

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

August 17, 2018

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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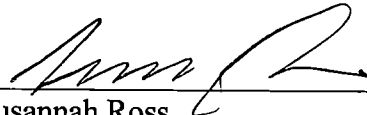
S.C. SUPREME COURT

Re: Sherra L. Werkmeister v. State
2017-CP-42-1720

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

2017-CP-42-1720

Sherra L. Werkmeister, Appellant,


v.

The State, Respondent.

NOTICE OF APPEAL

Sherra L. Werkmeister appeals the Honorable Grace Gilchrist Knie's Order of Dismissal filed May 11, 2018, and received by counsel August 16, 2018.

This 20 day of August, 2018.



Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Jordon Cox, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Sherra L. Werkmeister, #244320)
Applicant,)
v.)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

2017-CP-42-1720

ORDER OF DISMISSAL

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SPARTANBURG COUNTY
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H. ROSE L. L. L.

This matter comes before the Court by way of an application for post-conviction relief filed on May 15, 2017, by Sherra L. Werkmeister (Applicant). Respondent made its Return on or about December 5, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on February 2, 2018, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by Valerie Giovanoli, Esquire of the South Carolina Attorney General's Office. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet her requisite burden of proof and denies the application.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of confinement of the Spartanburg County Clerk of Court. In March 2015, Applicant was indicted for first-degree assault and battery. Subsequently, in August 2016, Applicant was indicted for one count of felony driving under the influence (DUI) resulting in death, a count of reckless homicide, and felony DUI resulting in great bodily injury. Andrew J. Johnston, Esquire and Andra J. Tat, Esquire represented Applicant.

JA

Assistant Solicitors Lindsey Overby and Spenser Smith represented the State. On September 20, 2016, Applicant pled guilty as indicted to both counts of felony DUI before the Honorable J. Derham Cole. In exchange for her guilty plea, the State dismissed the charge of reckless homicide and first-degree assault and battery.

Pursuant to the State's recommendation, Judge Cole sentenced Applicant to imprisonment for ten years and a fine of \$25,100 for felony DUI resulting in death, suspended upon the service of seven years and payment of \$10,100 and probation for three years. Judge Cole sentenced Applicant to a concurrent seven year term for felony DUI resulting in great bodily injury. Applicant did not appeal her convictions or sentences.

FACTUAL HISTORY

On October 11, 2013, Applicant was driving a dark green Toyota 4Runner while traveling westbound on S.C. Highway 290 in Spartanburg County, South Carolina. (Tr. p. 107, lines 1-9). At the same time and place, a black Chevrolet truck carrying two individuals was traveling eastbound, opposite of Applicant's vehicle. (Tr. p. 107, lines 4-6). Just before 5:30 p.m., the two vehicles were involved in a serious accident and the Tyger River Fire Dept. was the first agency to respond to the scene. (Tr. p. 107, lines 4-12).

The driver of the 4Runner, Ms. Patricia Rice, sustained great bodily injury and required extrication from her vehicle. (Tr. p. 111, lines 18-25; p. 112, lines 1-5). The passenger of the 4Runner, 85-year-old Lee Lowry, died at the scene. (Tr. p. 107, lines 10-11). It was later determined by the South Carolina Department of Public Safety's MAIT (Multidisciplinary Accident Investigation Team) team that the accident was caused when Applicant's vehicle crossed the solid-yellow center line, forcing a head-on collision with the victim's vehicle. (Tr. p. 109, lines 15-23). An investigation was performed on Applicant's vehicle, where it was determined that at

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the time of the accident, Applicant's vehicle suffered no system failures or any other mechanical issues that may have caused the accident. (Tr. p. 109, lines 24-25; p. 110, lines 1-2).

Upon arriving at the scene, a member of the Tyger River observed the odor of alcohol coming from the Applicant's vehicle. (Tr. p. 107, lines 11-13). Applicant required E.M.S. transport to Spartanburg Regional Hospital, where she admitted to taking Lexapro and Xanax during the hours prior to the accident. (Tr. p. 19, 20, 25; p. 20, lines 1-3). At the hospital, Defendant was administered a blood alcohol screen at or about 7:00 p.m., where it was determined Applicant's blood alcohol level was at or above .09. (Tr. p. 108, lines 18-25). A second blood screen was collected by law enforcement at 10:10 p.m., where it was revealed the Applicant's blood contained levels of Ambien, Tramadol and Lexapro. (Tr. p. 109, lines 7-14).

While receiving treatment at Spartanburg Regional Hospital, Applicant disclosed to her nurse that she had consumed one (1) alcoholic beverage earlier in the day of the accident, but no drugs. (Tr. p. 108, lines 24-25). On October 14, 2013, three days following the accident, Applicant met with law enforcement at the hospital. During her interview, Applicant admitted to drinking beer at her home during lunch on the day of the accident, estimating her alcohol consumption to having been "probably about two beers on the back porch." (Tr. p. 110, lines 16-20). Applicant admitted to drinking beer from a "kegerator" during this time, but denied having anything to drink after 3:00 p.m. or having any alcohol in her vehicle at the time of the accident. (Tr. p. 110, lines 16-18). During their investigation of the accident scene, officers discovered an open Natural Light beer can a few feet from Applicant's vehicle. (Tr. p. 111, lines 9-12). The beer can was tested and matched the DNA profile of Applicant. (Tr. p. 111, lines 15-17).

ALLEGATIONS

In her application for post-conviction relief, Applicant alleges she is being held in custody

unlawfully for the following reasons:

1. Ineffective assistance of Counsel
 - a. "Counsel failed to adequately prepare and present a defense"
 - b. "He failed to object to sentencing"
 - c. "He failed to object to hearsay"
 - d. "He failed to object to Solicitor's remarks and arguments"
 - e. "He failed to include lesser included offense due to evidence"
 - f. "He failed to present expert witness testimony"
 - g. "He failed to present pharmaceutical records"
 - h. "Failed to adequately investigate and present investigative evidence"
 - i. Coerced [Applicant] into repeating closing statements, not of [Applicant's] own words"
 - j. "Failed to follow up with proper character testimony on [Applicant's] behalf"
 - k. "Attorney failed to file notice of appeal"
 - i. "He felt there was no issue or merit which could be addressed or received on appeal"
2. Involuntary Guilty Plea
 - a. "Involuntary plea which was unlawfully induced and not made voluntarily or with a complete understanding of the nature of the charges and the inadequacies of the plea potential"

At the start of the evidentiary hearing, Applicant informed the Court that she intended to proceed with the additional allegation that plea counsel provided ineffective assistance based on a failure to object under Rule 3, alleging the charges were not indicted within 90 days. The Court allowed Applicant to proceed on the additional allegation.

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SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant Testimony

At the evidentiary hearing, Applicant testified on her own behalf. Applicant testified that although she wanted to go to trial, but that her trial counsel have used "pressure tactics" to convince her to take a plea agreement. Specifically, Applicant testified that her trial counsel talked to her family and told them to convince the Applicant to take the plea. According to her testimony, Applicant's father had hired an independent toxicology expert to be used as a witness a trial. Applicant also testified that her lawyer had met with potential witnesses to be used at trial in order



to strengthen her case. None of these witnesses were called to trial.

During her testimony, Applicant admitted that on the day of the accident, she had taken Ambien, Vyvanse, Lexapro and Tramadol. Applicant testified that she was aware at the time of her plea that a beer can matching her DNA had been found, as well as being aware of the alcohol in her system at the time of the accident. At the end of her testimony, Applicant admitted that she had possession of an opened beer can in her vehicle prior to the accident.

Mr. Charles Richardson's Testimony

Mr. Charles Richardson is Applicant's father and testified at the evidentiary hearing on behalf of the Applicant. Mr. Richardson testified that he was the person who hired Applicant's trial counsel and toxicology expert. Mr. Richardson testified that Applicant had paid for the expert to appear as a witness for trial, but that the expert never left his home. Mr. Richardson testified that it was his belief that the expert was told to stand down. During his testimony, Mr. Richardson told the court that he believed Applicant's trial counsel was intimidated and as a result, became intimidated himself. He testified that he told Applicant that "seven years is a lot better than twenty-five."

Mr. Richardson testified that Applicant's trial counsel was responsible for seeking out and hiring the expert witness for trial. He testified that when it came to paying for Applicant's defense, Applicant's trial counsel ended up paying a portion of the expert fees himself.

Trial Counsel's Testimony

Andrew Johnston, Esquire testified on behalf of the State of South Carolina. Trial Counsel testified as having represented Applicant during her guilty plea. As a part of his representation of Applicant, Mr. Johnston prepared as if he was going to trial on all of the charges against his client. This was to attempt to force the State into negotiating a plea or, in the alternative, winning at trial.

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Mr. Johnston testified as to the evidence that would be presented at trial against his client. Mr. Johnston testified that there had been no offers prior to trial.

Mr. Johnston testified that the toxicology expert was available for trial and was scheduled to fly in to Spartanburg on his private aircraft, had the need for his testimony arisen. During a pretrial hearing, Mr. Johnston testified that he was able to successfully argue for suppressing of blood evidence in the trial judge's chambers and this is what led to the first plea offer from the State. Mr. Johnston testified as to the remaining evidence against his client, but that he was prepared to continue on to trial if the plea had not been entered.

Mr. Johnston testified that he paid \$1,500 of the toxicology expert's bill as a courtesy to Applicant's father, who he described as very supportive during the trial. Mr. Johnston reiterated that at the time of Applicant's guilty plea, they were in fact in the beginning stages of her trial. He testified that he held discussions with Applicant about the risks of going to trial and the possible penalties facing her if she was convicted. Mr. Johnston denied having coerced Applicant into pleading guilty. During the hearing, Mr. Johnston testified that Applicant was being unreasonable in her evaluation of what she was facing at trial, and Mr. Johnston felt her father would be more reasonable. Mr. Johnston testified that he never told Applicant's father to convince her to plead guilty.

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 at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth



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SPARTANBURG COUNTY

below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). 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. With respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).



After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proof and had not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant:

Ineffective Assistance of Counsel

Applicant alleges that plea counsel was ineffective in his representation during her guilty plea. She asserts that plea counsel failed to adequately prepare and present a defense, including failing to present expert testimony. Although Applicant entered a guilty plea, counsel had begun to argue pretrial motions to suppress evidence that would have been used against Applicant at trial. Specifically, Counsel testified that the reason a plea offer was formally extended by the prosecution was based upon successfully arguing for the suppression of blood evidence that would have otherwise been used against the Applicant at trial.

Applicant also testified that an expert had been consulted prior to her guilty plea and was scheduled to testify at trial. Plea counsel testified that had the trial moved forward, the expert witness would have been available for his scheduled testimony whenever it was required. Based upon a review of the record and testimony, Applicant has failed to meet her burden of proof for this allegation.

Applicant has alleged ineffective assistance of counsel for failing to adequately investigate and present investigative evidence. Again, Applicant testified that she was confident in going to trial, because of the evidence and witnesses her defense case was prepared to present. Her plea counsel testified that he reviewed all of Applicant's medical documents and toxicology reports with their retained expert witness in order to build a defense strategy. Applicant failed to present

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any evidence of the investigative evidence that counsel failed to present prior to her guilty plea. Therefore, Applicant has failed to meet her burden of proof for this allegation.

In her applicant for post-conviction relief, Applicant alleges the following additional claims of ineffective assistance of counsel:

- He failed to object to sentencing
- He failed to object to hearsay
- He failed to object to Solicitor's remarks and arguments
- He failed to include lesser included offense due to evidence
- He failed to present pharmaceutical records
- Coerced [Applicant] into repeating closing statements, not of [Applicant] own words
- Failed to follow up with proper character testimony on [Applicant]'s behalf
- Attorney failed to file a notice of appeal

During the PCR hearing, Applicant failed to present testimony or other evidence to support these claims. Additionally, a review of the record finds the allegations are without merit. Based upon a review of the entire record and her failure to produce supportive testimony at the PCR hearing, Applicant has failed to meet her burden of proof. Therefore, the remaining allegations of ineffective assistance of counsel are denied and dismissed with prejudice.

Involuntary Guilty Plea

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130,137, 654 S.E. 2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 629 S.E. 2d 353 (2006). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his



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plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Roddy v. State, 339 S.C. 29 (2000).

Applicant alleges her guilty plea was not knowingly and voluntarily made. Applicant also alleges her guilty plea was not made with a complete understanding of the nature of the charges and the inadequacies of the plea potential. This Court finds the record supports Applicant's plea was made knowingly, voluntarily and upon the sound advice from Counsel. The underlying facts to the crime are overwhelming to establish the Applicant's guilt of the offense to which she pled. Her plea counsel appeared credible when he testified during the evidentiary hearing. Also, the transcript of the plea hearing is thorough as to the Applicant's understanding of her right to a trial and her willingness to forgo the trial.

Specifically, the plea Court, in great detail, explained each indictment, the potential penalty, the mandatory minimum penalty, and the negotiations of counsel for concurrent sentencing. The plea Court also explained the negotiations of counsel for a cap of ten years total concurrent period of incarceration on both offenses. Therefore, the Applicant has failed to meet her burden of proof.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this allegation is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an

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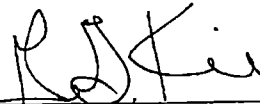
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appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 11 day of May, 2018.



GRACE G. KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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SEVENTH JUDICIAL CIRCUIT
SPARTANBURG COUNTY
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Spartanburg County

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M. Hope Blackley
Clerk of Court

May 11, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Sheela L. Werkmeister
Applicant #244320

7TH JUDICIAL CIRCUIT

CASE # 2017 MCP 42-1720

VS
Stall
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Doc. dismissed
In this action dated 3-11-2018 on 5-11-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Megan Jamerson
Sherrill Ross

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SPARTANBURG COUNTY
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5-11-18
(Date)

Corie Jeff
(Signature)

SUSANNAH ROSS
330 EAST COFFEE ST.
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