No. 84229

_____

IN THE
MISSOURI SUPREME COURT

_____

STATE OF MISSOURI EX REL.

AMY M. RODRIGUEZ,

Petitioner,

v.

PATRICIA CORNELL,

Respondent.

_____

Original Proceeding
Petition for Writ of Habeas Corpus

_____

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

_____

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

JURISDICTIONAL STATEMENT 4

STATEMENT OF FACTS 5

ARGUMENT

Point I - The claims in the petition for writ of habeas corpus are procedurally barred from review 7

Point II - Petitioner's plea was proper 15

CONCLUSION 21

CERTIFICATE OF COMPLIANCE AND SERVICE 22

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

Error! No table of authorities entries found.

Other Authorities

Error! No table of authorities entries found.

JURISDICTIONAL STATEMENT

This case involves an original petition for writ of habeas corpus under Missouri Supreme Court Rules 84.22 to 84.26, 91.01 et seq. and Chapter 532, RSMo. 2000. This is an original proceeding for writ of habeas corpus that was filed with this court on January 29, 2002. Jurisdiction over this cause lies with the Missouri Supreme Court. Missouri Constitution, Article V, Section 4.1; §532.030, RSMo. 2000; Missouri Supreme Court Rule 91.01(a), (b); 91.02(a).

Named respondent, Patricia Cornell, Superintendent of the Women's Eastern Reception and Diagnostic Center, is petitioner's custodian and is the proper party respondent. Missouri Supreme Court Rules 91.04, .07.

STATEMENT OF FACTS

Procedural History

Petitioner filed her petition for writ of habeas corpus with the Supreme Court of Missouri on January 29, 2002. After receiving suggestions in opposition to the petition, the court issued a writ of habeas corpus on March 19, 2002. The writ waived production of the petitioner, but ordered respondent to file a return. After the filing of the return, briefing by the litigants ensued.

Previously, petitioner sought state habeas relief from the Circuit Court of Audrain County (Respondent's Exhibit C). The circuit court denied relief (Respondent's Exhibit D). After an evidentiary hearing (Petitioner's Exhibit 1), the circuit court found petitioner's claim did not merit a writ of habeas corpus (Respondent's Exhibit D). The Missouri Court of Appeals also denied relief (Petition, page 1). Litigation of the petition for writ of state habeas corpus then began before this court. O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

Statement of Facts

On March 25, 1999, petitioner pled guilty to three counts of statutory rape. Between May 1, 1998, and June 14, 1998 (Respondent's Exhibit A, page 23), petitioner, a school teacher (Respondent's Exhibit B, page 12) had sexual intercourse with her sixth grade literature student on three different occasions (Respondent's Exhibit A, pages 14-18; Respondent's Exhibit B, page 31). Although statutory eligible for three consecutive life sentences, §566.032, RSMo. 2000, petitioner was sentenced to three concurrent terms of ten years imprisonment with the Missouri Department of Corrections (Respondent's Exhibit B). Habeas litigation ensued.

ARGUMENT

I.

THE COURT SHOULD DECLINE TO REVIEW PETITIONER'S CLAIMS CHALLENGING THE LAWFULNESS OF HER GUILTY PLEA BECAUSE REVIEW OF THOSE CLAIMS IS BARRED BY PETITIONER'S DEFAULT IN THAT SHE DID NOT LITIGATE THE CLAIMS IN A TIMELY FILED RULE 24.035 MOTION (Responding to Petitioner's Point IV).

In her brief to this court, petitioner contends that she received ineffective assistance of guilty plea counsel because counsel led her to believe that she could possibly get "shock probation" under §559.115, RSMo. 2000 (Appellant's Brief -- hereinafter App. Brf. -- pages 11-14). Petitioner also contends that the trial court had no jurisdiction to sentence petitioner to shock probation (App. Brf., pages 14-15). Lastly, petitioner contends that her due process rights were violated because the state did not express opposition to shock probation until a week before the circuit court's order denying shock probation (App. Brf., pages 16-17). Review of these claims in a state habeas corpus petition is barred by default because these claims should have been presented by petitioner in a timely filed Rule 24.035 post-conviction motion.

A claim of ineffective assistance of trial counsel and a claim of a trial court's lack of jurisdiction is typical litigation in a Rule 24.035 motion. E.g., State v. Hunter, 840 S.W.2d 850 (Mo. banc 1992), cert. denied, 509 U.S. 926 (1993) (post-conviction appeal under Rule 24.035 involving ineffectiveness claim); Carson v. State, 997 S.W.2d 92 (Mo. App. S.D. 1999) (jurisdiction issue reviewed). Of course, the third issue, the due process issue could have been litigated by petitioner in an amended motion under Missouri Supreme Court Rule 24.035(g). Recognizing that her claims are subject to procedural default from the

failure to litigate them in a timely filed post-conviction motion, State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993), petitioner seeks to show "good cause and actual prejudice" to overcome her default (App. Brf., pages 18-20). Petitioner cannot show cause for her default.

The court seems to have adopted the standard of cause and actual prejudice from United States Supreme Court cases discussing the concept in a federal habeas corpus context. 28 U.S.C. §2254 (federal habeas corpus statute); see Brown v. State, 66 S.W.3d 721, 726, 731 (Mo. banc 2002), quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) and United States v. Frady, 456 U.S. 152, 170 (1982). Petitioner fails to show either ineffective assistance of counsel or an external impediment to the presentation of the claim in a Rule 24.035 motion. Murray v. Carrier, 477 U.S. at 488.

Initially, petitioner contends that she received ineffective assistance of counsel; thus, she did not file a post-conviction motion (App. Brf., pages 18-19). Petitioner's complaint of ineffective assistance of counsel, however, refers to trial counsel during the period before her June 18, 1999 sentencing. Petitioner's default, on the other hand, occurred after sentencing when she did not file a timely Rule 24.035 motion. Petitioner does not suggest that she received ineffective assistance of counsel during that period after sentencing (App. Brf., pages 18-19). Nor can she since a claim of ineffective assistance of post-conviction counsel does not constitute cause to overcome default in federal habeas litigation. Coleman v. Thompson, 501 U.S. 722, 752 (1991). Petitioner refers to no Supreme Court decision where the underlying claim of ineffective assistance of trial counsel is also the cause for the default of that underlying claim (App. Brf., pages 18-19).

Petitioner cannot show good cause to overcome her default. She had the factual and legal tools by which to construct her challenge to the guilty plea. See Leggins v. Lockhart, 822 F.2d 764, 766 (8th

Cir. 1987), cert. denied, 485 U.S. 907 (1988). The legal theory underlying petitioner's claim is that "shock probation" -- the 120 day call back provision of §559.115, RSMo. 2000 -- was not available to her due to the nature of her crimes. That legal theory was readily available under the statute. Section 559.115.5, RSMo. 2000. The statute plainly states this theory. During the ninety days after sentencing, petitioner had the legal tools available by which to construct her claim that her guilty plea was involuntary because she received ineffective assistance of counsel in that shock probation was not an available sentencing alternative for statutory rape under §559.115.5, RSMo. 2000.

Petitioner contends that it was difficult for her to assert her claim because the state, the trial judge and trial counsel did not inform her of her ineligibility for shock probation (App. Brf., page 19). Of course, that is not the legal issue. The issue is whether petitioner could reasonably have been aware of the claim, Brown v. State, 66 S.W.3d at 731, and the answer is yes. The claim is based upon a statute, §559.115.5, RSMo. 2000; thus, petitioner could have asserted the claim in a timely filed post-conviction motion.

> That McClesky did not possess, or could not reasonably have obtained, certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event.

McClesky v. Zant, 499 U.S. 467, 497 (1991); see also Zeitvogel v. Delo, 84 F.3d 276, 281 (8th Cir.), cert. denied, 519 U.S. 953 (1996). Given the availability of petitioner's claims for assertion in a timely post-conviction motion, petitioner cannot demonstrate cause to overcome her default.

Petitioner criticizes her trial counsel, the plea court and the prosecutor for failing to disclose to her that she was ineligible for shock probation (App. Brf., page 19). As noted, the issue is not what petitioner knew, but what she could have known. Brown v. State, 66 S.W.3d at 731. Petitioner had a duty to

pursue diligently her claim. In Merriweather v. Grandison, 904 S.W.2d 485, 489 (Mo. App. W.D. 1995), the court of appeals stated that "the determination of 'manifest injustice' calls for a broader inquiry, into which would figure the prisoner's own want of diligence or his deliberate bypass of an available remedy as a matter of strategy, which might constitute waiver of his habeas corpus remedy." Similarly, the federal court of appeals in Duvall v. Purkett, 15 F.3d 745 (8th Cir.), cert. denied, 512 U.S. 1241 (1994) rejected as defaulted under Missouri law and barred from federal habeas review a claim that a Missouri inmate alleged he did not learn about until long after the time for filing a Rule 24.035 motion have elapsed. Id. at 748. The Duvall court noted that a post-conviction attorney could have discovered the claim by reading the relevant Missouri statute and a relevant decision on the issue. Id.

In short, Duvall and Merriweather indicate that a prisoner seeking Rule 91 state habeas corpus relief may not present claims that were reasonably discoverable in time to raise the claim in a post-conviction motion or on direct appeal. This view of the law is supported by the law concerning the filing of a second or successive Rule 27.26 motions that was set out before State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1992). Missouri Supreme Court Rule 27.26 was the vehicle for post-conviction challenges to Missouri judgments of conviction and sentence before the adoption of Missouri Supreme Court Rules 24.035 and 29.15. Missouri Supreme Court Rule 27.26(d) disallowed the filing of a successive motion when the successive motion had a claim resolved adversely to the movant on a prior application or "where the ground presented is new but could have been raised in the prior motion." As noted, petitioner had the legal tools by which to present her claim in a timely filed Rule 24.035 motion.

The Brown court also embraced the belief that state habeas corpus may not be used to circumvent the time limits set out in Rule 24.035(b). Brown v. State, 66 S.W.3d at 731. Accordingly, once "cause"

passes, or phrased another way, once the obstruction to asserting a claim passes, a ninety day period in which to instigate state habeas litigation should begin. Cf., 28 U.S.C. §2244(d)(1)(D) (federal habeas one year statute of limitations). A finding of "cause" in a state habeas setting should not allow litigation of a state habeas petition months, years or decades after the obstruction's removal.[1] Petitioner alleged that her claim became known on October 14, 1999 (Petition, page 3, paragraph 4). If so, petitioner should have filed her state habeas corpus petition within ninety days of October 14, 1999. Petitioner alleges that she filed her state habeas corpus petition on December 6, 2000 in the Circuit Court of Audrain County (Petition, page 4). This filing was long after the ninety day window closed.

Petitioner also contends that she suffered actual prejudice (App. Brf., pages 19-20 citing United States v. Frady, 456 U.S. at 170). Not only must have petitioner shown good cause to overcome the default, she must also show actual prejudice. Brown v. State, 66 S.W.3d at 731. Petitioner is required to show prejudice that rises to the level of actual prejudice discussed by the Supreme Court in United States v. Frady, supra. Brown v. State, 66 S.W.3d at 726. Of course, this requires much more than showing a constitutional error. Charron v. Gammon, 69 F.3d 851, 858 (8th Cir. 1995), citing Zinzer v. Iowa, 60 F.3d 1296, 1299 n.7 (8th Cir. 1995). All petitioner contends, however, is that her guilty plea is involuntary

[1]Similarly, a finding of cause and prejudice for one issue should allow litigation in state habeas for that one issue, not for any number of issues.

(App. Brf., page 20). Petitioner does not attempt to take the step of showing actual prejudice, as required by Brown v. State, 66 S.W.3d at 726.

Petitioner next suggests that there is a "manifest injustice" involves in this case (App. Brf., pages 20-21). Of course, a "manifest injustice" is but another way of stating that the prisoner is "actually innocent." Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000); Brown v. State, 66 S.W.3d at 731. Petitioner does not assert that she is probably actually innocent (App. Brf., page 21). Nor could she after her admissions at the guilty plea proceedings (Respondent's Exhibit A, pages 14-18). Some detail of petitioner's sexual activity with her twelve year old student is provided in the sentencing transcript (Respondent's Exhibit B, pages 31-44). In a guilty plea setting, the showing that petitioner must make in order to show "probable actual innocence" is extremely high. Weeks v. Bowersox, 119 F.3d 1342, 1351-52 (8th Cir. 1997) (en banc), cert. denied, 522 U.S. 1093 (1998). Petitioner does not supplement her claims with new reliable evidence of innocence; thus, she can not invoke the "probable actual innocence" exception.

In the "manifest injustice" section of her brief, petitioner improperly merges the concept of manifest injustice and the concept of jurisdiction (App. Brf., page 21). Petitioner contends that her last claim is a contention that the trial court did not have jurisdiction to sentence her to shock probation (App. Brf., page 21). Petitioner could cite Brown v. State, 66 S.W.3d at 731 for that proposition without merging these concepts. Of course, her contention fails as a matter of fact and as a matter of law. As a matter of fact, petitioner was not ever placed on shock probation; thus, her custody is not pursuant to an aspect of the criminal judgment for which there was no jurisdiction. As a matter of law, the concept of "jurisdiction" is a limited one. Circuit courts have jurisdiction to try crimes, including the felony of statutory rape. State v. Parkhurst, 845 S.W.2d 31, 35 (Mo. banc 1992). The circuit court obtained jurisdiction over petitioner

when she appeared and defended without objecting. Id. at 35 n.4. Given the limited concept of "jurisdiction," it appears there is no legitimate jurisdictional issue in this case. Since the trial court did not place petitioner on shock probation, it did not exceed its jurisdiction. Finally, petitioner contends that she is presenting claims that were not known to her in time to file a Rule 24.035 motion (App. Brf., pages 22-23). First, this exception to the procedural default rule is not recognized by this court in Brown v. State, 66 S.W.3d at 731. To the extent that this issue is now part of the good cause and actual prejudice test, respondent refers the court to her earlier analysis. Even with petitioner's analysis under this section, she concedes that she is not entitled to relief if the claim was reasonably discoverable during the time limits set forth in Rule 24.035 (App. Brf., page 22). Petitioner does not explain why her claim was not reasonably discoverable during the period following her plea but counsel acted unreasonably in failing to discover the claim before her guilty plea.

II.

THE COURT SHOULD DECLINE TO ISSUE THE WRIT OF HABEAS CORPUS BECAUSE PETITIONER'S CLAIMS ARE MERITLESS IN THAT PETITIONER'S PLEA WAS PROPER (Responding to Petitioner's Points I through III).

In any event, petitioner's claims are meritless. First, petitioner contends that she received ineffective assistance of guilty plea counsel because counsel led petitioner to believe that she could possibly get shock probation (App. Brf., page 11). At the guilty plea proceeding, there was no promise to petitioner that she would be placed on or given an opportunity for shock probation under §559.115, RSMo. 2000. Petitioner testified at the guilty plea proceeding.

> Q. Has anyone made you any promises in order to change your plea today?
>
> A. No.
>
> Q. Have I threatened you in order to get you to change your plea?
>
> A. No.
>
> Q. Have I made any promises to you in order to get you to change your plea?
>
> A. No.

(Respondent's Exhibit A, pages 6-7). It appears that petitioner pled guilty in order to spare her young victim from testifying (Respondent's Exhibit A, pages 11-12). Later in the proceeding, petitioner's understanding of the guilty plea was further explored.

> Q. Okay. I want to make sure that you understand all the consequences of a guilty plea today. Do you understand that you're pleading guilty to what in effect that we

as attorneys call a lid of fifteen years? In other words, the judge can't give you any more than fifteen years in prison, as part of this agreement; do you understand that?

A. Yes.

Q. Okay. And that it would be up to the judge to determine what sentence you get, all the way from probation, up to fifteen years in prison; do you understand?

A. Right. yes.

Q. And that it's totally and completely up to Judge Moran, and there's no unspoken promises between any parties, there are no guarantees to you, and nobody's going to know what's going to happen until you're sentenced that day.

A. Yeah. I know that.

Q. Okay. And you understand that the judge could conceivably give you concurrent or consecutive time leading up to 15 years. In other words, he could give you three five year sentences consecutive, or three fifteen-years concurrent.

A. I know.

Q. You understand that. Or any other way he wants to add up the years, if he sentences you to prison; do you understand that?

A. Yes, I understand.

Q. Okay. And that at this later sentencing date, I have the opportunity to come in and present my evidence and my arguments to the judge, and Mr. Jaco has the opportunity to present his evidence and his arguments to the judge, but it's completely up to the judge to determine what your disposition is going to be.

A. Right.

Q. Okay. And, again, that ranges all the way from probation to prison.

A. Yes. I understand that.

Q. I think you stated earlier there have been no threats made to you, no force, or no promises, apart from the, what's in effect a fifteen-year lid?

A. Right.

Q. And nobody's forced you, or promised, or coerced you to plead guilty.

A. Right.

(Respondent's Exhibit A, pages 20-21). At the state evidentiary hearing in the Circuit Court of Audrain County, petitioner ratified those answers as truthful (Petitioner's Exhibit 1, page 32).

Petitioner acknowledged that there was no promise at the guilty plea proceeding that she would be placed on probation at the end of 120 days (Petitioner's Exhibit A, page 32). The state habeas hearing also revealed that petitioner was extremely disappointed about not being placed on probation at the conclusion of the June 18, 1999 sentencing hearing (Petitioner's Exhibit 1, pages 36-37). The habeas transcript reveals that there was no discussion of shock probation until that June 18, 1999 sentencing proceeding (Petitioner's Exhibit 1, pages 37, 43). Petitioner's claim boils down to an assertion that her guilty plea on March 25, 1999 was unknowing and involuntary because of the statutory unavailability of shock probation, even though petitioner had not heard of shock probation until June 18, 1999.[2] This situation is the same as that

[2]To the extent of petitioner's plea of guilty was unknowing or involuntary due to her failure to get probation, then that claim was clearly available for petitioner to litigate in a Rule 24.035 motion. Petitioner

in Brown v. State, 66 S.W.3d at 732. Shock probation was not part of the guilty plea agreement (Respondent's Exhibit A, pages 6-7, 20-21). Shock probation was not consideration for petitioner to enter a guilty plea. The plea of guilty did not depend on shock probation since petitioner was unaware of shock probation until sentencing, three months after the plea. Instead, petitioner's plea was perhaps motivated by altruistic reasons (Respondent's Exhibit A, pages 11-12) or perhaps, more realistically, by a desire to avoid three consecutive life sentences and to obtain "a lid" of fifteen years. Under no circumstance has petitioner shown actual prejudice.

Petitioner's second ground for relief is a contention that her due process rights were violated because the trial court had no jurisdiction to sentence petitioner to shock probation. As noted earlier, petitioner was not actually placed on probation; thus, the circuit court did not act beyond its jurisdiction under §559.115.5, RSMo. 2000. More importantly, given the limited concept of "jurisdiction" under State v. Parkhurst, supra., petitioner does not show that the circuit court acted without jurisdiction of the subject matter or the person.

Petitioner's final contention that her due process rights were violated because the state failed to object or oppose her release under §559.115.5 during the guilty plea or sentencing (App. Brf., page 16). This claim fails as a matter of fact because the state did make its opposition known (Petitioner's Exhibit 1, page 7).

---

makes no contention to the contrary.

The claim also fails as a matter of law. Petitioner does not articulate a United States Supreme Court decision that requires the state to object to a post-hearing sentencing alternative at a guilty plea proceeding. Petitioner does not refer to a United States Supreme Court decision that requires the state to object to some future disposition of a defendant at the time of sentencing. Petitioner's failure to refer the court to any Untied States Supreme Court decision on this topic (App. Brf., pages 16-17) is telling. The United States Supreme Court has not chosen to micromanage the criminal justice systems of the various states in that manner. Petitioner's claim is meritless.

CONCLUSION

For the foregoing reasons, respondent prays the court enter an order denying the petition for writ of habeas corpus.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of July, 2002.

Scott W. Turner
Attorney at Law
4215 South Hocker, Suite 300
Independence, MO 64055

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent

No. 84229

_____

IN THE
MISSOURI SUPREME COURT

_____

IN RE THE MATTER OF:

AMY M. RODRIGUEZ,

Appellant,

v.

PATRICIA CORNELL,

Respondent.

_____

RESPONDENT'S APPENDIX

_____