

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Certiorari to Lexington County

Honorable W. Jeffrey Young, Circuit Court Judge

RECEIVED
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SC Court of Appeals

WILLIAM PATRICK DEATON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001883

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel was effective where she failed to seek to enforce the state's plea offer?

STATEMENT OF THE CASE

Indictment and Guilty Pleas

On October 12, 2009, the Lexington County Grand Jury returned separate indictments against Petitioner William Deaton for unrelated counts of first-degree burglary and armed robbery. App. 196 – 199. With respect to both offenses, Deaton was represented by Sara Hahn, and the state was represented by assistant solicitor Angela Garrick. App. 1; App. 65.

On January 27, 2010, Deaton appeared for trial before the Honorable R. Knox McMahan and jury. App. 3. However, following jury selection, Deaton pled guilty to armed robbery. App. 30 – 52. Judge McMahan sentenced Deaton to sixteen years, but he subsequently granted the defense's motion to modify the sentence and reduced it to twelve years. App. 62, ll. 19-24; App. 100, ll. 21-25; App. 119, l. 23 – 120, l. 5.

On January 29, 2010, Deaton appeared before Judge McMahan again and pled guilty to first-degree burglary. App. 67 – 75. Judge McMahan deferred sentencing to allow Deaton an opportunity to cooperate with police in the recovery of some of the stolen items. App. 75 – 80. Judge McMahan later sentenced Deaton to a concurrent term of fifteen years. App. 200.

First PCR Application, Hearing, and Order (2010-CP-32-05311)

On December 4, 2010, Deaton filed his application for post-conviction relief ("PCR"). App. 82. The State filed its return on March 1, 2011. App. 89. On August 15, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young. Deaton was represented by Aimee Zmroczek, and the state was represented by assistant attorney general Kaelon May. App. 96. On January 14, 2013, Judge Young filed an order of dismissal denying Deaton's PCR application. App. 123. Deaton made a *pro se* attempt to appeal from the order, but it was dismissed because it was not timely served. App. 129 – 145.

Second PCR Application and Hearing (2013-CP-32-02614)

On August 2, 2013, Deaton filed an application for post-conviction relief, alleging that his first PCR attorney rendered ineffective assistance of counsel in failing to seek review of the 2013 PCR order. App. 146. On January 21, 2014, he filed an amendment to his PCR application. App. 154. The state filed its return on May 21, 2014. App. 160.

On January 14, 2016, an evidentiary hearing was held before the Honorable J. Mark Hayes. Deaton was represented by Anna Good, and the state was represented by assistant attorney general Patrick Schmeckpeper. App. 165. On September 2, 2016, the PCR filed an Order of Dismissal, finding that Deaton was not entitled to Austin¹ review of his original post-conviction relief hearing. App. 189.

Grant of *Austin* Review

On February 13, 2017, Petitioner filed his petition for writ of certiorari, seeking review of the 2016 PCR order pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated review of an Austin PCR application) and pursuant to Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002) (establishing the procedure when seeking review of a finding for the state on both a laches defense and Austin claim). Respondent filed its return on June 30, 2017, to which Petitioner filed a reply on August 8, 2017.

By order filed October 30, 2017, the South Carolina Supreme Court transferred this appeal to this Court pursuant to Rule 243(i), SCACR. On June 22, 2018, this Court filed an order granting the petition for writ of certiorari, dispensing with further briefing, and directing Petitioner to serve and file his Austin petition addressing the appealable issues from his first PCR hearing. This petition for writ of certiorari pursuant to Austin follows.

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

ARGUMENT

The PCR court erred in finding that plea counsel was effective where she failed to seek to enforce the state's plea offer.

Relevant Facts

Guilty Plea

On January 27 and 29, 2010, Petitioner Deaton pled guilty under two separate and unrelated indictments to armed robbery and first-degree burglary. The statutory sentencing range for armed robbery is ten to thirty years imprisonment. S.C. Code Ann. § 16-11-330(A). The statutory sentencing range for first-degree burglary is fifteen years to life imprisonment. S.C. Code Ann. § 16-11-311(B).

A jury had already been selected for Deaton's trial on the robbery charge when the solicitor told the trial judge: "Mr. Deaton has actually changed his mind. He wishes to enter a guilty plea to the charge for trial, and we have a sentencing sheet here." App. 30, ll. 1-4; App. 221. Judge McMahon then questioned plea counsel Sarah Hahn and Deaton. App. 30, l. 12 – 43, l. 12. Deaton told the judge about the facts of the crime he committed, admitting that he robbed a convenient store with the use of a knife. App. 40, ll. 8-17. Judge McMahon then asked the solicitor if there had been any plea negotiations. The solicitor, plea counsel, and Deaton all affirmatively indicated that there were no plea negotiations. App. 40, ll. 18-25.

The solicitor then presented its recitation of the facts and Deaton's limited prior criminal history. App. 43, l. 14 – 48, l. 22. The solicitor also presented victim impact evidence through the two clerks who were working at the gas station, one of whom asked for imposition of the maximum punishment allowed. App. 49, l. 23 – 50, l. 11. Detective Gamble, who investigated the case, requested that the court impose a midrange to maximum sentence. App. 50, l. 14 – 51,

1. 2. It was at that point that the solicitor put information about their past plea negotiations on the record, stating:

Your Honor, the only other thing I would like to add is when I first got the file in August, Mr. Deaton has a completely unrelated case on a burglary first.

I did make a plea offer to Ms. Hahn back in August that involved negotiations on that burglary first charge as well. At that time I offered a reduction on that burglary first to a burglary second. And to wrap it all up, I was not going to be opposed to the minimum sentence.

Today as we stand here just on the armed robbery, I am opposed to the minimum sentence because during -- we were in plea negotiations for a very, very long time. Then they broke down.

So once I started getting the case ready for trial, there were things, as you probably remember, that weren't necessarily documented in writing. I didn't know Carmen Slice was over eight months pregnant.

In my mind that makes it even worse that what it originally was. I didn't have his rap sheet or full rap sheet at that time, and I didn't know the full extent of the chasing around in the parking lot of Ms. Weatherspoon and that there were other witnesses that saw it as well.

Because of all of that and because of where we are here today, I would ask for something more than the minimum sentence, Your Honor.

App. 51, l. 5 – 52, l. 6. Judge McMahon then accepted the plea. App. 52, ll. 13-20. At the end of the defense's presentation on sentencing, Deaton said: "The day I didn't sign the plea, I just had a bad panic attack that day. I was going to sign it, and it kept going back and forth. I tried to get the plea to sign it, but I didn't get to sign it. I was really shook up." App. 62, ll. 10-13. Judge McMahon imposed a sixteen-year sentence, which he later modified to twelve years. App. 62, ll. 19-24; App. 146; App. 119, l. 23 – 120, l. 5.

Two days later, Deaton pled guilty to first-degree burglary. Plea counsel said she had explained the charge and possible punishment to Deaton. App. 67, ll. 17-23. Deaton said he understood the charge and that he could "receive a sentence of from 15 years to life" imprisonment. App. 70, ll. 3-6. During the colloquy with Deaton, Judge McMahon asked the solicitor if there were any negotiations. She said there were no negotiations; plea counsel and Deaton both agreed. App. 71, ll. 4-12. Judge McMahon then accepted the plea. App. 75, ll. 13-

19. Plea counsel requested that Deaton be sentenced to the minimum of fifteen years, to be run concurrent to his prior sentence for armed robbery. App. 76, ll. 5-8. Judge McMahon took the case under advisement pending Deaton's cooperation with police in recovering some of the items he stole from his aunt and uncle's house. App. 76, l. 8 – 80, l. 4. The minimum fifteen-year sentence was imposed. App. 200.

PCR Proceedings

At the PCR hearing, Deaton explained that the solicitor extended a plea offer under which Deaton would plead guilty to armed robbery and second-degree burglary, both of which had a sentencing range of ten to thirty years imprisonment, and she would not oppose the ten-year minimum sentence. Deaton was given one week to consider the offer and told plea counsel after only a few days that he would accept. App. 101, l. 16 – 102, l. 8; App. 108, l. 23 – 109, l. 20. When they went to Court on December 21, 2009, the terms of the plea had been changed to “no recommendations and \$5,000 restitution,” which he also described as “10 to 30 years open.” When Deaton and his attorney inquired into the reason for the change, the solicitor took the sentencing sheet and left. She told Deaton's family that “the deal was off” because he had wasted her time. App. 102, l. 9 – 103, l. 24. Deaton averred that plea counsel Hahn should have sought to have the offer enforced. App. 103, l. 22 – 106, l. 3. The solicitor made additional plea offers before Deaton's first case was called to trial, but she was unwilling to reinstate the original offer. App. 110, ll. 1-14.

Deaton noted that he had relatively little experience with the criminal justice system having “never been really locked up before.” App. 106, ll. 17-20. However, he reported that “the officers promised” him “a second degree burglary to start with.” App. 111, ll. 9-12. Deaton gave the officers statements in both cases “at the very beginning of everything” and “helped

them recover the property.” App. 107, l. 24 – 108, l. 1; App. 110, ll. 8-14. He said: “They had no fingerprints or anything, and I am the one that came forward and gave the information to try to help get the stuff back.” App. 108, ll. 1-4. When asked why Deaton did not tell the plea judge about the plea negotiations, Deaton said that he had only recently learned about the ability to enforce the breached plea agreement. App. 106, l. 14 – 107, l. 4; see also App. 103, ll. 22-24.

Plea counsel Sarah Hahn agreed with Deaton about the terms of the original offer and said they discussed the offer on October 30, 2009, and again on December 2, 2009. She clarified that originally the solicitor would have told the judge that she was not opposed to the minimum sentence. App. 113, ll. 1-24; App. 115, ll. 3-8; App. 120, ll. 18-19. Hahn testified that Deaton rejected the offer, ostensibly at the December 2nd meeting. App. 113, l. 19 – 114, l. 3. Hahn averred both that she advised Deaton on December 12, 2019 of the solicitor’s revocation of the offer,² and that the State’s initial offer was “still in place” on December 15, 2019. App. 114, l. 4 – 115, l. 8. In any event, she said that she told Deaton it would be his last chance to accept the offer and “[h]e again rejected the offer.” App. 114, ll. 15-17.

On December 21, 2009, the solicitor called Hahn following receipt of a voicemail message from Deaton’s family members saying he wanted to accept the offer. The solicitor advised that she would extend the same offer except that she would no longer say that she was not opposed to the minimum. Hahn recalled that this change coincided with a policy change on sentence recommendations within the Solicitor’s office. App. 115, l. 9 – 116, l. 2. According to Hahn, Deaton originally told her that he accepted the offer, but then he left her voicemail saying he would only plead to attempted armed robbery. App. 115, l. 23 – 116, l. 2; App. 116, ll. 15-21. On December 22, 2009, they went to court and Deaton was unsure whether to accept the plea.

² It is unclear how or why the State would have revoked an offer that a defendant had already rejected, or why the offer would have been valid again just three days later.

Hahn advised him that the solicitor would not make a recommendation at sentencing and he eventually told her that he would accept. When faced with the sentencing sheet, Deaton asked for additional time to think about the offer and the solicitor said that “the deal was off.” App. 116, l. 15 – 118, l. 1. She averred that Deaton knew prior to arriving on the 22nd that the “the State was *not going to not oppose* the ten-year minimum.” App. 118, ll. 2-5; App. 118, ll. 18-22. On January 6, 2010, the solicitor advised Hahn that she was no longer willing to reduce the burglary charge, such that Deaton would have to plead to first degree burglary and armed robbery or go to trial for those same offenses. App. 116, ll. 5-14. As discussed *supra*, Deaton eventually pled guilty as indicted and was sentenced to twelve years for armed robbery and fifteen years for first-degree burglary. App. 62, ll. 19-24; App. 100, ll. 21-25; App. 119, l. 23 – 120, l. 5; App. 200.

In the PCR court’s Order of Dismissal, the court found plea counsel Hahn’s testimony more credible. App. 125. The court further found that Deaton failed to prove both deficiency and prejudice by plea counsel with respect to the plea negotiations and thus could not establish his claim of ineffective assistance of counsel. App. 125 – 127. The record does not support the PCR judge’s finding that “Applicant simply failed to present any evidence that by allegedly accepting the State’s original plea offer he was induced to act adversely to his legal detriment.” App. 127.

Discussion

The PCR court erred in finding that plea counsel rendered effective assistance of counsel where she failed to seek enforcement of the State’s plea offer. Deaton testified that the officers with whom he initially spoke told him that he would only be indicted for second degree burglary, inducing his cooperation with their investigation. App. 107, l. 24 – 108, l. 4; App. 110, ll. 8-14; App. 111, ll. 9-12. In reliance upon that, Deaton made incriminating statements and gave the

officers information to help them in the recovery of some of the items stolen in the burglary. Because Deaton could have enforced the plea agreement under the detrimental reliance exception and counsel failed to take this action, counsel failed to render reasonably effective assistance. See Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007) (reversing denial of PCR relief where Petitioner detrimentally relied upon prosecutorial promise of plea bargain and plea counsel failed to move to enforce the plea agreement). Instead, Deaton pled guilty to first-degree burglary, which carried a mandatory minimum of fifteen years incarceration rather than the ten-year minimum for second-degree burglary. S.C. Code Ann. §§ 16-11-311(B), 16-11-312(C)(1).

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 (1984). This Court has held that a defendant has the right to effective assistance of counsel during the plea bargaining process. 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); see also Davie v. State, 381 S.C. 601, 608-609, 675 S.E.2d 416, 420 (2009) (holding that counsel's failure to convey a plea offer constitutes deficient performance); Sprouse v. State, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003) (finding plea counsel ineffective for failing to ensure that the State adhered to the original plea agreement); Thompson v. State, 340 S.C. 112, 116-17, 531 S.E.2d 294, 296-97 (2000) (finding plea counsel ineffective for failing to object when the solicitor recommended the maximum sentence in violation of the plea agreement); Jordan v. State, 297 S.C. 52, 53-54, 374 S.E.2d 683, 684-85 (1988) (finding plea counsel ineffective for failing to withdraw guilty plea after State reneged on plea); Missouri v. Frye, 132 S.Ct. 1399, 1407-08 (2012) (noting that anything less than effective assistance during plea negotiations "might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him").

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Strickland, 466 U.S. at 674. In the guilty plea context, the inquiry with respect to the counsel's alleged deficiency turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). A defendant who pleads guilty upon the advice of counsel may attack the voluntary and intelligent character of the guilty plea only by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). Furthermore, "[t]he second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citation omitted).

"The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant **or any other change of position by him constituting detrimental reliance upon the arrangement.**" Custodio v. State, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007) (emphasis added). "Detrimental reliance may be demonstrated where the defendant performed some part of the bargain; for example, where the defendant provides beneficial information to law enforcement." Id. Here, the investigators promised Deaton that the charge against him related to the breaking and entering of his uncle and aunt's home would be second degree burglary. App. 111, ll. 9-12. It was with that in mind that Deaton gave the

officers beneficial information. App. 107, l. 24 – 108, l. 4; App. 110, ll. 8-14. During the plea negotiations that took place from October through December 2009, the solicitor was offering a plea to armed robbery and second-degree burglary, consistent with the promises made by law enforcement. Deaton's plea counsel attempted to negotiate a more favorable plea but was unsuccessful. In January 2010 the solicitor insisted that any plea be to first-degree burglary. This was a violation of the agreement that law enforcement made with Deaton that he would be charged with only second-degree burglary, which is what induced Deaton to make incriminating statements and assist in the recovery of the stolen items. Consequently, plea counsel was deficient in failing to move to enforce the plea agreement. Deaton was prejudiced because he would not have pled guilty to a greater offense had he known that the State was bound by its prior offer of second-degree burglary.

The PCR court's denial of relief should accordingly be reversed.

CONCLUSION

For the reasons set forth herein, Petitioner Brian Keith Stephens respectfully requests this Court grant certiorari and order further briefing of the issue raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of July, 2018.

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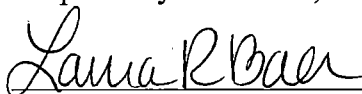
PETITION TO BE RELIEVED AS COUNSEL

Counsel for William Patrick Deaton states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's evidentiary hearing before the Honorable W. Jeffrey Young, which was held on August 15, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant vacation of the guilty plea or specific performance of the plea agreement.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for William Patrick Deaton.

Respectfully Submitted,



Laura R. Baer

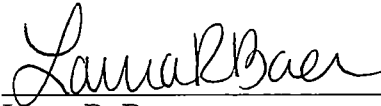
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of July, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Laura R. Baer
Appellate Defender

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CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari Pursuant to Austin v. State in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon William Patrick Deaton, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 20th day of July, 2018.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of July, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027 .