FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007
(843) 972-9005 Fax Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

June 7, 2019

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Sarah Toney 371030, v State, 2018-CP-26-3017

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Johnny James Jr, Esquire
Sarah L Toney 371030
Horry County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

JUN 11 2019

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable Kristi F. Curtis, Circuit Judge

Case No.: 2017-CP-26-3017

Sarah L Toney 371030.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Sarah L Toney appeals the Honorable Kristi F Curtis' April 15, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on May 17, 2019. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

June 7, 2019

Johnny James, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Horry CP
PO Box 677
Conway, SC 29526

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

JUN 11 2019

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable G. Kristi F Curtis, Circuit Judge

Case No.: 2017-CP-26-3017

Sarah L Toney 371030.....PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Johnny James Jr., Esquire. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Horry County Clerk of Court. I further certify that all parties required by Rule to be served have been served this June 7, 2019.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Sarah L. Toney, S.C.D.C. No. 371030,	)	Case No.: 2017-CP-26-03017
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Sarah L. Toney ("Applicant") on May 15, 2017. Respondent made its return on or about July 17, 2017. The Court convened an evidentiary hearing into the matter on Tuesday, November 27, 2018, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Applicant's plea counsel, J. Eric Fox, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the December 2015 term of the Horry County Grand Jury for homicide by child abuse (2015-GS-26-05651). J. Eric

Fox, Esq. represented Applicant, and Scott R. Hixson, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On January 11, 2017, Applicant pled guilty as indicted. The Honorable Steven H. John sentenced Applicant to imprisonment for a term of 27 years. Applicant did not appeal her plea or sentence.

Present Application

In her post-conviction relief application, Applicant alleges she is being held unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that:
    a. Counsel failed "to prepare and present a defense on my behalf"
    b. "Failure to call expert witnesses concerning Mental Health, to include [postpartum] Depression."
    c. "Failure to object to the sentence."
    d. "Failed to object to solicitor's comments."
2. Involuntary guilty plea, in that:
    a. "Involuntary Guilty Plea was unlawfully induced"
    b. "And not made voluntary or with a complete understanding of the nature of the charges and the inadequacies of the plea potential."
    c. "I did not understand the nature of the constitutional rights being [waived]."
3. "Direct appeal not filed"
    a. "Attorney failed to file direct appeal and I was prejudiced"
    b. "In all cases counsel has a duty to make certain the client is fully aware of the right to appeal."
4. "Rule 5 motion to discovery never viewed"
    a. "I was prejudiced by not having knowledge of my motion of discovery before or after plea. This is a Brady violation."

II. 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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel & Involuntary Guilty Plea

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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." Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong,

attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 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 (citing Strickland, 466 U.S. at 694). With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Applicant further claims her plea was not entered knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of her plea and the charges against her. Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991); see also Boykin v. Alabama, 395 U.S. 238, 243 (1969) (Courts must make sure defendants have "a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories."). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are

contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why she should be allowed to depart from the truth of her statements. Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir.1985)).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Richardson v. State, 310 S.C. 360, 363, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel.

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. Strickland, 466 U.S. at 696. 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. Id. at 696-97.

1. Failure to Develop, Present Mental Health Defense

Applicant alleges Counsel was ineffective in failing to develop and present a mental health based defense. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Due process prohibits the conviction of a person who is mentally incompetent, and that right cannot be waived by a guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992) (citing Bishop v. United States, 350 U.S. 961 (1956); Pate v. Robinson, 383 U.S. 375 (1966)). The test of competency to enter a plea is the same as required to stand trial: the accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him or her. Id., 308 S.C. at 232, 417 S.E.2d at 596 (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980)). An applicant alleging incompetence in fact must show by a preponderance of the evidence that he or she was incompetent at the time of his or her plea. Id.

An applicant alleging ineffective assistance of counsel for failure to seek a mental health evaluation, however, must still satisfy the two prongs of Strickland: the applicant must demonstrate (1) a "reasonable probability" that he was not competent at the time of the plea, and (2) that counsel's failure to seek an evaluation was unreasonable. Garren v. State, 423 S.C. 1, 12-13, 813 S.E.2d 704, 710-11 (2018)

The plea proceedings on January 11, 2017, started with a competency hearing pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), at which time the Court heard expert testimony from Dr. Emily Gottfried, a forensic psychologist on faculty with the Medical University of South Carolina.[1] Dr. Gottfried testified that Applicant was both competent to stand trial and, at the time of her actions on November 3, 2015, was criminally responsible and had the capacity to conform her behavior with the law. (Tr. 10-11). Dr. Gottfried also testified that Applicant was, at the time of the homicide, under the influence of methamphetamine, amphetamines, and opioids, and that she suffered from multiple, severe drug abuse disorders. (Tr. 13-15). Applicant's history of psychiatric hospitalizations indicated no psychotic symptoms, and that any such symptoms she may have been suffering "were likely substance induced." (Tr. 15-16). Dr. Gottfried concluded that Applicant's deficient cooperation with efforts to locate her child "did not appear to be consistent with psychosis[,]" but appeared to be "more related to personality pathology and possibly to substances." (Tr. 16-17). When pressed to expand upon Applicant's personality disorder, Dr. Gottfried agreed that Applicant suffers from borderline personality disorder, but rejected a previous diagnosis of bipolar disorder. (Tr. 18, ll. 3-21). Based upon Dr. Gottfried's testimony and associated written report, Judge John found Applicant criminally responsible. (Tr. 20-21).

[1] Much of Dr. Gottfried's testimony was pursuant to an extensive evaluation performed upon Applicant, for which Dr. Adam Bloom, MUSC, was also present.

At the evidentiary hearing, Counsel testified Applicant gave manic statements recorded on the dash cam of a police squad car, which were alone enough to prompt him to investigate her mental health issues. Counsel had Applicant evaluated for competence and she was found competent to stand trial. Counsel also had Applicant evaluated for criminal responsibility and she was found criminally responsible. Counsel testified he was able to secure thorough treatment records for Applicant. Counsel recalled that Applicant suffered from auditory hallucinations at the time of the killing, and that Applicant's parents also suffered from their own mental health issues, such that Applicant was abused from an early age. Counsel testified Applicant inconsistently used medications prescribed to her, and expressed he was "pretty sure" she was not using her prescribed medications at the time of the killing.

Counsel testified that, in the course of his investigatory efforts, he was contacted "out of the blue" by advocacy organizations with referrals to very well-regarded experts who could be potentially helpful to Applicant's defense. However, Applicant's toxicology report from the time of the killing, as well as her own self-reporting, indicated she was under the influence of methamphetamine at the time. As a consequence, it was impossible for Counsel to find an expert who would conclude Applicant's mental health was the cause of her actions, rather than the drugs. Counsel explained that mental disturbance and drug use provide for very distinct kinds of hallucinations, with surprisingly little overlap between drug-induced and non-drug-induced hallucinations. Counsel noted that he looked for a diagnosis of postpartum psychosis, and that without any such diagnosis, the Applicant's case was difficult to defend.

Applicant testified she used methamphetamine three days prior to the incident, and that she consistently reported her drug use occurred three days prior. Applicant recalled that law enforcement tested her urine, but that the urinalysis was "all wrong." Applicant denied using

opiates or Xanax. Applicant also testified she never got the results of law enforcement's test of her urine, and that she never looked at her discovery. Applicant testified that her obstetrician referred her to a specialist in Florence during her pregnancy with Victim, but she was simply sent back to her OBGYN. Applicant recalled that she was prescribed medications for her mental health, but did not take them. She further recalled being admitted to mental health facilities at least four times, and was prescribed anti-psychotics and lithium. Applicant emotionally testified that she was on lockdown at the detention center twenty-three hours a day before trial, and that she begged Counsel to get her out of the detention center no matter what. Applicant testified she was prescribed various medications while detained at J. Reuben Long, and listed them. Applicant explained her father was extremely abusive of her.

Applicant conceded there was not much else Counsel could have done to assist her, and accused the State of stonewalling plea negotiations. Applicant expressed her desire "to be done with it," and admitted that Victim's passing was her fault. Applicant offered that "it wasn't on purpose" and that she never would have intentionally harmed Victim.

The Court finds no deficiency in Counsel's representation and no prejudice to Applicant from the deficiency alleged. Counsel exhaustively investigated Applicant's mental health history and spoke to numerous medical professionals with significant experience with postpartum psychosis. None, however, would be able to say with confidence that Applicant's actions were caused by postpartum psychosis alone because of Applicant's voluntary drug use at the time. Therefore, Counsel's representation fell well within what is expected of attorneys, and Applicant was not harmed by Plea Counsel's failure to present expert witness testimony on postpartum psychosis during the Blair hearing. Additionally, Applicant offered no expert testimony at the evidentiary hearing to support any finding that she was not competent at the time of her plea

proceeding, or that she was not criminally responsible at the time of the killing. Applicant has failed to meet her burden of proving either prong under Hill, and accordingly her request for relief by way of this allegation is **DENIED.**

2. Failure to Object to the Sentence

Applicant alleged in her application for relief that Counsel was ineffective in failing to object to the sentence imposed by the plea court. Homicide by child abuse is a felony punishable by imprisonment for life, but not less than a term of twenty years. S.C. Code Ann. § 16-3-85(C)(1). Applicant was sentenced within the statutory range. No testimony was taken on this allegation at the evidentiary hearing, and the Court perceives no basis for objection from the record and the sentence imposed. Applicant has failed to meet her burden under either prong of Hill, and accordingly her request for relief by way of this allegation is **DENIED.**

3. Failure to Object to Solicitor's Comments

Applicant alleged in her application for relief that Counsel was ineffective in failing to object to the Solicitor's remarks during her plea proceeding. Applicant did not identify in either the application or in her testimony at the evidentiary hearing any objectionable statements made by the solicitor during the plea proceeding. Applicant has failed to meet her burden under either prong of Hill, and accordingly her request for relief by way of this allegation is **DENIED.**

4. Failure to File a Notice of Appeal

Applicant alleged in her application for relief that Counsel was ineffective in failing to file a notice of appeal. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

> Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in

> appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted).

The plea court informed Applicant of her right to appeal during the plea proceeding. (Tr,. 38, ll. 3-5). Counsel testified Applicant never asked for an appeal. Applicant offered no testimony on this allegation at the evidentiary hearing. Applicant did not ask for an appeal pursuant to White v. State[2] in her application or at any time during the evidentiary hearing.

Applicant offered no evidence to support this allegation. Accordingly, she has failed to meet her burden under Turner, and her request for relief by way of this allegation is **DENIED.**

B. Brady Violation

Applicant alleges a violation of Brady v. Maryland, 373 U.S. 83 (1963), at least insofar as she claims to have never seen her discovery. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)). In the context of a guilty plea, a Brady violation is material "when there is a reasonable probability that, but for the government's failure to disclose Brady

[2] 263 S.C. 110, 208 S.E.2d 35 (1974).

evidence, the defendant would have refused to plead guilty and gone to trial." Gibson, 334 S.C. at 525, 514 S.E.2d at 325.

During the Blair hearing prior to the plea, there was at least some fleeting inquiry by the Court to confirm Counsel received Victim's autopsy in discovery. (Tr. 34, ll. 3-23).

At the evidentiary hearing, Counsel testified he filed for and received discovery. Counsel explained that while he did discuss discovery with Applicant, and showed most of it to her, he advised her against keeping her own copy while she was incarcerated in the detention center, lest it be stolen. Applicant, in her own testimony, claimed she never looked at her discovery. Applicant claimed to have never received the results of her urine test, but thereafter contended the conclusions of her urinalysis was incorrect as she denied using opiates and Xanax. Testifying again when called by Respondent, Counsel denied withholding any discovery from Applicant, but recommended that she not look at the autopsy pictures of Victim, and Applicant agreed with his advice.

The Court finds Applicant has failed to establish any Brady violation. The limited testimony on this point indicates no failure on the part of the State to produce any relevant, material evidence to Applicant and Counsel. The only potential question raised by the testimony at the evidentiary hearing is whether Counsel withheld information from Applicant, and the answer provided by the same testimony is that Counsel advised Applicant that she should not personally review the autopsy photographs of her deceased child. The Court finds nothing credible in Applicant's testimony that she never looked at her discovery, or that she did not receive her own toxicology results. Applicant has failed to demonstrate any of the four points required as articulated in Gibson, and accordingly her request for relief by way of this allegation is **DENIED.**

III. CONCLUSION

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

This Court notifies the Applicant that she must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15th **day of** April **, 2019.**

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina