

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Stephanie P. McDonald, Circuit Court Judge  
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SEP 11 2013

S.C. Supreme Court

KEVIS LAVOR LEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

2013-000048

PETITION FOR WRIT OF CERTIORARI  
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WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

Trial counsel erred in obtaining an order by a federal judge to place petitioner in a federal prison instead of moving to withdraw petitioner's guilty plea after learning that the negotiated sentencing provision authorizing petitioner to serve his state sentence in a federal prison was a sentencing impossibility because such a sentencing provision could not be enforced unless the state sentence preceded the federal sentence.

## STATEMENT

Petitioner Kevis Lavore Lee pled guilty to assault and battery with intent to kill during the December 2010 term of the Charleston County General Sessions Court before Judge Robert M. Young. App. 1-6. Per a negotiated sentencing agreement, Judge Young sentenced petitioner to imprisonment for a period of seventy months to be served concurrently with his federal prison sentence and ordered that “[petitioner] be allowed to [serve] his sentence at the federal bureau of prisons.” App. 6, l. 21-p. 7, l. 2. Andrew Grimes represented petitioner at petitioner’s plea proceeding. Petitioner did not appeal his conviction and sentence.

On December 12, 2011, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. App. 9-15. The respondent filed a return dated February 10, 2012, requesting that a hearing be held in response to petitioner’s PCR action. App. 16-19.

A PCR hearing was convened on July 25, 2012, at the Charleston County Courthouse before Judge Stephanie P. McDonald. App. 21-49. Petitioner was present at the hearing and represented by William Harold Nixon. On December 12, 2012, Judge McDonald issued an Order of Dismissal denying petitioner’s allegations of ineffective assistance of counsel raised in the case. App. 51-58.

Petitioner appealed Judge McDonald’s Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in obtaining an order by a federal judge to place petitioner in a federal prison instead of moving to withdraw petitioner's guilty plea after learning that the negotiated sentencing provision that authorizing petitioner to serve his state sentence in a federal prison was a sentencing impossibility because such a sentencing provision could not be enforced unless the state sentence preceded the federal sentence.

During the plea proceeding, the solicitor apprised the plea judge of the facts in the case. Apparently, petitioner and Joshua Smith were embroiled in a verbal altercation on August 6, 2009, when petitioner pulled out a pistol and shot Smith in his abdomen area. App. 5 l. 24 – p. 6 l. 9.

During the PCR hearing, PCR counsel explained that petitioner pled guilty in federal court before pleading guilty in state court. PCR counsel stated that the state plea judge accepted the negotiated sentencing provision allowing petitioner's state sentence to be served in a federal prison concurrently with his federal sentence. The plea judge ordered this, but petitioner was never placed in a federal facility. App. 22, l. 17-p.23, l.11. PCR counsel stated that the service of a state sentence in a federal prison can only occur if the state sentence was issued prior to the issuance of the federal sentence. PCR counsel explained as follows:

MR.NIXON: [Petitioner] was sentenced to some federal charges prior to him pleading guilty to the state charges....On the federal sentence he had received a 70-month sentence.....[and] petitioner pled guilty in state court...because he understood that not only was he going to get the same 70-month negotiated sentence on the state charges, but it was also going to be served in the federal penitentiary as opposed to the state facility...[but] that didn't happen....After [plea counsel]...realized that it had been done basically backwards [because] in order to get him in the federal system, that it would have had to have been—the state charges would have had to have been taken care of first and then the federal charges.

App. 22, l. 17-p. 24, l. 16.

During the PCR hearing, trial counsel testified that the negotiated sentence agreed upon was for petitioner's state sentence of seventy months to run concurrently with his seventy-month federal sentence and that his state prison term would be served in federal prison. Counsel admitted that he promised this sentencing arrangement to petitioner, who relied upon counsel's promise when he decided to plead guilty as charged. App. 28, l. 6-p. 30, l. 3; App. 33, l. 7-12; App. 30, l. 14-20. Counsel added that after the plea, he (counsel) learned that he "messed up" because he did it "backwards" to the extent that the state sentence would have had to precede the federal sentence in order for petitioner to have been placed in a federal prison to serve both his state and federal sentences concurrently. App. 31, l. 11-p. 32, l. 3; App. 36, l. 2-22. Then, counsel stated that he "fix[ed] it" by securing an order from a federal judge (Judge Blatt) remanding petitioner to the custody of federal marshals. App. 37, l. 3-12; App. 32, l. 1-p. 33, l. 4; App. 34, l. 20-p. 35, l. 9. However, herein lay the problem: petitioner was never remanded to a federal prison and presently remains in the custody of the South Carolina State Department of Corrections.

Petitioner testified at the PCR hearing and explained that after he pled guilty he expected to be placed in a federal prison per counsel's promise via the negotiated sentence, which he relied on, as said promise was the inducement to plead guilty as charged in state court. App. 38, l. 18-p. 39, l. 13.

The PCR judge ruled that trial counsel was not ineffective in advising (petitioner) that he would be able to serve his sentence in the federal prison system because counsel had no power or authority to secure [petitioner's] housing in the federal prison system. App. 56.

In the instant case, petitioner's sentencing agreement included the following terms: 1.) that petitioner's state sentence that would be identical to his seventy-month federal sentence; 2.) that

petitioner's state sentence would run concurrently to his federal sentence; and 3.) that petitioner's state sentence would run be served in a federal prison. The third term was not honored in the case.

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 or move to have the plea withdrawn if a breach of the plea agreement occurs at the plea proceeding.

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 and that the plea agreement was violated. The Thompson Court found prejudice 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. In State v. Jordan, supra, 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

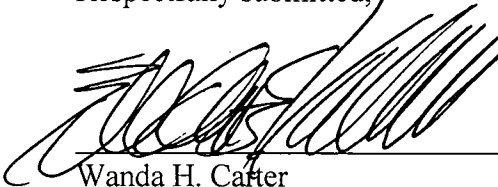
agreement included the solicitor's promise to neither oppose nor recommend probation in exchange for the defendant's plea; nevertheless, the solicitor voiced an opinion against probation at sentencing in the case and that the defendant was prejudiced because he would not have pled guilty had he known the solicitor planned to violate the agreement. In Sprouse, *supra*, counsel was found ineffective in failing to object to the state's failure to honor the original plea agreement in the case where the solicitor's classification of the defendant's second-degree burglary offense as violent deviated from the plea agreement. In Rolen, the Court found counsel ineffective in failing to move to withdraw the guilty plea where the defendant desired a jury trial and professed his innocence in court during the plea proceeding. In Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007), 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, counsel erred in failing to move to have petitioner's guilty plea withdrawn because the negotiated sentencing term regarding the location of petitioner's place of prison service was not met in the case, particularly since petitioner relied on that same term when deciding to plead guilty as charged. Counsel's error in this regard constituted deficient performance in violation of the Sixth Amendment to the United States Constitution. See also Hill v. Lockhart, 484 U.S. 52 (1985). But for counsel's error, a reasonable probability exists that petitioner would not have pled guilty and exercised his right to a trial by jury in the case.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of September, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County  
Stephanie P. McDonald, Circuit Court Judge

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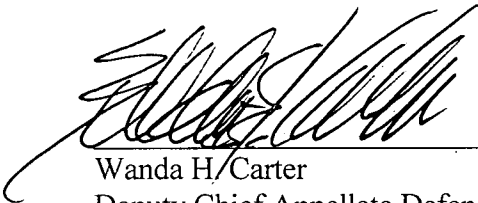
Appellate Case No. 2013-000048

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari, accompanying appendix and supplemental appendix in this case have been served on Ashleigh R. Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of September, 2013.

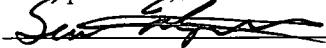


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Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day  
of September, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.