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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable R. Scott Sprouse, Circuit Court Judge

TERRY MCCALL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000385

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR court err in finding counsel effective where counsel failed to convey a ten-year plea offer to Petitioner which resulted in Petitioner proceeding to trial and receiving a sentence of fifteen years?

STATEMENT OF THE CASE

In February of 2015, the Greenville County grand jury indicted Petitioner, Terry McCall, for felony DUI resulting in great bodily injury. App. 530-31. The charges arose from a collision that occurred on March 4, 2012, at SC Highway 291 and Worley Road in Greenville County where Petitioner veered across the median and struck the pick-up truck of Robert Suddeth head on. App. 146, l. 22- App. 147, l. 15. Both Petitioner and Mr. Suddeth had to be extracted from their respective vehicles by the fire department and emergency personnel prior to being transported to the hospital. App. 199, 1. 4- App. 200, l. 13; App. 204, ll. 10-18.

Trooper David McAlhaney with the South Carolina Highway Patrol (SCHP) was the primary investigator assigned to the wreck. App. 218, ll. 16-17. While investigating the scene of the accident, Sergeant Hiatt, also of the SCHP, informed Trooper McAlhaney that he had spoken with Petitioner in the ambulance and suspected that Petitioner was "on some kind of drug." Hiatt also noted that Petitioner's eyes were "glassy" and his pupils were dilated. App. 213, l. 25-App. 214, l. 9. McAlhaney traveled to the hospital to interview Petitioner. Petitioner told McAlhaney that the wreck occurred because he did not have functioning brakes on his car. App. 222, l. 6- App. 223, l. 9.

McAlhaney observed that Petitioner's eyes were "sleepy" and when asked a question he would "open his eyes real wide and answer and reply to it." Based on Petitioner's reactions to questions, McAlhaney "knew something wasn't right." When questioned about drinking alcohol, Petitioner stated he had not been drinking but admitted to taking prescription medication. App. App. 223, ll. 14-22. Based on the evidence at the scene, the statements of the witnesses, Petitioner's admission to driving a vehicle without working brakes, and Petitioner's

reactions to questioning, McAlhaney charged Petitioner with felony driving under the influence resulting in great bodily injury. App. 224, ll. 17-25.

Petitioner was read his implied consent rights and agreed to provide blood and urine samples. App. 225, ll. 7-13; App. 227, ll. 13-18. Registered Nurse Ashley Norman obtained the requested samples. Prior to drawing blood from Petitioner, Nurse Norman confirmed with Petitioner that law enforcement had requested the sample and that he had agreed to provide one. App. 241, ll. 2-5; App. 243, ll. 12-15. Petitioner's blood sample was analyzed by a forensic toxicologist at South Carolina Law Enforcement Division. The sample tested positive for methamphetamine and benzodiazepines, including Lorazepam and Klonopin. An analysis of Petitioner's urine sample confirmed the results of the blood test. App. 288, ll. 11-12; App, 293, ll. 6-15; App. 294, ll. 2-21.

On May 12, 2015, Petitioner proceeded to trial before the Honorable Robin Stilwell and a jury. The state was represented by Sara Drawdy and Stan Overby. App. 1. Petitioner was initially represented by Randy Chambers. App. 1. However, at the start of the second day of trial Petitioner moved to relieve Counsel Chambers and requested to continue the case so that he could obtain private counsel. The court granted Petitioner's motion to relieve Counsel Chambers but denied Petitioner's request for a continuance. Petitioner was required to proceed *pro se* and Jake Erwin was appointed as standby counsel. App. 167-179. At the conclusion of the three-day trial, the jury found Petitioner guilty as charged. Judge Stilwell sentenced Petitioner to a term of imprisonment of fifteen years, with credit for time served since Petitioner was first ticketed, and a recommendation that Petitioner be screened for the Addition Treatment Unit within the Department of Corrections. App. 383, ll. 1-5; App. 388, l. 19-App. 389, l. 7.

Petitioner appealed his conviction and sentence. This Court affirmed Petitioner's conviction in a published opinion. State v. McCall, 429 S.C. 404, 839 S.E.2d 91 (2020); App. 533-617. Petitioner subsequently filed an application post-conviction relief on March 10, 2020, initially alleging twenty-three grounds of ineffective assistance of counsel. App. 626-636. Petitioner elected to proceed *pro se* in his PCR matter. App. 698-702. Petitioner proceeded to file fourteen amendments to his original PCR application along with various motions for injunctions, summary judgment, and a motion for bail. App. 637-697; App. 703-829. The State filed an initial return dated June 16, 2020, and an amended return dated December 10, 2020. App. 830-868. The State also filed a return to Petitioner's motion for bail on November 5, 2020. App. 869-871.

An evidentiary hearing was convened on January 5-6, 2021, before the Honorable R. Scott Sprouse. Petitioner proceeded *pro se* and the State was represented by Taylor Z. Smith. App. 937; App. 1081. At the start of the hearing Petitioner informed the PCR court that he only intended to go forward on four claims, one being that the State extended a plea offer of which trial counsel did not inform him. App. 942, l. 8-App. 943, l. 10. Petitioner also abandoned all of the motions he had filed, with the exception of the motion for bail which was denied by Judge Sprouse. App. 947, ll. 16-19; App. 951, ll. 22-25.

Petitioner testified that Counsel Chambers did not convey a plea offer for ten years to him. According to Petitioner, the State extended the offer on January 2, 2013, but Counsel Chambers only told him about the plea in 2015. The plea had allegedly expired on the same day that this was extended, January 2, 2013. Petitioner stated that Counsel Chambers told him he was sorry that he had not discussed the plea with him. App. 997, ll. 9-17. Petitioner testified multiple times that he would have taken the plea had he known it had been offered. App. 997, l.

25-App. 999, l. 8. During cross examination, Petitioner stated that even though he believed his arrest to be illegal, he would have plead guilty if Counsel Chambers had conveyed the plea offer to him. App. 1007, ll. 15-22.

In contrast, Counsel Chambers testified that he knew for a fact that he had reviewed the ten-year plea offer with Petitioner and Petitioner had turned it down. Counsel Chambers testified that "[t]here was never any point in this case where he [Petitioner] indicated to me that he intended to do anything but take this case to trial." App. 1018, ll. 1-8; App. 1024, l. 24-App. 1025, l. 1. On cross examination, Counsel Chambers testified that he did not recall on what date he discussed the plea offer with Petitioner but stated that there was no reason for him to force Petitioner to go to trial. He stated that he would have loved for Petitioner to have taken the plea offer. Petitioner clarified that there was not a record of him declining the plea offer. App. 1071, ll. 7-18.

The final witness to testify was the lead solicitor who prosecuted the case, Sara Drawdy. Ms. Drawdy testified that she remembered sending a plea offer and although she no longer had access to the file, she thought ten years sounded correct. She stated that she discussed renewing the offer with Counsel Chambers but that Counsel Chambers stated Petitioner was not interested in any offer at all. App. 1088, ll. 12-24. Ms. Drawdy testified she witnessed Counsel Chambers go into a conference room with Petitioner immediately following a discussion she had with him about the plea offer. When Counsel Chambers came out of the conference room, he told her Petitioner was not interested in pleading under any circumstances. App. 1090, l. 19-App. 1091, l. 1. When Petitioner questioned Ms. Drawdy on cross examination, she confirmed that she had never heard him state he did not want to plead and that there was not a record of him rejecting the plea offer. App, 1097, l. 22-App. 1098, l. 3.

At the conclusion of the hearing, the PCR court took the matter under advisement. App. 1124, l. 1. An order of dismissal was filed on March 3, 2021 denying all of Petitioner's claims. App. 1139-1178. Regarding the plea offer, the court found that trial counsel's credible testimony that he reviewed the offer with Petitioner was corroborated by the testimony from Ms. Drawdy. Further, the court ruled that Petitioner's "fixation on the alleged illegitimacy of his arrest...belies his testimony that he wanted to plead guilty and would have taken the plea offer if he had known of it before it expired." App. 1176-1177.

ARGUMENT

The PCR court erred in finding counsel effective where counsel failed to convey a ten-year plea offer to Petitioner which resulted in Petitioner proceeding to trial and receiving a sentence of fifteen years.

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).

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." 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*.

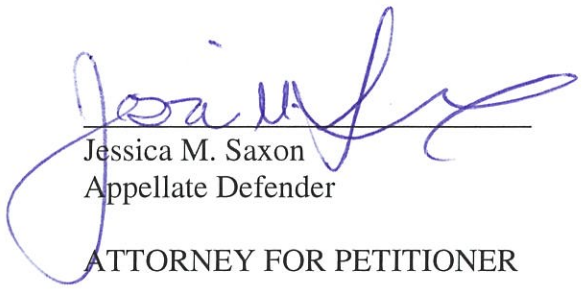
Petitioner repeatedly testified that he was not informed of the plea offer but would have taken the offer had it been conveyed to him. Notably, the testimony from both Counsel Chambers and Ms. Drawdy was that there was not a record of him formally rejecting the plea offer. In fact, neither Counsel Chambers nor Ms. Drawdy had access to their case file at the time of the PCR hearing and could not even provide dates as to when the supposed plea offer discussion occurred. While the court found Counsel Chambers testimony credible, it was not supported by any documentation.

Further, the court relied upon the fact that Petitioner was also challenging the legitimacy of his arrest on PCR to conclude that he would not have plead guilty. This was improper. Petitioner was not limited in what he could assert on PCR simply because the issues seemed to be at odds with one another. Petitioner was able to assert that he would have pled guilty had he known of the offer and that his arrest was illegal as the concepts were not mutually exclusive. In was improper for the court to rule that challenging the legitimacy of his arrest essentially foreclosed any claim that Petitioner would have pled guilty had he been advised of the plea offer.

Finally, Petitioner has proven prejudice. The testimony was that the plea offer was for ten years, five years less than his eventual sentence after trial. Based on the standard set out in Davie, *supra*, Petitioner has shown he would have benefited from the offer. That, along with his testimony that he would have pled had he known of the offer, met his burden to show prejudice.

CONCLUSION

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



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This 22nd day of February, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terry McCall 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 J. Cordell Maddox, which was held on January 5-6, 2021, 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 Terry McCall.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2022.

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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."

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