

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-001132
Lower Court Case No. 2015-CP-43-2810

RECEIVED

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S.C. SUPREME COURT

DEVAN DWYER, #302693,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

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QUESTION PRESENTED

I.

Whether the PCR court erred in concluding that defense counsel was not ineffective for failing to take any corrective action due to a prior assistant solicitor's promise to dismiss the charges against the Petitioner?

STATEMENT OF THE CASE

The Petitioner, Devan Dwyer, was charged in Sumter County for first-degree burglary, armed robbery, two counts of assault and battery with intent to kill, and possession of a firearm during the commission of a violent offense. On April 13-14, 2009, the Petitioner proceeded to trial on these charges. The Petitioner was represented at his trial by Lauren B. Stevens, Esquire. At the conclusion of the trial, the jury found the Petitioner guilty as charged on all counts. The Honorable R. Ferrell Cothran, Jr., presiding circuit judge, sentenced the Petitioner to thirty years' imprisonment for the burglary charge, twenty-five years' imprisonment on the armed robbery charge, twenty years' imprisonment on one ABWIK charge, fifteen years' imprisonment on the second ABWIK charge, and five years' imprisonment on the firearm charge. Judge Cothran ordered that the sentences run concurrently.

The Petitioner timely appealed his convictions and sentences to the South Carolina Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed his convictions and sentences. State v. Dwyer, Op. No. 2011-UP-010 (S.C. Ct. App. filed January 24, 2011); App. pp. 333-334. The remittitur was issued on February 10, 2011. App. p. 335.

On December 22, 2011, the Petitioner filed his first Application for Post-Conviction Relief with the Sumter County Clerk of Court. An evidentiary hearing into the matter was convened on December 17, 2014, before the Honorable J. Cordell Maddox, Jr., presiding circuit judge. The Petitioner was represented at this proceeding by Willie H. Brunson, Esquire. On May 15, 2015, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims. App. pp. 432-448.

By letter dated July 10, 2015, the Petitioner attempted to file a *pro se* notice of appeal with this Court. App. pp. 453-454. On July 20, 2015, this Court instructed PCR counsel to provide proof

of service of the notice of appeal and a written statement regarding the date on which PCR counsel received the Order of Dismissal. App. pp. 455-456. On September 30, 2015, this Court dismissed the appeal due to PCR counsel's failure to comply with these instructions. App. p. 457. The remittitur was issued on October 16, 2015. App. p. 458.

On December 22, 2015, the Petitioner filed his second PCR application with the Sumter County Clerk of Court. The State served its Return and Motion to Dismiss all Claims Beyond Austin Review on February 2, 2016. An evidentiary hearing was convened on March 17, 2016, before the Honorable Brooks P. Goldsmith, presiding circuit judge. The Petitioner was represented at this proceeding by Jeremy A. Thompson, Esquire. On April 21, 2016, the PCR court filed an Order Granting an Appeal Pursuant to Austin v. State. App. pp. 483-486. The Petitioner served its Notice of Appeal from this order on May 25, 2016, and this Court received the notice on May 27, 2016.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

ARGUMENT

- I. **The first PCR court erred in concluding that defense counsel was not ineffective in failing to take corrective action after prosecution was resumed following a promise by a prior prosecutor to dismiss the charges against the Petitioner.**

A. How the Issue Arose Below

The charges in this case arose out of a home invasion in the early morning hours on August 3, 2015, in Sarah McKenzie's residence that she shared with her live-in boyfriend Rohan Anderson in Sumter, South Carolina. According to McKenzie, two men came into her bedroom and demanded that she give them everything that she possessed; in response, she gave the assailants money and a cell phone. App. p. 86, line 16-p. 87, line 7. One of the assailants was armed while the other was not. McKenzie identified the armed assailant as the Petitioner and the unarmed assailant as an ex-boyfriend, Rick Van Buren. App. p. 88, line 11-p. 89, line 16. McKenzie told the Petitioner that she knew who he was, and then the Petitioner opened fire on her and her boyfriend, Rohan Anderson. App. p. 87, lines 8-25.

The evidence against the Petitioner presented at trial largely consisted of McKenzie's testimony and various police officers testifying that McKenzie had identified the Petitioner as the shooter, either at the scene or during her recovery from her gunshot wound. See App. p. 142, line 16-p. 143, line 3 (testimony of Detective William Lyons); p. 159, line 10-p. 160, line 9 (testimony of Investigator Ryan Ross); p. 227, lines 9-18 (testimony of Detective Irene Culick). Of the other alleged witnesses to the shooting, Anderson could not be located following the shooting and Van Buren was uncooperative with the State during his testimony, stating that he was not with the Petitioner the night of the shooting and that he did not know who shot McKenzie. App. p. 205, lines 19-22.

Additionally, McKenzie had significant credibility problems. She had prior convictions for crack cocaine, marijuana, and contributing to the delinquency of a minor. See App. p. 118, lines 2-7; p. 125, lines 6-10. Furthermore, though the evidence was not admitted at trial, substances suspected to be crack cocaine and marijuana were found in her home following the shooting. See App. p. 26, lines 14-22.

The case was originally prosecuted by James Hugh Ryan, III, Esquire,¹ who was an assistant solicitor at the time of the incident. See App. p. 406, lines 11-17. Following Attorney Ryan's departure from the Third Circuit Solicitor's Office, the case was transferred to Assistant Solicitor Catherine Fant. At the Petitioner's PCR hearing, the Petitioner testified that defense counsel informed him that the charges would be dismissed and that the case would never proceed to trial. App. p. 379, line 19-p. 381, line 8. Defense counsel confirmed that she had given the Petitioner this advice:

Q. Okay. Well, in speaking of the switch from solicitors can you discuss that – Mr. Dwyer had stated that you promised him that his changes [sic] were going to be dropped. Can you shed some light on that.

A. Certainly. I did indeed tell him that because Mr. Ryan told me that. Unfortunately, I took him as at his word; I don't have anything in writing. Ms. McKenzie, the victim in the case, I won't use the exact words that he used to describe her but needless to say, he did not feel that she was a victim worthy of prosecuting Mr. Dwyer over. She was currently in jail serving time for the drugs that they found at the scene. She had a prior record, and she had been shot either a month before or a month after – I can't remember – by someone that obviously they didn't know who it was, but he felt like that he not had a very good case. She wasn't a victim that he felt compelled to prosecute, and he told me this on several occasions.

¹ Attorney Ryan is now employed with the South Carolina Commission on Indigent Defense.

App. p. 406, line 22-p. 407, line 16. She further testified that she thought the dismissal “was a done deal” based on her conversations with Attorney Ryan. App. p. 418, line 11. She then failed to prepare for trial based on these promises because she discovered the week before trial that it would be called:

Q. Okay. So I guess my question is, when it appeared on the trial list you had less than a week to get everything ready?

A. Correct.

Q. All right. Now I presume since you were operating under the assumption it was gonna be dismissed, there was really no need to send a notice of alibi, correct?

A. Correct.

Q. There wasn't a need to subpoena any witnesses or anything while it was allegedly postured for dismissal?

A. Correct.

Q. All right. So no notices of alibi were sent, no subpoenas were sent?

A. Correct.

App. p. 419, line 16-p. 420, line 6. Despite the promises made to her that the Petitioner's charges would be dismissed, and her lack of preparation for trial based on those promises, defense counsel took no action at trial to enforce the promise not to prosecute.

The PCR court denied relief, concluding that “Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness.” App. p. 442. The PCR court further concluded that the Petitioner was not prejudiced by defense counsel's failure because defense counsel “met with Applicant, reviewed the discovery material with Applicant, and discussed strategy with Applicant.” App. p. 442. The Petitioner now contends that the PCR court's findings are unsupported by any probative evidence and should be reversed.

B. Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

C. Discussion

Defense counsel was ineffective for failing to take corrective action following the prosecution's decision not to honor its agreement to not prosecute the Petitioner in connection with this offense. According to defense counsel, Attorney Ryan informed her on numerous occasions that the charges against the Petitioner would be dismissed. Defense counsel, in turn, relied on these promises and did not prepare for trial. Indeed, defense counsel testified that she did not prepare for trial in any meaningful sense; instead, she had less than a week to prepare after she received notice of the trial. See App. p. 419, lines 16-19.

Despite the surprise nature of the trial being scheduled, her lack of preparation, and the prior promises to dismiss the case against the Petitioner, defense counsel did not move to enforce the agreement not to prosecute prior to trial. This was deficient conduct inasmuch as the Petitioner should have had the charges dismissed due to his, and his attorney's, detrimental reliance on the State's assurances that the charges would be dismissed. See State v. Peake, 345 S.C. 72, 77, 545 S.E.2d 840, 842 (Ct. App. 2001) (“[E]nforcement of an agreement not to prosecute is subject to two conditions: (1) the agent must be authorized to make the promise; and (2) the defendant must rely to his detriment on the promise”), aff'd, State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003). The fact that the promise to dismiss was not reduced to writing is not fatal to the claim. See generally United States v. McHan, 101 F.3d 1027, 1034 (4th Cir. 1996) (noting that “courts may enforce informal grants of transactional immunity.”) Moreover, Attorney Ryan's promise was binding on Assistant Solicitor Fant. See Santobello v. New York, 404 U.S. 257 (1971) (holding that a prosecutor's agreement not to make a sentencing recommendation was binding on a subsequent prosecutor who was assigned to prosecute the case). Defense counsel's lack of preparation, and therefore the Petitioner's detrimental reliance on Attorney Ryan's promise not to prosecute, is made all the more telling by the fact that the case had been pending for over three-and-a-half years by the time it was called for trial, yet defense counsel had subpoenaed no witnesses, nor was defense counsel even given sufficient amount of time prior to trial to file a notice of an alibi defense. Instead of permitting this trial by ambush, defense counsel should have moved to enforce the agreement not to prosecute, and her failure to do so constituted deficient conduct.

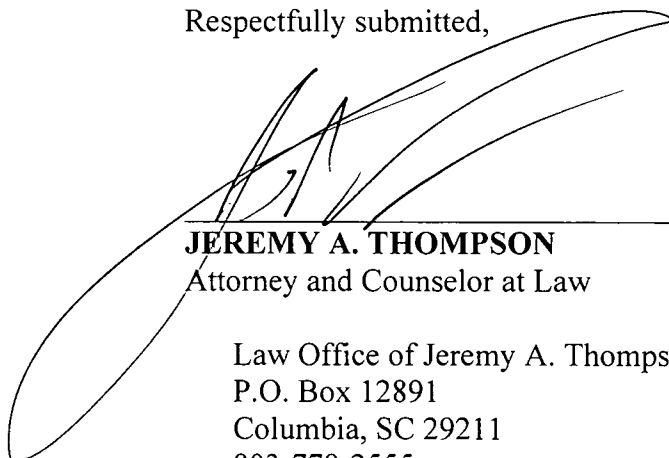
The Petitioner was also prejudiced by defense counsel's deficient performance. Had defense counsel made the correct motion, the case against the Petitioner would have been

dismissed. See generally Custodio v. State, 373 S.C. 4, 13, 644 S.E.2d 36, 40 (2007) (holding that a defendant who detrimentally relies on a plea agreement is prejudiced by a defense attorney's failure to move to enforce that plea agreement). The appropriate remedy is specific enforcement of the agreement not to prosecute. Id. (holding that the appropriate remedy for detrimental reliance on a plea offer "is the specific performance of the plea agreement.") Accordingly, the PCR court's conclusions that defense counsel was not deficient and that the Petitioner was not prejudiced by defense counsel's failure are unsupported by any probative evidence. Certiorari should be granted.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on this issue.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'J.A. Thompson', is written over a horizontal line. The signature is fluid and cursive, with the first letters being significantly larger and more prominent.

JEREMY A. THOMPSON
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This 20th day of October, 2016.



LAW OFFICE OF
JEREMY A. THOMPSON
LLC

October 20, 2016

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S.C. SUPREME COURT

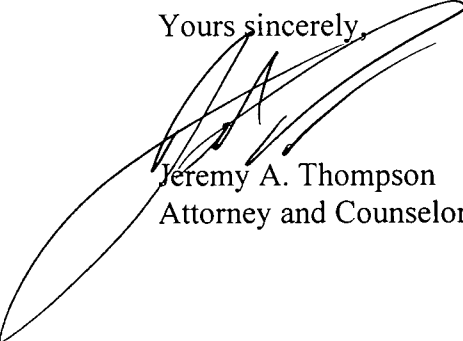
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

RE: Devan Dwyer, #302693 v. State of South Carolina; 2016-001132

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of my Petition for Writ of Certiorari, the original and seven copies of my Petition for Writ of Certiorari Pursuant to Austin v. State, and the original and one copy of my Certificate of Service. I would appreciate your filing the original and six copies of each petition, the original Certificate of Service, clocking the extra copies, and returning the extra copies to me in the enclosed self-addressed, stamped envelope. If I can be of any further assistance to the Court in this matter, please do not hesitate to contact me. With my thanks for the Court's assistance in this matter, and my best regards, I am,

Yours sincerely,


Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures

cc: Julie Coleman, Assistant Attorney General (w/ enclosures)
Devan Dwyer, #302693 (w/ enclosures)
Cassandra McCray (w/ enclosures)