23-CO-288

(Sup. Ct. No. 2020 CF2 001903)

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

LARRY WHITE, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLANT

Tamara Jones, Esq.
Bar No. 1027938
The Legal Courthouse
The Legal Courthouse, PLLC
6218 Georgia Ave. NW Suite #1-682
Washington, D.C. 20011
Phone: (202) 597-3740
Attorney@theLegalCourthouse.com
Counsel for Larry White, Jr.

STATEMENT OF INTERESTED PARTIES

Parties: *Larry White, Jr*, Appellant

United States, Appellee

Counsel: *Tamara Jones, Esq*. for Appellant, The Legal Courthouse, PLLC, 6218 Georgia Ave. NW, Washington, D.C. 20011

Chrisellen R. Kolb, Esq. for Appellee, Assistant United States Attorney, 555 4th St., NW, Washington, D.C. 20530

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

JURISDICTION

This Court has jurisdiction over this timely appeal from a final order in D.C. Superior Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Did the trial court err in holding that Mr. White didn't show proof of the prejudice prong in 23-110 motion?

(2) Did the trial court err in denying Mr. White's § 23-110 motion by considering findings not supported by evidence?

STATEMENT OF THE CASE

On April 13, 2021, Appellant, Mr. White, was convicted in a stipulated bench trial to Carrying a Pistol Without a License, Possessing a Large Capacity of Ammunition Feeding Device, Possessing an Unregistered Firearm, and Unlawfully Possessing Ammunition. Mr. White's trial counsels in this matter were ineffective as they did not relay the Pre-Indictment Plea to Mr. White. It would have been in Mr. White's best interest to take the plea that was offered by the government, and Mr. White would have taken the plea and not gone to trial had it not been for the ineffectiveness of his trial counsels.

On April 29th, 2022, by and through undersigned counsel, Mr. White filed a § 23-110 motion in order to prayfully rectify the prejudice that Mr. White suffered and allow him to take the plea. The trial court denied the § 23-100.

STATEMENT OF FACTS

On December 9, 2022, the trial court denied Mr. White's Motion to Vacate, Set Aside or Correct Sentence filed on April 29, 2022. The government filed its opposition to Mr. White's Motion to Vacate, Set Aside or Correct Sentence on October 14, 2022. Mr. White's Motion to Vacate was based on ineffective assistance of counsel as Mr. White's trial counsels did not present his preindictment plea to him that was offered by the government. Instead, Mr. White's trial counsels advised him to move forward with a stipulated trial without informing him that there was a plea available to him.

STANDARDS OF REVIEW

The standard of review of a trial court's denial of a defendant's ineffective assistance of trial counsel claim is well established. The appellate court accepts the judge's factual findings

unless they lack evidentiary support but reviews his or her legal conclusions de novo. *Bost v. United States*, 178 A.3d 1156, 1169.

Both the deficient performance and prejudice components of the ineffectiveness inquiry involve mixed questions of law and fact, which means the appellate court accepts a trial court's factual findings unless they lack evidentiary support, but the appellate court reviews its legal determinations de novo. *Benitez v. United States*, 60 A.3d 1230, 1232

SUMMARY OF THE ARGUMENT

Mr. Whites' constitutional rights were violated, and the trial court erred when it denied his § 23-110 motion for relief.

ARGUMENT

I. The Trial Court Erred in its Strickland Findings.

A. The Trial Court Erred in Finding that Mr. White Failed to Show a Reasonable Probability that He Would Have Accepted the Plea Offer.

To demonstrate prejudice, an appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Clark v. United States*, 136 A.3d 334, 336. If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence. *Lafler v. Cooper*, 566 U.S. 156, 156

In this instant case, the trial court based its denial of Appellant's Ineffective Assistance of Counsel claim, on its finding that "he has failed to show that there is a reasonable probability that he would have accepted the plea offer…" *See* Limited Appendix pg. 6 at 12. The trial court interpreted the Appellant's statement in his declaration, "that he most likely" would have

accepted the plea as an implication that Appellant was "grappling whether he should take a plea or proceed with a stipulated trial." *See* Limited Appendix pg.6 at 10. The trial court erred in its interpretation and should have called an evidentiary hearing to inquire about the Appellant's statement. Furthermore, for the record, throughout the Appellant's § 23-110 motion he asserts several times that he would have taken the plea. *See* Limited Appendix pg. 3 at 5.

The trial court erred because the Appellant did show that there is a reasonable probability that he would have accepted the plea offer. "We have repeatedly said that the "reasonable probability" standard is not the same as the "more likely than not" or "preponderance of the evidence" standard; it is a qualitatively lesser standard." *Kyles* v. *Whitley*, 514 U. S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). *Chinn v. Shoop*, 143 S. Ct. 28, 28. This Court claimed that a reasonable probability standard was a lesser standard than more likely than not. Therefore, Appellant's statement met the reasonable probability standard. Furthermore, the Appellant attached his declaration to support his argument, which clearly establishes that he would have taken the plea. In Appellant's § 23-110 motion, Appellant asserts that "he would have taken the plea had it been presented to him because it would have put him in a better position.," and "he would have taken that offer from the government." *See* Limited Appendix pg. 3 at 5 and 6. Appellant states clearly that, "he would have taken that offer from the government." The trial court did not take Appellant's assertions into consideration.

As a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. If defense counsel allows the offer to expire without advising the defendant or allowing him to consider it, defense counsel does not render the effective assistance the Constitution requires. To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient

performance, defendants must demonstrate a reasonable probability they would have accepted the plea offer had they been afforded effective assistance of counsel. But that is not enough to establish Strickland prejudice: Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under applicable law. Additionally, defendants must show a reasonable probability that 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. *Benitez v. United States*, 60 A.3d 1230, 1232.

B. The Trial Court Erred in Holding that Trial Counsel's Performance Was Not Deficient.

The trial court held, that "there is ample evidence that trial counsel's performance was not deficient…" *See* Limited Appendix pg. 6 at 7. The trial court in its order, while quoting, *Missouri v. Frye*, stated, "If defense counsel "allow[s] the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." *Missouri v. Frye*, 566 U.S. 134. *See* Limited Appendix pg. 6.

The order then states that "the Government advised that the plea offer would expire on October 29, 2020……" and on October 30, 2020, Mr. Tun read the terms of the agreement to Mr. White over speaker phone." *See* Limited Appendix pg. 6 at 8. The trial court acknowledges that the trial attorney discussed the plea with Appellant ***after*** the plea had already expired, which in itself renders trial counsel's performance ineffective. Furthermore, the fact that trial counsel thought that offering the plea a day later should have caused the trial court to question his credibility.

Trial counsel also claimed that he made a counteroffer of an extended plea to the government without any assertion that the defendant was first consulted or offered the original

plea. *See* Limited Appendix pg. 5 at 5. The trial court in its order acknowledged that trial counsel made a counteroffer to the plea. The fact that trial counsel didn't consult with Appellant at the time the plea was offered, yet instead counteroffered, is problematic and appears to be ineffective. Appellant had a right to understand that particular offer and make a decision whether he wanted to accept even before trial counsel counteroffered. This alone shows that it is more probable than not that trial counsel was deficient in consulting with Appellant about the subsequent plea offer. It appears that the trial court erred in not finding deficiency in these facts.

Furthermore, according to the record, the government reextended a plea offer on August 24, 2020 and trial counsel asserts that it made an appointment to speak with Appellant on October 29, 2020. Therefore, for two months, Appellant was unaware of the plea offer and trial counsel waited until the last day to attempt to explain the offer to Appellant, only to allegedly speak with him after the expiration date of the plea. *See* Limited Appendix pg. 5-Exhibit 1 at 11. Considering these facts, the trial court should have found that trial counsel's performance was deficient on its face.

II. The Trial Court Erred in Denying Mr. White's § 23-110 Motion Because the Trial Court's Findings Weren't Supported by the Evidence.

According to the Supreme Court, a guilty plea is an event of signal significance in a criminal proceeding. Certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action. *Clark v. United States*, 136 A.3d 334, 336. A lawyer is an agent; the client is the principal. When it comes to electing among options before sentencing that will determine the client's prison time, a lawyer cannot ethically or

lawfully interdict that choice by acting as the client's principal and justifying that preemptive role as a legitimate tactical decision. *Id.*

The trial court in its order stated that, "Mr. White….did not vocalize- at any time- that he was unaware of a plea offer." *See* Limited Appendix pg. 6 at 9. Mr. White did not know of a plea offer to vocalize anything about it in open court. If the Appellant didn't know about a plea offer, he couldn't vocalize that he was unaware of it. Even in the trial attorney's declaration, he stated that he communicated the plea offer through Mr. White's family. *See* Limited Appendix pg. 5 - Exhibit 2 at 9 and Exhibit 1.

The trial court also refutes Appellant's argument made, by saying that "it is possible that trial counsel had relayed an earlier plea to Mr. White…." *Id.* The evidence didn't support this wholly. Trial counsels' affidavits appear to seem inconsistent. They offered no dates when they allegedly communicated the preindictment plea to Mr. White or location as other parts of the affidavit. *See* Limited Appendix pg.5 at Exhibit 1 #7. The fact that the affidavit states the plea was relayed through his family and trial counsel counteroffered without consulting with Appellant, seems to support that the trial counsels were ineffective and that the trial court should have called a hearing.

III. The Trial Court Erred in Not Calling a Hearing.

The trial court held that, "because the Court concludes that Mr. White's claims are vague and conclusory, and there is no genuine dispute as to the material facts of the claim, an evidentiary hearing is not necessary." *See* Limited Appendix pg. 6 at 12. The statute under which courts might review for ineffectiveness of counsel, D.C. Code § 23-110, creates a presumption that a hearing should be held, especially where the allegations of ineffectiveness relate to facts outside the trial record. The statute emphasizes that unless the motion and files and records of the

case conclusively show that the prisoner is entitled to no relief, the trial court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto.

Although the decision whether to hold a hearing under D.C. Code § 23-110 is committed to the trial court's sound discretion, the scope of that discretion is quite narrow. Any question regarding the appropriateness of a hearing should be resolved in favor of holding a hearing. An appellate court will affirm the trial court's denial of a § 23-110 motion without a hearing only if the claims: (1) are palpably incredible; (2) are vague and conclusory; or (3) even if true, do not entitle the movant to relief. *Clark v. United States*, 136 A.3d 334, 336. ……the Court must be satisfied that under no circumstances could the appellant establish facts warranting relief. Any question regarding the appropriateness of a hearing on a § 23-110 motion should be resolved in favor of holding a hearing. *Dorsey v. United States*, 225 A.3d 724, 727.

Here the trial court should have held a hearing. Much of what was declared by trial counsel was outside of the record. Also, the Appellant's circumstances based on the facts could not have been taken as circumstances that didn't want relief. Appellants claims were not vague and conclusory. In fact, in Appellant's § 23-110 motion he was very specific that he didn't receive the plea and that he would have accepted the plea, had he been offered it. The trial court should have held a hearing in order to ascertain the truth especially because the trial attorney's credibility was in question. Not only did they make questionable statements about offering the plea to Mr. White, Harry Tun had several pending matters with the DC Bar Disciplinary Board. Although this may not bear on the instant matter, the fact that the trial counsels thought it was ok to assert that they offered the Appellant the plea, the day after it expired was fair, should have been enough for the trial court to call a hearing. Especially because trial counsels didn't assert

that they were able to open the plea back up after its expiration date.

CONCLUSION

WHEREFORE, Mr. White prays that this court vacate his conviction.

Respectfully Submitted,

Tamara Jones

Tamara Jones, Esq.
Bar No. 1027938

The Legal Courthouse

The Legal Courthouse, PLLC
6218 Georgia Ave. NW Suite #1-682
Washington, D.C. 20011
Phone: (202) 597-3740
Attorney@theLegalCourthouse.com
Counsel for Larry White, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 10th day of October 2023, to the following:

Chrisellen R. Kolb, Esquire
Assistant United States Attorney
555 4th Street, NW
Washington, D.C. 20530

/s/
Tamara Jones, Esq.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

Tamara Jones
Signature

23-CO-288
Case Number(s)

Tamara Jones
Name

10/6/2023
Date

Attorney@theLegalCourthouse.com
Email Address