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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable R. Scott Sprouse, Circuit Court Judge

JASON R. FRANKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001592

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred finding petitioner's allegation, that his Sixth Amendment right to advice of counsel was violated during plea negotiations, was "outside the scope" of PCR where the solicitor offered and later rescinded plea deal to petitioner before he was appointed counsel and before petitioner had seen any discovery in his case?

STATEMENT

On October 14, 2010, a York County grand jury indicted petitioner for attempted murder. App. 668-69. On December 13, 2010, petitioner's case was called to trial before the Honorable John C. Hayes and a jury. App. 1. B.J. Barrowclough and Erik Delaney represented petitioner. E.B. Springs, assistant solicitor, represented the state. App. 1. The jury found petitioner guilty of attempted murder and Judge Hayes sentenced petitioner to of life without the possibility of parole (LWOP). App. 439, ll. 23-25; 451, ll. 1-3.

Thereafter, petitioner filed an application for PCR. App. 453-58. On April 12, 2022, and evidentiary hearing was held before the Honorable R. Scott Sprouse. App. 466-654. Nathan Sheldon represented petitioner and Michael Neubauer represented the state. App. 466.

On October 4, 2022, Judge Sprouse signed an order denying PCR. App. 660-67. The PCR court found "while the procedure followed by the solicitor handling the case [was] concerning," petitioner's allegation that his right to counsel was violated during plea negotiations, was "outside the scope" of PCR. App. 666. The court found petitioner's allegation that defense counsel was ineffective for failure to request the trial court charge the jury with "the law of accident" was "purely speculative" where there was no proposed charge or any way to determine if the court would have accepted the proposed charge. The court also noted "the jury was given a charge on criminal intent" and "[w]hile the word 'accident' [was] not specifically used . . . the charge fit" the defense's theory of the case. App. 666.

This petition follows.

ARGUMENT

I. The PCR court erred finding petitioner's allegation, that his Sixth Amendment right to advice of counsel was violated during plea negotiations, was "outside the scope" of PCR where the solicitor offered and later rescinded plea deal to petitioner before he was appointed counsel and before petitioner had seen any discovery in his case.

Relevant trial facts

At trial the state alleged that petitioner intentionally drove a car into complainant, Edward Mullins, who was driving a moped. The central issue at trial was whether the incident was accidental or intentional.

Prior to sentencing the trial court stated, "this case has . . . a unique wrinkle that I think needs to be put on the record." App. 444, ll. 20-24. The court then asked the solicitor about the plea offer extended to petitioner. App. 445, ll. 1-3. The solicitor, E.B. Springs, answered and explained as follows:

> [Petitioner] was originally charged – this happened on June the 7th, a few days after the new attempted murder law was enacted and assault and battery with intent to kill was repealed, disappeared. The officer that made this case charged him with assault and battery with intent to kill on the 7th, and there is no such crime on June the 7th.
>
> . . . I looked at the case. I saw difficulties with the case. [Edward Mullins] has a horrible record, as the court has learned. I met with [petitioner]. He was in jail. His probation officer locked him up. He was pro-se. I met with him. We had a pleasant conversation. I said "first of all, do you want a lawyer?" He said "no. No, I'll handle this." **I said given the facts here, I will let you plead to leaving the scene of an accident with bodily injury, which carries a year, and reckless driving for one year active sentence."** And he was extremely happy with that. **[Petitioner] said "I want that. . . . I'll do that."** I said "do you want a lawyer? You can have the same things and do the same thing. I can get you a public defender." He said "no, I'll handle it myself."

> It came time for [petitioner] to take that deal and he came into my office pro-se with his girlfriend and his mother and he said "I'm not going to. I want a trial." And I said "do you understand that I had explained to you when I first met with you that this would be charged as attempted murder. That's what the correct charge would have been. With your prior record, you would be tried for life without parole. And if you lose, you are going to get life without parole." He said "I understand that. I want a trial."
>
> I brought him into the courtroom. We had a visiting judge next door. I don't remember the judge and gave the quick summary of where we were. I said "he needs a public defender," and [petitioner] indicated "yeah, I want a public defender because I want a trial." He got a public defender. He was charged with attempted murder and Mr. Delaney got this case. . . . Mr. Delaney came to see me and basically asked for some kind of an offer. I said "okay. I would allow him to plead to the new statutory assault and battery of a high and aggravated nature for twelve no-parole years. . . . [Petitioner] wanted nothing whatsoever to do with that. He wanted a trial and that's what we gave him, a trial.

App. 445, l. 6-447, l. 9. Defense counsel added that petitioner had been willing to plead guilty and that he had met with Mr. Springs and the elected solicitor, Kevin Brackett, and they were unable to come to an agreement. App. 447, ll. 16-23. Counsel told the court he thought the situation regarding early plea negotiations was "highly unusual," and that is why he escalated the conversation beyond Mr. Spring to Solicitor Brackett. App. 449, ll. 1-6. Defense counsel also informed the trial court that petitioner had cooperated with the prosecution of a murder case in another county and that he had been instrumental in that case. He said the solicitor in that county called this county "seeking some consideration" for petitioner. App. 449, ll. 7-20.

Petitioner told the trial court that had believed that Mr. Springs was going to protect him from the consequences of his testimony in the murder prosecution and the reason he wanted the first plea offer extended was so that he could get married. Petitioner stressed that he would have taken any plea available to him but Mr. Springs refused to work with him. App. 450, ll. 10-25.

Relevant evidentiary hearing facts

Petitioner testified at his evidentiary hearing that he was arrested on June 7, 2010 and charged with attempted murder. App. 473, ll. 10-25. Regarding the accident, petitioner testified Mr. Mullins was in front of him in a moped and refused to let him pass. App. 475, l. 23-476, l. 6. In an attempt to pass Mullins petitioner "clipped [the] tail end" of Mullins' moped. App. 476, ll. 6-11. Petitioner admitted he was driving without a license and that he left the scene of the accident. App. 476, ll. 1-3.

Petitioner turned himself in, gave a statement to law enforcement, and was released. He was arrested soon after for violating his probation from an unrelated charge. App. 474, ll. 22-25; 476, ll. 21-23. Petitioner testified that not long after his arrest, before he got bond, the solicitor, Mr. Springs, visited him in jail. App. 477, l. 22-748, l. 15. He contended Mr. Springs offered him a one-year sentence and told him he did not need a lawyer. App. 478, l. 24-479, l. 11. Petitioner believed this was a good offer he accepted and believed all was well. App. 479, ll. 13-19.

Soon after he was released on bond his son passed away. App. 479, ll. 24-25. Petitioner admitted he was "mentally distraught" and sought medical treatment at the hospital because he was suffering "outrages," "severe insomnia," "depress[ion]," and "contemplat[ing] suicide." App. 480, ll. 7-16. He still thought that he did not need an attorney and that Mr. Springs would let him know when to come to court and plead guilty. App. 481, ll. 4-10. In August he met with Mr. Springs and at that time petitioner asked to have counsel to "be present and help [him] get through [the process]." App. 485, ll. 3-25. Petitioner contended that Mr. Springs withdrew the offer and then offered twelve years. App. 486, 1-4. Petitioner asserted that during early plea negotiations with Mr. Spring he did not have the opportunity to consult with counsel and had not

seen any discovery. App. 488-89. Petitioner said the original plea offer was not revived once he was appointed counsel which made him feel like he was being punished for requesting counsel because the deal disappeared. App. 496.

An expert in forensic psychiatry, Dr. Donna Maddox testified at petitioner's evidentiary hearing. App. 522-48. Dr. Maddox evaluated petitioner in preparation for PCR in 2018. App. 526, ll. 4-6. She diagnosed petitioner with borderline personality disorder, major depressive disorder, post-traumatic stress disorder, and two substance abuse disorders. App. 659. Dr. Maddox opined petitioner was mentally ill at the time of the incident and during the time before trial. She opined he should have had psychiatric evaluation to determine competency particularly when the state's plea offer was rejected. App. 539, l. 23-540, l. 20. Dr. Maddox further opined someone with petitioner's mental difficulties should not have participated in serious legal proceedings without evaluation or aide of counsel. App. 542, ll. 6-24.

E.B. Springs, the prosecuting solicitor, testified at petitioner's evidentiary hearing. App. 550-605. Mr. Springs testimony at this hearing was very similar to his statements to trial court prior to petitioner's sentencing. Springs claimed that even though he thought the facts of the wreck supported a charge of attempted murder "he saw some wrinkles" and "serious problems" with the case. App. 551, ll. 16-18. Springs stated it was his understanding petitioner had declined counsel and so after he evaluated the case he went and made a very generous plea offer to petitioner in the detention center. App. 551, l. 19-552, l. 9.

Springs admitted this offer was made to petitioner when he did not have counsel[1] and without petitioner having seen any discovery in his case. App. 589. Petitioner accepted Springs

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1 Although Springs' testimony characterized it as petitioner representing himself *pro se* and declared it was petitioner's responsibility to request discovery. App. 551, ll. 20-24; 589, l. 10-590, l. 15.

offer to plead leaving the scene with injury for one active year. App. 585, ll. 1-5. He denied ever telling petitioner that he would not need an attorney and insisted that he offered multiple times to help him get counsel appointed. App. 553, ll. 1-20; 557, ll. 2-25; 559, ll. 3-20. Springs maintained petitioner was adamant that he could handle his case without the advice of counsel. Id. He insisted petitioner never asked for advice of counsel prior to rejecting the offer. App. 565, ll. 1-4. Springs denied that he rescinded the initial offer because petitioner asked for an attorney. He claimed that he rescinded the offer because the offer had reached its deadline and petitioner declined to keep the deal. App. 565, ll. 3-7.

Springs testified the guilty plea was scheduled to go forward on August 12, 2010. However, right before that he received a call from Randy Murdaugh, solicitor in another circuit, explaining petitioner had appeared as a prosecution witness in a murder trial that resulted in a not guilty verdict. Murdaugh was concerned for petitioner's safety if he were to be incarcerated in general population after his guilty plea in this case. App. 560, ll. 7-24. Murdaugh wanted to arrange for petitioner to go into a protective unit and that would take some time. App. 561, ll. 1-9. Springs contacted petitioner and explained this to him and told him the guilty plea would not go forward until August 25, but that it would be the same deal and petitioner said he understood. App. 561, ll. 9-22.

Springs contended that on August 25, petitioner came in as planned but told him that he no longer wanted the deal and instead wanted to go to trial. App. 562, ll. 9-12. He said he was "flabbergasted" by petitioner's decision to reject the offer. App. 562, ll. 12-13. Springs declared that because of this change he believed it was best they go before of a judge so that petitioner could consider whether he wanted counsel for these serious charges and they went before Judge McIntosh and an attorney was appointed to petitioner's case. App. 563, ll. 1-6; 564, ll. 18-24.

Springs testified he spoke with petitioner's appointed counsel who requested another offer and he offered twelve years if petitioner pled guilty to assault and battery of a high and aggravated nature. He said the earlier deal had expired and would never be revived. App. 565-66. He refused to revive the first offer because it would damage his "credibility," to not stick to the deadline. App. 567.

Petitioner was represented at trial by B.J. Barrowclough and Erik Delaney and they both testified at his evidentiary hearing. App. 605-45. Barrowclough said when he discovered what transpired before he was appointed, he "found the whole situation to be shocking." App. 606, ll. 12-16. In disbelief Barrowclough went to Springs superior, Mr. Brackett, to discuss and bring to his attention to the situation. App. 606, ll. 18-23. He said ultimately Bracket "decided not to involve himself with what Mr. Springs [had done]." App. 607, ll. 1-3.

Barrowclough testified petitioner wanted to accept the Spring's original plea offer and he "desperately [tried] to get that deal back." App. 607, ll. 16-18. During plea negotiations with Spring, Barrowclough expressed to him "how unreasonable [he] thought [Spring] was by . . . offering one year and then pulling it back before any attorneys were involved in the case." App. 610, ll. 1-4. The only subsequent offer Spring extended was a twelve-year offer. The turned that offer down and went to trial. App. 610, ll. 16-20.

Barrowclough appeared dismayed at the entire situation and stated "to go from a year with no lawyer to life . . . with a lawyer, numerous [] people, lawyers and non-lawyers around here, have commented on that being so inappropriate. App. 629, ll. 20-25. Erik Delaney's testimony was substantially the same as his co-counsel Barrowclough's.

Discussion

The PCR court erred finding this allegation was "outside the scope of an application for

PCR." The court did not make any findings regarding whether petitioner's right to counsel was violated when the solicitor offered and then rescinded a very beneficial deal before petitioner had obtained counsel or seen any discovery in his case. Instead, the PCR court found that petitioner's, later appointed defense counsels, "made a diligent effort to obtain the previous plea offer," and that this "issue" was known to the trial court who directed Mr. Spring to put the facts regarding plea negotiations on the record. App. 667.

Contrary to the findings of the PCR court, petitioner's claim that his conviction and sentence are in violation of the Constitution are within the scope of PCR. The Uniform PCR Act states: "[a]ny person who has been convicted of, or sentenced for, a crime and who claims: [t]hat the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State" may institute PCR proceeding. *See* S.C. Code Ann. § 17-27-20.

The Sixth Amendment right to counsel protects the integrity of the adversarial system of criminal justice by ensuring that all persons accused of crimes have access to effective assistance of counsel for their defense. "The right is grounded in 'the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense.'" *State v. Quattlebaum*, 338 S.C. 441, 446, 527 S.E.2d 105, 107 (2000) (internal citations omitted).

To establish a valid waiver of counsel, the accused must be advised of the right to counsel and adequately warned of the dangers of self representation. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 581-82 (1975). In the absence of a specific inquiry by the lower court addressing the dangers and disadvantages of proceeding pro se, we look to the record to determine whether petitioner had sufficient background or was apprised of her rights by some other source. *Bridwell v. State*, 306 S.C. 518, 519, 413 S.E.2d 30, 31 (1992).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687–88, (1984). The right to effective assistance of counsel extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Simuel v. State*, 432 S.C. 150, 154, 850 S.E.2d 642, 643–44 (Ct. App. 2020).

Petitioner was denied the right to advice of counsel during plea negotiations when the solicitor, Mr. Springs, approached him with a plea offer before petitioner was appointed counsel and before he had seen any discovery in his case. There is conflicting testimony regarding whether petitioner was advised he should consult with an attorney. Mr. Springs insisted he told petitioner multiple times that he should have an attorney and that he assured petitioner the deal would remain with or without an attorney. Petitioner testified Springs did not think he needed an attorney and that once he asserted his right to have counsel the offer was rescinded. However, it is uncontested Springs approached petitioner very shortly after his arrest and before he had seen any discovery with a plea offer. It is uncontested petitioner was not warned of the dangers of self-representation. It is also uncontested that once petitioner was appointed counsel the original deal was rescinded, the next offer was drastically different, and Spring was unwilling to revive his first offer.

Petitioner was prejudiced by the violation of his constitutional right to advice of counsel during plea negotiations where Mr. Spring refused to revive the original offer and petitioner went to trial and ultimately received a sentence of life without the possibility of parole where he was previously offered a sentence of one year.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.

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Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2023.