

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

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FEB 19 2014

S.C. Supreme Court

JONATHAN SINCLAIR PORTERFIELD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001336

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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ISSUES PRESENTED

- 1.) Trial counsel erred in failing to appeal the trial judge's denial of his request for specific performance of petitioner's original plea bargain as petitioner did not receive the benefit of the bargain per the agreement because this issue required direct appellate review.
- 2.) Trial counsel erred in failing to include as an express term of the original plea bargain that the negotiations were global in that all charges were being disposed of per the original plea agreement and that petitioner would not be subjected to any other or additional charges not contained in that agreement.

STATEMENT

Petitioner Jonathan Porterfield pled guilty to a total of **five** robbery charges: three counts of armed robbery, one count of attempted armed robbery and one count of robbery. These pleas were entered pursuant to a plea bargain at the May 2008 term of Richland County General Sessions Court before Judge J. Michelle Childs. Pursuant to the negotiated plea bargain, petitioner was sentenced to an aggregate prison term of ten years. App. 1-16. Greg Collins represented petitioner at the plea proceeding and Assistant Solicitor Anna Good appeared on behalf of the state in the case.

Subsequently, **two** new charges were brought up against petitioner: an additional armed robbery charge and a pistol charge. The pistol charge against petitioner was ultimately dropped and substituted for an assault on a correctional officer charge. The additional charges were not included in the original plea agreement executed at the May 20, 2008 plea proceeding. A motions hearing was convened on September 25, 2008, at the Richland County General Sessions Court before Judge Childs in response to the state's attempt to indict petitioner on these two new additional charges. Greg Collins appeared on behalf of petitioner at the motions hearing and moved for enforcement of the original plea bargain that was in effect at the May 20, 2008 guilty plea proceeding. Judge Childs responded by allowing petitioner to withdraw his original May 20, 2008 guilty pleas. App. 17-32. Assistant Solicitor Anna Good appeared on behalf of the state at the September 25, 2008 motions hearing.

On March 15, 2010, a re-plea proceeding was convened before Judge Childs at the Richland County General Sessions Court during which time petitioner received a fourteen-and-one-half-year sentence after pleading guilty to **seven** charges: four counts of armed robbery, attempted armed robbery, robbery, and assault on a correctional officer along with a new negotiated plea bargain that

included a fifteen-year sentencing cap. Ashley Thomas appeared as counsel for petitioner at the re-plea proceeding and Assistant Solicitor Vanessa Shipley appeared on behalf of the state at that time.

On March 19, 2010, a sentence reconsideration hearing was held before Judge Childs during which time petitioner's trial counsel moved for the enforcement of the original ten-year plea agreement in the case. App. 33 – 54. At that hearing, both Ashley Thomas and Greg Collins appeared on behalf of petitioner and Assistant Solicitor Vanessa Shipley appeared on behalf of the state. Judge Childs re-sentenced petitioner to a prison term of twelve years and six months at that March 19, 2010 hearing. Counsels for petitioner did not appeal.

On December 2, 2010, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App. 56-61. The respondent filed a return dated February 4, 2011. App. 62-68. A supplemental PCR application was filed on August 23, 2011. App. 69-75.

A PCR hearing was convened on May 23, 2012, at the Richland County Courthouse before Judge L. Casey Manning. App. 76 – 121. Petitioner was present at the hearing and represented by Richard P. Alston. Assistant Attorney General Robert D. Corney appeared at the PCR hearing on behalf of the state.

On June 7, 2013, Judge Manning issued an Order of Dismissal in the case denying post conviction relief to petitioner. App. 123 – 139. Petitioner appealed Judge Manning's Order of Dismissal. This petition follows.

QUESTION I

Trial counsel erred in failing to appeal the trial judge's denial of his request for specific performance of petitioner's original plea bargain as petitioner did not receive the benefit of the bargain per the agreement because this issue required direct appellate review.

The PCR appeal of the denial of petitioner's request for specific performance of his original ten-year bargain was error best addressed on direct appeal rather than on PCR. Trial counsel erred in failing to appeal the trial judge's decision denying specific performance of petitioner's original plea agreement at the sentence reconsideration hearing held at the trial level.

During the PCR hearing, trial counsel testified that the solicitor was unaware of or did not recognize that there were **six** robbery arrest warrants outstanding against petitioner during plea negotiations when the plea agreement for a ten-year prison term in exchange for petitioner's guilty pleas on only **five** robbery charges became finalized; and that after the original plea agreement was executed at the original plea proceeding, the state subsequently raised a **sixth** robbery charge and a **seventh** charge (weapons charge which was later substituted for a charge of assault on a correctional officer) against petitioner. Counsel explained that the original pleas on the **five** charges were withdrawn on September 25, 2008, and a re-plea took place on March 15, 2010, on the **seven** charges and the accompanying fifteen-year sentencing cap. Petitioner was sentenced to fourteen and one half years imprisonment at the re-plea proceeding. App. 87, l. 7 – p. 88, l. 16.

After the re-plea proceeded concluded, a sentence reconsideration hearing was held on March 19, 2010. At that time, counsel objected to the re-plea and requested specific performance of the original plea bargain because it was error to add a robbery charge that was not included in the original plea bargain. App. 88, l. 20, - p. 89, l. 15.

During the sentence reconsideration hearing held on March 19, 2010, after the March 15, 2010 re-plea proceeding, trial counsel argued that the original plea deal resulted in the dismissal of all robbery charges that were not included in the original plea bargain because in return for the original agreement, petitioner cooperated and gave confessions on all robberies included in the discovery, including the robbery for which petitioner did not plead guilty to originally, but was subsequently indicted nonetheless. The solicitor decided to indict petitioner on that additional robbery charge which was not encompassed in the original plea bargain, after her superiors advised that she convict petitioner on the additional robbery charge in question. App. 35, l. 2 – p. 54, l. 9.

Petitioner testified during the PCR hearing in effect that his understanding was that he would receive a ten-year sentence in exchange for his pleas on the robbery charges contained in the original plea agreement only and that he gave confessions based on all robberies, but did not gain the benefit of the bargain because he was subsequently coerced to pled guilty to the additional charges and received a greater sentence thereafter. App. 100, lines 1-25.

In the order of dismissal issued in the case, the PCR judge denied petitioner's request for specific performance of the original plea after noting that this issue was a direct appeal matter that was improperly raised on PCR. App. 130 – 133.

Here, the lower court error occurred when the trial judge denied petitioner's request for specific performance of the original plea agreement at the sentence reconsideration hearing. Specific performance in honoring the ten-year sentence agreement on the **five** robbery charges should have been the appropriate remedy in this case. The specific performance request was made during a motions hearing held on September 19, 2008, before the re-plea, and at the re-plea proceeding held on March 15, 2010, and again at March 19, 2010, sentence reconsideration hearing.

Specific performance is the remedy used where one has been denied a constitutionally-guaranteed right. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), citing to Turner v. Tennessee 858 F.2d 1201 (6th Cir. 1988) and United States v. Morrison 449 U.S. 361 (1981). In Davie, the court held that counsel was ineffective in failing to communicate a plea offer to the defendant. Moreover, specific performance of a plea agreement is an allowable remedy. In Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003), the case was remanded for specific performance on the plea agreement where counsel was ineffective in failing to ensure that the state adhered to the original plea agreement in order to grant the defendant the benefit of the bargain. In Sprouse, supra, the plea agreement breach was the solicitor's classification of the defendant's second-degree burglary offense as violent because this deviated from the plea agreement. See also Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007), where the case was remanded for specific performance where counsel was ineffective in failing to have a plea agreement enforced because the defendant detrimentally relied on the promised plea bargain. In Custodio, supra, there was a breach of a plea agreement that included a fifteen-year cap on non-violent burglary charges in exchange for the defendant's cooperation in returning stolen items and where there was reliance on the plea bargain by the defendant when he pled guilty in the case. In Jordan v. State, 247 S.C. 52, 374 S.E.2d 683 (1988), the Court remanded the case for specific performance on the plea agreement where the solicitor did not fulfill his promise not to oppose probation at the plea proceeding according to the plea agreement. See Smith v. State, ___ S.E.2d ___, 2014 WL 463062, and Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000), where the Court remanded for specific performance in both cases on both of the plea agreements where both of the solicitors promised not to make sentencing recommendations on the defendants' voluntary manslaughter pleas, but breached the agreements and asked for maximum sentencing in those cases.

As a rule, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); Santobello v. New York, 404 U.S. 257 (1971). Prosecutors are obligated to fulfill the promises they make to defendants when the promises are inducements to plead guilty. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). Breached plea agreements will invalidate guilty pleas. Thompson v. State, *supra*. There was a breached plea agreement in existence in petitioner's case, and thus counsel erred in failing to appeal the lower court's error in denying the request for specific performance of petitioner's original plea agreement as trial court error to be reviewed on direct appeal. Counsel's error violated petitioner's right to due process and competent legal counsel, both of which are rights guaranteed under the Sixth and Fourteen Amendments to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985). Petitioner was prejudiced as the error led to a re-plea and receipt of additional convictions and a greater sentence (two and one half additional years) in comparison to the original agreement, and because but for counsel's error in failing to file a direct appeal notice in the matter, petitioner would have received appellate review on this issue.

QUESTION II

Trial counsel erred in failing to include as an express term of the plea bargain that the negotiations were global in that all charges were being disposed of per the original plea agreement and that petitioner would not be subjected to any other or additional charges not contained in that agreement.

During the PCR hearing, trial counsel testified that he erred in failing to put on the record and in the plea agreement that the warrants that were not included in the original plea bargain could

not be resurrected subsequently against petitioner. App. 89, l. 16 – p. 91, l. 25. This would have sealed the original plea agreement and precluded additional charges and a re-plea in the case.

During the sentence reconsideration hearing held on March 19, 2010, after the March 15, 2010 re-plea proceeding, trial counsel Greg Collins argued for specific performance on the original ten-year sentence as follows:

Trial counsel: I suggested to... file this motion to reconsider when I heard he was sentenced to 15 years because I feel personally responsible. [At the original plea proceeding regarding the original plea bargain], I didn't say that magic sentence that no new warrants will come out with the information contained in the discovery. I didn't say that sentence, and according to South Carolina law, if I don't say those exact words on the record, we can't enforce the plea deal. I feel like it is personally my fault... I think it is extreme for him to have a 50 percent increase in a sentence because I didn't say five or six words on the record in the original plea because otherwise he would have a ten-year sentence. App. p. 38, l. 19- p.41, l. 8

Trial Counsel: With this plea, I obviously was. I missed warrants. I didn't say the magic words because I assumed the deal was for everything encompassed, and I assumed if it wasn't included in the paperwork provided to me for the deal before the plea that they weren't intending to go forward on it. I was mistaken and now he's paying because of my mistake. App. p. 47, l. 21 – p. 48. l. 2.

Trial counsel: After the plea, when she informed me she had another warrant, she informed me her superiors told her she had to go forward with that warrant even though it was contained in the discovery. What we discussed was based on his statement, which had all the information they used for these extra warrants. So, my understanding of the deal was that this is the deal he's getting for what he admitted to because he gave them the cases on the Silver matter and the State and my understanding was that this was the deal for what he gave the plea since he cooperated. They weren't going to bring in new warrants and going to recommend ten years because he was so forthright and cooperative.

Court: I recall making sure, at a prior hearing, not the one Monday, but that everything was going to be taken care of in the plea, but you're saying since then the State agreed to not let the one be included?

Trial Counsel: ...[It is] my understanding they had dismissed one of the warrants. App. 40, l. 9 – p. 41, l. 24.

Trial counsel: not all the armed robberies had been sworn out because he [petitioner] admitted to some they weren't investigating. So, they were of the understanding that a certain number of warrants were drowning out, were closing those cases, weren't going to do the ones, they were missing, went forward with all the information they had, and, again, it is because of my mistake that [the original plea was unenforceable]. App. p. 46, l. 15 – 22.

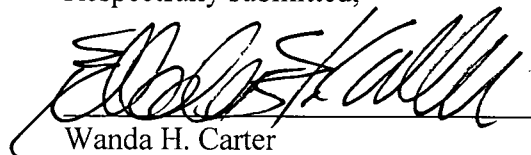
The PCR judge ruled that counsel's failure to ensure that the original ten-year plea agreement was global was not prejudicial ineffective assistance of counsel because of the solicitor's statement that had she been made aware of the additional robbery warrant, then she would not have agreed to a ten-year sentencing cap on all of the robbery charges in the first place. App. 131- 134.

In Thrift v. State, 312 S.C. 282, 440 S.E.2d 341 (1994), the Court held that the specific terms of any plea agreement must be fully set forth in the agreement in order to define the scope of the agreement. Here, counsel erred in failing to define the scope of the agreement in the case and as a result, petitioner was detrimentally affected because he received a greater sentence and additional convictions, both of which were inconsistent with the promises made in the original plea agreement. This error committed by counsel violated petitioner's right to competent counsel in a legal proceeding guaranteed under the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 50 (1989).

CONCLUSION

Based on the foregoing arguments in the case, petitioner requests that this Court grant the petition and allow full briefing on the issues raised above.

Respectfully submitted,

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

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of Febrau, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

JONATHAN SINCLAIR PORTERFIELD,

PETITIONER,

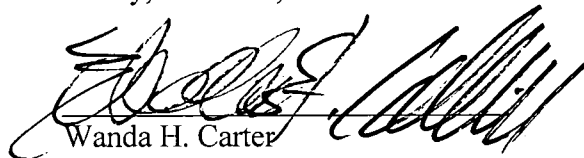
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

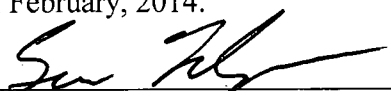
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jonathan Sinclair Porterfield, #328448, at Kershaw Correctional Institution, 4848 Gold Mine Hwy, Kershaw, SC 29067 this 19th day of February, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of February, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.