

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas
William H. Seals, Circuit Court Judge

Appellate Case No. 2017-002480

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OCT 17 2018

S.C. SUPREME COURT

BRIAN DELONTE SPANN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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1.

The issue was not properly preserved for Appellate review and plea counsel did not provide ineffective assistance for failing to allow Petitioner to accept or reject an alleged plea offer where there was testimony presented specifically denying such an offer existed, and Petitioner took a subsequent plea offer which included an additional kidnapping charge which required Petitioner to serve a sentence of eighty-five percent of fifteen years imprisonment5

2.

The issue was not properly preserved for Appellate review and the post-conviction relief court properly 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 offer9

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RESPONDENT'S ISSUES PRESENTED

1.

Did plea counsel provide 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 OF THE CASE

A Berkeley County Grand Jury indicted Petitioner for Armed Robbery (2014-GS-08-0496) and Kidnapping (2014-GS-08-0497) 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 the lesser included offense of strong arm robbery and one count of kidnapping. App. 1. Melissa Gay represented Petitioner and Assistant Solicitor 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 Berkley 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, 18-App. 6, 1. 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 Williams Seals. Alicia Olive represented the state and Rodney Davis represented Petitioner. App. 24. At the hearing, the Applicant only asked the court to vacate the kidnapping charge and did not ask to consider vacating the strong arm robbery charge. App. 43. In an order filed October 26, 2017, Judge Seals dismissed Petitioner's PCR application. App. 80-90. Applicant's allegation that counsel was ineffective for failing to advise him that he would be required to serve eighty-five percent of his kidnapping sentence before becoming eligible for

release was the only issue the court ruled upon in its order of dismissal. This return to petition for writ of certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. **The issue was not properly preserved for Appellate review and plea counsel did not provide 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.**

Petitioner contends that his counsel was ineffective for failing to allow him the opportunity to accept or reject an alleged plea offer to strong armed robbery. Petitioner alleges the Solicitor made an offer that his attorney communicated, but failed to return to get Petitioner's answer before he was indicted for kidnapping. The issue raised by Petitioner was not properly preserved for Appellate review as it was never ruled upon by the PCR court. Also, there is testimony from Petitioner's plea counsel from the PCR hearing directly refuting that any such plea offer ever existed.

A defendant has the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (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 (2012) (quoting Padilla v. Kentucky, 559 U.S. 356, 373 (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. “As 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. 145.

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.

In Frye, supra, the United States Supreme Court found defense counsel was 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, “To 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. 147. 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.

In Lafler v. Cooper, 566 U.S. 156, 174 (2012), 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 Supreme 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. 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.

First, this issue was not raised and ruled upon in a manner that would preserve it for appellate review. Petitioner admits in his Petition for Writ of Certiorari that no 59(e), SCRCR motion was ever filed and the PCR court never made a specific ruling on this issue in its order of dismissal. It is clear that PCR counsel raised the issue in the form of a motion to amend the application, however, the South Carolina Supreme Court has made it clear what is required in order to preserve a PCR issue for appellate review. The court in Marlar stated: “respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and

conclusions of law on his allegations, the issues were not preserved for appellate review.” Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007). The PCR court also did not make a ruling on the issue in its order of dismissal and PCR counsel failed to file a 59(e) motion asking the court to make specific findings of fact and conclusions of law on this issue, therefore, the issue was not properly preserved for appellate review.

Second, Petitioner’s argument rests on the presumption that there was indeed an initial offer from the Solicitor for 0-15 years on strong arm robbery. Prior to retaining Melissa Gay, Petitioner was appointed Debra Littlejohn of the Public Defender’s office. Petitioner alleges that the Solicitor made an offer to Ms. Littlejohn prior to Ms. Gay’s representation. However, Ms. Gay’s testimony at the Post-Conviction Relief hearing directly refutes the assertion that a plea offer was ever made to Ms. Littlejohn. On direct examination, Ms. Gay testified that Ms. Littlejohn “wasn’t getting anywhere on the plea offer.” (Tr. p. 31, lines 18-19). Ms. Gay also testified directly to this point: “this discussion that he had about how there was some plea offer that he had been offered and whether or not he had the ability to take that plea offer or not, Debby Littlejohn never got a strong-arm robbery offer out of the case.” (Tr. p. 31, lines 20-24). Again, Ms. Gay testifies that she was hired specifically because plea negotiations were not going well. There is no reason to believe that Ms. Gay would be anything other than truthful in her testimony, especially concerning something as important to her client’s case as a favorable prior plea offer. There can be neither deficiency nor prejudice when the alleged plea offer never existed.

Third, and finally, even if the original offer did exist, Petitioner must show that he was prejudiced by his attorney not returning to see whether or not he accepted the offer. A key element of prejudice in this matter is whether or not the prosecution would have canceled the

offer. It is undisputed that the prosecution later indicted Petitioner for kidnapping, after he was indicted for the armed robbery and after the alleged first plea offer. It can be reasonably inferred that the Solicitor's Office would not have gone through with the alleged original offer of strong-arm robbery if they intended to also indict Petitioner for kidnapping. Therefore, Petitioner cannot show with a reasonable probability that the prosecution would not have canceled the alleged plea offer and thus there is no prejudice to Petitioner.

II. The issue was not properly preserved for Appellate review and the post-conviction relief court properly 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.

Petitioner argues that the post-conviction relief court improperly denied Petitioner's motion to amend the PCR application to conform to testimony presented as to events that allegedly occurred during attorney Debra Littlejohn's representation of the Petitioner. However, the post-conviction relief court did not rule as to any alleged plea offer and only held that the Petitioner failed to carry his burden as to the ineffective assistance of counsel allegation against plea counsel for failing to advise of the collateral consequences of the plea.

Petitioner did not file a motion pursuant to Rule 59(e), SCRCP, requesting a ruling on this issue, and therefore, it is not preserved for appellate review. See *Marlar v. State*, 375 S.C. 407 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review in that defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations). In his Petition, Petitioner's counsel makes the argument that a 59(e) motion need not be filed and the PCR court need not rule specifically on the issue for it to be preserved for appellate review, however, that argument is not supported by precedent.

However, assuming *arguendo* that the issue is properly before this Court, the State would argue that the court properly denied the motion as it would have been highly prejudicial to the State. Petitioner, through counsel, argues that granting the motion would not have been prejudicial to the State as the State was “on notice” that issues could potentially be raised concerning Debra Littlejohn’s representation. Petitioner’s application simply stated “ineffective assistance of counsel” with no further concise statement of the facts supporting this allegation. There was no indication, prior to Petitioner’s testimony at the hearing, that any allegation existed as to Debra Littlejohn. The State would have been greatly prejudiced, as Debra Littlejohn was not present at the PCR hearing to testify and could not be questioned as to the alleged plea offer.

The State would also argue that the appropriate remedy, if the Court were to grant the petition for writ of certiorari, would be to remand to the PCR court for a hearing on the specific issue now alleged. Remanding to the PCR court would allow Judge Seals an opportunity to rule on the specific issue and provide Ms. Littlejohn the opportunity to testify as to the allegation.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

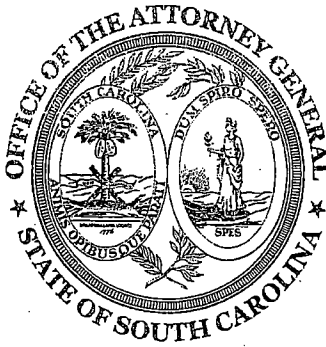
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies addressed to:

**Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201**

This 17th day of October, 2018.



Jennifer Jennison
Legal Assistant for Respondent



ALAN WILSON
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October 17, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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OCT 17 2018

S.C. SUPREME COURT

**RE: Brian Spann v. State of South Carolina
Appellate Case No.: 2017-002480**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jaj
Enclosures

cc: Victor R. Seeger, Esquire
Victim Advocacy Division