

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Greenville County
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000408

ELVIRA LYNN SEAY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT.....5

 The post-conviction relief court properly denied relief where Petitioner failed to establish
 counsel was ineffective for failing to ask the plea court to make findings that she was
 entitled to early parole eligibility pursuant to S.C. Code Ann. §16-25-90.....5

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005).....8
Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).....9
State v. Grooms, 343 S.C. 248, 254, 540 S.E.2d 99, 102 (2000).....7
State v. Blackwell-Selim, 392 S.C. 1, 3-4, 707 S.E.2d 426, 428 (2011).....7, 8

Statutes

S.C. Code Ann. §16-25-90..... passim

Other Authorities

McCormick on Evidence §339 (5th ed.1999).....8

RESPONDENT'S STATEMENT OF ISSUE

Did the post-conviction relief court properly denied relief where Petitioner failed to establish counsel was ineffective for failing to ask the plea court to make findings that she was entitled to early parole eligibility pursuant to S.C. Code Ann. §16-25-90?

STATEMENT OF THE CASE

Elvira Lynn Seay (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. Petitioner did not appeal.

Petitioner filed a PCR application January 13, 2015, alleging ineffective assistance of counsel. 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. The State filed a return to Petitioner's petition for writ of certiorari on June 19, 2017. In an order dated October 30, 2017, the South Carolina Supreme Court transferred this case to the Court of Appeals. On March 13, 2018, this Court granted certiorari. This Brief of Respondent follows.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the reviewing court. It will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her 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 "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 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 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. 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

The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was ineffective for failing to ask the plea court to make findings that she was entitled to early parole eligibility pursuant to S.C. Code Ann. §16-25-90.

Petitioner asserts the PCR court 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. Petitioner argues there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different and that she 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. This argument is without merit as the post-conviction relief court properly denied relief where Petitioner failed to establish counsel was ineffective for failing to ask the plea court to make findings that she was entitled to early parole eligibility pursuant to S.C. Code Ann. §16-25-90 because there was no credible evidence to show her eligibility.

In filing her application for post-conviction relief, Petitioner alleged plea counsel was ineffective for failing to ask the court to make a finding that Petitioner was early parole eligible pursuant to S.C. Code Ann. §16-25-90 during her sentencing. (App.p.46). In denying post-conviction relief, the court found 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). This finding is not based on any error of law as the PCR court's finding is supported by probable evidence in the record.

Under S.C. Code Ann. §16-25-90, a section of the 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, 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). Petitioner also testified that the victim was never charged with domestic violence. (App.p.67). 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 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 addressing the issue this court 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. Blackwell-Selim, Id.

Here, Petitioner failed to present credible evidence to the PCR judge during the evidentiary hearing. While Petitioner presented evidence in the form of her testimony concerning her eligibility for parole, the PCR court found this evidence to not be credible. This Court gives great deference to a PCR court's findings where matters of credibility are involved. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (citations omitted). Additionally, the PCR court noted plea counsel conducted a proper investigation in an attempt to formulate a battered woman defense, information that would have affected her parole eligibility but plea counsel was unable to do so based, in part, upon the vague information provided by the Applicant. Moreover, this finding speaks to the fact of the PCR court's findings concerning how Petitioner did not present credible evidence. Thus, the PCR's court finding was supported by probable evidence in the record.

As Petitioner failed to present any credible 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”). Moreover, pursuant to S.C. Code Ann. §16-25-90, the finding of parole eligibility was in the PCR court's discretion.

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, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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August 13, 2018

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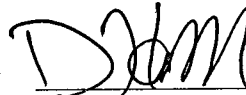
Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Kathrine H. Hudgins, Esquire
SC 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 13th day of August, 2018.



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