counsel's actions were deficient in defending Applicant. She has also failed to show that the outcome of her trial ~~would be~~ ^{likely would have been} different if Counsel had employed a different defense strategy. Accordingly, this allegation must be dismissed.

Trial Counsel was ineffective for failing to make proper motions.

Applicant testified that Counsel failed to make a motion to keep out her statement because it was used against her and consisted of hearsay.

Counsel testified, and the record reflects, that he made the proper Jackson v. Denno¹ motion to suppress all three statements and a hearing was held. See Trial Transcript 53-153. After the Denno hearing, Counsel again moved to suppress Applicant's second and third statement, however the trial judge allowed in all three statements.

This Court finds that Counsel was not ineffective and made the proper motions to suppress Applicant's statements. As Counsel did make these motions, Counsel was not ineffective and no prejudice can be shown. Accordingly, this allegation must be dismissed.

Trial Counsel was ineffective concerning the plea agreement.

Applicant testified that there was an agreement in place for her to plead guilty to abuse or neglect of a vulnerable adult causing death for twenty-five years. She testified that she did not want to plead and turned down the offer. She testified that there were no negotiations regarding this plea offer.

Counsel testified that Applicant did not want to plead guilty to any charge. He testified that the State spent a longer time negotiating the forgery charges. Counsel further testified that he kept Applicant and her family aware of the twenty-five year offer to plead to abuse or neglect of a vulnerable adult causing death, but ultimately Applicant did not want to accept a plea to this

¹ 378 U.S. 368 (1964).

charge. Counsel also testified that he made Applicant fully aware of the amount of time she was facing if she was found guilty.

This Court finds that Applicant has failed to show that Counsel was ineffective regarding her plea agreement. This Court finds that Counsel made Applicant and her family well aware of the twenty-five year offer to plead to abuse or neglect of a vulnerable adult causing death. It was ultimately Applicant's decision whether or not to take the plea offer and, by her own admission, she declined the offer. This Court finds that Applicant has failed to show that Counsel was ineffective and this Court finds that Counsel provided credible testimony that he relayed the plea offer to Applicant. Additionally, Applicant has failed to show that she was prejudiced by Counsel's actions. Accordingly, this allegation must be dismissed.

Newly Discovered Evidence

Applicant testified that the handprint found at the scene was not hers and this evidence, along with other evidence not submitted, should be analyzed as new evidence.

Counsel testified that the handprint and hair found at the scene was found to be not attributable to Applicant. He testified that there was no conclusive way to determine to whom it belonged.

A defendant requesting a new trial based on after discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). The applicant has to meet each prong in order to prevail on this claim. This Court finds that Applicant has failed to show that a new trial is warranted based on newly discovered evidence. The



evidence she refers to was part of the original investigation and available at the time of trial. Additionally, such evidence would not change the result of the trial because it was established by the defense that this print and hair did not belong to Applicant. Thus, Applicant has failed to show that a new trial is warranted based on newly discovered evidence and this allegation must be dismissed.

Failure to grant a change of venue

Applicant admitted in her testimony that Counsel did move for a change of venue but this motion was denied by the trial judge.

Counsel testified, and the record reflects, that he did make a motion for a change of venue but this motion was denied by the trial judge. See Trial Transcript 14-15, 46.

This Court finds that this allegation must be dismissed as Counsel did make a motion for a change of venue and the motion was denied by the trial court. The trial court has the discretion to grant or deny a motion for a change of venue and any allegation of the court's abuse of discretion in this regard is not proper for post-conviction relief. Accordingly, this allegation must be dismissed.

IV. CONCLUSION

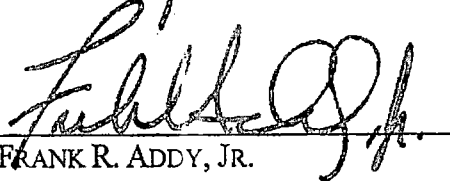
Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of her sentence.

AND IT IS SO ORDERED this 4th day of May, 2016.


FRANK R. ADDY, JR.
Presiding Judge
Sixteenth Judicial Circuit

Greenwood, South Carolina



CLERK OF COURT'S OFFICE
Post Office Box 649, York, South Carolina 29745-0649



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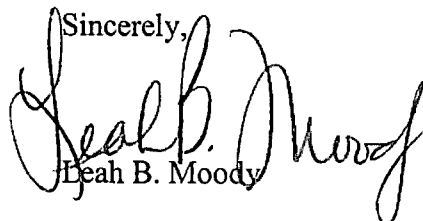
The Honorable David Hamilton
York County Clerk of Court
Post Office Box 649
York, South Carolina 29745

RE: Braquette Walton, #353118 v. State of South Carolina
C.A. No.: 2015-CP-46-0889

Dear Mr. Hamilton:

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Sincerely,

Leah B. Moody

Enclosures

cc Braquette Walton
Justin Hunter, Esq.
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Justin Hunter, Esquire
South Carolina Attorney General's Office
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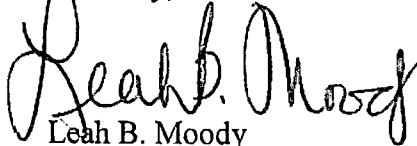
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July 25, 2016

Sharon Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

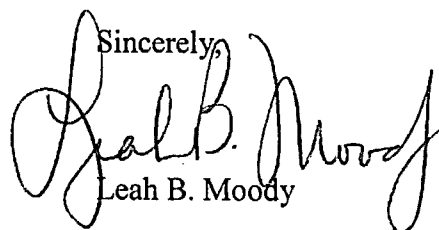
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Case No.: 2015-CP-46-0889

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Leah B. Moody

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Justin Hunter, Esq.
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
David Hamilton, Clerk of Court, York County

29730 JUL 25 2016

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TO:

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
PO Box 11330
Columbia SC 29211-1330

Charlotte PRDC NC 282
TUE 26 JUL 2016 PM

