

RECEIVED

May 08 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Certiorari to Greenwood County
Court of Common Pleas
Post-Conviction Relief

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No.: 2018-001116

Jamal Hakeem,..... Petitioner,

vs.

State of South Carolina,Respondent.

REPLY BRIEF

Tommy A. Thomas, Esq.
Attorney for Petitioner
7588 Woodrow Street
P.O. Box 88
Irmo, S.C. 29063
(803) 732-5507

Ambree M. Muller, Esq.
Office of the Attorney General
Attorney for Respondent
P.O. Box 11549
Columbia, SC 29211-1549

INDEX

QUESTION PRESENTED2
ARGUMENT3
CONCLUSION5

QUESTION PRESENTED
(by the court)

Whether trial counsel was ineffective in failing to file a motion to reconsider Petitioner's sentence after the trial judge communicated a plea offer to Petitioner and in failing to put this communication by the trial judge on the record when the trial judge imposed a sentence ten years harsher than its previously communicated fifteen-year offer?

ARGUMENT

The question presented by this court breaks down into two parts that must all be considered separately: 1) was trial counsel deficient for not filing a motion to reconsider after the trial judge communicated a plea offer to Petitioner and 2) was trial counsel deficient in failing to put the conference with the judge on the record when the judge sentenced Petitioner to a sentence ten years harsher than his previously communicated offer? Petitioner argues both of these questions should be answered in the affirmative. However, Respondent adds in a third question and argues that evidence does not support the assumptions made by this question that the judge made a plea offer and, when it was rejected, he sentenced Petitioner to a harsher punishment.

As discussed in Petitioner's initial brief, the opinions in Medlin v. State, 276 S.C. 540, 541, 280 S.E.2d 648 (1981) and Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981) discuss when it is appropriate for a trial judge to interfere with plea negotiations. These contemplate judges being asked to join in these discussions, not popping into conference rooms to make offers or give input. Quite specifically, and perhaps more importantly, they require all conversations to be held in open court and on the record unless good cause exists for sealing the record. Harden, 276 S.C. at 255, 277 S.E.2d at 694, cited by Medlin.

Regardless of the interpretation of other facts in the case, this did not happen. Nothing about this backroom conference was placed on the record, and trial counsel failed to remedy that. Not only did he fail to remedy it at trial by asking that the goings-on be placed on the record later, he failed to file a motion to reconsider that would attempt to bring these actions in line with what was required by case law. This would have been especially important once he knew what Petitioner received as a sentence and how vastly it differed from what had been previously

discussed. Clearly, trial counsel's failure to file a motion to reconsider prejudiced Petitioner as it foreclosed any chance to remedy this failure.

This was deficiency in trial counsel's performance as further compounded by his failure to file a motion to reconsider the sentence Petitioner received, which was a decade longer than the plea offers being negotiated. Petitioner stands by his reliance on Castro v. State, 417 S.C. 77789 S.E.2d 44 (2016) and disputes the importance of Respondent's attempt to distinguish the two matters. The ultimate holding in Castro was that it is improper for a judge to consider a defendant's exercise of his right to exercise a jury trial when determining a sentence and, as such, trial counsel can be found ineffective when they fail to object to the same.

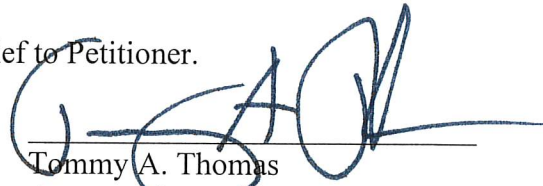
In the instant case, the trial judge did not issue bold-faced remarks about Petitioner's decision to continue to a jury trial; however, it is undisputed that the judge inserted himself into the plea negotiation process and had awareness of the proceedings. To tack on another ten years to what he knew Petitioner was considering is arguably punitive and would be up to trial counsel to refute. Trial counsel failed to do so both at trial and via a motion to reconsider, thus leaving this extreme sentence in place.

At the merits hearing in this matter, trial counsel did not provide any reasons or defenses for his failure to file a motion to reconsider on either of these grounds. Rather, he admitted that his failure to file a motion to reconsider was "something perhaps [he] should have done." App.302, lines 4-7. There is no attempt to frame this as trial strategy or excuse it as anything but what it is, which is deficient performance that prejudiced Petitioner to such a degree that, had it not occurred, the outcome of his trial would have likely been different. This satisfies the requirements in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) and Cherry v.

State, 300 S.C. 115, 386 S.E.2d 624 (1989) and, as such, the dismissal by the trial court in this matter must be overturned and post-conviction relief must be granted to Petitioner.

CONCLUSION

The court should grant post-conviction relief to Petitioner.

A handwritten signature in blue ink, appearing to read 'T. A. Thomas', written over a horizontal line.

Tommy A. Thomas
Attorney for Petitioner
Post Office Box 88
Irmo, South Carolina 29063
(803) 732-5507

May 5, 2023