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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

SHONATHAN M. JETER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000265

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

ISSUE PRESENTED.....1

STATEMENT2

ARGUMENT

The PCR court erred by finding counsel provided effective assistance of counsel where she conveyed an initial plea to petitioner, told petitioner not to accept the plea until she got further details from the solicitor, then never returned to follow-up with petitioner on the plea offer, and petitioner ultimately pled guilty without a negotiated sentence, and received a much lengthier sentence because of counsel’s deficiency in not following up with him on the plea offer3

Relevant Facts.....3

Discussion.....6

CONCLUSION.....11

PETITION TO BE RELIEVED AS COUNSEL.....12

ISSUE PRESENTED

Whether the PCR court erred by finding counsel provided effective assistance of counsel where she conveyed an initial plea to petitioner, told petitioner not to accept the plea until she got further details from the solicitor, then never returned to follow-up with petitioner on the plea offer, and petitioner ultimately pled guilty without a negotiated sentence, and received a much lengthier sentence because of counsel's deficiency in not following up with him on the plea offer?

STATEMENT

During its March 2016 term, the Spartanburg County Grand Jury indicted Petitioner for possession with intent to distribute cocaine base and two counts of distribution of cocaine base. App. 58 – 65. Petitioner waived presentment to the grand jury for trafficking cocaine. App. 3, ll. 16 – 19.

Petitioner pled guilty to the four aforementioned charges on August 25, 2016 in front of the Honorable Daniel Dewitt Hall. App. 1.

Candice Koopman Lapham represented Petitioner. Id. James Zachary Farr represented the state. Id.

Judge Hall accepted Petitioner's guilty plea as freely, voluntarily, and intelligently made. App. 10, ll. 12 – 15. Petitioner was sentenced to five years' imprisonment with credit for 215 days' time served. App. 17, ll. 9 – 13.

On March 27, 2017, Petitioner filed a post-conviction relief application. App. 19 – 25. The state filed its return on October 5, 2017. App. 26 – 30.

On November 17, 2017, Petitioner's post-conviction relief hearing was held in front of the Honorable G. Thomas Cooper. App. 32. Rodney Richey represented Petitioner. Id. Valerie Garcia Giovanoli represented the state. Id.

Judge Cooper filed an Order of Dismissal on January 24, 2018. App. 50 – 56.

This petition for Writ of Certiorari follows.

ARGUMENT

The PCR court erred by finding counsel provided effective assistance of counsel where she conveyed an initial plea to petitioner, told petitioner not to accept the plea until she got further details from the solicitor, then never returned to follow-up with petitioner on the plea offer, and petitioner ultimately pled guilty without a negotiated sentence, and received a much lengthier sentence because of counsel's deficiency in not following up with him on the plea offer.

Relevant Facts

The state alleges the facts as follows. On October 26, 2015 Petitioner sold crack cocaine to a Spartanburg County Sheriff's Office confidential informant. App. 10, l. 23 – 11, l. 3. Then on November 2, 2015, Petitioner sold crack cocaine to another Spartanburg County Sheriff's Office confidential informant. App. 11, ll. 9 – 13.

On November 24, 2015, because of the two prior incidents, Spartanburg County Sheriff's Office Narcotics Division conducted a search warrant of, "a room [Petitioner] was staying in." App. 11, l. 19 – 12, l. 6. In the room police officers found 6.5 grams of crack cocaine. App. 12, ll. 2 – 3.

On March 9, 2016, police officers responded to a call about a suspicious vehicle. App. 12, ll. 7 – 11. Officers saw two passengers in the vehicle. App. 12, l. 13. One of the passengers looked at the officer, got out of the car, and tried to walk away. App. 12, ll. 13 – 15. The officers stopped the person leaving the car, got consent to search the car, and found, "a little over 11 grams of cocaine in the car... and a weapon." App. 12, ll. 14 – 23.

On August 25, 2016, Petitioner pled guilty to two counts of distribution of cocaine base, one count of possession with intent to distribute cocaine base, and one count of trafficking in cocaine greater than ten grams but less than twenty-eight grams, second offense. App. 3, ll. 4 – 19; App. 3, l. 25 – 4, l. 1. Judge Daniel Dewitt Hall found Petitioner’s guilty plea was freely, knowingly, and voluntarily made. App. 10, ll. 12 – 15. Judge Hall sentenced Petitioner to five years’ imprisonment, with credit for 215 days’ time served. App. 17, ll. 9 – 13.

On March 22, 2017, Petitioner filed a post-conviction relief application that alleged plea counsel was ineffective for failing to give Petitioner the opportunity to accept the state’s initial plea offer to three distribution charges and not the trafficking charge. App. 19 – 25; App. 42, ll. 6 – 8. Petitioner alleged that because of plea counsel’s ineffective assistance, Petitioner pled guilty to more charges than the state recommended. App. 21.

On October 5, 2017, the state filed its return. App. 26 – 30. On November 17, 2017, Petitioner’s post-conviction relief hearing was held in front of the Honorable G. Thomas Cooper. App. 32. Rodney Richey represented Petitioner. Id. Valerie Garcia Giovanoli represented the state. Id.

Candice Koopman Lapham, plea counsel, testified that she did not recall there being any earlier plea offer made by the state. App. 36, ll. 10 – 12. She stated that she discussed the weight requirement for the trafficking charge with Petitioner. App. 37, ll. 5 – 6. Plea counsel showed Petitioner the “field weight,” which was 11 grams, one gram over the, “10 gra[m] minimum.” App. 36, ll. 7 – 16.

Petitioner testified he discovered that there was a plea offer made by the state prior to the offer he accepted. App. 41, l. 23 – 42, l. 5. The original plea allowed Petitioner the choice to plead guilty to either three distribution charges or one trafficking charge. App. 42, ll. 6 – 12.

Petitioner explained that pleading to the three distribution charges would have given him a “better sentence which would have gave [Petitioner] a chance for parole or a chance for work release.” App. 43, ll. 13 – 15. Petitioner also would have preferred to plead to distribution charges, which are a nonviolent crime, and get, “65 percent of [his] time versus trafficking.” App, 43, ll. 15 – 17.

Petitioner testified that he hired Candace Koopman Lapham, plea counsel, because his initial attorney, Richard Whelchel, had too large a work load. App. 42, ll. 13 – 23. Petitioner explained that plea counsel spoke with him about the plea offer. App. 42, l. 13 – 43, l. 9. She told Petitioner that she would talk to the prosecutor about the plea offer and then follow up with Petitioner regarding whether he wanted to accept the plea offer. Id. However, Petitioner stated that plea counsel never returned to give him the opportunity to accept the initial plea offer. App. 43, ll. 8 – 9.

Petitioner’s requested relief was for a new trial because plea counsel did not give him the chance to accept the initial plea offer. App. 43, ll. 18 – 23. Due to that failure by plea counsel, Petitioner claims that his guilty plea to the subsequent offer was involuntary. Id.

Plea counsel was recalled at Petitioner’s post-conviction relief hearing. App. 47, l. 1. She reiterated that she did not remember the separate plea offer that Petitioner testified too, “[t]hat was nothing that was relayed to me.” App. 47, ll. 7 – 11. She also explained that, “given [Petitioner’s] exposure of 120-plus years... it would not make any sense to go into court to plead to extra charges that were unnecessary.” App. 47, ll. 7 – 16. She testified then, after claiming to not recall details about Petitioner’s plea-bargaining process with the state, that, “it was always a straight-up plea.” App. 47, l. 17.

On January 24, 2018 Judge Cooper filed an Order of Dismissal denying Petitioner's post-conviction relief allegations. App. 50 – 56. Judge Cooper found that the record supports “the knowing and voluntary nature of [Petitioner's] plea,” and that plea counsel did not provide ineffective assistance. App. 55.

That was an error, and that error prejudiced Petitioner.

Discussion

Plea counsel provided ineffective assistance when she failed to allow Petitioner the opportunity to accept the state's initial plea offer. The initial plea offer was to three charges of distribution of cocaine, which required Petitioner to serve 65% of his sentence before being eligible for parole. App. 42, 1 24 – 42, 1. 17. However, due to plea counsel's ineffective assistance, Petitioner did not get the opportunity to accept the initial plea offer and ended up pleading guilty to trafficking cocaine, which requires Petitioner serve 85% of his sentence before being eligible for parole. Id.

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.

In the instant case, plea counsel provided ineffective assistance because she never followed up with Petitioner regarding his decision to accept the state’s initial plea offer. Petitioner would have been eligible for work release and earlier parole had he been able to accept the state’s initial plea offer to three distribution charges instead of the trafficking charge. App. 42, ll. 6 – 8; App. 43, ll. 10 – 17. Therefore, plea counsel’s ineffective assistance prejudiced Petitioner because her failure to allow Petitioner the opportunity to accept the state’s initial plea offer caused Petitioner to plead guilty to trafficking cocaine without any negotiations, which mandated that Petitioner serve 85% of his sentence before parole eligibility.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

SHONATHAN M. JETER,

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V.

STATE OF SOUTH CAROLINA,

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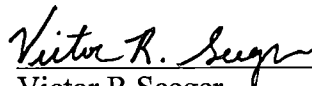
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shonathan M. Jeter states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge G. Thomas Cooper, Jr., which was held on November 17, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Shonathan M. Jeter.

Respectfully Submitted,



Victor R Seeger


Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of September, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



Victor R Seeger
Appellate Defender

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ATTORNEY FOR PETITIONER

This 5th day of September, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SHONATHAN M. JETER,

PETITIONER

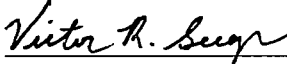
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jordan Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Shonathan M. Jeter, #369635, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 5th day of September, 2018.



Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of September, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028