

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

George C. James, Jr., Circuit Court Judge

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JAN - 9 2015

S.C. Supreme Court

JOHNNY CARRAWAY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014- 001252

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I N D E X

INDEX 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

The post conviction relief judge correctly granted relief based on plea counsel’s
failure to convey the ten year plea offer 4

CONCLUSION 11

QUESTION PRESENTED

Did the post conviction relief judge correctly grant relief based on plea counsel's failure to convey the ten year plea offer?

STATEMENT OF THE CASE

In March of 2010, the Horry County Grand Jury indicted Carraway for armed robbery, indictment #2010-GS-26-01552. On November 3, 2010, Carraway appeared before the Honorable Steven H. John and pled guilty as charged. James C. Galmore represented Carraway at the guilty plea. Elizabeth V. Tilley prosecuted the case. Judge John sentenced Carraway to eighteen (18) years. Carraway filed a notice of intent to appeal but the appeal was dismissed pursuant to Rule 203(d)(1)(B)(iv), SCACR.

On January 6, 2011, Carraway filed an application for post conviction relief. The State filed a return on March 3, 2011. On March 17, 2014, an evidentiary hearing was held before the Honorable George C. James Jr. Daniel A. Selwa, II represented Carraway at the PCR hearing. Joshua L. Thomas represented the State. In a written order signed April 24, 2014, Judge James granted relief and ordered the State to re-offer the ten year plea but left sentencing in the discretion of the sentencing judge. The State filed a petition for writ of certiorari on November 13, 2014. This return follows.

ARGUMENT

The post conviction relief judge correctly granted relief based on plea counsel's failure to convey the ten year plea offer.

On March 12, 2010, Assistant Solicitor Elizabeth V. Tilley sent a written plea offer to Carraway's attorney. (App. p. 61). According to the plea offer, if the defendant pled guilty to armed robbery, the State would recommend a ten year sentence. (App. p. 61). The offer specifically states, "The Defendant must accept the off by 5/7/10 or it is considered rejected and the State will not make the offer again. Should the defendant accept the offer, he or she must enter the plea before or during the MAY term of court. Please review the offer with your client, sign and date as indicated below, and return to me no later than 5/7/10. Please call me at 915-**** if I may be of service." (App. p. 61). The plea offer includes a portion titled "DEFENDANT'S RESPONSE" and includes a place for the defendant to check trial or guilty plea and a signature line for defendant and defense attorney. (App. p. 61). The Defendant's Response section on Carraway's plea offer is blank, not indicating trial or guilty plea and containing no signatures. (App. p. 61). During the PCR hearing plea counsel admitted that the plea offer sheet fails to reflect that Carraway ever saw the plea offer or accepted or rejected the plea offer. (App. p. 44, line 24 – p. 45, lines 1-5). Carraway pled guilty to armed robbery on November 4, 2010, with no recommendation from the State as to sentencing. (App. p. 3, lines 1-7). Carraway received an eighteen year sentence.

In the application for post conviction relief Carraway alleges plea counsel was ineffective in failing to convey the State's ten year plea offer. (App. pp. 18-22). During the PCR hearing Carraway testified that he did not receive a copy of the written plea offer until November of 2010, after the guilty plea while Carraway was serving his sentence in the South Carolina Department of

Corrections. (App. p. 37, line 16 – p. 38, lines 1-23). Carraway testified that he would have accepted the ten year plea offer, had it been conveyed. (App. p. 38, lines 24-25).

During the PCR hearing plea counsel did **not** testify that he discussed the ten year plea offer with Carraway before the plea offer expired. Instead, plea counsel testified that he sent the plea offer to Carraway at the jail through his investigator. (App. p. 42, line 20 – p. 43, lines 1-15). When asked if he talked to Carraway about the plea offer, plea counsel testified:

That's kind of the problem in this case. He wanted to take that offer, but he moved a little too slow. By the time that he wanted to take the offer, the State had withdrawn the offer. Like I said, the plea offer was set to expire in May of 2010, and his plea was November 3, 2010. Mr. Carraway contacted me on October 25, 2010 and told me he would take the ten years, and I told him it was armed robbery and it would be 85%. Unfortunately, the State did not have the offer out there for him at that time.

(App. p. 43, line 18 – p. 44, lines 1-2).

Plea counsel never testified that he discussed the plea offer with Carraway prior to the expiration of the plea offer. Plea counsel was not sure when the State withdrew the plea offer but testified that he continued to discuss the offer with the State after the May deadline. (App. p. 44, lines 3-6). When asked if he sent Carraway any correspondence about the plea offer deadline, plea counsel testified that he sent a letter to Carraway on October 21, 2010, approximately five months after the stated expiration of the plea offer. (App. p. 44, lines 7-14). According to plea counsel the letter stated, "I've now been informed that your case has been scheduled Number 2 for trial for the week of November 1, 2010. At this point you need to either accept the plea for ten years, or you need to take the case to trial. We are out of time, and we are out of choices." (App. p. 44, lines 15-20). As discussed above, on October 25, 2010, Carraway contacted plea counsel, after receiving the letter from counsel dated October 21, 2010, and indicated he would accept the ten year plea offer

but the offer had already expired. (App. p. 43, line 23- p. 44, lines 1-2)). There is no evidence in the record that plea counsel discussed the plea offer with Carraway prior to October 21, 2010.

Plea counsel testified that he met with Carraway at the jail on March 23, 2010, and discussed background information. (App. p. 50, lines 24-25). Plea counsel became concerned about mental health issues during the March meeting. (App. p. 51, lines 1-3). The guilty plea transcript reflects that Carraway was evaluated and found competent to stand trial. (App. p. 13, lines 22-25). Plea counsel testified that he met again with Carraway on April 21, 2010, July 27, 2010, and September 20, 2010. (App. p. 51, lines 3-8). Plea counsel never testified that he discussed the plea offer with Carraway during these meetings. Plea counsel never testified that Carraway rejected the ten year plea offer. While plea counsel testified that he and Carraway discussed a possible plea to strong armed robbery and drug rehabilitation, that offer was never made by the State. (App. p. 46, line 17 – p. 47, lines 1-2). PCR counsel asked, “During any of those meetings, did you have an opportunity to discuss a ten-year plea offer?” (App. p. 51, lines 11-12). Plea counsel answered:

Well, the ten-year plea offer was out there. I can't remember specifically when we discussed it. I do – I did make a note that on October 25, 2010 he said he wanted to take the ten- year plea offer. I have a note that says – sorry, October 20th. October 20th he was advised that they would not be putting him in drug court, and at that point we tried to see if we could maybe get a strong arm robbery out of it. Then five days later, the 25th, that is when he said he would take the ten years.

(App. p. 51, lines 13-22). There is no testimony or evidence that plea counsel conveyed the ten year plea offer prior to October 21, 2010, when he wrote to Carraway and told him he needed to make a decision. It appears that the plea offer had already expired when plea counsel wrote to Carraway on October 21, 2010, advising him to either accept the plea for ten years or go to trial. There is no testimony or evidence that Carraway knew of the ten year plea offer prior to October 21, 2010.

There is no testimony or evidence that Carraway was ever warned that the plea would expire and there is no testimony or evidence that Carraway ever rejected the ten year plea offer.

In the order granting relief the PCR judge wrote:

Here, the greater weight of the evidence establishes plea counsel did not effectively communicate the plea offer to Applicant or otherwise discuss it with him before the May 7, 2010, deadline. Plea counsel testified his investigator delivered the letter containing the plea offer to the detention center with other mail going to other inmates. There is no evidence plea counsel ever talked to applicant about the plea offer and there is no evidence Applicant received the plea offer. It is clear Applicant would have accepted the ten (10) year offer because he has never denied guilt for his crime. It seems most of plea counsel's efforts were aimed at investigating mental health issues and trying to get a reduction in the charge from armed robbery to strong arm robbery. Plea counsel wrote Applicant on October 21, 2010 – five (5) months after the offer expired – and advised him that he would either have to take the 10 year offer or go to trial. Four days later, applicant told plea counsel he would accept the offer. However, by that time the offer had been officially off the table for five (5) months. Therefore, the Court finds plea counsel was ineffective for failing to communicate the plea offer to Applicant. Furthermore, Applicant has shown prejudice in that he has demonstrated a reasonable probability he would have accepted the plea offer. There is also a reasonable probability the plea would have been entered without the prosecutor canceling the agreement or the trial court refusing to accept it. Pursuant to Lafler,¹ the State will be required to reoffer the ten (10) year plea, and sentencing will be left to the discretion of the sentencing judge.

(App. pp. 67-68). The PCR judge correctly found that counsel was ineffective in failing to convey the ten year plea offer. Carraway was prejudiced by counsel's failure to convey the offer as he would have timely accepted the offer and pled guilty for the recommended ten years rather than entering a guilty plea without recommendation and receiving an eighteen year sentence.

In Davie v. State, 381 S.C. 601, 607-08, 675 S.E.2d 416, 419-20 (2009), the South Carolina Supreme Court wrote:

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in

¹ Lafler v. Cooper, -- U.S.--, 132 S.Ct. 1376 (2012).

criminal cases i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56–58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). "The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Id. at 138, 631 S.E.2d 260, 631 S.E.2d at 261. "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith, 369 S.C. at 138, 631 S.E.2d at 261. This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber, 371 S.C. at 558–59, 640 S.E.2d at 886.

To prevail on his claim of ineffective assistance of counsel, Petitioner was required to prove that 1) plea counsel's failure to communicate the State's initial, fifteen-year 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.

In Davie the South Carolina Supreme Court granted relief and remanded for re-sentencing. In Missouri v. Frye, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012), the United States Supreme Court wrote, "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." The plea offer in the present case was a formal offer and trial counsel had a duty to convey the offer to Petitioner. Plea counsel was deficient in failing to convey the ten year plea offer.

Addressing the prejudice prong the Court in Missouri v. Frye, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012), wrote:

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 the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) (“[A]ny amount of [additional] jail time has Sixth Amendment significance”).

There is a reasonable probability that Carraway would have accepted the ten year offer. .

There is nothing to suggest that the prosecution would have withdrawn the offer prior to the expiration date. There is also nothing to suggest that the judge would not have accepted the plea to armed robbery with a recommended sentence of ten years. There is a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea with a recommendation for a ten year sentence.

In Bell v. State, 410 S.C. 436, 440-41, 765 S.E.2d 4, 6 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

Our supreme court has also held “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. “[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 that may be favorable to the accused.” Frye, 132 S.Ct. at 1408; see also Davie, 381 S.C. at 609, 675 S.E.2d at 420 (2009) (adopting “rule that counsel's failure to convey a plea offer constitutes deficient performance”).

In Bell the Court of Appeals upheld the grant of relief by the PCR judge because the Court found evidence of probative value in the record to support the PCR judge’s finding that a plea offer was made by the State and counsel failed to communicate the plea offer. As to prejudice the Bell court found that the difference between the sentence in the plea offer and the actual sentence imposed was evidence of prejudice.


Additionally, the Bell court found that Bell's testimony that he would have accepted the plea offer had it been conveyed was additional evidence of prejudice supporting the PCR judge's grant of relief. See also Davie.

In the present case there is evidence of probative value to support the PCR judge's finding that plea counsel failed to convey the ten year plea offer prior to the expiration date. There is probative evidence to support the PCR judge's finding that Carraway was prejudiced by counsel's deficient performance in failing to convey the ten year plea offer prior to the expiration date. Carraway testified that he would have accepted the ten year plea offer. (App. p. 38, lines 24-25). There is a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea with a recommendation for a ten year sentence rather than the actual sentence imposed of eighteen years. Based on the deferential "any evidence standard" of review, the petition for writ of certiorari should be denied.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be denied and the case remanded for re-sentencing.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 9th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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George C. James, Jr., Circuit Court Judge

JOHNNY CARRAWAY,

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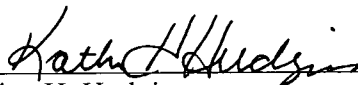
STATE OF SOUTH CAROLINA,

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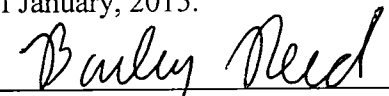
CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of January, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 9th day
of January, 2015.


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