

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Marion County

Michael H. Nettles, Circuit Court Judge

RECEIVED

SEP 21 2016

Appellate Case No. 2014-001631

S.C. SUPREME COURT

LETRON DAVIS,

RESPONDENT,

V.

THE STATE,

PETITIONER

RETURN TO MOTION TO AMEND APPENDIX

The State filed a motion to amend the appendix and hold deadlines in abeyance in this case, requesting that it be allowed to supplement with Respondent Davis' parole records, which indicate that his parole became effective on October 9, 2014 and will end on May 9, 2018. The State has further requested an additional thirty days to file its brief of petitioner from the date that this Court rules upon its motion. In opposition to part of the State's motion, Respondent respectfully states:

Procedural and Factual History

1. On December 6, 2011, Respondent pled guilty to one count of second degree burglary under S.C. CODE ANN. § 16-11-312(A), and two counts of distribution of cocaine base, second offense, under S.C. CODE ANN. § 44-53-375(B), for a negotiated sentence of seven years, concurrent. App. 1 – 9; App. 81 – 84.

2. On June 1, 2012, Respondent filed his application for post-conviction relief. App. 11 – 18. The State filed its Return on February 22, 2013. App. 19 – 23.

3. An evidentiary hearing was held before the Honorable Michael Nettles on February 11, 2014. Respondent was represented by Marcus Woodson and the State was represented by Assistant Attorney General Joshua Thomas. App. 24. The PCR court found Respondent’s and Meetze’s testimony equally credible and granted judgment in Respondent’s favor, vacating his convictions and remanding the case for a new trial. App. 64 – 71.

- a. In its written Order, the PCR court found credible Respondent’s testimony that his attorney advised him that due to a recent change the law, he would no longer be required to serve 85% of the negotiated sentence. Had his attorney told him otherwise, he would have rejected the State’s third plea offer. App. 69 - 70; see App. 28, l. 23 – 29, l. 23; App. 34, l. 22 – 35, l. 25; App. 41, ll. 1-7.
- b. The PCR court found equally credible plea counsel Meetze’s testimony that Respondent’s recollection was accurate that he advised him that he would not be subject to the service of eighty-five percent (85%). Meetze had no question that Respondent relied on his advice in deciding to accept the plea offer. App. 69 – 70; see App. 42, l. 22 – 43, l. 12; App. 44, ll. 17-20; App. 55, l. 22 – 56, l. 18; App. 58, l. 8-19. Specifically, Meetze said that “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 (emphasis added).
- c. Meetze testified that the only change that the Department of Corrections has made based on the new law is allowing the inmate to be eligible for parole. However,

if they are denied parole then inmates are still being required to serve eighty-five percent (85%) of their sentence. App. 43, ll. 15-18; App. 46, ll. 10-16. While Meetze disagreed with this application, he testified that he gave Respondent “wrong advice, and [he is] certain he [Respondent] relied on that advice when he entered his plea.” App. 43, ll. 19-22.

- d. Judge Nettles specifically asked Meetze about whether Respondent 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 Respondent 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 Respondent would be parole eligible at least once, if not more, during his incarceration, potentially resulting in his release on parole prior to serving eighty-five percent (85%) of his sentence.
- e. 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.
- f. In its written Order, the PCR court found that in accepting the State’s plea offer, Respondent relied on the advice of trial counsel regarding how his sentence would be handled by the Department of Corrections. App. 68.
- g. 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.

- h. 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 Respondent would not have accepted the negotiated sentence and guilty plea. App. 70.
- i. Accordingly, Respondent’s Application for Post-Conviction Relief was granted, his convictions were vacated, and his case was remanded for a new trial.¹ App. 71.
4. On January 9, 2015, the State filed its petition for writ of certiorari, arguing that “[t]he post-conviction relief judge erred in finding plea counsel ineffective for advising Respondent regarding parole eligibility.”
5. On April 21, 2015, the State filed a motion to dismiss its own appeal as moot, based on Respondent’s release on parole, and requested that judgment be entered in its favor. Respondent opposed the motion by a return filed May 1, 2015. On July 6, 2015, this Court denied the State’s motion to dismiss. Respondent filed his Return to the petition for writ of certiorari on August 5, 2016.
6. On May 6, 2016, this Court granted certiorari and ordered the parties to proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

¹ 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.

7. Having inadvertently missed the filing deadline for the brief of petitioner, the State's request for a fourth and final ten-day extension until September 19, 2016 to file its brief. Respondent consented.

8. On September 13, 2016, the State contacted Respondent's counsel requesting consent to amend the Appendix with documents regarding Respondent's parole. Respondent's counsel respectfully indicated that she would not consent to the amendment. The State then filed its motion to amend appendix and hold deadlines in abeyance.

Argument

9. The State's motion to amend the appendix should be denied because the materials it seeks to include were not before the lower court at the PCR hearing and as such do not fall under the content specifications for a PCR appeal appendix enumerated in Rule 243(f), SCACR. Rule 243(f), SCACR provides: "The Appendix shall contain: (1) The entire lower court record. (2) A copy of the final order entered after the post-conviction proceeding. (3) An index setting forth the principal matters contained in the Appendix. This index shall be in the same form required for a Record on Appeal under Rule 210(e)."

10. 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. Thus, consideration of extraneous documents which were not before the PCR court would be inconsistent with this Court's standard of review.

11. The State's motion should likewise be denied because Respondent's parole is not relevant to the appeal. As discussed in Respondent's return to the State's motion to dismiss, Respondent never claimed that he was promised release on parole, which is a promise that no attorney could possibly make to their client in good faith. See S.C. CODE ANN. § 24-21-640. Rather, he was promised that he would be *eligible* for parole (which it is undisputed that he was) such that he would *not be subject to service of eighty-five percent (85%)* of his sentence, i.e. that his sentence would "max out" before service of eighty-five percent.

12. During the pendency of this case on appeal, the Court of Appeals decided Bolin v. S.C. Dept. of Corrections, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2016). The inmate in Bolin was informed by the DOC after his incarceration that he would be eligible for parole, but that if he was not granted parole, his offense would thereafter be treated as a no-parole offense, such that he would have to serve eighty-five percent of his sentence before eligible for release. 415 S.C. at 278-79, 781 S.E.2d at 915. The Court of Appeals rejected the various arguments that the DOC made in support of its interpretation of the statutes amended by the Omnibus Crime Reduction and Sentencing Reform Act. Id. at 283-86, 781 S.E.2d at 917-19. Rather, the Court ruled that S.C. CODE ANN. § 44-53-375(B) is no longer a no-parole offense. Id. at 286, 781 S.E.2d at 919. As such, the eighty-five-percent requirement of S.C. CODE ANN. § 24-13-150 does not apply. Id. at 281, 781 S.E.2d at 916. Bolin illustrates that the DOC was indeed requiring eighty-five percent service of the sentence on drug distribution charges unless the

inmate was released on parole. Thus, had Respondent not accepted the offer of parole in October 2014, he would have been required to serve eighty-five percent of his sentence pursuant to the DOC's policies in place at the time.

13. Simply put, Respondent's release on parole does not change the PCR court's analysis that he was advised that he would serve less than 85% of the seven year sentence by his attorney, that this erroneous advice induced Respondent to plead guilty, and that he was entitled to vacation of his convictions and remand for a new trial. Respondent should certainly not be penalized for accepting the parole order rather than sitting in prison past what should have been his release date in the hopes that the appellate courts would someday rule that the DOC's interpretation was incorrect, as was eventually held in Bolin. Therefore, the documents attached to the State's motion are not relevant to this appeal.

WHEREFORE, Respondent respectfully requests that this Court:

- A. Deny Petitioner's motion to amend the appendix; and
- B. Require that the Brief of Petitioner be filed within thirty days of the Court's ruling on the State's motion.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

This 21st day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Colleton County

Michael H. Nettles, Circuit Court Judge

Appellate Case No. 2014-001631

LETRON DAVIS,

RESPONDENT,


V.

THE STATE,

PETITIONER.

CERTIFICATE OF SERVICE

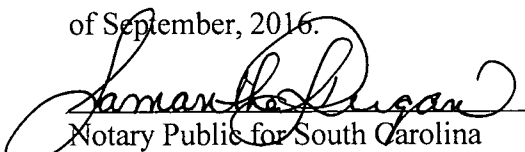
I certify that a true copy of the return to motion to amend appendix in this case have been served on Johanna C. Valenxula, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Letron Davis, at 4324 Bayou Village, Mullins, SC 29574, this 21st day of September, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 21st day
of September, 2016.



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