ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 20 2014

S.C. Supreme Court

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

CHRISTOPHER MCLEOD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000930

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Trial counsel erred in failing to pursue plea negotiations on the offenses of assault and unlawful conduct charged against petitioner in order to gain lenient and/or concurrent sentences in return, particularly since petitioner admitted guilt and desired to plead guilty on those two charges because this strategy would have produced a more favorable ending than the trial that was held on all four charges, i.e., those two charges, which yielded guilty verdicts and consecutive sentences, and two additional charges (sex offenses) that resulted in acquittals.

STATEMENT

Petitioner Christopher McLeod was tried on the offenses of first degree criminal sexual conduct with a minor, lewd act on a minor, assault and battery of a high and aggravated nature, and unlawful conduct towards a child during the March 2010 term of the Florence County General Sessions Court before Judge Thomas A. Russo. Petitioner was acquitted on the lewd act and criminal sexual conduct charges, but found guilty on the offenses of aggravated assault and unlawful conduct towards a child. Petitioner was sentenced to consecutive sentences of ten years and seven years respectively. App. 1-504. Karen E. Parrott and William V. Meetze represented petitioner at trial and Assistant Solicitor Robert N. Wells appeared on behalf of the state.

Petitioner appealed his convictions and sentences and was represented on direct appeal by Robert M. Pachak, who filed a final Anders Brief of Appellant in the case on December 20, 2010. Petitioner subsequently dropped his appeal, which was dismissed by Order of the Court of Appeals on January 27, 2011. App. 516.

On January 11, 2011, petitioner filed a PCR application with the Florence County Office of the Clerk of Court. App. 507 – 514. The respondent filed a return dated March 19, 2013, requesting that a hearing be held in response to petitioner's PCR action. App. 515-518.

A PCR hearing was held on February 26, 2013, at the Florence County Courthouse before Judge William H. Seals. App. 521 – 575. Petitioner was present at the hearing and represented by Bryan W. Braddock, and Assistant Attorney General Tyson Andrew Johnson appeared on behalf of the state. On March 19, 2013, Judge Seals issued an Order of Dismissal denying petitioner's claims of ineffective assistance of counsel in the case. App. 577 – 582.

Petitioner appealed Judge Seal's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to pursue plea negotiations on the offenses of assault and unlawful conduct charged against petitioner in order to gain lenient and/or concurrent sentences in return, particularly since petitioner admitted guilt and desired to plead guilty on those two charges because this strategy would have produced a more favorable ending than the trial that was held on four charges, i.e., those two charges, which yielded guilty verdicts and consecutive sentences and two additional charges (sex offenses) that resulted in acquittals.

At trial, Shante Kent Clarke testified that during July 2006, she allowed petitioner to take care of their daughter, who was two years old at that time, because he (petitioner) was living with his sister Niosha Williams. Clark stated that when their child was returned to her on July 26, 2006, there were bruises on the child's vagina and behind. App. 105, l. 2 - p. 110, l. 24. Petitioner's sister Niosha Williams testified that she also saw the bruises on that date and notified the police. App. 113, l. 2 - p. 125, l. 3. State's witness James C. Gregory, who was a police officer at that time, testified that after seeing the child's bruises, he had petitioner arrested. App. 134, l. 18 - p. 137, l. 2.

Petitioner testified in his defense at trial and explained that he spanked his daughter on her rear end by the use of his hand and a switch for cursing and having a bowel movement on the floor, and went on to admit his guilt on the assault and unlawful conduct charges, but insisted that he did not commit any lewd act or act of criminal sexual conduct on the child. App. 349, l. 3 – p.391, l. 25. Petitioner's trial testimony follows:

> Defense Counsel: So you admit that you hit your child in a way that you shouldn't have?
>
> Petitioner: I do admit that....[but] these sexual charges, I have nothing to do with that 'cause I didn't do it. App. 391, line 13 – 15; App. 391, l. 24 – p. 392, l. 1.

During the PCR hearing, petitioner testified that he had informed counsel that there was sufficient evidence to convict him on the assault and unlawful conduct charges, and that he was willing to plead guilty on those two charges. In effect, petitioner's PCR testimony was that since he desired to plead on those two charges, then he needed counsel to initiate a plea deal on the same and then proceed to trial only on the sex charges that he did not commit. Petitioner stated that had he pled guilty on the assault and unlawful conduct charges, then he would have received more lenient sentences in comparison to the consecutive sentences (seventeen years) that he received by the trial judge after having been convicted on those two charges at trial. Petitioner added that trial counsel advised him that a deal where the charges were split up via pleas on those charges in question and a trial on the remaining sex charges was impossible. App. 528, l. 7 - p. 530, l. 24. Petitioner explained how he was prejudiced by counsel's error as follows:

> PCR Counsel: [Y]our contention [is] that you lost the benefit of the plea by not pleading guilty to the two charges to which you were ready to plead guilty?
>
> Petitioner: Yes, sir.
>
> PCR Counsel: Okay. And is it your position then that the likelihood of receiving consecutive sentences as a result of the plea to the two charges of ABHAN and unlawful conduct would have been substantially less than the result that you received as a result of going to trial on those charges?
>
> MR. MCLEOD: Yes, sir. App. 532, l. 14 – p. 533, l.1.
>
> MR. BRADDOCK: is it your position that as a result of that failure [to negotiate the please at issue is] why you were prejudiced?
>
> MR. MCLEOD: Yes, sir. App. 533, lines 10-12.

Note that after petitioner was acquitted on the sex charges and prior to sentencing, the trial judge questioned defense counsel as to why petitioner was not allowed to plead guilty on the assault and unlawful conduct charges (which he admitted committing at trial) as follows:

> Defense Counsel: Your Honor, and I do think it's important to let you know and remind you, as I'm sure you heard, but still that [petitioner] was willing to plead to this, these two charges all along. This is what he said he was guilty of from the moment that our file was opened, and I would ask that you take in consideration exactly that the jury has found that credible and –
>
> The Court: Why didn't he plead to those [assault and unlawful conduct charges] and then go to trial on the sex offenses?
>
> Defense Counsel: Your Honor, there was no offer to just let him plead to just those two charges. It was taken as an offer with everything with the lewd act as well. It was never just I'll let you plead to those two and do the other two.
>
> The Court: How can they stop you?
>
> Solicitor: Your Honor, I need—yeah, if I'd been you know, I'd say that I would take a plea...if they said he wanted a trial on the other two and plead to these two I'd certainly take a plea on those two [assault and unlawful conduct charges].
>
> The Court: They can't stop him from doing that.
>
> Defense Counsel: Your Honor, it was not done so I, you know, whether that's my fault of then or not articulating it well with Mr. Wells it certainly was never offered. App. 495, l. 16 – p. 496, l. 13.

Assistant Solicitor Wells, who prosecuted the case, testified at the PCR hearing and stated that if counsel had asked, then he would have been amenable to taking a plea from petitioner on the assault and unlawful conduct charges and trying petitioner on the sex charges; and that he would not have made any recommendations regarding concurrent or consecutive sentencing on the assault and unlawful conduct pleas, but rather deferred to the judge's sentencing discretion in the case since judges usually reward defendants with favorable sentences in exchange for entering guilty pleas.

App. 540, l.1 – p. 541, l. 1; App. 551, lines 10-18; App. 549, lines 3-12. Assistant Solicitor Wells admitted that the trial judge was "aggravated" at petitioner's sentencing hearing over why a trial was held on the two charges to which petitioner admitted guilt. App. 541, l. 2 – p. 542, l. 6.

Trial counsel testified at the PCR hearing and explained that petitioner desired to plead guilty on the assault and unlawful conduct charges after admitting that he committed those crimes, but that the plea offer she obtained included the lewd act charge (the criminal sexual conduct charge was dropped), which petitioner rejected. Counsel added that the solicitor never offered a plea deal on the assault and unlawful conduct charges only. App. p. 556, l. 20 – 559, l.15. Trial counsel stated further that there was no guarantee that pleading guilty on the assault and unlawful conduct charges would have yielded concurrent sentences rather than consecutive sentences; so therefore, her strategy was to allow petitioner to testify at trial as to what he did and did not do and have the jury decide the case. App. 564, l. 2- p. 14; App. 565, l. 9 – 14; App 569, l. 23- p. 570, l. 2.

The PCR judge denied and dismissed petitioner's claim that but for counsel's error in failing to negotiate a plea deal that would have allowed him to plead guilty on the assault and unlawful conduct charges, then he would not have received consecutive sentences as such a claim was speculative because sentencing is a matter of judicial discretion. App. 579 – 581.

In the case at bar, the solicitor and trial judge were amenable to accepting pleas from petitioner on the assault and unlawful conduct charges and having a trial on the sex charges. Therefore, counsel erred in failing to pursue plea negotiations on these two charges because this deprived petitioner of the benefit of lesser or concurrent sentences on what could have been guilty plea convictions and avoided consecutive sentences on the two charges (17 years) that he received after being convicted at trial. Thus, a trial on the assault and unlawful conduct charges was unnecessary. Counsel erred in failing to proactively initiate and press for a plea bargain on those

two charges and ask for a trial on the sex charges only rather than bowing to a trial on all four charges. Counsel had a duty to bargain for a split case because this was reasonable under the circumstances.

Counsel has a duty to initiate plea negotiations when such an engagement would be reasonable or where the prosecution would agree to a particular plea offer. Van Wart v. United States, 2013 WL 88535 (4th Cir. 2013). In Van Wart, however, the defendant desired a trial and did not want to plead guilty. By comparison, however, note the case of United States v. Pender, 2013 WL 1137452 (4th Cir. 2013), where the Court remanded for a hearing on trial counsel's failure to pursue plea negotiations in a drug and firearm case where the defendant faced a mandatory life sentence if convicted (which happened); and as a result, the Court held that counsel's performance appeared unreasonable, particularly since the government's position was that a plea bargain and matching beneficial sentences would have been accepted had trial counsel initiated negotiations in the case. The Pender Court's rationale follows:

> The district court correctly noted that there is no constitutional right to a plea agreement and that the decision to initiate plea negotiations is a strategic decision within the purview of the defense counsel. See Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2nd 30 (1977); Hawkman v. Parrott, 661 F. 2nd 1161, 1171 (8th Cir. 1981). However, counsel is still required to be a "reasonably effective advocate" regarding the decision to seek a plea bargain. Brown v. Doe, 2 F. 3rd 1236, 1246 (2nd Cir. 1993). Thus if [the defendant] could show, as he alleged, that there was no reasoned strategy to his attorney's decision not to pursue a plea bargain, we conclude that [the defendant] would have satisfied the first Strickland prong and shown that his attorney's action were unreasonable.

Here, counsel's trial strategy of having petitioner testify at trial on all four charges and allow the jury to sort out the truth constituted ineffective assistance of counsel. Counsel's error resulted in a waste of judicial resources because there was no need for a trial on charges where one admitted

guilt. Moreover, counsel's error was particularly egregious in light of the fact that the solicitor and trial judge would have accepted petitioner's pleas if counsel had pursued the split arrangement strategy of a plea on the two charges and a trial on the remaining sex charges.

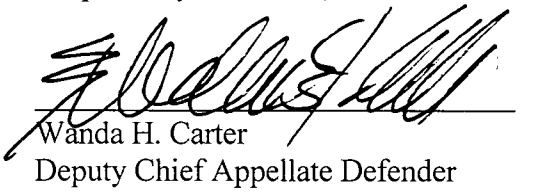
Counsel must articulate a valid reason for exercising a certain strategy in order to avoid being found ineffective and that reason must be measured under an objective standard of reasonableness. See Vail v. State, 402 S.C. 77, 738 S.E. 2nd 503 (2013). In Vail, the Court held that trial counsel erred in failing to object to multiple instances of hearsay testimony in a criminal sexual conduct case where prejudice resulted from the cumulative effects of the hearsay testimony. The Vail Court held further that the trial counsel's defense of offering transparency before the jury was not a valid trial strategy to justify failing to object to the hearsay testimony in the case.

The Sixth Amendment right to effective assistance of counsel in criminal cases includes claims of deficient representation during the plea bargaining process. Lafler v. Cooper, 32 S. Ct. 1376 2012). See also Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In Lafler, the Court held that but for counsel's error, the defendant would have accepted a plea and received a less severe conviction, sentence, or both. Here, trial counsel's error in failing to pursue plea negotiations on the assault and unlawful conduct charges constituted deficient representation in violation of the Sixth Amendment to the United States Constitution. But for counsel's error in this regard, a reasonable probability exists that petitioner's prison sentences on the assault and unlawful conduct convictions would have been more favorable.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issued presented above.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of March, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

CHRISTOPHER MCLEOD,

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 Joshua L. Thomas, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Christopher McLeod #339758, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 20th day of March, 2014.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of March, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.