

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

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SEP 26 2013

S.C. Supreme Court

OCTAVIUS OMAR COLLINS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213660

JOHNSON PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
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

Whether the PCR Court erred in finding that plea counsel provided effective assistance of counsel where plea counsel did not attempt to obtain any favorable plea offer for Petitioner and Petitioner was ultimately sentenced to a twenty (20) year sentence which was five years above the mandatory minimum sentence?

STATEMENT

Indictment

On January 15, 2010, Petitioner Octavius Omar Collins was indicted by the Georgetown County Grand Jury for distribution of crack cocaine on July 20, 2009 in violation of S.C. CODE ANN. § 44-53-375(B). App. 120-121.

Guilty Plea

On August 30, 2010, Petitioner appeared before the Honorable Benjamin H. Culbertson with the intent to plead guilty to the above charge. App. 1 – 13. Petitioner was represented by Charles Barr, and the State was represented by Assistant Solicitor Erin Bailey. App. 1.

At this hearing, the State informed Judge Culbertson that if Petitioner pled guilty to the distribution of crack cocaine third offense charge, the State would dismiss a proximity charge along with five other unrelated charges. App. 3, ll. 2-13.

At this hearing, Petitioner decided he wanted to discuss his plea further with his attorney, having concerns about the fifteen (15) year mandatory minimum sentence. App. 10, ll. 4-21. At the conclusion of the August 30, 2010 hearing, Judge Culbertson decided to go ahead and start the trial the next morning. App. 13, ll. 6-8.

Jury selection began on September 1, 2010. App. 13, l. 18 – 30, l. 21. At the conclusion of jury selection, Petitioner's plea counsel informed the court that Petitioner wished to resume the tendering of his guilty plea. App. 31, ll. 1-14. The court questioned Petitioner about his plea of guilty and whether he understood his constitutional rights which he was waiving. App. 33, l. 15 – 36, l. 20. The court asked Petitioner if he understood the absolute mandatory minimum sentence that could be imposed was fifteen (15) years, and

Petitioner responded in the affirmative. App. 35, ll. 12-15. Petitioner pled guilty to the charge of distribution of crack cocaine third offense. App. 37, ll. 4-6.

The State described the factual basis for the plea and stated that Petitioner had sold .84 grams of crack cocaine to an undercover confidential informant and that this was Petitioner's third offense. App. 37, l. 11 – 38, l. 13.

Petitioner's plea counsel asked the court to consider only giving Petitioner the minimum sentence of fifteen (15) years. App. 39, l. 15 – 43, l. 16. The plea judge ultimately imposed a twenty (20) year sentence on Petitioner. App. 50, ll. 4-6.

On September 23, 2010, another hearing was held before Judge Culbertson at which Petitioner's counsel requested the court to reconsider the twenty (20) sentence and to consider only sentencing Petitioner to the mandatory minimum of fifteen (15) years. App. 62 – 79. The court denied Petitioner's motion to reconsider the sentence and left the twenty (20) year sentence in place. App. 79, ll. 6-9.

Direct Appeal

Petitioner appealed his sentence of twenty (20) years to the South Carolina Court of Appeals, arguing that the Trial Court abused its discretion in sentencing Petitioner to twenty (20) years for distribution of crack cocaine third offense in light of Petitioner's young age, the small amount of cocaine at issue, and because Petitioner had never spend any substantial amount of time in prison. The Court of Appeals affirmed Petitioner's twenty (20) year sentence on March 14, 2012. App. 81.

PCR Application and Evidentiary Hearing

On April 20, 2012, Petitioner filed his application for post-conviction relief (“PCR”) seeking relief and requesting that only the mandatory sentence of fifteen (15) years be imposed upon him. App. 82 – 88. The State filed its Return on July 3, 2012. App. 89 – 93.

An evidentiary hearing was held before the Honorable Steven H. John on November 16, 2012. App. 94 – 112. Paul Archer represented Petitioner, and the State was represented by Assistant Attorney General Tyson Andrew Johnson, Sr. App. 94. Both Petitioner and his plea counsel testified at the evidentiary hearing. App. 96, l. 15 – 110, l. 13.

Petitioner testified that at one time he had a plea offer for fifteen (15) years that he did not accept, but that after the jury was selected, he decided to plead guilty and received a twenty (20) year sentence. His complaint was that he had wanted his plea counsel to obtain back the prior fifteen (15) year plea offer. App. 97, ll. 2-17.

On cross-examination, Petitioner explained that the fifteen (15) year plea offer was made to Eric Fox, his previous attorney. App. 97, l. 21 – 25. Petitioner explained that after his arraignment, Eric Fox advised him to retain Charles Barr, his current plea counsel, to represent him so that Petitioner might get a better deal from the State. When Petitioner went to see Barr, Barr told him that the solicitor was not willing to work with him. So when Petitioner went to court, the solicitor said that Barr never presented any plea deal and that was how Petitioner ultimately ended up with the twenty (20) year sentence. App. 98, ll. 8-15. Petitioner’s complaint against Barr was that he did not do anything on Petitioner’s behalf to try to get a good plea deal. App. 98, l. 19 – 99, l. 17.

Barr testified that at the time Petitioner retained him for his services, the State had already taken the fifteen (15) year plea offer made to Eric Fox off the table. App. 103, ll. 6-

11. Barr acknowledged that when Petitioner retained him instead of using a public defender, that Petitioner certainly retained Barr because Petitioner felt Barr could “do something better for him.” App. 106, l. 18 – 107, l. 10.

The PCR court ruled from the bench that Petitioner had not shown that his plea counsel was ineffective in any manner and denied Petitioner’s PCR application. App. 110, l. 15 – 111, l. 20.

Order of Dismissal

On December 14, 2012, Judge John filed his Order of Dismissal concluding that Petitioner had not established any constitutional violations or deprivations that would require the court to grant his PCR application. App. 113 – 117.

This petition for writ of certiorari follows.

ARGUMENT

The PCR Court erred in finding that plea counsel provided effective assistance of counsel where plea counsel did not attempt to obtain any favorable plea offer for Petitioner and Petitioner was ultimately sentenced to a twenty (20) year sentence which was five years above the mandatory minimum sentence.

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).

Here, Petitioner asserts that his retained plea counsel failed to even attempt to work with the solicitor to obtain a favorable plea offer and therefore, Petitioner ended up pleading without any sort of negotiated plea or recommendation by the State which ultimately led to the twenty (20) year sentence imposed by Judge Culbertson. Plea counsel has a duty to effectively represent Petitioner during the plea-bargaining stage and yet, according to Petitioner, Petitioner's plea counsel did not even undergo this process with the State. Had Petitioner's plea counsel worked more effectively on Petitioner's behalf, Petitioner would most likely not have received a twenty-year sentence. Therefore, Petitioner requests that this Court reverse the PCR court's denial of his application for relief.

CONCLUSION

Based on the foregoing reasons, Petitioner Octavius Omar Collins respectfully requests this Court to grant his Petition for Writ of Certiorari and allow for full briefing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Ganjehsani', is written over a horizontal line.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GEORGETOWN COUNTY
STEVEN H. JOHN, CIRCUIT COURT JUDGE

OCTAVIUS OMAR COLLINS,

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V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2012-213660

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Octavious Omar Collins states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on November 16, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Octavious Omar Collins.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of September, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

OCTAVIUS OMAR COLLINS,

PETITIONER,

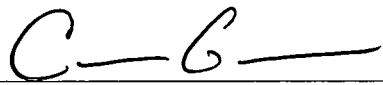
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

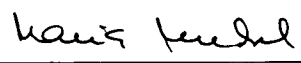
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Tyson Andrew Johnson, Sr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Octavious Omar Collins, #303278, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of September, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of September, 2013.



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