

BEFORE THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2018-001290

On Petition for a Writ of *Certiorari* to RICHLAND COUNTY Court of Common Pleas

Jean Hoefer Toal, sitting as Circuit Judge
Circuit Court Case No. 2016-CP-40-01444

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S.C. SUPREME COURT

The State of South Carolina,

Petitioner,

v.
Marie-Thérèse Assa'ad-Faltas, MD, MPH,

Respondent.

Dr. Assa'ad-Faltas' NECESSARY SUPPLEMENT TO Her Motion
to Relieve Appellate Defense and for Related Relief

"There may be an excuse for being general; but there is no excuse for being lazy."

South Carolina Associate Justice Few in live-streamed Thursday's, 29 November 2019, oral argument
of 2017-001277 *The State, Respondent, v. Michael Edward Gentile, Petitioner.*

Intellectual laziness includes refusal to question the status quo. Dr. Assa'ad-Faltas politely and scholarly summarized to Mr. Dudek of Appellate Defense and to Messers Ryan and Young of South Carolina's ("SC) Commission on Indigent Defense her urging that grant of PCR should not be appealable by the State on the legal symmetry basis of unappealability of grant to a criminal defendant of a new trial based on after-discovered evidence of actual innocence and on the reality basis of the *several years* PCR appeals take in SC which inevitably deny the constitutional rights to speedy *retrial*.

This supplement is not the place to expound on those arguments or to relist and update the times Dr. Assa'ad-Faltas' legal arguments did indeed prove "clever and prescient" as this Court wrote in June 2017 in ridicule of her, only to have *McCoy v. Louisiana*, 584 U.S. __ (2018), vindicate Dr. Assa'ad-Faltas' "clever and prescient" argument that the client, not the lawyer, retains control.

This supplement is to advice the Court that the intellectual laziness of Messers. Dudek, Ryan, and Young, lawyers who should be always thinking of justice and *judicial economy*, has devolved from indifference to Dr. Assa'ad-Faltas' arguments to rudeness, and even threats, to her person.

It is to further advise the Court of the miraculous issuance by Judge Gravely of another ORDER granting PCR (for the second time in the same case not underlying this appeal) to Dr. Assa'ad-Faltas, after dilatory conduct by the lower courts and by the State. When Dr. Assa'ad-Faltas went to Columbia's Municipal Court to seek (for the second time in that case) refund of her fine, she was told she needs to await the appeal period. This makes this Court's decision on allowing Dr. Assa'ad-Faltas to argue *pro se* the unappealability of PCR grants urgent for the pending case and for the expected case, all in light of her finding no ear in the persons currently appointed to protect her rights.

As the records of *this* case will show, this Court had to *twice* direct the lower court to promptly adjudicate Dr. Assa'ad-Faltas' applications. This is happening again in pending PCR case 2018-CP-40-01798 where the Clerk of Richland County's Court of Common Pleas is refusing to schedule that case for available dockets despite the Honorable Judge Clifton Newman's directions for the Clerk to do so.

Therefore, Dr. Assa'ad-Faltas asks this Court to make an earlier decision than projected by this Court's 19 October 2018 ORDER on Dr. Assa'ad-Faltas' right to advocate *pro se* as a respondent, or at the very least, to allow her to now submit her *pro se* brief urging unappealability of grants of PCR.

Submitted on 30 November 2018 and served on SC's Attorney General by hand-delivery to his office, on Messersr. Dudek, Ryan and Young at their office at 1331 Lady Street, Columbia, SC 29201, and on the Honorable Judge Clifton Newman and on the Clerk of Richland County by hand-delivery to the that Clerk's office with the attached ORDER, already in its records, unattached all God so willing.

Marie-Thérèse Assa'ad-Faltas, MD, MPH, Respondent *pro se* for purposes of this motion

P.O. Box 9115, Columbia, SC 29290

Phone: (803) 783-4536

e-mail: Marie_Faltas@hotmail.com

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Marie Assa'ad-Faltas,)
)
 Applicant,)
)
 -vs-)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

2018 NOV 27 AM 9:19
 JEANETTE W. MORRINE
 C.C.P. & G.S.
 RICHLAND COUNTY
 FILED

ORDER

C.A. No. 2017-CP-40-06831

This matter comes before the Court upon the Petition for Post-Conviction Relief filed by Marie Assa'ad Faltas (Hereinafter "Applicant") arising out of her conviction for contempt by the Columbia Municipal Court (CMC) on May 18, 2011 as set forth in an Order issued June 15, 2011 by Magistrate Marion O. Hanna (hereinafter "Contempt Order"). On August 10, 2018, this Court heard the present Motions for Summary Judgment filed by the Applicant and the State. Present at the hearing were the Applicant along with Christopher S. Truluck, who had been appointed as stand-by Counsel for Applicant and Johnny James, from the Attorney General's office on behalf of the State. Due to the substantial record, the Court needed additional time to consider all of the evidence and applicable law, but now submits this Order.

Motion to Recuse

Before addressing the substantive Motions for Summary Judgment, the Court needs to rule on the Applicant's Motion to Recuse which was filed on August 23, 2018 following the hearing on August 10, 2018. The primary ground for this Motion appears to be the assertion that the Court's "current law clerk has too many personal connections with lawyers in the PCR section of SC's Attorney General's Office." Applicant further states that this judge had improper

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communications with someone and could not be fair. The Applicant failed to provide any evidence or basis for these allegations and the Court is not aware of any reason which supports these assertions nor would be a basis for recusal or not considering this matter impartially and pursuant to the Code of Judicial Conduct. Therefore, Applicant's Motion to Recuse is denied.

Procedural History

Now, back to the Motions for Summary Judgment filed by the Applicant and the State. This case has a very tortured procedural history which is outlined below and reminds this author of the fictional case of *Jarndyce v. Jarndyce* in Charles Dickens' *Bleak House*. Unlike Dickens, this author has attempted to mete out the most equitable justice for all involved and bring this case to an abrupt end, so that the parties may pursue other quixotic engagements. But first, let's relive this tortured procedural history and how this case came to this bench.

Procedural History

On March 28, 2011, Applicant was convicted of 2 separate counts of contempt of court by the CMC and was sentenced to a total of 25 days in jail. Applicant appealed her convictions on March 30, 2011 and requested that she be released from jail during the pendency of her appeal. On April 6, 2011 the CMC held a hearing on the Applicant's request to be released and ordered that she be released under conditions set forth in its Order of April 11, 2011 (hereinafter "Bond Order") pursuant to which Applicant was released from jail on April 12, 2011.

Subsequently, the CMC issued a Rule to Show Cause for Applicant's failure to comply with the conditions of the Bond Order and a hearing was held on May 18, 2011, at which time the Applicant was found in contempt of court for violating the terms of Bond Order which is the basis for the Applicant's PCR. On May 31, 2011, Applicant filed a Notice of Appeal of her contempt conviction, although the Contempt Order was not issued by the Court until June 15,

2011. On May 9, 2012, Applicant's appeal was heard in Circuit Court by Judge Allison Lee who issued an Order on September 17, 2012 denying Applicant's appeal on various grounds.

Applicant filed a Motion to Alter Judge Lee's Order on the same day. This Motion to Alter was denied by Order of Judge Lee issued on October 17, 2012. On November 8, 2017, the Applicant filed her Application for Post-Conviction Relief for the proceedings on which the Contempt Order was based and filed an Amendment on January 23, 2018. By Order of Judge Clifford Newman, Christopher S. Truluck was appointed as stand-by Counsel for this PCR. On March 22-23, 2018, Judge Brooks Goldsmith held a full evidentiary hearing. By Order issued April 10, 2018, Judge Goldsmith granted the Applicant's PCR and the State filed a Motion to Reconsider on April 20, 2018. On May 21, 2018, Judge Goldsmith issued an Order granting the State's Motion and vacated his previous Order and remanded for further proceedings. On May 22, 2018, Applicant filed her Motion for Summary Judgment and on July 31, 2018, the State filed its Motion for Summary Judgment and a hearing was held on August 10, 2018 for oral argument on these Motions.

Standard for Motion for Summary Judgment and PCR

The Uniform Post-Conviction Procedure Act (S.C. Code Sec 17-27-10, et. seq.) provides for such matters to be heard by "summary disposition." Under S.C. Code § 17-27-70(c):

The Court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Further, when considering such a motion under Rule 56(a), SCRPC, the courts have found that summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can

be reasonably drawn from the evidence must be viewed in the light most favorable to the moving party.” Medical University of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747, 749

(2004). Further, Rule 56(e), SCRPC, provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Under the Uniform Post-Conviction Procedure Act (S.C. Code Sec 17-27-10, et.seq.), a person may file an application for post-conviction relief as follows:

- (A) Any person who has been convicted of, or sentenced for, a crime and who claims:
- (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
 - (2) That the court was without jurisdiction to impose sentence;....

S.C. Code Sec 17-27-20.

The Courts have recognized that one of the grounds for PCR can be the ineffective assistance of counsel and in order to establish this as a basis for relief, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, AND (2) that the applicant was prejudiced by counsel's ineffective assistance. Legge v. State, 562 S.E.2d 618. (S.C. Sup Ct 2002). The effective assistance of counsel is a necessary requisite of due process of law, Rogers v. State, 199 S.E.2d 761 (S.C. Sup Ct 1973), thus the ineffective assistance of counsel is a violation of due process of law.

In considering the Motions by both parties, the Court has reviewed a very substantial record which included the pleadings, various exhibits, portions of the transcript from the evidentiary hearing on March 22-23, 2018 and applicable law. Based on this review, the Court has determined that Applicant's Motion for Summary Judgment and PCR should be granted for the reasons outlined below.

1. The validity of CMC's conviction for contempt on May 18, 2011.

The Applicant was previously held in contempt on March 28, 2011 and filed an appeal to Circuit Court. This contempt conviction is not the basis of this PCR application. While this appeal was pending, applicant requested that she be released and a hearing was held on April 6, 2011 at which time Applicant was represented by Counsel, Orin Briggs. Based on the Bond Order, Applicant had waived her right to be present and was not at the hearing. *See Bond Order, Exhibit 1 to State's Motion for Summary Judgment.* On April 11, 2011, the CMC issued its Bond Order which contained the following conditions:

- 1) payment of \$1000 cash;
- 2) requiring the Applicant "to participate in regularly weekly sessions with a psychiatrist for period of one (1) year or until the conclusion of the pending appeal"; and
- 3) requiring Applicant to surrender her passport.

Under S.C. Code §14-25-95, a party has the right to appeal a sentence of the municipal court, at which time "the party appealing shall enter into a bond, payable to the municipality, to appear and defend the appeal at the next term of the Court of Common Pleas or shall pay the fine assessed." This statute allows an Appeal Bond to be issued by posting a monetary bond or payment of the fine, but does not provide for the imposition of any other conditions. Further, the Court is not aware of any authority which allows a municipal judge to impose additional conditions in an appeal bond from Municipal Court.

The sole purpose of an appeal bond from Municipal Court, under S.C. Code §14-25-95, is to assure a defendant's attendance at the subsequent hearing on the appeal in Circuit Court. The remedy for the failure to appear would be a bench warrant. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 344, 713 S.E.2d 278, 284 (2011) (where the Court found in analyzing S.C. Code § 14-25-95 "[i]f an appellant fails to comply with these provisions, the municipality may issue a

bench warrant to address any delinquency on the part of the appellant"). The additional conditions imposed by the Bond Order clearly go beyond assuring that the Applicant will attend her appeals hearing. (The Court would note that based on the review of the record and the Applicant's history with the Court system, the Court finds that there was very little risk that this Applicant would not show up for any hearing.)

The State argues that the Applicant waived her objection to the terms of her Bond Order by consenting to the bond upon her release from jail. First, there is no evidence before this court that such terms were accepted, except a signed receipt of the \$1,000 paid to the CMC. But the receipt did not contain the terms of the bond. **"Receipt", Exhibit 4 to State's Motion for Summary Judgment.** One of the statutes which applies to the issuance of bonds (i.e. release from jail pending the trial of the case) requires that "the person released shall acknowledge his understanding of the terms and conditions of his release and the penalties and forfeitures applicable in the event of violation thereof on a form to be prescribed by the Attorney General". S.C. § 17-15-40. Other than a receipt for payment, the Court is not aware of any document showing that the Applicant acknowledged her "understanding of the terms and conditions of [her] release." Therefore, the unacknowledged conditions would violate the statute governing bond conditions.

Accordingly, this Court finds that the CMC exceeded its statutory authority in issuing an Appeal Bond which added conditions other than a monetary bond or payment of the fine as required by §14-25-95. Additionally, the State has not presented any evidence that the Applicant acknowledged her "understanding" of the terms of the Bond Order as required by §17-15-40. Thus the Court finds that the CMC did not have jurisdiction to issue the Bond Order and

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the Bond Order and subsequent contempt conviction based on the Bond Order is null and void and the conviction vacated. Thus, Summary Judgment is appropriate on this basis.

2. The validity of the bond conditions.

As additional basis for Summary Judgment, the Court finds that the CMC had no authority to issue any conditions relating to psychiatric treatment. The Bond Order issued by the CMC included very specific requirements for the Applicant:

1. The Defendant is to participate in regular weekly sessions with a psychiatrist for a period of one (1) year, or until the conclusion of the pending appeal for this matter, whichever shall come first in time. The Defendant shall make available to the psychiatrist all of her criminal and civil litigation files. The Defendant is to provide this Court with proof of her initial compliance with this condition within ten (10) days of the date of this Order and shall provide to the Court regular monthly proofs of her visits to the psychiatrist. Both of those proof requirements may be made by the psychiatrist's office to this court.

This appears to be a very extensive psychiatric treatment plan which the Applicant was Ordered to attend, all of which is contained in an Order for an Appeal Bond for a conviction of contempt. The Court is not aware of any Motions filed requesting such a condition or bringing this matter properly before the Municipal Court, nor any affidavits affidavit or sworn testimony showing that such treatment was needed or even recommended. There is nothing in the record presented to this Court which warrants any such findings or authority to issue such an Order. The Order does not require the evaluation a licensed professional to make a recommendation regarding a treatment plan but imposes its own judgment as to the type of psychiatric treatment which the Applicant needs—all for the purpose of assuring that the Applicant will make it to the hearing on her appeal to Circuit Court. Without statutory authority, such conditions for an Appeal Bond or

any other type of Order would not be proper.¹ Therefore, the Court finds that the CMC did not have jurisdiction or authority to issue such conditions and the Bond Order and the subsequent Contempt Order based on the Bond Order are declared null and void and the conviction is hereby vacated. And thus, Summary Judgment is appropriate on this basis as well.

3. Ineffective assistance of counsel.

Applicant also alleges that her counsel was ineffective at her bond hearing on April 6, 2011 which constituted a violation of her Due Process rights protected by the State and Federal constitutions. First, based on the record before the Court, it does not appear that the Applicant was at the hearing to determine the bond and the Magistrate Court and Circuit Court (on her appeal) found that she had waived her presence. Applicant was represented by counsel, Orin Briggs, who appeared to negotiate an appeal bond on behalf of his client. The record appears to suggest that Applicant's attorney tacitly accepted certain terms offered by the City or at least failed to adequately object to the terms. It appears that the terms as discussed between counsel were altered slightly by the CMC without any further input by the Applicant. Applicant adamantly refutes that she waived her right to allow the Court free rein on approving conditions for her release. The attorney, without specific authority, should not have even conceded or even allowed the consideration of any terms beyond the scope of an appeal bond as provided for in S.C. Code §14-25-95. Although Applicant's counsel raised this argument at the May 18, 2011 hearing, there is no evidence that it was raised or objected to in the underlying hearing on April 6, 2011 from which the Bond Order was issued and these conditions were the foundation for the

¹ The Court is not aware of any authority which would support such a finding by the CMC. The Court is aware of a formal process for Judicial Commitment allowed by S.C. Code Ann. 44-17-510, et. seq. which allows for the Court to order certain out-patient treatment under specific circumstances and after a finding by clear and convincing evidence. And even then, the remedy for failure to follow the treatment plan is a supplemental hearing for further determination by the Court.

downward spiral of constitutional deprivations from which the later appeal and PCR applications were based.

In a PCR action, the "burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 570 S.E.2d 172 (2002). Where ineffective assistance of counsel is alleged 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 v. State*, 334 S.E.2d 813 (1985). In considering whether Counsel was ineffective in a PCR application, the Court looks at 2 factors: (1) whether the Applicant's counsel failed to render reasonably effective assistance under prevailing professional norms, AND (2) was the applicant prejudiced by counsel's ineffective assistance. See *Legge v. State*, 562 S.E.2d 618. (S.C. Sup Ct 2002). Upon review of the record, there appears to be some confusion on how the conditions on the bond came about—whether there was some initial consent by Applicant's attorney or not, but clearly, Applicant's counsel did not assert proper objections to the conditions except to state that Applicant did not consent to the conditions. *See Transcript of Record for hearing on March 22-23, 2018, pages 53-66*. The Court finds that counsel's acceptance or failure to adequately object to the improper terms of the Appeal Bond is clearly ineffective and not within prevailing professional norms. And as seen by the subsequent contempt charges, the Applicant was prejudiced by this failure. Thus, the Court finds that there is no genuine issue of material fact as to the ineffective assistance of counsel and as a result, the Applicant's Due Process right were violated and the Applicant is entitled to Summary Judgment on her Application for PCR.

Conclusion

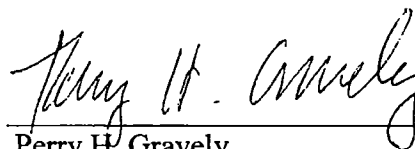
Based on the above findings, this Court finds that there is no genuine issue of material fact on the issues set forth above and the Applicant is entitled to Summary Judgment on her PCR Application. The Bond Order and Contempt Order are declared null and void and vacated and the conviction for contempt is hereby vacated and dismissed. Further, the Court remands the case back to the Columbia Municipal Court to vacate the conviction of contempt of May 18, 2011 and dismiss the charges. In light of this ruling, the State's Motion for Summary Judgment would be denied. The Applicant has requested additional remedies relating to the return of her bond and fines money, but those will need to be addressed to the CMC.

The Courts, parties, municipal court and everyone who has touched this matter has been dealing with this albatross for many years with little or no progress. This Court has adopted the analysis of the late Chief Justice Bruce Littlejohn, one of South Carolina's finest jurist, who with his usual wit and logic, compared the solving of a particularly complex factual and legal issues before the court as "attempting to unscramble an egg. The court strives to do justice which oftentimes must be only approximate. When justice cannot be meted out exactly, we do that which is next best—try to bring an end to the dispute." Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984).

Therefore, the Applicant's Motion for Summary Judgment and Application for PCR are granted on the basis set forth above; and the State's Motion for Summary Judgment is denied. It is so Ordered.

November 19, 2018

Pickens, South Carolina



Perry H. Gravely
Presiding Judge