

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
D. Garrison Hill, Circuit Court Judge

RECEIVED
APR 10 2014
S.C. Supreme Court

FRED DOUGLAS DOWNER,

PETITIONER,

RECEIVED
APR 11 2014
S.C. Supreme Court

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO.2013-001851

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Retained counsel erred in failing to advise petitioner that the ten-year plea offer presented in exchange for his guilty pleas on the state's charges expired when he rejected the offer and the public defender who negotiated the plea bargain was removed from the case because this meant that he plead unknowingly and unintelligently at the plea proceeding as he was unaware of sentencing consequences.

STATEMENT

Petitioner Fred Douglas Downer pled guilty to assault and battery with intent to kill, assault and battery of a high and aggravated nature, conspiracy, possession of a weapon during the commission of a violent crime, and three counts of kidnapping during the June 2011 term of the Pickens County General Sessions Court before Judge G. Edward Welmaker. Petitioner was sentenced to imprisonment for an aggregate term of fourteen years and four months. App. 1- 23. Petitioner retained Richard H. Warder to represent him at the plea proceeding, and Assistant Solicitor Mark Moyer appeared on behalf of the State. Petitioner did not enjoy the benefit of a direct appeal in the case.

Petitioner filed a PCR application and amended PCR applications with the Greenville County Office of the Clerk of Court on April 5, 2012, October 23, 2013, and May 28, 2013, respectively. App. 25-31; App. 38 – 44. The respondent filed a return dated July 31, 2012, requesting that a hearing be held in response to petitioner's PCR action. App. 32–36. A PCR hearing was convened on June 18, 2013, at the Greenville County Courthouse before Judge D. Garrison Hill. Petitioner was present at the PCR hearing and represented by Rodney W. Richey, and Assistant Attorney General Karen C. Ratigan appeared on behalf of the State. App. 45-70.

On August 12, 2013, Judge Hill issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of retained counsel in the case. App. 76–83.

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

ARGUMENT

Retained counsel erred in failing to advise petitioner that the ten-year plea offer presented in exchange for his guilty pleas on the state's charges expired when he rejected the offer and the public defender who negotiated the bargain was removed from the case because this meant that he plead unknowingly and unintelligently at the plea proceeding as he was unaware of sentencing consequences.

During the plea proceeding, the solicitor apprised the trial judge of the facts of the case. Apparently, petitioner went to a hotel room to deliver drugs to Christopher Barton (and Barton's wife) and Daniel Perry, but all three refused to pay him. Later, after Cassandra Mitchell managed to transport the Bartons and Perry to a particular residence, then petitioner ordered the three into a vehicle wherein he struck Perry. Thereafter, Perry and the Bartons managed to flee, but while doing so, petitioner and Barton began to fight and petitioner fired gunshots at Barton. App. 6, l. 20 – p. 11, l. 17.

During the PCR hearing, petitioner testified that at the time of his plea proceeding, retained counsel promised him that he would receive a ten-year sentence in exchange for his guilty pleas. App. 49, l. 20 - p. 50, l. 2, App. 50, lines 10-13, App. 50, l. 22-p. 51, l. 17. Petitioner stated that had he known that he would not have received a ten-year sentence, then he would not have pled guilty as charged. App. 53, lines 11-13.

Retained counsel testified at the PCR hearing and explained that petitioner hired him after relieving his first attorney (public defender who obtained a ten-year plea offer which was rejected), but that he (retained counsel) was unable to get the ten-year plea offer resurrected or extended during his representation because “the offer expired before he got the case,” and after it (plea offer) was rejected. App 57, l. 1-p. 58, l. 4. Retained counsel stated that he informed petitioner that he

received no plea offers from the state and that his pleas would be entered and accepted sans any recommendations from the state. App. 59, lines 12-24.

Petitioner's father and the mother of petitioner's children both testified at the PCR hearing and verified that retained counsel promised petitioner's receipt of a ten-year sentence in the case. App. 60, l. 20 – p. 70, l. 1.

In the Order of Dismissal handed down in the case, the PCR judge ruled that petitioner did not establish that trial counsel's assistance was ineffective because he (petitioner) knew that the pleas were entered without negotiations or recommendations (as evidenced by the sentencing sheets) in the case. App. 76–83.

In the case at bar, petitioner believed that the ten-year plea offer secured by his first attorney (public defender) would live on, survive, and be transferred to his second and final attorney who (retained counsel) represented him at the plea proceeding. Unfortunately, the reality was that the ten-year plea offer ended when petitioner rejected the offer and the representation from his first attorney ended. Retained counsel did not explain the expiration of the plea offer and how the same did not remain open indefinitely as it expired upon his rejection of it and upon the termination of the services of the public defender who negotiated bargain.

The Sixth Amendment right to effective assistance of counsel extends to cases involving plea offers, particularly where plea offers lapse and where prejudice is shown, i.e. that the defendant would have accepted the plea before the expiration date but for counsel's error explaining the expiration dates attached to the plea bargain. See Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not convey the plea offer to the defendant and as a result, the plea offer expired. See Davie v. State, 381 S.C. 601; 675 S.E. 2d 416 (2009), where the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel

because the defendant was unaware of the existence of the plea offer (due to counsel's error) until after the plea offer had expired, and that he would have accepted that plea offer had it been communicated to him. In Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), where counsel erred in advising the defendant that the plea offer would have remained open until after the suppression hearing ended, but in reality, the offer expired at the close of the suppression hearing held in the case.

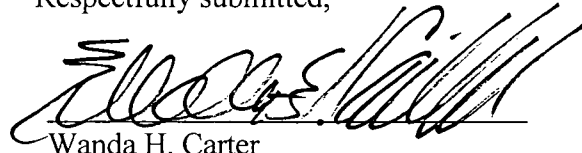
A defendant has a right to effective assistance of counsel during the plea bargaining process. See Lafler v. Cooper, 566 U.S. --- (2012), where counsel's incorrect advice led to the rejection of a plea offer in the case. See also Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1196), overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. Additionally, a guilty plea must represent a voluntary and intelligent choice among the alternative causes of action open to the defendant. Hill v. Lockhart, 474 U.S. 52 (1985).

Here, counsel's error regarding the failure to advise petitioner that the ten-year plea offer expired and was not available to him at time of the plea proceeding violated petitioner's right to receive effective legal assistance in his case as guaranteed under the Sixth Amendment to the United States Constitution. Petitioner was prejudiced because he would have chosen other options rather than pleading guilty had he known that the ten-year plea offer had expired in his case.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing this issue raised in the petition.

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 11th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
D. GARRISON HILL, CIRCUIT COURT JUDGE

FRED DOUGLAS DOWNER ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO.2013-001851

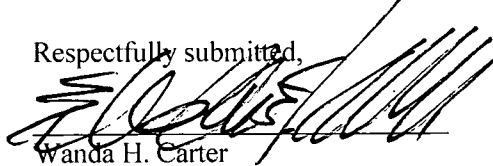
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Fred Douglas Downer states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 18, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Fred Douglas Downer.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of April, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

FRED DOUGLAS DOWNER ,

PETITIONER,

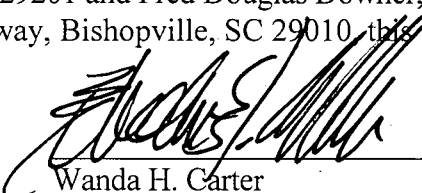
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

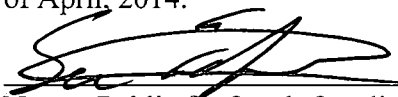
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Fred Douglas Downer, #346507, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 11th day of April, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of April, 2014.



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