

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Marie Assa'ad-Faltas, MD, MPH,

Applicant(s),

vs.

State of South Carolina,

Respondent(s).

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A NO: 2017-CP-40-06831

ORDER GRANTING POST-CONVICTION
RELIEF

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SC Court of Appeals

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C.C.P. & G.S.

This matter comes before the Court by way of Dr. Marie Assa'ad-Faltas, MC, MPH's ("Applicant") Application for Post-Conviction Relief filed November 8, 2017. A hearing was convened at the Richland County Courthouse in Columbia, South Carolina on March 22 and 23, 2018, at which time Applicant was present in the court with the assistance of standby counsel; Chris Truluck, Esquire.¹ Jessica E. Kinard of the South Carolina Attorney General's Office was present in court and represented the State of South Carolina ("Respondent"). Applicant's previous counsel whose representation was the subject of the above-listed listed action, Orin Briggs, Esquire ("Counsel"), was present and provided testimony on March 22, 2018.


Procedural History

Applicant was convicted of contempt of court and violation of a court order at a hearing held on March 28, 2011 before the Honorable Marion Hanna of the Columbia Municipal Court. On March 30, 2011, Applicant filed an appeal with the Court of Common Pleas in the Richland County Court of Common Pleas ("Circuit Court"). Applicant filed her motion for a release bond on April 1, 2011 and, through Counsel, moved for and was issued a bond for the release of Applicant pending the hearing of her appeal to the Court of Common Pleas ("Release Bond") by

¹ See Order of the Honorable Jocelyn Newman, filed January 26, 2018.

the Municipal Court executed on April 11, 2011 pursuant to a hearing held on April 6, 2011; Applicant was not release until April 12, 2011. At the Release Bond hearing, the terms of the bond were discussed in chambers, however, Counsel failed to object to the hearing of any matter before the Municipal Court where an appeal had already been filed with the Court of Common Pleas divesting jurisdiction. Counsel also consented or, otherwise, failed to object to certain conditions opposed by Applicant on the record. In addition to a one-thousand-dollar bond payment, Applicant's Release Bond consisted of three additional conditions: 1) attend weekly counseling sessions with a psychiatrist; 2) abide by the October 6, 2010, Order of the Municipal Court concerning access to City of Columbia buildings and personnel; and 3) surrender her passport to the court. The Municipal Court further made a determination to deprive Applicant of her "credit given for good behavior" to which Counsel failed to raise an objection. Applicant was transported to the hearing to set Release Bond, however, was not present in the courtroom during the issuance of the terms or privy to conversations held in chambers. On April 8, 2011, the South Carolina Supreme Court issued an order prohibiting Applicant from filing anything with any South Carolina State Court while in a *pro se* capacity; this order was later modified in several parts.

On May 18, 2011, Applicant, again represented by Counsel, was found in contempt for failing to comply with the terms of her Release Bond issued April 11, 2011; specifically, for failing to see a psychiatrist as ordered and failing to surrender her passport. Counsel made express statements suggesting the willfulness of Applicant in violating the terms of her Release Bond and implicitly consented to the violation or, otherwise, failed to object to the imposition of the conditions of Applicant's Release Bond. Applicant then filed an appeal of the Municipal Court's contempt order on May 31, 2011. The formal issuance of the Municipal Court's order subsequently followed on June 15, 2011. This appeal became Case No. 2011-CP-40-3547. The

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Honorable Alison Renee Lee, Circuit Court judge, presided over a hearing on Applicant's appeal on May 9, 2012. Judge Lee issued an order denying Applicant's appeal on September 17, 2012 in part due to the finding that Counsel consented to the terms of the Release Bond and, therefore, waived preservation of the issue for appeal. On September 17, 2012, Applicant filed a motion to alter or amend pursuant to SCRPC Rule 59(e), which was denied on October 19, 2012. Thereafter, on July 9, 2013, Applicant filed a motion to appoint counsel which was granted by the Honorable Clifton Newman on November 7, 2017. Judge Newman determined that, to provide Applicant with meaningful access to the courts, Applicant's timely motion to appoint counsel should be granted pursuant an application for post-conviction relief from the Municipal Court's order of finding of contempt issued on June 15, 2011. Further pursuant to Judge Newman's order, Jonathan Waller, Esquire, was appointed by the Richland County Clerk of Court on November 9, 2017. Mr. Waller was relieved by the Judge Jocelyn Newman on January 26, 2018 and Mr. Truluck was appointed thereafter as standby counsel allowing Applicant to appear *pro se* during the evidentiary hearing in this matter only and permitting Applicant, during that hearing, to examine witnesses, offer evidence, and present oral arguments.

Allegations

In her amended application for post-conviction relief filed January 23, 2018, Applicant alleges her conviction was unlawful for the following reasons:

1. As to representation rendered by Orin Briggs, Esquire:
 - a. Counsel was ineffective for failing to object to impermissible conditions of appeal bond set by the Columbia Municipal Court at a hearing held April 6, 2011;
 - b. Counsel was ineffective for failing to properly argue against impermissible conditions of appeal bond set by the Columbia Municipal Court at hearing held April 6, 2011;

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- c. Counsel was ineffective for failing to object to the Columbia Municipal Court's *sua sponte* "clarification of her two contempt of court sentences that were the subject of her appeal bond set at hearing held April 6, 2011;
 - d. Counsel was ineffective for failing to object to the Columbia Municipal Court's two contempt of court sentences that were the subject of her appeal bond set at a hearing held April 6, 2011; as the Columbia Municipal Court ordered that Applicant be denied credit for good behavior;
 - e. Counsel was ineffective for failing to file a motion for reconsideration or otherwise objecting to impermissible conditions of appeal bond contained in an order signed April 11, 2011;
 - f. Counsel was ineffective for failing to object to the holding of a rule to show cause hearing when the hearing was set based on allegations of violations of an appeal bond that contained impermissible conditions;
 - g. Counsel was ineffective for failing to properly argue against a finding of contempt at a Rule to Show Cause hearing held May 18, 2011;
 - h. Counsel was ineffective for failing to object to Applicant being held in contempt of court where the Columbia Municipal Court made no finding that the alleged violations of appeal bond were willful violations;
 - i. Counsel was ineffective for failing to object to impermissible conditions of appeal bond set by the Columbia Municipal Court at a Rule to Show Cause hearing held May 18, 2011;
 - j. Counsel was ineffective for not advocating for Applicant to not be held in contempt and instead representing to the Columbia Municipal Court that Applicant "probably didn't try hard enough" when Counsel was without factual basis to make such representations.
2. Contempt of Court is not the appropriate remedy for violations of conditions of appeal bond and as such violates State statute and as such Applicant being held in contempt for any violations is a violation of Applicant's constitutional rights.

Applicant requested the following relief:

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1. Applicant prays that this court issue an Order vacating the contempt pronouncements of May 18, 2011; and
2. Applicant prays that this court issue an Order to the Columbia Municipal Court to return Applicant's fine in the amount of \$500.00, with interest at the statutory rate, compounded annually from May 18, 2011 to the date of the Order.

In Applicant's supplement to amendment to application for post-conviction relief filed January 23, 2018, Applicant alleges her conviction was unlawful for the following reasons:

4. Applicant's May 18, 2011 two conviction[s] of contempt of court, formalized by order of the Columbia Municipal Court on June 6, 2011, are unconstitutional where Applicant was denied the appointment of appellate counsel to further appeal the Honorable Judge Lee's September 2012 affirmation of those convictions and, subsequent, October, 2012 denial of a timely motion for rehearing. Applicant was, at the time, barred from filing a notice of appeal without counsel and barred from seeking the appointment of counsel to file such appeal. Applicant alleges that the bar then effect on her ability to file *pro se* notice of appeal and to seek the appointment of appellate counsel renders her convictions subject to this PCR application unconstitutional as violating the Equal Protection and Due Process Clauses of the U.S. and South Carolina Constitutions generally and more specifically as announced by the Court in *Douglas v. California*, 372 U.S. 353 (1963) and *Evitts v. Lucey*, 469 U.S. 387 (1985).
5. Trial counsel, Orin Briggs, was ineffective in manners to be elicited in his responses to the questions proposed to be posed to him in the evidentiary hearing, as previously submitted to the State of South Carolina, and to such other questions as the Presiding Judge at the evidentiary hearing may pose and/or allow applicant to pose to Orin Briggs.

Summary of Testimony Presented

Orin Briggs, Esquire, as previous counsel to Applicant, appeared and was examined by Applicant with regard to his ineffectiveness in representing Applicant at her motion to set a release bond on April 6, 2011 and subsequent Rule to Show Cause for violation of the release bond on May 18, 2011. In addition to Counsel's testimony, the transcripts from both the April 6, 2011 and May 18, 2011 were submitted to the Court for review as well as Judge Lee's September 17, 2012

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finding that Counsel consented to the terms of the bond.

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 further had the opportunity to observe the witness presented at the hearing, closely pass upon his credibility and weigh his testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

A. Ineffective Assistance of Counsel

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCPP). 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*, 286 S.C. 441, 334 S.E.2d 813 (1985).

First, 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, 385 S.E.2d at 625, citing *Strickland*. Second, counsel’s deficient performance must have prejudiced 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*). This Court finds that Applicant has met her burden of proof as to the

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claim that Counsel failed to object to the Municipal Court's jurisdiction, issuance and enforcement of provisions beyond the authority and jurisdiction of the Municipal Court.

On March 30, 2011, Applicant filed an appeal with the Court of Common Pleas in the Richland County Court of Common Pleas. At hearing on April 6, 2011, Counsel failed to object to the hearing of any matter with the Municipal Court where Applicant's appeal divested the court of jurisdiction to set an appeal bond which properly lay with the Court of Common Pleas. Counsel also failed to object to the denial of credit for good behavior by the Municipal Court with regard to Applicant's sentence for the contempt violation. Further, in the event the issuance of an appeal bond by the Municipal Court had been proper, S.C. Code § 14-25-95 provides "[t]he 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." S.C. Code § 14-25-95. At hearing on April 6, 2011, in the absence of Applicant, Counsel disclosed to the court that his client did not agree with the forthcoming, and above-mentioned, bond provisions at issue in this action. However, Counsel consented or, otherwise, failed to object to the conditions imposed by the Municipal Court. Further, S.C. Code § 14-25-95, in providing the statutory authority for municipal courts to issue appeal bonds, does not authorize the imposition of the injunctive terms of bond imposed upon Applicant which subsequently resulted in a finding of contempt as against her by the Municipal Court at hearing on May 18, 2011. Counsel, therefore, failed to object to the jurisdiction of the Municipal Court to hear any matter pending appeal, failed to object to the terms imposed in disobedience of Applicant's instructions, failed to object to the authority of the Municipal Court to impose those terms beyond the language provided in S.C. Code § 14-25-95 and/or failed to object to the denial of credit for good behavior as to Applicant's sentence. Counsel's consent, or failure to object to, the Municipal Court's jurisdiction, denial of credit for

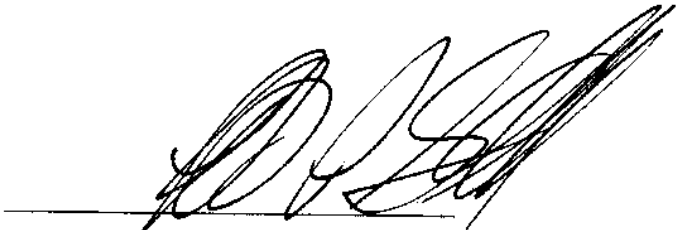
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good time behavior and imposition of unauthorized conditions of bond resulted in a deficiency in providing assistance to the Applicant and, as evidence by the subsequent contempt held on May 18, 2011 hearing finding Applicant in contempt for failure to adhere to those bond conditions, resulted in prejudiced to 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 v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be granted and conviction vacated as to Applicants contempt conviction heard on May 18, 2011 and memorialized by order on June 15, 2011; and
2. That the Applicant be granted a new trial as to the Rule to Show Cause previously heard on May 18, 2011 within thirty (30) days of the execution of this order.

AND IT IS SO ORDERED this 4 day of April 2018.



The Honorable Brooks P. Goldsmith
Presiding Judge, Fifth Judicial Circuit