

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Kristi Lea Harrington, Circuit Court Judge

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JUL 15 2015

S.C. Supreme Court

AZIKIWE ARCHIE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELATE CASE NO. 2014-002399

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was plea counsel ineffective in failing to communicate plea offers of three years and seven years to petitioner?

Did the PCR judge err in refusing to admit copies of the plea offer and acknowledgment form provided to petitioner by trial counsel in response to a request for a copy of discovery?

STATEMENT

Petitioner was convicted of distribution of crack cocaine after a jury trial held on February 28- March 1, 2011, before the Honorable Steven H. John in Georgetown County. A fifteen (15) year sentence was imposed. Richard F. Colvin, Esquire, was trial counsel. Nancy Cote', Esquire and Scott Hixson, Esquire were the assistant solicitors. (App. p. 1- p. 288). Petitioner appealed his conviction and the appeal was dismissed by the court of Appeals on February 20, 2013. State v. Archie, Op. No. 2013-UP-075.

Petitioner filed an application for post-conviction relief on June 5, 2013, along with an attachment. (App. p. 229- p. 243). Respondent filed a return dated May 20, 2014, (App. p. 244- p. 249). An evidentiary hearing was held on August 29, 2014, before the Honorable Kristi L. Harrington. Petitioner was present and was represented by Tristan M. Shaffer, Esquire. Respondent was represented by Joshua L. Thomas, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. p. 250- p. 331) On October 7, 2014, Judge Harrington issued an order denying and dismissing the application for post-conviction relief. (App. p. 332- p. 342)

A petition for writ of certiorari was filed on March 25, 2015, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E. 2d 201 (1988). On June 18, 2015, this Court issued an order directing the parties to address the questions contained herein.

This petition follows.

ARGUMENT

Trial counsel was ineffective in failing to communicate plea offers of three years and seven years to petitioner.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In this case trial counsel testified at the evidentiary hearing that he was appointed to represent petitioner as a public defender from the Fifteenth Circuit Defender Office. He said that office had a problem retaining case files and petitioner's file could not be found. (App. p. 260, l. 6- p. 263, l. 1) He said he did recall there was a plea offer of three years but not seven years that petitioner complained about. He said petitioner rejected the three year offer. Later, there was

another offer of a range between three and seven years. (App. p. 268, l. 8- 12) Trial counsel was asked about plaintiff's exhibits 1 and 2 and he said they were typical of a plea offer that would have been given him in writing. (App. p. 272, l. 22- p. 273, l. 16)

On cross-examination, trial counsel testified that it was his "practice" to communicate all plea offers. He said he had an independent recollection of the three-year plea offer. He said it was always the client's decision to decline or accept an offer. (App. p. 279, l. 17- p. 280, l. 6)

On redirect, trial counsel testified that the standard office practice was to convey offers in writing and have clients sign them. (App. p. 283, l. 3- 6)

Petitioner testified that trial counsel never conveyed a plea offer to him. The first he heard about the three year offer was on the day of trial. The solicitor told him trial counsel turned it down. (App. p. 288, l. 2- 13) He said no offer was conveyed to him in 2010. The two exhibits marked plaintiff's 1 and 2 were sent to him by trial counsel as part of his discovery. (App. p. 292, l. 9- p. 293, l. 21) Petitioner testified that if the seven-year offer had been made to him, he would have accepted it. He would have accepted the three-year offer as well. (App. p. 296, l. 19- 24)

In Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), this Court held an attorney ineffective when he failed to communicate a plea offer to his client. Prejudice was shown because petitioner testified neither the three year nor the seven year offer were communicated to him. He testified he could have taken either offer. And either sentence would have been much less than the 15 year sentence that was actually imposed.

The PCR judge erred in refusing to admit copies of the plea offer and acknowledgment form provided to petitioner by trial counsel in response to a request for a copy of discovery.

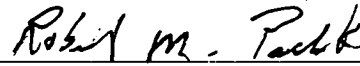
Trial counsel testified that plaintiff's exhibits 1 and 2 were typical of a plea offer that would have been given him in writing. (App. p. 272, l. 22- p. 273, l. 16) Petitioner testified that the two exhibits that were sent to him by trial counsel as a part of his discovery. (App. p. 292, l. 9- p. 293, l. 21) PCR counsel sought to admit the exhibits to what was conveyed to petitioner through discovery. Respondent objected on authentication grounds. The PCR judge upheld the objection. (App. p. 294, l. 10- p. 295, l. 8). Plaintiff's number 2 was the seven year plea offer by the assistant solicitor. It was dated February 11, 2010. Plaintiff's number 1 was addressed to trial counsel as part of his discovery request and it acknowledged Plaintiff's number 2. Plaintiff's number 1 was the cover letter for the plea offer. It was date stamped February 12, 2010, indicating it was received on that date. (App. p. 314- p. 315) Trial began on February 28. (App. p. 1) The documents were more than authenticated by trial counsel's testimony at the PCR hearing. (App. p. 276, l. 4- 12) In the order of dismissal, the PCR judge wrote that petitioner presented no competent evidence the State made an offer regarding a seven year plea. (App. p. 338) But plaintiff's number 2 was strong substantive evidence that an offer was presented to trial counsel and not relayed to petitioner. It is also impeachment of his inability to remember the seven year offer. (App. p. 281, l. 11- 21) It should be noted that under Rule 1003, SCRE "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised so to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Petitioner testified that he got exhibits 1 and 2 through discovery and they should be admissible to the same extent as an original. Also, under Rule 901 (b)(1), SCRE testimony by a witness that a matter is what it is claimed to be satisfies the requirement of authentication. Trial counsel testified that the exhibits

were typical of a plea offer that would have been given him in writing. And Rule 901 (b)(4) provides that the requirement of authentication is met through “appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” The proposed exhibits certainly looked like a plea offer and a cover letter.

CONCLUSION

Petitioner's writ should be granted and his conviction should be overturned

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Kristi Lea Harrington, Circuit Court Judge

AZIKIWE ARCHIE,

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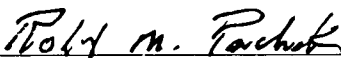
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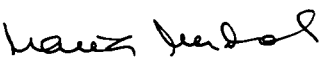
CERTIFICATE OF SERVICE

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 Joshua L. Thomas, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Azikiwe Archie #269814 at the Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162 this 15th day of July, 2015.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of July, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.