STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Knox McMahon, Circuit Court Judge

LINWOOD CARSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000512

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel provided effective assistance of counsel where Petitioner would have accepted the State's plea offer of fifteen (15) years had he not been misadvised by plea counsel that he would have had to serve at least 85% of that plea offer?

STATEMENT

Indictments

In November 2005, Petitioner Linwood Carson was indicted by the Lexington County Grand Jury for possession of less than one gram of ice, crank, or crack cocaine. App. 149-150. In January 2006, Petitioner was subsequently indicted for six counts of second degree burglary in violation of S.C. CODE ANN. § 16-11-312(B) and one count of possession or making of burglary tools. App. 152-171.

Plea Hearing

On January 30, 2006, a plea hearing was held before the Honorable Larry R. Patterson. App. 1 – 34. Petitioner was represented by Gene Stockholm, and the State was represented by Assistant Solicitor Angela Avenger. App. 1.

At the beginning of the plea hearing, Petitioner moved to dismiss his plea counsel because he believed his plea counsel was not being honest with him about a prior plea offer made to Petitioner's previous attorney. App. 3, l. 10 – 4, l. 7. The solicitor responded that the State had made a "straight-up plea [offer] to the six burglaries" of fifteen years. That offer was not accepted and Petitioner's previous counsel was relieved. App. 4, ll. 10-21.

The State then offered Petitioner's current plea counsel an opportunity for Petitioner "to plead this case for the 15 years violent on the burglaries," but Petitioner did not accept. The State then served Petitioner's plea counsel with notice of seeking life without parole. App. 5, ll. 2-7.

The plea court denied Petitioner's motion to dismiss his current plea counsel. App. 7, l. 23 – 8, l. 1.

Petitioner ultimately pled guilty to all counts. App. 22, ll. 3-5. Judge Patterson sentenced Petitioner to fifteen (15) years concurrent for each second degree burglary charge, five (5) years consecutive for possession of burglary tools, and three (3) years consecutive for possession of crack cocaine, for a total of twenty-three (23) years. App. 32, l. 17 – 33, l. 3. Petitioner did not file a direct appeal.

PCR Application and Evidentiary Hearing

On December 28, 2006, Petitioner filed his application requesting post-conviction relief ("PCR"). App. 35 – 39. The State filed its Return on April 2, 2007. App. 40 – 43.

On September 2, 2009, Petitioner filed his First Amended Application for Post-Conviction Relief. In this amended application, Petitioner alleged that the prosecution offered to allow Petitioner to "plea this case for 15 years violent on the burglaries." At the time, Petitioner's plea counsel was under the belief that a conviction of a "violent" offense obligated Petitioner to serve 85% of his sentence, and for this reason, Petitioner rejected the plea offer. App. 45.

Petitioner subsequently learned that his plea counsel's advice concerning the fifteen (15) year plea offer was deficient because it was premised on the mistaken belief that Petitioner would be required to serve 85% of the fifteen (15) year sentence before he would be eligible for an early release program. Had Petitioner been correctly advised that the 85% rule applied only to sentences of at least twenty (20) years, Petitioner would have accepted the fifteen (15) year plea offer. Petitioner alleged he was prejudiced because had he accepted the fifteen (15) year plea offer, he would have received a lower sentence than the twenty-three (23) year sentence that Judge Patterson ultimately imposed. App. 46.

An evidentiary hearing was held before the Honorable R. Knox McMahon on September 3, 2009. App. 48 – 98. Petitioner was represented by Elizabeth Ann Zeck, and the State was represented by Assistant Attorney General Adam West Lee. App. 48. Both Gene Stockholm and Petitioner testified at the hearing. App. 58 – 82.

At the hearing, Petitioner's plea counsel, Stockholm, confirmed that he advised Petitioner that he would have to serve 85% of the fifteen (15) year plea offer. App. 62, l. 24 – 63, l. 3. Plea counsel conceded that this advice was incorrect and that Petitioner would not have had to serve 85% of the sentence before being eligible for early release. App. 63, ll. 4 – 25. Plea counsel testified that Petitioner did not want to serve 85% of the sentence and wanted him to get back a plea offer made to Petitioner's previous attorney for fifteen (15) years nonviolent. Plea counsel informed Petitioner that the offer to his previous attorney was gone and there was nothing that could be done about that offer. App. 64, ll. 1 – 20.

Plea counsel acknowledged that Petitioner wanted the previous offer back because he was concerned about having to serve 85% of the fifteen (15) year violent plea offer. App. 64, l. 21 – 65, l. 20. Plea counsel again admitted that his advice about whether Petitioner would have to serve 85% of the sentence was incorrect and further agreed that Petitioner would have accepted a plea offer of fifteen (15) years where he did not have to serve 85% of the sentence. App. 65, l. 21 – 67, l. 11.

Plea counsel also testified that despite the solicitor's statement to the plea court that she offered plea counsel "an opportunity to plead this case for the 15 years violent on the burglaries," that he thought the solicitor was only referring to a plea offer for the burglaries and not the two other charges. App. 60, l. 8 – 61, l. 17.

Petitioner testified that his plea counsel, Mr. Stockholm, informed him that the only offer he could get for Petitioner was the fifteen (15) year violent where Petitioner would have to serve 85%. App. 76, ll. 1-4. Petitioner testified that he did not want to have to serve 85% of the sentence and he would have accepted the plea offer of fifteen (15) years had he known that he would not have to serve at least 85% of the sentence. App. 76, l. 5 – 77, l. 18.

Petitioner also testified that his understanding of the State's plea offer of fifteen (15) years was for the whole case. App. 76, ll. 8 -16.

At the conclusion of the hearing, Judge McMahon asked both sides to submit proposed orders. App. 97, ll. 6-9.

Order of Dismissal

On March 2, 2010, Judge McMahon denied Petitioner's PCR application. App. 118 – 126. Judge McMahon found that despite plea counsel's admission that he gave petitioner erroneous information about the State's plea offer, Petitioner was unable to prove resulting prejudice. App. 125. Judge McMahon found "it was impossible to prove that [Petitioner] would have gotten a better sentence if he had accepted an earlier plea," further stating:

> This Court finds credible Counsel's testimony that the fifteen-year violent offer was intended solely for the burglary charges, while simultaneously finding that [Petitioner's] testimony on the issue is not credible. As such, it is impossible to say how [Petitioner] would have been sentenced with relation to his remaining charges. The only thing known is that he received concurrent sentences of fifteen (15) years for the burglary charges, which equates to the same deal that [Petitioner] was originally offered. This Court further notes that [Petitioner] previously rejected a prior, better offer, so there is no way to know that he would have accepted the earlier plea deal had he been given different information. This Court finally notes that the Guilty Plea Transcript reflects that the judge made it very clear that it was not his practice to accept negotiated pleas, and that he alone was responsible for sentencing.

App. 125.

On March 16, 2010, Petitioner filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e), SCRCP. App. 127-129. On September 18, 2011, Petitioner wrote the Lexington Clerk of Court inquiring as to a ruling on his motion to reconsider. App. 130. On January 10, 2013, he subsequently attempted to file a Motion to Comply with Established Law and Civil Rules of Procedures Concerning Order Denying or Granting the Motion to Alter or Amend pursuant to Rule 59(e). App. 132-135. The Lexington Clerk of Court forwarded Petitioner's motion to his PCR counsel. App. 131.

Thereafter, on February 5, 2013, the State filed a Return to the Motion to Alter or Amend. App. 136-139. Judge McMahon denied Petitioner's motion to alter or amend in an order filed February 25, 2013. App. 141-142.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective assistance of counsel where Petitioner would have accepted the State's plea offer of fifteen (15) years had he not been misadvised by plea counsel that he would have had to serve at least 85% of that plea offer.

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The United States Supreme Court established the constitutional right to *effective* assistance of counsel in Powell v. Alabama, 287 U.S. 45 (1932), and subsequently created the standard for ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court extended this standard to guilty pleas in Hill v. Lockhart, 474 U.S. 52 (1985), and recently expanded this standard to apply during the plea-bargaining stage. See Missouri v. Frye, 566 U.S. ____, 132 S.Ct. 1399 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); see also Lafler v. Cooper, 566 U.S. ____, 132 S.Ct. 1376 (2012) (addressing, as the companion case to Frye, cases where "inadequate assistance of counsel caused nonacceptance of a plea and further proceedings led to a less favorable outcome" after a full trial and jury verdict).

This Court has also held that "a defendant has the right to effective assistance of counsel during the plea bargaining process." Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Id. "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases i.e., was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith

v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill, 474 U.S. at 56-58).

"The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith, 369 S.C. at 138, 631 S.E.2d at 261. "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

In this case, the PCR court erred in denying Petitioner's claim of ineffective assistance of counsel where Petitioner proved that (1) plea counsel gave him erroneous advice that he would have to serve 85% of the State's plea offer of fifteen (15) years; and (2) he was prejudiced by that deficient performance, *i.e.,* there was a reasonable probability that but for counsel's deficient performance, he would have accepted the original plea offer.

Deficient Performance

Plea counsel's performance fell below "an objective standard of reasonableness" when he misadvised Petitioner about the maximum sentence Petitioner would be required to serve and Petitioner detrimentally relied on that erroneous advice. See Frye, at 1410; Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding ineffective assistance of counsel when plea counsel erroneously advised the defendant regarding his potential sentence prior to his guilty plea); Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991) (finding involuntary plea based on plea counsel's erroneous sentencing advice); see also Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) ("[A] guilty plea must be aware of . . . the maximum and any mandatory minimum penalty") (emphasis removed and citations omitted).

Specifically, plea counsel admitted at the plea hearing that he erroneously advised

Petitioner that he would have to serve 85% percent of the State's plea offer of fifteen (15) years when the 85% requirement does not apply to sentences less than 20 years. App. 63, ll. 4 – 25; see also S.C. CODE ANN. § 23-13-100; § 24-13-150. That Petitioner's plea counsel gave Petitioner erroneous advice with respect to the fifteen (15) year plea offer is undisputed. The State agreed at the evidentiary hearing that the 85% rule applied to sentences of twenty (20) years and above. App. 88, ll. 15-23. The PCR court even noted that plea counsel admitted he gave Petitioner erroneous advice regarding his plea offer. App. 125.

If a defendant's attorney undertakes to advise the defendant about the collateral consequences of sentencing and gives erroneous advice, then the plea may be collaterally attacked. See Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997). Given that there is no question that Petitioner's plea counsel gave him erroneous advice about the maximum sentence he would have to serve if he accepted the State's fifteen (15) year plea offer, Petitioner has met the first prong in establishing that he is entitled to relief – that his counsel's performance was deficient.

Prejudice

Given that there is no doubt that Petitioner's plea counsel's erroneous advice to Petitioner about the State's plea offer constituted deficient performance, the question becomes whether Petitioner was prejudiced by his deficient performance.

In his Order of Dismissal, the PCR judge found Petitioner was unable to prove prejudice for three reasons:

(1) the State's fifteen (15) year violent offer was intended solely for the burglary charges such that it was impossible to say how Petitioner would have been sentenced with relation to his remaining charges;

(2) Petitioner previously rejected a prior, better offer so there is no way of knowing whether he would have accepted the State's fifteen (15) year violent offer had he been given correct information by his plea counsel; and

(3) the guilty plea judge made it very clear that it was not his practice to accept negotiated pleas and that he alone was responsible for sentencing.

App. 125.

Thus, the PCR judge concluded that it was impossible to prove that Petitioner would have gotten a better sentence if he had accepted an earlier plea offer. App. 125.

As to the PCR judge's first rationale – that the State's plea offer of fifteen (15) years violent was only for the burglaries and not the other two charges against Petitioner, the solicitor's statement at the guilty plea hearing establishes otherwise. At the guilty plea hearing, the solicitor stated to the court that "Mr. Stockholm also had an opportunity to plead *this case* for the 15 years violent on the burglaries . . . ." App. 5, ll. 2-5 (emphasis added). The solicitor used the phrase "this case," indicating that the entire case, including the two additional charges of possession of crack cocaine and burglary tools, could be pled for fifteen (15) years total. Not once at the guilty plea hearing did the solicitor ever mention that any of their plea offers did not include all charges against Petitioner.

Where the solicitor stated that Petitioner had the "opportunity to plea *this case* . . ." for fifteen (15) years violent, any ambiguities in that plea offer should be construed against the State. Plea agreements themselves are construed in this State in accordance with contractual principles. State v. Tillman, 320 S.C. 61, 63, 463 S.E.2d 94, 96 (Ct. App. 1995). Citing United States v. Ringling, 988 F.2d 504 (4th Cir. 1993), the Tillman court stated that a plea agreement must be construed differently from a commercial contract because the rights involved are fundamental and constitutionally based. The government must be held

to a higher standard degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements. Tillman, 320 S.C. at 63, 463 S.E.2d at 96.

The ambiguity in the State's plea offer – as to what charges it covered – should be construed against the State. See United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994) ("Given the contractual nature of plea offers and given that the government drafted the offer, all ambiguities are to be resolved in favor of [the defendant.]"); see also Mathis v. Brown & Brown of S.C., 389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.").

The PCR judge's ruling that the State's fifteen (15) year plea offer was limited to solely the burglaries is not supported by the evidence or the law. The State's plea offer of fifteen (15) years encompassed the entire case. Petitioner was prejudiced because had he not relied on his plea counsel's erroneous advice, he would have accepted the fifteen (15) year deal for the entire case rather than to have waited to plead where he received a total of twenty-three (23) years.

The PCR court next found that there was no way of knowing whether Petitioner would have taken the fifteen (15) year plea deal had he been given better information since he had rejected a previous better offer. Petitioner unequivocally testified at the evidentiary hearing that he would have accepted the State's fifteen (15) year plea deal made to his plea counsel had he been given correct information about the maximum sentence he would have to serve. App. 76, l. 5 – 77, l. 18. Petitioner's plea counsel also agreed at the evidentiary hearing that Petitioner would have accepted that plea offer had plea counsel given Petitioner the correct information. App. 65, l. 21 – 67, l. 11.

Therefore, the evidence was uncontroverted that Petitioner would have accepted the State's fifteen (15) year plea offer had he been advised correctly by his plea counsel about the maximum sentence he would have to serve. The PCR judge's finding that it was impossible to know whether Petitioner would have accepted the State's plea offer is therefore not supported by the evidence. See Davie, 381 S.C. at 614, 676 S.E.2d at 423 (finding prejudice by plea counsel's deficient performance where (1) the difference in the sentence Petitioner received and the plea offer was proof of prejudice; and (2) both plea counsel and Petitioner testified that had the plea offer been communicated to Petitioner, Petitioner would have accepted the plea agreement).

Finally, the PCR judge ruled that Petitioner could not establish prejudice because the guilty plea judge made it clear during the guilty plea hearing that it was not his practice to accept negotiated pleas and that he alone was responsible for sentencing. This factor should not negate Petitioner's right to effective assistance of counsel during the plea bargaining process. If this were the case, there could essentially never be a claim for ineffective assistance of counsel during the plea bargaining process because an applicant would never know which judge would be presiding over his plea and issuing the sentence. Clearly, this Court has found that an applicant can prevail on a claim of ineffective assistance of counsel with respect to plea counsel's deficient performance during the plea bargaining process, and this Court did not find that prejudice could not be shown since the applicant would have not known how the plea judge would have sentenced him. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009).

The PCR judge's ruling that Petitioner could not show prejudice for the three reasons listed above is not supported by the evidence and the law. Petitioner has proven

that he was prejudiced by his plea counsel's deficient performance where there was an eight year difference in the sentence Petitioner received and the plea offer and both Petitioner and plea counsel testified at the evidentiary hearing that Petitioner would have accepted the State's fifteen (15) year plea offer had plea counsel advised Petitioner correctly. Petitioner is therefore entitled to relief for his plea counsel's deficient performance.

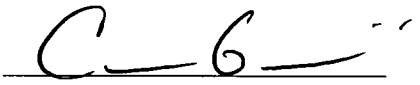
Remedy

In Davie, where this Court held that the petitioner established his claim of ineffective assistance of counsel where plea counsel failed to communicate a more favorable prior plea offer, the appropriate form of relief was a re-sentencing hearing. Pursuant to the instructions of this Court in Davie, Petitioner requests a re-sentencing hearing and that the sentencing court be instructed to take into consideration the State's prior fifteen (15) year plea offer and direct that any sentence Petitioner receives should not exceed the original twenty-three (23) year sentence. Davie, 381 S.C. at 614-16, 657 S.E.2d at 423-24.

CONCLUSION

Based upon the foregoing reasons, Petitioner Linwood Carson requests that his petition for writ of certiorari be granted and full briefing be allowed on the issue raised herein.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
R. Knox McMahon, Circuit Court Judge

LINWOOD CARSON,

PETITIONER,

V.

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RESPONDENT

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 a copy of the petition for writ of certiorari and accompanying appendix has been served on Mr. Linwood Carson #263672, Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 18th day of September, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of September, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.