STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

FRED JACK SANDERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000712

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when he failed to properly convey the state's guilty plea offer, to possession of heroin with intent to distribute, second offense, to Petitioner where trial counsel was on notice Petitioner wanted a guilty plea offer with the potential to have the entire sentence suspended on completion of the drug court program?

STATEMENT

During the September 2013 term the Richland County Grand Jury indicted Petitioner for possession of a controlled substance, possession of a firearm by a person convicted of a crime of violence, manufacturing methamphetamine, possession of methamphetamine with intent to distribute, possession of crack cocaine with intent to distribute, possession of heroin with intent to distribute. App. 693 - 710.

Petitioner proceeded to trial on March 17 – 19, 2014 before the Honorable G. Thomas Cooper, and a jury. App. 1. Lucas D. Hawks and John Christopher Shipman represented Petitioner. Id. Kathryn Cavanaugh and Foster M. Matthews represented the state. Id.

Prior to trial Petitioner pled guilty to possession of a firearm by a person convicted of a crime of violence and sentenced to five years' imprisonment. App. 149, l. 15 – 154, l. 4; App. 481, ll. 6 – 24. At the conclusion of his trial, Petitioner was found guilty of possession of a controlled substance, possession of crack cocaine, possession of methamphetamine, manufacturing methamphetamine, and possession with intent to distribute heroin. App. 458, l. 8 – 459, l. 4. Petitioner was sentenced to six months' imprisonment for possession of a controlled substance; five years' imprisonment for possession of crack; five years' imprisonment for possession of methamphetamine; twenty years' imprisonment for manufacturing methamphetamine; and twenty years' imprisonment for possession with intent to distribute heroin. App. 481, ll. 6 – 24. All of Petitioner's sentences ran concurrently. Id.

On June 9, 2014, Petitioner proceeded to a reconsideration hearing before the Honorable G. Thomas Cooper. App. 483 – 595. Lucas Hawks represented Petitioner. Id. Kathryn Cavanaugh represented the state. Id. Petitioner's twenty year imprisonment sentences for

manufacturing methamphetamine and for possession of heroin with intent to distribute, third offense, were reconsidered to fifteen years' imprisonment. App. 696 – 698; App. 708 – 710.

On July 28, 2017, Petitioner filed an application for post-conviction relief (PCR) alleging, among other arguments, that trial counsel provided ineffective assistance of counsel for failing to convey the state's guilty plea offer to possession of heroin with intent to distribute, second offense. App. 497 – 517. On January 24, 2018, the state filed its Return. App. 518 – 528.

On December 7, 2018, Petitioner proceeded to a post-conviction relief hearing before the Honorable Jocelyn Newman. App. 527. Tricia A. Blanchette represented Petitioner. Id. Lindsey A. McCallister represented the state. Id. On May 16, 2019, Judge Newman filed an order of dismissal denying Petitioner relief. App. 682 – 692.

This petition for writ of certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel when he failed to properly convey the state's guilty plea offer, to possession of heroin with intent to distribute, second offense, to Petitioner where trial counsel was on notice Petitioner wanted a guilty plea offer with the potential to have the entire sentence suspended on completion of the drug court program.

Relevant Facts

The state alleged that in April 2013, Petitioner was manufacturing methamphetamine and selling various drugs from his residence. App. 173, l. 7 – 177, l. 3; App. 178, l. 22 – 181, l. 13. A search warrant was executed on April 13, 2013 at Petitioner's residence. App. 174, ll. 5 – 7. The search allegedly produced methamphetamine, heroin, crack cocaine, as well as a "meth lab" that was not an "active cook" at the time the warrant was executed. App. 178, l. 22 – 181, l. 13; App. 203, l. 25 – 204, l. 4.

Prior to Petitioner's trial, there were extensive guilty plea negotiations between Petitioner and the state; however, no "offer sheet" was ever filled out memorializing the offers made by the state and rejected by Petitioner. App. 569, l. 21 – 572, l. 12.

At Petitioner's PCR hearing, the details of the plea negotiations were elucidated. Petitioner testified that trial counsel only conveyed a guilty plea offer from the solicitor for ten years' imprisonment. App. 636, l. 8 – 638, l. 14. Petitioner stated trial counsel never conveyed the guilty plea offer for possession of heroin with intent to distribute, second offense, "straight up." App. 667, ll. 3 – 10. Petitioner told trial counsel he wanted a guilty plea offer where Petitioner could get the maximum sentence "over his head," but the sentence could be suspended upon Petitioner's completion the drug court program. Id. Petitioner said that he would have

accepted the guilty plea offer to possession of heroin with intent to distribute, second offense, "straight up" if trial counsel conveyed the guilty plea offer to him. App. 641, ll. 3 – 10.

Petitioner testified that trial counsel never told him that the ten years' imprisonment guilty plea offer was withdrawn by the state. App. 640, ll. 3 – 11. He also stated that trial counsel explained the plea offer as ten years' imprisonment was guaranteed, not that it was a "cap" of ten years' and Petitioner could have received less than ten years' imprisonment if he accepted the solicitor's guilty plea offer. App. 642, l. 24 – 643, l. 7; App. 656, ll. 16 – 23. Petitioner testified that it was in his best interest to accept the "straight up" plea offer to possession of heroin with intent to distribute, second offense. App. 647, ll. 3 – 9.

Trial counsel testified at Petitioner's PCR hearing regarding the guilty plea negotiations as well. He explained that on September 10, 2013, the solicitor sent an email to him with a guilty plea offer to "ten years, the minimum, on PWID heroin third offense." App. 566, l. 25 – 567, l. 4. On October 22, 2013, trial counsel sent an email back to the solicitor stating that Petitioner rejected that initial guilty plea offer. App. 567, ll. 11 – 19.

Trial counsel then testified about a subsequent email regarding an updated guilty plea offer from the solicitor on March 3, 2014, where the solicitor offered "ten years as a PWID second" but then later in the email stated "sentencing up to the Judge." App. 570, 20 – 24. Trial counsel understood that guilty plea offer as possession with intent to distribute heroin, second offense "straight up" which would have a sentencing exposure of five to thirty years' imprisonment, with the potential of Petitioner having that prison sentence suspended. App. 570, l. 20 – 571, l. 13.

A few hours later on March 3, 2014, the solicitor sent a follow up email saying "scratch the ten years. I meant straight up plea." App. 571, ll. 19 – 24. Trial counsel understood that to

mean Petitioner would plead guilty "straight up" to possession of heroin with intent to distribute, second offense, and sentencing would be left to the plea court's discretion. Id. A final email was sent on March 5, 2014, where the solicitor informed trial counsel that the final guilty plea offer expired at the end of the week. App. 571, l. 25 – 572, l. 4.

Trial counsel also testified that it was his understanding that the best guilty plea offer in this case was to possession of heroin with intent to distribute, second offense, "straight up." App. 572, ll. 14 – 21. Trial counsel also admitted that he could not recall specifically conveying the possession with intent to distribute heroin, second offense, "straight up" guilty plea offer to Petitioner, but stated "there was no reason he wouldn't have conveyed that to [Petitioner]." App. 669, l. 18 – 670, l. 5. Trial counsel admitted that Petitioner told him he wanted a plea offer that had the potential for his sentence to be suspended upon completion of the drug court program. App. 567, l. 20 – 568, l. 10. The state's final plea offer of "straight up" to possession of heroin with intent to distribute, second offense, fit Petitioner's desired guilty plea offer.

Despite trial counsel testifying that he did *not* specifically recall conveying the "straight up" guilty plea offer to Petitioner, the PCR Court found that trial counsel did not provide ineffective assistance of counsel because he "specifically recalled telling [Petitioner] that the best plea offer from the state was for [Petitioner] to plead guilty 'straight up' to possession with intent to distribute, second offense." App. 678, ll. 7 – 13; App. 685 – 686. As a result, the PCR court denied Petitioner relief. App. 682 – 692.

Discussion

Trial counsel provided ineffective assistance of counsel when he failed to convey the state's guilty plea offer to possession of heroin with intent to distribute, second offense, where trial counsel was on notice that Petitioner would have accepted the guilty plea offer and where

trial counsel had no recollection of conveying the offer to Petitioner. App. 536, l. 8 – 538, l. 14; App. 641, ll. 3 – 10; App. 647, ll. 3 – 9; App. 667, ll. 3 – 10; App. 668, l. 18 – 670, l. 5

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 104 S.Ct. 2052 (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, 132 S.Ct. 1399, 1406 (2012) (quoting Padilla v. Kentucky, 130 S.Ct 1473, 1485 – 86 (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, 132 S.Ct. at 1407. "[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 1408.

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. Davie, at 610, 675 S.E.2d at 421. Our Supreme 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. Our Supreme 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 – 24.

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, at 1408. 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 1409. 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 1411.

In Lafler v. Cooper, 132 S.Ct. 1376, 1383 – 84 (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 victim] 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 assistance of counsel there is a reasonable probability that the defendant would have accepted the plea, 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 1385.

The Court held 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 1391.

Furthermore, in Lafler, the Court rejected the state'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." 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 1386.

Additionally, in Kolle v. State, 386 S.C. 578, 591 – 92, 690 S.E.2d 73, 80 (2010), our Supreme 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). Our Supreme 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, the Court affirmed the PCR court's decision to grant Kolle relief. Id. at 593, 690 S.E.2d at 81.

Here, Petitioner testified that trial counsel never conveyed the state's guilty plea offer to possession of heroin, second offense. App. 667, ll. 3 – 10. Moreover, Petitioner stated he would have accepted that guilty plea offer had he known of its existence. App. 641, ll. 3 – 10; App. 647, ll. 3 – 9. Petitioner also testified that he informed trial counsel he would accept a guilty plea that allowed for his sentence to be suspended upon completion of the drug court program, even if those sentences were the statutory maximum. App. 536, l. 8 – 538, l. 14. The state's guilty plea offer to possession of heroin, second offense was exactly what Petitioner desired in that Petitioner could have had his entire sentence suspended and he could have been admitted to the drug court program. App. 542, ll. 6 – 11. Furthermore, trial counsel admitted he had no recollection of conveying that guilty plea offer to Petitioner. App. 668, l. 18 – 670, l. 5. Accordingly, trial counsel provided ineffective assistance for failing to convey the state's guilty plea offer to Petitioner for possession of heroin with intent to distribute, second offense, with no

sentencing recommendation because trial counsel was on notice that Petitioner would have accepted that guilty plea offer if it was conveyed to him.

In the present case, Petitioner can demonstrate prejudice under Lafler because Petitioner showed that but for the ineffective assistance of counsel there is a reasonable probability that he would have accepted the guilty plea offer had it been conveyed to him. Petitioner also showed that the solicitor would not have withdrawn the guilty plea offer before he had the opportunity to accept it. Lastly, the court would have accepted the terms of the guilty plea and Petitioner's sentence under the offer's terms would have been less severe than under the judgment and sentence that were imposed after his trial. Lafler, at 1385.

Petitioner stated that he would have accepted the "straight up" guilty plea offer to possession of heroin with intent to distribute, second offense. App. 641, ll. 3 – 10. The March 5, 2014 email from the solicitor showed the guilty plea offer had an expiration date of one week, which guaranteed Petitioner the opportunity to accept it within the one week period. App. 571, l. 25 – 572, l. 4; App. 602, l. 22 – 603, l. 6. There was no evidence that the lower court would not have rejected the terms of the guilty plea as the possession with intent to distribute heroin, second offense, was a reasonable charge for Petitioner to plead guilty to, in light of the allegations against him at trial. Lastly, the sentence that Petitioner could have received under the guilty plea offer would have been less severe than the twenty years' imprisonment he received after being convicted at trial because his entire sentence could have been suspended upon his completion of the drug court program. App. 542, ll. 6 – 11.

Accordingly, trial counsel provided ineffective assistance of counsel that prejudiced Petitioner when he failed to convey the state's guilty plea to Petitioner where trial counsel was on notice Petitioner would have accepted the offer and Petitioner would have received a more

lenient sentence than he received at trial because the sentence could have been suspended upon completion of the drug court program. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) ("The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.)

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of December, 2020.