STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Eugene C. Griffith,Jr., Circuit Court Judge

SAMUEL THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2015-001420

PETITION FOR WRIT OF CERTIORARI

SAMUEL THOMPSON,Jr.,#124650
MacDougall Correctional Institution
1516 Old Gilliard Rd.
Ridgeville, S.C. 29472

QUESTION PRESENTED

Whether defense counsel was ineffective for failing to object to and move to withdraw Petitioner's plea, whereas plea was made on basis that he would not be sentenced to a term of imprisonment exceeding three to five years due to colloquy in Judge's chambers where all parties were in agreement but during sentencing, Petitioner received harsher sentence, absent objection by defense counsel?

STATEMENT OF FACTS

Petitioner Samuel Thompson was sixty-one years old and had been a model citizen. Petitioner was indicted by the Charleston County Grand Jury during the March 5,2012 term for the offense of Felony driving under the influence, Ind. No. 2012GS1001468. Ind. No. 2012GS1001468 was later replace with Ind. No. 2012GS1001466,-Reckless Homicide. He proceeded to trial on January 7,2013, and trial ultimately ended in a plea on January 9,2013. Petitioner was sentenced by the Honorable Deadra L. Jefferson to a term of nine (9) years. No appeal was taken. Thereafter, Petitioner filed a timely Application for post-conviction relief on Sept.27,2013, CaSE No. 2013-CP-10-5744. The State made a return on Feb. 10,2014. An evidentiary hearing was held in Charleston County on February 17,2015 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Jeremy thompson, Esquire. Ashleigh R. Wilson Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Eugene C. Griffith, Jr., denied relief in an Order of Dismissal filed June 11,2015. A timely notice of appealwas perfected on Petitioner's behalf by the S.C Commission on Indigent Defense. Chief Appellate Defender, Robert M. Dudek filed a Johnson Petition with the S.C. Supreme Court on Petitioner's behalf.

This appeal Follows:

During the trial, the judge summoned the attorneys to her chambers to see if a guilty plea could be negotiated. Petitioner recalled that Attorny Smiley came out of the judge's chambers, and "[h]e said if I plead [I would get] 3-5. years. Based on that particular information, Petitioner decided to enter a plea of guilty. App. 259,1. 15-260,1. 19.

During the guilty plea proceeding Judge Deadra Jefferson anked Assistant Solicitor Greg Voigt: "Does the State have any response to Mr. Smiley's request for a three-year sentence? Voigt responded, "the State believes that's too low." App.230,11.9-14.

PCR counsel Thompson told Judge Griffith that petitioner was told by his trial attorney that he would receive a sentence of no more than three to five years. That is what type of impression that he had in regard to his understanding of the nature of his plea. App. 225,11. 10-18.

Petitioner was steadfast that he would have accepted a guilty plea offer if it was in the three to five-year range. App 258,11.2-21.

Defense attorney Smiley maintained after talking with the judge and the solicitor: "I was fairly clear it [the sentence] would be between 3-7." App. 269,11. 10-23. Smiley recalled telling petitioner: "Sam, if you are going to plead, now is the time to do it, I have an indication that we are somewhere between three and seven. I would guess the worst the judge is going to do is split the baby." App. 270,11. 7-20. "Counsel testified the trial judge indicated she would accommodate the ranged preferred by the applicant and the State." App. 284-285. "Counsel also testified the Petitioner relied on his advice and pled guilty. App. 284-285.

ARGUMENT

Defense counsel was ineffective for failing to object to and move to withdraw Petitioner's plea, whereas plea was made on basis that he would not be sentenced to a term of imprisonment exceeding three to five years due to colloquy in Judge's chambers where all parties were in agreement, but during sentencing, Petitioner received sentence that was harsher, absent objection by defense counsel.

In a post-conviction relief proceeding, the applicant has the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441,334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adverserial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984): Butler, 286 S.C. 441,334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of compentence required in criminal cases. The courts presume that counsel rendered adquate assistance and made all significant decisions in the exercise of reasonable professional judgement. Strickland v. Washington, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115,386 S.E.2d 624 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the attorney performance is measured

by its "reasonableness under professional norms." Id at 117,386 S.E.2d at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id A reasonable probability is 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).

When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors , there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52,58-59 (1985); Roscoe v. State, 345 S.C. 06,20, 546 S.E.2d 417,419 (2001).

As a general rule, defense counsel has a duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. Missouri v. Frye, 132 S.Ct. 1399,182 L.Ed.2d 379 (2012).

Standards for prompt communication and consultation recommened by the American Bar Association and adopted by numerous states and federal courts, though not determined, serve as important guides. The prosecution and trial court may adopt measures to help ensure against late, frivolous or fabricated claims. First, a formal offers terms and processing can be made part of the record at any time and subsequent plea proceeding or before trial to ensure that defendant has been fully advised before the later proceedings commenced.

To show prejudice when a plea offer has lapsed or been rejected because of counsel's deficient performance, defendant's must demonstrate a reasonable

probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have beeb entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law. This application to Strickland v. Washington,,to uncommunicated, lapsed pleas does not alter Hills v. Lockhart satndard, which requires a defendant complaining that ineffective assistnace led him to accept a plea offer instead of going to trial to show " a reasonable probabvility that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. 474 U.S.,at 59,106 S.Ct. 366. Hill correctly applies in the context in which it arouse, but it does not provide the sole means for demonstrating prejudiced arising from counsel's defficient performance during plea negotiation. Because Frye argues that with effective assistance he would accepted an earlier plea offer as opposed to entering an open plea. Strickland's inquiry into whether "the result of the proceeding would beem different, 466 U.S., at 694,104 S.Ct. 2052, requires looking not at whether the defendant would have proceeded to trial, but whether he would have accepted the earlier plea offer. He must also show that, if the prosecution had the discretion to cancel the plea agreement or the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecutor nor the trial court would have prevented the offer from being accepted or implemented. This further showing is particularly important because a defendant has no right to be offered a plea. See Wheatherford v. Bursey, 429 U.S. 545,561,97 S.Ct. 837,51 L.Ed.2d 30, nor a federal right that the judge accept it. Santobello v. New York, 404 U.S. 257,262,92 S.Ct. 495,30

L.Ed.2d 427. See also Lafler v. Cooper, 132 S.Ct. 1376,182 L.Ed.2d 398 (2012).

Holdings: The Supreme Court, Justice Kennedy, held that: Petitioner was prejudiced by counsel's deficient performance in advising petitioner to reject plea.

During plea negotiations defendants are entitled to the effective assistance of counsel. U.S.C.A. Amend. 6. The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. U.S.C.A. Amend. 6. If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering to accept it or not. If the right is denied prejudice can be shown if loss of opportunity led to a trial resulting in a conviction or more serious charges or the imposition of a more serious sentence. The goal of a just result is not devorced from the reliability of the conviction,see U.S. v. Cronic, 466 U,S, 648,658,104 S.Ct. 2039,80 L.Ed.2d 657 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the process that proceeded it, which caused the defendant to lose benefits he would have received in the ordinary cause but for counsel's ineffective assistance.

The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical' stage at which the right to counsel adheres." Iowa v. Taylor, 541 U.S. 52,58,106 S.Ct. 366,88 L.Ed.2d 203 (1985). And it follows from this that acceptance of a plea after offer is a critical stage. That and nothing more is the point of the Court's observation in Padilla v. Kentucky, 559 U.S.___,___.,130 S.Ct. 1473,1486,176 L.Ed.2d 284 (2010). The negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." When guilty plea rests in

Significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Once a guilty plea is entered by a defendant, and is accepted by the court, due process requires the plea bargain be honored. U.S.C.A. Const. Amend. 14. Reed v. Becka, 333 S.C. 676,511 S.E.2d 396 (C.App.1999). Even if the agreement has not been finalized by the court, a defendant's detrimental relinace on a prosecutorial promise in plea bargaining could make plea agreement binding. U.S. v. Saavge, 987 F.2d 1336 (9th. Cir.1992).

The phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonable due in the circumstances. Those circumstances will vary, but a constant factor is that where plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Santobello v. New York, 404 U.S. 257,92 S.Ct. 495,30 L.Ed.2d 427 (1971).

When prosecutor breaks the bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea. This provides the defendant with ample justification for recinding the plea. Brady v. U.S, 397 U.S. 742, 755, 90 S.Ct. 1463,1472,25 L.Ed.2d 747 (1970).

CONCLUSION

Based on the froegoing argument, a writ of certiorari should issue to allow full briefing on the issue.

Respectfully submitted,

Samuel Thompson, Jr., #124650

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Eugene C. Griffith, Jr., Circuit Court Judge

SAMUEL THOMPSON, Jr.

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2015-0001420

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 29201, this 29th day of February, 2016.

State of SC County of Berkeley
The foregoing instrument was acknowledged before me
this 29th day of Feb, 2016
by Samuel Thompson
Lisa M. Cross Notary Public
My Commission Expires Jan 16, 2024

LISA M. CROSS
Notary Public, State of South Carolina
My Commission Expires 1/16/2024

Respectfully submitted,

Samuel Thompson, Jr., #124650