

STATE OF SOUTH CAROLINA
In the Supreme Court

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MAR 17 2015

APPEAL FROM GREENVILLE COUNTY
County of Common Pleas

S.C. Supreme Court

The Honorable D. Garrison Hill, Judge

Appellate Case No. 2014-001427

Patrick B. Connor, Respondent,

v.

State of South Carolina, Petitioner.

RETURN

J. Falkner Wilkes
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Greenville, SC 29601
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QUESTIONS PRESENTED

1. Does the record contain any evidence of probative value that supports the trial judge's ruling that Connor was prejudiced by the trial attorney's failure to convey the State's second plea offer prior its expiration?
2. Does the fact that trial counsel failed to adequately review the case with Connor and give advice prior to the expiration of both offers further support the reversal of Connor's conviction?

STANDARD OF REVIEW

Upon appellate review, this court gives great deference to the 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). This court also “gives great deference to a PCR [court's] findings where matters of credibility are involved.” Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). “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.” Davie, 381 S.C. at 608, 675 S.E.2d at 420. “This [c]ourt will uphold the findings of the PCR court when there is any evidence of probative value to support them, and [it] will reverse the decision of the PCR court when it is controlled by an error of law.” *Id.*

ARGUMENT

- I. **Evidence of probative value exists to support the trial judge's finding that Connor was prejudiced where the trial attorney failed to adequately advise and convey a plea offer to Connor prior to the offer's expiration.**

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, 685-86 (1984). 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").

There is probative evidence in record that supports the trial court's finding that the May 24th plea offer was not conveyed to Connor prior to the offer's expiration. App. p. 123. The record shows that a second offer was mailed to counsel on May 24, 2011. App. p. 80. Counsel testified that although it was now his practice to immediately send plea offers by mail to

clients upon receipt, "it probably wasn't [his policy] back then." App. p. 91, l. 10-11. Although counsel testified that Connor appeared at roll call in August of 2011, it is clear that they did not discuss the case at that time. App. pp. 80-81. This was due to how many people counsel has appear for roll calls: "And I can assure you that during those times, I can't discuss anything. So I'm sure every time he appeared, I didn't discuss it in detail with him." App. p. 66; p. 85, l. 13-16. Counsel's file had no notation or other indication that he sat down and discussed the case when he conveyed the first offer to Connor during roll call. 72-73. As trial counsel said, "The Defendant appeared, no deal. And I let them go. Once they tell me that, I just let them go." App. p. 66, l. 7-9. When asked if he talked to Connor during a roll call counsel stated: "There's no way I could have done that..... I mean, I couldn't have talked to him then." App. p. 83, l. 4-14. Although Connor attempted to meet with counsel to go over the case when he picked up his discovery material, counsel was out of the work due to surgery. App. pp. 14, l. 23-24; 55-56. By the time counsel met with Connor and actually had a sit down discussion about the case and gave him his advise based on the evidence, both offers had expired. App. pp. 57-58.

Subsequent to the offers' expiration counsel advised Connor that "there ain't no use in going to trial. I'm telling you, it's -- the evidence is overwhelming." App. pp. 74, l. 17-18; 57-58. Once that happened Connor made the decision to enter a guilty plea. Unfortunately, the plea offers were no longer on the table. App. pp. 58-59.

The record further shows that defense counsel failed to object during the plea, or otherwise inform the court of the issue that the prior offer had not been effectively conveyed to Connor. App. p. 6; 13-15. Counsel informed the sentencing judge only that Connor was throwing himself on the mercy of the court. App. pp. 14-15. Counsel's failure to inform the plea court of the issue with the prior plea further constitutes ineffective assistance of counsel. *See State v. Bell*, 5277 (S.C. Ct.App. 11-5-2014).

Although there was testimony that counsel may not have had the correct mailing address for Connor, there was no indication in the file that Connor actually gave them an incorrect address. App. p. 45; 77. The State appears to imply that Connor gave trial counsel an incorrect address. (Petition Pg. 7). This is not however, what the record shows. Counsel testified that he was told by his secretary that the Defendant gave the jail

the wrong address. App. p. 67, l. 1-12. He did not testify that Connor gave him the wrong address. Nor did the State introduce any documentation to show Connor was in any way responsible for the incorrect address. Connor testified that he gave counsel his correct address. App. p. 46. Counsel appears to have used an address imported from a source other than Connor. The PCR judge clearly did not find Connor at fault in giving an incorrect address. Trial counsel either didn't realize that they had an incorrect address, or didn't take additional action to contact Connor, until just prior to the trial date. App. p. 45-46; 76-77. When he did take additional action counsel was able to call Connor's mother who got in touch with him right away. App. p. 68.

The record is clear that Connor maintained contact with counsel's office, and even went by to pick up his discovery and meet with counsel of his own volition. App. pp. 54-55. The record shows that the clerk of court and the solicitor had Connor's correct address, as he received "bond" cards to appear in court. App. p. 46. Correct address or not, counsel never mailed the second offer to Connor prior to the offer's expiration. App. p. 77. Nor did he effectively meet with and advise Connor as to the facts of the case

until just prior to trial and after the expiration of the offer. There is ample evidence in record to support the PCR judge's finding that the second offer was not timely or effectively conveyed to Connor.

Here the testimony of Connor alone is sufficient to support the court's findings. "[D]epending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice." See Davie, 381 S.C. 601, at 608, 675 S.E.2d 416, at 420 (2009). "This [c]ourt gives great deference to a PCR judge's findings where matters of credibility are involved." See Simuel, 390 S.C. 267, at 270, 701 S.E.2d 738, at 739. In addition to Connor, the testimony of trial counsel makes clear that he never sat down and discussed the case, or the second plea agreement, until after the offer had expired. "This [c]ourt will uphold the findings of the PCR court when there is any evidence of probative value to support them, and [it] will reverse the decision of the PCR court when it is controlled by an error of law." Davie, 381 S.C. 601, at 608, 675 S.E.2d 416, at 420 (2009).

The State's reliance on Whetsell¹ is misplaced. Whetsell involves a question as to the appellate review of trial error after a subsequent

¹Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981).

admission of guilt. Here the Applicant seeks relief for counsel's failure to effectively advise and convey a plea offer. Whetsell has no application in this case.

Prejudice is established by the testimony of the Applicant in this case who specifically testified that, had trial counsel sat down and gone over the case with him prior to the expiration of the second plea offer, he would have accepted plea. App. p. 49. The trial judge found this testimony credible and it is clearly supported by the fact that once he had the advice of counsel, he plead straight up. The issue of prejudice turns on a factual finding and credibility analysis by the PCR judge. The question is, does the record contain any evidence to support it. A review of the record shows that it does. The second offer was never meaningfully conveyed to him prior to its expiration. App. 60. Counsel admitted that he did not have a sit down at length discussion about the case with Connor until after the case had been placed on the trial docket, and after the expiration of all plea offers. App. pp. 74-75.

The fact that the state offered a different mix of charges in the second plea offer does not change the outcome of the case. Each offer was

intended to end the prosecution of Connor on all charges. The first 14 year plea offer required a plea on three armed robberies and required Connor's cooperation in the prosecution of the co-defendants. App. 108-109. The second offer lists only two armed robberies and provides: "If defendant pleads guilty to one of these armed robberies, I will recommend 14 years, concurrent with the 14 years I am recommending on the other charges." App. 106. The second offer for 14 years would likely have resulted in a conviction on only one armed robbery without requiring Connor to testify against the co-defendants. Without the offer, Connor entered a "straight-up" plea to three armed robberies and received a sentence of 25 years. App. 147-152.

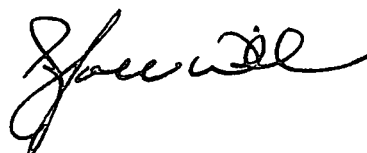
The PCR judge found that the second, more favorable offer, was never forwarded to Connor prior to the case being placed on the trial docket and the resulting automatic expiration of all offers. App. 123. The PCR judge further found that Connor would have accepted the second offer and that the recommendation would likely have been accepted by the sentencing judge. App. 123-124. The standard for review is whether "there is any evidence of probative value" supporting the trial judge's findings of

fact. Davie, *supra*. In this case there clearly is.

CONCLUSION

Based on the foregoing the decision of the trial judge should be affirmed.

Respectfully submitted,



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Counsel for Respondent

March 13, 2015.



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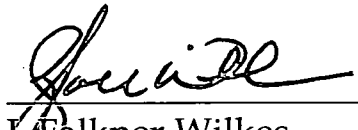
v.

State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

I certify that on the 13th day of March, 2015, I served the Respondent's Return on the Appellant by placing a copy of same in the United States Post, first class postage pre-paid, addressed to counsel of record as indicated below:

Karen C. Ratigan
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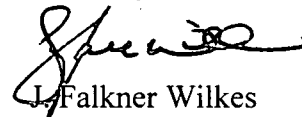
March 13, 2015

Hon. Daniel Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Patrick Conner v. State of South Carolina, Appellate Tracking No.: 2014-001427

Dear Mr. Shearouse,
Enclosed please find the Return of the Respondent.

Sincerely,



J. Falkner Wilkes

c:
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