STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Dorchester County

Benjamin H. Culbertson, Circuit Court Judge

RANDAL WILLIAM BENTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002021

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did trial counsel render ineffective assistance by failing to advise Petitioner properly prior to attempting to enter his guilty plea where the judge refused to accept the guilty plea because Petitioner indicated he had not reviewed all of the evidence against him and trial counsel admitted to withholding evidence from Petitioner prior to the attempted guilty plea?

STATEMENT

On January 31, 2011, a Dorchester County grand jury indicted Petitioner for murder (2010-GS-18-1675). App. 598-599. On January 6, 2012, Petitioner appeared before the Honorable Diane S. Goodstein with his counsel, John Loy, to enter a plea to murder pursuant to Alford v. North Carolina, 400 U.S. 25 (1970) with a negotiated sentence of imprisonment for forty years. App. 1; App. 3, ll. 1-4; App. 4, ll. 10-18; App. 13, l. 25 – App. 14, l. 2. Russell Hilton appeared on behalf of the state. App. 1. When Petitioner indicated he had not been over "every bit" of the state's evidence with his lawyer, Judge Goodstein refused to accept the guilty plea. App. 27, ll. 5-15.

Thereafter, the state, represented by Hilton and Barney Giese, called the case to trial before the Honorable Stephanie P. McDonald and a jury on February 9, 2012. App. 29. Loy and Michelle Suggs represented Petitioner. App. 29. During jury deliberations, the jury asked for "definitions for murder with malice of aforethought, and involuntary manslaughter." App. 461, ll. 18-21. Additionally, the foreperson of the jury indicated she needed to leave "before 5:00." App. 462, ll. 12-16. When the jury returned to the courtroom, the judge informed them that voluntary manslaughter was an issue in the case, but that involuntary manslaughter was not. App. 463, ll. 19-24. She then re-instructed the jury on murder and voluntary manslaughter. App. 464, l. 1 – App. 468, l. 25.

Immediately after giving the re-instruction, the judge noted that she was aware that a juror needed to leave "before 5 o'clock." App. 469, ll. 3-5. The judge explained that court would adjourn when the juror needed to leave and then resume the following day at 9:30. App. 469, ll. 3-10. According to the judge, the jury would deliberate *until* a verdict was reached. App. 469, l. 11. Shortly thereafter, the jury reached a verdict. App. 469, l. 23 – App. 470, l. 4. The jury found

Petitioner guilty of murder. App. 470, ll. 5-10. Judge McDonald sentenced Petitioner to life imprisonment without the possibility of parole. App. 483, ll. 5-10; App. 600.

Petitioner was represented on direct appeal by Breen Stevens. App. 486-500. On appeal, Petitioner challenged the judge's erroneous admission of a hearsay statement by the decedent. App. 486-500. The Court of Appeals dismissed the appeal. State v. Benton, 2013-UP-400 (S.C. Ct. App. filed Oct. 30, 2013); App. 501-502. Remittitur was issued on November 18, 2013. App. 503.

On May 23, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 504-510). The matter proceeded to a hearing on May 18, 2016, before the Honorable Benjamin H. Culbertson. App. 516. Rodney Davis represented Petitioner, and J. Clayton Mitchell, III, represented the state. App. 516. By an order filed on September 20, 2017, Judge Culbertson denied relief. App. 590-597.

On September 28, 2017, Petitioner served his notice of appeal. Thereafter, Petitioner filed a petition for writ of certiorari. After the state filed its return, the South Carolina Supreme Court transferred the case to this Court on October 31, 2018. After review, this Court granted the petition and ordered briefing on March 25, 2020. This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue presented. The appellate courts defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, the reviewing court examines questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Trial counsel rendered ineffective assistance by failing to advise Petitioner properly prior to attempting to enter his guilty plea where the judge refused to accept the guilty plea because Petitioner indicated he had not reviewed all of the evidence against him and trial counsel admitted to withholding evidence from Petitioner prior to the attempted guilty plea.

Relevant facts

During the plea colloquy, the judge had cautioned Petitioner that she had many questions to ask and that if Petitioner did not understand a question, he should not answer it, but should seek clarification. App. 5, ll. 11-21; App. 5, ll. 23-24. The judge acknowledged there were "many ways to explain any one thing" and indicated she was "happy to try, perhaps, a different way" if Petitioner did not understand a question. App. 5, ll. 21-23. Such an admonition is proper in all guilty pleas, but it was especially suitable where Petitioner indicated he had only an eighth grade education. App. 6, ll. 15-16.

The state provided a lengthy factual recitation to support the charge and guilty plea. App. 20, l. 9 – App. 21, l. 8. At the conclusion of the recitation, the judge asked Petitioner if those were the facts that Petitioner believed the state could produce to establish his guilt beyond a reasonable doubt. App. 26, ll. 13-16. Petitioner responded that he did not know. App. 26, l. 17. Inquiring further, the judge asked if those were the facts for which Petitioner believed he would be found guilty. App. 26, ll. 18-19. Petitioner responded unequivocally, "Yes, ma'am." App. 26, l. 20. Thereafter, the judge asked Petitioner if he had been over the evidence the state had available. App. 26, ll. 21-25. Petitioner responded that he had. App. 27, l. 1. When the judge asked if he had been over the evidence with his lawyer, Petitioner again responded that he had. App. 27, ll. 2-4.

Next, the judge wanted to know if Petitioner had "been over *every bit* of that evidence." App. 27, ll. 5-6 (emphasis added). Petitioner responded, "No ma'am, I wouldn't say every bit of it." App. 27, l. 7. The judge then indicated that she would not accept the plea: "If he doesn't know the evidence and he can't tell me if he believes that that's the evidence that the state has and he's been over it and he thinks there's evidence he hadn't been over I can't take the plea." App. 27, ll. 11-15.

A month later, Petitioner was tried, convicted, and sentenced to life imprisonment. App. 29; App. 470, ll. 5-10; App. 483, ll. 5-10; App. 600.

During the PCR hearing, trial counsel explained that he did not review the autopsy photographs with Petitioner prior to the guilty plea. App. 554, ll.18-23. Trial counsel believed that Petitioner still loved his wife, the deceased, and would not have wanted to see those photographs of her in that state. App. 554, l. 18 – App. 555, l. 4. It was trial counsel's understanding that when Petitioner told the judge he had not reviewed "every bit" of discovery, Petitioner was referring to the autopsy photographs. App. 554, l. 9 – App. 555, l. 4. Trial counsel agreed that it would have been very easy to remedy the problem – simply show the pictures to Petitioner. App. 555, ll. 5-9. Trial counsel further agreed that it was in Petitioner's best interest to enter into the plea agreement with the state. App. 555, ll. 10-13.

Contrary to the clear evidence in the record, the PCR court's order indicated that trial counsel believed Petitioner "likely did not agree with the state's reference to a broken photo frame of his wife." App. 593. According to the order, "the state's factual recitation … alleged that [Petitioner] 'smashed' a picture of the victim, his wife, in a buildup of anger and violence over the victim's new relationship." App. 593. While the state's factual recitation made such a claim,

Petitioner did not pose any objection to the claim or indicate he disagreed with the claim during the guilty plea hearing.

Importantly, the PCR judge found "trial counsel's testimony to be credible and persuasive." App. 592. Thus, the trial court found trial counsel's testimony that the reason Petitioner told Judge Goodstein he had not reviewed "every bit" of evidence with trial counsel was because he had not, in fact, reviewed "every bit" of evidence in the case because trial counsel and Petitioner decided that Petitioner would not look at the autopsy photographs. Despite finding counsel's testimony credible, the PCR judge found trial counsel "was not deficient because [Petitioner] was unable to successfully enter a plea of guilty." App. 593. According to the court, Petitioner "was unable to admit certain facts set forth by the solicitor were accurate." App. 593. The PCR judge found this inability "compounded with the fact that it seem[ed] Judge Goodstein was not in favor of an Alford plea where the facts set forth clearly show[ed] there was sufficient evidence for the jury to convict [Petitioner]." App. 593.

Additionally, the PCR court found Petitioner "failed to present any evidence to support a finding that he was prejudiced by the alleged deficiency." App. 593. The court further explained that a "plea judge will accept a plea if it is intelligently and voluntarily made." App. 593-594. What the PCR court found distinguishing in this case was that "[i]n the plea attempt, [Petitioner] did not agree with certain facts laid out by the state and that those facts would be sufficient for a jury to find him guilty." App. 594. Therefore, according to the PCR court, "[t]he court was correct in not accepting [Petitioner]'s plea." App. 594. Based upon these erroneous and unsupported findings of fact, the PCR court denied Petitioner relief.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 133, 141 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Robinson v. State, 422 S.C. 78, 85, 810 S.E.2d 32, 36 (2018). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

In Lafler, 566 U.S. at 161, the defendant initially expressed a willingness to accept a plea offer in court, but later rejected the offer based upon the advice of counsel. Thereafter, the defendant was tried, found guilty, and sentenced to substantially more time than the plea offer

would have provided. Id. On appeal to the United States Supreme Court, the parties agreed trial counsel's advice with respect to the plea offer constituted deficient performance. Id. at 163. The issue before the Supreme Court was held to apply Strickland's prejudice test where ineffective assistance resulted in rejection of a plea offer, and yet the defendant was convicted after a trial. Id. The Court held that in circumstances such as these, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, 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 were in fact imposed. Id. at 164.

Turning to the question of an appropriate remedy, the Court considered two scenarios. In the first scenario, where the defendant would have pled guilty to the same charges as the defendant was convicted after trial, the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors, he would have accepted the plea. If such a showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment per the offer, the sentence he received at trial, or something in between. Id. at 171. In the second scenario in which resentencing alone will not redress the issue, such as when the guilty plea offer was to counts less serious than the ones for which the defendant was convicted after trial, the proper remedy may be to require the prosecution to extend the offer again. The judge can then exercise discretion in deciding whether to vacate the conviction from trial and except the plea or leave the conviction undisturbed. Id. at171-172.

The Supreme Court analyzed a similar issue in Frye. The issue before the court was whether the constitutional right to effective assistance of counsel extended to negotiations and considerations of plea offers that lapse or are rejected. 5666 U.S. at 138. The Court held that

defense counsel has a duty to communicate formal offers from the prosecution that may be favorable to the accused. Id. at 145. The Court further held that to show prejudice from counsel's deficient performance where a plea offer has lapsed or been rejected, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer. In addition, defendants must show a reasonable probability the plea offer would have been entered without the prosecution canceling it, or the trial court refusing to accept it if they had the authority to exercise that discretion under state law. In short, the defendant must show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Id. at 146-147.

In Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009), the South Carolina Supreme Court said that to prevail on a claim of ineffective assistance of counsel based upon a claim that trial counsel failed to communicate a plea offer, the applicant must prove (1) counsel's failure to communicate the prosecution's offer constituted deficient performance, and (2) the applicant was prejudiced by this deficient performance. Specifically, the Court adopted the rule that "counsel's failure to convey a plea offer constitutes deficient performance." Id. at 609, 675 S.E.2d at 420. Concerning the prejudice prong, the Court held "a case-by-case approach is most consistent with our prior decisions and effectively achieves the ultimate goal of assessing whether but for counsel's deficient performance a defendant would have accepted the state's proposed plea bargain and that he would have benefited from the offer." Id. at 613, 675 S.E.2d at 422.

In Bell v. State, 410 S.C. 436, 442, 765 S.E.2d 4, 7 (Ct. App. 2014), this Court affirmed a PCR judge's conclusion that trial counsel provided ineffective assistance by failing to extend a plea offer to Bell. "[T]rial counsel testified Bell's file contained a note indicating the solicitor made an offer of ten years imprisonment." Id. Additionally, "Bell testified he did not know anything about a

plea offer until his sentencing." Id. The PCR court relied upon this evidence to find a plea offer was made by the state and not communicated to Bell. Id. The Court held there was evidence of probative value to support that finding. Id. Further, the Court relied heavily upon the fact that the plea offer was for ten years' imprisonment, but Bell was sentenced to twenty years' imprisonment, showing a significant difference in the sentencing, and thus, demonstrating prejudice. Id. at 443, 765 S.E.2d at 8. Additionally, the Court relied upon Bell's "self-serving" statement that he would have accepted the state's plea offer had he been presented with it to find Bell suffered prejudice from counsel's failure to convey the offer. Id.

Exploring plea negotiations is an important part of providing adequate representation to a criminal client. United States v. Almany, 621 F.Supp.2d 561, 569 (E.D. Tenn. 2008), cited in Gonzales v. State, 419 S.C. 2, 12-13, 795 S.E.2d 835, 840 (2017). This is no surprise in light of the vast number of guilty pleas heard every day in courtrooms throughout the country. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Missouri v. Frye, 566 U.S. 134, 143 (2012). "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." Id.

"Because ours is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." Id. at 143-144 (internal quotations omitted). "To a large extend … horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system."

Id. at 144 (internal quotations omitted). "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." Id.

No facts in the record supported the PCR court's factual finding that trial counsel believed Petitioner "likely did not agree with the state's reference to a broken photo frame of his wife." There was no indication during the attempted plea hearing or the PCR hearing that Petitioner indicated an unwillingness to go forward with the plea due to the state's claim about a broken frame. Although the state mentioned that Petitioner "smashed a picture" of himself and the deceased, the plea hearing transcript was devoid of any evidence whatsoever that Petitioner indicated he was disputing that fact or disputing the facts recited by the state. Further, trial counsel never said that he believed Petitioner likely did not agree with the state's reference to a broken photo frame. Contrary to the PCR court's order, trial counsel never made any such statement. This factual finding by the PCR judge warrants no deference as it is not supported by evidence in the record.

After the state presented the factual basis for the guilty plea, the judge somewhat confusingly asked, "Are those the fact[s], Mr. Benton, that you believe that the state could produce sufficient evidence to convict you and establish your guilt beyond a reasonable doubt?" App. 26, ll. 13-16. Petitioner responded, "I don't know, Your Honor." App. 26, l. 17. Realizing Petitioner did not understand the question, the judge asked it a different way, which she had promised to do if Petitioner did not understand something she said: "All right. And are those the facts for which you believe you would be found guilty?" App. 26, ll. 18-19. To this question, which was phrased more simply, Petitioner responded, "Yes ma'am." App. 26, l. 20. Judge Goodstein then posited:

> Well, if those are the facts which you think you would be found guilty of then why is it that you say that you don't know if those are the facts which you believe the state has evidence to present at trial; have you not been over the evidence that the state has available?

App. 26, ll. 21-25. Petitioner told the judge he had reviewed the evidence. App. 27, l. 1.

The judge asked again if he had "been over that evidence with [his] lawyer," and Petitioner responded that he had. App. 27, ll. 2-4. When the judge asked if he had "been over *every bit* of that evidence," Petitioner answered, "No ma'am, I wouldn't say every bit of it." App. 27, l. 7 (emphasis added). Then, the judge refused to accept the guilty plea, explaining

> I'm not going to take the plea. If he doesn't know the evidence and he can't tell me if he believes that that's the evidence that the state has and he's been over it and he thinks there's evidence he hadn't been over I can't take the plea.

App. 27, ll. 11-15.

The transcript of the attempted guilty plea hearing made clear – there was no dispute by Petitioner regarding the facts presented by the state. More specifically, there was no dispute by Petitioner regarding a smashed photograph during the guilty plea hearing. The PCR judge's factual finding to the contrary is not supported by the record.

Instead, Petitioner truthfully told the plea judge that he had not been over "every bit" of the evidence. During the PCR hearing, trial counsel admitted that Petitioner had not reviewed the autopsy photographs because the two had agreed that Petitioner would not want to see those. When the plea judge asked if Petitioner had "been over every bit of that evidence," Petitioner honestly responded that he had not been over "every bit of it." It was the fact that Petitioner was not familiar with all of the evidence against him that prompted the judge to refuse to accept the guilty plea. Had trial counsel performed reasonably in his representation of Petitioner by either showing the photographs to Petitioner or explaining to the judge that Petitioner's answer reflected that he had not viewed the autopsy photographs, then there is a reasonable probability that the outcome of the proceeding would have been different because the judge would likely have accepted the guilty plea.

Counsel could have explained that pursuant to controlling Supreme Court precedent, the state was not required to disclose "every bit" of its evidence prior to a guilty plea. United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding the Constitution does not require the disclosure of impeachment information prior to a guilty plea). As such, Petitioner could not say *under oath* that he had reviewed "every bit" of evidence the state had against him. Further, Counsel could have explained to Judge Goodstein that under the Rules of Professional Conduct he had withheld the autopsy photographs from Petitioner. See Rule 1.4 cmt. 7, RPC, Rule 407, SCACR. Thus, Petitioner's statements to the judge that he was generally familiar with the evidence against him and that he had not reviewed "every bit" of the state's evidence against him were true and permissible under the law. Most importantly, the fact that Petitioner had not reviewed "every bit" of evidence against him was hardly a basis for the judge to reject the plea and counsel could have easily explained the circumstances in order to ensure the judge accepted the plea.

In its return, the state argued that Petitioner failed to carry his burden of proof because "his only support for [his] allegation [was] his uncorroborated assertion at the PCR hearing that he had not seen all the evidence at the time of his plea proceeding." Ret. at 12. Although the state recognized trial counsel's admission that he had not shown Petitioner the autopsy photographs, the state continued to claim this evidence was insufficient. Ret. at 13. According to the state, trial counsel "at no point indicated he was certain what evidence Petitioner was referring to." Ret. at 13. Thus, the state concluded there was "no evidence counsel ever failed" to review evidence with Petitioner. Ret. at 13. Such a conclusion contradicts the very evidence presented at the PCR hearing when trial counsel testified and found to be credible by the PCR judge.

At the conclusion of his trial, Petitioner received a life sentence. This sentence was in stark contrast to the negotiated term of forty years, to which Petitioner had contracted with the state.

The attempted guilty plea hearing transcript manifested Petitioner's desire and intent to enter a guilty plea. The PCR hearing transcript also supported Petitioner's desire and intent to enter a guilty plea. During the trial, Petitioner did not deny shooting the deceased. Rather, his defense was that he shot the deceased in the sudden heat of passion based on sufficient legal provocation. See App. 360, l. 24 – App. 361, l. 2 (Petitioner's testimony); App. 423, ll. 4-18 (closing argument admitting guilt to voluntary manslaughter). Had trial counsel performed reasonably, then Petitioner would have received the benefit of the negotiated plea agreement – a sentence of forty years.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR judge, reverse his conviction, and remand for a new trial or for resentencing of Petitioner according to the terms of the plea offer rejected by the plea judge due to trial counsel's ineffectiveness.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Apr 13 2020
SC Court of Appeals

Appeal from Dorchester County

Benjamin H. Culbertson, Circuit Court Judge

RANDAL WILLIAM BENTON,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Sara Gunton, Esquire, at the primary email address listed in the Attorney Information System (AIS), which is saragunton@scag.gov; and a copy of the Brief of Petitioner has been served on Randal William Benton, #349652, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of April, 2020.

s/*Susan B. Hackett*

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ATTORNEY FOR PETITIONER