

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

May 22 2020

S.C. SUPREME COURT

MARCUS LAMONT SHEARIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000149

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
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ISSUE PRESENTED

Did plea counsel's failure to adequately communicate a plea offer made by the state to Petitioner violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel?

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Petitioner on May 6, 2016 for attempted murder and possession of a weapon during the commission of a violent crime. App. 79-82. On September 5, 2017, Petitioner pled guilty as indicted before the Honorable R. Keith Kelly. App. 1. Assistant Solicitor Jennifer Wells represented the state, and Michael C. Morin represented Petitioner. App. 1. Judge Kelly sentenced Petitioner to thirty years suspended upon the service of fifteen years and five years' probation for attempted murder and five years concurrent for the weapons offense. App. 15, 1.18 – 16. 1. 1.

On July 24, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 18-27. The state filed a return to this application dated May 1, 2019. App. 28-37. An evidentiary hearing was convened on October 8, 2019 before the Honorable G. Thomas Cooper. App. 38. Assistant Attorney General Jacob Isenberg represented the state, and Rodney Richey represented Petitioner. App. 38.

At the evidentiary hearing, Petitioner explained that he was originally represented by Roger Poole. While Poole represented him, the state offered to allow Petitioner to plead guilty with a sentence recommendation that did not include any incarceration. Instead, Petitioner would only be responsible for paying restitution related to the complainant's medical bills. Petitioner testified that he first learned of this offer on the record during a pretrial hearing. However, during the hearing, the solicitor asserted the offer had already expired. App. 45, ll. 1-9; App. 47, 1. 22 – 48, 1. 16; App. 50, 1. 1 – 51, 1. 1. Petitioner asserted that he would have accepted the offer if he had known about it before it expired. App. 45, ll. 10-12.

When Petitioner's plea counsel, Michael Morin, was appointed to represent Petitioner after Poole was relieved as counsel, Petitioner told Morin about the offer. App. 53, ll. 2-10.

Morin testified that the offer “seemed crazy” to him. However, he reached out to the assistant solicitor assigned to the case to confirm whether such an offer had ever been extended. The solicitor denied making a “restitution only” offer. App. 53, 2-18. The only offer Morin recalled was the offer Petitioner ultimately accepted. App. 53, l. 24 – 54, l. 6.

Jennifer Wells, the assistant solicitor who prosecuted the case, testified that she never offered to recommend a sentence that only included restitution and not any period of incarceration. App. 58, ll. 1-23. She maintained she never would have made such an offer. App. 58, l. 24 – 59, l. 5.

By order filed January 21, 2020, the PCR judge denied Petitioner relief. App. 67-78. The judge found Assistant Solicitor Wells testified credibly that the state never offered to recommend Petitioner only pay restitution if he pled guilty. App. 77. Consequently, the judge concluded Petitioner “failed to overcome the burden to prove he is now entitled to accept this offer based upon legal representation deficiencies.” App. 77-78.

Because plea counsel’s failure to adequately communicate a plea offer made by the state to Petitioner violated Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel, this petition for writ of certiorari follows.

ARGUMENT

Plea counsel's failure to adequately communicate a plea offer made by the state to Petitioner violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to adequately communicate a plea offer made by the state to Petitioner. Petitioner first learned of the offer on the record during a pretrial hearing. However, the solicitor made clear during the hearing that the offer had already expired. Petitioner was prejudiced by counsel's deficient performance because he testified that he would have accepted the "restitution only" offer and pled guilty if he would have known about it before it expired.

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) (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. "[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.” Id. at 145.

To prevail on his claim of ineffective assistance of counsel, Petitioner is required to prove that (1) plea 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. 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.” Id. 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.” Id. at 150-151.

In Lafler v. Cooper, 566 U.S. 156, 161 (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 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.

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. 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. Thus, this Court affirmed the PCR court's decision to grant Kolle relief. Id. at 593, 690 S.E.2d at 81.

In this case, Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to communicate the "restitution only" plea offer made by the state to Petitioner. Petitioner first learned of the offer on the record during a pretrial hearing. However, the solicitor made clear during the hearing that the offer had already expired. Petitioner was prejudiced by counsel's deficient performance because he testified that he would have accepted the "restitution only" offer and pled guilty if he would have known about it before it expired. Petitioner was further prejudiced because under the state's initial offer he would not have been required to serve any prison time. However, he was ultimately sentenced to fifteen years incarceration and is subject to an additional fifteen years if he violates his probation once he is released from the department of corrections.

Respectfully, this Court should hold the PCR judge erred by denying Petitioner relief, reverse Petitioner's convictions and sentence, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of May, 2020.

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Counsel for Marcus L. Shearin 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 October 8, 2019 before the Honorable G. Thomas Cooper, Jr., 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 Marcus L. Shearin.

Respectfully Submitted,

s/ Lara M. Caudy _____
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of May, 2020.

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.”

s/ Lara M. Caudy _____
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