

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari To Marlboro County

R. Ferrel Colhran Jr. Circuit Court Judge

Dexter Palmer,

Petitioner.

Vs.

State Of South Carolina

Respondent

Case No.2013-001940

Pro-se Petition For Writ Of Certiorari

Dexter J. Palmer

Petitioner
Lee Correctional Institution
990 Wisacky Highway
Bishopville, S.C.29010

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ISSUE(s) PRESENTED

Issue (1) Whether the pcr Court's order of dismissal failed to make the required "specific finding of facts" concerning the Petitioner's claim of ineffective assistance of counsel pursuant to S.C.Code.Ann.§17-27-80?

Issue (2) Whether the pcr Court's order of dismissal failed to make the required "specific finding of facts" concerning the Petitioner's claim of counsel's ineffectiveness, for failing to move to enforce the original plea agreement providing for a sentence of twenty five (25) years concurrent for all of the charges in both Dillon and Marlboro counties?

Issue (3) Whether the pcr Court's order of dismissal failed to make the required "specific finding of facts" concerning the Petitioner's claim of Breach of plea agreement?

STATEMENT

In April of 2005, the Dillon County Grandjury 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, indictment number 05-GS-17-393, 394, 395, 396, 397. In July of 2005 the Marlboro County Grandjury indicted Petitioner for murder, indictment number 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 Grow represented Petitioner at the plea. Kernard Redmond prosecuted the case. Pursuant to negotiations with the state, judge Lockemy sentenced Petitioner to an aggressive 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.p.35-43). The Marlboro County charge was held in abeyance and Judge scheduled a states 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 judge 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 follows.

Now comes, Dexter J. Palmer pro-se seeking relief in this court claiming that his constitutional rights were violated in a number of ways, including, but not limited to his Sixth Amendment right to the effective assistance of counsel; as well as his right to a fair trial that are protected under the Fourteenth Amendment of the United States Constitution.

In the Post Conviction Relief actions, the petitioner has the burden of proving the allegations set before the pcr court. The proper measure of performance is whether counsel provided proper representation, within the scope of competence required by attorney's in a criminal case. Butler v. State, 334 S.E.2d 813 (1985).

The Petitioner acknowledge that courts presume that counsel rendered adequate assistance and made all significant decision in the exercise of reasonable professional judgment. Butler Id, and that Petitioner must overcome, this presumption to receive relief. Cherry v. State, 386 S.E.2d 624 (1989).

The Court's two prong test in evaluating allegations of ineffective assistance of counsel have been met in the pcr application and the pcr hearing which was before the Honorable judge R Ferrel Cothran Jr., and this

petition for Writ of Certiorari now being presented to the South Carolina Supreme Court, with issues arising out of the violations of his Sixth Amendment rights and Fourteenth Amendment Due Process Clause, S.C. Const. Art. 1§11 were all violated because of the errors arising out of counsel's failure to move to enforce the original plea agreement, counsel's failure to challenge solicitor on breach of plea agreement.

This court has the supreme opportunity for the State of South Carolina to review the record as the Petitioner has requested of the allegations in violation of his constitutional rights in the lower courts of South Carolina.

Petitioner therefore, presents this petition for Writ of Certiorari. The issues included herein along with Petitioner's statement of facts will show unto this Court that Petitioner is entitled to the requested relief stated herein.

Respectfully Submitted

s/ Dexter Palmer

Dexter J. Palmer #311922

ISSUE (1) Whether the P.C.R. Court's order of dismissal failed to make the required "specific finding of facts" concerning the Petitioner's claim of ineffective assistance of counsel pursuant to S.C.Code.Ann.§17-27-80?

FACTS

The Petitioner in his memorandum of law in support of this application for Post Conviction Relief (pcr) alleges that, "plea counsel was ineffective for failing to give adequate assistance." Which is guaranteed under the Sixth Amendment of our constitution.

The Petitioner testified at the pcr hearing that counsel explained to him what he would be pleading guilty to and what the agreement was. Petitioner's testimony at pcr hearing on (PCR Tr. 7. Ln. 4-17)

If I were to plead guilty to all Dillon County and provide sufficient information that they would run the Marlboro County murder, they would drop it down to a lesser crime and give me twenty five (25) years and run them all concurrent.

DISCUSSION

The Petitioner contends that the pcr court's order of dismissal failed to make the required "specific findings of fact" and failed to specifically rule on the Petitioner's claim that trial counsel was "ineffective for failing to give adequate assistance which is guaranteed under the Sixth Amendment of our constitution, and therefore the pcr court's order of dismissal violated S.C.Code.Ann.§17-27-80.

In Mccray v. State, 408 S.E.2d 241, this court held that "S.C.Code.Ann.§17-27-80, requires that the pcr court make, "specific findings

of facts and state expressly its conclusion of law to each issue presented."

This court further concluded that, "remand was required on appeal from denial of pcr where pcr court dismissed movant's ineffective assistance of counsel claim without making findings of fact on specific allegations raised, violated statute precluding appellate review.

The Petitioner would like to direct the court's attention to the standards set forth in our Sixth Amendment under the constitution.

The Sixth Amendment

The Sixth Amendment recognize the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney whether retained or appointed, who plays the role necessary to ensure that the trial/plea agreement is fair. And for that reason, the court has recognize that :the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 104 S.Ct. 2052 (1984).

In Strickland, supra, [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction, has two components. [Two part test] First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment.

Secondly, the defendant must show that the deficient performance prejudice the defendant. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

However, the ineffectiveness of counsel in this case falls under the principle of U.S. V. Cronic, 104 S.Ct. 2039 (1984) For instance, the right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal case has been concluded—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process lose its character as a confrontation between adversaries, the constitutional guarantee is violated. The presumption that counsel's assistance is essential requires a conclusion that a trial/plea agreement unfair if the accused is denied effective counsel at a critical stage of his trial/plea arraignment. Cronic, supra, stands for the proposition that constitutional error can exist without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the trial/plea arraignment proceedings.

ISSUE (2) Whether pcr court's order of dismissal failed to make the required "specific finding of facts" concerning the Petitioner's claim of counsel's ineffectiveness, for failing to move to enforce the original plea agreement providing for a sentence of twenty five (25) years to run concurrent with all charges in both Dillon and Marlboro counties?

Plea counsel was ineffective 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, 17-20). 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 in the same context when we were negotiating the case 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, lines 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 (25) 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 (25) year offer and that file notes confirmed this. Plea counsel testified the state eventually made a plea offer for a thirty (30) 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 made to defendants when those promises serve as inducements to defendants to plea 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 341,247 (1994); see also State v. Mathis, 287 S.C. 589,592,340 S.E.2d 538,540 (1986)("The public interest of encouraging statement 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 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 have 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 668 104 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 that 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 eighty five percent sentence discussed rather than the thirty (30) 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 base 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(2014).

ISSUE (3) Whether the pcr court's order of dismissal failed to make the required "specific finding of facts" concerning the Petitioner's claim of breach of plea agreement?

In regards to Applicant's claim of breach of plea agreement. Applicant directs the court's attention to (App.pp.34-51) where Mr. Redmond goes into great detail about how Applicant's Marlboro County charges will be handled as part of a plea agreement with both Dillon and Marlboro counties.

"Yes it's the negotiation, and as I'll get to, your Honor, he is pleading to twenty five (25) years total and the other charges to run concurrent. We have indicated that if the cooperation and information he's given us is credible that we would then plead him to voluntary manslaughter in Marlboro County and allow that to run concurrent since he is pleading to a twenty five (25) year, no parole sentence." (App.p.34, line 25, p.35, lines 1-7).

There are essentially three (3) "types" of guilty pleas—a guilty plea; a nolo contendere as a no contest plea; and a guilty plea under North Carolina

v. Alford, 400 U.S. 25 (1970). While each differs in terms of defendant's admission of guilt, each has the same consequences. See Id.; Kibler v. State, 267 S.C. 250,227, S.E.2d 199 (1976). Under S.C.Code.Ann.§17-23-40 Com. Supp.1996. All act as waiver of non-constitutional rights prior to plea. Whelsell v. State, 276 S.C.295,277 S.E.2d 891 (1981); Kibler v. State, supra."

A negotiated plea agreement was entered into by the State and Petitioner, on October 17,2005 with the understanding that for Petitioner's cooperation with the solicitor and local law enforcement agencies, the solicitor would except a plea of guilty, of voluntary manslaughter for pending murder offense in Marlboro County. (App.p.35, line 1-7)("that we would then plead him to voluntary manslaughter in Marlboro County and allow that to run concurrent since he is pleading to a twenty five (25) year, no parole sentence.")

In Rallinson v. State, (S.C.2001) 346 S.C.506,552 S.E.2d 290. A defendant may as part of a plea bargain agree to plead guilty to a crime for which he has been indicted (or to which he has waived Grand jury presentment), but of which he is not guilty.

Once a defendant enters a guilty plea and the pleas is accepted by the court, due-process requires the plea bargain to be honored. (U.S.C.A.Const.Amend.14).

In respect to the breaching of the plea agreement contract, Petitioner would like to bring the court's attention to "Law pertaining contracts."

S.C.App.2005 Contract Law(key)143(1)

"A contract is an obligation which arises from an actual agreement of the parties manifested by word, oral, or written, or by conduct." Armstrong v.

Collins, 621 S.E.2d 368.366 S.C.204.

D.S.C.2002. "Under South Carolina law, the intention or meaning in a contract may be manifested or conveyed either expressly or impliedly."

S.C.App.2006. "For a contract to arise, there must be an offer, an acceptance and a meeting of the minds of the parties involved." Rushing v. McKinney, 633 S.E.2d. 917,370 S.C.280.

D.S.C.2004. "Once a determination is made that a contract is unambiguous under South Carolina law, a court must enforce it according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties failure to guard their carefully." In re Georgetown Steel Co.LLC, 31 B.R.313.

Another contract law case in South Carolina: State v. Cochran, 594 S.E.2d 844,358 S.C.24. In Anderson v. State, supra, for example, we held that an individual could plead guilty to involuntary manslaughter under an indictment charging him with "murder", even though the facts would not support a lesser charge.

In Santobello v. New York, 404 U.S.257,262, 92 S.Ct.495,30 L.Ed.2d.427(1971): The Supreme Court recognized that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Also see San Pedro v. U.S., 79 F.3d 1065 U.S. v. Reives, 969 F.2d 985.

"When prosecutor breaks his promise with respect to an executed plea agreement, the defendant pleads guilty on a false promise, and therefore his conviction cannot stand." U.S. v. Griffin, 641 F.Supp.1546.

CONCLUSION

For the forementioned reasons in issues (1-3) and the violations of the Petitioner's constitutional rights including but not limited to his Sixth Amendment right to the effective assistance of counsel; as well as his right to a fair trial that is protected under the Fourteenth Amendment Due Process Clause. And S.C.Constitution Article 1§11 and S.C.Code.Ann.§17-19-10. The Petitioner will forever pray that this court will grant his request of relief to vacate the pcr court's order of dismissal and remend for a new hearing or grant Petitioner relief in the form of a sentence reduction/reconsideration on all the issues herein.

Dated: 25 day of August, 2014

Respectfully Submitted

s/ Dexter Palmer

Dexter J. Palmer #311922

Petitioner

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO MARLBORO COUNTY

R. Ferrel Colhan Jr. Circuit Court Judge

Dexter J. Palmer

Petitioner

Vs.

State Of South Carolina

Respondent

CERTIFICATE OF SERVICE

I, Dexter J. Palmer, do hereby swear under the penalty of law that I have placed this petition for Writ of Certiorari in the Mailroom here at Lee Correctional Institution, with sufficient postage affixed.

Thus, the said document were placed in the mailroom and addressed to the persons whose names and addresses are below.

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Respectfully Submitted

s/ Dexter Palmer

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Sworn To And Subscribe Before Me This

25 day of Aug., 2014

Debra Sides

Notary Public For South Carolina

Commission Expires: 11/4/2015