

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County
Stephanie P. McDonald, Circuit Court Judge

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S.C. Supreme Court

DANIEL E. DICKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002030

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the court erred by failing to find that a verbal plea offer was made to Petitioner and that he detrimentally relied on the plea offer when he cooperated with the state in the murder prosecution of Joseph Samuel Whitt?

STATEMENT

A Charleston County Grand Jury indicted Petitioner at the October 2007 term of General Sessions for kidnapping and at the August 2008 term for attempted armed robbery. App. 453-456. His case was called to trial on October 21, 2008 before the Honorable R. Marley Dennis, Jr., and a jury. App. 1. Assistant Solicitors Michael Sahn and Jennifer Shealy represented the state, and Rodney Davis represented Petitioner. App. 1. On October 22, 2008, the jury found Petitioner guilty. App. 218, ll. 5-21. He was sentenced by Judge Dennis to life without parole (LWOP) pursuant to S.C. Code Ann. §17-25-45.¹ App. 230, l. 19 – 231, l. 1.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Dickson, Op. No. 2010-UP-348 (S.C. Ct. App. Filed July 6, 2010); App. 261-262.

On June 27, 2011, Petitioner filed an application for post-conviction relief (PCR) raising the issue argued in this petition. App. 263-350. The state filed a return to this application dated December 16, 2011. App. 351-355. The matter proceeded to an evidentiary hearing on July 25, 2012 before the Honorable Stephanie P. McDonald. App. 356. Assistant Attorney General Ashleigh Wilson represented the state, and J. Howard Yates, Jr. represented Petitioner. App. 356. By order dated July 23, 2013, Judge McDonald denied Petitioner relief. App. 442-452.

This petition for writ of certiorari follows.

¹ Approximately two months before trial, the state served Petitioner with a notice of intent to seek life without parole based on his prior conviction from 1989 for assault and battery with intent to kill (ABIK). App. 40, ll. 5-6; App. 224, ll. 12-17.

ARGUMENT

The court erred by failing to find that a verbal plea offer was made to Petitioner and that he detrimentally relied on the plea offer when he cooperated with the state in the murder prosecution of Joseph Samuel Whitt.

Facts at Trial

Petitioner allegedly walked in front of Pearl Jones' car as she was leaving the parking lot of her church. When Jones rolled down her window to apologize to Petitioner for nearly hitting him, he allegedly punched her in the face and climbed through the driver's side window and across Jones to the passenger seat. The state alleged that Petitioner then put Jones in a headlock, held a screwdriver to her neck, and ordered her to drive. While the two were driving around erratically, Petitioner allegedly demanded money from Jones and searched her purse, but Jones did not have any cash. Concerned motorists called 911 and two patrol cars eventually stopped Jones and Petitioner by blocking the vehicle's path. Petitioner was originally charged with carjacking and kidnapping, but was later directly indicted for attempted armed robbery. See App. 453-456. For whatever reason, the state only tried Petitioner for kidnapping and attempted armed robbery. See App. 457-458; see also App. 40, ll. 18-21.

Before the trial began, trial counsel, Rodney Davis, explained to the court that Petitioner had cooperated with the Ninth Circuit Solicitor's Office and gave them detailed information about conversations he had with Joseph Samuel Whitt while the two were incarcerated pretrial. Whitt was charged with the murder of his father and confessed to Petitioner. Trial counsel explained that he contacted Assistant Solicitors Peter McCoy and Burns Wetmore, who were prosecuting Whitt's case, and arranged for them to meet with Petitioner at the jail. Trial counsel was present during the first meeting that lasted forty-five minutes. Petitioner told the solicitors during this meeting about

Whitt's confession and agreed to testify against Whitt at trial. McCoy and Wetmore later met with Petitioner on several other occasions at the jail without trial counsel present, but with trial counsel's consent. Tr. 39, ll. 1-19.

Trial counsel told the court that Petitioner always wanted to plead guilty and that "this was never a trial" until the state served Petitioner with a notice of intent to seek life without parole based on his prior 1989 conviction for ABIK. App. 38, ll. 13-16; App. 40, ll. 9-11. Trial counsel explained that Petitioner was still willing to plead guilty if life without parole was "off the table." App. 40, ll. 7-25. When Judge Dennis asked if there was ever any indication "that there would be some plea arrangement concerning these charges," trial counsel told him there was a "gentlemen's agreement" that if Petitioner cooperated the state would inform the court of his cooperation in hopes of a reduced sentence. App. 41, l. 10 – 42, l. 8. The court commented and trial counsel confirmed that obviously life without parole was not on the table when Petitioner agreed to cooperate with the state. App. 42, ll. 9-22.

Trial counsel explained that Whitt ultimately pled guilty in September 2008. Whitt and his attorney were aware that Petitioner had given statements to the solicitor's office and was a potential witness for the state. However, it was unclear whether Petitioner's possible testimony influenced Whitt's decision to plead guilty. Either way, trial counsel explained that "there was a rumor around the jail that if my client [Petitioner] went to jail that there was a death contract," meaning that Whitt had threatened to have Petitioner killed once he got to prison. App. 42, l. 23 – 43, l. 18.

PCR Hearing

Petitioner testified that while he was incarcerated at the Charleston County Detention Center awaiting trial he was housed in the same cell as Joseph Samuel Whitt. Whitt, who was charged with

murder, bragged about beating his father to death with a pipe bender tool while he was sleeping and discussed details of the murder with Petitioner. App. 362, l. 14 – 363, l. 8.

Shortly thereafter, Petitioner notified the solicitor's office that he had information regarding the Whitt case and Assistant Solicitors Peter McCoy and Burns Wetmore, who were prosecuting Whitt, came to visit Petitioner at the jail. App. 363, ll. 9-24. During this first meeting with trial counsel present, Petitioner and McCoy reached a "gentlemen's agreement" where McCoy agreed to dismiss one of Petitioner's charges and reduce the other charge to a lesser included offense in exchange for Petitioner's cooperation in the Whitt case. App. 377, l. 20 – 378, l. 16; App. 379, ll. 15-25. Petitioner testified, "Mr. McCoy actually asked me did he need to go get a letter typed up telling me this is everything we were going to do. I said your word is good enough for me." App. 374, ll. 26-23; App. 375, ll. 15-19. Petitioner also explained that he asked trial counsel about whether he should get the agreement in writing immediately after this initial meeting and trial counsel told him "that Mr. McCoy was a stand-up guy. I could take him at his word." App. 374, l. 24 – 375, l. 5.

Petitioner met with McCoy on several other occasions, gave numerous written statements, and agreed to testify against Whitt at his trial.² App. 364, ll. 15-20; App. 365, l. 22 – 366, l. 3. McCoy had Whitt moved from Petitioner's "cellblock" after the first meeting out of concern for Petitioner's safety since McCoy would be turning over Petitioner's statements to Whitt's attorney. Petitioner also testified that McCoy told him during one of his meetings that he "was on his team" and never once suggested that the state would be seeking a sentence of life without parole against him. Tr. 366, l. 12 – 367, l. 8.

² Whitt ended up pleading guilty to murder and was sentenced to thirty years imprisonment. App. 374, ll. 2-6.

At some point, the prosecution of Whitt was turned over to the Attorney General's Office because of a conflict with the Ninth Circuit Solicitor's Office and Assistant Attorney General Jennifer Evans was assigned to the case.³ Petitioner also met with Evans on several occasions. App. 364, ll. 15-25. He testified that while he was cooperating with the Attorney General's Office, he was never given any reason to believe that the solicitor's office would ultimately seek a sentence of life without parole against him. App. 370, ll. 13-18.

Moreover, Petitioner testified that he believed based on his conversations with McCoy and the solicitor's office that by cooperating with the state in the Whitt prosecution, the state was going to recommend leniency during his eventual guilty plea. Petitioner explained that if he would have known that the state was ultimately going to seek a sentence of life without parole, he would not have cooperated with the state and put himself at risk. App. 370, ll. 19-22; App. 373, ll. 3-9.

Petitioner is currently in protective custody within the Department of Corrections because of his cooperation with the Whitt prosecution. Petitioner explained that because he is in protective custody, he does not receive the same freedoms and privileges as the general population. For example, he is only allowed two hours of recreation five days a week and spends the remainder of his time in a cell by himself. App. 373, ll. 19-24.

Peter McCoy testified that in June 2007 he was an assistant solicitor with the Ninth Circuit Solicitor's Office and was assigned to prosecute Joseph Samuel Whitt. The prosecution of Whitt was eventually turned over to the Attorney General's Office because an investigator with the solicitor's office had obtained recordings of telephone calls between Whitt and his attorney and failed to turn them over "in a timely fashion." App. 380, l. 24 – 381, l. 21.

³ Jennifer Evans died before Petitioner's PCR hearing. App. 359, ll. 18-20.

McCoy explained that he met with Petitioner on several occasions and found Petitioner to be very cooperative. He said Petitioner provided valuable and what appeared to be accurate information that corroborated evidence the state had already obtained. The information Petitioner provided was helpful to the state because there was a dispute about whether Whitt murdered his father while he was lying in bed or whether the men engaged in “mutual combat” and Whitt acted in self-defense. App. 382, l. 2 – 383, l. 10. After his numerous meetings with Petitioner, McCoy added him to the state’s witness list. App. 384, ll. 3-4.

According to McCoy, he did not promise Petitioner anything in exchange for his cooperation with the Whitt prosecution. He testified, “I think it makes [him] a less credible witness on the stand if I were to make him a promise on pending charges or a promise for anything else down the road because that would just come out on cross-examination and make my case weaker and make him look like a weaker witness.” App. 384, ll. 7-19. He added that he was not the solicitor handling Petitioner’s case so he had “no say either way on those [Petitioner’s] charges.” App. 385, ll. 14-16. McCoy maintained that what he had agreed to do was whenever Petitioner pled guilty, he “was going to go [to court] as well and indicate to a judge his cooperation and what he had done for us.” App. 387, l. 22 – 388, l. 3. He thought that even if Petitioner pled guilty “straight up” without any reduction of his charges, it would have been helpful for him to speak on Petitioner’s behalf since Petitioner’s charges did not carry a mandatory minimum sentence. App. 388, ll. 10-17; App. 389, ll. 8-11.

McCoy explained that when he agreed to come to court on Petitioner’s behalf and inform the judge of his cooperation, it was before Petitioner had been served with a notice of intent to seek life without parole. He agreed that once Petitioner had been served with such notice he could do

little to help Petitioner since the court would have no discretion during sentencing. App. 388, ll. 16-24; App. 389, ll. 12-13.

McCoy admitted that he was surprised to learn Petitioner had been served with a notice of intent to seek life without parole after he had told Michael Sahn, the assistant solicitor who prosecuted Petitioner's case, about Petitioner's cooperation in Whitt's case. Once the notice was served, Petitioner's trial counsel asked McCoy to intervene on Petitioner's behalf. McCoy "had no problem" speaking with Sahn and reminded him of "how important" the information Petitioner had given the state was to the Whitt prosecution. App. 389, l. 14 – 390, l. 15. Apparently, McCoy's intervention had no impact on Sahn's decision to seek life without parole.

Trial counsel, Rodney Davis, testified that Petitioner's case was originally being prosecuted by Nathan Williams with the Ninth Circuit Solicitor's Office, but that it was ultimately reassigned to Assistant Solicitor Michael Sahn in January 2008. Sahn sent an email to Davis on January 22, 2008 stating that "given the facts I cannot reduce the charges or make any recommendations. If he wants to plead guilty, let me know and I will put him on the docket. Second appearance is February 8th." App. 398, l. 24 – 399, l. 13.

Petitioner began cooperating with the state in the Whitt prosecution in March 2008. See App. 39, ll. 1-4. Davis explained that there was an "implied understanding" with the solicitor's office that if Petitioner cooperated, McCoy or some other representative of the solicitor's office would speak to the judge on Petitioner's behalf during his eventual guilty plea and explain his cooperation "in hopes of some leniency." App. 398, ll. 7-19. He testified that neither before nor while Petitioner was cooperating with the state did Sahn ever indicate he was going to seek a sentence of life without parole. It was not until late July 2008 that Davis first learned Sahn was going to seek a life sentence. App. 4-1, ll. 5-14.

Davis explained that Petitioner had always planned to plead guilty and that he hoped to resolve the case through plea negotiations with the solicitor's office. It was not until Petitioner was served with an LWOP notice that the case became a trial. App. 397, ll. 11-24.

Moreover, Davis testified that he thought Petitioner had detrimentally relied on McCoy's promise to come to court and speak on Petitioner's behalf during sentencing about his cooperation in the Whitt prosecution in hope for a reduced sentence. App. 421, ll. 17-18. Davis explained that this promise came with it the understanding that the state would not seek a sentence of life with parole because, as all parties agreed, it would be useless for McCoy to speak on Petitioner's behalf if an LWOP notice had been served since the court would have no discretion during sentencing. App. 388, l. 18 – 389, l. 13.

Order of Dismissal

The PCR court found Petitioner failed carry his burden of proving the state failed to abide by the terms of a plea agreement. Specifically, the court found that no plea agreement existed and that it was within the state's discretion to seek a sentence of life without parole. App. 448. The court found credible Peter McCoy's testimony that the state never made any promises regarding a specific plea offer, recommendation, or sentencing range to Petitioner in exchange for his cooperation in the prosecution of Joseph Samuel Whitt. App. 449. The court found Petitioner had merely hoped to receive some benefit from the state for his cooperation. App. 450. Because the court found no plea offer existed, it concluded Petitioner could not prove detrimental reliance. App. 450.

Discussion

The PCR court erred by failing to find that the state, through its representative Peter McCoy, extended a verbal plea offer to Petitioner in exchange for his cooperation in the prosecution of

Joseph Samuel Whitt. It was **undisputed** that McCoy told Petitioner that if he agreed to cooperate with the state, McCoy or some other representative of the Ninth Circuit Solicitor's Office would inform the trial judge during Petitioner's eventual guilty plea that Petitioner had fully cooperated with the expectation of a lesser sentence. McCoy testified, "[E]ven if he [Petitioner] had gone and pled straight up to his actual indicted charges, it would have been a help for me to have gone and said this [that Petitioner cooperated], even without a reduction in [his] charges." App. 389, ll. 8-11. McCoy's testimony makes it clear that the offer extended to Petitioner at a minimum was help from the state with receiving a reduced sentence on his pending charges.

Moreover, the state's offer to speak on Petitioner's behalf during his sentencing came with it the understanding that the state would not seek a sentence of life without parole pursuant to S.C. Code Ann. §17-25-45. Any other conclusion would lead to an absurd result. If the state sought life without parole pursuant to this statute than the trial court would have no discretion during sentencing and would be forced to sentence Petitioner to life. Whether McCoy spoke on Petitioner's behalf would be meaningless. McCoy admitted during his testimony that it "would not be much good of me going in and indicating . . . that he [Petitioner] had cooperated with us if he had been served with life without parole." App. 388, ll. 18-24.

Thus while the state may not have been willing to recommend a specific sentence to the trial court or even reduce his charges, it is clear that an offer was extended to Petitioner whereby the state would not seek life without parole and McCoy would speak on Petitioner's behalf during his eventual guilty plea likely leading to a lesser sentence than he would have received without McCoy's assistance. McCoy's agreement with Petitioner was imputed to the entire Ninth Circuit Solicitor's Office, including Assistant Solicitor Michael Sahn who prosecuted Petitioner's case. See State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996).

Not only did a plea offer exist, but Petitioner detrimentally relied on the state's offer not to seek life without parole when he cooperated with the Ninth Circuit Solicitor's Office and the Attorney General's Office in the prosecution of Joseph Samuel Whitt.

A defendant has no constitutional right to plea bargain. Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 38-39 (2007) (citing Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999)). "A plea agreement is only an 'offer' until the defendant enters a court-approved guilty plea. A defendant accepts the 'offer' by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court." Reed, 333 S.C. at 688, 511 S.E.2d at 402 (citing Harden v. State, 453 So.2d 550 (Fla. Dist. Ct. App. 1984)). The Court of Appeals in Reed found this general rule is subject to a detrimental reliance exception. Custodio, 373 S.C. at 10, 644 S.E.2d at 39 (finding the Court of Appeals properly adopted the detrimental reliance exception).

"This exception is stated as: Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining." Custodio, 373 S.C. at 10, 644 S.E.2d at 39 (citing Reed, 333 S.C. at 688, 511 S.E.2d at 402 and State v. Peake, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001)). "Even if the agreement has not been finalized by the court, a defendant's detrimental reliance on a prosecutorial promise in plea bargaining may make a plea agreement binding." Custodio, 373 S.C. at 11, 644 S.E.2d at 39 (citing Reed, 333 S.C. at 688, 511 S.E.2d at 402-403). "For example, a defendant who provides beneficial information to law enforcement can be said to have relied to his detriment." Id. (citing Reed, 333 S.C. at 688, 511 S.E.2d at 403).

The PCR court erred by failing to find that the detrimental reliance exception applies to Petitioner's situation. In reliance on an agreement that McCoy or another state representative would

speak on Petitioner's behalf during his sentencing and thereby not seek a sentence of life without parole, Petitioner fully cooperated with the Ninth Circuit Solicitor's Office and the Attorney General's Office by meeting with Assistant Solicitor McCoy and Assistant Attorney General Jennifer Evans on multiple occasions, sharing information he had learned from Whitt while the two were incarcerated together, and agreeing to testify against Whitt if he proceeded to trial. See State v. Gates, 299 S.C. 92, 382 S.E.2d 886 (1989). McCoy admitted that the information Petitioner provided appeared accurate, corroborated evidence the state already had, and was valuable to counter Whitt's possible defense that he killed his father in self-defense. App. 382, l. 2 – 383, l. 10.

Moreover, Petitioner testified that if he had known the state was going to seek a sentence of life without parole then he would not have cooperated with the state and assisted in the prosecution of Whitt. If the state was going to seek life without parole then Petitioner would have had no incentive to share his information with the state because McCoy's offer to speak on Petitioner's behalf in hopes of a lesser sentence would have been meaningless. Therefore, it is clear Petitioner detrimentally relied on the state's agreement.

Petitioner was prejudiced because if the state had been forced to abide by the terms of its verbal agreement with Petitioner then he would have received a lesser sentence and could not have been sentenced to life without parole. Even if the state had refused to reduce any of his charges and Petitioner pled "straight up" to kidnapping, carjacking, and attempted armed robbery, the most Petitioner could have been sentenced to was thirty years imprisonment if the sentences ran concurrently.⁴

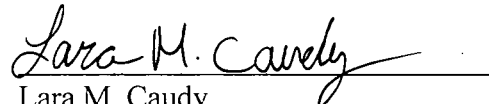
⁴ Under S.C. Code Ann. § 16-3-910, kidnapping carries up to thirty years imprisonment. It does not have a mandatory minimum sentence. Under S.C. Code Ann. § 16-11-330, attempted armed robbery carries up to twenty years imprisonment. It also does not have a mandatory minimum sentence. Under S.C. Code Ann. § 16-3-1075, carjacking carries up to twenty years imprisonment and it also does not have a mandatory minimum sentence.

Because there was clearly a verbal plea agreement between the state and Petitioner that Petitioner relied on to his detriment when he cooperated with the state, this Court should vacate his sentence and remand for a new sentencing proceeding with the condition that the state cannot seek a sentence of life without parole.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of March, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County
Stephanie P. McDonald, Circuit Court Judge

DANIEL E. DICKSON,

PETITIONER,

V.

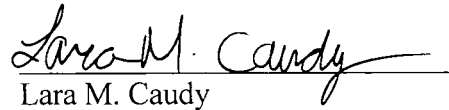
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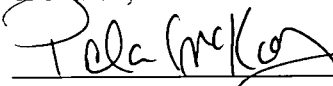
CERTIFICATE OF SERVICE

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 Ashleigh R. Wilson, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of March, 2015.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of March, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.