STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2012-CP-33-00379

Letron S. Davis, #348914, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable Michael G. Nettles, dated April 14, 2014, and filed April 23, 2014. Petitioner received written notice of the denial of a Rule 59(e), SCRCP, motion to reconsider on June 30, 2014.

July 28, 2014

JOSHUA L. THOMAS
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S.C. Bar No. 100777

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Other Counsel of Record:

Marcus L. Woodson, Esquire
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PROOF OF SERVICE

I, Joshua L. Thomas, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Marcus L. Woodson, Esquire
Post Office Box 1657
Marion, South Carolina 29571

I further certify that all parties required by Rule to be served have been served.

July 28, 2014

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STATE OF SOUTH CAROLINA)
COUNTY OF MARION)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

Letron S. Davis, # 348914,

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2012-CP-33-00379

ORDER RESCINDING ORDER

This matter was before the Court by way of an Application for Post-Conviction Relief (PCR) filed on June 1; 2012. Respondent filed a Return on or around February 2, 2013. The Court convened a hearing in Florence County on February 11, 2014, at which time Applicant Letron S. Davis (Applicant) was present in court and represented by Marcus L. Woodson, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented the Respondent State of South Carolina (Respondent).

This Court signed an Order granting Applicant's PCR application in March; however, Respondent never received notice of its entry. Subsequently, Mr. Thomas made an inquiry to this Court about another PCR matter heard during the same term of court. In reviewing the log, the entry for Applicant's Order was inadvertently overlooked. Subsequently, a second Order was issued in April. Notably, the second order is substantively identical with the original order.

Ultimately, Respondent received the second Order issued in this matter. Respondent filed a Motion for Reconsideration according to Rule 59(e) of the South Carolina Rules of Civil Procedure

ATTORNEY GENERAL'S OFFICE

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within ten days of its receipt of the notice of the April Order. This Court denied Respondent's Motion for Reconsideration without a hearing in May. Applicant and Respondent contacted this Court in June with a question about the timeliness of Respondent's 59(e) Motion.

To resolve any confusion with these two identical orders this Court hereby finds the following:

(1) The original Order signed on March 3, 2014, is hereby rescinded.

(2) The Order signed on April 14, 2014, is the only remaining Order for Applicant's PCR application.

(3) Thus, the April 14th Order will be used to calculate the timeliness of Respondent's Rule 59(e) Motion.

(4) Respondent's Motion to Reconsider was timely filed with this Court.

AND IT IS SO ORDERED this 26 day of June, 2014.

Michael G. Nettles
Presiding Judge, Twelfth Judicial Circuit

Florence , South Carolina

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Letron S. Davis, # 348914, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2012-CP-33-00379 **ORDER**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed on June 1, 2012. Respondent filed a Return on or around February 2, 2013. The Court convened a hearing in Florence County on February 11, 2014, at which time Applicant Letron S. Davis (Applicant) was present in court and represented by Marcus L. Woodson, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented the Respondent State of South Carolina (Respondent).

BACKGROUND

Applicant was indicted at the August 2011 term of the Marion County Grand Jury for distribution of cocaine base second (2011-GS-33-0228) and burglary second (2011-GS-33-00476). The court appointed Vick Meetze, Esquire, from the Public Defender's office, to represent Applicant. On December 6, 2011, Applicant pled guilty as indicted and The Honorable William H. Seals sentenced Applicant to seven years imprisonment on each offense—each served concurrently

with the others. Applicant did not appeal and is presently confined in the South Carolina Department of Corrections.

ISSUES PRESENTED

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel"
2. "Violation of Fourth Amendment (Warrant Clause)"
3. "Ex Posto violation; Due Process Const. Amend 14th Violation."

STANDARD OF REVIEW

The Sixth Amendment of the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. CONST. amen. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984); *Holden v. State*, 393 S.C. 565, 713 S.E.2d 611 (2011). In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. 668, 80 L.E.2d at 692; *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. *Strickland*, 466 U.S. 668, 80 L.E.2d 674. Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*, 80 L.E.2d 674. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

The two-part test adopted in *Strickland* also "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.E.2d 203 (1985). With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. *Id.* "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." *Stalk v. State*, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

SUMMARY OF TESTIMONY

Applicant Letron S. Davis testified that he met with his attorney, Mr. Meetze, on multiple occasions prior to entering his guilty plea. Davis testified that during these meetings he discussed, among other things, the various plea offers from the State and their implications. Initially, the State offered Davis ten (10) years, which he rejected. Subsequently, the State attempted to negotiate a plea

offer for an eight (8) year sentence, and again Davis rejected the State's offer. Finally, the Court heard testimony that the State offered a plea deal of seven (7) years and Applicant, upon the advice of counsel, acquiesced. It is this advice during negotiations that Davis avers was deficient. Specifically, Applicant testified that his attorney instructed him that due to a recent change in the law regarding the distribution of cocaine base (second offense) he would no longer be required to serve eighty-five percent (85%) of that seven-year negotiated sentence. Davis testified that had Meetze told him otherwise, he would have rejected the plea offer from the State.

Additionally, Mr. Meetze testified that Davis' recollection of his advice was accurate. Mr. Meetze affirmed that he communicated this interpretation of the new language in the statute regarding distribution charges to Davis. Specifically, he testified that at the time these negotiations occurred, the state legislature altered this statute to include, in relative part:

> *Notwithstanding any other provision of law*, a person convicted and sentenced pursuant to this subsection for a first offense *or second offense* may have the sentence suspended and probation granted, and *is eligible for parole*, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

S.C. Code Ann. § 44–53–375 (emphasis added). Trial counsel took the affirmative position that Davis' offense was no longer a typical "A" felony, and as such, it was not subject to the service of eighty-five percent of the actual term of imprisonment imposed. *See* S.C. Code Ann. § 24–13–100; *State v. Miller*, 404 S.C. 29, 744 S.E.2d 532 (2013). Of particular importance, trial counsel believes that there is "no question [Davis] relied on that advice" in agreeing to accept the plea offer of a seven-year sentence for each charge.

Subsequently, Davis instituted this PCR application—well beyond the time for an appeal—when he was informed by the State Department of Corrections that he was required to serve eighty-five percent of his seven year sentence.

ANALYSIS

The Court has reviewed the record in its entirety, heard the testimony and arguments presented at the PCR hearing, and reviewed the relevant case law. The Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility and finds Davis and Meetze equally credible. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17–27–80 (2003).

It appears that Davis and Meetze were actively involved in negotiations with the State regarding potential plea offers, and that on several occasions Davis made the decision to reject the State's offer. Ultimately, Davis agreed to a plea offer of seven concurrent years for his charges. In doing so, it appears that Davis relied upon the advice from his trial counsel regarding how his sentence would be handled by the Department of Corrections.

Normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. *Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2004). Additionally, the "85% Rule," which requires a defendant to serve 85% of sentence prior to being eligible for release, is also a collateral consequence of sentencing of which a defendant need not be informed. *Knox v. State*, 340 S.C. 81, 530 S.E.2d 887 (2000); *Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2004). Even so, if a defendant is actively misinformed about parole eligibility post-conviction relief is proper when the defendant establishes that he relied on this

information from counsel. *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983); *see Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989) (relief granted on this ground); *Brown v. State*, 306 S.C. 381, 412 S.E.2d 399 (1991) (plea vacated where trial judge misinformed defendant about parole eligibility) *modified by Hunter v. State*, 316 S.C. 105, 447 S.E.2d 203 (1994) (erroneous parole advice from the bench could, on certain facts, mislead a defendant, but relief is not required without something more). Where there is no evidence contradicting or conflicting with an applicant's testimony that he would not have pled guilty but for counsel's deficient performance, applicant is entitled to relief. *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). However, inaccurate advice of counsel may be cured by information conveyed at the plea proceeding. *Terry v. State*, 383 S.C. 361, 680 S.E.2d 277 (2009); *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

In *Moorehead*, the Supreme Court of South Carolina relied on the fact that at the defendant's plea hearing, the trial judge asked the defendant if he understood the possible sentence for the charge for which he was pleading guilty. 329 S.C. at 333, 496 S.E.2d at 416. Additionally, the court mentioned that the trial judge summarized the plea agreement on the record before accepting the defendant's plea. *Id.* The court stated, "even if trial counsel erroneously informed respondent that his sentence would be probationary, any misconception was cured at the plea hearing." *Id.* at 333, 496 S.E.2d at 416–17.

Here, this Court is concerned with the advice that Davis' attorney provided during plea negotiations. It is uncontroverted that Meetze advised Davis that he was eligible for parole and that this plea would not be subject to the "85% rule." It is further uncontroverted that the Department of

Corrections is subjecting Davis to service of eighty-five percent of his seven-year sentence. While it appears that there is some ambiguity in the enforcement of this law, a defendant subject to the 85% Rule is not eligible for parole, but is only eligible for release pursuant to a community supervision program (CSP) after serving 85% of the sentence.

It is the position of this Court that even though counsel need not inform a defendant of a plea's collateral consequences, if counsel affirmatively guarantees those collateral consequences, that attorney has an obligation to be correct. In other words, if counsel informs the defendant that a guilty plea will not affect their parole eligibility and the defendant relies on that information, then the attorney must be correct and the defendant should not be subjected to the "85% Rule" upon arrival at the State Department of Corrections.

Furthermore, unlike *Moorehead*, it appears that the trial court never cured Davis' misconception and counsel's incorrect advice regarding his parole eligibility during his plea hearing. Therefore, this Court finds that Davis' trial counsel was deficient by providing incorrect advice concerning the collateral consequences of Davis' guilty plea. Additionally, this Court finds that this deficient performance prejudiced Davis because it is uncontroverted that, but for counsel's advice, Davis would not have accepted this negotiated sentence and pled guilty.

CONCLUSION

Based on the foregoing, the Court finds Applicant Letron S. Davis has satisfied his burden for relief by establishing ineffective assistance of counsel; therefore, Davis' PCR application is **GRANTED**. Because this Court has granted Davis the relief he requested in his first allegation, it finds it unnecessary to determine the validity of Davis' remaining claims for relief.

IT IS THEREFORE ORDERED that the Application for Post-Conviction Relief is **GRANTED**.

IT IS FURTHER ORDERED that this conviction is **VACATED** and this matter is hereby **REMANDED** for a new trial.

AND IT IS SO ORDERED this 14 day of April, 2014.

Michael G. Nettles
Presiding Judge, Twelfth Judicial Circuit

Florence, South Carolina

ALAN WILSON
ATTORNEY GENERAL

July 28, 2014

The Honorable Sherry R. Rhodes
Marion County Clerk of Court
Post Office Box 295
Marion, South Carolina 29571

Re: Letron S. Davis, Respondent v. State of South Carolina, Petitioner
Civil Action No. 2012-CP-33-379

Dear Ms. Rhodes:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. Correspondence with the court reporter regarding the transcript.

Sincerely,

Joshua L. Thomas
Assistant Attorney General

JLT/jlt

Enclosures

CC: Marcus L. Woodson, Esquire
South Carolina Department of Corrections
The Honorable Daniel E. Shearouse, Clerk of the South Carolina Supreme Court
The Honorable E.L. Clements, III, Twelfth Circuit Solicitor
Office of Appellate Defense
Ms. Trisha Allen, Victim Services

ALAN WILSON
ATTORNEY GENERAL

July 28, 2014

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Letron S. Davis, Respondent v. State of South Carolina, Petitioner
Civil Action No. 2012-CP-33-379

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

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Sincerely,

Joshua L. Thomas
Assistant Attorney General

JLT/jlt

Enclosures

CC: Marcus L. Woodson, Esquire
South Carolina Department of Corrections
The Honorable Sherry R. Rhodes, Marion County Clerk of Court
The Honorable E.L. Clements, III, Twelfth Circuit Solicitor
Office of Appellate Defense
Ms. Trisha Allen, Victim Services

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