

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable James R. Barber, Circuit Court Judge

MARSHALL HEATH COLLINS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2014-002397

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1.

Did the PCR court err in finding trial counsel is ineffective in failing to request a continuance?

2.

Did the PCR court err in finding trial counsel did not properly handle the issue of the expired plea offer?

COUNTERSTATEMENTS OF ISSUE ON APPEAL

1.

Was there any evidence to support the PCR court's ruling that trial counsel was ineffective for failing to request a continuance where he objected to the state serving a weapons charge indictment on respondent the morning of the trial, yet counsel inexplicably did not move for a continuance?

2.

Was there any evidence to support the PCR court's ruling that defense counsel was ineffective where counsel admitted he did not remember taking any action to remedy the problem of the prior "contract lawyer" not conveying a favorable plea offer to respondent since counsel's lack of action in this regard was inexcusable?

STATEMENT OF FACTS

Respondent was arrested on the drug charges on October 2, 2009. He applied for a public defender in Pickens County in February, 2010. Contract public defender Robert Newton was appointed to represent him. Newton left his position as a contract public defender at some point and respondent never met him. App. 375, l. 18- 376, l. 8.

Respondent said he “reapplied here at the courthouse on August the 30th, 2010, somewhere around the beginning of September, and I was appointed Mr. DeJong.” App. 376, ll. 1-18. Respondent met with DeJong, and paid the public defender fee, at the public defender’s office on October 19, 2010. Respondent remembered that he discussed “some bare bone facts of the case, and I provided him my side of the story.” This meeting lasted fifteen to twenty minutes. App. 377, ll. 3-15. Respondent recalled that DeJong told him that he was “waiting on items from discovery to be delivered to him,” and that they would meet again when he received those materials.

Respondent also thought DeJong was waiting on his case file “from Mr. Newton’s office, I presume.” App. 377, l. 16- 378, l. 7. However, DeJong would later say at the PCR hearing that “back in those days when a case was sent to one of our contract attorneys [such as Newton] we did not open a file.” App. 395, ll. 8-14.

Respondent’s second and only other meeting with DeJong was in **November, 2010**. Respondent recalled the approximately twenty to thirty minute meeting with DeJong well because DeJong apparently had to answer a barrage of phone calls which led respondent to believe that his assistant may not have come to work that day. App. 378, l. 8- 379, l. 21.

It was at this meeting that DeJong asked respondent about “a plea agreement and he showed me a plea agreement . . . [it] was a plea agreement that was made out to Mr. Newton. And I think it was made out in May.” At the PCR hearing respondent identified the document dated **May 26**,

2010. It was undisputed that the plea agreement offered Respondent a **fifteen year prison sentence** at eighty-five percent in return for a guilty plea to trafficking in ice, crank or crack-10 grams or more, but less than 28 grams- first offense, unlawful neglect of a child or a helpless person and possession of less than one gram of meth or cocaine base, third or subsequent offense. Part of the plea offer involved dropping three other serious drug offenses, and a forgery count involving less than five thousand dollars. See Defendant's Exhibit 1 Supp. App. 1; App. 380, l. 1- 383, l. 4; 401, ll. 13-23. The agreement stated that the defense had **until June 21, 2010 (i.e. six months earlier)** to accept the plea offer. App. p. 401, ll. 14-23.

Respondent told DeJong that he did not have any knowledge of the plea agreement because "I never met with Mr. Newton. I didn't even know that he was my public defender at the time." App. 382, ll. 3-8.

Respondent also recalled that he received a letter from DeJong "approximately *a week before Thanksgiving that gave a court date for December 1*. Respondent telephoned DeJong, and DeJong told him: "They will be picking a jury for your case." App. 382, l. 21- 383 l. 4. (Emphasis added).

It was undisputed that on the morning of respondent's trial that he was served with an indictment for "possession of a weapon during the commission of violent crime. A Pickens city police officer "walked up to me and my mother and my father and asked me my name. I affirmed my name. And he said, consider yourself served. And I said, well, what is this? He said, **this is an additional charge that we will try you on today.**" App. 383, l. 14-20. (Emphasis added).

Respondent remembered telling DeJong that he was not comfortable going to trial at that time because of the new charge, and he remembered that DeJong "stressed on the record that he objected to having to try this without proper time to prepare for it." App. 385, ll. 11-16.

The trial record shows that DeJong told the judge that the weapons indictment was “just served on my client less than five minutes ago. So he’s never been arraigned on that.” App. 7, ll. 16-21. Assistant solicitor Them responded that he emailed DeJong a copy of the indictment before it was presented to the grand jury. DeJong offered that apparently solicitor Them thought “an arraignment was just a mere formality.” DeJong argued an arraignment five minutes before the trial was the equivalent of “going back to the star chamber.” App. 7, l. 22- 9, l. 9.

DeJong added that sending him a copy of the indictment was not the point of his objection: “I’m the mouthpiece. Mr. Collins has the rights, not me.” App. 9, ll. 5-9. Them responded that he could have had respondent arrested and served with the indictment. Instead, Them said he emailed DeJong on November 12, 2012, so DeJong could inform respondent of the additional indictment. Them warned that in the future that he could have all DeJong’s clients arrested, and make them make bond if DeJong would not discuss additional indictments with his clients in the future. App. 9, l. 10- 10 l. 17.

DeJong added that these new events occurred during the “Thanksgiving holiday weekend. And perhaps I am supposed to work on holidays. If that is the case, then I will do that. Nonetheless, those were the holidays.” DeJong told the judge that it was *now December 1, 2015, and the fact was that he had not had additional time to discuss the new indictment with respondent.* App. 10, ll. 6- 12, l. 14.

Respondent was then arraigned on the weapons charge. App. 12, ll. 4-16. The judge asked DeJong if he was ready for trial on the weapons charge. DeJong responded: “**That is difficult to say because I never really talked to Mr. Collins about that particular charge.** The judge stated he would take a break, and get an update on the situation after DeJong spoke with respondent. App. 13, ll. 2-19. (Emphasis added).

After the break, when asked if he was prepared to go forward on the new indictment, DeJong only responded :**“I can try . . . however for the record, I still object to it, Your Honor.”** App. 13, l. 20 - 14, l. 8. (Emphasis added). DeJong **did not move for a continuance**, the trial went forward, and respondent was convicted.

DeJong testified at the PCR hearing that he did not know if Newton had requested discovery from the state. DeJong also said his file did not indicate how many times he met with respondent. DeJong’s memory was he first respondent was on October 14, 2010. DeJong said: “I would have to say in all candor that there were not many meetings between myself and Mr. Collins. I am not trying to make excuses, but unfortunately, the case got old while Mr. Newton was handling it, and God rest Peter Them’s, he could rush into trials at some point.” App. 396, ll.13-25.

DeJong acknowledged that the weapons charge indictment was not served on respondent “until the morning of the trial actually started. I believe that I raised an objection on that. And nonetheless, in spite of or because of my objection, we moved forward on the charge.” App. 398, ll. 3-15.

When asked if respondent was surprised his case was going forward same day he was served the indictment, DeJong answered: “He was a bit disgruntled, to say the very least.” App. 399, ll. 10-14. When additional asked why he did not request a continuance, DeJong said: **“Can’t honestly answer that. I don’t know.”** App. 404, ll. 15-20.

Plea Agreement

DeJong confirmed that the state offered respondent, through Newton, a fifteen-year prison sentence with respondent doing eighty-five percent of that sentence. The offer was good through June 21, 2010. App. 401, l. 13- 402, l. 4; Supp. App. 1.

DeJong speculated: "I feel certain I shared with Mr. Collins that I would get back with Mr. Them to see if that offer still was open or not." *DeJong said he "believed" he called Them but he said he could not recall Them's response to his telephone call. When asked if he tried to engage in any plea negotiations with Them, DeJong said: "I can't honestly say."* App. 402, l. 5- 403, l. 3. (Emphasis added). The PCR judge took the case under advisement after this final exchange occurred.

THE COURT: And when you would have received any notice of a prior plea offer, it would have been substantially after June 1 of 2009, when it expired?

THE WITNESS: That's correct, yes, sir.

THE COURT: And you have nothing in your file indicating any contact between the prior return and this---

THE WITNESS: No, sir.

App. p. 406, l. 23- 407, l. 5.

Order granting relief

The PCR judge issued an order granting post-conviction relief dated October 16, 2014 App. 409-416. The PCR court found that it was undisputed respondent was served with the weapons charge indictment on the morning of the trial, and he ruled respondent had met his burden of proving defense counsel was ineffective for not moving for a continuance. App. 412-413. "The applicant faced a significant amount of time in prison and trial counsel only briefly met with the applicant on two occasions prior to trial. This court finds the applicant demonstrated he suffered prejudice from the lack of a continuance." App. 412-413.

The PCR judge also found that respondent had met his burden of proving ineffective assistance of counsel due to the fact that trial counsel "did not properly handle the issue of the

expired plea recommendation.” App. 413. The PCR court wrote: “Trial counsel testified that he was unsure [if] he discussed this expired offer with the assistant solicitor prior to trial. The offer had expired by the time trial counsel represented the applicant.” App. 413.

The state’s petition for a writ of certiorari was granted, and this brief of respondent follows.

ARGUMENT

1.

There was evidence to support the PCR court's ruling that trial counsel was ineffective for failing to request a continuance where he objected to the state serving a weapons charge indictment on respondent the morning of the trial, yet counsel inexplicably did not move for a continuance.

Defense counsel objected to the service of the weapons charge indictment on respondent on the morning of his trial. He argued it violated respondent's rights, and he chastised the solicitor essentially for trial by ambush. Despite the sound and fury, defense counsel **did not move for a continuance despite his objection to the state's actions.**

When the judge asked counsel if he was prepared for trial, defense counsel only said he would "try" to represent respondent during the trial. There was no logical reason to not move for a continuance where defense counsel lodged an objection to the state serving the weapons indictment on the morning of the trial.

Thus, there was evidence to support the findings of the PCR court and under the "**any evidence**" standard of review PCR judge's ruling should be affirmed by this court. See, Bell v. State, 410 S.C. 436, 440, 765 S.E.2d 4, 6 (Ct. App. 2014); Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Defense counsel also confirmed at the PCR hearing that respondent was very disturbed by the state serving the weapons indictment on him on the morning of the trial. Respondent testified at the PCR hearing that he was served with the weapons indictment on the morning of the trial. His mother and father were with him.

Defense counsel told the trial judge that the solicitor's belated notice to him by email regarding the indictment over the holidays was not the correct procedure. Counsel also offered that he should not be expected to have to work over the holidays.

The PCR court was well within its discretion to find and rule on this record that defense counsel provided ineffective representation in his handling of the "continuance matter." The standard of review is "any evidence" to support the PCR judge's order. See Bell v. State, supra.

The order of the PCR court should be affirmed.

2.

There was evidence to support the PCR court's ruling that defense counsel was ineffective where counsel admitted he did not remember taking any action to remedy the problem of the prior "contract lawyer" not conveying a favorable plea offer to respondent since counsel's lack of action in this regard was inexcusable.

It is undisputed the state made a very favorable plea offer to contract defense counsel Newton. Newton never met with respondent, and the offer was never conveyed to respondent. Consequently, the plea agreement offer expired before counsel DeJong could convey it to respondent. DeJong testified that the public defender's office at that time did not even keep an open file on a case, such as respondent's case, when it was assigned to a contract attorney.

Despite the favorable plea offer being made to Newton, **DeJong could not remember, nor did his file indicate, that he took any action to revive the plea agreement under these unusual circumstances.** It is almost impossible to fathom why defense counsel would not have talked to solicitor Them. Counsel could have informed Them that under these unusual circumstances the plea offer, which had expired, was never conveyed to respondent. The solicitor would then have faced the choice of either: (1) reviving the plea agreement or, (2) face the very likely finding of ineffective assistance of counsel in PCR due to the failure to convey the favorable plea offer to respondent. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009).

Yet, it strongly appears that that defense counsel **did nothing** regarding the earlier plea agreement offer.

The PCR judge was well within his discretion to find this did not constitute effective legal representation under the "any evidence" standard. Our Supreme Court's well-reasoned decision in Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), holding that Davie was provided ineffective

assistance of counsel where **plea** counsel failed to communicate the state's proposed plea offer reveals the PCR court was on firm ground in finding ineffective assistance of counsel on the plea agreement issue in this case. Again, the standard is "any evidence" in support of the PCR judge's findings. See Bell v. State; Lomax v. State, supra.

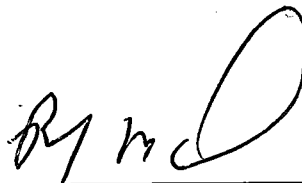
"In revealing PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); "This Court gives great deference to the post-conviction relief court's findings of facts and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

Respondent testified at the PCR hearing he would have given considerable thought to the guilty plea matter if defense counsel had only done the bare minimum regarding the plea agreement in this case. Respondent was sentenced to *twenty-five years imprisonment* where the plea offer was **fifteen years for more charges than respondent was tried for in the case**, and the dismissal of other charges. Supp. App. 1. There was evidence to support the PCR court's ruling on this issue also, particularly given the reasoning of Kolle v. State, 386 S.C. 578, 592, 690 S.E.2d 73, 80 (2010), regarding the bottom line outcome of the case.

Respondent submits the PCR court correctly granted relief on both issues of ineffective assistance of counsel given the "any evidence" standard. See Bell v. State; Lomax v. State, supra.

CONCLUSION

The order of the PCR judge granting relief on both grounds of ineffective assistance of counsel should respectfully be affirmed.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 1st day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Pickens County

Honorable James R. Barber, Circuit Court Judge

MARSHALL HEATH COLLINS,

RESPONDENT,

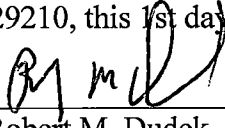
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Respondent has been served on Marshall H. Collins, #322086, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of February, 2017.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: November 3, 2026.