

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

KENDRICK L. MIMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000190

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in finding defense counsel was not deficient for failure to convey petitioner's acceptance of the state's plea offer of five years' imprisonment, which was later withdrawn resulting in prejudice where petitioner ultimately went to trial and received a sentence of twenty-five years' imprisonment?

STATEMENT

In May 2013, a Lexington County grand jury indicted petitioner for trafficking cocaine, four hundred or more grams. App. 458-59. On February 10, 2016, petitioner proceeded to trial before the Honorable R. Knox McMahan and a jury. App. 1. Robert (Theo) Williams represented petitioner. Gil Bell, assistant solicitor, and Casey Rankin, assistant solicitor, represented the state. App. 1. Petitioner was found guilty, as indicted, on February 11, 2016. App. 332. Judge McMahan sentenced petitioner to twenty-five years' imprisonment and imposed a fine of \$200,000.

Petitioner, through appellate counsel, Taylor Gilliam, filed an appeal arguing the trial court erred in qualifying an officer as an expert in cocaine valuation where the testimony did not assist the jury and where the testimony's probative value was substantially outweighed by the danger of unfair prejudice. The Court of Appeals affirmed petitioner's conviction and sentence. *State v. Mims*, Op. No. 2017-UP-389 (S.C. Ct. App. filed October 18, 2017).

Thereafter, petitioner filed an application for PCR on September 11, 2018. App. 342-47. On December 15, 2020, an evidentiary hearing was held before the Honorable Debra R. McCaslin. App. 373. Tommy Thomas represented petitioner, and Lillian Meadows, assistant attorney general, represented the state. App. 373.

On January 28, 2021, Judge McCaslin signed an order denying PCR. App. 435-56. Judge McCaslin found petitioner failed to demonstrate he was offered a five-year negotiated plea agreement, noting there was nothing in the record, beyond petitioner's own testimony, indicating Solicitor Bell made such an offer. Additionally, Judge McCaslin found defense counsel did not deficiently allow petitioner's plea offer to expire without consulting him and petitioner failed to demonstrate counsel's representation fell outside the range of competent assistance. Lastly,

Judge McCaslin found petitioner failed to show he was prejudiced because petitioner's testimony precluded the court finding he intended to plead guilty prior to the alleged error by counsel and that, beyond his own testimony, petitioner did not present evidence suggesting he expressed any desire to plead guilty. App. 449-51.

This appeal follows.

ARGUMENT

The PCR court erred in finding defense counsel was not deficient for failure to convey petitioner's acceptance of the state's plea offer of five years' imprisonment, which was later withdrawn resulting in prejudice where petitioner ultimately went to trial and received a sentence of twenty-five years' imprisonment.

Relevant facts

In February 2013, state trooper Adam Antley pulled over a truck for speeding. Petitioner was the passenger in the truck. After speaking with Antley, petitioner admitted he had been drinking and Antley seized and emptied an open container of beer. App. 50-57. Antley proceeded to conduct a field sobriety test on the driver, Brian Vanderhall. App. 61. Next, Antley requested petitioner get out of the vehicle so that he could pat him down for possible weapons. App. 63. At trial, Antley alleged that while conducting the pat down he felt a hard object in petitioner's pants that he believed could be a weapon. Antley requested petitioner get on his knees. Antley claimed petitioner refused to comply with his requests and petitioner ran. App. 66-73.

Antley pursued petitioner, tasing him twice and eventually drawing his gun. App. 74-80. Antley soon closed the gap between them and although petitioner had his back to him, Antley testified he saw petitioner remove an object from his pants, place it on the ground, and try to cover it with leaves. App. 82-83. Once petitioner was handcuffed Antley found a package nearby containing a white powder substance that was later tested and found to be 997 grams of cocaine. App. 87-89; 261.

The jury convicted petitioner as indicted, and he was sentenced to twenty-five years' imprisonment.

At the evidentiary hearing, petitioner testified that he hired Theo Williams as his attorney and was out of jail on bond for three years before his trial. App. 380. Petitioner insisted, more than once, that he never wanted to go to trial and wanted to accept a five-year negotiated plea offer from the state. App. 380; 382. Petitioner said he went to court in December 2015, for an appearance. Ben Stitely, Williams' law partner, assisted petitioner because Williams had to be in court elsewhere. Petitioner testified that he told Stitely that he wished to accept the state's negotiated plea offer that day. However, petitioner did not want to plead guilty that day but asked Stitely to request a continuance so that he could discuss the offer further with Williams before pleading guilty. App. 383. Petitioner called Williams after leaving court and told him that he did not want to go to trial. App. 385. Petitioner maintained that he did not understand that if he did not plead guilty that day the offer would be withdrawn. App. 386; 391. Petitioner testified that he ultimately went to trial because when the five-year offer was withdrawn, the state changed the offer from five years to a range of five to twenty-five years and he took his chances at trial. App. 387.

Petitioner's girlfriend, Misty Davis, testified that petitioner never wanted to go to trial and that he wanted to plead guilty to this charge. Davis testified about the December 2015, court appearance. She said that when they left court, petitioner called Williams and said, "I'm not going to trial, am I," and Williams assured petitioner he would not be going to trial. App. 397-99.

Counsel Williams testified there were negotiations with the state regarding a plea deal for petitioner. He said the state offered petitioner the choice between pleading guilty to possession, second offense, which carried five to thirty years, or pleading guilty to trafficking, first offense, which carried seven to twenty-five years. App. 403-04. Counsel said he continued to try to

negotiate a better offer from the state because petitioner was not satisfied with those offers. App. 404. Counsel stated that he was not sure if the state's offer "was ever five years," but then qualified that statement saying, "if I'm wrong, I'm wrong." App. 404, ll. 11-14. Counsel admitted petitioner would have pled guilty to a five-year sentence if it had been offered. App. 405. Williams stated that his office received an email from the state before petitioner's December 2015 appearance indicating that all offers had expired, and a trial date would be set for the following February. App. 405. After that Williams said he continued to negotiate with the state and try to obtain a better offer for petitioner. App. 405, l. 23-25; 408. Williams testified that it was his understanding after the December 2015, appearance that petitioner did not want to plead guilty and they should begin preparing for trial. 406.

Ben Stitely testified he stood in for Williams at a few of petitioner's appearances in court including the December 2015 appearance. Stitely recalled that there were two or three "plea dates" scheduled, one for September 2015 and another for December 2015. App. 424. Stitely said the plea offer from the state in December 2015 was without negotiation or recommendation and he informed petitioner the sentence would be anywhere from five to thirty years and there was no guarantee petitioner would get five years. App. 424-25

Discussion

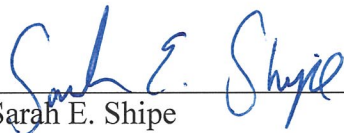
The PCR court erred in finding that there was nothing in the record, beyond petitioner's testimony, indicating the state ever made an offer of five years. At times, Counsel Williams' testimony indicated that he was unsure if five years was ever offered to petitioner. Williams' hedged saying, "if I'm wrong, I'm wrong." Defense counsel was deficient for failure to convey petitioner's acceptance of the state's plea offer. *See, e.g., Sprouse v. State*, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003) (finding defendant was entitled to post-conviction relief where the

State failed to honor the plea agreement it made with defendant and counsel failed to ensure that the State adhered to the original plea agreement); *Thompson v. State*, 340 S.C. 112, 116–17, 531 S.E.2d 294, 296–97 (2000) (concluding defendant established a claim for ineffective assistance of counsel where counsel failed to object when the solicitor recommended the maximum sentence in violation of the plea agreement); *Jordan v. State*, 297 S.C. 52, 53–54, 374 S.E.2d 683, 684–85 (1988) (holding counsel rendered ineffective assistance of counsel in failing to withdraw guilty plea after State reneged on plea, and reasoning that counsel's conduct in not protecting defendant's right to enforce the plea agreement with the solicitor's office fell below “prevailing professional norms”).

The PCR court erred in finding petitioner failed to show he was prejudiced because his testimony precluded a finding that he intended to plead guilty prior to the alleged error by counsel. Petitioner testified during the evidentiary hearing consistently that he did not want to go to trial and that he wanted to plead guilty. His testimony was corroborated by Misty Davis’ testimony that he did not wish to go to trial. Williams’ testimony supports petitioner’s allegation that he wished to plead guilty where he testified that he attempted to negotiate a plea offer with the state. Petitioner was prejudiced by defense counsel’s error when the state withdrew the offer and petitioner was sentenced after a trial to twenty-five years’ imprisonment. *Davie v. State*, 381 S.C. 601, 614, 675 S.E.2d 416, 423 (2009), abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (concluding that the difference in the sentence petitioner received and the plea offer is proof of prejudice where counsel admitted he failed to communicate plea offer to petitioner, counsel and petitioner both testified if offer had been communicated petitioner would have accepted, and solicitor and counsel both acknowledged the state originally offered particular sentence).

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be granted to allow full briefing on the issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2021.

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Counsel for Kendrick L. Mims states:

1. She is 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 before Judge Debra R. McCaslin, which was held on December 15, 2020, 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 Kendrick L. Mims.

Respectfully Submitted,



Sarah E. Shipe

Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2021.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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."



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