

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Clarendon County

Honorable H. Steven DeBerry, IV, Circuit Court Judge

TAMMY D. BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-000763

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX	i
ISSUES PRESENTED.....	1
STATEMENT	2
ARGUMENTS	
I.	
The PCR court erred by finding that trial counsel was not ineffective for failing to adequately advise Petitioner to accept a favorable plea offer.	5
II.	
Pursuant to <i>Fishburne v. State</i> , 427 S.C. 505, 832 S.E.2d 584 (2019), this case should be remanded to the PCR court for findings of fact and conclusions of law regarding Petitioner’s allegation that trial counsel did not properly advise her of the consequences of rejecting a plea deal, where evidence was presented at the PCR hearing supporting that allegation and PCR counsel argued the merits of that allegation in summation.	9
CONCLUSION.....	12

ISSUES PRESENTED

I. Whether the PCR court erred by finding that trial counsel was not ineffective for failing to adequately advise Petitioner to accept a favorable plea offer?

II. Whether, pursuant to *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019), this case should be remanded to the PCR court for findings of fact and conclusions of law regarding Petitioner's allegation that trial counsel did not properly advise her of the consequences of rejecting a plea deal, where evidence was presented at the PCR hearing supporting that allegation and PCR counsel argued the merits of that allegation in summation.?

STATEMENT

Background

At around midnight on August 20, 2014, Petitioner was involved in a two-car collision which resulted in the death of the driver of the other vehicle and injury to the passenger in the other vehicle. Petitioner was indicted at the December 11, 2014 term of the Clarendon County grand jury for felony DUI resulting in death and felony DUI resulting in great bodily injury. App. 901-902.

Petitioner was tried between May 14-18, 2018, before the Honorable R. Ferrell Cothran and a jury. App. 1. Retained counsel Charles Barr represented Petitioner; Christopher R. Durant and Hugh McMillian represented the state. App. 1. At trial, the state presented evidence that a blood draw was taken from Petitioner pursuant to a search warrant on the night of the accident. App. 249-253. The blood draw revealed that Petitioner's blood alcohol concentration (BAC) was 0.21. App. 463, l. 8. The state also presented an expert accident reconstructionist who testified that Petitioner was travelling at least 64.6 miles per hour at the time the accident sequence began. App. 553, ll. 20-21.

At some point near the end of the trial, the state made a plea offer to Petitioner, where she would plead guilty in exchange for a five-year prison sentence. App. 859, ll. 6-7. Judge Cothran "stopped the trial," according to trial counsel, and allowed Petitioner and trial counsel to discuss the plea deal in a conference room. App. 859, ll. 19-22. Ultimately, Petitioner did not enter a guilty plea.

The jury convicted Petitioner as indicted. App. 735. Judge Cothran sentenced Petitioner to concurrent prison terms of fifteen years for felony DUI resulting in death and twelve years for felony DUI resulting in great bodily injury. App. 741. Petitioner noted a timely appeal, and the

Court of Appeals affirmed in a published opinion. *See State v. Brown*, 436 S.C. 505, 873 S.E.2d 445 (Ct. App. 2022); App. 789-807. This Court denied certiorari. App. 808.

Post-Conviction Relief Application

Petitioner filed a timely application for post-conviction relief (PCR) on July 14, 2023. App. 809-815. An evidentiary hearing was held on August 18, 2025, before the Honorable H. Steven DeBerry, IV. App. 831. Timothy Griffith represented Petitioner; T. Cruise Mitchell represented the state. App. 831. In her amended application, she alleged, *inter alia*, “Judicial Bias: the trial Judge did not recuse himself even though he had lost family members to a drunk driver. [Attorneys] had conf [sic] with Judge and came out and said the AT Gen said the speed limit was not 55 it was 35.” App. 887.

At the hearing, Petitioner testified that the state offered her a mid-trial plea deal which would have resulted in her serving five years in prison. App. 836, ll. 5-7. Petitioner acknowledged that trial counsel communicated the plea deal to her but that he did not explain it to her in a way that she understood it. App. 851, ll. 1-21. Specifically, Petitioner testified:

[A]t the fourth day of – fifth – fourth day of trial, [trial counsel] – we entered the room and he was like “Tammy, they offered you five years.” I said, “Mr. Barr, you know what happened. You know...the truck was on top of my car. I don’t know how it moved from there and from when we first made contact.” And he even said they hit the gas or whatever. And I’m like, “Mr. Barr, you’re doing good. You’re doing good.”

He said, “Tammy, it’s not a matter of me doing good.” He said, “You know, this is the state you’re in and the county you’re in. You need to go ahead and jury do this.” I’m like – my cousin Angie was there. And she said, “Well, Mr. Barr, how much time is she going to do out of five years?” And he didn’t answer her.

So – and with that, I felt like – after he said that the judge said...that the attorney general changed the speed limit,¹ I didn't trust him anymore or anything because he betrayed me. He...just betrayed me. He just threw me away. He just didn't do what he said he was going to do. He was going to help me. And I didn't trust him no more than I thought I would. He just left me by myself.

App. 850, l. 24 – 851, l. 21. Petitioner testified that had trial counsel “explained to [her] more” she would have accepted the plea offer. App. 852, ll. 1-11. Trial counsel testified that he conveyed the plea offer and advised Petitioner to accept it; however, Petitioner believed that she would be acquitted, and the other person in the room—who trial counsel believed to be Petitioner's daughter—persuaded Petitioner not to plead guilty. App. 859, ll. 2-17. At the close of evidence, both PCR counsel and the state argued the merits of the plea offer issue. App. 876, ll. 2-6; 47, l. 23 – 48, l. 10.

Petitioner also testified that she had been made aware of other DUI cases involving Judge Cothran. App. 848, ll. 2-9. Specifically, she testified that she discovered a lawsuit filed by Judge Cothran “for a case almost identical to [Petitioner's].” App. 848, ll. 8-9. According to Petitioner, the facts of that case were: “[Judge Cothran] had a family member that lost himself looking for his dog on a highway when a car hit him, thinking that they were in the wrong lane.” App. 848, ll. 11-13.

The PCR court denied relief and dismissed the application with prejudice. App. 881. The PCR court did not make any findings of fact or conclusions of law regarding the plea offer issue or the “judicial bias” issue. *See generally* App. 881. This petition follows.

¹ This is in reference to the solicitor offering the trial court an advisory opinion from the Attorney General's office that stated that an advisory speed sign at a curve reduces the speed limit in that zone. While contested at trial, the speed limit in the accident area is not at issue in this appeal.

ARGUMENTS

I.

The PCR court erred by finding that trial counsel was not ineffective for failing to adequately advise Petitioner to accept a favorable plea offer.

Petitioner testified that she would have accepted the state's five-year plea offer, had she fully understood the advantages and disadvantages of doing so. Trial counsel failed to fully apprise her of the disadvantages of continuing trial. In so doing, trial counsel rendered ineffective advice to Petitioner. This Court should grant certiorari and reverse.

During plea negotiations, defendants are "entitled to the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). A failure to communicate a plea offer generally constitutes deficient performance. *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Likewise, rendering unreasonable advice about a plea offer can constitute deficient performance. *Cooper v. Lafler*, 376 Fed. Appx. 563, 571 (6th Cir. 2010) (objectively unreasonable advice regarding the acceptance of a plea offer constitutes ineffective assistance of counsel), *vacated on other grounds sub nom. Lafler v. Cooper*, 566 U.S. 156 (2012); *see also Kolbe v. State*, 386 S.C. 578, 591-92, 690 S.E.2d 73, 80 (2010), *overruled on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). A defendant, when deciding whether to plead guilty, "is entitled to counsel's considered and reasonable judgment." *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009).² To that end, "counsel is required to *fully communicate* with the client so that the client can make an informed decision regarding any proposals by the state." *Davie v. State*, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (emphasis added), *overruled on other grounds by*

² While *Berry* concerned "use of prior convictions for enhancement purposes, this reference to an accused's entitlement to counsel's considered and reasonable judgment *clearly has broad application* in Sixth Amendment jurisprudence." *Berry*, 381 S.C. at 635 n.1, 675 S.E.2d at 427 n.1 (emphasis added).

Smalls, supra. “After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.... If the accused’s choice on the question of a guilty plea is to be an informed one, the accused must act with *full awareness* of the alternatives, including any that arise from proposals made by the prosecutor.” *Turner v. Tennessee*, 664 F. Supp. 1113, 1120 (M.D. Tenn. 1987) (*quoting* ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.1(a), 4-5.2 commentary (2d ed. 1980)).

Even when a plea offer is ultimately rejected, a defendant still has the right to effective assistance regarding that plea offer. *Judge v. State*, 321 S.C. 554, 559, 471 S.E.2d 146, 149 (1996), *overruled on other grounds by Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). “[T]he question is whether an offer was communicated *and* whether counsel was effective in advising the client to accept or reject an offer.” *Lassalle-Valazquez v. United States*, 948 F. Supp. 2d 188, 192 (D.P.R. 2013). “[T]he defendant’s *comprehension* of the various factors that will inform his plea decision,” is a relevant factor in determining counsel’s effectiveness in rendering advice regarding a plea offer. *United States v. Frederick*, 868 F. Supp. 2d 32, 46 (E.D.N.Y. 2012) (emphasis added) (*citing Purdy v. United States*, 208 F.3d 41, 45 (2d Cir. 2000)).

Here, Petitioner’s testimony suggests that she would have accepted the plea offer had she understood it. In fact, Petitioner’s cousin attempted to ask trial counsel how much of the five-year term of imprisonment Petitioner would serve, and trial counsel did not provide an answer to that question. Trial counsel’s failure to ensure Petitioner understood the benefits of pleading guilty constitutes deficient advice.

Petitioner was charged with felony DUI resulting in death. Five years’ imprisonment for that offense is an extraordinarily generous plea offer. S.C. Code Ann. § 56-5-2945(A)(2) (felony

DUI resulting in death carries a maximum penalty of twenty-five years imprisonment, no part of which may be suspended nor probation granted); *cf. Kolle*, 386 S.C. at 591-92, 690 S.E.2d at 80 (“Clearly, the state’s offer of a sentence of ten years suspended on the service of five years with three years’ probation was significantly better than the seven to twenty-five-year sentence Kolle faced....”). The generous nature of the plea offer is amplified ten-fold when considering that Petitioner’s blood test proved that she was intoxicated to almost three-times the “legal limit,”³ and an expert accident reconstructionist testified that Petitioner was travelling at least 64.6 miles per hour, in violation of even Petitioner’s contested higher speed limit of 55 miles per hour. A reasonable attorney under these circumstances would not only advise Petitioner to accept the plea offer; he would spend as much time as needed ensuring Petitioner understood her decision and assuaging any possible concerns that Petitioner may have about pleading guilty.

Trial counsel testified that he “tried to convey” that it would be in Petitioner’s best interests to plead guilty, but he did not testify as to the content of what he told Petitioner or whether he answered Petitioner’s questions. Merely recommending acceptance of a plea offer is insufficient. Trial counsel should have given Petitioner sufficient information to make a “voluntary and intelligent choice among the alternative courses of action open to [her].” *Cf. North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The record does not support the proposition that trial counsel ensured Petitioner fully understood the decision she was making. Thus, Petitioner was unable to act with “full awareness.” *Turner*, 664 F. Supp. at 1120.

The testimony presented to the PCR court regarding the plea offer and Petitioner’s conversations regarding the same was light. But what was presented is this: Petitioner did not fully grasp the plea offer or why she should take it, and there is no evidence that trial counsel did

³ It is unlawful to operate a motor vehicle with an alcohol concentration of “eight one-hundredths of one percent” or 0.08%. S.C. Code Ann. § 56-5-2933(A).

much of anything to aid her understanding. Rather, trial counsel simply blamed “somebody in the room with” Petitioner for “influenc[ing] her and persuad[ing] her.” App. 859, ll. 8-9. Trial counsel testified that “he tried to convey” to Petitioner that she should accept the plea offer, but there is little in the way of testimony regarding what trial counsel did to “convey” the importance of accepting the offer. App. 859, l. 15.

Therefore, on this record, it cannot be said that trial counsel “fully communicate[d]” with Petitioner regarding the plea offer. *See Davie*, 381 S.C. at 609, 675 S.E.2d at 420. Thus, trial counsel fell short of his “constitutional duty...to advise [his] client[] on the crucial decision whether to accept a plea offer.” *Cardoza v. Rock*, 731 F.3d 169, 178 (2d Cir. 2013) (internal quotation marks omitted). Accordingly, trial counsel rendered ineffective assistance of counsel regarding the plea agreement. This Court should grant certiorari and reverse.

II.

Alternatively, pursuant to *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019), this case should be remanded to the PCR court for findings of fact and conclusions of law regarding Petitioner's allegation that trial counsel did not properly advise her of the consequences of rejecting a plea deal, where evidence was presented at the PCR hearing supporting that allegation and PCR counsel argued the merits of that allegation in summation.

Petitioner presented testimony from two witnesses regarding the existence of a favorable mid-trial plea offer and trial counsel's failure to properly advise her of the consequences of rejecting the offer. In summation, PCR counsel argued the merits of this claim to the PCR court. Further, Petitioner alleged and presented evidence that the trial court should have recused itself. However, the PCR court did not address either allegation in its order of dismissal. Therefore, the PCR court's order of dismissal is noncompliant with S.C. Code Ann. § 17-27-80, and the case should be remanded to the PCR court to make specific findings of fact and conclusions of law.

The PCR court must make "specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80; *see also* Rule 52(a), SCRCivP; *see generally Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016) (general denial of all claims not sufficient). When the PCR court fails to do so "as to *all issues* raised by an applicant," the proper remedy is for this Court to remand the matter to the PCR court. *Fishburne*, 427 S.C. at 516, 832 S.E.2d at 589 (emphasis added). The scope of that remand can vary; this Court could remand for the limited purpose of requiring the PCR court to make the proper findings, *see id.*, or it could remand for a new PCR hearing entirely, *see McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991) ("we reverse the order...and remand for a new PCR hearing.").

Typically, a prerequisite for challenging the sufficiency of an order on appeal would be the filing of a Rule 59(e), SCRCivP motion. However, “because the United States Constitution’s Sixth Amendment guarantee to a defendant’s right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party’s procedural shortcoming...to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court’s order does not comply with section 17-27-80.” *Fishburne*, 427 S.C. at 516, 832 S.E.2d at 589. Therefore, a PCR court’s failure to make specific findings on an issue presented to it constitutes “such extraordinary circumstances” that justifies departure from the typical error preservation rules. *Id.* at 515, 832 S.E.2d at 589.

Here, Petitioner presented evidence that trial counsel did not sufficiently explain a plea offer and the benefits and drawbacks of accepting it. Had trial counsel done so, Petitioner would have accepted the plea offer. If this testimony is accepted as true, Petitioner likely has a colorable claim for ineffective assistance of counsel. *Cf., e.g., Cooper v. Lafler*, 376 Fed. Appx. 563, 571 (6th Cir. 2010) (objectively unreasonable advice regarding the acceptance of a plea offer constitutes ineffective assistance of counsel), *vacated on other grounds sub nom. Lafler v. Cooper*, 566 U.S. 156 (2012); *cf. also, Padilla v. Kentucky*, 559 U.S. 356 (2010). Further, Petitioner presented evidence that Judge Cothran had suffered personal loss at the hands of a drunk driver, under similar circumstances to Petitioner’s case. *Cf. Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 84, 504 S.E.2d 311, 316 (1998) (“a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned”). However, the merits of either allegation are beside the point. The PCR court did not make the statutorily required findings of fact and conclusions of law as to either. That necessitates remand.

Because Petitioner presented evidence of the allegations and argued their merits to the PCR court, the PCR court should have made specific findings regarding the allegations. Because it did not, its order of dismissal does not comply with S.C. Code Ann. § 17-27-80. Accordingly, this Court should grant certiorari and reverse with instructions to make specific findings of fact and conclusions of law.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to allow further briefing on the issues presented herein.



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ATTORNEY FOR PETITIONER

This 31st day of August, 2026.