

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

OCTAVIA DENISE BELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001096

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Trial counsel erred in thwarting the solicitor's attempts to contact petitioner regarding questions about her knowledge concerning another unrelated case because this might possibly have led to favorable plea and sentencing opportunities in her case.

STATEMENT

Petitioner Octavia Denise Bell pled guilty to kidnapping during the June 2013 term of the Charleston County General Sessions Court before Judge R. Markley Dennis and was sentenced to imprisonment for a period of eleven years during a sentencing hearing held on July 30, 2013, before Judge Dennis. App. 1-49. Beattie Butler represented petitioner at both proceedings, and Assistant Solicitor Chad Simpson appeared on behalf of the state at both proceedings also. Petitioner did not enjoy the benefit of a direct appeal of her conviction and sentence in the case.

On October 1, 2013, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. App. 51 – 61. The respondent filed a return dated February 10, 2014, requesting that an evidentiary hearing be held in the case. App. 62 – 65.

A PCR hearing in the case was convened on December 14, 2015, at the Charleston County Courthouse before Judge Deadra L. Jefferson. App. 67 – 132. Petitioner was present at the hearing and represented by Rodney Davis, and Assistant Attorney General J. Rutledge Johnson appeared on behalf of the state. On April 12, 2016, Judge Jefferson issued an Order of Dismissal denying and dismissing petitioner's allegations of ineffective assistance of trial counsel in the case. App. 133 – 142.

Petitioner appealed Judge Jefferson's Order of Dismissal issued in the case. This petition follows.

ARGUMENT

Trial counsel erred in thwarting the solicitor's attempts to contact petitioner regarding questions about her knowledge concerning another unrelated case because this might possibly have led to favorable plea and sentencing opportunities in her case.

The solicitor apprised the circuit court judge of the facts of the case during the plea proceeding. Apparently, petitioner and her cousin Tameka Judge went to a certain Kangaroo gas station in Charleston, South Carolina, where Judge was previously employed, and while there petitioner, who held a taser gun, pulled the cashier (Teresa Johnson) into the store's walk-in cooler and ordered her to stay there. Then, Judge entered the store, opened the cash register, and took out money totaling approximately \$3,500.00. Store manager Dale Brinson arrived at the store as these events were occurring. Petitioner and Judge took Brinson's car and drove away after she (Brinson) fled the scene upon seeing the taser gun. App. 9, l. 1 – p. 14, l. 13. Petitioner was charged with armed robbery, kidnapping, and grand larceny. Petitioner pled guilty to kidnapping.

During the PCR hearing, petitioner's PCR attorney raised by inference the allegation that petitioner's knowledge of information concerning an unrelated case (murder of Solomon Chisolm) might have led to a favorable disposition regarding the Kangaroo gas station charges with respect to the terms of her imprisonment had trial counsel not interfered by denying the solicitor's access to petitioner. For example, petitioner testified at the PCR hearing and explained that she possessed information about the Chisolm murder, but that her trial counsel would not allow her to speak with the solicitor's office about that particular murder case per the suggestion that she was not needed in that respect, and that she believed trial counsel was actually connected to that case as well. Petitioner stated that she spoke with solicitor Stephanie

Linder after her guilty plea proceeding and that she believed the state could have helped her had she (petitioner) cooperated in assisting with the Chisolm murder. App. 105, l. 3 – p. 112, l. 14.

Trial counsel testified at the PCR hearing and explained his position regarding this matter as follows:

Q. You're aware that [petitioner] was of interest as a potential witness to the homicide of Solomon Chisolm?

A. I knew her name came up in the discovery. She and I discussed it at length and she was not interested in testifying. App. 91, l. 12-17.

Q. Do you recall being contacted by [solicitor] in Chisolm case in an attempt to talk with [petitioner]?

A. I don't. I heard her testimony and I see the e-mails, but I haven't looked at them. I'm not in a position to dispute that, but I don't independently recall that. App. 92, l. 2-8.

Counsel insisted that petitioner desired no involvement with the Chisolm case. App. 92, l. 12 – 19.

Stephanie Linder, who was the solicitor in the Solomon Chisolm murder case testified at petitioner's PCR hearing and stated that petitioner was included in the police report for the Chisolm murder. App 78, lines 6 – 16. Note the e-mails sent by Solicitor Linder to trial counsel expressing requests to speak with petitioner about the Chisolm murder submitted as exhibits #1 and #2 at the PCR hearing held in the case. App. 130 – 131. In these e-mails, Solicitor Linder wrote the following: “[petitioner] is a witness in a murder trial of mine...[and] I would like to speak with her” and “I contacted you before about your client...I need to speak with her, as she is an eyewitness in a murder case that I am prepping for trial.”

The PCR judge issued an Order of Dismissal denying petitioner's PCR application on the ground that her guilty plea was given voluntarily and intelligently in the case. App. 133 - 142

The PCR judge did not address in its order the Soloman Chisolm murder and its connection to petitioner's claim against trial counsel.

During plea negotiations, the prosecutors operate via a quid pro quo approach and routinely move in the direction of "an agreement whereby the defendant will enter a plea in the hope of receiving certain...sentence[ing] concessions [as] this bargaining process [is one of]" a mutuality of advantage and a mutuality of disadvantage[wherein] the government and the accused both seek a concession for a concession." State v. Wills, 409 S.C. 183, 762 S.E.2d 3 (2014).¹ In Wills, the Court held that after the breach of the defendant's prior plea agreement due to a failed polygraph test, the sue of his statement, which was connected to his plea and normally would have been inadmissible at trial under SCRE Rule 410, was nonetheless properly admitted into evidence at trial. In Wills, the plea agreement was that the defendant's truthful account of the murder from the case would result in the state taking "into consideration his cooperation in offering a sentence recommendation."

Negotiating a deal in exchange for cooperating with the state occurs in many cases. Compare the case of State v. Pitt, 390 Md. 697, 891 A.2d 312 (2006), where a defendant charged in a burglary case received a dismissal on all charges arising from that investigation in exchange for his complete and truthful cooperation regarding the case. In State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991), a witness testified (cooperated) against Brown in exchange for receipt of a conspiracy charge and conviction that carried a maximum seven and one-half year sentence rather than proceed with a trafficking in cocaine charge and conviction which would have been "more than three times the duration she would [have] face[d] on her plea to conspiracy." See State v. Gilliam, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), where a witness testified against

¹State v. Wills, 409 S.C. 183, 762 S.E.2d 3 (2014), citing to United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978).

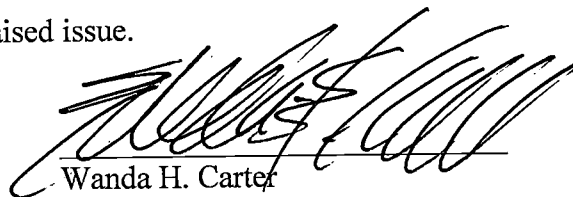
Gilliam at his (Gilliam's) murder trial and in return, the solicitor advised the plea and sentencing judge regarding his cooperation at Gilliam's trial when his burglary charge was disposed of later. See also State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002), where a witness (Peterson) testified against Sims (who was tried for murder) via a promised deal of leniency in exchange for his testimony and cooperation. Finally, compare State v. Mizzell, 349 S.C. 326, 563 S.E.2d 3125 (2002), where a co-conspirator (Steele) expected favorability at sentencing if convicted of the same crimes as the defendants as a result of his testimony against Jamie Mizzell and Jimmy Allen Mizzell at their (Jimmy and Jamie) trial on grand larceny and second degree burglary charges.

In the case at bar, it appeared that there was a window of opportunity that existed where petitioner and Solicitor Linder, who worked on the unrelated Chisolm murder case, could possibly have reached a favorable outcome in her Kangaroo gas station case in exchange for her cooperation regarding the Chisolm murder case had trial counsel allowed the solicitor to have access to petitioner. Any interference by counsel that prevented petitioner from meeting with the solicitor to receive any benefit in the case at that time constituted deficient representation at the plea bargaining stage. In Judge v. State, 321 S.C.554, 471 S.E.2d 146 (1995), the Court held that the Sixth Amendment guarantee of competent counsel applies to the plea bargaining process. See also Hill v. Lockhart, 484 U.S. 52 (1985). Judge was overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. Also, petitioner was prejudiced by counsel's ineffective assistance in this regard because her cooperation in the unrelated murder case might have resulted in sentencing leniency, i.e., a

sentence that was less than the eleven-year sentence she received. Unfortunately, this opportunity at issue did not materialize or come to fruition due to counsel's interference in the matter. Counsel's ineffective representation in this regard violated the Sixth and Fourteenth Amendments.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

OCTAVIA DENISE BELL,

PETITIONER

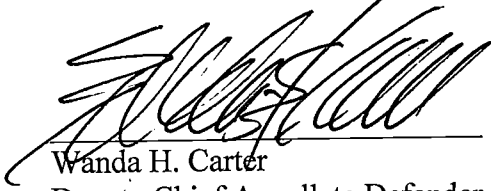
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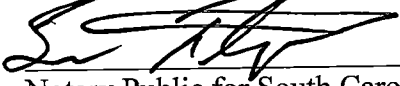
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Octavia Denise Bell, #356384, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 9th day of January, 2017.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 9th day of January, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022