

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Edgar W. Dickson, Circuit Court Judge **S.C. SUPREME COURT**

RECEIVED

SEP 06 2016

VERNELL W. HARRIS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2015-002082

RETURN TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
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ATTORNEY FOR RESPONDENT

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ISSUES PRESENTED

1. Whether the PCR judge committed an error of law when he ruled *sua sponte* in the order denying Petitioner's Rule 59(e) motion that Plea Counsel was ineffective for failing to advise Respondent he could not receive a sentence reduction below the mandatory minimum sentence.
2. Whether any probative evidence supports the PCR judge's finding that Plea Counsel was ineffective where Respondent entered a knowing and voluntary negotiated plea to the mandatory minimum sentence, and no prejudice has been shown.
3. Whether the PCR judge committed an error of law when he ruled that Plea Counsel was ineffective for failing to pursue a sentence reduction hearing where counsel had no duty or authority to do so.

COUNTER-ISSUES PRESENTED

1. The PCR Court was well within its authority to ensure that respondent was granted a sentencing reduction hearing where such a reduction was clearly contemplated at the time of his guilty plea given his substantial assistance in solving a host of burglaries in Florence County, and the PCR court, respectfully, had to ensure relief was not evaded by the state playing procedural games to deny respondent relief.

2. The PCR Court correctly granted respondent relief where nothing in the sentencing reduction statute limited a future judge from going below the mandatory minimum sentence to credit respondent for his substantial assistance in solving a large number of crimes in the Florence area.

3. The PCR Court properly held that it is obvious defense counsel must “follow through” in an effort to get the solicitor to file a sentencing reduction motion where the solicitor had the sole authority to file that motion, and it was common sense that “follow through” from defense counsel was required to ensure the solicitor actually filed that motion.

STATEMENT OF FACTS

At the guilty plea proceeding the solicitor told the judge “there [have] been a lot of crimes solved because of Mr. Harris. In fact, there were apparently “about fifteen or sixteen cases that were solved...” App. 8, ll. 4-16. The solicitor said “that’s the reason for our negotiation of fifteen years, Your Honor.”

Further, though, the solicitor then specifically cited S.C. Code § 17-25-65 which allowed respondent “to come back into court for some consideration to be given by the judge [in a sentencing reduction for helping the state solve crimes]. App. 8, ll. 17-24. Moreover, Investigator Poston said that respondent **had helped the police solve an “estimated forty burglaries in the Florence area.”** App. 9, ll. 4-10. (emphasis added). Interestingly, the solicitor immediately added that respondent was going to provide “additional information” to law enforcement that went to his future sentencing reduction. App. 9, ll. 12-16.

Defense Counsel Anderson observed “As the two investigators said also as Mr. DeBerry said, he has helped them a great deal, you honor. As Mr. DeBerry said under 17-25-65 we anticipate that, you know, hopefully, he’ll be back *in the near future* to be before the Court to see whether or not his is eligible for another time reduction.” App. 10, ll. 11-16. (emphasis added).

However, defense counsel did not follow through to ensure to solicitor filed the motion so respondent would receive a sentencing reduction for his great and assistance with law enforcement.

PCR counsel Tyler correctly argued that defense counsel had the obligation to follow through, and inform the solicitor that respondent had met his obligations of getting a sentencing reduction and prompt the solicitor to file that sentencing reduction motion. As the PCR Court

observed, defense counsel had to “light a fire under” the solicitor to ensure he would, in fact, file the motion. App. 54, l. 23 – 60, l. 11.

The judge ruled that respondent was entitled to relief given the promises at the guilty plea hearing that he would receive the opportunity for a sentencing reduction given his great cooperation with law enforcement. “and now I’m sitting here saying, well, we can’t do anything. **Well, we’re going to do something.** I don’t know what we’re going to do, but I’ll take this matter at this time under advisement and see if I - - see what we can do.” App. 60, ll. 2-5. (emphasis added).

A sentencing reduction hearing was subsequently held on January 27, 2015 before the Honorable William H. Seals. William “Vick” Meetze now represented respondent. John Jepertinger was the assistant solicitor. App. 62.

Jepertinger told the judge that after the post-conviction relief hearing the judge ordered “that the state conduct a hearing in regards to a sentence reduction for Mr. Vernell Harris.” However, despite that recent order, Jepertinger argued that such a hearing **was not possible** on a sentencing reduction because respondent had not filed the motion within the one year called for under S.C. Code § 17-25-65. App. 65, ll. 16-25.

In other words, even though the PCR judge ordered a sentencing reduction hearing be held for respondent, the solicitor and judge vetoed that relief. Further, defense counsel failed to follow through with the solicitor to ensure that the motion was filed within one year after respondent was sentenced, and that was the basis for the relief.

The state also argued that respondent was not eligible for a sentencing reduction hearing because he received a mandatory minimum sentence of fifteen years, and therefore a lower sentence is not possible. The judge ruled that the motion was not filed within one year and “the

statute does not allow me to go under the mandatory minimum. I would help you. **If I had the authority to help you, I would.**” App. 70, ll. 19-23. (emphasis added).

ARGUMENT

1.

In the context of this case, the PCR Court merely insured that respondent be afforded the opportunity for a sentencing reduction given the promises made at the time of his guilty plea.

Defense counsel was ineffective in this case. First, respondent was promised the opportunity for a sentencing reduction for his great assistance to law enforcement. The state then argued that a sentencing reduction was not possible because respondent received the mandatory minimum sentence of fifteen years, and because the motion was not filed within one year of sentencing. Both reasons respectfully were error.

This Court has held that misleading a criminal defendant on sentencing exposure constitutes ineffective assistance of counsel. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). This Court has also held that defense counsel is ineffective for failing to move for proper relief when the state “renewed” a sentencing exposure promise. See Jordan v. State, 297 S.C. 52, 374 S.E.2d 663 (1998).

The state’s argument here is simply, but respectfully, “too cute.” The state argued that it a sentencing reduction hearing was not possible because: (1) the motion was not filed within one year even though relief for a sentencing reduction was specifically ordered by the PCR Court. The state also argued that (2) respondent received the mandatory minimum of fifteen years and such a sentencing reduction was not possible. However, nothing in the statute prevented relief if the defendant received a mandatory minimum sentence. See S.C. Code § 17-25-65 (A) (1). The post-conviction court properly provided respondent relief in this case, and respondent should be granted a sentencing reduction hearing as ordered by the PCR court.

2.

The state's argument that respondent received the mandatory minimum fifteen year sentence forbids a sentencing reduction ignores the plain language of S.C. Code § 17-25-65 which provides that opportunity for a sentencing reduction for providing "substantial assistance" to the state.

The state's second argument is that respondent cannot show any prejudice because he received the mandatory minimum fifteen year sentence for burglary in the first degree. This argument overlooks the plain and obvious import of the sentencing reduction statute, § 17-25-65, which provides that the court "may reduce a sentence" if the defendant provides substantial assistance to the state.

Nothing in the statute limits the court in reducing a sentence based upon the **original sentence** the defendant received at his guilty plea. The sentencing reduction statute merely provides that the court can reward a defendant for helping law enforcement solve other crimes.

Respondent helped the law enforcement community in Florence solve a whole host of other burglary cases. S.C. Code § 17-25-65 provided the mechanism for the court to reward respondent for helping law enforcement. Respondent's defense counsel simply failed to follow through in this case, and the court correctly found he was ineffective for failing to prompt the solicitor to file the motion within one year. Jordan v. State, supra.

Defense counsel obviously did not have the authority to file the sentencing reduction motion. The salient point was that defense counsel had the duty, as the post-conviction relief court correctly found, to follow through and prompt the solicitor to file the promised sentencing reduction motion within one year.

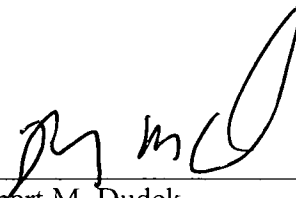
Respectfully, again, the state's "gotcha" procedural game that defense counsel did not have the authority to file a sentencing reduction motion misses the salient point the PCR court found obvious. Defense counsel had a duty to follow through with the solicitor to ensure that the motion was in fact filed within the one year provided in the statute.

Defense counsel, not the solicitor, represented respondent in this case. It would seem clear beyond cavil that defense counsel would have to follow through to ensure that the solicitor follow through on his promise of a sentencing reduction motion. Otherwise, the state reneged on a promise to respondent, and his defense attorney simply did nothing to correct that wrong. Jordan v. State. That was simply the reality of the situation.

There was ample evidence to support the PCR Court's ruling in granting respondent relief since he was misled, and the PCR Court properly fashioned a remedy to cure the unfairness in this case, and certiorari simply is not warranted to reward the state respectfully, for its procedural games. See Hill v. Lockhart, 474 U.S. 52 (1985). There was much more than the "any evidence" necessary to support the PCR Judge's ruling granting respondent a sentencing reduction hearing in this case. App. 78. See, Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

CONCLUSION

By reason of the foregoing arguments, the relief granted by the PCR Court should be affirmed since there is evidence supporting it.

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County

Honorable Edgar W. Dickson, Circuit Court Judge

VERNELL W. HARRIS,

RESPONDENT,

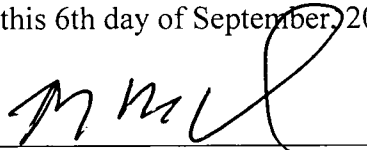
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STATE OF SOUTH CAROLINA,

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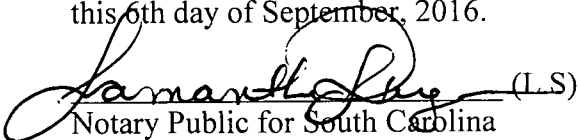
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johanna Catalina Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Vernell W. Harris, #341357, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 6th day of September, 2016.



Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR RESPONDENT
this 6th day of September, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.