

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APR 01 2018

Certiorari to Sumter County

Honorable D. Craig Brown, Circuit Court Judge

S.C. SUPREME COURT

DERRICK DARBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002381

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
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The PCR court erred by finding plea counsel correctly reasoned she could not move to enforce the fifteen year plea offer or otherwise use the accepted plea offer to petitioner’s advantage because she thought petitioner had not detrimentally relied on the offer, since the solicitor did not withdraw the plea offer, he asserted that he did not remember making the plea offer, it was undisputed that petitioner accepted the plea offer when it was relayed by defense counsel to him in writing, since counsel had an obligation to bring the acceptance of the plea offer to the attention of the plea court.2

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ISSUE PRESENTED

Whether the PCR court erred by finding plea counsel correctly reasoned she could not move to enforce the fifteen year plea offer or otherwise use it because she thought petitioner had not detrimentally relied on the offer, since the solicitor did not withdraw the plea offer, he asserted that he did not remember making the plea offer, it was undisputed that petitioner accepted the plea offer when it was relayed by defense counsel to him in writing, since counsel had an obligation to bring the acceptance of the plea offer to the attention of the plea court?

ARGUMENT

The PCR court erred by finding plea counsel correctly reasoned she could not move to enforce the fifteen year plea offer or otherwise use the accepted plea offer to petitioner's advantage because she thought petitioner had not detrimentally relied on the offer, since the solicitor did not withdraw the plea offer, he asserted that he did not remember making the plea offer, it was undisputed that petitioner accepted the plea offer when it was relayed by defense counsel to him in writing, since counsel had an obligation to bring the acceptance of the plea offer to the attention of the plea court.

Relevant facts

Petitioner was indicted at the May 23, 2013, term of the Sumter County Grand Jury for the offenses of murder, possession of a weapon during the commission of a violent crime, unlawfully carrying a pistol, and possession of a stolen pistol. App. 81 – 82. Petitioner was first represented by Sumter County public defender Tiffany Butler. App. 62, ll. 3-20. When Butler accepted another position, Sumter County public defender Katarzyna Timmons took over representation of petitioner. App. 48, l. 21 – 50, l. 22.

Timmons would later testify that assistant solicitor Jason Corbett made a plea offer that petitioner could plead guilty to voluntary manslaughter with a recommended sentence of zero to fifteen years imprisonment. A “fifteen-year cap.” App. 49, l. 14 – 51, l. 6.

Timmons sent petitioner “a standard plea offer letter” which stated “I am in receipt of the following PLEA OFFER: **Plead to reduced charge, Voluntary Manslaughter, with a sentencing cap of fifteen years.** This offer will be withdrawn after *April 6, 2015* . . .” The plea offer letter was dated March 16, 2015. App. 71.

It was undisputed that petitioner timely responded *in writing* that he wanted Timmons to ask the solicitor if he would make an offer for zero to ten years, but if the solicitor refused, “*I’ll take that offer* but I would like to see you very soon so we can discuss all this. I also want to thank you for putting in the time and patience in representing me. I highly appreciate it. Thank you.” App. 72. (emphasis added).

Timmons said when she approached Corbett again, he told her “he doesn’t remember making that plea offer, that this is not an offer . . . that he never made a fifteen year offer and I guess I had a discussion with him [because] I thought he made that offer. So I thought, well, maybe there’s something missing in translation, something of that sort.” Counsel admitted she was upset when Corbett denied making the plea offer with the fifteen-year “cap.” App. 53, ll. 5-8. Counsel confirmed she would not have spent the time of sending petitioner the plea offer letter if she did not think the offer had indeed been made. App. 50, l. 3 – 54, l. 10.

Counsel confirmed that she did not move to enforce the plea or even bring the plea offer to the court’s attention because “solicitors can make and **withdraw offers** as they please and [the] only time it can be enforced is whenever the defendant relies on the offer to his detriment.” App. 53, l. 17 – 54, l. 10. (emphasis added). Counsel agreed that the plea offer in this case was not withdrawn, and that this was a case where the solicitor denied he ever made the offer that counsel conveyed to her client, and that he accepted. App. 54, ll. 11-21.

Petitioner testified at the PCR hearing that he wrote the letter stating that he would accept the fifteen-year plea offer to voluntary manslaughter if that was the lowest the solicitor was willing to go. App. 39, l. 7 – 40, l. 10; App. 42, ll. 2-7. Petitioner remembered his attorney came to see him, and he asked counsel about the plea offer: “[S]he said she went and asked the solicitor about it and he says he doesn’t remember it, he doesn’t remember offering me that. She

said *he got her upset because she felt like he was playing with her.*” App. 43, l. 23 – 44, l. 6. (emphasis added).

Petitioner subsequently pled guilty with a negotiated sentence of twenty years. App. 44, ll. 7-9. Petitioner appeared on December 18, 2015, before the Honorable R. Ferrell Cothran. Timmons represented petitioner at the guilty plea, and assistant solicitor Jason Corbett appeared for the state. App. 1. Solicitor Corbett told the judge petitioner was entering a guilty plea to voluntary manslaughter and that the negotiated sentence was twenty years. App. 3, l. 3 – 4, l. 18.

Defense counsel **never** mentioned the prior plea offer of fifteen years that she believed was offered to petitioner, and that he accepted. All Timmons said at the plea was: “The solicitor and I, per negotiations, we were thinking about the twenty-year sentence. That’s the recommendation.” The judge responded, “Well, it’s a negotiated sentence *so therefore I can’t change it.* The sentence of the court is that you are committed to the Department of Corrections for a term of twenty years.” App. 17, l. 20 – 18, l. 16. (emphasis added).

Petitioner filed an application for post-conviction relief on October 24, 2016. App. 20 – 25. The state filed a return dated March 3, 2017. App. 27 – 31.

An evidentiary hearing was convened on July 24, 2017, before the Honorable D. Craig Brown. Lance S. Boozer represented petitioner. Julie Coleman was the assistant attorney general. App. 32. Petitioner, counsel Timmons, and former counsel Tiffany Butler testified. App. 33.

As stated, Darby testified that he was told in a plea offer letter that the state had offered him a fifteen-year cap on a guilty plea for voluntary manslaughter. Darby accepted the offer and was later told by counsel Timmons that the state did not remember making the offer, and that she thought the solicitor was “playing with her.” App. 38, l. 2 – 44, l. 6.

Counsel Timmons testified consistently that assistant solicitor Corbett made a plea offer that petitioner could plead to voluntary manslaughter with a cap of fifteen years. Corbett later stated he did not remember making the plea offer, and that she “was upset” when Corbett claimed he could not remember the offer. Timmons said she did not take any action, to enforce the plea, or tell the sentencing judge at the time of petitioner’s subsequent guilty plea of the plea offer because she did not think petitioner detrimentally relied on the offer. Timmons admitted this was not “a withdrawn offer, this was an offer that they say they don’t ever remember making.” App. 49, l. 14 – 54, l. 21.

In his order of dismissal, the judge wrote, “Plea Counsel testified she did not make a motion to enforce the plea offer or bring up the original offer to the court. She stated she chose not to do so because the plea offer could only be enforced if the defendant detrimentally relied on the offer, and she did not believe that Applicant detrimentally relied on this plea offer.” App. 75.

The PCR court also wrote, “Plea counsel credibly testified she truly believed there was a legitimate plea offer for 0-15 years from the State, but the Solicitor did not recall making the offer when asked about it. However, Plea Counsel testified that she did not believe Applicant detrimentally relied on the plea offer, so she chose not to move to enforce the original offer. This Court finds Plea Counsel’s actions were reasonable under the circumstances, and nothing about her performance regarding this alleged plea offer was deficient.” App. 78. The PCR court therefore denied relief.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243, SCACR.

Discussion

Plea counsel respectfully conflated two different concepts: (1) a prosecutor being entitled to withdraw a plea agreement where the defendant has suffered no detriment, and, (2) a prosecutor claiming he never made a plea offer that defense counsel conveyed to the defendant in good faith, and that the defendant accepted.

This Court has held that plea counsel is ineffective if counsel does not move to have a withdrawn plea agreement enforced where the defendant has shown detrimental reliance based on the plea offer or agreement. See Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007); Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (1999); Right of Prosecutor to Withdraw from Plea Bargain Prior to Entry of Plea, 16 A.L.R. 4th 1089, § 3(a).

The plea offer in this case as conveyed by defense counsel to petitioner did not require any performance or helpful information from petitioner to the state prior to acceptance of negotiated sentence by the court at the guilty plea proceeding. Therefore, this is not a case of an alleged breach of a plea agreement by a defendant wherein the trial or appellate court is required to ascertain whether the defendant breached the plea agreement. See, State v. Tillman, 320 S.C. 61, 463 S.E.2d 94 (1995) *citing* State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); Santobello v. New York, 404 U.S. 257 (1971).

In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), Jordan agreed to plead guilty if the solicitor recommended a probationary sentence. On the day of the guilty plea, defense counsel negotiated with the assistant solicitor, and the solicitor agreed neither to recommend nor oppose a probationary sentence. When defense counsel conveyed that counter offer to Jordan, Jordan accepted the plea offer.

That very same day, however, another solicitor appeared for the state and vigorously opposed probation at the hearing on the grounds that Jordan was “too old for probation.” Defense counsel neither requested to withdraw the guilty plea or point out to the judge that the solicitor had breached the plea agreement.

However, after the guilty plea hearing, defense counsel and the assistant solicitor met with the judge in chambers to discuss the unfulfilled plea agreement, but the judge refused to reconsider his sentence based on his assertion that the solicitor’s opposition to probation did not influence his sentencing decision.

In Jordan, this Court found that Jordan only pled guilty because he believed the solicitor would neither oppose nor recommend probation. When the solicitor disregarded the plea agreement, this Court found defense counsel was ineffective for failing to protect Jordan’s right to enforce the plea agreement. Such representation fell “below professional norms.” Strickland v. Washington, 466 U.S. 668, 694 (1984). Jordan v. State, 297 S.C. at 54, 374 S.E.2d at 684-85.

In the present case, defense counsel admitted she was “upset” when the solicitor denied making the plea offer that defense counsel had conveyed to petitioner. Petitioner also remembered that defense counsel was upset with the solicitor’s subsequent claim that he never made the plea offer “because she felt like he was playing with her.” App. 4, ll. 1-6.

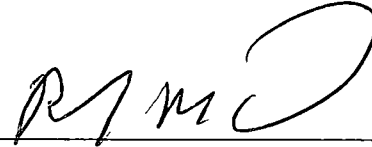
Unlike defense counsel held ineffective in Jordan v. State, present defense counsel did not even bring the plea agreement to the attention of the plea court in any manner. Plea counsel did not move to enforce the agreement or bring to the court’s attention that the state had earlier agreed to a fifteen-year “cap” where on the day of the plea it was recommending a sentence of twenty years imprisonment.

While defense counsel may have correctly surmised that petitioner could not show detrimental reliance based on the plea offer, this was not a withdrawn plea offer. Further, the prejudice from her failure to take “any action” pertaining to the accepted fifteen year plea offer by never calling it to the attention of the plea judge was unambiguously shown when defense counsel told the judge that the twenty year recommendation was only a “recommendation,” and the sentencing court responded: “Well, it’s a negotiated sentence, therefore I can’t change it.” App. 17, l. 20 – 18, l. 16.

Five years additional time in the South Carolina Department of Corrections for the failure of defense counsel to take any action -- even to bring up the prior fifteen year plea offer petitioner accepted as mitigating against a twenty year sentence -- during the guilty plea proceeding -- was a showing of legal prejudice. See, Jordan v. State, supra. The PCR court’s acceptance of plea counsel’s erroneous “detrimental reliance “ reasoning in this case in which the plea offer was not withdrawn was erroneous as a matter of law.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should respectfully be issued to allow full briefing on this novel issue.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Sumter County

Honorable D. Craig Brown, Circuit Court Judge

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DERRICK DARBY,

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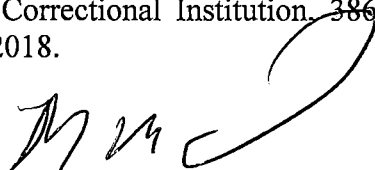
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STATE OF SOUTH CAROLINA,

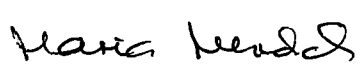
RESPONDENT

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CERTIFICATE OF SERVICE
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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 Julie Coleman, 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 Derrick Darby, #366339, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 1st day of August, 2018.


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Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 1st day of August, 2018.

 (L.S)
—————
Notary Public for South Carolina
My Commission Expires: July 3, 2023