

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

RECEIVED

AUG - 7 2013

S.C. Supreme Court

DANIEL BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213495

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT4

CONCLUSION8

ISSUE PRESENTED

Trial counsel erred in not securing the state's plea offer in writing and in failing to object to the state's breach of the terms of the plea agreement and move to withdraw the plea, particularly since these omissions compromised any demand for specific performance or to invalidate his plea, because petitioner pled guilty in reliance on the plea provisions that exempted him from registering as a sex offender and guaranteed no opposition to the issuance of a probation sentence in the case.

STATEMENT

Petitioner Daniel Brown pled guilty to assault and battery of a high and aggravated nature during the January 2010 term of the Richland County General Sessions Court before Judge J. Michelle Childs. Joenathan Chaplin and Gwendlyn Smalls represented petitioner at the plea proceeding. After petitioner pled guilty, Judge Childs took the matter of sentencing under advisement. App. 1-18.

On March 19, 2010, a sentencing hearing was held on petitioner's behalf at the Richland County General Sessions Court before Judge Childs. Petitioner's attorneys Chaplin and Smalls were present at the sentencing hearing, but petitioner was not present for sentencing. Judge Childs imposed a sealed sentence in the case. App. 20-27.

On June 9, 2010, petitioner appeared pro se before Judge Childs at the Richland County General Sessions Court for the publication of his sealed sentence. App. 29-34. Petitioner was sentenced to imprisonment for a period of ten years and required to register as a sex offender. Petitioner did not enjoy the benefit of a direct appeal of his case.

Petitioner filed a PCR application and an amended PCR application with the Richland County Office of the Clerk of Court on December 14, 2010, and September 9, 2011, respectively. App. 36-40; App. 48-53. The respondent filed a return dated February 4, 2011, requesting that a hearing be held in response to petitioner's PCR action. App. 41-46.

A PCR hearing was convened on May 22, 2012, at the Richland County Courthouse before Judge L. Casey Manning. Petitioner was present at the PCR hearing and represented by Robert Corney. App. 55-86.

On November 19, 2012, Judge Manning issued an Order of Dismissal in the case. Petitioner appealed the Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in not securing the state's plea offer in writing and in failing to object to the state's breach of the terms of the plea agreement and move to withdraw the plea, particularly since these omissions compromised any demand for specific performance or to invalidate the plea, because petitioner pled guilty in reliance on the plea agreement provisions that exempted him from registering as a sex offender and guaranteed no opposition to the issuance of a probation sentence in the case.

During the plea proceeding, the trial judge was apprised of the facts of the case. According to the solicitor, the minor prosecutrix was walking to her grandmother's house on the evening of June 4, 2007, when petitioner offered her a ride in his car. Thereafter, petitioner took her to his apartment and allegedly committed a vaginal sexual assault upon her. App. 5, l. 14-p. 6, l. 25.

During the PCR hearing, petitioner testified that trial counsel Chaplin led him to believe that there was a plea agreement in effect wherein he could plead guilty to aggravated assault¹ and receive a probation sentence and be excused from registering as a sex offender; and that based on that offer and those terms, he pled guilty in reliance of the same. Petitioner emphasized that the sex registry exemption component was the most important term of the agreement to him, and that it was this provision in effect that induced him to accept the plea offer and plead guilty to aggravated assault and battery. App. 60, l. 6-p. 61, l. 14. Petitioner stated that he would not have pled guilty if the sex registry exclusion had not been part of the plea agreement reached in the case. Petitioner stated that the plea "deal" at issue was not reduced to writing and complained that counsel was ineffective in failing to obtain a written plea agreement from the solicitor in the case. App. 61, l. 15-24; App. 64, lines 16-22.

¹ Petitioner was indicted for second degree criminal sexual conduct, but pled guilty to aggravated assault and battery.

Trial counsel testified at the PCR hearing and explained that the negotiated plea bargain in question included an agreement to allow a plea on the lesser charge, and an agreement that the solicitor would not oppose a probation sentence, and the promise to leave the question of petitioner's exemption from the sex registry as an issue for the plea judge to decide. App. 71, l. 6- p. 73, l. 18. Counsel added that petitioner's absence from the sentencing proceeding quite possibly affected the sentence imposed the plea judge. App. 75, l. 11-20. Note that petitioner stated that he was not present at sentencing due to a family death and funeral. App. 62, l. 25 – p. 63, l. 2.

The plea agreement details were addressed by petitioner at PCR hearing and by trial counsel at the plea proceeding, respectively, as follows:

Attorney General: And what did [trial counsel] tell you was the essence of that plea?

Petitioner: He told me that a plea – no prison time, a lesser charge of assault battery of high and aggravated nature. That was it.

Attorney General: [And] you understood that your name would not be placed on the sexual offense registry; is that right?

Petitioner: Yes, sir.

Attorney General: And that you would be on probation?

Petitioner: Probation.

Attorney General: And based on that...did you decide to plead guilty?

Petitioner: Yes, sir. App 60, l. 6 – p. 61, l. 4.

Defense Counsel at Plea Proceeding: Your Honor...I'm asking for some type of probationary stint. Also, Your Honor, as to the registry, Your Honor, I think –I'm asking that he is not imposed or put upon the registry for numerous reasons but, therefore, the information that was provided by law enforcement...I'm asking for no registry, some type of probation or either some type of weekend time. App. 14, lines 7 – 17.

Thus, per the plea bargain, the solicitor agreed not to oppose a probation sentence or the excusal of petitioner's placement on the sex registry, but yet the solicitor reneged on the terms of the agreement by informing the plea judge of the prosecutrix's mother's request that petitioner get the "fullest sentence" and that her (prosecutrix's mother's) opinion was that it would be "appropriate" for petitioner to register as a sex offender. App. 15, l. 14-18. The solicitor's repetition of the prosecutrix's mother's request and opinion constituted in effect a violation of the terms of the agreement by the solicitor because this was tantamount to an indirect request for a maximum sentence for petitioner and the requirement that he register as a sex offender when the agreement prohibited the solicitor from opposing a probation sentence and the sex offender registry exemption.

The PCR judge ruled that trial counsel "was able to obtain a beneficial plea offer from the state under which [petitioner] would be allowed to plead to a lesser included offense with no negotiations/recommendations as to the sentence or sex offender registry" and that there was no showing as to "how counsel's performance was objectively unreasonable in this regard or how such alleged deficient representation affected his decision to plead guilty." App 93-94.

Plea agreements are subject to contractual principles where the terms are binding and must be enforced if the defendant accepts the offer and the defendant relied (to his detriment) on the terms of the agreement when he entered his plea. State v. Miller, 375 S.C. 370; 652 S.E. 2d 444 (2008); State v. Thrift, 312 S.C. 282; 440 S.E. 2d 341 (1994); Reed v. Becka, 333 S.C. 676, 511 S.E. 2d 396 (Ct. App. 1999). As a rule, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); Santobello v. New York, 404 U.S. 257 (1971). Therefore, counsel must object if a breach of the plea agreement occurs at the plea proceeding.

Also, there is in existence the protocol that a plea offer should be extended to the defendant formally in writing by the solicitor. State v. Miller, *supra*. In Miller, the Court held that the discussion of a wide range of potential sentences did not constitute a plea offer because it was not memorialized in writing.

Moreover, this Court has reversed in cases where the terms of plea agreements were not met. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009); Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007); Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003).

In Thompson v. State, *supra*, the Court held that trial counsel erred in failing to object to the solicitor's recommendation for the maximum sentence of thirty years at sentencing in exchange for the defendant's guilty plea to voluntary manslaughter because the plea agreement reached included the solicitor's promise that there would be no specific sentencing recommendation requested in the case. The Thompson Court held further that the plea agreement was violated and prejudice resulted because the defendant would not have pled guilty if he had known that the solicitor was going to request the maximum sentence in the case. See also State v. Jordan, *supra*, where the Court held that counsel was ineffective in failing to move for the withdrawal of the defendant's guilty plea where even though the plea agreement included the solicitor's promise to neither oppose nor recommend probation in exchange for the defendant's plea; nevertheless, the solicitor voiced an opinion against probation at sentencing in the case. Also in Jordan, the defendant was prejudiced because he would not have pled guilty had he known the solicitor planned to violate the agreement. Compare Sprouse v. State, *supra*, where counsel was found ineffective in failing to object to the state's failure to honor the original plea agreement in the case. In Sprouse, the solicitor's classification of the defendant's second-degree burglary offense as violent deviated from the plea

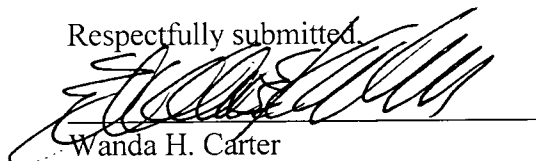
agreement. Also, compare Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007), where the Court found counsel ineffective in failing to have the plea agreement between the defendant and the solicitor's office enforced, particularly where the defendant relied on the same to his detriment.

In the case at bar, trial counsel's errors in not requesting that the plea offer be reduced to writing and in failing to object to the breach of the terms of the agreement and move to withdraw the plea constituted ineffective assistance of counsel in connection with petitioner's plea proceeding in violation of the Sixth Amendment to the United States Constitution. See also Hill v. Lockhart, 484 U.S. 52 (1985). Petitioner was prejudiced by counsel's deficient performance in this regard because he would not have pled guilty had he known that the plea terms were not going to have been honored, and because counsel's errors hindered any move to invalidate the plea or request specific performance to enforce the terms of the plea bargain. Specific performance is a remedy in a plea case where an agreement was not honored, especially if the defendant was apprised of the plea offer and relied to his detriment on the plea offer when pleading guilty, and also where counsel performed ineffectively in connection with the plea agreement. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009). The PCR judge erred in denying petitioner's claim that he received ineffective assistance of trial counsel in his guilty plea case.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

DANIEL BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213495

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Daniel Brown, # 341265, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 7th day of August, 2013.

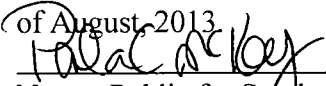


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day

of August, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24 2022.