THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Charleston County

G. Thomas Cooper, Circuit Court Judge

HAROLD JONES, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-000396

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the PCR court err in denying petitioner's application for relief where his plea counsel failed to convey a twenty-three-year plea offer to the charge of voluntary manslaughter which was made by the state and petitioner testified that had he known of the offer he would have accepted it?

STATEMENT OF THE CASE

Petitioner Harold Jones was indicted at the August 5, 2013 term of the Charleston County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. App. 450-451; App. 468-469; Supp.App. 1-2. Petitioner's case was called to trial on May 12, 2015, before the Honorable J. C. Nicholson, and a jury. Petitioner was represented by Ashley Pennington and John Koslowski. Assistant solicitor Bruce DuRant represented the state. App. 1

After discussion and argument about the enforceability of a plea offer, and the need for a competency evaluation, the court recessed for the day. The following day, May 13, 2015, the judge denied the motion to enforce the plea offer. App. 141, ll. 7-21.

Petitioner later pled guilty to voluntary manslaughter and possession of a weapon during a violent crime for a negotiated sentence of thirty-five years' imprisonment. Judge Nicholson sentenced petitioner to thirty years' imprisonment for voluntary manslaughter and he imposed a consecutive five-year term for possession of a weapon during a violent crime. App. 184, ll. 12-15.

Petitioner filed an application for post-conviction relief on November 25, 2015. App. 186. The state filed its return on May 9, 2016. App. 193.

Petitioner then filed an amended application for post-conviction relief on July 27, 2017, through his PCR counsel, Rodney Davis. App. 198. The state then filed an amended return and partial motion to dismiss based on petitioner having signed a waiver of post-conviction relief at the time of his guilty plea. App. 200-205.

On December 5, 2017, a hearing was held on the state's motion to dismiss before the Honorable Michael Nettles. App. 206. At the conclusion of the hearing, Judge Nettles denied the state's motion to dismiss and ordered that an evidentiary hearing be held. App. 256-260.

On December 4, 2018, an evidentiary hearing was held before the Honorable G. Thomas Cooper. Petitioner was represented by Rodney Davis. The state was represented by Megan Jameson. App. 326. Testimony was taken from petitioner, plea counsel John Koslowski, and assistant solicitor Bruce DuRant. App. 327. An order of dismissal was filed on February 27, 2019. App. 450-466.

Petitioner filed a petition for writ of certiorari, through his attorney, Appellate Defender Adam Ruffin, with the South Carolina Supreme Court on September 20, 2019. The state filed its return to the petition on February 3, 2020. Petitioner's case was transferred to this Court by order of the Supreme Court dated February 18, 2020. This Court granted the petition for certiorari in its order dated October 11, 2022.

This brief of petitioner follows.

STATEMENT OF FACTS

On May 12, 2015, petitioner's case was called to trial in Charleston County on the charges of murder and possession of a weapon during the commission of a violent crime before the Honorable J.C. Nicholson. App. 1. He was represented by Ashley Pennington and John Kozelski. The state was represented by Bruce DuRant. App. 1.

After selecting a jury, defense counsel moved to enforce a prior plea agreement pursuant to Lafler v. Cooper, 566 U.S. 156 (2012). App. 54, ll. 6 – 14. Counsel Kozelski told the judge that petitioner had always wanted to plead guilty if he could get a twenty-year plea deal. App. 86, ll. 19 – 25. The original offer they received from assistant solicitor DuRant was a negotiated thirty-year sentence on the charge of voluntary manslaughter. App. 88, 1 – 4. Kozelski relayed this offer to petitioner who rejected it. App. 88, ll. 13 – 23.

After more negotiating, they arrived at a plea offer of a negotiated sentence of twenty-two-and-a-half-years to the charge of voluntary manslaughter which, as seen infra, petitioner accepted. App. 88, l. 23 – 89, l. 3. Kozelski later said during a PCR hearing that he and DuRant agreed to "split the baby at twenty-two-and-a-half-years" which was the difference between the twenty-five year offer Durant made, and the twenty year goal Kozelski had in mind. App. 348, ll. 10-13.

Kozelski relayed the twenty-two-and-a-half-year plea offer to Petitioner. Petitioner agreed to accept this twenty-two-and-a-half-year plea offer, and he signed the sentencing sheets in preparation for court. App. 89, ll. 4 – 11.

The following day, February 11, 2015, petitioner went to court to plead guilty pursuant to this offer. However, when Kozelski got to court, he was confronted by petitioner's family who told him that Petitioner was not competent and that he needed to be evaluated. App. 90, ll. 5 –

22. Kozelski later testified that petitioner's family members were "yelling at him," and telling him that petitioner "was retarded." Kozelski knew petitioner had an IQ of 56 from reviewing prior records. App. 352-353.

Fearing a possible PCR problem, Kozelski believed that he needed to have petitioner evaluated for competency before they could go through with the plea. App. 90, l. 23 – 91, l. 13. Kozelski told the judge that even though he believed petitioner was competent, he still requested the competency evaluation. App. 91, l. 22 – 92, l. 13.

Assistant solicitor DuRant told the judge that the day the plea was scheduled to take place was the first time he had ever heard there were concerns about Petitioner's competency. App. 92, ll. 20 – 25. According to DuRant, the twenty-two-and-a-half-year plea offer was revoked when Kozelski requested the competency evaluation and thus delayed the plea.[1] App. 95, ll. 7 – 20. Kozelski said that after this, DuRant increased the plea offer to a negotiated twenty-three years. As will be seen infra, Kozelski found this increase in the offered sentence vindictive on Durant's part, he also thought he could get DuRant to offer twenty-two and a half years again, and he did not convey this twenty-three year offer to petitioner. App. 96, ll. 4 – 12; App. 358, ll. 13 – 25. When the competency evaluation was done by DMH and DDSN on April 30, 2015, it found that petitioner was competent to stand trial. App. 96, l. 23 – 97, l. 7.

Petitioner informed the court that he did sign plea paperwork agreeing to the twenty-two-and-a-half-year plea deal and that his intention was and had always been to plead guilty to that

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[1] Dr. Susan Knight had already been retained by defense counsel to evaluate Petitioner for mitigation purposes so Kozelski suggested that Dr. Knight do the competency evaluation. Kozelski believed that Dr. Knight could perform a competency evaluation quickly, but she was unable to do so until March. When Dr. Knight attempted to perform the evaluation on March 13, 2015, Petitioner was not cooperative with her. App. 93, ll. 10 – 20. For this reason, Kozelski and DuRant agreed to ask the Department of Mental Health or Department of Disabilities and Special Needs to do the evaluation. App. 93, ll. 20 – 24.

offer. App. 102, l. 18 – 103, l. 2; app. 103, l. 24 – 104, l. 10. Again, Kozelski admitted that he never conveyed the twenty-three-year offer to Petitioner. App. 111, ll. 14 – 25.

Defense counsel Pennington then argued to the judge that Kozelski had made a mistake by requesting the competency evaluation which caused Petitioner to lose the twenty-two-and-a-half-year plea offer, and pursuant to Lafler v. Cooper, 566 U.S. 156 (2012), this plea offer should be enforced. App. 112, l. 4 – 117, l. 23; app. 119, l. 12 – 120, l. 17; app. 131, ll. 5 – 16. The judge took that matter under advisement and said he would rule the following morning. App. 134, ll. 20 – 23.

The following day, May 13, 2015, the judge denied the motion to enforce the twenty-two-and-a-half-year guilty plea finding there was no ineffective assistance of counsel by Kozelski.[2] App. 141, ll. 7 – 21. Petitioner then pled guilty to voluntary manslaughter and possession of a weapon during the commission of a violent crime before the Honorable J.C. Nicholson for a negotiated total sentence of thirty-five years imprisonment.

Facts of the crime

The state alleged that petitioner stabbed and shot his great-uncle, James Butler, to death while at their residence. App. 158, ll. 2 – 13. Petitioner was developed as a suspect and taken into custody. App. 158, ll. 14 – 23; app. 159, ll. 5 – 8. When the officers conducted a search incident to his arrest, they found a .32 caliber revolver in his pocket, and he was also wearing jeans that appeared to have bloodstains. App. 159, ll. 8 – 14.

The bullet that was recovered from Butler at the autopsy was determined to have been fired from the .32 caliber revolver that was found in petitioner's pocket and the blood on petitioner's jeans matched Butler's DNA profile. App. 159, l. 21 – 160, l. 7. Petitioner gave a

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[2] A finding of a lack of ineffective assistance of counsel by a trial court was unusual since that is commonly a post-conviction relief issue in this state.

statement to law enforcement in which he admitted he shot Butler after an altercation. App. 160, ll. 16 – 19.

The guilty plea

At the guilty plea, petitioner agreed with the facts as presented by the state. App. 161, ll. 1 – 7. The court accepted petitioner's guilty plea and imposed the negotiated sentence agreed to by the parties of thirty years imprisonment for voluntary manslaughter and a consecutive five-year term of imprisonment for the possession of a weapon during the commission of a violent crime charge. App. 162, ll. 16 – 25; app. 167, ll. 16 – 23. As part of petitioner's plea, he signed a waiver of post-conviction review. App. 170 – 171.

On June 9, 2015, the parties reconvened before Judge Nicholson to vacate petitioner's guilty plea to possession of a weapon during the commission of a violent crime and have petitioner instead enter a new guilty plea to possession of a stolen pistol instead. App. 172 – 185. This was done because the parties had a misunderstanding of the sentencing calculation between the two offenses.[3] App. 174, l. 8 – 175, l. 16. Judge Nicholson again sentenced petitioner to a negotiated five-year term of imprisonment which was to run consecutively to his thirty-year sentence on the voluntary manslaughter charge. App. 184, ll. 12 – 15.

The PCR proceedings

Petitioner filed an application for post-conviction relief on November 25, 2015. App. 186. The state made its Return on May 9, 2016. App. 193. Petitioner then filed an amended

[3] Possession of a weapon during the commission of a violent crime carries a mandatory sentence of five-years imprisonment which cannot be suspended and must be served day-for-day. S.C. Code Ann. §16-23-490. Possession of a stolen pistol, on the other hand, carries a maximum term of imprisonment for five years but is parole eligible after the service of one quarter of the sentence and "maxes out" after roughly fifty-five percent of the sentence. S.C. Code Ann. §§16-23-30 – 16-23-50.

application on July 27, 2017, through his attorney, Rodney Davis. App. 198. In response, the state filed an amended return and partial motion to dismiss based on petitioner having signed a waiver of post-conviction review at the time of his guilty plea. App. 200 – 205.

On December 5, 2017, a hearing on the state's motion to dismiss was held before the Honorable Michael Nettles. App. 206. At the end of the hearing, Judge Nettles found that petitioner could not be found to have fully understood the consequences of signing the PCR waiver and therefore, denied the state's motion to dismiss and ordered that a full evidentiary hearing be conducted on petitioner's PCR claims.[4] App. 256 – 260.

On December 4, 2018, a full evidentiary hearing was held before the Honorable G. Thomas Cooper. App. 326. Petitioner was represented by Rodney Davis and the state was represented by Megan Jameson. App. 326. Petitioner testified along with his plea counsel, John Kozelski, and the assistant solicitor who prosecuted him, Bruce DuRant. App. 327.

At this hearing, Petitioner proceeded on the sole ground that his plea counsel was ineffective for failing to relay the twenty-three-year offer that was made by assistant solicitor DuRant. App. 337, l. 23 – 338, l. 2; app. 454. Kozelski admitted that he never relayed the negotiated twenty-three year offer to petitioner. App. 358, ll. 11 – 13. Kozelski said he did not relay this offer because he thought the six-month increase in the sentence because of the competency evaluation was vindictive. In addition, Kozelski thought that he could get the

[4]On July 24, 2018, an evidentiary hearing was started before the Honorable Deadra L. Jefferson, but prematurely ended after Petitioner withdrew his application for PCR. App. 261 – 316. Petitioner subsequently filed a motion to alter/amend judgement alleging that his withdrawal of his PCR application was unduly influenced by erroneous statements of law by the court, non-testimonial statements by assistant solicitor DuRant, and his low intelligence. App. 319 – 323. Petitioner's motion was granted with the consent of the state and his PCR application was then reinstated. App. 324 – 325.

twenty-two-and-a-half-year offer back because petitioner had accepted that offer. App. 358, ll. 13 – 25.

Kozelski testified that he did not interpret DuRant's email to him extending the twenty-three-year plea offer as having a deadline or being conditioned on a finding of competency. App. 367, l. 18 – 368, l. 4; app. 369, ll. 5 – 8. Kozelski acknowledged that petitioner had not been evaluated for competency at the time the twenty-three-year offer was extended. App. 370, ll. 6 – 10.

Petitioner testified and confirmed that Kozelski never told him about the twenty-three-year plea offer. Further, had petitioner known about the twenty-three-year offer, he said would have accepted it. App. 383, ll. 2 – 8.

Assistant solicitor DuRant claimed that his plea offer of twenty-three years was conditioned on two things: (1) A psychiatrist finding petitioner competent; and, (2) an answer of acceptance by the end of the week because the plea would have to go forward the following week. App. 388, ll. 4 – 14.

Kozelski informed DuRant that Dr. Susan Knight needed to conduct a full competency exam because her prior evaluation of Petitioner had been specifically limited to mitigation. App. 430. Kozelski told DuRant that Dr. Knight had scheduled the evaluation for the week of March 9, 2015. App. 430. Even though DuRant did not respond to Kozelski's email, DuRant now contended that once he heard that Dr. Knight would not opine on competency without conducting an evaluation that the "twenty-three years was off the table." App. 388, ll. 15 – 19.

PCR counsel argued that assistant solicitor DuRant never put a firm deadline on the twenty-three-year plea offer. App. 396, l. 4 – 397, l. 2. Counsel cited to Missouri v. Frye, 566

U.S. 134 (2012), Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009)[5], and Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014)[6] in support of his contention that plea counsel for petitioner was ineffective for failing to relay the twenty-three-year plea offer that was extended by the state through Durant. App. 398, l. 12 – 400, l. 18.

The assistant attorney general argued that pursuant to Collins v. State, 422 S.C. 250, 810 S.E.2d 871 (2018), petitioner was required to show not only that he would have accepted the plea offer but also that it would have been entered into without the prosecutor rescinding it and that it would have been accepted by the court. App. 412, l. 13 – 413, l. 19. She argued that petitioner could not satisfy these elements because DuRant conditioned the twenty-three-year plea offer on petitioner being found competent and petitioner entering the plea within a week of the offer. She argued neither of those conditions were met. App. 413, l. 20 – 414, l. 11.

The PCR court found that petitioner failed to meet his burden of proof because he failed to show that the twenty-three-year plea offer would have been entered without being cancelled by the prosecution. App. 465. The PCR court denied Petitioner's application. App. 466.

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[5] *Abrogated on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

[6] *Overruled on other grounds by* Smalls v. State, 422 S.C. 174, 181 n.2 810 S.E.2d 836, 839, n. 2 (2018)

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

ARGUMENT

The PCR court err in denying petitioner's application for relief where his plea counsel failed to convey a twenty-three-year plea offer to the charge of voluntary manslaughter which was made by the state and petitioner testified that had he known of the offer he would have accepted it.

In order to prove ineffective assistance of counsel, Petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

Criminal defendants have a right to effective assistance of counsel during the plea negotiating process. Missouri v. Frye, 566 U.S. 134, 144 (2012); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996).[7] This includes defense counsel's "duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the

[7] *Overruled on other grounds by* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

accused." Id. "Generally, where defense counsel does not communicate such an offer to the defendant, counsel has rendered ineffective assistance." Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876-877 (2018).

In order to show prejudice from defense counsel's failure to relay a plea offer, "a defendant must demonstrate a reasonable probability that: (1) he 'would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.'" Collins at 262, 810 S.E.2d at 877 (quoting Missouri v. Frye, 566 U.S. at 147).

In this case, it is undisputed that assistant solicitor DuRant extended a plea offer to defense counsel of a negotiated sentence of twenty-three years to the charge of voluntary manslaughter by way of an email on February 17, 2015. App. 430. It is also undisputed that defense counsel failed to convey this offer to petitioner. App. 358, ll. 11 – 13; app. 383, ll. 2 – 8. As seen, Kozelski testified that he thought the six-month increase in the offer after he elected to delay the plea in order to get petitioner evaluated was vindictive by the assistant solicitor. Kozelski also said he did not convey the twenty-three-year offer because he believed that he could get the twenty-two-and-a-half-year offer back. App. 358, ll. 13 – 25.

Regardless, Kozelski's failure to convey the twenty-three-year plea offer was not excusable under applicable plea bargaining precedent. Although Kozelski said that he believed assistant solicitor Durant's six-month increase in the sentence was vindictive, he never argued this position to the judge in attempting to enforce the twenty-two-and-a-half-year offer. Instead, defense counsel Ashley Pennington, his boss, told the judge that Kozelski "made a big mistake"

by requesting the competency evaluation based on what petitioner's family claimed prior to the plea and thereby precluded the plea from going forward that day which resulted in the assistant solicitor revoking the offer. App. 112, l. 4 – 117, l. 23; app. 119, l. 12 – 120, l. 17; app. 131, ll. 5 – 16.

Kozelski testified at the PCR hearing that he did not believe the twenty-three-year plea offer was in fact conditioned on the one-week deadline for a finding of competency and completion of the plea. App. 367, l. 18 – 368, l. 4; app. 369, ll. 5 – 8. Therefore, there was no reason for Kozelski to *not* inform petitioner of this twenty-three-year plea offer over the course of the next two months while he continued to represent Petitioner.

Petitioner testified that he would have accepted the twenty-three-year plea offer had he known about it and the PCR court did *not* find that petitioner's testimony was not credible. App. 383, ll. 2 – 8. Petitioner's testimony was strongly supported by the fact that he had already signed sentencing sheets agreeing to plead guilty to twenty-two-and-a-half years and that he ultimately pled guilty to a total sentence of thirty-five years. That was twelve years longer than the offer that Kozelski failed to convey to him.

Had Kozelski informed petitioner of the twenty-three-year plea deal he would have learned that petitioner would accept that plea offer. Kozelski would then have informed DuRant of petitioner's acceptance of that new offer which was "only" six months longer than the twenty-two and a half year offer petitioner had previously accepted.

Kozelski's failure to convey the twenty-three-year offer to petitioner obviously resulted in Kozelski not conveying petitioner's acceptance to assistant solicitor DuRant. Kozelski's performance in these respects constituted deficient performance, and petitioner presently serving a thirty-five-year prison term was the resulting prejudice.

If Kozelski had, at the very least, fulfilled his duty in relaying the twenty-three-year plea offer prior to its supposed expiration date then he would have also been able to inform DuRant of Petitioner's acceptance prior to this supposed expiration date. Once this occurred, the only "condition" of DuRant's plea offer left unmet would have been an official finding of competency. It was disingenuous at best for a caviler solicitor to contend that a plea offer was revoked based on an unmet condition that was impossible for the defense to fulfill -- a competency evaluation and finding within the next week that was wholly out of the control of defense counsel and petitioner. DuRant's contention that the "twenty-three years was off the table" after Kozelski emailed him to say that Dr. Knight would not be able to opine on petitioner's competency until she had a chance to conduct a full evaluation was alarming. App. 388, ll. 15 – 19.

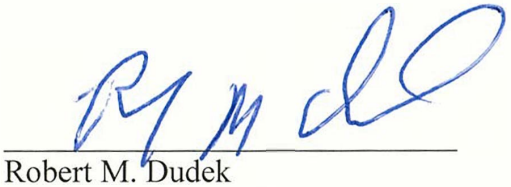
Petitioner was ultimately found to be competent and the fact that he was not evaluated by a doctor in the five-day time span following DuRant's offer of twenty-three years would not have, in-and-of-itself, led to the revocation of the plea offer. Therefore, petitioner did meet all three requirements pursuant to the Collins v. State, 422 S.C. 250, 810 S.E.2d 871 (2018) standard. Petitioner would have accepted the twenty-three-year plea offer had Kozelski rendered effective assistance by relaying this plea offer to him; the plea would have been accepted without being cancelled by the solicitor despite his contention to the contrary; and the end result would have been significantly more favorable to petitioner because he would have been sentenced to twelve years less imprisonment than he is currently serving.

Again, Kozelski's failure to relay the twenty-three-year plea offer constituted ineffective assistance of counsel. DuRant's claim that he would have revoked a plea offer based on petitioner's failure to meet an impossible condition that was out of his control respectfully strains

credulity. If Kozelski would have simply relayed the twenty-three-year offer to petitioner as he was required to do, and then informed DuRant of petitioner's acceptance, the twenty-three-year plea would have been entered by petitioner and accepted by the court. The PCR court respectfully erred in denying petitioner relief. See Missouri v. Frye, 566 U.S. 134 (2012); Collins v. State, 422 S.C. 250, 810 S.E.2d 871 (2018).

CONCLUSION

By reason of the foregoing argument, petitioner's guilty plea and sentence should be vacated, and this case remanded to the Charleston County Court of General Sessions for further proceedings consistent with this Court's opinion. In the alternative, an order should be issued by this Court enforcing the twenty-three-year plea offer that was never conveyed to petitioner.



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This 10th day of February, 2023.