SUPREME COURT OF GEORGIA
Case No. S21H0182

February 01, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

KIERA SHANICE GRAHAM v. BROOKS BENTON, WARDEN.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

All the Justices concur.

Trial Court Case No. 19CV0344

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Thiina A Banna, Clerk

Appendix A

IN THE SUPERIOR COURT OF HABERSHAM COUNTY
STATE OF GEORGIA

KEIRA SHANICE GRAHAM, GDC # 1001154592,	*	CIVIL ACTION NO. 19CV0344RS
Petitioner,	*	
vs.	*	HABEAS CORPUS
BROOKS BENTON, Warden,	*	
Respondent.	*	

FINAL ORDER

This case came before the Court for hearing on December 10, 2019, in which Petitioner is challenging the validity of her Thomas County convictions for felony murder and first degree arson, arising from a guilty plea. Upon consideration of the record as established at the December 2019 hearing[1], the Court denies relief, based on the following findings of fact and conclusions of law.

I. Procedural History

In February 2013 Petitioner was indicted with Alvin Davis, Chaquel Cook, and Kimberly Williams by a Thomas County grand jury for malice murder (count 1), felony murder (count 2), armed robbery (count 3),

[1] Citations to testimony at the December 2019, hearing (pages 1-61) are "HT" followed by the page number(s). Citations to the exhibits, which appear after page 62 and sequentially paginated as 001-206, are "Ex" followed by the page number(s).

Appendix B

aggravated assault (count 4), hijacking a motor vehicle (count 5), arson in the first degree (count 6), and cruelty to children in the first degree (count 7) in connection with the shooting death of Hassan Hana Williams in July 2012. (Ex. 18-28). Cook was also indicted for possession of a firearm during commission of a felony. *Id.*

Pursuant to a negotiated plea agreement, on September 12, 2013, Petitioner pleaded guilty to felony murder (count 2) and received a life sentence, armed robbery (count 3) and received a life sentence but it was merged with count 2, and arson in the first degree (count 6) and received 20 years concurrent. (Ex. 87-92, 95, 108-10, 135-55). A judgment of nolle prosequi was entered on the remaining counts. *Id.* at 93.

On October 3, 2013, her plea counsel Jason Moon filed a "motion for new trial and withdrawal of guilty plea." (Ex. 112). Attached to the motion was a handwritten letter from Petitioner in which she expressed her dissatisfaction with counsel and said she was "pressured" to take the plea. *Id.* at114.

On September 10, 2014, Moon filed a motion to withdraw as counsel. (Ex. 120). New counsel Wade Krueger entered his appearance on Petitioner's behalf on June 22, 2015. (Ex. 131).

Pursuant to a hearing on February 15, 2016, at which Petitioner and

Moon testified, the trial court denied the motion to withdraw the guilty plea on February 18, 2016. (Ex. 134, 157-84).

Krueger pursued an appeal on Petitioner's behalf from that order and enumerated one error: Petitioner's guilty plea was not knowing, intelligent and voluntary, as counsel's "misleading statements" to Petitioner about the death penalty were coercive and her consent to waive trial was not validly obtained. (Ex. 187, 193-94).

The Supreme Court affirmed the trial court's ruling, concluding that the guilty plea was voluntary and the trial court did not abuse its discretion in denying the motion to withdraw the plea. *See Graham v. State*, 300 Ga. 620, 797 S.E.2d 459 (2017).

Petitioner filed this petition on June 25, 2019, in which she challenges the validity of these convictions. She raises two grounds, alleging that she received ineffective assistance of counsel in connection with her guilty plea and with her motion to withdraw her plea and appeal.

Both of Petitioner's former attorneys testified at the December 2019 hearing in this case, as did Petitioner. (HT.13, 31, 40).

II. The Grounds of the Petition

A. Ground 1

In ground 1 Petitioner alleges she received ineffective assistance in connection with her guilty plea. She alleges counsel was ineffective in three

instances when counsel: (a) did not move to sever her trial from the co-defendants; (b) waived her presence at arraignment; and (c) did not produce a complete copy of all discoverable material to her, particularly evidence favorable to her.

These claims are procedurally defaulted under O.C.G.A. § 9-14-48(d), as they were not raised in the motion to withdraw the guilty plea – i.e. the "earliest practicable moment" in which such claims could be raised when Petitioner changed counsel, and in the appeal therefrom. *Wright v. Hall*, 281 Ga. 318, 319(1), 638 S.E.2d 270 (2006); *Fortson v. State*, 272 Ga. 457, 532 S.E.2d 102 (2000); *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991); *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985).

Cause to excuse a default under O.C.G.A. § 9-14-48(d) may be constitutionally ineffective counsel under the standard of *Strickland v. Washington*, 446 U.S. 668 (1984). *Turpin v. Todd*, 268 Ga. 820, 826, 493 S.E.2d 900 (1997). Actual prejudice can be shown by satisfying either the prejudice standard of *Strickland* or the actual prejudice test of *United States v. Frady*, 456 U.S. 152 (1982). *Todd*, 268 Ga. at 829. *Frady* requires that a petitioner show not merely that errors at trial created a possibility of prejudice, but that the errors "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. "[A] habeas petitioner who meets both

prongs of the *Strickland* test has established the necessary cause and prejudice to overcome the procedural bar of OCGA § 9-14-48(d)." *Battles v. Chapman*, 269 Ga. 702, 506 S.E.2d 838 (1998).

For reasons set for below in Section B, Petitioner has not established cause and actual prejudice as defined under state law to excuse her failure to have timely raised these claims in the motion to withdraw her guilty plea and the appeal therefrom. Ground 1 provides no basis for relief.

B. Ground 2

In ground 2 Petitioner alleges she received ineffective assistance of counsel in connection with her motion to withdraw her guilty plea and the appeal. She alleges appellate counsel was ineffective when counsel: (a) did not allege that plea counsel was ineffective for not filing a motion to sever and for waiving her presence at arraignment; (b) did not show that plea counsel had favorable or exculpatory evidence; (c) did not obtain a copy of discovery and the case file from plea counsel; (d) did not investigate plea counsel's "ineffectiveness"; (e) did not investigate facts; and (f) did not prepare Petitioner for the hearing on the motion to withdraw. Petitioner clarified that she told appellate counsel that she wanted a copy of discovery to clear up matters about what had happened and "discrepancies" in people's statements. (HT. 46).

Findings of Fact and Conclusions of Law

Petitioner was represented on the charges and at the plea hearing by Jason Moon, a practicing attorney since 2004 whose practice was half criminal and half civil and had handled several hundred guilty pleas and five to ten jury trials when he began representing her. (HT. 14, 18-19). She was represented in the motion to withdraw proceeding and the appeal therefrom by public defender Wade Kreuger, a practicing attorney since 2005 who had handled hundreds of guilty pleas and several appeals at the time he represented her. (HT 31, 32).

Moon was appointed to represent Petitioner shortly after her arrest. (HT. 14). Moon's general custom and practice for arraignment was to talk with the client beforehand, explain the process, and then file a waiver of arraignment and enter a guilty plea on the client's behalf so that clients who were out on bond would not have to miss work by attending court and those who were incarcerated would not have to be taken out of their cells. (HT. 19-20). Moon had no reason to think that he did not follow that practice in this case. *Id.* Had Petitioner expressed a desire to attend arraignment, he would have attended arraignment with her. *Id.* at 19.

Moon obtained discovery from the State and went over all of it with Petitioner, including the discs which he showed to her using his laptop. (HT. 15, 17). This discovery included videos, pictures, the evidence against

her, police reports, and the autopsy report. (HT. 17, 21). Counsel was not able to give Petitioner copies of the discs, as she was in jail and could not keep them. (HT. 21).

Moon's investigation of the case revealed that Petitioner had known the victim from being in the Army together, they had had a physical relationship back then, and he came down from Virginia after being in contact with her and showed up one morning outside her apartment. (HT 15-16). Petitioner's boyfriend took the victim out into the countryside, accompanied by Petitioner's five-year old child and Petitioner's roommate, where the victim was shot in the back and then shot in the back of the head. (HT. 16). Petitioner, who had stayed behind at the apartment, brought some bleach to the site, and they burned the victim's car. (HT. 16, 17). Some of the photos of surveillance provided in discovery showed Petitioner getting the bleach. (HT. 17). Petitioner's five-year old child witnessed the entire incident. (HT. 16).[2]

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[2] The State's factual basis at the plea hearing was that Petitioner, individually and as a party to a crime: committed the offense of felony murder by causing the death of Hassan Williams, while in the commission of the offenses of armed robbery and aggravated assault, by multiple gunshot wounds to the head and back; committed the offense of armed robbery when, with the intent to commit a theft, took a GPS, property of Williams, by use of a Jiminez .380 firearm; and committed the offense of arson in the first degree by knowingly damaging by means of a fire a 1995 Mercedes vehicle, owned by Williams, at Millpond Road. (Ex. 147-48). Petitioner admitted that this was what had occurred. (Ex. 148).

Counsel's investigation led him to conclude there was "no question as to the arson," so it became a question of whether Petitioner went to trial as a party to murder and to armed robbery. (HT. 16). There were also witnesses to the events and what Petitioner told them. (HT. 17). There was little exculpatory information in the discovery, as surveillance photos showed Petitioner getting the bleach, Petitioner's phone records showed contact with the victim prior to his coming to Georgia, and counsel's discussions with her revealed that she had not told the victim about her boyfriend. (HT. 26, 27). Had the case gone to trial, the defense would have been that Petitioner was not present when the murder occurred. (HT. 27). However, they had also discussed felony murder and the differences between it and malice murder. (HT. 27).

Moon did not file a motion to sever Petitioner's trial as they were still in plea negotiations when he was able to obtain a favorable plea offer. (HT. 20). Moon would have filed a motion to sever closer to the time of trial had there been a trial. (HT. 20, 21).

Following his appointment, Krueger requested a copy of the plea hearing transcript and sentencing, arranged to and met with Petitioner to discuss potential claims, spoke with plea counsel Moon about the case, and talked with the prosecuting attorney about the case. (HT. 32-34). Krueger could not recall if he obtained a copy of Moon's file. (HT. 34). Regardless of

whether he had a copy of Moon's file, Krueger thought he was able to conduct a full and sufficient investigation. (HT. 37).

Krueger's review of the plea transcript, indictment, and sentence showed "nothing out of order" and there was nothing to challenge. (HT. 35).

In discussing potential ineffectiveness claims with Petitioner, the only thing she told Krueger was that she had wanted to go to trial, but that Moon told her that she would get the death penalty if she did. (HT. 34). She identified no other potential issues. (HT. 35).

Krueger did not see a viable issue to raise about Moon's not having filed a motion to sever given that Petitioner's case was resolved by a guilty plea. (HT. 35, 36). Krueger similarly saw no viable issue to raise about Moon's waiving arraignment, as it did not bear upon the voluntariness of the guilty plea. (HT. 36).

Petitioner has the burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show that attorney Krueger's performance was deficient and that she was prejudiced as a result of his purported errors.

Where the claim is that appellate counsel was ineffective for not raising a particular issue on appeal, a petitioner must overcome the "strong presumption" that appellate counsel's actions fell within the range of reasonable professional conduct and affirmatively show that appellate counsel's decision not to raise the issue "was an unreasonable one which

only an incompetent attorney would have made." *Griffin v. Terry*, 291 Ga. 326, 337, 729 S.E.2d 334 (2012) (citations omitted). To establish prejudice, a petitioner must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

Where the claim is that appellate counsel was ineffective for not raising claims of trial counsel ineffectiveness, "two layers of fact and law are involved in the analysis of the habeas court's decision." *Gramiak v. Beasley*, 304 Ga. 512, 820 S.E.2d 50 (2018). To find that appellate counsel provided ineffective assistance, a reviewing court must determine that appellate counsel's performance was deficient in not raising the issue. *Id.* at 513. If appellate counsel's performance is found to be deficient, then the petitioner must establish prejudice, which requires a showing that, had the trial counsel ineffectiveness claim been raised on appeal, there is a reasonable probability that the outcome of the appeal would have been different. *Id.* "This, in turn, requires a finding that trial counsel provided deficient representation and that the defendant was prejudiced by it." *Id.*

The *Strickland* standard applies in the guilty plea context. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The attorney performance prong of the test in this setting is simply a restatement of attorney competence set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973), and *McMann v. Richardson*, 397 U.S. 759 (1970), which is that counsel's advice fall within the range of

competence demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 56, 58. The prejudice prong looks to "whether counsel's constitutionally ineffective performance affected the outcome of the plea process" and requires a showing of a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on a trial. *Hill*, 474 U.S. at 59.

Petitioner has not shown that attorney Krueger's performance was deficient. He met with Petitioner to identify potential claims of ineffective assistance of plea counsel, spoke with plea counsel and the prosecuting attorney, and reviewed the plea transcript and other documents in the case. He saw no basis on which to allege that plea counsel's performance was deficient for reasons other than the one he raised in the motion to withdraw and on appeal, which was that plea counsel had coerced the guilty plea through remarks about the death penalty. That Krueger may or may not have had Moon's file did not prevent him from investigating the case and identifying potential issues.

Since Petitioner pleaded guilty, Krueger reasonably concluded there were no ineffective assistance claims to pursue based on the lack of a severance motion and the waiver of Petitioner's presence at arraignment. Moon would have filed a severance motion closer to the time of a trial. Under O.C.G.A. § 17-8-4, if the death penalty is not being sought, a trial court has

broad discretion to decide if defendants will be tried jointly or separately. *See, e.g., Floyd v. State*, 307 Ga. 789, 795 (1), 837 S.E.2d 790 (2020). At arraignment, the plea of the accused shall be entered and the case set for trial if a plea of not guilty is entered. *See* O.C.G.A. § 17-7-91(b). At arraignment, the indictment or accusation is to be read to the person accused of committing a crime. *See* O.C.G.A. §17-7-93(a). Moon waived arraignment, which meant that the indictment was not read aloud to Petitioner in open court, and entered a plea of not guilty on her behalf, which meant that her case would be placed on a trial calendar.

Petitioner has also failed to establish the requisite prejudice from Krueger's decision not to allege that Moon was ineffective for the reasons now asserted by Petitioner. Since Petitioner pleaded guilty and there was no trial, the severance issue became moot. Though Moon waived arraignment, Moon did go over the indictment with Petitioner and did explain the charges to her, as well as the elements of the offenses. (HT. 18). Though Moon could not provide copies of the discovery discs to Petitioner, he showed them to her on his laptop and went over all of the discovery with her. Petitioner has not shown there was information favorable to her in discovery that Moon did not use or that there was additional information that he did not get. Not only has Petitioner failed to show that Moon's performance was deficient, but she had not shown that, but for Moon's purported errors, she would not have

pleaded guilty but would have gone to trial. In other words, she has not shown that she had meritorious plea counsel ineffectiveness claims that Krueger did not raise. *Gramiak*, 304 Ga. at 513.

Finally, Petitioner contends that Krueger did not prepare her for the hearing on the motion to withdraw her guilty plea, but she did not question him about this claim nor otherwise identify what he could or should have done to prepare her. She has not shown that his performance was deficient in this regard and that she was prejudiced as a result.

Ground 2 lacks merit.

CONCLUSION

Wherefore, the petition is denied.

If Petitioner desires to appeal this order, Petitioner must file an application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date this order is filed. Petitioner must also file a notice of appeal with the Clerk of the Superior Court of Habersham County within the same thirty (30) day period.

The Clerk of the Superior Court is hereby DIRECTED to mail a copy of this order to Petitioner, Respondent, and the Office of the Georgia Attorney General.

SO ORDERED, this 30th day of July, 2020.

RUSSELL W. SMITH, Chief Judge
Mountain Judicial Circuit

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