

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Honorable Michael G. Nettles, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-000090

RADU RENCIU,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

Trial counsel was not ineffective for properly communicating a prior plea offer to Petitioner, where Petitioner failed to formerly accept said offer.

STATEMENT

Petitioner Radu Renciu pled guilty to first degree burglary, second degree burglary, (nonviolent), second degree burglary (violent), and possession of methamphetamine during the June 2015 term of Berkeley County General Session Court before Judge R. Markley Dennis, Junior. Petitioner was sentenced to imprisonment for a term of thirty years, suspended upon the service of eighteen years for his first-degree burglary conviction, and ten years and fifteen years, respectively, for his two second-degree burglary convictions (nonviolent and violent), and one year on his drug conviction. App. 1-23. Chad D. Shelton represented petitioner at the plea proceeding, and Assistant Solicitor Wilton H. McNeely appeared on behalf of the state.

On June 24, 2016, petitioner filed a PCR application with the Berkeley County Office of the Clerk of Court. App. 25-41. The respondent filed a return dated June 27, 2017, requesting that a hearing be held in response to petitioner's PCR action. App. 42-48.

A PCR hearing was convened on December 4, 2017, at the Berkeley County Courthouse before Michael G. Nettles. App. 49-92. Petitioner alleged that plea counsel was ineffective for failing to secure Petitioner's acceptance of an earlier plea offer and submitting it to the court. App. 53. The original plea offer was communicated to Petitioner and was later revoked by the Solicitor when Petitioner was arrested on new charges. App. 69-73. After communicating the offer, but before the new arrest, plea counsel made attempts to get in contact with Petitioner. App. 70-71. Petitioner failed to formerly accept the offer and put that acceptance on the record before being arrested on the new charges and the offer being revoked. App. 71-73. On December 13, 2017, Judge Nettles signed an Order of Dismissal denying petitioner's allegations of ineffective assistance of counsel in the case. App. 99-107.

Petitioner appealed Judge Nettles' Order of Dismissal.

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

Trial counsel was not ineffective for properly communicating the state's fifteen-year plea offer on the burglary charge to Petitioner when Petitioner failed to communicate an acceptance of this offer to counsel.

The central issue is whether or not plea counsel was ineffective for failing to secure an acceptance of the original plea offer and getting an acceptance of that plea offer before the court. Plea counsel is charged with communicating plea offers to their clients, which clearly occurred in this case. Petitioner's issue is that he was not able to get in front of the court to accept the original offer and that this offer was later revoked when he was arrested on new charges. Counsel testified at length at the PCR hearing concerning the events surrounding this original plea offer. Counsel testified that he communicated this offer to Petitioner, that he attempted to contact Petitioner after he bonded out, and that the offer was revoked because Petitioner was arrested on new charges. App. 101-102. Petitioner also testified that he never attempted to contact plea counsel after he bonded out concerning his acceptance of the plea offer. App. 101. It is clear that plea counsel communicated the offer to Petitioner, Petitioner did not make an attempt after being released to communicate an acceptance of the offer, and the offer was properly revoked when Petitioner was arrested on new charges. Therefore, plea counsel cannot be found deficient for properly communicating a plea offer that Petitioner failed to accept.

The PCR court properly denied Petitioner's PCR application and in the Order of Dismissal clearly states the Court's grounds for dismissing, those grounds are supported by the legal standard:

... the original plea offer was made and clearly communicated to Applicant through Plea Counsel. Applicant did not follow up on the plea offer while he was

out on bond, and they were unable to get back into court to accept the offer because Applicant did not reach out to his attorney and lost contact with him. Applicant lost the plea offer through his own actions when he committed new crimes, resulting in a new arrest on new charges. The offer from the State was not unconditional; there was an expiration date, and there was always an understanding that Applicant must stay out of trouble to keep the offer.

During the plea proceeding, the solicitor apprised the plead judge of the burglary charges lodged against petitioner in his case. Petitioner was charged with entering a home on August 29, 2013, located in Goose Creek, South Carolina, and taking certain household items. App. 10, l. 18-24. After petitioner's arrest, he was subsequently released on bond on March 21, 2014. App. 116-121. Then, in October 2014, petitioner was subsequently arrested again and charged with the burglary of another residence in Goose Creek, South Carolina, that occurred on September 13, 2014, and the burglary of a gas station (Murphy's Oil) in Goose Creek, South Carolina, that occurred on September 19, 2014. App. 10, l. 25-p. 11, l. 18.

During the PCR hearing, petitioner testified that he was informed by trial counsel of the state's fifteen-year plea offer on the first burglary charge, but that he was released on bond shortly thereafter and had no further communication with counsel until he was arrested in October 2014 on additional burglary charges. Petitioner stated that he would have accepted the plea offer and that counsel promised to discuss the details with him during the week that followed, but that counsel never explained it to the "full extent." App. 55, l. 13- p. 59, l. 22; App. 63, l. 24- p. 64, l. 8.

Trial counsel testified at the PCR hearing and explained that the plea offer for fifteen years was submitted and re-offered on March 11, 2014, with an April 25, 2014 deadline, but that petitioner made bond on March 21, 2014, and that after petitioner's release, Petitioner made no attempts to contact him until he was re-arrested in October 2014 on another set of burglary

charges that occurred in September 2014. Counsel admitted that he lost contact with petitioner after the offer was made and was unable to reach him before the expiration date, and that even though he (trial counsel) informally told the Solicitor they intended to accept the plea offer, there was never a formalized acceptance of the same by petitioner submitted by counsel. App. 69, l. 19-p. 73, l. 20; App. 74, l. 19-p. 78, l. 25. See plea offer at Appl. 94-98.

The PCR judge found that petitioner failed to meet his burden of proving that plea counsel was ineffective with respect to the plea offer issue because petitioner lost contact with counsel, which in effect precluded action on the plea offer. App. 104-105.

The PCR judge properly found that plea counsel did not err when he properly communicated the fifteen-year plea offer to petitioner and the offer was rightly revoked by the solicitor when petitioner was arrested on more burglary charges. Petitioner, in her PWC, erroneously states that the plea offer was revoked because it had gone past the expiration date of the offer without an acceptance. It is clear that the offer's expiration date was extended numerous times while petitioner was out on bond and that it was ultimately revoked because he was charged with further crimes. The solicitor's office was quite accommodating when plea counsel was not able to get in touch with petitioner and extended the expiration date on multiple occasions.

A defendant has a right to effective assistance of counsel during the plea bargaining process. See Lafler v. Cooper, 1376 (2012). See also Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1196), where the Court held that the Sixth Amendment protects defendants against ineffective assistance of counsel during the plea bargaining process. State v. Judge, was overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (200), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea

bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. In Judge, the issue was whether counsel was ineffective in advising the defendant to reject a plea offer and opt for a trial by jury. In Jackson, supra, the Court held that counsel was ineffective in failing to advise the defendant that the crime he was pleading to was a felony and that but for that omission, the defendant would not have plead guilty in his case.

Specifically, with respect to plea offers, the Sixth Amendment right to effective assistance of counsel where plea offers lapse and where prejudice is shown to the extent that the defendant would have accepted the plea offer and received a more favorable sentence. See Missouri v. Frye, 1399 (2012). In Missouri v. Frye, counsel did not communicate the plea offer to the defendant and as a result, the plea offer expired. Compare with Davie v. State, 381 S.C. 601, 675 S.E. 2d 416 (2009), where the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer until after the plea offer had expired, and because he would have accepted that plea offer had it been communicated to him. See also Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014), where the Court held that counsel was ineffective in failing to extend the state's plea offer of ten years to the defendant prior to sentencing and that the defendant was prejudiced by counsel's deficient performance as he received a twenty-year sentence instead.

Here, there is a distinction between the cases cited by Petitioner and this case, it has been clearly established that plea counsel communicated the State's offer to petitioner. In all of the cases cited above plea counsel was found to be deficient because they did not formerly communicate the plea offer to the defendant, here, both plea counsel and petitioner testified that

the offer was indeed communicated. Plea counsel in this case communicated the offer to petitioner and petitioner failed to make any effort to communicate with counsel once he was released on bond. The record shows that counsel made every effort, even when not in communication with his client, to keep plea negotiations open and to keep extending the expiration date of the offer. Again, it should be made clear that the offer was not ultimately revoked because of an expiration date, but rather due to petitioner's arrest on further charges. Also, solicitors have broad discretion in plea negotiations leading up to trial and withdrawing the plea offer due to petitioner being arrested on new charges certainly falls within that discretion. State v. Johnson, 287 S.C. 171, 172, 337 S.E.2d 204, 205 (1985).

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,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
S.C. Bar No. 100108
Senior Assistant Deputy Attorney General

BENJAMIN HUNTER LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

By: Benjamin Limbaugh
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

Dec 7, 2018

STATE OF SOUTH CAROLINA
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CERTIORARI TO CHARLESTON COUNTY
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Honorable Michael G. Nettles, Circuit Court Judge

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STATE OF SOUTH CAROLINA,

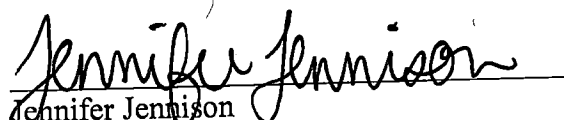
RESPONDENT

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 mailing two copies in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211

This 7th day of December, 2018.


Jennifer Jennison
Legal Assistant for Respondent



RECEIVED
DEC 07 2018
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

December 7, 2018

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

RE: Radu Renciu v. State of South Carolina
Appellate Case No.: 2018-000090

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 Limbaugh

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

BHL/jaj
Enclosures

cc: Wanda H. Carter, Esquire
Victim Advocacy Division