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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable R. Scott Sprouse, Circuit Court Judge

FREDERICK CALVIN JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001285

JOHNSON PETITION FOR WRIT OF CERTIORARI

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Plea Counsel provided ineffective assistance by failing to object when the trial court imposed a 25-year sentence where Petitioner believed he was pleading to an offer of 18 to 20 years based upon prior negotiations?

STATEMENT

Petitioner Frederick Calvin Jones was indicted by the Laurens County Grand Jury for murder on February 12, 2016. The charge stemmed from his alleged involvement in an incident on November 17, 2015. App. 157—App. 158. Petitioner's first appointed attorney, Tom Adducci, left the office of the Laurens County Public Defender, and Chelsea McNeill (Plea Counsel) took over representation. App. 12, ll. 19-25; App. 128, 6-15.

After lengthy negotiations, Petitioner's case was brought before the Honorable Letitia H. Verdin for a guilty plea on October 23, 2018. Petitioner was still represented by Plea Counsel, while the State was represented by C. Dale Scott. App. 1. After reciting the facts of the case, the State recommended a sentence of 25 years.[1] App. 11, 3-17. In mitigation, Plea Counsel discussed negotiations with the State, and recited an email from the prosecutor dated November 30, 2017, wherein the State wrote as follows: "Fred Jones can plead to voluntary, but I would be looking for something closer to the 18-to-20 year range. I have a number of Newberry charges I will roll into that plea." App. 13, ln. 14—App. 14, ln. 21. In another email, dated February 14, 2018, the prosecutor wrote, "[w]ell, I think he wants 18. I can't do that. I had a very sad meeting with the victim's girlfriend, mother, aunt, and grandmother yesterday. I felt very unhappy after the meeting. And that feeling stayed with me for the rest of the day." App. 14, ll. 10-15. The Court acknowledged negotiations in the case, and sentenced Petitioner to the State

[1] Numerous charges from Newberry County were also dismissed as part of Petitioner's guilty plea. Plea Counsel did not represent Petitioner on those charges. App. 11, ll. 5-11; App. 136, ll. 14—App. 137, ln. 9.

recommended 25 years with credit for 1080 days of time served.[2] App. 21, ll. 12-23; App. 22, ln. 25—App. 23, ln. 1.

Plea Counsel filed a "Motion to Reconsider Sentence" on November 1, 2018, and requested a hearing on the matter. App. 25. On December 6, 2018, the Plea Court's order was filed denying Petitioner's motion. App. 26.

Petitioner appealed. On May 21, 2021, the Court of Appeals dismissed Petitioner's direct appeal pursuant to Anders v. California.[3] Remittitur was sent June 8, 2021. App. 28; App. 81.

Petitioner filed his post-conviction relief (PCR) application on July 28, 2021. App. 27; App. 80. Petitioner asserted, *inter alia*, that Plea Counsel provided ineffective assistance for failing to object to a recommended sentence beyond the range of 18 to 20 years. App. 42—App. 43. The State filed its return on October 21, 2021. App. 80. An amended PCR application was filed on November 18, 2022, requesting the PCR application be amended to conform to the evidence presented at the upcoming hearing. App. 104.

Petitioner's PCR hearing was held on November 28, 2022, before the Honorable R. Scott Sprouse. Petitioner was represented by Ashley A. McMahan (PCR Counsel), while the State was represented by T. Cruise Mitchell. App. 106. Two witnesses provided testimony at the hearing: Petitioner; and Plea Counsel. App. 107.

Petitioner informed the Court that he discussed plea negotiations with Plea Counsel. App. 116. Although he wanted a sentence of 20 years, suspended to an active term of 15 years

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[2] Although the plea court conducted a colloquy with Appellant on the record regarding the plea agreement and various waivers of rights, the plea court never made a finding on the record that Appellant's guilty plea was knowingly, intelligently, and voluntarily made. See, e.g., Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); see also State v. Barton, 325 S.C. 522, 530, 481 S.E.2d 439, 443 (1997). However, no objection was made, and no motion to withdraw was filed. See State v. McKinney, 278 S.C. 107, 108, 292 S.E.2d 598, 599 (1982).

[3] 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

followed by five (5) years' probation, he indicated the State agreed to a sentence range of 18 to 20 years after it met with the victim's family in the case. As a result, he believed he was supposed to have received a sentence between 18 and 20 years. App. 116, ln. 13—App. 117, ln. 20. Further, although Petitioner acknowledged that he was looking for a plea offer from the outset and did not want to proceed to trial, he indicated that he did so in part because he "was going off what [the State] had said." App. 114, ln.8 –App. 115, ln. 8; App. 125, ll. 6-21.

Plea Counsel also testified at the PCR hearing. As to the issue of negotiations and Petitioner's sentence, she acknowledged the email exchange with the State in negotiating on behalf of Petitioner. App. 128, ln. 21—App. 130, ln. 6. Plea Counsel stated the final plea offer made was on July 24, 2018, for a recommended 25-year sentence and was accepted; she further indicated prior negotiation involving a recommended sentence of 18 to 20 years was not a formal recommendation or negotiated plea. App. 130 ln. 2—App. 135; App. 142.

The PCR Court filed its Order of Dismissal on March 28, 2023. App. 144. Regarding the issue of failure to object to the imposition of a 25-year sentence, it held that "Plea Counsel was not deficient in failing to object to the sentence imposed." App. 154. The PCR Court further determined that, even if Plea Counsel was deficient, Petitioner was not prejudiced because he "repeatedly testified he never intended on going to trial and was simply seeking the best plea deal possible. App. 154—App. 155. No motion was filed pursuant to Rule 59(e), SCRCP.

This petition for writ of certiorari follows.

ARGUMENT

Plea Counsel provided ineffective assistance by failing to object when the trial court imposed a 25-year sentence where Petitioner believed he was pleading to an offer of 18 to 20 years based upon prior negotiations.

Plea Counsel provided ineffective assistance for failing to object to the sentence imposed by the Trial Court. Petitioner pled guilty under the belief that he was going to be sentenced to a range of 18 to 20 years. This was supported not only by his testimony at the PCR hearing, but also by Plea Counsel's recitation of an email from negotiations on Petitioner's behalf during the guilty plea hearing. Although Petitioner indicated he was looking for a guilty plea offer, his ultimate choice to accept an offer and plead guilty was based upon what he believed were representations made in the State's offer. Moreover, Petitioner's guilty plea on the record after the State recommended 25 years should be properly viewed as mitigation of the harm under principles of contract law. Regardless, Plea Counsel's assistance was constitutionally defective for failing to object to the sentence of 25 years. Accordingly, Petitioner was prejudiced, and the PCR Court's Order of Dismissal should be reversed.

The Constitution demands that a defendant enter a guilty plea voluntarily, and that the related waivers "not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468-69 (1970). The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance

of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) to claims of the same against plea counsel). On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. 474 U.S. at 59, 106 S.Ct. at 370.

"While plea agreements are a matter of criminal jurisprudence, most courts have held they are subject to contract principles." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999); see also United States v. Jordan 509 F.3d 191, 196 (2008) ("It is well-established that the interpretation of plea agreements is rooted in contract law."). "Because a defendant's fundamental and constitutional rights are implicated when induced to plead guilty by reason of a plea agreement, our analysis of the plea agreement or a breach thereof is conducted with greater scrutiny than in a commercial contract." Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also, United States v. Squirrel, 588 F.3d 207, 217 (4th Cir. 2009); see also United States v. Peglera, 33 F.3d 412, 414 (4th Cir. 1994). "Even if the agreement has not been finalized by the court, a defendant's detrimental reliance on a prosecutorial promise in plea bargaining may make a plea agreement binding." Custodio v. State, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007). "Detrimental reliance may be demonstrated where the defendant performed some part of the bargain." Custodio, 373 S.C. at 11, 644 S.E.2d at 39.

In the present case, Petitioner pled guilty to voluntary manslaughter prior to the State's recitation of facts or its offer on the record.[4] App. 4, ln. 3—App. ln. 6. Petitioner indicated he did so under the belief that it was for a recommended sentence of 18 to 25 years. This belief was supported by Plea Counsel's recitation of terms from the November 30, 2017 email during Petitioner's guilty plea. App. 13, ln. 14—App. 14, ln. 21. In other words, Petitioner relied upon a

[4] Although Petitioner did plead guilty again after the State placed the facts and its recommendation on the record, he did so the first time prior to the State recommending a 25-year sentence in open court. App. 6, ll. 4-6; App. 11, ll. 18-21.

prior prosecutorial promise made in his case, and pled guilty based upon it to his detriment. As noted by the United States Supreme Court, "when a plea agreement rests *in any significant degree* on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 95 S.Ct. 495, 499 (1971) (emphasis added); see also United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997) ("Violations of plea agreements on the part of the government serve not only to violate the constitutional rights of the defendant, but directly involve the honor of the government . . . .").

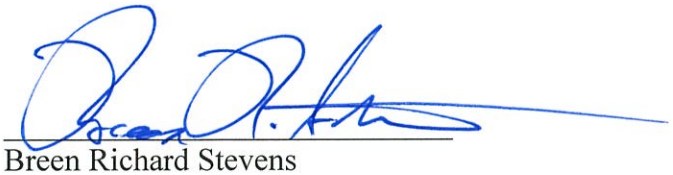
However, Trial Counsel failed to object to the State's recommendation of 25 years, and the Plea Court's subsequent imposition of the same. "The Government, no less (and arguably more) than a private citizen, must be held to the agreements it enters into with its citizens." Jordan, 509 F.3d at 199. Yet, Plea Counsel failed to hold the government to the agreement previously tendered. Although Plea Counsel testified at the PCR hearing that the State later altered the offer to 25 years, and that Petitioner pled knowing the offer was 25 years, Petitioner was not asked at the hearing about the later negotiations or email between the State and Plea Counsel from July 24, 2018, and so did not respond to it and refute being advised of the State's new offer of 25 years. Cf. Missouri v. Frye, 566 U.S. 134, 145, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). However, Petitioner did indicate that he spoke with Plea Counsel after the plea, and a Motion to Reconsider was filed as a result to "try and give that 25 back, to get to [his] original plea." App. 119, ln. 1-14. Such conduct belies the notion that Petitioner was aware the State would recommend a sentence of 25 years at the guilty plea, or that the Plea Court would impose such a sentence. Accordingly, under the circumstances presented, "[t]he appropriate remedy is the specific performance of the plea agreement." Custodio,

373 S.C. at 13, 644 S.E.2d at 40; see also Sprouse v. State, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003).

Finally, under principles of fundamental fairness in criminal law, Petitioner had a right to mitigate the damage done by the State's change from the prior agreement, and the trial court's imposition of a higher sentence than originally worked out. Cf. State v. Mueller, 319 S.C. 266, 269, 460 S.E. 409, 411 (1995) ("To force a defendant to choose between challenging an incorrect final ruling on appeal or minimizing the impact [of] damaging evidence would be fundamentally unfair."). Indeed, even under the principles of contract law, an aggrieved party has a duty to mitigate in the face of a breach of contract. See, e.g., Hunter v. So. Ry., Co., 90 S.C. 507, 73 S.E. 1017, 1019 (1912); see also Reed, 333 S.C. at 685, 511 S.E.2d at 401 ("While plea agreements are a matter of criminal jurisprudence, most courts have held they are subject to contract principles."). Accordingly, Petitioner had a right and a duty to mitigate the harm by accepting the subsequent plea offer to 25 years for voluntary manslaughter rather than the prior recommendation of 18 to 20 years. To hold Petitioner's mitigation efforts against him now would be fundamentally unfair under existing principles of criminal and contractual law, and result in the abhorrent tolerance of "allowing the government to forego its plea bargain obligations." Peglera, 333 F.3d at 414.

CONCLUSION

For the foregoing reasons, Petitioner Frederick Calvin Jones respectfully requests reversal of the PCR Court, reversal of his conviction, and remand for resentencing in the range of 18 to 20 years. Alternatively, Petitioner respectfully requests reversal of the PCR Court, reversal of his conviction, and remand for a trial.



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Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Frederick Calvin Jones states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Scott Sprouse, which was held on November 28, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Frederick Calvin Jones.

Respectfully Submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 12th day of February, 2024.