

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2015-002162
Lower Court Case No. 2014-CP-10-0437

RECEIVED

SEP 22 2016

S.C. SUPREME COURT

Timothy Young.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR court properly find Counsel effective in her representation of Petitioner where Petitioner had ample opportunity to accept two plea offers but simply failed to do so?

STATEMENT OF THE CASE

Petitioner (Timothy Young) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the August 2010 term of the Charleston County Grand Jury for possession with intent to distribute (PWID) cocaine base- third offense (2010-GS-10-5622), possession with intent to distribute cocaine base within proximity of a school/park (2010-GS-10-5623), and resisting arrest (2010-GS-10-5624). The Applicant was represented by Cantrell Frayer, Esquire.

On August 31-September 2, 2011, the Applicant proceeded to trial and was found guilty. The Applicant was sentenced by the Honorable Deadra L. Jefferson to confinement for a period of fifteen years for PWID cocaine base, ten years for PWID cocaine base within the proximity of a school/park, and one year for resisting arrest. The Applicant's convictions are to be served concurrently.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Katherine Hudgins, Esquire, of the Office of Appellate Defense. The Applicant's appeal was dismissed by the Court of Appeals pursuant to Anders v California¹ on November 27, 2013. The Remittitur was issued on December 13, 2013.

Petitioner subsequently filed an application for post-conviction relief on January 22, 2014. Respondent filed a Return on March 20, 2014. On July 21, 2015, an evidentiary hearing was convened at the Charleston County Courthouse. Petitioner was present and represented by Rodney Davis, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On September 18, 2015, the Honorable Roger E.

¹ 386 U.S. 738 (1967)

Henderson issued an Order of Dismissal. On June 8, 2016, Petitioner filed a Petitioner for Writ of Certiorari to this Court. This Return to Petitioner for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

The PCR court properly found Counsel was effective in her representation of Petitioner when Petitioner had ample opportunity to accept two plea offers but simply failed to do so.

Petitioner asserts the PCR court erred in not finding Counsel ineffective to properly communicate with the solicitor that Petitioner wanted to accept the plea offer to a recommended cap of three years which resulted in the expiration of the offer before it could be formally accepted by the court. This argument is without merit.

“[A] defendant has no constitutional right to plea bargain.” Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Many “jurisdictions permit the prosecution to withdraw a plea offer or agreement if the defendant has not yet pled guilty.” Id., 333 at 686, 511 at 402. “A plea agreement is only an “offer” until the defendant enters a court-approved guilty plea. A defendant accepts the “offer” by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court.” Id., 333 at 688, 511 at 402.

Counsel testified the original offer was for a cap of three (3) years for possession of crack cocaine. (App. p. 362 lines 4-6) Counsel stated she asked the solicitor for a sentence of time served, but the solicitor rejected this idea. (App. p. 362 lines 11-19) Counsel also stated she relayed this offer to Applicant, but Applicant rejected it. (App. p. 362 line 20- p. 363 line 6). Counsel testified Applicant wanted the city case dismissed and then a dismissal of these charges. Counsel testified the original offer for a cap of three (3) years was in March or April of 2011, and that Applicant had until August to accept it. (App. p. 363 line 25- p. 364 line 17). Counsel requested that Applicant’s case be put on the docket one more time, but then Judge Hughston,

who was presiding over the August term of General Sessions, became ill and had to cancel the court term. (App. p. 364 lines 16-22). Counsel sent an email asking that the solicitor not penalize Applicant and that if Applicant did not plead guilty in August, for a five (5) year offer. (App. p. 364 line 23- p. 365 line 10). The solicitor offered Applicant five (5) years and the Applicant rejected the five (5) year offer on the record prior to trial. (App. p. 366 line 8- p. 377 line 9). Counsel also testified that, while it is not a “good practice,” a solicitor may retract an offer at any time prior to a defendant accepting an offer. (App. p. 366 lines 1-5).

The PCR court first found Counsel’s testimony concerning Counsel’s alleged ineffective assistance of counsel credible, while finding Petitioner’s testimony not credible. (App. p. 128) See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (Great deference is given to the PCR court’s findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses).

Then the PCR court held:

Counsel acted diligently in regards to the plea offers from the State. Applicant had over three (3) months to accept the plea offer, but failed to do so. As stated above, Counsel testified she relayed this offer to Applicant, but he rejected it. He then openly rejected the five (5) year offer on the record. This Court finds Applicant had ample opportunity to accept either offer, but rejected both of them. When he did not accept the offers, but rejected them, the solicitor was under no obligation to re-offer the plea bargains. Therefore, this Court finds Applicant failed to meet his burden of proving Counsel performed deficiently in this case and also finds no resulting prejudice due to Applicant’s own actions.

App. p. 395.

The PCR court correctly found Counsel effectively represented Petitioner. Counsel testified that she not only negotiated with the State to obtain a very favorable plea offer on

Petitioner's behalf, but also practically begged Petitioner to accept the offer. Unlike Davie², where counsel failed to advise a defendant of a plea offer, not only did Counsel relay this three-year offer to Petitioner that he rejected, but also Counsel urged Petitioner to accept the five-year offer prior to trial. (App. 362 line 20- p. 363 line 6; p. 367 lines 6-9). Simply put, it was Petitioner's decision to reject the offers. This is purely a case of buyer's remorse. Per Cherry, *supra*, there exists evidence of probative value to sustain the post-conviction relief judge's findings.

² Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009)

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By:



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September 22, 2016

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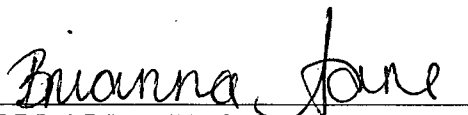
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Laura R. Baer, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 22nd day of September, 2016


BRIANNA ARNONE
LEGAL ASSISTANT