STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Plea Judge
The Honorable William P. Keesley, PCR Judge

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S.C. Supreme Court

Appellate Case No. 2015-000101

MICHAEL T. CANNON,..... Petitioner,

v.

STATE OF SOUTH CAROLINA,..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Is Petitioner's argument that counsel was ineffective in failing to move to enforce an earlier plea agreement preserved for this Court's review, where the sole claim raised before the lower court was whether counsel was ineffective in failing to advise Petitioner that his earlier plea offer could be withdrawn by the State?

2. Is the grant of Certiorari necessary to review whether there is any probative evidence to support the PCR Judge's finding that Applicant failed to meet his burden to show counsel was ineffective for failing to move to enforce an earlier plea offer made by the State, where there was no evidence that the State induced Petitioner to take any action in detrimental reliance on the offer?

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 Lexington County. Petitioner was indicted at the April 2012 term of the Court of General Sessions for Lexington County for distribution of crack cocaine, third or subsequent offense (2012-GS-32-0987). He was represented by Sarah Mauldin, Esquire.[1] On December 11, 2012 Applicant entered a guilty plea to the lesser-included offense of distribution, second offense, pursuant to the State's agreement. The Honorable Roger M. Young, Sr., sentenced Applicant to a ten (10) year term of imprisonment. As a result of the plea, Judge Young revoked Applicant's probationary sentence on a separate distribution conviction in full. Applicant did not appeal his guilty plea, sentence, or probation revocation.

Petitioner filed an application for post-conviction relief on September 27, 2013. Respondent made its Return on or about December 11, 2013. An evidentiary hearing into the matter was convened on April 17, 2014, at the Lexington County Courthouse. The Petitioner was present at the hearing and represented by Kristy Goldberg, Esquire. Walt Whitmire, Esquire, of the South Carolina Attorney General's Office represented the Respondent. Petitioner testified on his own behalf at the PCR hearing. Also present and testifying was Petitioner's trial counsel, Sarah Mauldin, Esquire. By Order filed June 12, 2014, the Honorable William P. Keesley denied and dismissed the application with prejudice. This discretionary appeal follows.

[1] Formerly Sarah Hahn at the time of the representation.

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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Appellate courts give great deference to the PCR Court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

STATEMENT OF FACTS

After originally being indicted for distribution of crack cocaine, third or subsequent offense, Petitioner entered a guilty plea to distribution of crack cocaine, second offense on December 11, 2012. App. p. 1-16. According to testimony later submitted at the PCR evidentiary hearing, this was the third plea offer made by the state. App. p. 61; see also, App. p. 45. The first offer was for Petitioner to plead guilty to distribution of crack, second offense. App. p. 61. The second offer was for Petitioner to plead guilty to distribution of crack, first offense, and was made after the state learned that a video tape, originally submitted to counsel as part of Petitioner's discovery, was actually a recording of an unrelated crime involving a different criminal defendant. App. p. 60-61. Thereafter, Petitioner appeared before Judge Young on or about October 4, 2012. App. p. 64-65. However, apparently Judge Young told Petitioner that he was going to revoke his probation in full - effectively a fourteen year sentence – and gave Petitioner a chance to stand down. App. p. 65. Petitioner decided not to proceed with the plea that day. Id. The case was placed on the trial docket. Id. The following December, Petitioner asked counsel whether he could enter a plea under the initial plea offer. App. p. 67. Counsel made the inquiry to the new solicitor assigned to Petitioner's case,[2] who declined. Id. Petitioner then pled guilty to distribution of crack cocaine, second offense.

[2] The previous solicitor with whom counsel had dealt with was no longer with the office. App. p. 66-67.

ARGUMENT

I Petitioner's argument that counsel was ineffective in failing to move to enforce an earlier plea agreement is not preserved for this Court's review, where the sole claim presented to the lower court was whether counsel was ineffective in failing to advise Petitioner that his earlier plea offer could be withdrawn by the State.

Petitioner argues, for the first time on this appeal, that counsel was ineffective in failing to move to enforce an earlier plea agreement by the State. Respondent submits that this claim is not preserved for appellate review. Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review. State v. Dunbar, 356, S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Arguments raised for the first time on appeal are not preserved for review. Further, "[a] party may not argue one ground at trial and an alternate ground on appeal. Id. at 142, 587 S.E.2d at 694; see also State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (finding an issue unpreserved when the appellant argued one ground in support of a jury charge at trial and another ground in support of the charge on appeal).

Petitioner did not allege at any point during his PCR proceeding that counsel was ineffective for failing to move to enforce the contested plea agreement. Instead, Petitioner alleged counsel was ineffective for failing to advise him that the earlier plea offer could be revoked by the State at any time. See App. p. 38;

Admittedly, the PCR Court did rule that a motion to enforce the earlier plea would not have been successful.[3] Such a ruling, however, was only addressed to the extent that it was necessary to the disposition of Petitioner's actual allegation – that counsel was ineffective for failing to advise Petitioner that his plea offer could be revoked by the State. Such a ruling does not constitute a ruling on whether counsel was ineffective or not in failing to move to enforce the

[3] Respondent submits such a ruling was correct and supported by ample probative evidence in the record. INFRA, Section II.

earlier plea agreement. As a result, granting certiorari in this case would be appropriate and should be denied.

II. There is ample probative evidence to support the PCR Court's finding that Applicant failed to meet his burden to show counsel was ineffective in failing to move to enforce an earlier plea offer made by the State, where there was no evidence that the State induced Petitioner to take any action in detrimental reliance on the offer.

In the even this Court finds Petitioner's argument is properly preserved for appeal, Respondent submits it is still without merit and that certiorari should be denied. In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. To show prejudice from ineffective assistance of counsel where the allegation is that a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Missouri v. Frye, 132 S.Ct. 1399, 1409 (2012). Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. Id.

In the present case, there is ample probative evidence in support of the PCR court's finding because any motion to enforce the earlier plea agreement would have been frivolous.

As a general rule, all plea agreements must be on the record, and neither the State nor a defendant will be able to enforce plea agreement terms which do not appear on the record before the trial judge who accepts the plea. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). Absent an actual plea of guilty, however, a defendant may enforce an oral plea agreement *only upon a showing* of detrimental reliance on a prosecutorial promise in plea bargaining. Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 39 (2007) (*citing* Reed v. Becka, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999)). Accordingly, the State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. Custodio v. State, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007). Detrimental reliance may be demonstrated where the defendant performed some part of the bargain; for example, where the defendant provides beneficial information to law enforcement. Id.

The PCR Court properly found that Petitioner failed to meet his burden to show any such prosecutorial promise and induced reliance in this case. App. p. 85-86. Specifically, it found

that Petitioner had not shown that the State did anything that caused him to rely to his detriment. App. p. 86. This finding was clearly supported by the record. Counsel, when asked whether there were any grounds for her to move to have the State's previous offer enforced, pointed out that Petitioner had not "relied on anything." App. p. 67-68. She also testified that Petitioner did not take any actions to his detriment on reliance on the offer. App. p. 64. At the evidentiary hearing, Counsel said her notes indicated Petitioner withdrew at the first plea hearing "because the judge said that he would give 15 years on the probation revocation." App. p. 64-65. Petitioner corroborated this, stating that he backed out and refused to plead guilty at one point because the plea judge warned him that his probation was going to be revoked in full – effectively a fourteen year minimum sentence.[4] App. p. 54.

Petitioner has also failed to argue or even *allege* that the State made any promises – inappropriate or otherwise – on which he detrimentally relied. There has been no evidence presented in this case showing or even suggesting that the State ever told Petitioner or counsel that the contested plea offer would remain open. Unless Petitioner plans to argue that the Solicitor's unqualified *silence* should be interpreted as an implied promise that the offer would not be withdrawn – a dubious proposition even in the more implication-prone field of contract law[5] – such a failure necessarily dictates the outcome here. Counsel was under no professional obligation to make a frivolous motion; nor was Petitioner prejudiced by such a purported failure where the Solicitor was free to withdraw the plea at will. Accordingly, in light of the probative evidence in support of the PCR Court's Order dismissing Petitioner's application, Respondent respectfully requests discretionary review be denied in this case.

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[4] Indeed, Petitioner at one point acknowledges that he still would not have pled guilty on that first day *even if* he had been aware that he offer would be withdrawn later. App. p. 48. Petitioner later backtracked. App. p. 49.

[5] But see Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984) ("A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. If agreement is manifested by words, the contract is said to be express. If it is manifested by conduct, it is said to be implied. In either case, the **parties must manifest a mutual intent to be bound**. Without the actual agreement of the parties, there is no contract." (emphasis added) (internal citations omitted)).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

November 25, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Court of Common Pleas
The Honorable Roger M. Young, Plea Judge
The Honorable William P. Keesley, PCR Judge

MICHAEL T. CANNON,

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:

Mr. John H. Strom, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street
Suite 401
Columbia, SC 29201

This 25th day of November, 2015

LAKESICHA GIBBS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

November 25, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Michael T. Cannon v. State of South Carolina**
Appellate Case No. 2015-000101
Lower Court Case No. 2013-CP-32-3322

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Patrick Schmeckpeper
Assistant Attorney General
SC Bar No. 102100

PS/lg
Enclosures

cc: Appellate Defender John H. Strom (2 copies)