

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

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AUG 12 2014

S.C. Supreme Court

FRANK BOLIN, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002759

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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

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QUESTION PRESENTED

Does the record support the PCR court's finding that plea counsel was not deficient in failing to relay the State's plea offer where counsel took the most minimal measures possible to locate Petitioner and relay the State's favorable plea offer and where counsel never reached out to Petitioner's probation officer in order to communicate with him?

STATEMENT

On July 26, 2010, the Spartanburg County Grand Jury indicted Petitioner Frank Bolin, Jr. on two counts of shoplifting. App. 96-101. On April 15, 2011, Petitioner appeared at a plea hearing before The Honorable J. Mark Hayes, II. James A. Cheek represented Petitioner and Prina C. Taylor represented the State. App. 1. The court led a plea colloquy and Petitioner pled guilty to both charges. App. 9, line 3—App. 14, line 16. Petitioner's probation officer also appeared and explained Petitioner had four years of probation remaining stemming from two charges in 2005. App. 15, line 10—App. 16, line 16. The court accepted the plea, revoked his probation in full, and sentenced Petitioner to ten years' incarceration. App. 18, lines 6-23.

On February 27, 2012, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 21-27. The State filed a return on February 5, 2013. App. 28-32. Petitioner appeared at an evidentiary hearing on June 25, 2013 before The Honorable R. Lawton McIntosh. Shane W. Rogers represented Petitioner and Suzanne H. White represented the State. App. 32.

Petitioner testified he was originally assigned Matthew Shealy as counsel through the public defender's office. He never met Shealy but received written correspondence from him. Shealy never relayed to him any plea offer by the State. The day before his plea, he was assigned a new attorney, James Cheeks. App. 36, line 2—App. 37, line 21. Cheeks discussed Petitioner's plea but never mentioned any current or previous offers from the State. App. 40, lines 11-24.

Petitioner later learned that the State had offered a plea of with a recommended five-year cap. Specifically, on October 26, 2010, Assistant Solicitor Prina Taylor sent Shealy an email offering a plea, which would expire when the case appeared on the trial docket, with a

recommended cap of five years. Petitioner testified he would have accepted the offer had he known about it. App. 41, line 8—App. 43, line 8; App. 45, lines 8-10; App. 73.

Shealy testified that he received the State's plea offer and did not relay it to Petitioner. He called the phone number he had for Petitioner on November 1, 2010, six days after receiving the offer. After getting no answer, he sent a letter on November 2 to the address he had for Petitioner, but the letter was returned on November 5, 2010. The letter made no mention of a plea offer. Shealy made no other efforts to reach Petitioner at that time. App. 49, line 12—App. 50, lines 15; App. 53, lines 11-18. However, in February of 2011, Shealy received a request for discovery from Petitioner while he was incarcerated. Shealy replied multiple times, but never mentioned the plea offer. App. 54, line 8—App. 57, line 11.

On November 7, 2013, the PCR court issued its order of dismissal concluding Petitioner failed to prove ineffective assistance of counsel. App. 75-82. Specifically, the court stated Petitioner failed to show Shealy was deficient in failing to convey the plea offer because he attempted to contact Petitioner, but Petitioner failed to provide him with a current address or phone number. Additionally, Petitioner failed to show prejudice because he did not prove that the trial court would have accepted the plea. App. 78-81.

On November 15, 2013, Petitioner file a motion to alter or amend the order of dismissal. App. 83-90. The State filed a return on December 3, 2013. App. 91-93. The PCR court denied the motion on December 4, 2013. App. 94-95.

ARGUMENT

The record does not support the PCR court's finding that trial counsel was not deficient in failing to relay the plea offer because he should have contacted Petitioner's probation officer.

The record does not support the PCR court's finding that trial counsel was not deficient in failing to relay the favorable plea offer to Petitioner because he reasonably should have contacted Petitioner's probation officer to reach Petitioner. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). The right to effective assistance of counsel extends to plea negotiations. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 ("This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

In this case, Shealy reasonably should have contacted Petitioner's probation officer to reach Petitioner. Shealy made only minimal efforts to relay the offer. He waited six days after receiving the offer to call the phone number he had for Petitioner. He then sent a letter, which made no mention of a plea offer, on November 2 to the address he had for Petitioner, but the letter was returned on November 5, 2010. He took no further initiative to reach Petitioner. However, throughout Shealy's representation, Petitioner was on probation for two charges from 2005. Accordingly, Petitioner's probation officer was readily available to counsel to help communicate

with him. Moreover, in February of 2011, Shealy received a request for discovery from Petitioner while he was incarcerated. Shealy replied multiple times, but never mentioned the plea offer. Thus, the record does not support the PCR court's conclusion that Shealy took adequate measures to relay such crucial information to Petitioner.

Additionally, the record does not support the PCR court's conclusion that the failure did not cause prejudice because Petitioner did not prove that the trial court would have accepted the plea. "[P]rosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would . . . cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Missouri v. Frye* at 1410, 182 L. Ed. 2d at 379. *See also Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) ("As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3 & half times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied." (citations omitted)); *Davie v. State*, 381 S.C. 601, 614, 675 S.E.2d 416, 423 (2009) ("Thirdly, both plea counsel and Petitioner testified that had this offer been communicated Petitioner would have accepted the plea agreement. Finally, had Petitioner accepted the original offer, he would have received a significantly lower sentence than the twenty-seven-year sentence that was imposed.").

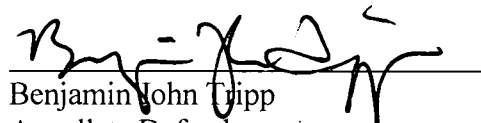
Here, the record indisputably establishes that the State offered a plea deal with a recommended five-year cap, and Petitioner ended up with a ten-year sentence. Petitioner twice testified he would have accepted the offer had he known about it. As explained in *Lafler v. Cooper*

and *Davie*, these circumstances raise a sufficient presumption of prejudice. Thus, as described *Missouri v. Frye*, particular intervening circumstances suggesting judicial nonapproval of the recommendation would have to exist in the record to rebut this presumption. The PCR court never propounded any such circumstances; it merely relied on the authority of the plea judge to reject the recommended offer. Not only did the court make no objective assessment of prejudice, but also the record does not support a finding that no prejudice resulted, and the order of dismissal should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Frank Bolin, Jr.'s petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2014.

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IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
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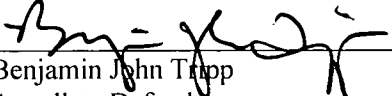
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Frank Bolin, Jr. states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 25, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Frank Bolin, Jr..

Respectfully submitted,


Benjamin John Trapp
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of August, 2014

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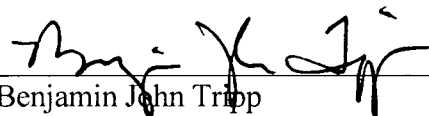
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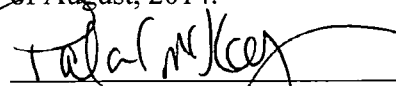
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Frank Bolin, Jr., #209887, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 12th day of August, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of August, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.