

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County

Roger E. Henderson, Circuit Court Judge

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SC SUPREME COURT

RONALD L MCCAULEY

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001998

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to communicate the State's plea offer of a negotiated sentence of twenty-five to thirty years' imprisonment in exchange for Petitioner's guilty plea to three counts of first-degree criminal sexual conduct with a minor and one count of unlawful conduct toward a child, where Petitioner was not aware of the State's plea offer until after he had been convicted at trial and sentenced to life imprisonment without the possibility of parole?

STATEMENT OF FACTS

According to Charles Thacker, one morning in November 2008, he went to Julie Barnes' home in Berkeley County, South Carolina, to pick up his ten-year old son, Minor one. App. 450, l. 25– App. 451, l. 1. Barnes is Minor one's mother. App. 451, ll. 1 – 2. When Thacker arrived at the home, he walked inside and observed Petitioner in bed with Minor one. App. 451, ll. 1 – 15.

Petitioner and Barnes became close friends while they both worked at cab drivers. App. 233, ll. 10 – 14. Petitioner eventually began babysitting Minor one and eight-year old Minor two, while Barnes was working and attending school.¹ App. 248, ll. 6 – 19. Petitioner would spend the night at the minors' home. App. 248, ll. 6 – 19. The minors would also stay the night at Petitioner's home for several nights during the week. App. 248, ll. 6 – 19.

At Thacker's home later that day, Minor one disclosed to Thacker that Petitioner had been sexually abusing him. App. 451, l. 23 – App. 452, l. 23. Thacker called the Monck's Corner Sheriff's Department to report what Minor one told him and a criminal investigation commenced. App. 453, ll. 8 – 17. Minor one and Minor two both alleged that Petitioner had been sexually and physically abusing them and their brother. App. 244, l. 6 – App. 245, l. 25; App. 304, l. 6 – App. 305, l. 9.

Petitioner was indicted for five counts of first-degree criminal sexual conduct with a minor, three counts of lewd act on a minor, and three counts of unlawful conduct toward a child by the Berkeley County Grand Jury on October 28, 2009. App. 227, l. 19 – App. 228,

¹ Minor one and Minor two had different fathers. App. 450, ll. 14 – 23.

1. 6. The State served Petitioner and trial counsel with a notice of intent to seek a life sentence based on Petitioner's prior conviction for second-degree criminal sexual conduct with a minor. App. 739.

On December 13, 2010, Petitioner's case proceeded to a jury trial before the Honorable Kristi L. Harrington. App. 1. Prior to trial, the State dismissed two counts of first-degree criminal sexual conduct with a minor and one count of lewd act on a minor. App. 738. David Schwacke and Patricia Kennedy represented Petitioner. App. 1. Debbie Herring-Lash and Anne Williams represented the State. App. 1.

At trial, the minors alleged that Petitioner beat them and forced them to engage in various sexual acts at their home and at Petitioner's home. App. 244 – 245; App. 304 – 305.

On December 15, 2010, the jury found Petitioner guilty of all charges. App. 665, 1. 1 – App. 667, 1. 13. Judge Harrington sentenced Petitioner to life imprisonment without the possibility of parole for the two counts of first-degree criminal sexual conduct with a minor, based on the statute. App. 679, 1. 2 – App. 681, 1. 10. She also sentenced Petitioner to fifteen years' imprisonment for the lewd act on a minor charges, and ten years for the unlawful conduct toward a child charges. App. 679, 1. 2 – App. 681, 1. 10. Petitioner's sentences were to run concurrently to each other. App. 681, ll. 8 – 10. Petitioner appealed his conviction and sentence.

On May 15, 2013, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. See State v. McCauley, Op. No. 2013-UP-202 (S.C. Ct. App. filed May 15, 2013). Appellate Defender Breen R. Stevens represented Petitioner.

On September 17, 2013, Petitioner filed a PCR application. App. 683. Respondent filed its return on April 1, 2015. App. 690. On July 22, 2015, an evidentiary hearing was held before the Honorable Roger E. Henderson. App. 695. Lance S. Boozer represented Petitioner. Joshua L. Thomas represented the State. App. 695.

Petitioner testified during the PCR hearing. App. 699. Petitioner explained that prior to his trial, he was not aware that the State extended an offer of twenty-five years in exchange for pleading guilty. App. 710, ll. 8 – 11. Petitioner became aware of the plea offer while in prison after receiving a copy of his discovery, which he requested from trial counsel. App. 710, l. 20 – App. 711, l. 8. Petitioner discovered a plea offer from the solicitor to trial counsel with a date of July 30, 2010. App. 711, ll. 14 – 24.

According to the plea offer, Petitioner would be allowed to plead guilty to three counts of first-degree criminal sexual conduct with a minor and only one count of unlawful conduct towards a child with a negotiated sentence range of twenty-five to thirty years' imprisonment. App. 712, ll. 5 – 8. The offer was set to expire on August 30, 2010. App. 712. If Petitioner had known about the plea offer, he would have considered accepting the offer. App. 713, ll. 8 – 14. Because trial counsel did not relay the State's plea offer to Petitioner, Petitioner did not have an opportunity to consider it. App. 713, ll. 15 – 17.

Defense counsel Schwacke recalled receiving a written plea offer from the State on July 30, 2010.² App. 726, ll. 22 – 24. Counsel stated that he discussed the offer with Petitioner. App. 726, ll. 22 – 24. However, Petitioner refused to sign the written offer indicating whether he accepted or rejected the offer. App. 728, ll. 6 – 9.

² Defense counsel Patricia Kennedy did not testify during the PCR hearing.

Counsel Schwacke further contended that the solicitor kept the July 30, 2010 plea offer open past the August 30, 2010 expiration date. App. 727, ll. 20 – 23. Counsel stated that he and Co-counsel Kennedy read and reviewed an acknowledgment form with Petitioner in October 2010. App. 723, l. 13 – App. 723, l. 23. The form detailed the State’s plea offer of a negotiated twenty-five to thirty-year prison sentence. App. 723, l. 21 – App. – 723, l. 19.

Counsel Schwacke asserted that Petitioner refused to sign the acknowledgement form as well. App. 723, ll. 21 – 23. However, there was no document memorializing Petitioner’s refusal to sign the written plea offer or the acknowledgment form that counsel contend was reviewed with Petitioner. App. 727, l. 12 – App. 728, l. 10.

Order of Dismissal

Judge Henderson issued an order of dismissal on August 28, 2015. App. 738. The PCR judge wrote that Petitioner “failed to meet his burden to demonstrate trial counsel ineffective in failing to convey a plea offer.” App. 744. Petitioner appealed the PCR judge’s order. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding trial counsel provided effective representation where counsel failed to communicate the State's plea offer of a negotiated sentence of twenty-five to thirty years' imprisonment in exchange for Petitioner's guilty plea to three counts of first-degree criminal sexual conduct with a minor and only one count of unlawful conduct toward a child, where Petitioner was not aware of the State's plea offer until after he had been convicted at trial and sentenced to life imprisonment without the possibility of parole.

Trial counsel was ineffective for failing to communicate the State's plea offer to Petitioner prior to trial. The State made a plea offer of a negotiated prison sentence of twenty-five to thirty years in exchange for Petitioner's guilty plea. However, Petitioner was not aware that the State had extended an offer until he had been convicted at trial and sentenced to life imprisonment without the possibility of parole.

“[A]s a general rule, 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.” Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012); Bell v. State, 410 S.C. 436, 441, 765 S.E.2d 4, 6 (2014). Defense counsel's failure to convey a plea offer from the State constitutes deficient performance. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009).

Under the Sixth Amendment to the United States Constitution, a criminal defendant is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). “[A] defendant has the right to effective assistance of counsel during the plea bargaining process” as well. Davie, 381 S.C. at 607, 675 S.E.2d at 419.

When a defendant challenges a conviction and sentence on the ground that defense counsel was ineffective, 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; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether defense counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Here, defense counsel was ineffective for failing to communicate to Petitioner the State’s plea offer of a negotiated sentence of twenty-five to thirty years’ imprisonment prior to Petitioner’s trial. Counsel admitted that he received a written plea offer from the State. However, Petitioner was not aware of such an offer. Petitioner’s signature was not on the original written plea offer indicating whether he rejected or accepted the offer. Petitioner’s signature was not on the acknowledgment form that defense counsel claimed to have reviewed with Petitioner.

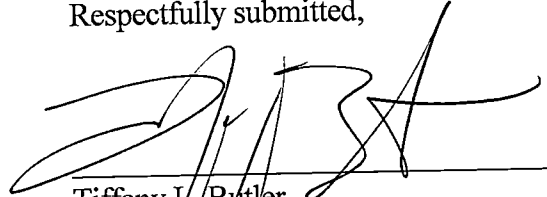
If counsel had conveyed the State’s offer to Petitioner, Petitioner would have considered the plea offer. Petitioner knew he faced life imprisonment without the possibility of parole. Obviously, he would have taken any plea offer seriously. Because defense counsel failed to communicate the

State's plea offer, Petitioner was deprived of that opportunity. Instead, Petitioner proceeded to trial where he was convicted and given a life sentence without the possibility of ever being released.

CONCLUSION

For the reasons argued above, Petitioner Ronald McCauley respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', written over a horizontal line.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BERKELEY COUNTY
ROGER E. HENDERSON, CIRCUIT COURT JUDGE

RONALD L. MCCAULEY

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-001998

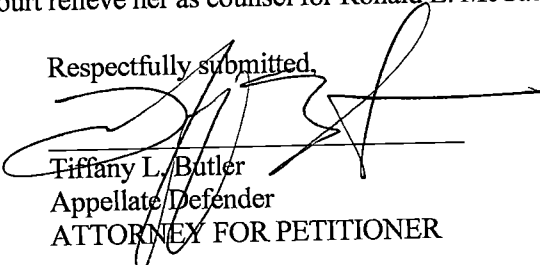
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ronald L. McCauley states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on July 22, 2015. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Ronald L. McCauley.

Respectfully submitted,


Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of April, 2016

STATE OF SOUTH CAROLINA

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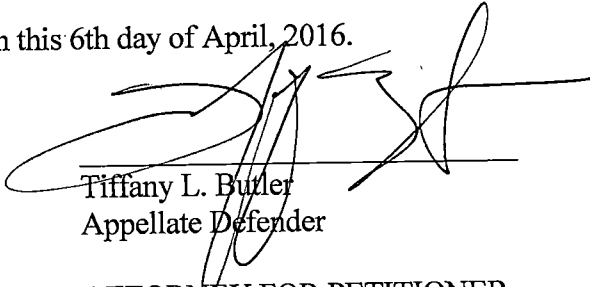
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-001998

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire and Ronald L. McCauley, #276407, at McCormick Correctional Institution this 6th day of April, 2016.


Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of April, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026