

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Saluda County

Honorable J. Derham Cole, Circuit Court Judge
—————

DAVID ANDREW BOWERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-001000
—————

PETITION FOR WRIT OF CERTIORARI
—————

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel provided effective representation where counsel did not adequately and reasonably advise Petitioner about the twelve-year plea offer in a clear and prompt manner?

STATEMENT

On October 8, 2012, Rusty Enlow discovered a series of sexually graphic text messages on his minor daughter's cellphone. App. 130-131. The text messages, which had been sent over the course of the previous day, were between Minor and Petitioner. App. 156, ll. 4-8; App. 157, ll. 4-18. Enlow, suspecting a sexual assault of Minor had occurred, took the phone to the Saluda County Sheriff's Department. App. 142, ll. 14-23. Minor was interviewed and eventually alleged that Petitioner had digitally penetrated her vagina and fondled her breasts. App. 162, ll. 7-25; App. 164, ll. 1-13.

Petitioner was arrested that same day and interviewed by Investigator Kenneth Clark. App. 207, ll. 14-24. Petitioner provided a written statement¹ wherein he admitted to exchanging text messages with Minor and digitally penetrating her vagina at her request. App. 213-214. Subsequently, during the February 2013 term of the Saluda County grand jury, Petitioner was indicted for one count of first degree criminal sexual conduct with a minor and one count of criminal solicitation of a minor. App. 464-465; App. 470-471.

At the PCR hearing testimony revealed that Petitioner believed he had received two separate plea offers. Petitioner believed the first offer was for a plea to a reduced charge with a range of zero to fifteen years imprisonment. He believed the second offer was to plead guilty for a ten year sentence. App. 405, ll. 6-11. However, according to Counsel Sheek the state only

¹ Petitioner challenged this statement prior to trial, alleging it was coerced and untrue. Petitioner testified he wrote the statement after being informed of Minor's allegations and being threatened with a lengthy prison sentence. Petitioner believed that he would be able to go home if he wrote out "what the cops wanted to hear." App. 70-77.

made a single plea offer for a negotiated twelve-year² sentence. App. 438, ll. 8-17. Petitioner wanted to take what he believed to be a ten-year plea offer but he was informed that the offer was “off of the table” when he tried to accept it. App. 405, ll. 12-16.

The state, represented by Ervin Maye, called the case to trial on February 4, 2014, before the Honorable William P. Keesley and a jury. App. 1. Petitioner was represented by Lance Sheek. App. 1. After a two-day trial the jury found Petitioner guilty as charged. App. 365, l. 23-App. 366, l. 12. Petitioner was sentenced³ to a term of imprisonment for twenty-five years on the criminal sexual conduct charge and ten years imprisonment on the solicitation of a minor charge, to run concurrently. App. 372, l. 16-App. 371, l. 13.

Petitioner’s convictions and sentences were affirmed by the South Carolina Court of Appeals in an unpublished opinion on June 15, 2016. State v. Bowers, Op. No. 2016-UP-252 (S.C. Ct. App. 2015). Petitioner filed an application for post-conviction relief on September 16, 2016. App. 373-79. The state submitted a return and motion to dismiss or motion for a more definite statement, dated August 24, 2017. App. 380-84. An amended PCR application was filed by PCR Counsel Thomas on September 12, 2017, alleging, *inter alia*, that counsel was ineffective for failing to “properly explain the ten-year plea offer.” App. 385-87. The state filed an amended return dated October 10, 2017. App. 388-95.

On February 23, 2018, a hearing was convened on Petitioner’s PCR application before the Honorable J. Derham Cole. App. 396. The state was represented by Susannah Cole.

² Although unclear from the transcript, it appears the plea would have been to a lesser included charge as the CSC with a minor first-degree charge carries a mandatory minimum twenty-five years.

³ In addition to the prison sentence, the court informed Petitioner that upon his release from prison he would be required to register as a sex offender and would have to submit to lifetime electronic monitoring. App. 370-371.

Tommy Thomas represented Petitioner. App. 396. Petitioner and trial counsel Lance Sheek testified at the hearing. App. 397.

Petitioner testified that Counsel Sheek had advised him that a plea deal was in his best interest based on the “type of charge” he was facing. App. 404, l. 23-App. 405, l. 4. According to Petitioner, he had a plea offer of a straight up plea to an unspecified charge for a range of zero to fifteen years. Petitioner stated he never heard anything else about that offer after it was initially explained to him. App. 450, ll. 6-10. Next, Petitioner stated he was offered a plea to ten years imprisonment. Petitioner testified that he told Counsel Sheek over text messages that he wanted to accept that plea the night it was offered. That same evening, Petitioner sent another text message to Counsel Sheek asking to wait until the morning to decide, but when he decided to accept the plea the following morning it was no longer available. App. 405, ll. 12-16; App. 416, l. 21-App. 417, l. 11.

Petitioner did state that he discussed what he believed to be a ten-year plea offer with Counsel Sheek and asked that he be given the night to sleep on it before deciding whether to accept the plea. Petitioner testified that the solicitor, Mr. Maye, would not give him over night to decide and that the state wanted “to know something right now.” App. 421, ll. 9-25.

When asked about the development of the plea negotiations, Counsel Sheek testified that he asked the solicitor for a plea to the lesser included charge of lewd act for a range of zero to fifteen years, but the state would not entertain that option. The Minor’s family wanted Petitioner to serve a ten-year prison sentence, so the state countered with an offer for a plea to a lesser

included charge for a negotiated twelve⁴ years imprisonment. App. 438, ll. 10-22. Counsel Sheek testified that,

“[T]hey made the offer, then they said if we didn't take it that term, it was gonna be no good. They didn't go to trial that term. We went back, asked Ervin [Maye, the Solicitor] if he would still leave it open ... I asked him if he would still leave it open. He said he would for that day and that's when we had the conversation that Mr. Bowers has testified about that he said can I think about it overnight. I went up and talked to Mr. Maye and he said no. It's now or never.”

App. 438, l. 22-App. 439, l. 5 (emphasis added).

An order of dismissal was issued on July 14, 2020. App. 447-461. The PCR court found that Counsel Sheek had adequately and reasonably advised Petitioner of the plea offer because Petitioner had testified that he had plea offers, and that Counsel Sheek had advised him to take a plea offer. App. 457. The PCR court further ruled that Counsel Sheek could not be found ineffective in failing to advise Petitioner regarding the plea when Petitioner “admitted he ignored counsel’s competent advice to accept the plea without delay.” App. 458. The order of dismissal did not address any potential prejudice regarding counsel’s alleged failure to properly explain the plea offer.

⁴ Twelve years on a violent, non-parole charge, would require the service of 85% of the sentence which is just over ten years.

ARGUMENT

The PCR court erred in finding that trial counsel provided effective representation where counsel did not adequately and reasonably advised Petitioner about the twelve-year plea offer in a clear and prompt manner.

During the pendency of the case the state only made a single plea offer – a negotiated plea for a twelve-year sentence of imprisonment. Petitioner was never offered a plea of a zero to fifteen-year sentence on a lesser included charge, nor was he ever offered a plea to a ten-year sentence. Petitioner’s testimony at the PCR hearing revealed that he did not understand the most basic terms of the plea offer he did receive. Further, Counsel Sheek’s testimony showed that he did not inform Petitioner of the twelve-year plea offer in a prompt manner, waiting until the day the offer expired to discuss the plea offer with Petitioner. This was deficient performance that resulted in prejudice to Petitioner as he lost the benefit of a favorable plea offer which he was inclined to accept and received a much harsher sentence after trial.

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, even if the plea offer is ultimately rejected. Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); 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). Regarding communicating information to a client, the South Carolina Rules of Professional Conduct state that a lawyer is required to “*promptly inform* the client of any decision or circumstance with respect to which *the client's informed consent...is required* by these Rules,” as well as “explain a matter to the extent reasonably necessary to permit *the client*

to make informed decisions regarding the representation.” Rule 1.4, RPC, Rule 407, SCACR (emphasis added).

In Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009), this Court adopted the rule that “counsel’s failure to convey a plea offer constitutes deficient performance.” Implicit in this rule is the duty to convey a plea offer in a prompt and clear manner so that the defendant has adequate time to make an informed decision. To determine prejudice this Court announced a case-by-case approach 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 2010, the United States Supreme Court 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.” Padilla v. Kentucky, 599 U.S. 356, 373 (2010). Two years later the Court decided two companion cases concerning a defendant’s right to effective assistance of counsel during the plea-bargaining process. In Frye and Lafler, *supra*, the Supreme Court held that failure of counsel to communicate a plea offer and properly advise a defendant as to the acceptance or rejection of that plea offer constituted deficient performance under the standards set forth in Strickland and Hill, *supra*.

In Frye the Court held that “defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” 566 U.S. at 145. The Court ruled that when Frye’s counsel allowed the plea offer to expire without advising the defendant of the offer or allowing him to consider it that defense counsel had not render effective assistance of counsel as required by the Constitution. Id.

In order to show prejudice from ineffective assistance of counsel where a plea offer lapsed or was rejected because of counsel's deficient performance the Court held that a defendant must show (1) a reasonable probability that he would have accepted the earlier plea offer, (2) a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, and (3) a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to lesser charge or a sentence of less prison time. Id. at 147.

In Lafler, the defendant had initially expressed a willingness to accept a plea offer in court, but later rejected the offer based upon the erroneous advice of counsel. 566 U.S. at 161. Thereafter, the defendant was tried, found guilty, and sentenced to substantially more time⁵ 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 rejection of the plea offer constituted deficient performance. Id. Thus the sole issue before the Court was how to apply Strickland's prejudice test where ineffective assistance resulted in rejection of a plea offer, and the defendant was convicted after the resultant trial. Id. at 163.

The Court held that when having to stand trial due to the deficient performance of counsel is the prejudice alleged, a defendant must show that there is a reasonable probability (1) that the defendant would have accepted the plea offer, (2) that the prosecution would not have withdrawn the plea offer in light of intervening circumstances, (3) that the court would have accepted the terms of the plea offer, and (4) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence were imposed.

⁵ In analyzing the specific prejudice suffer by the defendant the Court noted that the defendant received a minimum sentence three and a half times greater than the sentence he would have received under the plea offer. 566 U.S. at 174.

Id. at 164. Importantly, the Court stated that subsequently receiving a fair trial did not necessarily cure the errors of counsel that occurred during the pretrial stages. Id. at 166. This is because the question was “not the fairness or reliability of the trial, but *the fairness and regularity of the process that preceded [the trial], which caused the defendant to lose benefits he would have received in the ordinary course but for counsel’s ineffective assistance.*” Id. at 169 (emphasis added).

In the case at bar, Petitioner was offered a plea deal for a negotiated twelve-year sentence. According to the testimony of Counsel Sheek, that plea offer was made at the beginning of a term of court and was only valid for that duration of that term of court. When Petitioner’s case was not called to trial, Counsel Sheek requested that the state leave the offer open. Only when the state agreed to leave the offer open for the balance of the day did Counsel Sheek then discuss the matter with Petitioner. Counsel Sheek’s testimony indicated that he was aware of the offer for a number of days but only communicated it to Petitioner on the day it was set to expire.

The PCR court stated that because Petitioner was advised of the plea offer and advised to accept the plea that Counsel Sheek was not deficient. However, the court overlooked the fact that Counsel Sheek did not promptly convey the offer to Petitioner, waiting until the day the offer expired to discuss it with Petitioner, nor did Counsel Sheek clearly explain the pertinent details of the plea. Petitioner’s testimony revealed that he had no actual understanding of the single plea offer for twelve years. He believed that he had *two different plea offers* and that the offer he tried to accept was for *ten years*. Petitioner’s lack of understanding of the terms of the plea offer is further highlighted by the fact that even the amended PCR application references the ten year offer instead of the twelve year offer he received. The combined testimony of Counsel

Sheek and Petitioner show that Counsel Sheek's performance regarding conveying the plea offer in prompt and clear manner was deficient.

Petitioner's testimony made clear that he would have accepted the plea offer. He testified that he did in fact want to accept the plea offer but at the time he tried to accept it the state had withdrawn the offer. Notably, if Counsel Sheek had promptly informed Petitioner of the offer instead of waiting until it was set to expire, Petitioner would have had ample time to make the decision to enter the plea. There is nothing in the record to indicate that the plea would have been withdrawn prior to the expiration date. Further, it is extremely likely that the trial court would have accepted the plea offer being recommended by the state considering the facts of the case, Petitioner's age, and Petitioner's lack of a prior criminal record. Finally, the conviction and twenty-five year sentence that Petitioner received after trial was considerably harsher than the conviction to a lesser included charge for a twelve-year sentence that he would have received under the plea agreement.

Petitioner has shown that Counsel Sheek's performance regarding the prompt and clear communication of the twelve-year plea offer was deficient. Due to that deficient, Petitioner was forced to stand trial and upon conviction he received a sentence double that of the twelve-year plea offer. Thus, Petitioner has also established the actual prejudice he is required to show. Counsel Sheek's failure to promptly and clearly explain in the plea offer in a manner that allowed Petitioner to fully consider it and accept it was constitutionally ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of January, 2021.