

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
William P. Keesley, Circuit Court Judge

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S.C. Supreme Court

ARTHUR R. LADIA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001426

PETITION FOR WRIT OF CERTIORARI

JOHN H. STROM
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

INDEX

INDEX.....1

ISSUES PRESENTED.....2

STATEMENT3

ARGUMENT6

CONCLUSION13

ISSUES PRESENTED

I.

Did the PCR court correctly grant Petitioner's belated appellate review pursuant to *White v. State*,¹ when Petitioner did not knowingly and voluntarily waive his right to a direct appeal?

II.

Did the PCR court err in finding counsel provided effective assistance where counsel advised Petitioner to continue with a guilty plea after counsel failed to enforce the terms of a plea agreement between Petitioner and the State; allowing Petitioner to plea to one count of attempted armed robbery?

¹ *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

STATEMENT

Indictment

On February 2, 2012, the Lexington County Grand Jury indicted Petitioner, Arthur Ladia, for armed robbery, burglary in the first-degree, and criminal conspiracy. App.158-159.

Plea Hearing

On June 21, 2012, Petitioner appeared before the Honorable D. Craig Brown, and pled guilty to attempted armed robbery, burglary in the second degree, and criminal conspiracy. App. 1 – 39. Petitioner was represented by John W. Locklair, III and the State was represented by Assistant Solicitor Angela Garrett.

The plea judge sentenced Petitioner to a term of fifteen years imprisonment for attempted armed robbery, a term of ten years imprisonment for burglary in the second degree, and a term of five years imprisonment for criminal conspiracy. App. 38, ll. 8-19. The sentences were to be served concurrently. *Id.*

Petitioner did not file a timely appeal.

PCR Application and Evidentiary Hearing

On June 18, 2013, Petitioner filed his application requesting post-conviction relief (PCR). Petitioner alleged counsel was ineffective and that his guilty plea was made involuntarily. App. 40 – 52. On July 5, 2013, Petitioner filed an amended application. App. 53 – 54. On December 20, 2013, the State filed its Return. App. 55 – 60.

On April 14, 2014, an evidentiary hearing was held before the Honorable William P. Keesley. App. 61 – 139. Anna R. Good represented the Petitioner and Assistant Attorney General Walt Whitmire represented the State. Petitioner, counsel, and Petitioner's mother testified at the evidentiary hearing.

Petitioner testified that Locklair told him to expect probation as Petitioner had no prior criminal record. App. 74, ll. 2-13. Petitioner stated that counsel never discussed the option of cooperating with law enforcement, never discussed a plea offer from the state, and never prepared for trial. App. 69, ll. 22 – App. 71, ll. 14; App. 74, ll. 24 – App. 75, ll. 24. Petitioner also testified that he asked counsel to file an appeal or motion for reconsideration. App. 76, ll. 20 – App. 77, ll. 24. However, Locklair refused to do so and did not meet with Petitioner in time to file a motion for reconsideration after the guilty plea. App. 78, ll. 1-10.

Petitioner's mother testified that counsel was difficult to contact. App. 89, ll. 25 – App. 90, ll. 4. Petitioner's mother also recalled that counsel promised to file post-trial motions in Petitioner's case within five days of Petitioner's plea, but never actually filed the motions. App. 89, ll. 2-10.

Counsel remembered that he agreed to represent Petitioner because he "seemed like a really good kid" with a supportive family. App. 93, ll. 1-8. Counsel claimed that Petitioner refused to cooperate with law enforcement in order to get a better plea offer and that several co-defendants had agreed to give evidence against him. App. 96, ll. 4-14; App. 104, ll. 1-22.

Counsel further alleged that on the day of the plea hearing, the solicitor changed the plea offer and demanded Petitioner plead guilty to burglary in the second degree and conspiracy in addition to the agreed on guilty plea to attempted armed robbery. App. 98, ll. 18 – App. 99, ll. 99. Counsel stated that he explained to Petitioner he still recommended pleading guilty despite the additional charges and that the case was scheduled for trial so the decision to continue with the guilty plea had to be made at the plea hearing. App. 100, ll. 11 – App. 101, ll. 3.

Counsel averred that he did not file a motion for reconsideration because he believed that it was not warranted. App. 112, ll. 4-15. Locklair admitted that he failed to meet with Petitioner to discuss filing a motion for reconsideration, but was under the impression Petitioner had decided to

move forward on a PCR claim. *Id.* at ll. 16 –App. 113, ll. 15. On cross-examination, Counsel conceded that, while he believed a motion for reconsideration was not proper, he knew Petitioner wanted to appeal and that he should have honored Petitioner’s decision. App. 122, ll. 5 – App. 123, ll. 21.

At the close of testimony, the PCR Court questioned the Petitioner about his understanding of the kind of relief that the court could order. App. 127, ll. 18-25. The court explained that any plea offers from the original hearing would not apply and that Petitioner could face life without parole for first degree burglary charge. App. 128, ll. 7-13.

Order of Dismissal

On June 4, 2014, Judge Kessley filed an Order of Dismissal Granting a Review of Direct Appeal Issues Pursuant to *White v. State*. App. 140 – 154. The Order specifically found that Petitioner had failed to prove that counsel’s performance was ineffective for failing to file a motion for reconsideration and that the other allegations of ineffectiveness concerning negotiating the plea offer, preparing for trial, and failing to request a preliminary hearing were without merit. App. 145; App.148 – 150.

The court did conclude that Petitioner was entitled to a belated review of direct appeal issues pursuant to *White v. State*. App. 146. The court noted that counsel stated “he should have gotten the decision about an appeal directly from [Petitioner] and that an appeal should be filed to protect the record.” *Id.* Accordingly, the court held that Petitioner should be allowed a review of his direct appeal issues. *Id.*

This petition for writ of certiorari follows.

ARGUMENT

I.

The PCR court correctly granted Petitioner's belated appellate review pursuant to *White v. State*, when Petitioner did not knowingly and voluntarily waive his right to a direct appeal.

In *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002), this Court held that “[a] defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal.” In *Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002), this Court further held that a defendant has the right to a belated appeal when the applicant did not knowingly and intelligently waive his right to a direct appeal. Therefore, this Court has reaffirmed the principle that a criminal defense attorney must make certain that his client is fully aware of his right to appeal and in the absence of an intelligent waiver by the client, must either pursue an appeal or file a brief under *Anders v. California*, 386 U.S. 738 (1967); see *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

In this case, the record contains probative evidence supporting the PCR court's ruling that Petitioner did not make a knowing and voluntary waiver of his right to a direct appeal. App. 122, ll. 5 – App. 123, ll. 21. Specifically, counsel represented Petitioner, and thus, had a duty to protect Petitioner by filing a timely notice of appeal. Cf. *In Re Anonymous Member of the Bar*, 303 S.C. 306, 308, 400 S.E.2d 483, 484 (1991) (attorney retained solely for the purpose of trial of a non-indigent criminal defendant must serve and file a timely Notice of Appeal as required by Rule 203, SCACR, and continue to represent the client until relieved by Court; counsel is required to take all necessary steps reasonably practicable to protect the client's interests under Rule 1.16 of the Rules of Professional Conduct). Therefore, the PCR court correctly granted Petitioner belated appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), when Petitioner did not knowingly and voluntarily waive his right to a direct appeal. App. 127 – 136.

II.

PCR court erred in finding counsel provided effective assistance where counsel advised Petitioner to continue with a guilty plea after counsel failed to enforce the terms of a plea agreement between Petitioner and the State; allowing Petitioner to plea to one count of attempted armed robbery.

Relevant Facts

On November 19, 2011, Henry Durugbor was robbed at gun point in his hotel room. App. 12, ll. 18 – App. 14, ll. 13. Durugbor was identified to an individual, known only as “Tay”, as a potential robbery target by Charlene “China” De Jesus, who had been with Durugbor during the day and knew that he had money and electronics in his hotel room. App. 15, ll. 1-22. Tay then allegedly contacted Appellant and two other unknown individuals, instructing them to meet up with De Jesus and rob Durugbor. *Id.*

After robbing Durugbor and burglarizing his hotel room, the group fled the scene in a vehicle driven by Marquetta Foster and owned by her parents. *Id.* at ll. 22-25. A maid at the hotel reported their license plate number to the police who contacted Foster’s parents. App. 16, ll. 2-23. Foster turned herself in and cooperated with law enforcement. App. 16, ll. 9 – App. 17, ll. 14. She identified Appellant as the gunman in the robbery. *Id.* Durugbor also identified Appellant in a line-up. App. 17, ll. 9-14.

By the time of Appellant’s plea, De Jesus and Foster had both pled and were cooperating with the State. App. 18, ll. 3-18. Also cooperating with law enforcement was Latasha Busbee, who was arrested for using Durugbor’s credit cards. App. 17, ll. 15-21. None of the other men involved in the robbery, including Tay, were ever identified or apprehended. App. 17, ll. 24 – App. 18, ll. 2.

Plea Negotiations

The State initially offered the Appellant to plead guilty to all charges with the State making no recommendations as to sentencing. App. 100, ll. 1-10. Appellant rejected this offer. App. 98, ll.

18-23. The State subsequently offered to allow Appellant to plead guilty to armed robbery and violent burglary, again with no recommendation. App. 97, ll. 20-24. This was also rejected.

With the case set for trial, the State made a final offer to let Appellant plead guilty to attempted armed robbery. App. 98, ll. 18-23. Appellant accepted this offer and a plea hearing was scheduled for June 21, 2012. *Id.* However, at the plea hearing, the State reneged on its offer and demanded that Appellant plead guilty to additional charges of second degree burglary and criminal conspiracy. App. 98, ll. 18 – App. 99, ll. 13. Locklair advised Petitioner to still accept the offer, noting at the PCR hearing that the case was:

coming up on the trial docket. Unfortunately, in our state, they let the solicitor's control the docket, which they're finally going to change, and so they can sandbag you like this... So eventually [Assit. Solic. Garrett] started out with, you know, he can plea to the armed robbery -- basically plea straight up to everything is their initial plea offer in Lexington County, you know, just plea to everything and we'll ask for the maximum and everybody can be happy. So, obviously, I said, no. So then she offered the armed robbery and the [burglary first degree], the violent section, obviously dealing with the guns.they had cooperating co-defendants, she, at that point -- she seemed hesitant to want to try the case, you know, and she came out with a better offer...

App. 99, ll. 17 – App. 100, ll. 18.

PCR Hearing and Order of Dismissal

At the PCR hearing, counsel testified that he believed the State used their control of the criminal docket to “sandbag” the Petitioner into pleading guilty to the second degree burglary and the criminal conspiracy charges. App. 98, ll. 18 – App. 99, ll. 13. Counsel stated that he nevertheless advised Petitioner to take the offer because Durugbor was a sympathetic figure and multiple co-defendants were cooperating. App. 100, ll. 11 – App. 101, ll. 17.

Order of Dismissal

In denying Petitioner's application, the PCR Court determined that Petitioner "failed to meet his burden to prove counsel was ineffective for failing to properly advise [Petitioner] on the terms of the guilty plea." App. 144. While the court noted that Petitioner testified that he felt pressured into taking the deal, the court concluded that counsel was not ineffective for failing to seek a more favorable plea offer:

[Petitioner's] allegation that counsel was ineffective for failing to negotiate a more favorable plea agreement is without merit. "Our state constitution provides) [t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record. S.C. Const. art. V, § 24. Thus, the prosecution has wide latitude in selecting what cases to prosecute." *Rainey v. Haley*, 404 S.C. 320, 332-33, 745 S.E.2d 81, 87 (2013) (internal citations omitted) (Beatty, J., concurring). "Prosecutors have broad powers in the plea bargain process: Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case." *Reed v. Becka*, 333 S.C. 676, 684, 511S.E.2d 396, 400 (Ct. App. 1999).

App 148. The PCR Court conceded that Petitioner may rightly feel that the sentence leveled against him was excessive, but that there was no showing that anything related to the severity of the sentence was improper or that his counsel failed to render effective assistance. App. 151 – 152.

Discussion

The PCR court erred in finding that counsel provided effective assistance where counsel advised Petitioner to continue with a guilty plea. Counsel was ineffective for failing to enforce the terms of a plea agreement with the State allowing Petitioner to plea to one count of attempted armed robbery. *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard to guilty plea challenges).

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results."

Brady v. United States, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); see also *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. See *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 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. at 56–58). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Furthermore, “[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” *Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (2009) (citing *Hill*, 474 U.S. at 57-59); See *Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant’s guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by counsel).

“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). Specifically, even if the agreement has not been finalized by the court a defendant’s detrimental reliance on a prosecutorial promise in a plea bargain may make a plea agreement binding. *Custido v. State*, 373 S.C. 4, 10-11, 644 S.E.2d 36, 39 (2007). In addition, if a prosecutor reneges on a plea bargain agreement, counsel may be ineffective for continuing with the guilty plea. *Santobello v. New York*, 404 U.S. 257 (1971); *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988).

In the present case, Locklair clearly testified that the State reneged on their offer to allow Petitioner to plead guilty to attempted armed robbery. App. 99, ll. 3-13. The State abused its control over the General Sessions’ docket, since ruled unconstitutional, to extract guilty pleas on the additional charges. *State v. Langford*, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012) (preparation of dockets in criminal matters is an inherent judicial function; solicitor or executive branch control of the criminal docket violates the separation of powers doctrine and runs afoul of our system of checks and balances). Counsel should have held the State to the terms of its plea agreement as it was either binding because it was already offered and accepted or was binding under the detrimental reliance exception. *Custido*, 373 S.C. at 10, 644 S.E.2d at 38; *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d. 290, 292 (2001) (plea bargains are governed by contract principles).

Locklair had the opportunity to bring before the court the terms of Petitioner’s actual plea agreement. The existence of a contract was evidenced by the scheduling of the plea hearing, by Petitioner giving up his right to a trial, and by counsel’s own testimony. Petitioner had indicated with his course of conduct an acceptance of the State’s offer or had acted in detrimental reliance on the terms of that offer. Further, the record and counsel’s credible testimony makes clear that, but for

the State's offer to allow Petitioner to plead guilty to attempted armed robbery, Petitioner was prepared to go to trial and had rejected several prior plea offers from the State. App. 98, ll. 18 – App. 100, ll. 18.

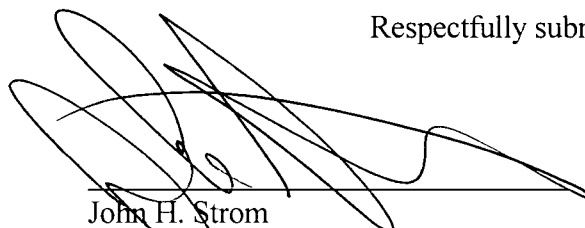
Moreover, even if counsel was unable to enforce the plea agreement; counsel's performance was also deficient for strongly advising Petitioner to continue with the plea despite the additional charges, which drastically reduced the likelihood of Petitioner chance receiving probation. *Jordan*, 297 SC at 54, 374 S.E.2d at 685 (defendant's previous insistence on going trial, before receiving terms of plea agreement that the State reneged on at the plea hearing, was evidence that defendant would have not pled guilty and would have insisted on going to trial).

The proper remedy is the specific performance of the plea agreement. *See Sprouse v. State*, 355 S.C. 335, 585 S.E.2d 278 (2003) (specific performance of plea agreement is most efficient option because it eliminated need for new trial or plea hearings and granted parties nothing more and nothing less than the benefit for which they had bargained). Therefore, this Court should reverse the PCR court's denial of relief to Petitioner and order that on remand, the solicitor's office cannot assert anything other than the promised plea agreement of one count attempted robbery related to Petitioner's sentence.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow Petitioner belated appellate review of his guilty plea sentence and resentencing hearing pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) or, in the alternative, grant Petitioner's writ of certiorari to allow full briefing on the issue (Argument II).

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of February, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County
William P. Keesley, Circuit Court Judge

ARTHUR R. LADIA,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001426

CERTIFICATE OF SERVICE

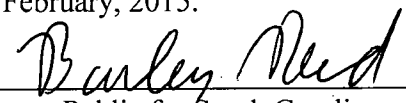
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of February, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of February, 2015.



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