

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

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S.C. Supreme Court

ANTROWN A. IRBY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000954

PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Does the record support the PCR court's finding that plea counsel was not deficient in failing to accept the State's original negotiated ten year plea offer where both Petitioner and counsel testified that the offer resolved all outstanding charges except a possession of crack cocaine charge, which carries a maximum sentence of three years imprisonment, and where after the offer was rescinded, plea counsel accepted a fifteen year plea offer to resolve all outstanding charges including the possession of crack cocaine charge?

STATEMENT

The State alleged that on February 8, 2009, Appellant used a firearm to rob a man in a Spartanburg hotel room, and in the course of the robbery, he discharged the firearm and wounded the victim. App. 12, ll. 20-25. The State also alleged that on March 26, 2009, law enforcement found Petitioner in the back of a stopped vehicle with 0.02 grams of crack cocaine. App. 13, ll. 4-10. Around this time Petitioner was also facing a charge for possession of stolen goods. App. 40, ll. 19-25; App. 48, l. 11 –App. 49, l. 13. Attorney Richard H. Whelchel was Petitioner’s appointed counsel. App. 35, ll. 16-17.

On February 24, 2011, to resolve all of his outstanding charges, Petitioner pled guilty on a negotiated sentence of fifteen years to assault and battery with intent to kill, armed robbery, and possession of crack cocaine.¹ App. 10, l. 25 – App. 17, l. 2. He subsequently filed an application for post-conviction relief on January 25, 2012 claiming ineffective assistance of plea counsel. App. 19-25. The State filed a return on September 28, 2012. App. 26-29.

On January 9, 2013, a PCR hearing was held before the Honorable J. Derham Cole. Suzanne H. White represented the State, and R. Patrick Martin represented Petitioner. App. 32. Petitioner testified that at one of his initial meetings with plea counsel around August of 2009, plea counsel told Petitioner that solicitor Jacquelyn Moss had offered a negotiated ten-year plea bargain to resolve the assault and battery, armed robbery, and possession of stolen goods charges. App. 39, l. 20 – App. 40, l. 19. Plea counsel later testified to substantially the same:

Q: Okay. And you heard us talk about the letter of 2009 where they offered a recommendation of concurrent sentencing with potentially a 10-year cap. Did you discuss that with the applicant?

¹ Under S.C. Code Ann. § 4-53-375(A) (1976), “[a] person possessing less than one gram of [crack] cocaine . . . is guilty of a misdemeanor and, upon conviction for a first offense, must be imprisoned not more than three years or fined not more than five thousand dollars, or both.”

A: Yes

. . .

There were still other pending charges that were made, and I think Ms. Moss made reference to them in that letter.

Q: Okay. And so your understanding was it was the [possession of stolen goods] charge.

A: Yes, ma'am.

Q: The 10-year cap. And the concurrent was for everything else?

A: Yes, ma'am.

. . .

Q: At this point you then got a 2010 offer that again stated concurrent to all cases.

A: Uh-huh.

Q: Did you convey that as well to Mr. Irby?

A: Yes, ma'am.

App. 44, l. 24 – App. 46, l. 3; App. 48, l. 11 – App. 49, l. 19. Petitioner and counsel agreed the bargain was favorable and agreed to accept it. App. 35, l. 24 – App. 36, l. 21.

Both Petitioner and counsel also testified that counsel never accepted the offer, and approximately three weeks later, a replacement solicitor on the case, Michael Morin, rescinded the offer and filed a notice of intent to seek life without parole if Petitioner was found guilty.

Q: Now, did I hear you right when you testified earlier that the 10-year plea was no longer an option? Is that what you told us?

A: It was taken off the table.

Q: Taken off the table. So you didn't accept it before it was taken off the table. Is that a no?

A: No I didn't accept it before it was taken off the table.

App. 36, l. 23 – App. 37, l. 11; App. 46, ll. 9-19; App. 48, l. 11 – App. 49, l. 19.

Further testimony revealed that around April of 2010, counsel negotiated a fifteen year plea to the charges of assault and battery with intent to kill, armed robbery, and possession of crack cocaine. Counsel and the solicitor intended for the plea to resolve all outstanding charges against Petitioner. App. 37, l. 22 – App. 38, l. 1; App. 40, ll. 20-25; App. 45, l. 24 – App. 47, l. 9. On February 24, 2011, Petitioner and counsel attended the plea hearing before the Honorable Mark Hayes. Solicitor Morin represented the State. App. 1. The plea judge accepted the plea, finding that a sufficient factual basis existed for the plea and that Petitioner made the plea freely and knowingly. App. 17, ll. 3-13. The plea judge sentenced Petitioner to concurrent fifteen year sentences for the assault and battery and armed robbery charges and three years concurrent for the possession charge. App. 17, ll. 14-20.

On April 12, 2013, the PCR court issued its order dismissing Petitioner's claims. App. 52-58. The court found that at the time of his plea, Petitioner was aware that the ten year deal was rescinded, and he was pleading to a negotiated sentence of fifteen years. The court also found that, based on his testimony, plea counsel understood that the ten year offer did not include either the armed robbery or assault and battery charge. Accordingly, the court found Petitioner failed to show any deficiency or prejudice. App. 55.

ARGUMENT

- I. **The record does not support the PCR court's finding that plea counsel was not deficient in failing to accept the original negotiated plea offer because the failure resulted in Petitioner's ultimately receiving a longer sentence.**

The record does not support the PCR court's finding that plea counsel was not deficient in failing to accept the original negotiated plea offer because the failure resulted in Petitioner's ultimately receiving a longer sentence. The Sixth Amendment to the United States Constitution

guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

The right to effective assistance of counsel extends to plea negotiations. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (“This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”). Counsel’s performance can be deficient based on counsel’s failure to accept a favorable plea offer. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (“As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3 [and one] half times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied.” (citations omitted)).

In this case, both Petitioner and counsel testified that solicitor Moss initially offered a negotiated ten year plea bargain to resolve the assault and battery, armed robbery, and possession of stolen goods charges. They also testified that counsel failed to accept the offer despite Petitioner’s instructions to do so. Had counsel accepted the offer, Petitioner would have received a ten year sentence for these charges. Under subsection 4-53-375(A) for the subsequent possession of crack cocaine charge, Petitioner could at most be sentenced to three more years; therefore, at most Petitioner would be imprisoned for fifteen years. However, counsel failed to accept the plea

offer before solicitor Morin withdrew it and filed the notice of intent to seek life without parole. Thereafter counsel was only able to secure a negotiated plea bargain for fifteen years to resolve all the charges including the possession of crack cocaine charge. Accordingly, the record establishes that counsel was deficient in subjecting Petitioner to a sentence at least two years longer than it should have been.

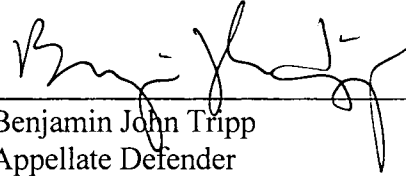
In its order, the PCR court found that counsel was not deficient because Petitioner knowingly and voluntarily pled guilty to the negotiated sentence of fifteen years. Based on the testimony of counsel's failure to accept a more favorable plea offer, the record does not support the finding that counsel was not deficient. Whether Petitioner's later plea for a harsher sentence was knowing and voluntary was simply not at issue in the case.

The PCR court also found that, based on his testimony, plea counsel understood that the ten year offer did not include either the armed robbery or assault and battery charge. The record similarly does not support this finding for two reasons. First, Petitioner explicitly testified that plea counsel informed him Jacquelyn Moss had offered a negotiated ten-year plea bargain to resolve the assault and battery, armed robbery, and possession of stolen goods charges. Second, plea counsel testified that the original ten year offer was made for the possession of stolen goods charge and included concurrent sentencing for all other charges. He also testified that the second offer *again* included concurrent sentencing for all charges. Thus, the record establishes that plea counsel was deficient in failing to accept the initial plea offer. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



A handwritten signature in black ink, appearing to read 'Benjamin John Tripp', is written over a horizontal line. The signature is stylized and cursive.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

ANTROWN A. IRBY,

PETITIONER,

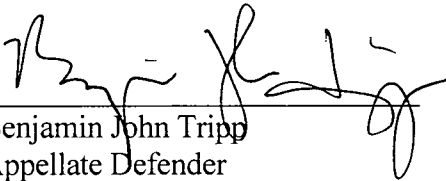
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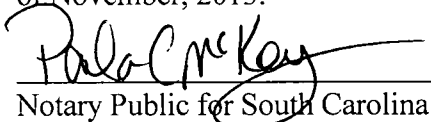
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of November, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of November, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.