

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

ISAIAS DIAZ GUTIERREZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001080

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by unilaterally rejecting a thirty-year plea offer prior to informing Petitioner of the offer?

STATEMENT

On April 12, 2007, a York County grand jury indicated Petitioner for three counts of forgery (2007-GS-46-1261; -1264; -1265), armed robbery (2007-GS-46-1262), murder (2007-GS-46-1263), and burglary in the first degree (2007-GS-46-1266). App. 937-938; App. 940-941; App. 943-944; App. 946-947; App. 949-950; App. 952-953. The state, represented by Walter W. Thompson and Lisa J. Collins, called the case for trial before the Honorable J. Derham Cole and a jury on December 10-13, 2007. App. 1. Derek Chiarenza represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 717, l. 18 – App. 718, l. 12. Judge Cole sentenced Petitioner to life imprisonment without the possibility of parole for murder and burglary in the first degree, thirty years' imprisonment for armed robbery, and to five years' imprisonment for each count of forgery. App. 729, l. 19 – App. 731, l. 2; App. 939; App. 942; App. 945; App. 948; App. 951; App. 954. All sentences were to be served concurrently. App. 942; App. 945; App. 948; App. 951; App. 954.

Following his trial, Petitioner filed a notice of appeal. He was represented by Robert M. Pachak, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 735-745. On appeal, Petitioner challenged the introduction of knife because it was irrelevant and unfairly prejudicial. App. 735-745. On October 21, 2009, the Court of Appeals dismissed the appeal. App. 746; State v. Gutierrez, 2009-UP-495 (S.C. Ct. App. filed Oct. 21, 2009). Remittitur issued on November 6, 2009.

On June 23, 2010, Petitioner filed an application for post-conviction relief (PCR), which was assigned case number 2010-CP-46-2611. App. 748-753. The matter proceeded to a hearing on June 1, 2001, before the Honorable Lee S. Alford. App. 760. David Clayton Cook

represented Petitioner, and Harrison David Brant represented the state. App. 760. By an order filed September 16, 2011, Judge Alford denied Petitioner relief. App. 819-832.

On October 21, 2015, Petitioner filed a second application for PCR, which was assigned case number 2015-CP-46-3199. App. 833-919. The matter proceeded to a hearing on April 17, 2017, before the Honorable G. Thomas Cooper. App. 926. Nathan James Sheldon represented Petitioner, and Justin James Hunter represented the state. App. 926. By an order filed on April 19, 2017, Judge Cooper granted Petitioner belated review of his PCR proceeding pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).¹

Petitioner received written notice of entry of the order on April 19, 2017. On April 20, 2017, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

¹ Along with this petition for writ of certiorari pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Petitioner is filing a petition for writ of certiorari addressing whether he is entitled to belated appellate review of his initial PCR application and order denying review. See King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

ARGUMENT

Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by unilaterally rejecting a thirty-year plea offer prior to informing Petitioner of the offer.

Relevant facts

During the PCR hearing, Petitioner explained that his trial lawyer told him that the state had offered him a plea agreement for a thirty-year sentence, but the lawyer had turned it down prior to even telling Petitioner about it. App. 772, ll. 16-21. In essence, trial counsel rejected the plea offer “without consulting” with Petitioner. App. 783, ll. 22-24; App. 784, ll. 4-10; App. 785, l. 2. Trial counsel assured Petitioner that his case was an easy case and he had won even harder cases. App. 772, l. 25 – App. 773, l. 10.

Trial counsel claimed the state did indeed offer Petitioner a plea offer to thirty years. App. 793, l. 25 – App. 794, l. 1. Trial counsel then stated, “So the conversation we had when I told him I had turned down the thirty year offer he wasn’t gonna take thirty years. It was thirty years no parole. He understood that. He was denying any involvement.” App. 794, ll. 1-5. Trial counsel also claimed that if Petitioner had wanted the deal, then “we’d a done it.” App. 794, ll. 9-11. Eventually, during cross-examination, trial counsel denied rejecting the plea offer without consulting Petitioner. App. 805, ll. 15-20. Upon questioning by the PCR judge, trial counsel claimed he turned down the plea after Petitioner said he did not want it. App. 810, l. 24 – App. 811, l. 2.

The PCR court held Petitioner’s claim that trial counsel failed to communicate the thirty year plea offer was “entirely without merit.” App. 826. In order to support such a finding, the PCR court found “the testimony of counsel more credible on the issue than that of” Petitioner.

App. 826. The PCR court also found Petitioner “made the decision to reject the thirty year plea offer.” App. 826.

Discussion

To prove ineffective assistance of counsel, Petitioner must prove plea counsel’s performance fell below an objective standard of reasonableness, and but for counsel’s errors, there is a reasonable probability that the result would have been different. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 134, 138 (2012); Padilla v. Kentucky, 559 U.S. 356, 373-374 (2010); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

Plea counsel rendered deficient performance by failing to move to enforce the plea offer extended by the prosecution. Although plea agreements are within the purview of criminal jurisprudence, contract principles apply. Custodio v. State, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007); Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). The general rule is that a criminal defendant does not have a constitutional right to plea bargain, a judge is not required to accept a plea bargain, and a plea offer is only an offer until it is accepted by the defendant by entering a court-approved plea of guilty. Custodio, 373 S.C. at 11, 644 S.E.2d at 39; Reed, 333 S.C. at 687-688, 511 S.E.2d at 402. Like all rules, this one too has an exception. This Court explained that where there is no actual plea of guilty, a defendant may enforce a plea agreement upon a showing of detrimental reliance on the prosecutorial promise. Custodio, 373 S.C. at 11, 644 S.E.2d at 39; see also Reed, 333 S.C. at 688, 511 S.E.2d at 402. Detrimental reliance occurs with a defendant takes some “substantial step” or “accept[s] serious risk of an

adverse result following acceptance of the plea offer.” Reed, 333 S.C. at 689, 511 S.E.2d at 403. For example, when a defendant performs some part of the bargain, such as providing beneficial information to law enforcement, the defendant has relied to his detriment. Custodio, 373 S.C. at 11, 644 S.E.2d at 39. However, halting preparations for a defense, the mere passage of time, and the prospect of a longer sentence are not indicators of detrimental reliance. Reed, 333 S.C. at 689, 511 S.E.2d at 403.

In Lafler, the defendant initially expressed a willingness to accept a plea offer in court, but later rejected the offer based upon the advice of counsel. 566 U.S. 161. Thereafter, the defendant was tried, found guilty, and sentenced to substantially more time than the plea offer would have provided. Id. On appeal to the United States Supreme Court, the parties agreed trial counsel’s advice with respect to the plea offer constituted deficient performance. Id. at 163. The issue before the Supreme Court was held to apply Strickland’s prejudice test where ineffective assistance resulted in rejection of a plea offer, and yet the defendant was convicted after a trial. Id. The Court held that in circumstances such as these, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that were in fact imposed. Id. at 164.

Turning to the question of an appropriate remedy, the Court considered two scenarios. In the first scenario, where the defendant would have pled to the same charges as the defendant was convicted after trial, the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel’s errors, he would have accepted the plea. If such a showing is made, the court may exercise discretion in determining

whether the defendant should receive the term of imprisonment per the offer, the sentence he received at trial, or something in between. Id. at 171. In the second scenario in which resentencing alone will not redress the issue, such as when the guilty plea offer was to counts less serious than the ones for which the defendant was convicted after trial, the proper remedy may be to require the prosecution to extend the offer again. The judge can then exercise discretion in deciding whether to vacate the conviction from trial and except the plea or leave the conviction undisturbed. Id. at 171-172.

The Supreme Court analyzed a similar issue in Frye. The issue before the court was whether the constitutional right to effective assistance of counsel extended to negotiations and considerations of plea offers that lapse or are rejected. 586 U.S. at 138. The Court held that defense counsel has a duty to communicate formal offers from the prosecution that may be favorable to the accused. Id. at 145. The Court further held that to show prejudice from counsel's deficient performance where a plea offer has lapsed or been rejected, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer. In addition, defendants must show a reasonable probability the plea offer would have been entered without the prosecution canceling it, or the trial court refusing to accept it if they had the authority to exercise that discretion under state law. In short, the defendant must show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Id. at 146-147.

In Davie, 381 S.C. at 608, 675 S.E.2d at 420, the South Carolina Supreme Court said that to prevail on a claim of ineffective assistance of counsel based upon a claim that trial counsel failed to communicate a plea offer, the applicant must prove (1) counsel's failure to communicate the prosecution's offer constituted deficient performance, and (2) the applicant was prejudiced by this

deficient performance. Specifically, the Court adopted the rule that “counsel’s failure to convey a plea offer constitutes deficient performance.” Id. at 609, 675 S.E.2d at 420. Concerning the prejudice prong, the Court held “a case-by-case approach is most consistent with our prior decisions and effectively achieves the ultimate goal of assessing whether but for counsel’s deficient performance a defendant would have accepted the state’s proposed plea bargain and that he would have benefited from the offer.” Id. at 613, 675 S.E.2d at 422.

Recently, this Court confronted a similar issue. In Bell v. State, 410 S.C. 436, 442, 765 S.E.2d 4, 7 (Ct. App. 2014), this Court affirmed a PCR judge’s conclusion that trial counsel provided ineffective assistance by failing to extend a plea offer to Bell. “[T]rial counsel testified Bell’s file contained a note indicating the solicitor made an offer of ten years imprisonment.” Id. Additionally, “Bell testified he did not know anything about a plea offer until his sentencing.” Id. The PCR court relied upon this evidence to find a plea offer was made by the state and not communicated to Bell. Id. This Court held there was evidence of probative value to support that finding. Id. Further, this Court relied heavily upon the fact that the plea offer was for ten years’ imprisonment, but Bell was sentenced to twenty years’ imprisonment, showing a significant difference in the sentencing, and thus, demonstrating prejudice. Id. at 443, 765 S.E.2d at 8. Additionally, this Court relied upon Bell’s “self-serving” statement that he would have accepted the state’s plea offer had he been presented with it to find Bell suffered prejudice from counsel’s failure to convey the offer. Id.


The PCR court erred in denying Petitioner relief from his convictions and sentences where the evidence presented demonstrated that trial counsel rejected a plea offer to the mandatory minimum sentence without consulting with Petitioner. Pursuant to the Rules of Professional Conduct, “the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a

plea to be entered, whether to waive jury trial and whether the client will testify.” Rule 1.2, RPC, Rule 407, SCACR. The decision to accept or deny a guilty plea offer rests with the client alone. Trial counsel usurped that power and rejected a plea offer to the mandatory minimum sentence of thirty years. Although trial counsel testified during the PCR hearing that he declined the offer only after consulting with Petitioner, his earlier answer to the question was revealing. After admitting the state offered a thirty-year sentence in exchange for Petitioner’s guilty plea, trial counsel explained, “So the conversation we had when I told him I had turned down the thirty year offer he wasn’t gonna take thirty years. It was thirty years no parole. He understood that. He was denying any involvement.” This answer indicated trial counsel “turned down” the offer prior to even discussing the matter with Petitioner. Trial counsel’s failure to convey the plea offer prior to rejecting it was deficient performance.

Petitioner received a life sentence, a thirty-year sentence, and multiple five-year sentences. The disparity between the thirty-year sentence pursuant to the terms of the plea agreement and the life sentence Petitioner received alone demonstrates prejudice due to the significant disparity in the sentences. This was not a case where the plea offer was a mere five years less than the sentence the defendant actually received. Petitioner must spend the rest of his life in prison, but had he been aware of the plea offer, he could have received a significantly lesser sentence. Petitioner was prejudiced by trial counsel’s deficient performance as illustrated by the sentence he received in comparison to the sentence offered by the state.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court decides to grant the petition without further briefing, Petitioner requests this Court grant him relief from his convictions and sentences and order a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of October, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

ISAIAS DIAZ GUTIERREZ,

PETITIONER

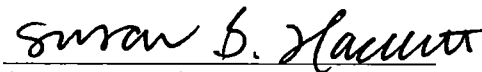
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STATE OF SOUTH CAROLINA,

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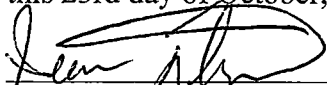
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari pursuant to Austin v. State and a copy of the Appendix have been served on Isaias Diaz Gutierrez, #325762, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 23rd day of October, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of October, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.