STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Charleston County
Honorable Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-002030

DANIEL E. DICKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
SC Bar # 101254

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTION 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 OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Petitioner was indicted at the August 2008 term of the Charleston County Grand Jury for attempted armed robbery (2008-GS-10-6743) and at the October 2007 term for kidnapping (2007-GS-10-0830). Rodney Davis, Esquire, represented Petitioner.

Petitioner proceeded to trial and was found guilty. On November 22, 2008, Petitioner was sentenced by the Honorable R. Markley Dennis, Jr., to life without the possibility of parole on both charges after being served with a timely notice of the State's intention to seek life prior to trial.

A timely Notice of Appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. Lanelle DuRant, Esquire, of the South Carolina Office of the Appellate Defense represented Petitioner on appeal. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Dickson, Op. No. 2010-UP-348 (S.C. Ct. App. filed July 6, 2010).

Petitioner filed an application for post-conviction relief on June 27, 2011. Respondent made its Return on December 16, 2011. An evidentiary hearing into the matter was convened on July 25, 2012, at the Charleston County Courthouse. Petitioner was present at the hearing and represented by J. Howard Yates, Jr., Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented Respondent. Petitioner testified on his own behalf at the PCR hearing. Also present and testifying were Petitioner's trial counsel, Rodney Davis, Esquire, and Peter McCoy, a former 9th Circuit assistant solicitor. Joseph Samuel Whitt testified by phone from the South Carolina Department of Corrections. By Order filed August 28, 2014, the

Honorable Stephanie P. McDonald denied and dismissed the application with prejudice. This appeal follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

There is evidence of probative value to support the post-conviction relief court's ruling that no promises or plea offers were made.

Petitioner asserts that his trial counsel erred by conceding guilt during his closing argument without Petitioner's permission. This argument is without merit.

A criminal defendant has "no right to be offered a plea." Lafler v. Cooper, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012). The decision whether to offer a plea bargain is within the solicitor's discretion. State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (*citing* State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1996)). Our Supreme Court has recognized that plea agreements rest on contractual premises. State v. Gates, 299 S.C. 92, 94-95, 382 S.E.2d 886-87 (1989). Unless intended by both parties, terms and conditions should not be read into a plea agreement. State v. Compton, 366 S.C. 671, 678, 623 S.E.2d 661, 665 (Ct. App. 2005). Even in cases involving an actual agreement, parties are free to withdraw offers until performance occurs. Reed v. Becka, 333 S.C. 676, 687 S.E.2d 396, 402 (Ct. App. 1999). A plea agreement is only an "offer" until the defendant enters a court-approved guilty plea. Id. at 668, 511 S.E.2d at 403.

Until formal acceptance has occurred, the plea is not binding on the defendant, the State, or the Court. Id. This general rule is subject to a detrimental reliance exception. Custodia v. State, 373 S.C. 4, 11, 664 S.E.2d 36, 39 (2007); Reed, 333 S.C. at 668, 511 S.E.2d at 403. Absent a plea of guilt, a defendant may enforce an oral plea agreement upon a showing of detrimental reliance. State v. Miller, 375 S.C. 370, 389 S.E.2d 44, 454 (2007). State prosecutors are obligated to fulfill the promises that they make to defendants when those promises serve as inducements to defendants to plead guilty or otherwise act to their detriment. Santobello v. New York, 404 U.S. 257, 262 (1971). However, a defendant may not attempt to create a firm

commitment out of mere plea negotiations. Whipple, 324 S.C. at 49, 476 S.E.2d at 687. The State is not bound to accept a defendant's terms simply because a defendant reveals otherwise undiscoverable facts in the hope of securing a favorable plea agreement. State v. Miller, 375 S.C. 370, 389 S.E.2d 444, 454 (2007).[1]

The initial problem with Petitioner's argument is that it is grounded in a faulty premise – specifically, that "it was undisputed" that Petitioner was told that if he agreed to cooperate with the State, someone from the Solicitor's office would inform the judge during the guilty plea of his cooperation. PWC, p. 11. Respondent takes this opportunity to *unequivocally* dispute this assertion, as was previously done several times during the PCR hearing.

First, the existence of such an agreement is contrary to the findings of fact made by the PCR judge and the trial judge. In its order dismissing Petitioner's application with prejudice, the PCR judge found that "at best, [Petitioner] *hoped* to receive a benefit from the State for his cooperation in Whitt's case, but that he was *never promised any benefit* in exchange for his cooperation with the State." App. p. 450 (emphasis added). The trial judge likewise found that "there was never any specific offer made" by the State. App. p. 79, ll. 9-15.

In addition, there is substantial probative evidence in the record supporting these findings. Throughout the course of the evidentiary hearing, McCoy repeatedly testified that when he was an assistant solicitor he did not make promises in exchange for cooperation in this type of situation. App. p. 384, ll. 2-6 ("I would go to the jail and I would talk to different witnesses. I never promised anybody anything"); p. 394, ll. 21-24 ("Anytime I met with somebody who had information for me...I wouldn't have threatened them for their testimony, and I wouldn't make

[1] See also Whipple, 324 S.C. at 48, 476 S.E.2d at 686 (though solicitor agreed to consider a plea agreement if Whipple provided substantial mitigation evidence, he never promised a life sentence nor was a plea agreement ever reached); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982) (that solicitor's plea negotiations involved considering a life sentence did not prevent State from seeking death penalty) *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

them any promises...."). McCoy acknowledged that there are probably people who cooperate and help the State thinking, "in their own minds, even if they have been promised nothing, that they're going to receive assistance." App. p. 395, ll. 3-8. He expressed doubt that he would have made any type of promise or indication to Petitioner – even a promise that he would tell the judge of Petitioner's cooperation – explaining that it would almost certainly come out in cross-examination and be harmful to credibility. App. p. 392, l. 7 – p. 393, l. 24. Understandably, his normal practice was to inform sentencing judges of cooperation when it occurred. Id. But such a practice does not in any way create – implicitly or otherwise – an obligation on behalf of the State in exchange for Petitioner's cooperation. The PCR Court found McCoy's testimony to be credible. App. p. 449. Where matters of credibility are involved, the Court gives great deference to a judge's findings, because the Court lacks the opportunity to directly observe the witnesses. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

Trial counsel's testimony, while perhaps more ambiguous, also contains support for the PCR judge's finding that no offer was made. Although trial counsel does, at one point, say that the only discussion he *would have had* with McCoy would be "that the most he would commit would be telling the solicitor prosecuting [Petitioner's] case and the judge at the resolution that he cooperated," App. p. 407, ll. 13-19, his earlier testimony indicates that such an agreement was merely "implied." App. p. 398, ll. 10-20.

Regardless of how definitive or credible this evidence may appear on review, this determination was properly made by the PCR judge. Such a finding, that there was no actual agreement, precludes the possibility of detrimental reliance on Petitioner's part. Thus, there exists evidence of probative value to support the PCR Court's findings.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By: _____
ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
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Certiorari to Charleston County
The Honorable Stephanie P. McDonald, Circuit Court Judge

DANIEL E. DICKSON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esq.
SC Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 6th day of July, 2015

ELIZABETH MCLELLAN
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

July 6, 2015

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

Re: **Daniel E. Dickson v. State of South Carolina**
Appellate Case No. 2014-002030
Lower Court Case No. 2011-CP-10-4505

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/em
Enclosures

cc: Lara M. Caudy, Appellate Defender
Trisha Allen, Victim Services