ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marion County

Michael H. Nettles, Circuit Court Judge

Appellate Case No. 2014-001631

RECEIVED

MAY - 1 2015

S.C. Supreme Court

LETRON DAVIS,

RESPONDENT,

V.

THE STATE,

PETITIONER

RETURN TO MOTION TO DISMISS

The State has filed a motion to dismiss ***its own*** Petition for Writ of Certiorari on the ground that the appeal is now moot because Respondent was released on parole. The State has requested that ***in addition*** to dismissal of the appeal, that this Court remand this matter to the circuit court for an entry of judgment ***in Petitioner's favor***. In opposition to the State's motion, Respondent respectfully states:

1. Contrary to the State's narrow view of this case presented in its Petition for Writ of Certiorari and in its Motion to Dismiss, Respondent's release on parole neither renders Respondent's allegation of ineffective assistance of counsel moot nor is it commensurate with the relief granted to him in the PCR court's Order.

2. Respondent succeeded at his PCR hearing based on his attorneys' admission that he misadvised Respondent by telling him that his sentence would be completed with service of less than eighty-five (85%) percent of his seven year sentence. Respondent's release on parole is obviously not the equivalent of completion of his sentence, as Respondent is required to comply with the terms and conditions of parole until the term of parole ends on May 9, 2018. See SCDPPS Ltr, attached to Petitioner's Motion to Dismiss. Furthermore, if Respondent's parole is revoked, then he would again be incarcerated and subject to the 85% rule that his attorney advised him would not apply to him.

Procedural and Factual History

3. Respondent filed his application for post-conviction relief on June 1, 2012. App. 11 – 18. The State filed its Return on App. 19 – 23. An evidentiary hearing was held before the Honorable Michael Nettles on February 11, 2014. Respondent was represented by Marcus Woodson and the State was represented by Assistant Attorney General Joshua Thomas. App. 24. The PCR court found Respondent's and Meetze's testimony equally credible and granted judgment in his favor, vacating his convictions and remanding the case for a new trial. App. 64 – 71. The State filed its Petition for Writ of Certiorari on January 9, 2015.

4. In its written Order, the PCR court found credible Respondent's testimony that his attorney advised him that due to a recent change the law, he would no longer be required to serve 85% of the negotiated sentence. Had his attorney told him otherwise, he would have rejected the State's third plea offer. App. 69; see also App. 70. The PCR court found equally credible plea counsel Meetze's testimony that Respondent's recollection was accurate that he advised him that he would not be subject to the service of eighty-five percent (85%). Meetze had no question that Respondent relied on his advice in deciding to accept the plea offer. App. 69; see also App. 70.

5. Respondent testified at the PCR hearing, which again the PCR court found credible, that he was advised plea counsel and the solicitor that under the new law[1] he would be required to serve sixty-five percent (65%) of his seven year sentence. App. 28, l. 23 – 29, l.13; App. 34, l. 22 – 35, l. 2. He understood that, including work and education credits that he could earn, his total service on the seven years (84 months) would actually be 42 months. App. 35, ll. 13-25; see also App. 41, ll. 1-7. He said that once he was transferred to Kirkland Correctional Institution, he was informed that he would be required to serve eighty-five percent (85%) of his sentence. App. 29, ll. 14-20. Respondent testified that had he known that he would be required to serve eighty-five percent (85%), he would not have accepted the plea. App. 29, ll. 21-23. Respondent further stated that he understood that if he is granted relief at the PCR hearing, he would "start from scratch" and confirmed that was what he wanted. App. 29, l. 24 – 30, l. 7.

6. Meetze testified that part of the negotiations in Respondent's case was that he would be pleading to an offense that would not require him to do eighty-five (85%) minimum of the sentence. App. 44, ll. 17-20. Meetze said that "the intent of the sentence was that he be able to be sentenced to a seven-year sentence that would be both parole eligible and non 85 percent, and was – and that is not how it has turned out. I think that's wrong." App. 52, ll. 12-16; see also App. 55, l. 22 – 56, l. 18; App. 58, l. 8-19. Meetze said that he did not believe that he would have told Respondent that he would serve sixty-five percent (65%). Rather, and more interestingly, Meetze believed that it would be ***even less than sixty-five percent (65%)*** that Respondent would have to serve. App. 42, l. 22 – 43, l. 6. Regardless, Meetze testified that "there's no question that I advised him" that he was "not going to have to do 85 percent." App.

[1] The "new law" referenced in the PCR transcript is the 2010 Omnibus Crime Reduction and Sentencing Reform Act. See App. 40, l. 13 – 41, l. 7.

43, ll. 6-10. He further stated that "there's no question that he relied on that advice when he entered his plea." App. 43, ll. 11-12.

7. Meetze testified that the only change that the Department of Corrections has made based on the new law is allowing the inmate to be eligible for parole. However, if they are denied parole then inmates are still being required to serve eighty-five percent (85%) of their sentence. App. 43, ll. 15-18; App. 46, ll. 10-16. While he stated that he disagreed with this application, he testified that he gave Respondent "wrong advice, and [he is] certain he relied on that advice when he entered his plea." App. 43, ll. 19-22.

8. Judge Nettles specifically asked Meetze about whether Respondent would receive more than one parole hearing before DOC required him to serve 85% of his sentence. App. 59, ll. 21-23. Meetze responded that he was not sure how many times Respondent would come up for parole, but "maybe one would have been all" because the sentence was only for seven years. App. 59, l. 24 – 60, l. 7. Thus, the PCR court understood that Respondent would be parole eligible at least once, if not more, during his incarceration, potentially resulting in his release on parole prior to serving eighty-five percent (85%) of his sentence.

9. Judge Nettles asked Assistant Attorney General Thomas how a plea can be valid if the Respondent was told something that was wrong. App. 47, ll. 17-23. Thomas responded that the State's position is that Mettze advised his client "as best he could at the time" "based upon a reasonable reading of the statute, and based on the general consensus of everybody else in the Bar." App. 47, l. 24 – 48, l. 2. Thomas further contended that DOC's interpretation was different, not necessarily right or wrong. App. 48, ll. 5-12. Judge Nettles responded that DOC is treating "as an 85 percent" and Meetze told him that it not be subject to the "85 percent rule,"

presenting "a very real problem" since Respondent relied on Meetze's advice. App. 48, ll. 13-21.

10. Judge Nettles noted that an attorney does not have to advise a client with regard to how much time he will serve or collateral consequences. However, when an attorney gives incorrect advice regarding collateral consequences and the client depends upon that advice, "that poses a problem." App. 49, ll. 15-20. Thomas ***conceded that such is the state of the law***, but pointed to Meetze's testimony that he did not specifically say that it would be sixty-five percent (65%), but rather said that it was parole eligible and less then eighty-five percent (85%). App. 49, ll. 21-25. Judge Nettles responded "and that's wrong."

11. At the conclusion of the PCR hearing, Judge Nettles ruled that he was granting the requested relief and would draft the written Order. App. 62, ll. 10-13.

12. In its written Order, the PCR court found that in accepting the State's plea offer, Respondent relied on the advice of trial counsel regarding how his sentence would be handled by the Department of Corrections. App. 68.

13. The PCR court found that "[i]t is uncontroverted that Meetze advised Davis that he was eligible for parole and that this plea would not be subject to the "85% rule." App. 69. It further found that it is "uncontroverted that the Department of Corrections is subjecting Davis to service of eighty-five percent of his seven-year sentence." App. 69 – 70.

14. The PCR court ruled that "even though counsel need not inform a defendant of a plea's collateral consequences, if counsel affirmatively guarantees those collateral consequences, that attorney has an obligation to be correct." Therefore, the PCR court found that Meetze "was deficient by providing incorrect advice concerning the collateral consequences of Davis' guilty

plea." But for this deficient advice, the court found that Respondent would not have accepted the negotiated sentence and guilty plea. App. 70.

15. Accordingly, Respondent's Application for Post-Conviction Relief was granted, his convictions were vacated, and his case was remanded for a new trial.[2] App. 71.

Argument

16. The State filed a Petition for Writ of Certiorari in this case and now asks this Court to "dismiss this appeal [***i.e., the State's own Petition***] and remand this matter to the circuit court with directions to enter judgment in favor of Petitioner." Motion to Dismiss, 4.

17. Petitioner argues that because Petitioner was released on parole before completion of sixty-five percent of his sentence, that "Respondent's release on parole granted him the relief he alleged he was promised by counsel."[3] Motion to Dismiss, 2-3. This argument conflates the separate concepts of release based on completion of a sentence and parole eligibility, both of which are collateral consequences testified to at the PCR hearing and recognized in the PCR court's Order. See S.C. Code Ann. § 24-21-690.

18. Respondent testified that he understood that would be required to serve, at most, forty-two (42) months of his seven year sentence. Thus, he would have been released – not paroled – on or before November 11, 2014. Instead, Respondent was paroled on October 9, 2014, and is subject to the stringent requirements and costs of parole until May 9, 2018. See

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[2] Because the PCR court granted Respondent the requested relief based on his first allegation, it did not determine the validity of the remaining claims for relief. App. 70.

[3] Respondent never claimed that he was promised release on parole, which is a promise that no attorney could possibly make to their client in good faith. See S.C. Code § 24-21-640. Rather, he was promised both that he would be *eligible* for parole (which it is undisputed that he was) and that he would *not be subject to service of eighty-five percent (85%)* of his sentence, i.e. that his sentence would "max out" before service of eighty-five percent.

SCDPPS Ltr, attached to Motion to Dismiss. Because Respondent was released on parole rather than after the completion of his sentence, there is always the possibility that Respondent's parole could be revoked. See S.C. Code Ann. § 24-21-680 ("Upon failure of any prisoner released on parole under the provisions of this chapter to do or refrain from doing any of the things set forth and required to be done by and under the terms of his parole, . . . a final determination must be made by the board as to whether the prisoner's parole should be revoked and whether he should be required to serve any part of the remaining unserved sentence."). If that occurs, he may be subject to service of eighty-five percent (85%) of his sentence, which remains contrary to the advice of plea counsel that he would serve less than eighty-five percent (85%). Thus, Respondent's release on parole does not change the PCR court's analysis that he was advised that he would serve less than 85% of the seven year sentence by his attorney, that this advice induced Respondent to plead guilty, and that he was entitled to vacation of his convictions and remand for a new trial.

19. Because of the potential of parole revocation, even if this Court found that this matter was otherwise moot it should consider the merits of the case because "the trial court's decision may affect future events, or have collateral consequences for the parties." See McClam v. State, 386 S.C. 49, 55, 686 S.E.2d 203, 206 (2009) (citing Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). This case is also "capable of repetition yet evading review." Id.; Nelson v. Ozmint, 390 S.C. 432, 434-35, 702 S.E.2d 369, 370 (2010). Meetze testified that he had a similarly situated client who was serving a three year sentence, which is how he first learned that the Department of Corrections was applying the "85% rule" unless the inmate was granted parole. App. 45, ll. 13-24. Depending on the length of their sentence, most inmates will have either served eighty-five percent of their sentence or be released on parole before their case

would reach disposition at the appellate level, despite their plea having been induced based on advise that they would be released based on completion of their sentence by service of the less than eighty-five percent (85%). See Nelson, 390 S.C. at 434-35, 702 S.E.2d at 370.

20. Regarding Petitioner's request that this Court dismiss Petitioner's own Petition for Writ of Certiorari and "remand the matter to the circuit court for an entry of judgment in Petitioner's favor," it is notable that Petitioner has cited ***no precedent*** in support of this convoluted request. Petitioner alleged in footnote 1 of its Motion to Dismiss that "this Court has the authority to remand a case to a lower court with directions to enter judgment in favor of an appealing party." It cited to Taylor v. Bryant, 274 S.C. 509, 265 S.E.2d 514 (1980) and Crider v. Infinger Transp. Co., 248 S.C. 10, 148 S.E.2d 732 (1966) in support of that proposition. However, neither case supports the irregular procedure that the State requests this Court employ in this case. Both cases were "reversed and remanded" for entry of judgment in favor of the appealing party after consideration of the case on the merits. They did not involve a motion to dismiss filed by the appellants themselves.

21. If the Petition for Writ of Certiorari[4] is dismissed, then the controlling order in the case would be the PCR court's Order filed April 23, 2014. Pursuant to that Order, Respondent's

[4] Despite Respondent's release on parole on October 9, 2014, three months prior to the filing of Petitioner' Petition for Writ of Certiorari on January 9, 2015, the State did not include any argument related to Respondent's release in its Petition. Instead, it cited to SCDC records printed on January 10, 2013 indicating that Respondent had a parole hearing on November 30, 2012. Cert Pet., 5. Thus, it argued that since plea counsel advised Respondent that he would be parole eligible and Respondent was parole eligible, that plea counsel did not perform deficiently. Cert Pet., 5. The State essentially repeats this argument in the Motion to Dismiss, just in the context of release on parole rather eligibility for parole. However, as discussed supra and will be more fully argued in Respondent's Return to the Petition for Writ of Certiorari, this case is about much more than just parole eligibility or release on parole. The erroneous advice of counsel dealt instead with how much time Respondent would be required to serve to complete his sentence, which the Department of Corrections was and is linking to Respondent's release on parole.

convictions are vacated and he is entitled to a new trial. App. 64 – 71. If the State instead wants the PCR court's Order overturned and judgment entered in its favor, then the first step of the proper procedure to that end is to file a Petition for Writ of Certiorari, which it has done. Respondent should have an opportunity to file its Return, after which this Court can determine whether to grant or deny the Petition.[5]

WHEREFORE, Respondent respectfully requests that this Court:

A. Grant Petitioner's Motion to Dismiss the Petition for Writ of Certiorari only; and

B. Deny Petitioner's request for remand with directions to the Circuit Court to enter judgment in favor of Petitioner; or

C. Alternatively, Deny Petitioner's Motion to Dismiss the Petition for Writ of Certiorari and order this matter to proceed in the normal course, allowing Respondent to file its Return to the Petition for Writ of Certiorari.

Respectfully submitted,

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

This 1st day of May, 2015.

[5] Pursuant to Rule 204(b), SCACR, the State's filing of the Motion to Dismiss automatically stayed the time limits for filing of the Return.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Colleton County

Michael H. Nettles, Circuit Court Judge

Appellate Case No. 2014-001631

LETRON DAVIS,

RESPONDENT,

V.

THE STATE,

PETITIONER.

CERTIFICATE OF SERVICE

I certify that a true copy of the return to motion to dismiss appeal in this case have been served on Joshua Thomas, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Letron Davis, at 4324 Bayou Village, Mullins, SC 29574, this 1st day of May, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 1st day
of May, 2015.

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