

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable William H. Seals, Circuit Court Judge

BRIAN DELONTE SPANN,

RECEIVED

MAY 29 2018

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002480

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

1.

Whether plea counsel provided ineffective assistance when she failed to allow Petitioner to accept the state's initial plea offer to strong armed robbery for a sentence of sixty-five percent of fifteen years imprisonment, without a kidnapping charge, where Petitioner took the subsequent plea offer which included an additional kidnapping charge which required Petitioner to serve a sentence of eighty-five percent of fifteen years imprisonment?

2.

Whether the post-conviction relief court erred when it denied Petitioner's motion to amend the PCR application to conform to the testimony presented where the state was already on notice because Petitioner's PCR allegation of ineffective assistance of counsel covered his first attorney, Debra Littlejohn's, who was the attorney that failed to allow Petitioner to accept the state's initial plea offer?

STATEMENT

A Berkeley County Grand Jury indicted Petitioner for Armed Robbery and Kidnapping in April 2014. App. 92 – 95.

On August 28, 2014, in front of the Honorable Roger M. Young, Petitioner pled guilty to one count of strong arm robbery and one count of kidnapping. App. 1. Melissa Gay represented Petitioner and Brian Alfaro represented the state. Id.

At the plea hearing the state recited the underlying facts of the case. On October 13, 2013 Petitioner entered a gas station on North Highway 52 in Berkeley County. He went towards the bathroom and pulled his sweatshirt over one hand. He waived his concealed hand at the gas station clerk and demanded money. Petitioner left the gas station with about two-hundred dollars in cash. App. 5, l. 18 – App. 6, l. 15. The state recommended fifteen years for each offense and Judge Young sentenced Petitioner to fifteen years for each offense. App. 6, ll. 18 – 21; App. 10, l. 15.

Petitioner filed a PCR application on April 30, 2015, he alleged, “ineffective assistance of counsel.” App. 12 – App. 18. His PCR hearing was held on January 13, 2017 in front of the Honorable William Seals. Alicia Olive represented the state and Rodney Davis represented Petitioner. App. 24. In an order filed October 26, 2017, Judge Seals dismissed Petitioner’s PCR application. App. 80 – 90.

This petition for Writ of Certiorari follows.

ARGUMENT

1.

Plea counsel provided ineffective assistance when she failed to allow Petitioner to accept the state's initial plea offer to strong armed robbery for a sentence of sixty-five percent of fifteen years imprisonment, without a kidnapping charge, where Petitioner took the subsequent plea offer which included an additional kidnapping charge which required Petitioner to serve a sentence of eighty-five percent of fifteen years imprisonment.

Relevant Facts

Plea Hearing

Petitioner pled guilty to strong-arm robbery and kidnapping. App. 2, ll. 4 – 13. The state's version of the facts are as follows.

On October 12, 2013, Petitioner allegedly entered a gas station in Berkeley County. He walked to the bathroom and pulled an arm of his sweatshirt over his hand. Petitioner then walked directly behind the counter, pointed his concealed hand at the gas station attendant, and demanded money. App. 5, l. 18 – App. 6, l. 8. The state alleged that the gas station attendant believed that Petitioner was in fact armed; however, the gas station attendant gave a statement to police that he did not believe Petitioner was armed. App. 6, ll. 9 – 10; App. 55, ll. 4 – 6. The state recommended fifteen years for strong armed robbery and kidnapping respectively and Judge Young sentenced Petitioner to fifteen years for each offense. App. 6, ll. 18 – 21; App. 10, l. 15.

Post-Conviction Relief Application and Hearing

In front of the Honorable William Seals. Petitioner's PCR hearing was held on January 12, 2017. App. 24. Petitioner was represented by Rodney Davis and the state was represented by Alicia Olive. Id. At the hearing Petitioner and his hired counsel Melissa Gay testified; however,

his court appointed attorney, Debbie Littlejohn, who represented Petitioner at the outset of his case, was not at the hearing. App. 25.

Petitioner's PCR application alleged "ineffective assistance of counsel" without further specificity. App. 14. The blanket allegation of ineffective assistance covered the entirety of his representation, which included the time he was represented by Debra Littlejohn. Moreover, the state moved to dismiss two other allegations in Petitioner's PCR application because one allegation was an issue for direct appeal and the other was "overly vague." App. 26, ll. 11 – 17. However, the state did not move to dismiss Petitioner's claim of "ineffective assistance of counsel" as overly vague. Therefore, Petitioner's allegation of ineffective assistance of counsel applied to Littlejohn's representation, and his application alleged with sufficient specificity that Littlejohn provided ineffective assistance of counsel.

Petitioner testified that Debbie Littlejohn told him that the state was willing to lower the initial armed robbery charge to strong-arm robbery and offer zero to fifteen years imprisonment. App. 38, ll. 8 – 12. Petitioner stated, "they offered me zero to fifteen [years]," and that Littlejohn told Petitioner that she would come back before they went to court to see if Petitioner accepted the plea. App. 38, ll. 13 – 16. Littlejohn never returned to give Petitioner a chance to accept the plea. App. 38, l. 16. The next time Petitioner saw Littlejohn, she came with a new indictment for kidnapping. App. 38, l. 22 – App. 39, l. 1. PCR counsel asked, "Were you ever given the opportunity to accept or reject the 0-to-15-year offer on the strong-arm robbery." Petitioner responded, "No, I was not." App. 44, ll. 13 – 16.

In her failure to give Petitioner the opportunity to accept the initial plea offer, Littlejohn provided ineffective assistance of counsel. As a result of that failure, Petitioner must serve a

longer sentence than he would have had to if Littlejohn allowed him the chance to accept the original plea. Therefore, Littlejohn's failure was an error and that error prejudiced Petitioner.

Discussion

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Our Supreme Court "has held that a defendant has the right to effective assistance of counsel during the plea bargaining process." Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (citing 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)). The United States Supreme Court has also "made clear that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Missouri v. Frye, 566 U.S. 134, 141, 132 S.Ct. 1399, 1406 (2012) (quoting Padilla v. Kentucky, 559 U.S. 356, 373, 130 S.Ct. 1473, 1486 (2010)) (internal quotations admitted).

"The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." Frye, 566 U.S. at 143, 132 S.Ct. at 1407. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions favorable to the accused." Id. at 145, 132 S.Ct. at 1408.

To prevail on his claim of ineffective assistance of counsel, Petitioner is required to prove that (1) trial counsel's failure to communicate the state's plea offer constituted deficient performance, and (2) he was prejudiced by this deficient performance, i.e., there is a reasonable

probability that but for counsel's deficient performance, he would have accepted the original plea offer. Davie, 381 S.C. at 608, 675 S.E.2d at 420. Additionally, Petitioner must show actual prejudice. "However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice." Id. at 613, 675 S.E.2d at 422 (citing Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000)).

In Davie, our Supreme Court found defense counsel's failure to convey the state's initial plea offer of fifteen years imprisonment to the defendant constituted deficient performance when the defendant later pled guilty and was sentenced to an aggregate amount of twenty-seven years imprisonment. Davie, 381 S.C. at 610, 675 S.E.2d at 421. This Court further found the defendant was prejudiced by defense counsel's deficient performance noting "that the difference in the sentence [the defendant] received and the plea offer is proof of prejudice." Finally, the Court held that a new sentencing hearing was the proper form of relief for the defendant. Id. at 614, 675 S.E.2d at 423. This Court noted that there was no evidence in the record that the defendant expressed a desire to proceed to trial rather than plead guilty and, therefore, a remand for a new trial was not the proper remedy. Id. at 615, 675 S.E.2d at 423-424.

In Frye, supra, which was decided after Davie, the United States Supreme Court found defense counsel ineffective when he failed to advise the defendant of a plea offer or allow him to consider the offer before it expired. Frye, 566 U.S. at 149, 132 S.Ct. at 1411. The Court held, "[T]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability that

the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it.” Id. at 147, 132 S.Ct. at 1409. The Court ultimately remanded the case noting that the Court of Appeals of Missouri failed to require Frye to show that the “plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court.” Id. at 150, 132 S.Ct. at 1411.

In Lafler v. Cooper, 566 U.S. 156, 174, 132 S.Ct. 1376, 1390-1391 (2012), which was also decided after Davie, the United States Supreme Court found defense counsel ineffective when the defendant rejected a favorable plea offer, despite admitting guilt and expressing a willingness to accept the offer, after defense counsel, “convinced [the defendant] that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist,” which was “an incorrect legal rule.”

In order to prove prejudice in these circumstances, the Court held “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), 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 in fact were imposed.” Id. at 164, 132 S.Ct. at 1385. The Court found that Lafler suffered prejudice because he had shown that but for counsel’s deficient performance there was a reasonable probability he would have accepted the offer, the trial court would have accepted its terms, and as a result of not accepting the plea and being convicted at trial, the defendant received a minimum sentence three and a half times greater than he would have received under the plea. Id. at 174, 1376 S.Ct. at 1391.

Furthermore, in Lafler, the Court rejected the Solicitor General's argument that "there can be no finding of Strickland prejudice arising from plea bargaining if the defendant is later convicted at a fair trial." The Court stated, "[E]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." Id. at 166, 132 S.Ct. at 1386.

In Kolle v. State, 386 S.C. 578, 591-592, 690 S.E.2d 73, 80 (2010), this Court found plea counsel was ineffective when he advised Kolle that the state's initial plea offer was "not a good deal" and misinformed Kolle that the offer would remain open after a suppression hearing, when not only did the offer did not remain open, it was significantly less than the seven year sentence Kolle received. (internal quotations omitted). This Court stated, "[H]ad Kolle known that the state would withdraw this offer after the suppression hearing, he may have decided to accept it and received a lower sentence." Id. This Court affirmed the PCR court's decision to grant Kolle relief. Id. at 593, 690 S.E.2d at 81.

Petitioner was offered zero to fifteen years imprisonment on strong-arm robbery, of which Petitioner would have to serve a minimum of sixty-five percent before parole eligibility. However, Littlejohn did not return to give Petitioner the opportunity to accept that plea deal. App. 44, ll. 16 – 19. As a result, Petitioner was unable to accept the first plea offer before being indicted on a kidnapping charge. Petitioner received a plea offer of zero to thirty years on his kidnapping charge. App. 2, ll. 4 – 9.

At the plea hearing, Petitioner received a fifteen year sentence for kidnapping to run concurrent with his fifteen year strong-arm robbery sentence. However, because of the new kidnapping sentence, Petitioner must serve a minimum of eighty-five percent of his sentence

before parole eligibility. Whereas he would only have to serve sixty-five percent of the fifteen year sentence for strong-arm robbery. Had Littlejohn returned to Petitioner so that he could accept the initial plea, he would have to serve twenty percent less time than his current sentence.

Thus, Littlejohn's failure to allow Petitioner the opportunity to accept the original plea offer constituted ineffective assistance of counsel, and that ineffective assistance prejudiced Petitioner because it resulted in a longer sentence than Petitioner would have had to endure had performed effectively.

2.

The post-conviction relief court erred when it denied Petitioner's motion to amend the PCR application to conform to the testimony presented where the state was already on notice because Petitioner's PCR allegation of ineffective assistance of counsel covered his first attorney, Debra Littlejohn's, who was the attorney that failed to allow Petitioner to accept the state's initial plea offer.

Relevant Facts

Petitioner's PCR application alleged "ineffective assistance of counsel" without further specificity. App. 14. The state moved to dismiss Petitioner's two remaining PCR allegations because one was an issue for direct appeal and the other was "overly vague." App. 26, ll. 11 – 17. However, the state did not move to dismiss Petitioner's claim of, "ineffective assistance of counsel," as overly vague. Therefore, the allegation of ineffective assistance of counsel, in Petitioner's PCR application, applied to Littlejohn's representation and adequately raised the issue that Littlejohn provided ineffective assistance of counsel.

Nonetheless, PCR counsel moved to amend the pleadings to conform to the testimony regarding Littlejohn's failure to give Petitioner a chance to accept the first plea offer. App. 45, ll. 1 – 10. The court overruled the motion because it was, "a little late in the ball game to be doing something that significant with a lawyer that's not even here," and Petitioner's post-conviction relief claim was denied. App. 45, ll. 15 – 18; App. 80 – 90. The PCR judge overruling the motion to amend was an error and that error prejudiced Petitioner.

Discussion

Petitioner testified at the PCR hearing that Littlejohn presented him with the state's plea offer to the lesser-included offense of strong arm robbery for a sentence of up to fifteen years.

App. 38, ll. 8 – 13. He also testified that she told him to think about whether he wanted to accept the plea or go to trial, but never followed up with him on his decision. App. 38, ll. 18 – 24. Instead, the next time he saw her, she presented him with an indictment for kidnapping and Petitioner was never given an opportunity to accept the state’s initial plea offer. App. 38, l. 25 – 39, l. 1.

Petitioner argues that his claim of ineffective assistance of counsel regarding Debra Littlejohn’s failure to allow him to accept the state’s plea offer was properly raised in front of the PCR court and that the PCR judge made a final ruling upon the issue when he denied Petitioner’s motion to amend the pleadings.

In this case, it matters not that the order of dismissal does not address Littlejohn’s ineffective assistance and that a Rule 59(e) motion to alter or amend the judgment was not filed. Notwithstanding the precedent from this Court that has held that issues not raised and ruled on were not preserved for review (See *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007); *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001)), Petitioner’s allegation of ineffective assistance of counsel was preserved for review because it was alleged in his application, brought up at the PCR hearing, and ruled on by the PCR judge when he denied Petitioner’s motion to amend the pleadings. App. 45, l. 15 – 17. Therefore the issue is properly preserved for review.

In *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992), Plyler raised a number of specific issues of ineffective assistance of trial counsel. The PCR court found that the trial record and the testimony at PCR refuted those allegations. *Id.* at 409, 424 S.E. 2d at 478. On Petition for Writ of Certiorari, Plyler argued a new ineffective assistance of counsel claim. However, since that issue was neither raised nor ruled upon by the PCR court, it was unpreserved for review. *Id.* (citing *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983)).

In this case, Petitioner is not raising a new issue unheard at the court below. Petitioner made an adequate allegation of ineffective assistance of counsel in his PCR application. Moreover, unlike in Plyler, Petitioner raised the issue of Littlejohn's ineffective assistance during the hearing and that issue was ruled upon when the judge denied the motion to amend the pleadings to adhere to the testimony given at the PCR hearing.

In Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017) this Court reversed the Court of Appeals decision and denied Mangal's claim of ineffective assistance of counsel. Id. at 88, 805 S.E.2d at 569. Mangal argued at PCR that his trial counsel was ineffective for not objecting to the state's expert improperly bolstering, however the PCR court refused to rule on the issue because it was not raised in the PCR application and PCR counsel did not inform the PCR court he would make a claim for ineffectiveness based on the failure to make an objection. Id. at 92, 805 S.E.2d at 571.

This Court examined Rule 71.1 of the South Carolina Rules of Civil Procedure which requires that PCR "counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary." SCRPC 71.1.

Mangal filled out his PCR Application in the following manner. "[I]n the blank requiring the applicant to "State concisely the grounds on which you base your allegation that you are being held in custody unlawfully," Mangal handwrote, (a) "ineffective assistance of counsel trial," (b) "prejudiceness," (c) "ineffective assistance of appellate counsel." In the blank requiring the applicant to "State concisely and in the same order the facts which support each of the grounds set out [above]," Mangal handwrote (a) "failure to preserve direct appeal issue," (b) "failed to investigate documentary evidence and witnesses," and (c) "fail to make an additional object [ion] to the sufficiency of the curative charge or moved for a mistrial." Id. at 90, 805


S.E.2d at 570. Mangal later retained an attorney to represent him at the PCR hearing, but gave no indication that he would be raising issues outside of his application. Id.

Petitioner's case is distinguishable from Mangal. In Mangal, he specifically stated in his application the grounds for ineffective assistance of counsel and then went on to raise a different allegation, outside of the ones in his PCR application, at the end of the hearing.

In this case, Petitioner's application stated "ineffective assistance of counsel" without further specificity. Petitioner is entitled to effective assistance of counsel throughout his representation, i.e., Debbie Littlejohn was required to provide effective assistance of counsel while she represented him. Moreover, the state moved to dismiss one of Petitioner's other PCR allegations as overly vague, but did not move to dismiss his ineffective assistance of counsel claim as overly vague. Therefore, the allegation of ineffective assistance of counsel covered the period that Littlejohn represented him and put the state on notice that Petitioner may raise an issue regarding Littlejohn's representation at his PCR hearing. Thus, the motion to amend the pleadings to adhere to the testimony given at the PCR hearing was not prejudicial to the state, the denial of the motion was an error, and that error prejudiced Petitioner.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests this Court grant the petition for Writ of Certiorari and vacate his kidnapping conviction, or, in the alternative, permit a full briefing on the issue presented.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable William H. Seals, Circuit Court Judge

BRIAN DELONTE SPANN,

PETITIONER

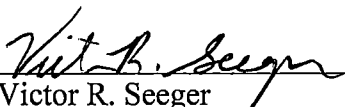
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


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 Meagan Harrigan Jameson, 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 Brian Delonte Spann, #320123, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 29th day of May, 2018.



Victor R. Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 29th day of May, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023