

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

R. Ferrell Cothran, Jr., Circuit Court Judge

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SEP 30 2013

S.C. Supreme Court

JAMES WESLEY BOONE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000263

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ISSUE PRESENTED

Trial counsel erred in failing to clarify with the solicitor the expiration date attached to the state's plea offer in order to advise petitioner of the same because petitioner believed there was no expiration date on the plea offer, but learned later that the plea offer lapsed after he selected a jury for trial, even though he decided ultimately to plead guilty as charged.

STATEMENT

Petitioner James Wesley Boone pled guilty to armed robbery during the September 2009 term of the Sumter County General Sessions Court before Judge George C. James. Petitioner was sentenced to imprisonment for a period of eighteen years. App. 1-24. A sentencing reconsideration hearing was held on September 17, 2009, (two days after the plea proceeding), at the Sumter County General Sessions Court before Judge James. At that time, Judge James reduced petitioner's sentence to imprisonment for a period of fourteen years. App. 26-39. Petitioner was represented by Lauren Stevens at the plea proceeding and sentence reconsideration hearing. Petitioner did not enjoy the benefit of a direct appeal.

On October 18, 2011, petitioner filed a PCR application with the Sumter County Office of the Clerk of Court. App. 41-48. The respondent filed a return dated December 19, 2011, requesting that a hearing be held in response to petitioner's PCR application. App. 49-52.

A PCR hearing was convened on December 10, 2012, at the Sumter County Courthouse before Judge Ferrell Cothran. Petitioner was present at the hearing and was represented by Charles T. Brooks. App. 54-95. On January 24, 2013, Judge Cothran issued an order of dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 97-107.

Petitioner appealed Judge Cothran's order of dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to clarify with the solicitor the expiration date attached to the state's plea offer in order to advise petitioner of the same because petitioner believed there was no expiration date on the plea offer, but learned later that the plea offer lapsed after he selected a jury for trial, even though he decided ultimately to plead guilty as charged.

During the plea proceeding, the solicitor apprised the plea judge of the facts of the case. According to the state's summary, around 9:00 p.m. on September 13, 2006, petitioner, who allegedly wore a hooded jacket and a white mask, walked into Mrs. Lee's Chinese Restaurant (Twin Dragon) near Shaw Field and demanded money. Mrs. Lee complied. Thereafter, petitioner was arrested in connection with the robbery. App. 14, l. 16-p. 16, l. 22. Prior to accepting the plea, the trial judge made it clear that the plea was being accepted without any recommendations, i.e. sans any plea bargains and/or negotiations. App. 3, l. 15-p. 4, l. 2.

Prior to the plea proceeding, a plea bargain was reached where petitioner was supposed to have received a ten-year sentence in exchange for entering a plea of guilty to the armed robbery charge. Apparently, counsel and petitioner were unaware of the solicitor's stipulation that the offer would expire if petitioner exercised his right to a trial by jury. Thereafter, petitioner commenced to select a jury in contemplation of a trial by jury, but then immediately abandoned the idea of a trial and decided to plead guilty and accept the state's ten-year plea offer. At that point, counsel and petitioner learned that the plea offer had expired when the jury was selected for trial. Neither counsel nor petitioner knew that such an act, i.e., the

jury selection, would result in the expiration of the plea offer. App. 32, l. 6 – p. 33, l.

7. This issue was addressed by counsel at the resentencing hearing as follows:

Trial Counsel: My motion is based on the fact that there was a negotiated plea offer that was never formally rescinded until after my client and I had signed a plea sheet that still had it as a negotiated plea and at no time did Mr. Conner tell me that picking a jury would end that negotiated plea. App. 28, lines 4-15.

Solicitor: Your Honor, a negotiated sentence. I told her the first week, the week of September 7th that if he would plea, I would be agreeable to a negotiated ten (10) year sentence. She had all week to do it ...Nothing happened that week. She did lead me to believe that he was leaning toward accepting the plea. On Monday afternoon, right over there at the probation agents table I had a discussion with her and let her know that after we drew the jury there would not be a negotiated agreement. App. 30, 16 - 23.

Trial Counsel: Your Honor, that was after --- [solicitor] gave me the plea sheet...with negotiated still marked on it. No time after that when he gave me the plea sheet did he say he cannot have ten (10) years. After we, right before we picked the jury I was taking the plea sheet back to him and he was upset that Mr. Scurry was getting off so Mr. Conner looks at him and says go sit down we'll pick your jury. Not at that time did he say and the ten (10) years is gone. I still had a plea sheet, Your Honor, with negotiated ten (10) year sentence written on it. App 31, lines 14-25.

Ultimately, the trial judge resentenced petitioner and committed petitioner to prison on a new sentence of fourteen years, which was four years less than his original sentence. App. 38, lines 23-25.

During the PCR hearing, petitioner testified that trial counsel informed him that he would receive a ten-year sentence in exchange for his plea of guilty on the armed robbery charge when he came to court to plead guilty per that plea bargain. Petitioner added that when they were all seated in the courtroom, trial counsel advised him that the ten-year plea offer was no longer available. Petitioner explained that counsel tried to correct and remedy the

misunderstanding during a sentencing reconsideration hearing, but the plea judge only reduced his sentence by four years (from an eighteen year sentence to a fourteen year sentence). App. 60, l. 9-p. 64, l. 19. Petitioner stated that if he had known that he would have ended up with a fourteen year sentence, then he would never have pled guilty, but rather had a jury trial because he relied on the ten-year offer when he plead guilty. App. 65, l. 10; App. 65, l. 20-p. 66, l. 5. Petitioner stated that he pled guilty nonetheless because counsel led him to believe that he would still probably end up with a ten-year sentence sans the plea bargain. App. 62, l. 19-p. 63, l. 4; App. 69, l. 9-21.

Trial counsel testified at the PCR hearing as well. Counsel explained that the solicitor agreed to the ten-year plea offer in the case. App. 91, lines 13-19. Counsel added that she delayed the actual plea so that petitioner could spend time with his family, and that when she and petitioner went forward with selecting a jury for a trial, they believed that the ten-year option was still viable regardless of their actions, which was why the idea of a trial was abandoned and the plan to move with the plea came into play. Counsel explained further that neither she nor petitioner knew that the plea offer lapsed and was off the table when the jury was selected, which was before the decision was made to abandon the trial and plead guilty as charged. Counsel added in effect that when the trial was aborted, she was still in possession of a sentencing sheet that said “negotiated ten-year sentence” believing that the plea offer remained viable. Counsel admitted that she advised petitioner before his plea that the negotiated plea no longer existed. App. 87, l. 10-p.88, l. 23. Counsel was not apprised until the jury was selected that such an act (i.e. the selection of a jury) would result in the expiration of the plea offer. App. 92, lines 14-25.

Counsel's PCR testimony regarding the matter follows:

MS.STEVENS: The solicitor and I had a conversation. He did not, at that point, tell me the deal was off the table. We did pick a jury. I still had the sentencing sheet. The sentencing sheet still had negotiated 10-year sentence."

I explained to Jessie when he signed it that it still said "negotiated 10-years," and as far as I was concerned, since [the solicitor] had not verbally told me that that was no longer the case, that it was the case when he signed it.

When I took it to [the solicitor], he scratched out the negotiated plea and said "I picked a jury. There is no longer a negotiated plea." App. 87, l. 17 – p. 88, l. 2.

The PCR judge ruled that counsel's performance was reasonable and effective because counsel was not the cause of the lapsed plea offer, but rather it was petitioner's request to delay adjudication (presumably the reason for the selecting of the jury) that ended the plea offer and that petitioner pled guilty knowing that the offer was not in effect at that time. App. 104-105.

The Sixth Amendment right to effective assistance of counsel extends to cases involving plea offers, particularly where plea offers lapse and where prejudice is shown, i.e. that the defendant would have accepted the plea before the expiration date but for counsel's error in allowing the expiration date to pass before acceptance of the offer. Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not convey the plea offer to the defendant and as a result, the plea offer expired. See Davie v. State, 381 S.C. 601; 675 S.E. 2d 416 (2009), where the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer (due to counsel's error) until after the plea offer had expired, and that he would have accepted that

to counsel's error) until after the plea offer had expired, and that he would have accepted that plea offer had it been communicated to him. In Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), where counsel erred in advising the defendant that the plea offer would have remained open until after the suppression hearing ended, but in reality, the offer expired at the close of the suppression hearing held in the case.

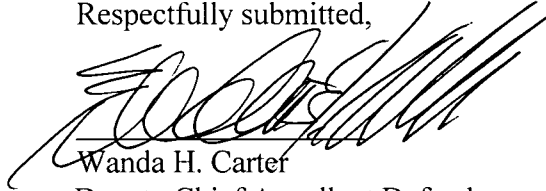
In the case at bar, counsel did not learn until after the jury was selected that such an action would end the availability of the plea offer, even though petitioner ultimately nixed the idea of a trial by jury. Had counsel known this and communicated the same to petitioner, then they would not have selected a jury panel, but rather moved to enter the guilty plea immediately.

A defendant has a right to effective assistance of counsel during the plea bargaining process. Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1196), overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. Additionally, a guilty plea must represent a voluntary and intelligent choice among the alternative causes of action open to the defendant. Hill v. Lockhart, 474 U.S. 52 (1985). Here, counsel's error regarding the failure to communicate the deadline to accept the ten-year plea offer violated petitioner's right to receive effective legal assistance in his case as guaranteed under the Sixth Amendment to the United States Constitution. Petitioner was prejudiced because he would have accepted the ten-year plea offer and avoided a greater sentence but for counsel's error in failing to advise of the end date on which the ten-year plea offer expired.

CONCLUSION

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

Respectfully submitted,

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

Wanda H. Carter
Deputy Chief Appellant Defender
ATTORNEY FOR PETITIONER

This 30th day of September, 2013.

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JAMES WESLEY BOONE,

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CERTIFICATE OF SERVICE

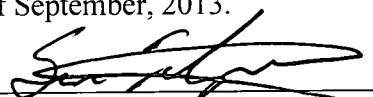
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire this 30th day of September, 2013.



Wanda H. Cartey
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of September, 2013.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.