STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Doyet A. Early, III, Circuit Court Judge

MICHAEL ANTHONY ALLEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-000739

PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
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INDEX

ISSUES PRESENTED

I. Whether the PCR court erred in finding that plea counsel provided effective assistance of counsel where Petitioner would have accepted the State's prior more favorable plea offer of fifteen (15) years had his plea counsel shown him the damaging surveillance footage that Petitioner was ultimately not made aware of until the first day of trial?

II. Whether the PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to inform Petitioner that if he had continued with the trial, he could have requested a charge on the lesser included offense of strong-arm robbery and might have been convicted of this lesser offense?

STATEMENT

Indictments

On October 16, 2006 Petitioner Michael Anthony Allen was indicted by the Aiken County Grand Jury for (1) armed robbery; (2) carjacking; and (3) grand larceny. App. 302-304; 306-308; 310-312.

Guilty Plea

On September 21, 2009, Petitioner appeared before the Honorable R. Markley Dennis, Jr. and a jury for a trial on the above-referenced charges. App. 1. Petitioner was represented by Charles H. S. Lyons, III, and the State was represented by Assistant Solicitors Stephen P. Kodman and J. William Weeks. Id.

On September 22, 2009, during the middle of trial, Petitioner pled guilty as indicted to all three charges. App. 186, l. 18 – 198, l. 16; 201, l. 12 – 202, l. 16.

Judge Dennis sentenced Petitioner to (1) twenty-four years for armed robbery; (2) twenty years for carjacking; and (3) five years for grand larceny with the sentences to run concurrently. App. 227, ll. 5 – 16.

Direct Appeal

Appellant Defender Robert M. Pachak filed an appellant's brief with the South Carolina Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967) arguing that Petitioner's guilty plea did not comply with the mandates set forth in Boykin v. Alabama, 395 U.S. 238 (1969). The Court of Appeals dismissed the appeal on June 21, 2011. App. 229.

PCR Application and Evidentiary Hearing

On April 5, 2012, Petitioner filed his application for post-conviction relief ("PCR"). App. 230-235. The State filed its Return on May 30, 2012. App. 236-241.

An evidentiary hearing was held before the Honorable Doyet A. Early, III on January 23, 2013. App. 248-290. Petitioner was represented by Christopher C. Johnson, and the State was represented by Assistant Attorney General Megan E. Harrigan. App. 248. Both Petitioner and his plea counsel testified at the hearing. App. 251-288.

Petitioner testified that he was never advised by his plea counsel that the jury could have been charged on the lesser included offense of strong-arm robbery and that if he had known that, it would have influenced his decision to plead guilty. App. 261, ll. 17 – 25.

Petitioner also testified that when he met with his plea counsel on April 14, 2009, his plea counsel showed him video footage from the alleged armed robbery at the B.P. station which showed a subject wearing a heavy camouflage coat and a dark black cap. App. 252, ll. 5-19. Petitioner believed that this tape did not show any armed robbery taking place. App. 254, ll. 2 -16. Therefore, when the State offered a fifteen (15) plea deal, Petitioner declined because the video footage was not very strong against him. App. 258, l. 8 – 259, l. 14.

On the first day of trial, September 21, 2009, Petitioner was shown an additional part of the video footage from the B.P. station that was much more damaging against him. He had never seen this additional video footage prior to the first day of trial. App. 252, l. 19 – 254, l. 1. Petitioner asserted he would have been much more likely to have accepted the fifteen (15) year plea deal had he been shown the more damaging video footage when the plea offer was made to him. App. 258, l. 8 – 259, l. 21.

Plea counsel confirmed at the evidentiary hearing that Petitioner had been offered a fifteen (15) year plea deal by the State. App. 277, ll. 3-6; 278, ll. 10-21. Plea counsel also recalled watching the video footage from the B.P. station with Petitioner. App. 279, ll. 13-25. Plea counsel acknowledged that the first video they watched was not the complete video. Plea counsel testified that the additional video footage which he showed Petitioner on the first day of trial "showed more active participation from a person that was no doubt [Petitioner] . . . ." App. 280, ll. 1-11. In plea counsel's opinion, the additional video footage that he showed to Petitioner on the first day of trial was much worse for Petitioner's case than the first video footage he had shown to Petitioner earlier in the year. App. 282, ll. 13-19. Plea counsel agreed that Petitioner had never seen the more harmful video footage prior to trial. App. 282, ll. 20-24.

Plea counsel could not recall exactly why only a part of the video was viewed before the trial date. He thought for some reason all of the lawyers were missing that part of the video or he just did not get to that part of the video when showing it to Petitioner. The night before trial, plea counsel went back to review the video again and that is when plea counsel noticed the additional, more damaging part of the video. App. 281, ll. 8 -17.

At the conclusion of the evidentiary hearing, Judge Early denied Petitioner's PCR application. App. 290, ll. 18-20.

Order of Dismissal

On March 13, 2013, Judge Early filed his Order of Dismissal denying and dismissing Petitioner's PCR application with prejudice. App. 292-301.

This petition for writ of certiorari follows.

ARGUMENT

I. The PCR court erred in finding that plea counsel provided effective assistance of counsel where Petitioner would have accepted the State's prior more favorable plea offer of fifteen (15) years had his plea counsel shown him the damaging surveillance footage that Petitioner was ultimately not made aware of until the first day of trial.

It is undisputed from the evidence presented at the PCR evidentiary hearing that when the State extended a fifteen (15) year plea offer to Petitioner that Petitioner was not shown all of the State's evidence against him, specifically the additional, more damaging video footage from the B.P. station. Therefore, when Petitioner declined the fifteen (15) year plea deal, he based his decision off the video footage his plea counsel had shown him which did not strengthen the State's case. Has his plea counsel realized sooner than the night before trial that the video footage did actually contain additional, more damaging video footage against Petitioner, Petitioner would have accepted the State's fifteen (15) year plea deal at that time rather than proceeding with trial and subsequently pleading guilty, ultimately receiving a total imprisonment term of twenty-four (24) years.

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).

In Missouri v. Frye, the "case [arose] in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later." Frye , 132 S.Ct. at 1404. There were two questions before the United States Supreme Court in Frye: (1) "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected[;]" and (2) "If there is a right to effective assistance with respect to those offers, . . . what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance." Frye, 132 S.Ct. at 1404.

The Frye Court noted that the "Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, post-indictment interrogations, post-indictment line ups, and the entry of a guilty plea." *Id.*, 132 S.Ct. at 1405 (citations and internal quotation omitted). The Frye Court held that the right to effective assistance of counsel extends not only to those situations in which a criminal defendant accepts a plea bargain and waives his right to trial, but also to situations where plea offers are rejected or allowed to lapse. Id. at 1409.

In support of its holding, the Frye Court explained:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours 'is for

> the most part a system of pleas, not a system of trials,' Lafler, post, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

Id. at 1407.[1] The Court emphasized, "*In today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant*" and "*defense counsel have responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires.*" Id. at 1407 (emphasis added). Accordingly, "[a]nything less [than effective counsel during plea negotiations] . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted)).

Having found that the Sixth Amendment right to effective assistance counsel applies to the plea bargaining stage, the Frye Court then applied the Strickland ineffective assistance of counsel standard to the plea bargaining stage: (1) whether plea counsel's performance was deficient by failing to communicate the prior more favorable plea offer to Frye; and (2) whether Frye was prejudiced as a result of plea counsel's deficient performance. The Frye Court held that plea counsel's performance was deficient, as it fell below "an objective standard of reasonableness" when he "did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired." Id. at 1410.

As to proving prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, the Frye Court adapted the Strickland standard to require a

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[1] The Frye Court noted, the "simple reality" is that "ours 'is for the most part a system of pleas, not a system of trials.'" Frye , 132 S.Ct. at 1407 (citing Lafler, 132 S.Ct. at 1388). Specifically, "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Id.

PCR claimant to show: (1) that there is "a reasonable probability [the defendant] would have accepted the earlier [more favorable] plea offer had [he] been afforded effective assistance of counsel[;]" and (2) that there is "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." Id. at 1409.

The Frye Court noted, "[I]n most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." Id. at 1410. Therefore, "[t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or *a sentence of less prison time*." Frye, at 1409 (emphasis added); see also Glover v. United States, 531 U.S. 198, 203 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance"), quoted with approval in Lafler, 132 S.Ct. at 1387.

Applying the modified Strickland standard, the Frye Court found that "there appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor." Id. at 1411. Notably, the Court noted that Frye had received a "new offense" after having received the former plea offer, and that the lower court failed to address whether the plea offer would have been adhered to by the prosecution and accepted by the court. Id. at 1411. Consequently, the Court remanded the case to allow the state court to address that question. Id. at 1411.

In the companion case of Lafler, the United States Supreme Court found that while the favorable plea offer was reported to the client, the client, on the advice of counsel, rejected the plea offer and proceeded to trial, receiving a harsher sentence than that offered in the rejected plea. 132 S. Ct. at 1383. The client in Lafler had been charged with assault with intent to murder, but his defense attorney convinced him to reject a favorable plea offer by informing the client that the prosecution would be unable to establish his intent to murder since he shot the victim below the waist. Id. This advice was erroneous, and the client received a far more severe sentence after a trial than he would have received had he accepted the favorable plea offer and had not rejected it based on his counsel's deficient advice. Id. at 1386. The Court in Lafler concluded that the client was prejudiced by his counsel's deficient performance in advising him to reject the plea offer and proceed to trial. Id.

This Court, even prior to the United States Supreme Court's decisions in Frye and Lafler, 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).

Deficient Performance and Prejudice

In this case, the PCR court erred in denying Petitioner's claim of ineffective assistance of counsel where it was undisputed at the PCR hearing that when the State made its more favorable plea offer of fifteen (15) years to Petitioner, Petitioner lacked complete information of the State's evidence against him – the additional, more damaging video footage from the B.P. station. App. 252, l. 9 -254, l. 19; 279, l. 14 – 280, l. 11; 281, ll. 8-17; 282, ll. 13-24. From plea counsel's testimony, it appears either this additional footage

was missing by all the lawyers or that plea counsel did not watch the entire video footage prior to showing only the first part of it to Petitioner. App. 281, ll. 11-17. Either way, there is no question that when Petitioner rejected the favorable plea offer to proceed to trial, he was unaware of the more harmful video footage against him. Had he been aware of this additional footage at the time of the plea offer, Petitioner testified he most likely would have accepted it. 259, ll. 11-14.

Petitioner was prejudiced by his plea counsel's deficient performance in not discovering and making Petitioner aware of the additional, more damaging video footage against him when the State made the initial plea offer of fifteen (15) years. Lacking this critical information, Petitioner proceeded to trial and then subsequently pled guilty after finally viewing on the first day of trial the more harmful video footage against him. Petitioner then received a greater prison term – a total of twenty-four (24) years. The difference in the sentence Petitioner received and the plea offer is proof of prejudice. See Davie, 381 S.C. at 614, 675 S.E.2d at 423.

There is also absolutely no evidence in the record that the State would have withdrawn the plea offer or that the plea judge would not have accepted the Petitioner's plea. Therefore, the PCR court erred in denying Petitioner post-conviction relief based on his rejection of a more favorable plea offer when he lacked complete information to make an intelligent and informed decision whether to accept or reject the more favorable fifteen (15) year plea offer.

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-four (24) year sentence. Davie, 381 S.C. at 614-16, 657 S.E.2d at 423-24.

II. The PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to inform Petitioner that if he had continued with the trial, he could have requested a charge on the lesser included offense of strong-arm robbery and might have been convicted of this lesser offense.

In the alternative, Petitioner asserts that he was prejudiced by his plea counsel's failure to advise him that if he continued with the trial instead of pleading guilty, he could have requested a charge of the lesser included offense of strong-arm robbery and therefore, could have been convicted on the lesser included offense instead of armed robbery.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31(1970)). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

The evidence at the PCR hearing was uncontroverted that Petitioner was not advised of the lesser included offense of strong-arm robbery. App. 261, ll. 17-25. Strong-arm robbery, defined as the "taking from the person or immediate presence of another by violence or intimidation," is a lesser included offense of armed robbery. State v. Moore, 374 S.C. 468, 476-77, 649 S.E.2d 84, 88 (Ct. App. 2007); State v. Scipio, 283 S.C. 124, 125-26, 322 S.E.2d 15, 16 (1984). The common law offense of robbery is punishable by a maximum sentence of fifteen (15) years. S.C. CODE ANN. § 16-11-325.

In this case, Petitioner was adamant throughout his plea counsel's entire representation of him and at both the guilty plea hearing and the PCR hearing that he was not in possession of weapon during the robbery of the clerk at the B.P. station. App. 211, ll. 16-25; 220, ll. 21-25; 221, ll. 8-12; 269, l. 25 – 271, l. 22.

Despite the clerk's testimony that it appeared Petitioner showed her the "hand part" of a gun in his coat, Petitioner did not recall doing that and disputed that he led the clerk to believe that he was in the possession of a weapon. App. 160, ll. 19-21; 222, l. 25 – 223, l. 9; 271, ll. 11-22.

In Kerrigan v. State, 304 S.C. 561, 561-63, 406 S.E.2d 160, 161-62 (1991), this Court held that defense counsel was ineffective in advising the petitioner to plead guilty to grand larceny where defense counsel failed to inform the petitioner that if he went to trial, he could have requested a charge on the lesser offense of use of a vehicle without permission and might have been convicted of that offense and have received a lesser punishment. This Court found the defendant satisfied the prejudice prong of the ineffective assistance of

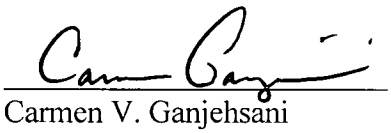
counsel test because but for counsel's errors, the petitioner would not have pled guilty and would have insisted on going to trial in an effort to mitigate his sentence. Id. at 564, 406 S.E.2d at 162.

Likewise, Petitioner's plea counsel also failed to inform him that he could have requested the lesser included offense of strong-arm robbery and might have been convicted of that lesser offense which carried only a maximum of fifteen (15) years instead of the twenty-four (24) years Petitioner received for armed robbery. Therefore, where Petitioner testified that this information would have influenced his decision to plead guilty or not and where Petitioner received a harsher punishment for armed robbery than he would have received had he been convicted of the lesser included offense of strong-arm robbery, Petitioner has established that he was prejudiced by his plea counsel's ineffective assistance of counsel. Therefore, Petitioner is entitled to the relief of a new trial.

CONCLUSION

For the reasons set forth herein, the PCR court erred in denying Petitioner's Application for Post-Conviction Relief. This Court should grant Petitioner's writ of certiorari with the ultimate relief of either (1) a remand for resentencing; or alternatively, (2) a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of January, 2014.

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MICHAEL ANTHONY ALLEN,

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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, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Michael Anthony Allen, #155673, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 2nd day of January, 2014.

C G

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of January, 2014.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.