STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

ELVIRA LYNN SEAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

RECEIVED
APR 12 2018
SC Court of Appeals

APPELLATE CASE NO 2016-000408

BRIEF OF PETITIONER

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

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 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. Caroline 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. A petition for writ of certiorari was filed on February 3, 2017. The State filed a return on June 19, 2017. On March 13, 2018, this Court granted the petition for writ of certiorari. This brief of petitioner 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). At the time, plea counsel was unaware of §16-25-90 and was only thinking of how further investigation would have applied to the battered woman syndrome defense.

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 PCR judge commented, "Anything else? I mean, I don't think that that -- I mean, this was a plea. I mean, I don't think that that's going to be relevant in any findings that I have. So I'll be glad to hear from you on the merits if you'd like.

(App. p. 94, lines 13-18). PCR counsel argued that the records "go directly to the merits." (App. p. 94, lines 19-21). Counsel argued that the records could corroborate Petitioner's testimony in regard to abuse and should have been presented to the trial judge for both mitigation **and** eligibility for early release on parole pursuant to S.C. Code §16-25-90. (App. p. 94, 95, 96, lines 1-16).

The State then argued that Petitioner had not met her burden of proof stating:

> She would have to demonstrate today that such a defense would have been successful. We've heard no expert testimony. We've heard no testimony from any kind of lay witness who observed any kind of abuse. We've seen no medical records that would have justified further pursing [sic] the idea of battered woman's syndrome at trial.
>
> So the State's position would be that absent such a showing here today, it's completely speculative for us to entertain the idea that if these avenues had been pursued, that Mr. Ervin [plea counsel] would have been able to successfully argue both battered woman's syndrome at a potential trial or for the reduction under 16-25-90.

(App. p. 96, line 19 – p. 97, lines 1-12). PCR counsel correctly noted that eligibility for early parole pursuant to S.C. Code §16-25-90 only required the presentation of credible evidence of a history of criminal domestic violence at the hands of the household member. (App. p. 97, lines 14-19). PCR counsel noted that S.C. Code §16-25-90 could be met with evidence of prior convictions[1] or with the medical records she was seeking to obtain. (App. p. 97, line 20 – p. 98, lines 1-2).

PCR counsel again indicated that she wished to present the medical records to the court. (App. p. 99, lines 1-5). The PCR judge denied the request to leave the record open for Petitioner to obtain the medical records stating:

---

[1] Petitioner testified that the deceased had been arrested but used a different name. (App. p. 67, line 16 – p. 68, lines 1-20..

> Yeah. Well, I mean, I think that there is – you know, I think that all of the mitigation circumstances were properly thrashed out. I mean, there's even discussion with the solicitor when the solicitor was setting forth their facts and the evidence that the victim was abusive towards the Defendant and even that night. I mean, the solicitor brings that out in her designation of the facts. And then they stop the plea at that point and she went and got an evaluation and it was almost a year later. And in the record the judge clearly, you know, outlines that he's reviewed this record by the psychiatrist and they kind of indicate on the record that she didn't fall in the batter's syndrome, that it was more of a mitigating circumstances. So, you know, I don't find that that – I mean it sounds like that there was -- . . . all of the mitigating circumstances were brought forth at the plea and considered – in fact, considered by the judge."

(App. p. 99, line 6 – p. 100, lines 1-4). The PCR judge acknowledged that there was evidence of a history of domestic violence but then prohibited Petitioner from obtaining additional evidence in the form of the medical records. The PCR judge erred in narrowly viewing the request for time to obtain the additional medical records as simply a request to obtain additional mitigation evidence rather than additional credible evidence of a history of domestic violence.

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, as a matter of law. First, Petitioner was not required to present additional evidence at the PCR hearing when credible evidence of a history of domestic violence was presented during the plea. Second, the allegation is **not** that counsel was ineffective for failing to adequately investigate a battered woman defense. Instead, counsel was ineffective for not asking the plea court to make a finding that Petitioner was entitled to early

parole pursuant to S.C. Code §16-25-90. There is a difference between the proof required to establish a battered woman's syndrome defense and the proof required to establish early parole eligibility pursuant to S.C. Code §16-25-90. The fact that Petitioner decided not to pursue a battered woman defense does not preclude her from asserting early parole eligibility pursuant to the statute. The PCR judge's failure to address the difference constitutes an error of law.

As correctly noted by the PCR judge at the PCR hearing, there was evidence of a history of domestic violence presented during the plea hearings. (App. p. 99, line 6 – p. 100, lines 1-4). Although plea counsel admitted that he was unaware of §16-25-90 (App. p. 88, lines 7-16) and 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), there was credible evidence of a history of domestic violence presented to the plea judge. Dr. Veronen's report documenting domestic abuse of Petitioner by the deceased was admitted, as mitigation rather than as a basis to qualify for early parole, during the sentencing hearing. (App. p. 30, lines 11-30; pp. 39-42). Additionally, during the plea, the prosecutor admitted, "There is some evidence, Your Honor, that the victim was abusive towards the defendant in the past and, perhaps, even that night ..." (App. p. 17, lines 3-5). Credible evidence of a history of domestic violence, as discussed in Blackwell-Selim, was presented to the plea judge. If plea counsel had asked the judge to make a finding for early parole eligibility pursuant to §16-25-90, the plea judge would have erred in not granting early parole.

Petitioner's testimony at the PCR hearing provided additional credible evidence of a history of domestic abuse. Viewing the entire record including the transcript of the guilty plea and the prosecutor's statements, the transcript of the sentencing hearing and Dr. Veronen's report and the transcript of the PCR hearing with plea counsel's testimony and Petitioner's testimony,

there was credible evidence presented of a history of domestic violence. 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).

In the return to the petition for writ of certiorari Respondent wrote:

> Given the opportunity to call expert witnesses, lay witnesses, and submit new medical records 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.

(Return p. 8). In arguing that Petitioner failed to present any evidence of prior domestic abuse Respondent overlooks the credible evidence of a history of domestic abuse contained in the guilty plea and sentencing transcripts, Dr. Veronen's report and in the PCR transcript. Additionally, the PCR judge denied Petitioner's request to leave the record open so that she could obtain the medical records from the emergency room at Parkway at Pelham as additional credible evidence of a history of domestic violence. The PCR judge misunderstood the request as simply a request to obtain more mitigation evidence. While Petitioner submits that the evidence presented at the guilty plea, sentencing hearing and PCR hearing is sufficient to grant relief in the form of a remand to General Sessions Court for a hearing on parole eligibility[2], Petitioner alternatively argues for a remand to the PCR court in order to obtain the additional medical records.

---

[2] During that hearing Petitioner would be able to obtain and present the missing medical records.

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 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")).

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, the South Carolina Supreme Court remanded the case for resentencing.

Because of plea counsel's failure to ask for a finding as to parole eligibility pursuant to S.C. Code §16-25-90, the plea judge in the present case was not given the opportunity to make specific findings in regard to parole eligibility. "The circuit court must make specific findings in ruling on parole eligibility or ineligibility under § 16–25–90. See *e.g.* Grooms, 343 S.C. 248, 540 S.E.2d 99." State v. Blackwell-Selim, 392 S.C. 1, 4, 707 S.E.2d 426, 428 (2011). Petitioner is entitled to a remand for a new hearing and specific findings as to parole eligibility.

The PCR judge erred in refusing to grant Petitioner limited relief in the form of a remand for a hearing to determine parole eligibility pursuant to S.C. Code §16-25-90. 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 evidence presented at the guilty plea, the sentencing hearing and the PCR hearing, including the statement of the prosecutor during the guilty plea that there was some evidence that the deceased was

abusive toward the defendant in the past and perhaps even the night he was killed, Dr. Veronen's report and the testimony from both plea counsel and Petitioner at the PCR hearing. Considering the entire record, the history of abuse inflicted upon Petitioner by the deceased was proved by a preponderance of the evidence. At this procedural stage, however, Petitioner only has to show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Petitioner has made that showing and is entitled to a remand for a hearing to determine parole eligibility pursuant to S.C. Code §16-25-90.

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 12th day of April, 2018.