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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge
Docket No.: 11-ALJ-150035-AP

DALLAS FERRELL, #239855, APPELLANT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES, RESPONDENT

FINAL BRIEF OF RESPONDENT

Tommy Evans, Jr.
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ATTORNEY FOR THE RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Respondent (the Department) properly declined Appellant's request to be considered for parole where Appellant irrevocably waived parole consideration as part of a negotiated plea with the State, and where Appellant received the benefit of his bargain?

RESPONDENT'S STATEMENT OF THE CASE

Appellant and his co-defendant, Jonathan Chaffee, were indicted for the offenses of criminal conspiracy, murder, criminal sexual conduct in the first degree (four counts), armed robbery, larceny, housebreaking, and arson. At the first phase of a bifurcated trial, both were found guilty on all counts except armed robbery. At the second phase of the bifurcated trial, the jury found that both should die by electrocution on the murder count. On April 2, 1983, the jury unanimously recommended a sentence of death based finding the statutory aggravating circumstances of rape, housebreaking, and physical torture, beyond a reasonable doubt. On the same day, the Honorable James M. Morris found as an affirmative fact that the evidence on the case warrants the imposition of the Death Penalty and that its imposition is not a result of prejudice, passion or any other arbitrary factor. Judge Morris then sentenced Appellant to death by electrocution in the manner provided by law. (R.p.103-p.107). Sentences for terms of years were imposed on the other counts.

Appellant and Chaffee filed direct appeals, and in a published opinion the South Carolina Supreme Court affirmed the convictions and death sentences. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984). In that opinion, the Supreme Court described the facts as follows:

At about 4 o'clock in the afternoon on May 10, 1982, Jonathan Chaffee, age 23, and Dallas Ferrell, age 24, went to the home in Florence of Mrs. Adele Baroody, an eighty-one year old widow, for the ostensible purpose of getting a drink of water. She allowed them to enter her home and supplied their needs; upon the arrival of her daughter-in-law, Mrs. Elizabeth Baroody, at the home the two men left. The daughter-in-law left shortly after their departure. Soon thereafter, the two men returned to the home and with the use of force entered through a door. Ferrell held a gun on Mrs. Baroody while Chaffee proceeded to disrobe and assault her. Through force, they carried her upstairs and onto a bed where both committed rape upon her body, both regularly and by way of the anus. They then strangled her by wrapping her own panty hose around her neck creating pressure with the "tourniquet." A mop handle was also rammed into her chest, and she was cut about the breasts with a broken light bulb. Her feet were

tied to the bed posts.

Thereafter, they stole property from the house and in order to destroy the evidence of their crimes set fire to the building and left. When neighbors saw smoke coming from the building, the fire department was called and arrived about 6 o'clock p.m. to extinguish the blaze.

The daughter-in-law of Mrs. Baroody gave to the police officers descriptions of the men she had seen in the home of Mrs. Baroody. Using these descriptions, they located both defendants in the vicinity and detained them.

Each of the defendants, on separate days and acting independently of each other, gave a video taped confession demonstrating in the home of Mrs. Baroody how they committed the crimes. The testimony of each, as included in the respective confessions, is consistent with the evidence supplied by other witnesses. The confession of each is also consistent with the other although each has some details not included by the other. The convictions are based in large measure on these two confessions. Neither testified at either stage of the trial.

Chaffee at 24-25, 328 S.E.2d at 465.

Following affirmance of their convictions and sentences on direct appeal, State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1878, 85 L.Ed.2d 170 (1985), Chaffee and Ferrell each sought post-conviction relief. While their post-conviction relief applications were pending, the United States Supreme Court decided Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), holding that the exclusion of evidence of adjustability to life in prison violated the constitutional principles established in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). After denial by the Circuit Court of post-conviction relief, the Supreme Court granted writs of certiorari to consider the

contentions of both defendants. The Court held that denial of right to present evidence of adaptability to prison life in capital murder case was unconstitutional. It reversed the circuit court and remanded the matter to the sentencing court for the sole and exclusive purpose of conducting another sentencing hearing to determine the punishment to be imposed for the crime of murder. Chaffee v. State, 294 S.C. 88, 362 S.E.2d 875 (1987).

Instead of risking another death sentence, Appellant and his attorneys negotiated a sentence of life imprisonment, which included a "Contractual Agreement Waiving all Rights to Parole." On May 20, 1997, Appellant executed an "Irrevocable Waiver of Parole." On the same day, in conjunction with the re-sentencing proceeding, the "contractual agreement" was executed and signed by: (1) Appellant, (2) Twelfth Circuit Solicitor Dudley Saleeby, Jr., (3) Appellant's defense attorneys, Richard W. Strobel and Darryl J. Corbin, and (4) the Department's Chief Legal Counsel, Carl Lundberg. (R.p.95-p.102).

Appellant did not file a direct appeal from the re-sentencing proceeding. On June 30, 1998, however, he filed an Application for post-conviction relief (PCR) in the Florence County Court of Common Pleas. (R.p.65-p.73). The State made its Return on March 9, 1999, and its Amended Return and Motion to Dismiss on December 11, 1999, requesting that the Application be summarily dismissed as barred by the statute of limitations. (R.p.74-p.82). A hearing into the matter was convened on December 17, 1999, at the Florence County Courthouse before the Honorable James E. Brogdon, Jr. Appellant was present at the hearing and was represented by Henry Anderson, Jr., Esquire. The State was represented by Assistant Attorney General J. Benjamin Aplin. In an Order dated July 11, 2000, the Court denied and dismissed the Application with prejudice because the Applicant failed to file within the time mandated by

statute. (R.p.83-p.86).

On May 5, 2011, Counsel for Appellant wrote a letter to Respondent (the Department) stating that Appellant wished to “exercise his right to parole.” In letter dated May 16, 2011, the Department notified Appellant that due to his contractual agreement waiving all rights to parole and his irrevocable waiver of parole, he would not be scheduled for parole consideration before the Parole Board. (R.p. 93-p.94). Appellant timely served and filed a notice of appeal with the Administrative Law Court (ALC), and on October 18, 2011, he submitted a Brief in support of his appeal. (R.p.8-p.17). In an Order dated October 22, 2012, Judge Robinson ordered that the Department’s decision to permanently deny parole eligibility was affirmed. (R.p.3-p.7). On October 30, 2012, Appellant timely served and filed a notice of appeal with the Court of Appeals. (R.p.1). This Final Brief of Respondent follows.

ARGUMENT

The Department properly declined Appellant’s request to be considered for parole where Appellant irrevocably waived parole consideration as part of a negotiated plea with the State, and where Appellant received the benefit of his bargain.

Appellant contends he is entitled to the statutory right to seek parole consideration because the irrevocable waiver of parole made as part of his negotiated plea with the State is not a valid waiver of his right to seek parole. He argues there is evidence to suggest Appellant was not competent to enter into the contractual agreement waiving parole, and that as a result the irrevocable waiver was not entered into voluntarily, knowingly, intelligently and freely. The Department disagrees and submits the Appeal should be denied and dismissed as without merit.

“A plea bargain rests on contractual principles,” and therefore, “each party should get the

benefit of the bargain.” State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). Thus, where a defendant’s waiver of rights is made voluntarily, knowingly, and intelligently, that waiver has been upheld. Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (affirming the defendant’s waiver of the right to appellate, post-conviction, and habeas review in exchange for the State’s withdrawal of intent to seek the death penalty). Indeed, because a plea agreement can be faithfully enforced and specific performance promotes judicial economy, a waiver of rights as part of a plea agreement should be enforced. State v. Dingle, 376 S.C. 643, 659 S.E.2d 101 (2008). The right to apply for post-conviction relief is a statutory right. S.C. Code Ann. § 17-27-20 to -50 (2003). Likewise, the right to be considered for parole is a statutory right. S.C. Code Ann. §§ 16-3-20 & 24-21-610 to -670 (2007). In Spoone, the Supreme Court held the PCR court correctly enforced the defendant’s waiver of both his constitutional and statutory rights where that waiver was knowing and voluntary. The same principle should apply to Appellant.

Here, despite the self-serving claims in Appellant’s 1998 PCR Application, the evidence overwhelmingly demonstrates Appellant’s waiver of parole was knowingly, freely, and voluntarily given. In his signed “Irrevocable Waiver of Parole,” Appellant states that: “Being fully advised of my rights by my attorneys, I wish to make the following irrevocable waiver of parole consideration.” He says he waives parole consideration so that he can serve the rest of his natural life within the penal system of the South Carolina Department of Corrections, acknowledges the waiver is irrevocable, that it is a knowing, intelligent, and voluntary decision made upon the advice of his attorneys, with a full understanding of the consequences. Appellant describes the bargain struck with the Solicitor and the Department, and references the contractual

agreement executed along with the waiver. He asks the Parole Board not to consider him for parole at any time during his life, not to consider any request for parole consideration made on his behalf by any other person, and to enter into its official records that he is not eligible for parole.

Next, in the "Contractual Agreement Waiving all Rights to Parole," Appellant explains he discussed the case with his attorneys, including his options and his rights, and that he "voluntarily and intelligently has decided to enter into the following Contractual Agreement with the Solicitor in consideration and exchange for the State's agreement not to seek the death penalty." He acknowledges and attests that: (a) he is mentally and legally competent; (b) he has a full understanding of the terms and provisions of the contractual agreement; (c) he has read the contractual agreement in detail; (d) he has had ample opportunity to discuss, and has discussed at length, the terms and provisions of the contractual agreement with counsel (e) he understands the provisions of the contractual agreement are permanent and irrevocable such that he shall never be entitled to parole, or be granted parole; (f) he understands the provisions of the contractual agreement are permanent and irrevocable and that he shall never apply for a pardon or accept a pardon; and (g) that it is the purpose and intent of the contractual agreement that he live the remainder of his natural life in a correctional facility in secure confinement. Counsel for Appellant also attest that to the best of their knowledge, Appellant fully understands the terms of the contractual agreement and has made a knowing, intelligent, and voluntary decision to enter into the contractual agreement after discussion with counsel such that Appellant has a full understanding of the consequences of his actions.

Finally, both Appellant and his attorneys appeared before Judge Burch at a May 20, 1997,

sentencing proceeding to formalize and seek judicial approval of the contractual agreement and the irrevocable waiver of parole. First, Richard Strobel explained that he read the documents with Appellant word by word, sentence by sentence, paragraph by paragraph, and explained the agreement to Appellant. Strobel said Appellant fully understood the agreement and wanted to proceed. (May 20, 1997, Tr.p.3, line 13-p.4, line 10). Next, Daryl Corbin confirmed Strobel's comments. (May 20, 1997, Tr.p.4, lines 11-17). Then, Appellant was questioned by Judge Burch. He said he fully understood the charges he had been convicted of, and had reviewed the contractual agreement. Appellant said he was not under the influence of drugs, alcohol, or medication, and did not suffer from any condition, mental or physical, that could affect his judgment or understanding. He claimed he had been institutionalized for a mental problem for six months, but it was so long ago he did not really remember it, and provided no additional details. Appellant said he understood the contractual agreement, did not have any questions about it, and agreed with the terms.

Appellant sat with his attorneys and followed along with the Solicitor while the agreement was published for the record. Judge Burch paused periodically to ensure Appellant didn't have any questions. (May 20, 1997, Tr.p.6, line 3-p.17, line 6). Indeed, the court went line by line through paragraph 12 of the agreement, where Appellant had attested to his competency and understanding of the agreement. After each line, Appellant confirmed the statements were correct. (May 20, 1997, Tr.p.17, line 7-p.18, line 21). Mr. Strobel and Mr. Corbin also acknowledged their representations from the agreement. (May 20, 1997, Tr.p.18, line 22-p.19, line 7). Next the Solicitor and the judge worked through the same process with the irrevocable waiver. (May 20, 1997, Tr.p.19, line 8-p.22, line 16).

Appellant said nobody had made any promise, assurance, or inducement of any kind to induce him to enter the contractual agreement and waiver other than what was covered in the agreement. He said nobody had used threats, coercion, force, pressure or intimidation to cause him to enter the agreement. Appellant said he entered the contractual agreement and waiver voluntarily and of his own free will and accord, and wanted to go forward to execute the written documents. He said he was satisfied with his attorneys' representation, that they had answered all of his questions, and had done everything he asked them to do in the case. (May 20, 1997, Tr.p.22, line 19-p.24, line 12). Judge Burch asked one last time if Appellant fully understood the ramifications of the agreement, and that it was irrevocable. Appellant answered "Yes, sir." (May 20, 1997, Tr.p.24, line 19-p.25, line 4). Appellant, his attorneys, and the Solicitor then executed the Contractual Agreement and the Irrevocable Waiver on the record. They each signed the contract and initialed each page.

The Department submits this evidence shows Appellant made a free, knowing, and voluntary decision to irrevocably waive his right to parole. In fact, he signed a contract waiving that right. The Department made the final determination that Appellant may not be considered for parole on his current life sentence based on the clear and unambiguous terms of his negotiated sentence and the "Contractual Agreement Waiving all Rights to Parole." Pursuant to that contractual agreement, the State is prohibited from seeking to execute Appellant, Appellant is prohibited from seeking parole, the Department is prohibited from scheduling Appellant for a parole hearing, and the Parole Board is prohibited from considering Appellant for parole on his current life sentence. Appellant received the benefit of this bargain. As the Supreme Court held in *Spoone* in regard to the PCR court, the Department submits this Court should enforce the

waiver and dismiss this appeal. Therefore, the Department submits the decision to permanently deny parole eligibility should be affirmed.

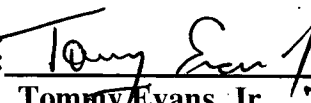
CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the South Carolina Department of Probation, Parole and Pardon Services be affirmed.

Respectfully submitted,

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Columbia, South Carolina
May 23, 2013

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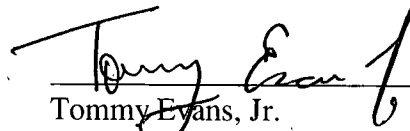
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v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES, RESPONDENT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and
with the South Carolina Supreme Court's order dated August 13, 2007.



Tommy Evans, Jr.
Assistant General Counsel

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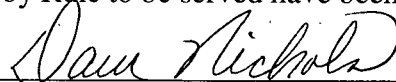
SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES, RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated May 23, 2013, on Appellant this 23rd day of May, 2013, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certify that all parties required by Rule to be served have been served.



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