

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Lexington County

S.C. Supreme Court

William P. Keesley, Circuit Court Judge

MICHAEL T. CANNON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000101

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

ISSUE PRESENTED2

STATEMENT3

ARGUMENT9

CONCLUSION15

ISSUE PRESENTED

Did the PCR court err in finding counsel provided effective assistance where counsel failed to make a meaningful effort to have the court enforce the terms of an emailed plea agreement; which included the State agreeing to allow Petitioner to plead guilty to distribution of crack cocaine, first offense?

STATEMENT

Indictment

On November 10, 2011, Lexington County Sheriff's Deputies conducted a controlled purchase operation using a confidential informant. App. 7, ll. 22 – App. 8, ll. 24. Petitioner sold the informant what was later determined to be .32 grams of crack cocaine. *Id.* The informant was wearing a “wire” which recorded the conversation between Petitioner and the informant. *Id.* On April 2, 2012, Petitioner was indicted for one count of distribution of crack cocaine, third offense. App.91 – App. 92.

Plea Negotiations

Sarah Hahn represented Petitioner and the State was initially represented by Assistant Solicitor Will Whetstone. Prior to the exchange of discovery, the State indicated that there was video footage of the transaction between Petitioner and the informant. App. 60, ll. 17 – App. 61, ll. 13. However, the video produced by the State did not show Petitioner selling drugs to the informant, but rather his uncle selling drugs. *Id.* When brought to the State's attention, the assistant solicitor conceded that there was no video of the transaction. *Id.*

Nevertheless, the State refused to dismiss the case and decided to rely on the informant's credibility and the audio tape. *Id.* Rather than dismiss the charges, the State acknowledged the problems in its case and agreed via email to let Petitioner plead to distribution of crack cocaine, first offense. App. 65, ll. Petitioner accepted the offer. App. 48, ll. 20-23.

First Attempted Plea Hearing

A plea hearing was scheduled for October 4, 2012. App. 62, ll. 8-22. On the day of the plea hearing, Petitioner “stood down” and, at the advice of counsel, did not enter a plea. App. 65, ll. 2-14. Counsel strongly recommended against entering a guilty plea because the presiding

judge indicated that he would revoke Petitioner's probation in full, resulting in Petitioner receiving a fourteen year sentence. *Id.*

At the time, the solicitor gave no indication that the written and accepted plea offer would be withdrawn if Petitioner did not go through with the guilty plea on October, 4th. *Id.* The written plea offer did not contain an expiration date. At the time of the October 4, 2012 plea hearing Petitioner's case was already on the trial docket following with the first possible trial date being October 15, 2012. App. 65, ll. 20 – App. 66, ll. 7.

Second Guilty Plea

After the October, 4th hearing, Petitioner's case was reassigned to a different solicitor, Robert Lanier. App. 66, ll. 19 – App. 67, ll. 22. The new solicitor repudiated the first guilty plea offer. *Id.* Plea counsel did not attempt to enforce the original offer's terms. App. 67, ll. 23 – App. 68, ll. 6. Instead, the State and defense counsel agreed to have Petitioner plead guilty to distribution of crack cocaine, second offense.

On December 11, 2012, Petitioner again appeared before the Honorable Roger M. Young, Sr. to plead guilty. App. 1 – App. 16. Judge Young sentenced Petitioner to ten years imprisonment. App. 13, ll. 22 – App. 15, ll. 5. Judge Young also revoked Petitioner's probation in full, resulting in the activation of Petitioner's fourteen year suspended sentence from his earlier distribution of crack cocaine charge. *Id.* The sentences were ordered to run concurrent. *Id.*

PCR and Evidentiary Hearing

Petitioner filed an application for post-conviction relief (PCR) on September 27, 2013. App. 18 – App. 30. The State filed a Return on December 11, 2013. App. 31 – App. 37. Petitioner filed an amended application on April 3, 2014. App. 38.

An evidentiary hearing was held before the Honorable William P. Keesley on April 17, 2014. App. 40 – App.79. Petitioner was represented by Kristy G. Goldberg. The State was represented by Assistant Attorney General Walt Whitmire. Petitioner and defense counsel testified at the hearing.

Hearing Testimony of Petitioner

Petitioner recalled that he accepted the offer from the State to plead guilty to first offense distribution of crack cocaine and was prepared to go forward with the guilty plea on October, 4, 2012. App. 45, ll.1-19. Petitioner signed the sentencing sheets, which – along with the solicitor’s email – were the only documents used to memorialize the plea agreement. *Id.* Petitioner stated that counsel decided not to go forward with the guilty plea after watching Judge Young fully revoke another defendant’s probation. App. 45, ll. 21 – App. 46, ll. 17.

Petitioner testified that counsel never informed him that the first plea offer had an expiration date or that it was contingent on being accepted at the October 4th hearing. App. 48, ll. 2 – App. 51, ll. 5. Petitioner said, had he known that the first offer would have been withdrawn, he would have accepted the offer even if it would have resulted in his probation being revoked in full.

Petitioner also detailed the impact pleading guilty to distribution of crack cocaine, second offense, had on the maximum length of his incarceration. Distribution of crack cocaine, second offense, requires eighty-five percent of any sentence be served in incarceration. *Id.* Distribution of crack cocaine, first offense, requires that only sixty-five percent of any sentence be served in incarceration. *Id.* This meant that activation of the fourteen year suspended sentence would result, with credit for time served, in Petitioner serving seven years of incarceration. By contrast, Petitioner will serve eight and a half years of incarceration on his ten year sentence for the distribution of crack cocaine, second offense. App. 17. Defense counsel’s concerns about Judge Young revoking

Petitioner's probation in full actually resulted in Petitioner being incarcerated for an additional year.

Id.

Testimony of Plea Counsel

Plea counsel testified that the State made the first plea offer because the video surveillance footage showed Petitioner's uncle making a drug sale to the informant, not Petitioner. App. 61, ll. 3-13. Plea counsel recalled that Petitioner accepted the State's offer, but summarily averred that Petitioner did not "detrimentally rely" on the offer. App. 64, ll. 2-18. Counsel admitted that the plea offer, as conveyed to her in an email, did not contain a time limit. *Id.* at ll. 16-21. Counsel further conceded that Petitioner would have signed the sentencing sheets to indicate his acceptance of the plea offer. App. 71, ll. 7-19.

Plea counsel had no recollection of the October 4, 2012 plea hearing. A review of her case notes, only stated that "the plea was scheduled and we stood down because the judge said that he would give 15 years on the probation revocation." App. 65, ll. 1-4. Plea counsel conceded that Petitioner may be "completely correct" about her advice that he not enter the guilty plea because of the threat of probation revocation, but she could not specifically recall her advice. *Id.* at ll. 4-14.

Plea counsel further conceded that:

If the solicitor had told me that day that that was the last chance to plead and the offer would be withdrawn, I would have conveyed that to him. But I don't remember if there was any other information provided to us from the State then, and I don't remember anything else about why he stood down at that point.

Id.

After Petitioner did not enter a guilty plea at the October 4th hearing, counsel treated the case as if it was going to trial. *Id.* at ll. 20-25. The case was called for trial on October 15th, and again during the November term of court. App. 66, ll. 1-2. Plea counsel testified that the solicitors

assigned to the case changed and that in the lead up to trial, Petitioner asked her about the initial plea offer. App. 67, ll. 1-5.

The new solicitor would not agree to enforce the first plea offer. *Id.* Oddly, defense counsel seemed to assume Petitioner clearly understood that the written plea offer with no expiration date would have been withdrawn after the failed plea hearing. App. 66, ll. 15 – App. 67, ll. 22. Specifically, counsel stated; “I don't remember a specific conversation about [the first plea offer], no, but, I mean, if we were going to trial, then *it would have been obvious to [Petitioner]* that that option wasn't available.” *Id.* Plea counsel did not elaborate on why or how this result should have been “obvious” to Petitioner.

When examined by the State, defense counsel emphasized that, despite her apparent inability to enforce the first written plea agreement, she fully advised Petitioner of the sentencing consequences of pleading guilty to distribution of crack cocaine, second offense. App. 70, ll. 5-24. Lastly, counsel recalled that she had advised Petitioner against pleading guilty at the October 4, 2012 because the judge indicated that he would revoke probation in full before providing Petitioner the opportunity to discuss his decision with counsel. App. 71, ll. 12 – App. 72, ll. 9. Plea counsel then again reiterated that she did not recall when the first plea offer was withdrawn or if the solicitor indicated to her that the offer was void after the October 4, 2012 hearing, but that she believed the case was headed for trial. *Id.*

Order of Dismissal

Judge Keesley denied Petitioner's application by an Order of Dismissal filed June 10, 2014. The PCR court ruled that after the October 4th hearing, the new solicitor rejected the first plea offer and that new negotiations resulted in Petitioner pleading guilty to distribution of crack cocaine,

second offense. App. 84 – App. 85. Practically, the court concluded that, while the first plea offer had no expiration date, there was no indication that the offer was held open indefinitely. *Id.*

The Order of Dismissal further stated that Petitioner had failed to show detrimental reliance on the State's offer. App. 86. Curiously, given counsel's equivocal testimony at the evidentiary hearing, the Order states that, Petitioner's "hope that the original plea offer would not terminate or be revived was a product of wishful thinking, not deficient performance from counsel." App. 87. This would seem to contradict defense counsel's recollection that the written plea offer from the solicitor contained no expiration date or other indication that it was contingent upon Petitioner's immediate acceptance. App. 62, ll. 23 – App. 10; App. 71, ll. 3-11.

ARGUMENT

The PCR court erred in finding counsel provided effective assistance where counsel failed to make a meaningful effort to have the court enforce the terms of an emailed plea agreement; which included the State agreeing to allow Petitioner to plead guilty to distribution of crack cocaine, first offense.

The PCR court erred in ruling that defense counsel provided effective assistance when counsel failed to motion the court to enforce the terms of a written plea agreement with the State where Petitioner would agree to plead guilty to distribution of crack cocaine, first offense, because of evidentiary weaknesses in the State's case. App.113-124; *See Missouri v. Frye*, 566 U.S. ____, 132 S.Ct. 1399 (2012) (Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, reaffirming *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to guilty pleas).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland*, 466 U.S. at 686. "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 686).

This Court has also held "a defendant has the right to effective assistance of counsel during the plea bargaining process." *Davie v. State*, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009). Moreover, "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 (counsel's failure to convey a plea offer constitutes deficient performance).

In *Frye*, the United States Supreme Court held that the right to effective assistance of counsel extends not only to those situations in which a criminal defendant accepts a plea bargain and waives his right to trial,¹ but also to situations where plea offers are rejected or allowed to lapse. 132 S.Ct. at 1408-1409. The Court emphasized that “[i]n today’s criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Id.* at 1407.

As to proving prejudice where a plea offer has lapsed or been rejected because of counsel’s deficient performance, the *Strickland* framework as adapted by *Frye* requires a defendant to show: (1) that there is “a reasonable probability [the defendant] would have accepted the earlier [more favorable] plea offer had [he] been afforded effective assistance of counsel” and (2) that there is “a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.”² *Id.* at 1409.

Therefore, “[t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the **end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.**” *Id.*; cf. *Glover v. United States*, 531 U.S. 198, 203 (2001) (any amount of additional jail time has Sixth Amendment significance).

¹ See *Hill v. Lockhart*, 474 U.S. 52 (1985) (ineffective assistance of counsel from a guilty plea (1) where counsel’s advice was not within the range of competence demanded of attorneys in criminal cases and (2) where “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial).

² The Court noted that its adaptation of the *Strickland* standard “does nothing to alter the standard laid out in *Hill*” *Frye*, 2012 WL 932020, at 11-12.

Deficient Performance

In this case, defense counsel's performance was deficient, as it fell below "an objective standard of reasonableness" when counsel failed to make a meaningful effort to force the State to honor the terms of the first written plea agreement which would have allowed Petitioner to plead guilty to the lesser offense of distribution of crack cocaine, first offense. App. 70, ll. 5 – App. 71, ll. 19; see *Frye*, 2012 WL 932020, at 8–13; see also *Kolle v. State*, 386 S.C. 578690 S.E.2d 73 (2010) (counsel deficient for misinforming defendant plea offer would remain open after a suppression hearing).

Defense counsel admitted that the first plea offer contained no deadline for acceptance and that Petitioner had indicated his acceptance of the offer by signing the sentencing sheets. App. 64, ll. 16-21; App. 85. Petitioner, on recommendation of defense counsel, "stood down" from the guilty plea out of concern that Judge Young would fully revoke his probation. App. 68, ll. 18-23. This is supported by counsel's testimony at the evidentiary hearing that: "we had gotten mostly through the plea and the judge announced what sentence he was likely to give and gave us an opportunity to stand down." App. 71, ll. 15-19.

Counsel made no effort to hold the State to its earlier plea agreement. App. 67, ll. 1-15. *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988) (if a prosecutor reneges on a plea bargain agreement, counsel may be ineffective for continuing with the guilty plea). Instead of moving to enforce the first plea agreement, defense counsel simply asked the new solicitor if he would accept the initial guilty plea. *Id.* Her representation falls below the objective standard of reasonableness set out in *Frye*. Counsel had a duty to enforce the earlier written plea agreement reached with the first solicitor or, at a minimum, to make a meaningful effort to have the agreement enforced by bringing it to the trial court's attention. *Frye*, 132 S.Ct. at 1410-1411; see also *Custodio v. State*,

373 S.C. 4, 10, 644 S.E.2d 36, 39 (2007) (plea counsel ineffective for failing to seek specific performance of the original plea agreement).

Moreover, in concluding that defense counsel's performance was objectively reasonable, the Order of Dismissal made a number of erroneous conclusions unsupported by record. First, the PCR court wrongly states that there was "no indication that the prior plea was put in writing." App. 85. On the contrary, testimony from defense counsel makes clear that a **written plea offer was extended to Petitioner via email to counsel and that the offer was accepted when Petitioner signed the sentencing sheets.** App. 46, ll. 5 – App. 47, ll. 22; App. 63, ll. 3 – App. 68, ll. 19 (*emphasis added*).

Second, the Order says that Petitioner's case appeared on the trial docket after only the October 4th hearing. App. 84; App. 86. In actuality, Petitioner's case first appeared on the trial docket *before* the October 4, 2012 hearing and continued to be on the trial docket until the second plea hearing in December. App. 65, ll. 15 – App. 66, ll. 11. Further, solicitor control of the criminal docket makes it almost impossible to draw any conclusions regarding the status of the plea offer merely from the case being on the trial docket.

Third, the Order accepted defense counsel's summary contention that Petitioner did not detrimentally rely on the written plea offer. App. 67, ll. 23 – App. 68, ll. 2; App. 85. To the contrary, Petitioner relied on the continuation of the offer when deciding whether to "stand down" at the October 4, 2012. Counsel had no recollection about whether the first plea offer was held open after the October, 4, 2012 hearing." App. 65, ll. 1-4.

Accordingly, the PCR court erred in finding that counsel was not deficient, "in advising [Petitioner] on the terms and conditions of the first plea offer and [in] not making a motion for specific performance". App. 82.

Prejudice

Petitioner was prejudiced by defense counsel's deficient performance because, had defense counsel sought to enforce the initial plea offer, the "end result of the criminal process would have been more favorable by reason of a plea to a lesser charge". *Frye*, 132 S.Ct. at 1402-1403. In addition to Petitioner's unequivocal testimony, this likely result is evinced best by counsel's testimony at the evidentiary hearing confirming that Petitioner "stood down" out of fear of having his probation revoked in full and that Petitioner later tried to accept the initial plea offer after the October 4, 2012 hearing. App. 68, ll. 14-23; App. 66, ll. 19 – App. 67, ll. 22.

Secondly, all the evidence produced at the evidentiary hearing indicates that the State made an unconditional offer for Petitioner to plead guilty to distribution of crack cocaine, first offense. App. 61, ll. 3-13; App. 65, ll. 16-21. Therefore, it is very highly unlikely that the new assistant solicitor would have been able to renege on the plea agreement entered into by his predecessor and it is unlikely that the Court would have rejected the agreement, in light of the weaknesses in the State's case. *State v. Peake*, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001) (enforcement of agreement not to prosecute or plea agreement is contingent upon government agent having authority to make offer and bind the State).

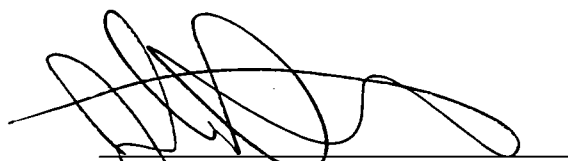
Here, as in *Frye*, Petitioner "pleaded guilty to a more serious charge" because defense counsel failed to move to enforce the earlier, more favorable plea agreement. Even if counsel was unable to have the court enforce the plea agreement; counsel's performance would have been deficient for allowing Petitioner to continue with the guilty plea because distribution of crack cocaine, second offense, rendered concerns about probation revocation – the reason the plea was not entered at the October 4, 2012 hearing – irrelevant. *Santobello v. New York*, 404 U.S. 257 (1971); *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988).

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 eliminates 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.

CONCLUSION

For the reason herein stated, Petitioner Michael Cannon's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

MICHAEL T. CANNON,

PETITIONER,

V.

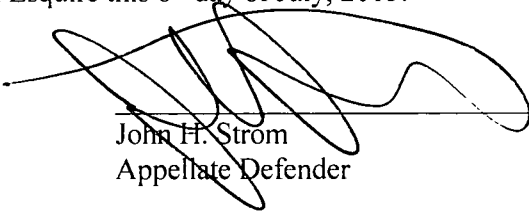
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000101

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 this 8th day of July, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of July, 2015.

Alvi (L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.