ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Michael G. Nettles, Circuit Court Judge

KELVIN EUGENE COHEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000408

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
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ISSUES PRESENTED

1.

The circuit court judge erred in denying PCR relief after finding that no prejudice resulted from counsel's admission that he erred in misadvising petitioner on the classification of one charge when clearly there are negative consequences attached to different classifications of offenses.

2.

Trial counsel erred in failing to ensure the fulfillment of the plea agreement reached on petitioner's behalf in the case.

STATEMENT

Petitioner Kelvin Eugene Cohen pled guilty to hit and run involving a death, habitual traffic offender involving a death, and failure to stop for a blue light during the December 2016 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole, and was sentenced to an aggregate ten-year prison term. App. 1-30. Matthew William Shealy represented petitioner at the plea proceeding and Assistant A.J. Jordan appeared on behalf of the state.

On November 7, 2017, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 32-44. The respondent filed a Return dated January 11, 2018, requesting that a hearing be held in response to petitioner's PCR action filed in the case. App. 45-51.

On February 22, 2018, a PCR hearing was convened at the Spartanburg County Courthouse before Judge Michael G. Nettles. Petitioner was present at the hearing and represented by Susannah C. Ross, and Assistant Attorney General Valerie Giovanoli appeared on behalf of the state. App. 53-86. On February 4, 2019, Judge Nettles issued an Order of Dismissal in the case therein denying petitioner's PCR action. App. 88-99.

Petitioner appealed Judge Nettles' Order of Dismissal. This petition follows.

ARGUMENT

The circuit court judge erred in denying PCR relief after finding that no prejudice resulted from counsel's admission that he erred in misadvising petitioner on the classification of one charge when clearly there are negative consequences for different classifications of offenses.

During the PCR hearing, trial counsel admitted that he mistakenly told petitioner that the hit and run offense (death) to which he pled guilty was a non-violent offense, when said offense was actually classified as a violent offense. See S.C. Code Ann. §56-01-1105 (B)(2). App. 71, l. 3 – p. 73, l. 2; App. 79, lines 21-25.

Petitioner testified during the PCR hearing and stated that trial counsel misadvised him on the violent versus non-violent classification on the hit and run offense to which he pled guilty, and that he learned subsequently that the offense was a violent offense. App. 64, l. 4 – p. 67, l. 9.

The PCR judge ruled that the effect of the misadvice regarding the violent versus nonviolent status of the offense in question was of "no consequence," and that since counsel gave the correct advice regarding parole eligibility consequences for the same offense, then there was no prejudice per the rationale that parole eligibility issues and violent versus non-violent classification issues are two separate matters, and that petitioner would likely have pled guilty to this offense regardless even if he had known of the correct classification for the offense, particularly since the "classification had no effect on whether an inmate must serve sixty-five or eighty-five percent of his sentence." App. 94-95.

To the contrary, although the classification of the hit and run offense "had no effect on whether an inmate must serve sixty-five or eighty-five percent of his sentence," nonetheless, there are negative consequences attached to violent offenses that do not attach to non-violent offenses, and therein lies the prejudice in counsel's misadvice in this case.

Furthermore, although the general rule is that misadvice regarding collateral consequences such as a violent classification of an offense will not render a guilty plea involuntarily given, there are consequences that yield negative consequences based on offense classified as violent (parole on a subsequent most serios offense, preclusions from PTI and supervised furlough, and limitations on furloughs and work release and education credits). S.C. Code Ann. §17-22-50; §24-13-710 §24-3-210(b) §24-13-650; §24-13-230(F). See Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), where the Court held that the defendant's guilty plea to second degree burglary was not rendered involuntary due to his counsel's failure to inform him that second degree burglary was a violent crime, but in the end the reasoning in Smith was that there were basic sentencing consequences that were made known to petitioner, and that he wanted to plead guilty and that he was not induced to plead guilty based on not knowing that the offense classification was violent. However, in the instant case, it does not follow here that petitioner was not induced to plead guilty under the misadvice that his hit and run conviction was mistakenly believed to have fallen under the non-violent category. To the contrary, the record suggests that petitioner was induced to plead guilty on the hit and run charge under the mistaken understanding that the same was a non-violent offense. Hence the prejudice. Therefore, in the case at bar, trial counsel was deficient with respect to his representation regarding sentencing advice to the extent that he misadvised petitioner regarding an offense classification in violation of the Sixth Amendment and Hill v. Lockhart, 484 U.S. 52 (1985), such that but for the error, a reasonable probability exists that petitioner likely would not have pled guilty on the charge in question.

QUESTION II

Trial counsel erred in failing to ensure the fulfillment of the plea agreement reached on petitioner's behalf in the case.

During the PCR hearing, petitioner testified that the plea deal in his case was that he would receive two identical sentences of twenty years, suspended upon the service of ten years, on both the hit and run charge and the habitual offender charge. However, petitioner complained during the PCR hearing about the fact that the plea judge sentenced him according to the plea bargain to twenty years, suspended upon the service of ten years, on only one charge, which was on the habitual trial offender charge, but did not issue the identical sentence per the plea bargain on the hit and run charge. App. 63, l. 19 – p. 64, l. 2; App. 67, l. 22 – p. 68, l. 2.

Trial counsel testified in reference to this issue at the PCR hearing and stated that he did not object to the hit and run offense sentence not being twenty-years, suspended to ten years, because he did not believe that the ten year sentence handed down on the hit and run charge was harmful to petitioner. App. 73, lines 3 – 17.

The PCR judge ruled that the hit and run sentence did not adversely affect petitioner. App. 98.

However, to the contrary, the failure to enforce the plea bargain in the instant case constituted ineffective assistance of counsel. Specific performance is the remedy used where one has been denied a constitutionally-guaranteed right. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), citing to Turner v. Tennessee 858 F.2d 1201 (6th Cir. 1988) and United States v. Morrison 449 U.S. 361 (1981). Compare Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003), the case was remanded for specific performance on the plea agreement where counsel was ineffective in failing to ensure that the state adhered to the original plea agreement in order to grant the defendant the

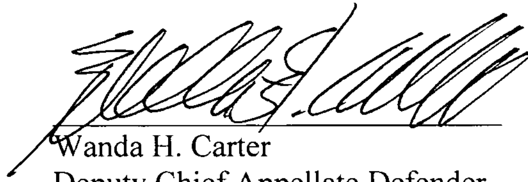
benefit of the bargain. In Sprouse, supra, the plea agreement breach was the solicitor's classification of the defendant's second-degree burglary offense as violent because this deviated from the plea agreement. See also Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007), where the case was remanded for specific performance where counsel was ineffective in failing to have a plea agreement enforced because the defendant detrimentally relied on the promised plea bargain. In Custodio, supra, there was a breach of a plea agreement that included a fifteen-year cap on non-violent burglary charges in exchange for the defendant's cooperation in returning stolen items and where there was reliance on the plea bargain by the defendant when he pled guilty in the case. In Jordan v. State, 247 S.C. 52, 374 S.E.2d 683 (1988), the Court remanded the case for specific performance on the plea agreement where the solicitor did not fulfill his promise not to oppose probation at the plea proceeding according to the plea agreement. See reversals in Smith v. State, 407 S.E.2d 270, 754 S.E.2d 900 (2014); and upheld at 413 S.C. 194, 7754 S.E.2d 696 (2015), and Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000), where the Court remanded for specific performance in both cases on both of the plea agreements where both of the solicitors promised not to make sentencing recommendations on the defendants' voluntary manslaughter pleas, but breached the agreements and asked for maximum sentencing in those cases.

As a rule, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); Santobello v. New York, 404 U.S. 257 (1971). Prosecutors are obligated to fulfill the promises they make to defendants when the promises are inducements to plead guilty. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). Breached plea agreements will invalidate guilty pleas. Thompson v. State, supra.

There was a breached plea agreement regarding sentencing that existed in petitioner's case, and thus counsel erred in failing to move to enforce the plea agreement and request specific performance of petitioner's original plea agreement which included identical sentences on both the hit and run and the habitual offender charges. Counsel's error in this regard violated petitioner's right to competent legal counsel in a criminal case as guaranteed under the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issues.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of October, 2019.

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Counsel for Kelvin Eugene Cohen states:

1. She is Deputy Chief 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 before Judge Michael G. Nettles, which was held on February 22, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

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 Kelvin Eugene Cohen.

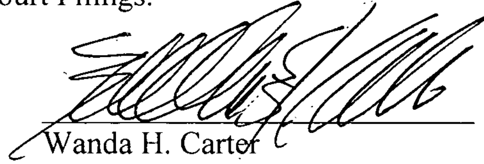
Respectfully Submitted,

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of October, 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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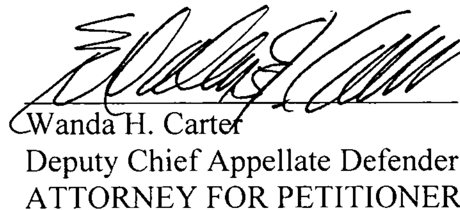
CERTIFICATE OF SERVICE

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 Johnny Ellis James, Jr., 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 Kelvin Eugene Cohen, #314256, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 3rd day of October, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of October, 2019.

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