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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Michael G. Nettles, Circuit Court Judge

LETRON DAVIS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001631

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED

Is certiorari warranted to review the post-conviction relief judge's finding that plea counsel erroneously advised Respondent regarding parole eligibility where plea counsel reasonably interpreted a change in the law?

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the PCR court's finding that Respondent satisfied his burden for relief by establishing ineffective assistance of counsel where plea counsel was deficient in providing Respondent incorrect advice concerning the collateral consequences of his plea and Respondent was prejudiced because it was uncontroverted that, but for counsel's advice, he would not have accepted the negotiated sentence and pled guilty, was supported by "any evidence" presented at the PCR hearing?

COUNTER-STATEMENT OF THE CASE

On August 18, 2011, the Marion County grand jury indicted Respondent Letron Davis for two counts of distribution of cocaine base. App. 8 1- 82 (Indictments). He also waived presentment on one count of second degree burglary. App. 3, ll. 6-10; App. 4, ll. 19-24.

On December 6, 2011, Davis appeared before the Honorable William H. Seals, Jr. and entered a guilty plea to the above offenses pursuant to a plea agreement for a negotiated sentence of seven years, concurrent. Davis was represented by Vick Meetze and the State was represented by assistant solicitor John Jepertinger. The State nol prossed a separate charge for possession of cocaine base. App. 1 – 5. The plea judge accepted the negotiated sentence and sentenced Davis to seven years for each offense, all to run concurrent. App. 8, ll. 23-25.

On June 1, 2012, Davis filed an application for post-conviction relief (PCR). App. 11. The State filed its Return on February 22, 2013. App. 19. On February 11, 2014, an evidentiary hearing was held before the Honorable Michael Nettles. Davis was represented by Marcus Woodson, and the State was represented by Assistant Attorney General Joshua Thomas. App. 24. The witnesses at the hearing included Respondent Davis and plea counsel, Vick Meetze.

On April 23, 2014, Judge Nettles issued an Order granting Davis' PCR application, vacating his convictions, and ordering a new trial.[1] App. 64. On April 30, 2014, the State filed a Motion to Alter or Amend, which was denied. App. 72; App. 77.

The State filed its Petition for Writ of Certiorari on January 9, 2015. This Return follows.

[1] The PCR court signed an Order granting the PCR application on March 3, 2014, which was never received by the State. The court issued an identical, second Order on April 14, 2014. For clarification of the timeliness of the Rule 59(e) motion, Judge Nettles signed an order on June 27, 2014, noting the timeline of the case, rescinding the March Order, and finding that the Motion to Alter or Amend was timely made. App. 79.

ARGUMENT

The PCR court's finding that Respondent satisfied his burden for relief by establishing ineffective assistance of counsel where plea counsel was deficient in providing Respondent incorrect advice concerning the collateral consequences of his plea and Respondent was prejudiced because it was uncontroverted that, but for counsel's advice, he would not have accepted the negotiated sentence and pled guilty, was supported by "any evidence" presented at the PCR hearing.

Relevant Facts

The PCR court found both Davis' and Meetze's testimony equally credible and made the following relevant findings of fact in its Order granting relief:

> [T]he Court heard testimony that the State offered a plea deal of seven (7) years and Applicant, upon the advice of counsel acquiesced. It is this advice during negotiations that Davis avers was deficient. Specifically, Applicant testified that his attorney instructed him that due to a recent change in the law regarding the distribution of cocaine base (second offense) he would no longer be required to serve eighty-five percent (85%) of that seven-year negotiated sentence. Davis testified that had Meetze told him otherwise, he would have rejected the plea offer from the State.
>
> Additionally, Mr. Meetze testified that Davis' recollection of his advice was accurate. Mr. Meetze affirmed that he communicated this interpretation of the new language in the statute regarding distribution charges to Davis.
>
> ...
>
> Trial counsel took the affirmative position that Davis' offense was no longer a typical "A" felony, and as such, it was not subject to the service of eighty-five percent of the actual term of imprisonment imposed. *See* S.C. Code Ann. § 24-13-100; *State v. Miller,* 404 S.C. 29, 744 S.E.2d 532 (2013). Of particular importance, trial counsel believes that there is "no question [Davis] relied on that advice" in agreeing to accept the plea offer of a seven-year sentence for each charge.

App. 67 – 68. These findings are all supported by the testimony presented at the PCR hearing.

Davis testified that the plea negotiations in his case occurred over "a couple of days," which began with an offer of ten years and decreased to an offer of eight years, both of which Davis rejected. He was then offered seven years. App. 28, ll. 9-24. He was told by his attorney and the solicitor that he would only have to serve sixty-five percent (65%) of the seven year sentence under

"the new law."[2] App. 28, l. 24 – 29, l. 13; App. 34, l. 19 – 35, l. 2. He understood that he would only serve approximately three and one-half years with other credits and would be released by the time his three year old daughter was six years old. App. 35, ll. 13-25; App. 36, ll. 14-20. Howeer, after accepting the offer and entering the guilty plea, Davis was advised at the Department of Corrections ("DOC") that he would instead have to serve eighty-five percent (85%) of his sentence. App. 29, ll. 14-20. Davis testified that if he had known that he would have to serve eighty-five percent (85%) of the sentence, he would not have accepted the plea offer. App. 29, ll. 21-23.

Meetze testified that part of the negotiations in Davis' case was that he would be pleading to an offense that would not require him to do eighty-five (85%) of the sentence. App. 44, ll. 17-20. "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. Notably, at the beginning of the plea hearing, the solicitor said:

> The other case we're dealing with is 2011-228 that is two counts of distribution of cocaine base second, Your Honor. Your Honor, even though the charges happened prior to the change in the law, he [Davis] wasn't arrested until after the change in the law. Therefore, the action would be under or the case would be under the new law where technically he's eligible for all sorts of things including a probationary sentence on that.

App. 3, ll. 17-23.

Meetze's only correction to Davis' testimony was that he did not believe that he would have told him 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 Davis would have

[2] 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.

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. 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.

Meetze recalled that prior to the 2010 Omnibus Crime Bill, Davis' drug charges would have carried potential sentences of five to thirty years, were not eligible for any suspended sentence or parole, and required service of at least of eighty-five percent (85%) of the sentence prior to release. App. 40, ll. 8-22. The new law changed it so that a distribution second offense was considered a non-violent, parole eligible offense. He understood the new language to provide that persons convicted under that provision are eligible for work credits, education credits, good-time credits and no longer have to serve eighty-five percent (85%) of their sentence. App. 40, l. 23 – 42, l. 21.

Contrary to Meetze's advice to Davis, the only change that DOC made based on the new law was to allow the inmate to be eligible for parole. However, if they are denied parole then inmates are still required to serve eighty-five percent (85%) of their sentence. App. 43, ll. 15-18; App. 46, ll. 10-16. Meetze conceded that the application of the statute was for DOC to determine and not him. He then reiterated: "I gave him [Davis] wrong advice, and I'm certain he [Davis] relied on that advice when he entered his plea." App. 43, ll. 19-22.

Judge Nettles specifically asked Meetze about whether Davis 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 Davis 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 Davis would be parole eligible at least once, if not more, during his incarceration, potentially resulting in his release on parole prior to serving

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. 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.

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eighty-five percent (85%) of his sentence. Parole is, of course, not the equivalent of release, in light of its stringent requirements and costs and the potential of revocation. See S.C. CODE ANN. § 24-21-680.

Judge Nettles asked Assistant Attorney General Thomas how a plea can be valid if the defendant was told something that was wrong. App. 47, ll. 17-23. Thomas responded that the State's position is that Meetze 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 the sentence "as an 85 percent" and Meetze told him that it not be subject to the "85 percent rule," presenting "a very real problem" since Davis relied on Meetze's advice. App. 48, ll. 13-21.

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 than eighty-five percent (85%). App. 49, ll. 21-25. Judge Nettles responded "and that's wrong." App. 50, l. 1.

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

68. 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.

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 Davis would not have accepted the negotiated sentence and guilty plea. App. 70. Accordingly, Davis' application for Post-Conviction Relief was granted, his convictions were vacated, and his case was remanded for a new trial.[3] App. 71.

Discussion

Petitioner argues that the PCR court erred in granting Davis' application for post-conviction relief because plea counsel's advice was based upon a reasonable interpretation of a change in the law and could not have anticipated a potential misinterpretation of the law by the Department of Corrections. What Petitioner overlooks is this Court's deferential standard of review and the precedent that gross misinformation by counsel regarding collateral consequences, relied upon by the defendant, causes deprivation of the constitutional right to counsel. See Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979). Meetze's deficient advice was regarding the percentage of Davis sentence that he would have to

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[3] 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.

serve in order to be released. The evidence at the PCR hearing reflected that Meetze advised Davis that he would serve less than eighty-five percent (85%) of his sentence. App. 43, ll. 6-10; App. 44, ll. 17-20; App. 52, ll. 12-16; App. 58, l. 8-19. The PCR court found both Davis' and Meetze's testimony credible and properly granted the request for post-conviction relief.

This advice was inaccurate because the Department of Corrections, which implemented the statutory changes following the passing of the omnibus bill, requires service of eighty-five percent (85%) of the sentence unless the offender is released earlier on parole. App. 43, ll. 15-18; App. 46, ll. 10-16. Davis and Meetze both testified that his decision to plead guilty was induced by the erroneous advise that he would serve less than eighty-five percent (85%) of his sentence. App. 29, ll. 21-23; App. 43, ll. 11-12; App. 43, ll. 19-22.

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). It is well settled that "[i]n reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court will affirm if ***any evidence*** of probative value in the record exists to support the finding of the PCR court. Cherry, 300 S.C. at 119, 386 S.E.2d at 626. In the present case, there was far more evidence supporting the remand court's findings than the minimal amount required for this Court to affirm.

The PCR court properly determined "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." App. 70. In Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979), the Fourth Circuit Court of Appeals held:

> [T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, **when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel.** When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation.

(emphasis added); see Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (finding counsel ineffective where evidence was uncontroverted that Hinson entered his plea in expectation of receiving the lesser period for parole eligibility based upon attorney's erroneous advice); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding counsel ineffective where she advised Ray that he *would* be sentenced to life without parole when in reality, he *may* have received a sentence of seventy-five years without parole and *could* have received as little as ten years); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (finding counsel ineffective where he misinformed client that he would face a potential life sentence if he proceeded to trial).

There is little advice in the criminal defense realm that can be given with absolute certainty. While an attorney can give advice on a sentencing range, it is rare that he can advise the client what his exact sentence will be absent a plea negotiation where the judge agrees to be bound by the negotiation. See Ray, 303 S.C. at 376, 401 S.E.2d at 152-53 (recognizing the distinction between advice as to a potential sentence defendant "may" or "could" receive and advice as to what sentence the defendant "would" receive). Similarly, an attorney can discuss potential defenses with a client, but cannot guarantee that a trial judge will allow presentation of

evidence in support of the defense or that the jury would be persuaded by it. Thus, an attorney must be careful to couch advice such that the client understands which advice is unequivocal and which is part of a discussion of potentials and probabilities.

Petitioner argues that the PCR court's decision imposed an unreasonable requirement that plea counsel be "clairvoyant." Petitioner's reliance upon this Court's decision in Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), in support of its position is misplaced. Gilmore involved an allegation that trial counsel was ineffective in failing to request a King[4] instruction Gilmore's trial for drug related offenses. 314 S.C. at 455-56, 445 S.E.2d at 455. The majority stated: "We have never required an attorney to be clairvoyant or anticipate changes in the law **which were not in existence at the time of trial.**" Id. at 457, 445 S.E.2d at 456 (emphasis added). At the time of Gilmore's trial in July 1989, "the law only required the King charge where murder and a lesser-included offense of murder were presented by the evidence raised at trial." Id. It was not until the Court of Appeals' decision in State v. Clifton, 302 S.C. 431, 396 S.E.2d 831 (Ct. App. 1990), issued August 27, 1990, that the King charge was extended to the drug-related offenses of possession with intent to distribute and simple possession. Id. Thus, the Gilmore court found that trial counsel "could not be ineffective for failing to request a jury instruction which would not be applicable to the offenses charged for at least another year." Id.; see also Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 91 (1992) (finding trial counsel not ineffective for failing

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[4] State v. King, 158 S.C. 251, 155 S.E. 409 (1930). A King instruction requires the jury to resolve any reasonable doubt as to whether defendant was guilty of greater or lesser offense in favor of lesser offense. Gilmore, 314 S.C. at 455-56, 445 S.E.2d at 455. This Court noted in Gilmore that "[t]he legal definition of 'reasonable doubt' has gone through significant modification and revision since 1930, and an argument could now be made that the King charge is unnecessary and archaic." Id. at 456 n.1, 445 S.E.2d at 456 n.1.

to present battered woman's syndrome in the context of her self-defense claim where trial took place six years before Supreme Court recognized battered woman's syndrome as relevant to claim of self-defense); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding trial counsel not ineffective for failing to interview the victim where victim was a witness for the State and whose testimony changed only after the trial); Kirkpatrick v. State, 306 S.C. 359, 412 S.E.2d 389 (1991) (finding trial counsel not ineffective assistance for failing to anticipate or discover co-defendant's attorney's erroneous advice regarding parole eligibility).

Unlike the case law denying post-conviction relief based on unanticipated change in the law or witness testimony, this case involved trial counsel's erroneous advice regarding the interpretation of a change in the statute that had already occurred. Here, plea counsel admitted that his advice to Davis was that he would not have to serve eighty-five percent (85%) of his seven year sentence. App. 43, ll. 6-10. He and Davis later learned that the advice was incorrect, because unless paroled DOC would require him to serve eighty-five percent (85%) of his sentence prior to his release. App. 43, ll. 15-18; App. 46, ll. 10-16. While Meetze opined that his interpretation of the law was more in line with the goal of the omnibus bill to alleviate overcrowding in DOC, he admitted that it was DOC's "call to make and not [his]." App. 44, l. 21 – 46, l. 22; App. 43, ll. 15-22. Thus, plea counsel recognized that DOC was free to interpret the new statute differently, unless or until ordered authorize by the courts. Despite that fact, he assured Davis that he would not be required to serve eighty-five percent (85%) of his sentence. App. 43, ll. 6-10.

It was not until after another client to whom Meetze had given the same advice contacted him that Meetze learned that DOC's interpretation was different from his. App. 45, l. 10 – 46, l. 22. He certainly could have contacted DOC regarding their interpretation of the new law prior to

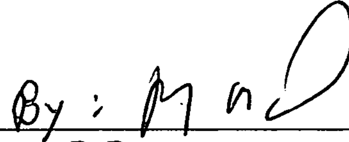
that, but he did not. Instead, Meetze relied on his own interpretation of the law, which was incorrect. The PCR court's findings may have been vastly different had Meetze couched his advice to Davis as merely his interpretation of the new law or told Davis that he should assume that he would have to serve eighty-five percent (85%) even though it may turn out to be less. But, based on the advice as it was actually given, the PCR court properly found that Davis had an obligation to be correct.

The evidence presented to the PCR court unequivocally established that plea counsel gave Davis inaccurate advice regarding what portion of his sentence he would be required to serve before his release and that Davis relied on that advice in accepting the State's plea offer. Trial counsel admitted his mistake and that DOC was ultimately responsible for interpreting the new statute. Thus, the PCR court's finding of ineffective assistance of counsel was supported by far more than the "any evidence" required for this Court to affirm its decision. Therefore, the State's Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth herein, Respondent Letron Davis requests this Court to deny the State's Petition for a Writ of Certiorari.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 5th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Michael G. Nettles, Circuit Court Judge

LETRON DAVIS,

RESPONDENT,

V.

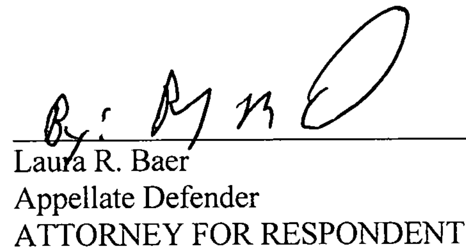
STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001631

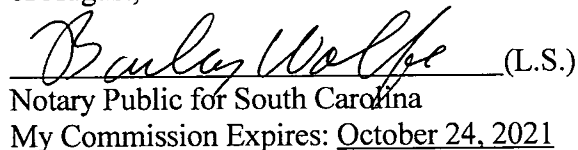
CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, and Mr. Letron S. Davis, 4324 Bayou Village, Mullins, SC 29574, this 5th day of August, 2015.



Laura R. Baer
Appellate Defender
ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 5th day
of August, 2015.


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