

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

ANTHONY STEVENS BANKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001327

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the post-conviction relief court err in denying Petitioner's application for relief where his plea counsel conveyed a fifteen-year plea offer but failed to subsequently follow up with Petitioner on his decision which ultimately resulted in the fifteen-year plea offer expiring and Petitioner pleading guilty instead to a seventeen-year sentence?

STATEMENT

Petitioner was indicted in August 2018 by the Spartanburg County Grand Jury for first-degree criminal sexual conduct with a minor under the age of eleven. Petitioner was subsequently indicted in October 2018 by the Spartanburg County Grand Jury for possession with intent to distribute marijuana, possession with intent to distribute methamphetamine, trafficking in cocaine, and escape. App. 103 – 114.

On February 13, 2019, Petitioner appeared before the Honorable J. Mark Hayes, II and pled guilty to the escape and drug charges for a negotiated sentence of seventeen-years imprisonment. App. 1 – 4. The criminal sexual conduct charge was dismissed. Petitioner was represented by Brendan Delany and the state was represented by Wendy Hallford. App. 1. Petitioner did not appeal his guilty plea.

Petitioner filed an application for post-conviction relief on October 21, 2019 and the state filed its Return on March 6, 2020. App. 18 – 42. An evidentiary hearing was held on September 16, 2021 before the Honorable William A. McKinnon. Susannah Ross represented Petitioner and Chelsey Marto represented the state. App. 43 – 44. Petitioner and his plea counsel Brendan Delaney testified. App. 45.

PCR counsel argued that plea counsel was ineffective “for allowing a prior plea offer of 15 years to expire before accepting it” and cited to Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) for support. App. 48, ll. 8 – 14.

Petitioner testified that his plea counsel, Delaney, came and saw him while he was housed at the jail and told him that a plea offer of fifteen years had been made by the state. App. 50, ll. 18 – 25. Petitioner told plea counsel that he needed some time to speak with his family about it. App. 51, ll. 4 – 11. After speaking with his family, Petitioner decided he wanted to

accept the fifteen-year offer, so he wrote¹ to plea counsel asking counsel to come see him at the jail. Petitioner did not receive a response from counsel, so Petitioner wrote counsel again asking counsel to come see him before the deadline when the fifteen-year plea offer was set to expire. App. 51, l. 21 – 52, l. 5; app. 88 – 90.

Petitioner recalled that approximately one month later he received a message from plea counsel that counsel would come visit him at the jail soon. When counsel finally came to visit Petitioner at the jail, counsel informed Petitioner that the plea offer was seventeen-years imprisonment. When Petitioner asked what happened to the fifteen-year plea offer, plea counsel responded, “we can’t talk about that.” App. 66, l. 9 – 67, l. 4. Petitioner testified that he would have pled guilty to the fifteen-year plea offer if counsel had gotten in touch with him before the deadline expired. App. 69, ll. 8 – 15.

¹ Petitioner attempted communicating with plea counsel through a kiosk that allowed Petitioner to essentially send plea counsel e-mails. Plea counsel testified that these kiosk messages were not a safe method of communicating with his clients. App. 80, ll. 14 – 24.

ARGUMENT

The post-conviction relief court erred in denying Petitioner's application for relief because his plea counsel conveyed a fifteen-year plea offer but failed to subsequently follow up with Petitioner on his decision which ultimately resulted in the fifteen-year plea offer expiring and Petitioner pleading guilty instead to a seventeen-year sentence.

In order to prove ineffective assistance of counsel, Petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

Criminal defendants have a right to effective assistance of counsel during the plea negotiating process. Missouri v. Frye, 566 U.S. 134, 144 (2012). This includes defense counsel's "duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Id. "Generally, where defense counsel does

not communicate such an offer to the defendant, counsel has rendered ineffective assistance.” Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876-877 (2018).

In order to show prejudice from defense counsel’s failure to relay a plea offer, “a defendant must demonstrate a reasonable probability that: (1) he ‘would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;’ (2) ‘the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it;’ and (3) ‘the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.’” Collins at 262, 810 S.E.2d at 877 (quoting Missouri v. Frye, 566 U.S. at 147).

In Davie v. State, 381 S.C. 601, 605, 675 S.E.2d 416, 418 (2009), the defendant pled guilty to several drug charges and received an aggregate sentence of twenty-seven years imprisonment. The defendant then filed a PCR application in which he alleged that his plea counsel had failed to inform him of a previous plea offer of fifteen-years imprisonment. Id. at 606, 675 S.E.2d at 418. The defendant stated that he would have accepted the offer if it had been communicated to him. Id. Plea counsel in Davie testified that he was not aware of the fifteen-year plea offer until after it had already expired but agreed that Petitioner would have likely accepted the offer had he been aware of it. Id. at 606, 675 S.E.2d at 419.

This Court ultimately concluded that plea counsel was ineffective for failing to inform the defendant of the fifteen-year plea offer. Id. at 610, 675 S.E.2d at 421. In discussing plea counsel’s explanation that he was not aware of the plea offer until it was already expired, this Court reasoned:

Even if counsel is given the benefit of the doubt that he was not aware of the plea offer until after the expiration date, we find counsel was deficient in not objecting at the plea hearing. During the plea hearing, the solicitor informed the circuit court judge that “[t]he original plea offer in this matter has not been accepted by

the due date of September 11th of this year, and so we told the defendant we were ready to go to trial.” In view 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. Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence. Because counsel failed to make any attempt to protect Petitioner's interests regarding this significantly lower sentence, we conclude counsel's performance fell below the prevailing professional norms and, thus, constituted deficient performance.

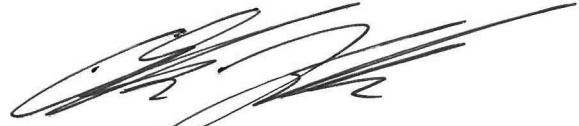
Id. at 610–11, 675 S.E.2d at 421. This Court went on to hold that the defendant was prejudiced by plea counsel’s failure to relay the plea offer because the defendant would have received a significantly lower sentence than the twenty-seven years that he ultimately did receive. Id. at 614, 675 S.E.2d at 423.

Here, Petitioner was prejudiced by plea counsel’s ineffective assistance by failing to adequately communicate with Petitioner to ensure that Petitioner had an opportunity to accept the fifteen-year plea offer before it expired. Counsel’s failure to maintain communication with Petitioner resulted in the plea offer expiring. After the fifteen-year plea offer expired, the state increased the offer to seventeen years which Petitioner begrudgingly accepted. However, Petitioner clearly stated at his PCR hearing that he would have taken the fifteen-year plea offer had counsel communicated with him prior to the plea offer expiring.

As a result of counsel’s ineffective assistance, Petitioner was sentenced to seventeen-years imprisonment instead of fifteen years. The PCR judge erred in finding that plea counsel was not ineffective.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of March, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Stevens Banks states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge William A. McKinnon, which was held on September 16, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Anthony Stevens Banks.

Respectfully Submitted,



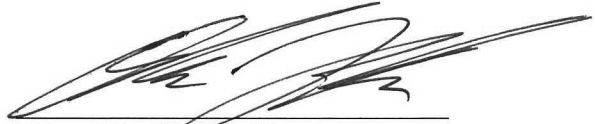
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of March, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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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This 25th day of March, 2022.