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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO SALUDA COUNTY

Court of Common Pleas

The Honorable William P. Keesley, Trial Judge
The Honorable J. Derham Cole, Post-Conviction Relief Judge

Appellate Case No. 2020-0010000

DAVID BOWERS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI

Whether 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?

RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

The PCR court correctly determined trial counsel was not constitutionally ineffective during plea negotiations because ample probative evidence demonstrates counsel clearly communicated the State’s offer to Bowers and warned him the offer expired the following day where Bowers nonetheless ignored counsel’s advice and stated he wanted to think about it overnight. Even if counsel was somehow deficient for failing to adequately advise Bowers regarding the plea offer, the record is devoid of anything—including Bowers’ own testimony—indicating he would have accepted the plea offer in light of Bowers maintaining his innocence.

STATEMENT OF THE CASE

On October 8, 2012, David Bowers was arrested following an investigation into sexually explicit text messages the ten-year-old victim's father discovered on her cell phone. In October 2012, the Saluda County grand jury indicted Bowers for first-degree criminal sexual conduct (CSC) with a minor (2012-GS-41-0440). (App'x 470–71). Bowers was subsequently indicted for criminal solicitation of a minor (2013-GS-41-0010) in February 2013. (App'x 464–65).

On February 4, 2014, Bowers proceeded to a jury trial before the Honorable William P. Keesley. C. Lance Sheek, Esquire (Counsel) represented Bowers. Deputy Solicitor Ervin J. Maye prosecuted the case.

A. Summary of Evidence Adduced at Trial

Prior to the start of trial, Bowers requested the court conduct a *Denno*¹ hearing to determine whether Bowers' statement to the Saluda County Sheriff's investigator was voluntary. (App'x 55–80). At the time Bowers gave his statement, he was in custody and had waived his *Miranda* rights. (App'x 56–60, 67–69, 71, 75–77). Bowers wrote the statement himself, signed it, and two deputies witnessed it. (App'x 63–64, 67–68, 75–77). In his statement, Bowers admitted he touched the minor between her legs, put his hand down her pants, touched her breasts, and put his finger in her vagina. (App'x 64–65). Bowers claimed he was provoked by the ten year old victim. (App'x 64). The trial court found the statement admissible. (App'x 78–80).

¹ *Jackson v. Denno*, 378 US 368 (1964).

The victim's father, Russell, testified Bowers is his second cousin, who also worked for him. (App'x 118–21). Russell testified he provided a cell phone for his ten year old daughter to use during her custodial visits with his ex-wife. (App'x 124–25). On the day of the incident, Russell and his family and Bowers and his girlfriend attended a gathering to watch a football game. (App'x 121–22). Because Bowers' girlfriend left the gathering early, Bowers rode home with Russell and his family. (App'x 123–24). When they arrived back home around 11:00 PM, Russell went to bed while the children stayed up to watch a movie. (App'x 128–29). Russell testified he did not know Bowers was in the house at that time. (App'x 129).

The next morning, Russell felt something was unusual, so he reviewed the text messages from his daughter's phone. (App'x 130). In the messages, the victim and Bowers discuss feeling "horny," getting "drunk," being "sexy," and clearly refer to an incident that occurred on the car ride home the night before in which Bowers digitally penetrated the victim. (App'x 137–42). After finding the texts on his daughter's phone, Russell immediately took the phone to the sheriff's department. (App'x 142).

The victim testified she spent a great deal of time with Bowers because he babysat them sometimes and lived nearby. (App'x 151). The victim said Bowers taught her some of the graphic language she used in the texts. (App'x 155–56). The victim said the texts occurred over time. (App'x 156–57). The victim corroborated her father's testimony, explaining that after her family went to bed, she and Bowers stayed up to watch a movie. (App'x 159–60). Bowers first touched her leg, then put

his hand down her pants. (App'x 161–62). He touched her vagina and penetrated her with his fingers. (App'x 162–63). Bowers also touched her breasts. (App'x 162–63).

The victim was interviewed twice at the Dickerson Children's Advocacy Center, a child-focused facility that provides forensic interviews, forensic medicals, mental health and victim advocate services to victims of child abuse. During her testimony, the victim acknowledged that she first denied any sexual activity took place when she was examined at the Dickerson Center. (App'x 164–65, 171–74). However, she later told the sheriff's deputy what happened. (App'x 164–65, 171–74). She testified she initially denied what happened because she was embarrassed and scared. (App'x 164–65, App'x 173–74).

The State introduced copies of phone calls Bowers made to his girlfriend from the detention center following his arrest in which he admitted the assault of the child, but claimed he was drunk and said he was “pursued into that.” (App'x 219).

B. Bowers' Testimony

Bowers admitted he sent the text messages to the victim, but claimed he was only joking with the ten-year-old girl on the night in question. (App'x 240–41). He testified he never touched the victim or had any sort of sexual relationship with her. (App'x 241). Regarding one of the jail phone calls where Bowers told his girlfriend he “wished it hadn't happened,” Bowers testified by “it” he was referring only to the text messages he sent the victim. (App'x 246, 258–59). Bowers further testified that the statement he gave to law enforcement was not true. (App'x 244–45, 250–51).

C. Verdict & Subsequent Proceedings

On February 6, 2014, the jury convicted Bowers as indicted. (App'x 462, 468). Judge Keesley sentenced Bowers to concurrent terms of twenty-five years' imprisonment for first-degree CSC with a minor and ten years for solicitation of a minor. (App'x 463, 469).

Bowers filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins perfected Bowers' appeal by filing an *Anders*² brief with the Court of Appeals on the following issue:

Did the trial judge err in refusing to direct a verdict of acquittal for the charge of criminal solicitation of a minor when the State failed to introduce any evidence of the offense?

The Court affirmed Bowers' conviction and sentence on June 15, 2016. *State v. Bowers*, 2016-UP-252 (S.C. Ct. App. filed June 15, 2016). The case was remitted back to the circuit court on June 24, 2016.

Bowers timely commenced the underlying PCR action September 11, 2016. (App'x 373–79). On August 24, 2017, the State submitted its return and motion for a more definite statement. (App'x 380–84). Bowers, through PCR counsel, filed an amended application on September 12, 2017, raising the following grounds for relief (excerpted verbatim):

1. Ineffective assistance of trial counsel
 - a. Failure to bring out the fact that the results of the medical examination of the minor was negative.

² *Anders v. California*, 386 U.S. 738 (1967).

- b. Failure to bring out that the statement given by the Applicant by the police was coerced. He was told that if he signed the statement that he could go home. Counsel was ineffective for not filing a Motion to suppress this statement.
- c. Failure to investigate and bring out the relationship of the witnesses and that some of them were related to each other and their potential bias.
- d. Failure to properly explain the ten (10) year plea offer to the Applicant.
- e. Failure to file a Post-Trial Motion to reconsider the sentence.
- f. Failure to properly investigate the Jury Pool. One of the Juror's and the victim's Father were Facebook friends.

(App'x 385–87). The State requested an evidentiary hearing through its amended return on October 10, 2017. (App'x 388–95).

On February 23, 2018, the PCR court convened a hearing before the Honorable J. Derham Cole. (App'x 396–445). Bowers was present and represented by Tommy Thomas, Esquire. Assistant Attorney General Susannah Cole represented the State. Bowers and Counsel both testified. Judge Cole took the matter under advisement.

On July 14, 2020, Judge Cole issued an order denying relief and dismissing the action with prejudice. (App'x 447–61). This appeal follows.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The PCR court correctly determined trial counsel was not constitutionally ineffective during plea negotiations because ample probative evidence demonstrates counsel clearly communicated the State’s offer to Bowers and warned him the offer expired the following day where Bowers nonetheless ignored counsel’s advice and stated he wanted to think about it overnight. Even if counsel was somehow deficient for failing to adequately advise Bowers regarding the plea offer, the record is devoid of anything—including Bowers’ own testimony—indicating he would have accepted the plea offer in light of Bowers maintaining his innocence.

Bowers contends Counsel was ineffective for failing to adequately advise him of the State’s twelve-year plea offer in a clear and prompt manner. The PCR court rejected this claim, finding Counsel cannot be ineffective for failing to properly advise Bowers about the offer where Bowers admitted he ignored counsel’s competent advice to accept the offer without delay. Even if Counsel was somehow deficient in this regard, Bowers unequivocally testified at the PCR hearing that he *wanted* to go to trial and still maintains his innocence. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. *Id.* at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell

below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; see *Hill v. Lockhart*, 474 U.S. 52 (1985) (extending the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel).

“Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.” *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (citations omitted). In the context of plea negotiations, an attorney's failure to communicate a formal plea offer to a criminal defendant falls below an objective standard of reasonableness under *Strickland*. *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012); see *Strickland*, 466 U.S. at 688 (explaining that counsel has a duty “to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.”). In *Lafler*, and its companion case, *Frye*, the Supreme Court recognized that “the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.” *Lafler*, 566 U.S. at 170 (citing *Frye*, 566 U.S. at 143–44).

The defendant in *Lafler* ultimately proceeded to trial rather than accept a plea deal, and the parties conceded that counsel was deficient during the plea negotiation process. *Id.* at 166. Although the fairness of the trial was not contested, the Court expressly rejected the notion that “[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining.” *Id.* at 169. Such a position “ignores the reality that criminal justice today is for the most part a system of pleas, not a system

of trials.” *Id.* at 169–70.

Thus, the key question in *Lafler* was “how to apply *Strickland*’s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.” *Id.* at 163. Unlike *Hill*, the ineffective advice in *Lafler* “led not to an offer’s acceptance but to its rejection.” *Id.* In other words, “[h]aving to stand trial, not choosing to waive it, is the prejudice alleged.” *Id.* at 163–64; *see id.* at 169 (explaining that “the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel’s ineffective assistance”).

The Court ultimately held that, to show prejudice, the defendant must demonstrate a reasonable probability that (1) he would have accepted the plea offer; (2) the prosecution would not have withdrawn the offer in light of intervening circumstances; (3) the court would have accepted its terms; and (4) 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. *Lafler*, 566 U.S. at 164; *accord. Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018).

As an initial matter, the case *sub judice* is distinguishable from *Frye* and *Lafler* in that Bowers admits Counsel communicated the State’s plea offer to him. Bowers contends nonetheless that Counsel was ineffective for failing to *promptly* advise him of and adequately explain the plea offer. In support of his contention, Bowers points to his testimony indicating he had two offers—a zero to fifteen-year offer and a ten-year

offer. When viewed in the context of the rest of Bowers' testimony, however, it is clear he was using the term "offer" loosely in referring to possible sentences he discussed with Counsel.

Specifically regarding Bowers' claim he received an offer for zero to fifteen years, Bowers testified the solicitor told them he had to discuss the matter with the victim's family. (App'x 405). Bowers stated he never heard anything further about the possible zero to fifteen-year plea. (App'x 405). While Bowers referred to this as an "offer," it is clear from his testimony he did not interpret it as a formal offer.

As to Bowers' claim he did not understand the terms of the twelve-year offer, Counsel explained that the victim's family wanted Bowers to serve ten years. (App'x 438). Counsel testified the plea offer was technically for twelve years; however, the solicitor explained that they offered twelve rather than ten because Bowers would end up serving only serve 85%—approximately ten years—of the twelve-year sentence. (App'x 438). Bowers and Counsel therefore both referred to this offer as the "ten-year offer." (App'x 438).

Bowers further contends Counsel was ineffective for failing to *promptly* inform him of the offer, citing Rule 1.4 of the Rules of Professional Conduct. However, this Court held in *Langford v. State* that "the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993). Rather, "[t]heir purpose is to regulate and guide the legal profession by defining proper ethical conduct, and 'nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary

consequences of violating such a duty.’” *Id.* (quoting Rule 407, SCACR); *see* Rule 407, Scope of RPC (“Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.”).

Even if the Rules were relevant in assessing a claim of ineffective assistance of counsel, nothing in the record—including Bowers’ own testimony—indicates when specifically Counsel informed him of the twelve-year offer. Bowers’ testimony indicates only that he was not aware of the date the offer *expired* until the day before it was set to expire. Moreover, Bowers cannot show he was prejudiced in this regard because he admitted he was aware the offer would expire if he did not accept it that day. (App’x 417, 421). Bowers testified Counsel advised him to accept the offer in light of the evidence, but that he told Counsel he wanted to wait. (App’x 404–05, 417). He further recalled Counsel asking the solicitor if he would consider extending the deadline until the next day, but the solicitor refused. (App’x 421). Bowers explained that he told Counsel via text message later that night that he wanted to accept the offer; however, he then texted Counsel again and “said let’s hold up and wait until in the morning and they ended up taking it off the table.” (App’x 421).

Bowers cites this Court’s opinion in *Davie v. State* in support of his claim Counsel was ineffective for failing to promptly notify Bowers of the twelve-year plea offer. 381 S.C. 601, 675 S.E.2d 416 (2009), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. *Davie* is inapposite, however, because defense counsel in that case wholly failed to communicate the State’s fifteen-year offer to the applicant. In fact, counsel was not aware of the plea offer until after it already expired. *Davie*

ultimately pled “straight up” and received a twenty-seven year sentence. At some point during the plea hearing, the solicitor informed the plea court that the original offer had lapsed. This Court explained that, in light of the solicitor’s statement, “it was incumbent upon plea counsel to object or in some way indicate to the court that he had no knowledge of the original plea offer.” *Id.* at 610, 675 S.E.2d at 421. Counsel could have at that point tried to convince the solicitor to reinstate the plea offer or persuade the judge to impose a fifteen-year sentence. “Because counsel failed to make any attempt to protect [Davie]’s interests regarding this significantly lower sentence,” this Court concluded that counsel’s performance fell below the *Strickland* standard. *Id.* at 610–11, 675 S.E.2d at 421.

Applying the *Lafler* framework to Bowers’ case, the record supports the PCR court’s finding that Bowers failed to meet his burden under *Strickland*. It is undisputed that Counsel communicated the twelve-year plea offer to Bowers. Bowers knowingly let the offer expire; however, Counsel attempted to convince the solicitor to reinstate the offer. The solicitor refused.

Moreover, in *Davie*, the applicant and counsel both testified the applicant would have accepted the fifteen-year offer. Here, Bowers never testified he would have accepted the twelve-year offer—he instead testified he did not accept the offer because he is innocent. Therefore, he failed to establish a reasonable probability that he would have accepted the offer even if Counsel was somehow deficient. *See Hill*, 474 U.S. at 59 (“In the context of plea negotiations, the prejudice element turns on

whether counsel's performance affected the defendant's final decision to accept or reject a plea offer.

Because the record conclusively establishes Counsel fulfilled his duty to communicate all plea offers to Bowers, the PCR court properly found Bowers failed to meet his required burden under *Strickland*. See *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a PCR judge's factual finding will be upheld if supported by any evidence and a PCR judge's decisions will only be reversed where controlled by an error of law); *Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). Bowers' petition for a writ of certiorari should be denied.

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Bowers' PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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