

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Florence County
Michael G. Nettles, Circuit Court Judge

S.C. Supreme Court

DAVID MYERS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000910

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did trial counsel's failure to adequately communicate a plea offer made by the state to Petitioner violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where it was undisputed that the solicitor offered to recommend a sentence of four years imprisonment if Petitioner pled guilty and where Petitioner testified that if trial counsel would have advised him of the offer he would have accepted the offer and pled guilty instead of proceeding to trial?

STATEMENT

A Florence County Grand Jury indicted Petitioner at the June 9, 2011 term of General Sessions for shoplifting third or subsequent. App. 191-192. His case was called to trial on June 29, 2011 before the Honorable Thomas A. Russo, and a jury. App. 1. Assistant Solicitor John C. Jepertinger represented the state, and Scott P. Floyd represented Petitioner. App. 1. At the conclusion of the trial, the jury found Petitioner guilty. App. 102, l. 23 – 103, l. 4. He was sentenced by Judge Russo to ten years imprisonment. App. 110, ll. 4-8.

The South Carolina Court of Appeals dismissed Petitioner's direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). See State v. Myers, Op. No. 2013-UP-051 (S.C. Ct App. Filed January 30, 2013).

On February 18, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 112-118. The state filed a return to this application dated September 16, 2013. App. 125-130. The matter proceeded to an evidentiary hearing on February 10, 2014 before the Honorable Michael G. Nettles. App. 131. Assistant Attorney General Joshua L. Thomas represented the state, and Tristan M. Shaffer represented Petitioner. App. 131. By order dated March 7, 2014, Judge Nettles denied Petitioner relief. App. 182-190.

This petition for writ of certiorari follows.

ARGUMENT

Trial counsel's failure to adequately communicate a plea offer made by the state to Petitioner violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where it was undisputed that the solicitor offered to recommend a sentence of four years imprisonment if Petitioner pled guilty and where Petitioner testified that if trial counsel would have advised him of the offer he would have accepted the offer and pled guilty instead of proceeding to trial.

PCR Hearing

Trial counsel, Scott Floyd, testified that he was assigned to represent Petitioner on March 30, 2011, but that he did not visit Petitioner at the detention center until a month later around the end of April or the beginning of May. App. 135, ll. 2-10. Floyd stated that the solicitor "delivered" a plea offer "to us" on March 22, 2011 or March 23, 2011 and that the offer did not expire until the start of trial on June 29, 2011. The solicitor agreed to recommend a sentence of four years imprisonment if Petitioner pled guilty to shoplifting third or subsequent. App. 138, l. 16 – 140, l. 2.

Floyd maintained it was Petitioner's decision not to accept the plea offer. App. 147, ll. 17-19. He testified that after he reviewed the case he "was kind of mystified as to why [Petitioner] didn't want to take the offer." App. 141, ll. 2-4. He explained, "They [Wal-Mart employees] claimed they saw him actually taking the stuff and then followed him out into the parking lot while they were calling the police. Then he was arrested within a few minutes after that. So under the circumstances I really didn't feel that he had much of a chance of success at trial." App. 141, ll. 14-21.

Petitioner testified that while trial counsel discussed with him the option of pleading guilty, he never told him that the state had offered to recommend a sentence of four years imprisonment if

he pled guilty. Petitioner said trial counsel told him to plead guilty to a “property offense third.” He explained, “I tell him I ain’t here for a property offense. I’m here for shoplifting. When I went to trial, he ain’t never told me nothing about no four years. He told me after the trial. That[’s] when he told me about the four years. If he had even told me about the four years, I wouldn’t have went to no trial. I would have taken the four years.” App. 152, l. 6-18. Petitioner testified further, “I ain’t never been in jail for no property. If he just tell me to plead to shoplifting, I would have pled. He told me to plead to an enhancement third, a third offense. I ain’t never got a first offense on an enhancement.” App. 153, ll. 8-13.

Near the end of his testimony, Petitioner clarified that trial counsel never explained to him that shoplifting third or subsequent constituted a property offense. He said that when trial counsel discussed with him whether or not to plead guilty he “said property offense. I ain’t never had no property offense. [If trial counsel had come to me] and [said] you got a third shoplifting. Go ahead and plead to the four years. I would have ple[d]. He ain’t never told me.” App. 159, l. 17 – 160, l. 5.

At the end of the PCR hearing, Petitioner’s counsel explained to Judge Nettles that Petitioner “was under the impression that Mr. Floyd [trial counsel] was trying to get him to plead to a different charge than it actually was. That was his resistance to pleading . . . If he [trial counsel] would have explained to him that this is the same charge . . . You’re pleading to an enhanced sentence for a shoplifting. He said he would have taken the four years, Your Honor.” App. 161, ll. 1-9. PCR counsel further argued, “I think he [Petitioner] had some legitimate confusion . . . He seemed fairly credible whenever he testified to his confusion” and “[i]t took quite a bit of, you know, me talking to him before he actually understood it.” App. 162, ll. 8-9; App. 163, ll. 4-6.

Order of Dismissal

The PCR court found that trial counsel had met with Petitioner on several occasions prior to trial and that, during these meetings, the two “discussed the charges he [Petitioner] faced, the elements and potential defenses to those charges, and all plea offers from the State.” App. 186. The court further found it was Petitioner’s choice “to reject any plea offer and proceed to trial.” App. 186. In sum, the court found Petitioner’s “claim for ineffective assistance of counsel fails because [trial] counsel was not deficient and the evidence overwhelmingly points to [Petitioner’s] guilt.” App. 186.

Discussion

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). Our Supreme Court “has held that a defendant has the right to effective assistance of counsel during the plea bargaining process.” Davie, 381 S.C. at 607, 675 S.E.2d at 419 (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000)). The United States Supreme Court has also “made clear that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” Missouri v. Frye, 566 U.S. ___, 132 S.Ct. 1399, 1406 (2012) (quoting Padilla v. Kentucky, 559 U.S. 356, 373 (2010)) (internal quotations admitted).

“The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” Frye, 566 U.S. at ___, 132 S.Ct. at 1407. “[A]s a general rule, defense counsel has the duty to communicate formal offers from

the prosecution to accept a plea on terms and conditions favorable to the accused.” Id. at ____, 132 S.Ct. at 1408.

To prevail on his claim of ineffective assistance of counsel, Petitioner is required to prove that (1) trial counsel’s failure to communicate the state’s plea offer constituted deficient performance, and (2) he was prejudiced by this deficient performance, *i.e.*, there is a reasonable probability that but for counsel’s deficient performance, he would have accepted the original plea offer. Davie, 381 S.C. at 608, 675 S.E.2d at 420. Additionally, Petitioner must show actual prejudice. “However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant’s self-serving statement may be sufficient to establish actual prejudice.” Id. at 613, 675 S.E.2d at 422 (citing Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000)).

In Davie, our Supreme Court found defense counsel’s failure to convey the state’s initial plea offer of fifteen years imprisonment to the defendant constituted deficient performance when the defendant later pled guilty and was sentenced to an aggregate amount of twenty-seven years imprisonment. 381 S.C. at 610, 675 S.E.2d at 421. This Court further found the defendant was prejudiced by defense counsel’s deficient performance noting “that the difference in the sentence [the defendant] received and the plea offer is proof of prejudice.” Finally, the Court held that a new sentencing hearing was the proper form of relief for the defendant. Id. at 614, 675 S.E.2d at 423. This Court noted that there was no evidence in the record that the defendant expressed a desire to proceed to trial rather than plead guilty and, therefore, a remand for a new trial was not the proper remedy. Id. at 615, 675 S.E.2d at 423-424.

In Frye, which was decided after Davie, the United States Supreme Court found defense counsel ineffective when he failed to advise the defendant of a plea offer or allow him to

consider the offer before it expired. 566 U.S. at ____, 132 S.Ct. at 1408. The Court held, “To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it.” Id. at ____, 132 S.Ct. at 1409. The Court ultimately remanded the case noting that the Court of Appeals of Missouri failed to require Frye to show that the “plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court.” Id. at ____, 132 S.Ct. at 1411.

In Lafler v. Cooper, 566 U.S. ____, 132 S.Ct. 1376, 1383-1384 (2012), also decided after Davie, the United States Supreme Court found defense counsel ineffective when the defendant rejected a favorable plea offer, despite admitting guilt and expressing a willingness to accept the offer, after defense counsel “convinced [the defendant] that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist,” which was “an incorrect legal rule.”

In order to prove prejudice in these circumstances, the Court held “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.” Id. at ____, 132 S.Ct. at 1385. The Court found the defendant in Lafler suffered

prejudice because he had shown that but for counsel's deficient performance there was a reasonable probability he would have accepted the offer, the trial court would have accepted its terms, and as a result of not accepting the plea and being convicted at trial, the defendant received a minimum sentence three and a half times greater than he would have received under the plea. Id. at ___, 1376 S.Ct. at 1391.

Furthermore, in Lafler, the Court rejected the Solicitor General's argument that "there can be no finding of Strickland prejudice arising from plea bargaining if the defendant is later convicted at a fair trial." The Court stated, "Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." Id. at ___, 132 S.Ct. at 1386.

Additionally, in Kolle v. State, 386 S.C. 578, 591-592, 690 S.E.2d 73, 80 (2010), this Court found plea counsel was ineffective in advising Kolle that the state's initial plea offer was "not a good deal" and misinforming Kolle that the offer would remain open after a suppression hearing, when the offer did not remain open and was significantly less than the seven year sentence Kolle received. (internal quotations omitted). This Court stated, "Had Kolle known that the state would withdraw this offer after the suppression hearing, he may have decided to accept it and received a lower sentence." Id. This Court thus affirmed the PCR court's decision to grant Kolle relief. Id. at 593, 690 S.E.2d at 81.

Here, it is undisputed that the solicitor offered to recommend a sentence of four years imprisonment if Petitioner pled guilty to shoplifting third or subsequent. The record indicates that, while trial counsel tried to convince Petitioner to plead guilty rather than proceed to trial, he never communicated the four year offer to Petitioner. At no point during the PCR hearing did trial

counsel testify that he discussed the offer with Petitioner. He merely stated in a conclusory fashion when asked by the assistant attorney general that it was Petitioner's decision to reject all plea offers. See App. 147, ll. 17-19. However, Petitioner testified, "When I went to trial, he [trial counsel] ain't never told me nothing about no four years. He told me after the trial. That[']s when he told me about the four years." App. 152, ll. 12-15.

Additionally, based on Petitioner's testimony, it appears that when trial counsel talked to Petitioner about possibly pleading guilty, he used the term "property enhancement third," not shoplifting third or subsequent. App. 153, ll. 7-13. Petitioner obviously thought "property enhancement third" and shoplifting third or subsequent were different offenses and he did not want to plead guilty to the "property offense." See App. 153, ll. 10-11. Instead, he wanted to plead guilty to shoplifting third or subsequent, which is the offense reflected on his indictment. Petitioner testified, "So Mr. Floyd come and told me to plead to the property offense. I tell him I ain't here for a property offense. I'm here for shoplifting." App. 152, ll. 8-12. He also said, "I ain't never been in jail for no property. If he [trial counsel] just tell me to plead to shoplifting, I would have ple[d]. He told me to plead to an enhancement third, a third offense. I ain't never got a first offense on an enhancement charge." App. 153, ll. 8-13. Petitioner's genuine confusion is obvious from his testimony at the PCR hearing. Furthermore, PCR counsel stated during the hearing that "[i]t took quite a bit of . . . me talking to him before he actually understood it [that shoplifting third or subsequent is a property enhancement offense]." See App. 163, ll. 4-6.

Trial counsel's failure to communicate the state's plea offer to Petitioner constituted deficient performance. Trial counsel should have adequately discussed the state's offer with Petitioner and ensured that he properly understood its terms before Petitioner proceeded to trial. See Davie, 381 S.C. at 608, 675 S.E.2d at 420.

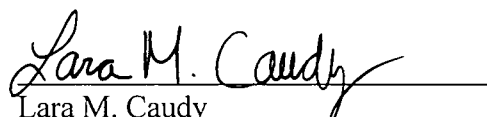
Petitioner was prejudiced by trial counsel's deficient performance because if trial counsel would have properly communicated the four year offer to Petitioner, Petitioner would have accepted the offer and pled guilty. Petitioner testified, "If he [trial counsel] just [told] me to plead to shoplifting, I would have ple[d]." App. 153, ll. 9-10. He also maintained, "If he [trial counsel] had even told me about the four years, I wouldn't have went to no trial. I would have taken the four years." App. 152, ll. 16-18; see Davie, 381 S.C. at 613, 675 S.E.2d at 422 ("[I]t is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice."). Additionally, Petitioner was prejudiced because after he was convicted at trial, he was sentenced to ten years imprisonment, the maximum amount possible under the statute. See S.C. Code Ann. § 16-01-57; see also S.C. Code Ann. § 16-01-20. However, under the plea offer, Petitioner would have been sentenced to only four years imprisonment. The difference in the sentence Petitioner received and the plea offer alone is proof of prejudice. See Davie, 381 S.C. at 614, 675 S.E.2d at 423. Furthermore, it is likely the four year sentence offered by the solicitor would have been accepted by the trial judge if Petitioner had pled guilty because it was a reasonable sentence considering the underlying allegations.

Lastly, it should be noted that the United States Supreme Court has held that "[t]he fact that [the defendant] is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." Lafler, 566 U.S. at ___, 132 S.Ct. at 1388. Thus, even though Petitioner admitted he was guilty of shoplifting forty-two dollars worth of turtle wax from Wal-Mart, this does not mean he was not entitled to the effective assistance of counsel or that he did not suffer prejudice from trial counsel's deficient performance. See App. 160, ll. 8-14.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented with the ultimate relief being a reversal of Petitioner's conviction and sentence and a remand to the Florence County Court of General Sessions for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
Michael G. Nettles, Circuit Court Judge

DAVID MYERS,

PETITIONER,

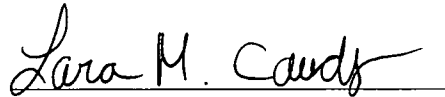
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

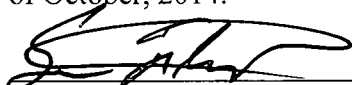
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of October, 2014.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of October, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.