

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JUN - 2 2014

Certiorari to Marlboro County

S.C. Supreme Court

R. Ferrell Cothran, Jr., Circuit Court Judge

DEXTER PALMER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001940

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to move to enforce the original plea agreement providing for a sentence of twenty five years concurrent for all of the charges pending in both Dillon and Marlboro counties?

STATEMENT

In April of 2005, the Dillon County Grand Jury indicted Petitioner for two counts of armed robbery, two counts of possession of a weapon during the commission of a violent crime and one count of assault and battery with intent to kill, indictments #05-GS-17-393, 394, 395, 396, 397. In July of 2005 the Marlboro County Grand Jury indicted Petitioner for murder, indictment # 05-GS-34-643. On October 17, 2005, Petitioner appeared before the Honorable James E. Lockemy and pled guilty to the Dillon county charges. Wade Crow represented Petitioner at the plea. Kernard Redmond prosecuted the case. Pursuant to negotiations with the State, Judge Lockemy sentenced Petitioner to an aggregate sentence of twenty five (25) years for all of the Dillon charges. During the plea there was a discussion about reducing the Marlboro County murder charge and negotiating a twenty five (25) year concurrent sentence for that charge as well. (App. pp. 35-43). The Marlboro County charge was held in abeyance and Judge scheduled a status conference for an update on the Marlboro County murder charge for February 13, 2006. (App. p. 42, line 21 – p. 43, lines 1-25).

On December 6, 2010, Petitioner appeared before the Honorable J. Michael Baxley and pled guilty to murder. Emily Crayton represented Petitioner at the guilty plea. Kernard Redmond prosecuted the case. Pursuant to a recommendation from the State, Judge Baxley sentenced Petitioner to thirty (30) years concurrent for the murder charge. Petitioner did not appeal.

On June 1, 2011, Petitioner filed an application for post conviction relief. The state filed a return on January 17, 2013. On July 16, 2013, an evidentiary hearing was held before the Honorable R. Ferrel Cothran. David Belding represented petitioner at the PCR hearing. Karen Ratigan was present on behalf of the State. In a written order signed August 21, 2013, Judge

Cothran denied relief and dismissed the application. A timely notice of intent to appeal was filed served on September 12, 2013. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to move to enforce the original plea agreement providing for a sentence of twenty five years concurrent for all of the charges pending in both Dillon and Marlboro counties

Plea counsel was ineffective in failing to move to enforce the plea agreement in regard to the Marlboro County murder charge discussed during the earlier guilty plea to the Dillon County charges. The plea agreement is discussed on the record during the course of the earlier Dillon County guilty pleas. (App. pp. 35-43). During the PCR hearing, Petitioner testified that prior to the guilty plea to murder he told counsel about the earlier plea agreement. (App. p. 125, lines 13-25). Petitioner testified that when counsel asked the prosecutor about the prior plea agreement he told her the deal was off because the deceased's family was opposed to the plea bargain. (App. p. 125, lines 17-21). The record of the plea reflects that plea counsel did not move to enforce the prior plea agreement. The record of the Marlboro guilty plea supports Petitioner's testimony that the plea agreement was withdrawn because of opposition from the victim's family. During the guilty plea the prosecutor told the judge:

The other thing that I would like to add is, initially this case in being all candor with the court, and I think I owe it to the family, this was a case that I was negotiating from the standpoint of a manslaughter, based upon some of the issues that I have addressed with the Court. And Mr. Perry made a trip from New York a couple of months ago, and met with me in Dillon. And in all candor, that significantly changed my thinking, because at least in this situation it is not like he getting nothing for what he did to Mr. Gallishaw. If we had gone along with the previous negotiations for a manslaughter, even though those were done all in the same context when we were negotiating the cases in Dillon, I could understand where he was coming from. At that point I did notify the Public Defender's office that I could not do it. I really do that as much for their benefit, because we had been discussing that particular type of a sentence. And, I'm sure Mr. Palmer was somewhat shocked when it all of a sudden changed.

(App. p. 18, line 15 – p. 19, lines 1-7). There is no indication in the record that Petitioner failed to cooperate as discussed as part of the plea agreement. Additionally, there was no mention by the

prosecutor or by plea counsel during the Marlboro guilty plea that Petitioner had rejected the twenty-five year plea agreement discussed earlier during the Dillon County guilty pleas.

In the order of dismissal the PCR judge wrote: "This Court finds the applicant failed to meet his burden of proving plea counsel should have argued the State breached the plea agreement. Plea counsel testified the applicant admitted he had rejected the twenty-five year offer and that file notes confirmed this. Plea counsel testified the State eventually made a plea offer for a thirty-year sentence and the Applicant accepted this offer when the case was on the trial docket." (App. p. 187). The PCR judge erred.

In State v. Miller, 375 S.C. 370, 389, 652 S.E.2d 444, 454 (Ct.App.2007), the South Carolina Court of Appeals wrote:

State prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). South Carolina has recognized the principles set forth in Santobello; when an accused pleads guilty upon the promise of a prosecutor, the agreement must be fulfilled. See Sprouse v. State, 355 S.C. 335, 338, 585 S.E.2d 278, 280 (2003); State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994); see also State v. Mathis, 287 S.C. 589, 592, 340 S.E.2d 538, 540 (1986) ("The public interest of encouraging settlement of criminal cases without necessity of trial favors permitting an accused to plead guilty to the offense charged without prejudicing his position if it is later withdrawn.") (quoting State v. Wright, 103 Ariz. 52, 436 P.2d 601, 604-05 (1968)).

Plea counsel was ineffective in failing to move to enforce the earlier plea agreement. Petitioner was prejudiced by the deficient performance. A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's

representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

There is a reasonable probability if plea counsel had moved to enforce the earlier plea agreement, the agreement would have been enforced and Petitioner would have received the aggregate twenty-five (25) year eight five percent sentence discussed rather than the thirty year day for day sentence imposed. See Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (granting PCR when defendant pled guilty based on belief that solicitor would not oppose or recommend probation and finding defense attorney's failure to draw the plea court's attention to solicitor's violation of plea agreement fell below prevailing professional norms). Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct.App. 2014).

CONCLUSION

Based on the above argument, the case should be remanded for re-sentencing consistent with the plea agreement.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO MARLBORO COUNTY
R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

DEXTER PALMER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-001940

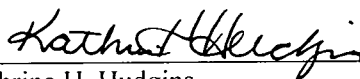
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dexter Palmer states:

1. She is an 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 July 16, 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 Dexter Palmer.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of June, 2014

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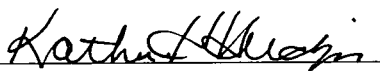
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CERTIFICATE OF SERVICE

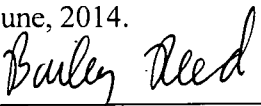
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire and Dexter Palmer, #311922, at Lee Correctional Institution this 2nd day of June, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

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


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.