

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

VANESSA L. FRAYER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001338

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT

Trial counsel’s failure to adequately communicate a favorable plea offer made by the state to Petitioner violated Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel where the state offered to recommend a sentence of five years imprisonment if Petitioner pled guilty, Petitioner testified she would have accepted the offer and pled guilty had she known it was made, and Petitioner was ultimately sentenced to twelve years after a jury trial 5

CONCLUSION 10

PETITION TO BE RELIEVED AS COUNSEL 11

ISSUE PRESENTED

Did trial counsel's failure to adequately communicate a favorable plea offer made by the state to Petitioner violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where the state offered to recommend a sentence of five years imprisonment if Petitioner pled guilty, Petitioner testified she would have accepted the offer and pled guilty had she known it was made, and Petitioner was ultimately sentenced to twelve years after a jury trial?

STATEMENT OF THE CASE

The state alleged at trial that Petitioner distributed cocaine base to a confidential informant, who was wired with audio and video recording equipment, on June 13, 2014. The alleged transaction occurred on the enclosed porch at Petitioner's sister's residence. The informant claimed he purchased sixty dollars' worth of crack from Petitioner. App. 70, l. 3 – 73, l. 6; App. 75, l. 13 – 76, l. 21. However, a hand to hand transaction does not appear on the footage of the alleged controlled buy. App. 47, ll. 8-10; App. 127, ll. 22-25. The substance the informant turned over to law enforcement tested positive for cocaine base with a weight of 0.25 grams. App. 119, ll. 12-22.

Petitioner testified at the evidentiary hearing that trial counsel never discussed with her any plea offers extended by the state. Specifically, counsel never advised her that the state offered to reduce her charge from a third offense distribution of cocaine base to a second offense and recommend a sentence of five years imprisonment if she pled guilty. App. 245, ll. 9-18; App. 246, ll. 5-12; App. 247, ll. 13-19. Petitioner maintained had counsel informed her of this offer, she would have accepted it and pled guilty instead of proceeding to trial. App. 245, ll. 19-21.

Jason King, Petitioner's trial counsel, explained that Petitioner was charged with distribution of cocaine base, third offense, which has a mandatory minimum sentence of ten years. According to King, the state agreed to reduce the charge to a second offense, if Petitioner pled guilty, and recommend a sentence of five years' imprisonment. App. 232, ll. 11-25. He testified that he met with Petitioner and reviewed the offer with her "more than once." Petitioner appeared in court on April 7, 2015 and May 5, 2015. On both of those occasions,

King claimed he reviewed the plea offer with Petitioner and advised her to take it, but she ultimately rejected the offer. App. 233, ll. 3-16.

A Charleston County grand jury indicted Petitioner on December 1, 2014 for distribution of cocaine base. App. 274-275. Her case was called to trial on August 12, 2015 before the Honorable Michael G. Nettles, and a jury. App. 1. Assistant Solicitors Stephanie Linder and Scott Maynor represented the state. App. 1. Jason King and Shirene Hansotia represented Petitioner. App. 1. The jury found Petitioner guilty as indicted. Judge Nettles sentenced her to twelve years' imprisonment. App. 170, ll. 6-8; App. 276.

Petitioner filed a timely notice of appeal and Appellate Defender Laura R. Baer of the Division of Appellate Defense perfected an appeal on Petitioner's behalf. The Court of Appeals ultimately affirmed Petitioner's conviction and sentence. State v. Frayer, Op. No. 2016-UP-511 (S.C. Ct. App. filed December 14, 2016); App. 206-207.

On March 6, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 209-215. The state filed a return to this application dated May 22, 2017. App. 216-222. An evidentiary hearing was convened on May 22, 2018 before the Honorable Roger M. Young, Sr. App. 223. Assistant Attorney General Kelly Oppenheimer represented the state, and James Falk represented Petitioner. App. 223.

By order filed July 10, 2018, Judge Young denied Petitioner relief. App. 258-273. He found trial counsel's testimony that he conveyed the plea offer to Petitioner credible. App. 270. Because the judge found counsel communicated the offer to Petitioner, he concluded Petitioner failed to establish any deficiency on the part of counsel. App. 270. The judge further found Petitioner failed to establish any resulting prejudice because her testimony that she would have

accepted the offer had she known of its existence was not credible. App. 271. Consequently, the judge dismissed Petitioner's application with prejudice. App. 273.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to communicate a favorable plea offer made by the state to Petitioner and where Petitioner was prejudiced since she testified she would have accepted the offer had she known about it and pled guilty, this petition for writ of certiorari follows.

ARGUMENT

Trial counsel's failure to adequately communicate a favorable plea offer made by the state to Petitioner violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where the state offered to recommend a sentence of five years imprisonment if Petitioner pled guilty, Petitioner testified she would have accepted the offer and pled guilty had she known it was made, and Petitioner was ultimately sentenced to twelve years after a jury trial.

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). 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 (2009), *overruled on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (internal citation omitted). 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 quotation marks 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. “[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.” Frye, 566 U.S. at 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. "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. 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, 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 145. 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." Frye, 566 U.S. at 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." Frye, 566 U.S. at 150.

In Lafler v. Cooper, 566 U.S. 156, 161 (2012), 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 decedent] 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. The Court found the defendant in 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.

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." Id. at 164. The Court stated, "Even 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.

Additionally, in Kolle v. State, 386 S.C. 578, 591-592, 690 S.E.2d 73, 80 (2010), this Court found plea counsel was ineffective in advising Kolle that the state's initial plea offer was "not a good deal" and misinforming Kolle that the offer would remain open after a suppression hearing, when the offer did not remain open and was significantly less than the seven year sentence Kolle received. (internal quotations omitted). This Court stated, "Had 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 thus affirmed the PCR court's decision to grant Kolle relief. Id. at 593, 690 S.E.2d at 81.

In this case, trial counsel admitted the state offered to reduce Petitioner's charge from a third offense to a second offense and recommend a sentence of five years if Petitioner pled guilty. App. 232, ll. 11-25. Petitioner testified that counsel never advised her of this offer or any other offer. App. 245, ll. 9-18. Counsel's failure to communicate the plea offer to Petitioner constitutes deficient performance. See Frye, 566 U.S. at 145 ("[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions favorable to the accused.")

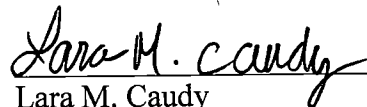
Petitioner was prejudiced by counsel's deficient performance because she testified that if she would have known about the offer, she would have accepted it and pled guilty instead of proceeding to trial. App. 245, ll. 9-21. Moreover, Petitioner was convicted at trial and sentenced to twelve years' imprisonment for a third offense, which has a mandatory minimum sentence of ten years. However, under the plea offer, the state offered to allow Petitioner to plead guilty to a second offense, eliminating the ten year mandatory minimum, with a sentence recommendation of five years. The difference in the sentence Petitioner received and the plea offer alone is proof of prejudice. See Davie, 381 S.C. at 614, 675 S.E.2d at 423. Furthermore, it is very likely that the five year sentence offered by the state would have been accepted by the trial judge given the underlying allegations.

Because of counsel's deficient performance and the resulting prejudice, Petitioner respectfully requests this Court reverse her conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

Respectfully Submitted,

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Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

VANESSA L. FRAYER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vanessa Laquetta Frayer states:

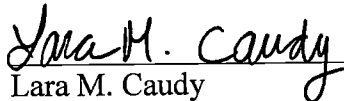
1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on May 22, 2018 before the Honorable Roger M. Young, and, in her opinion, the seeking certiorari from the order of dismissal is without merit.

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 Vanessa Laquetta Frayer.

Respectfully Submitted,

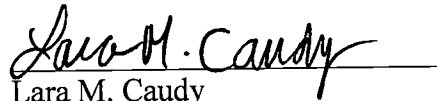

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2019.

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."



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ATTORNEY FOR PETITIONER

This 26th day of April, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Honorable Roger M. Young, Circuit Court Judge

VANESSA L. FRAYER,

PETITIONER

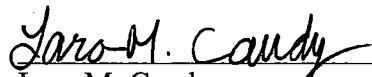
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

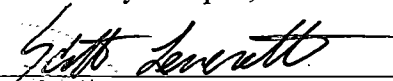
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served upon Vanessa Laquetta Frayer, #365066, at Marlboro County Detention Center, 253 Throop St., Bennettsville, SC 29512, this 26th day of April, 2019.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.

