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H. P. T. v. COMMISSIONER OF CORRECTION\*

(SC 18962)

Rogers, C. J., and Zarella, Eveleigh, McDonald and Espinosa, Js.

*Argued September 27—officially released November 26, 2013*

*Michael Proto*, assistant state's attorney, with whom, on the brief, was *Gail Hardy*, state's attorney, and *Robin Krawczyk*, senior assistant state's attorney, for the appellant (respondent).

*Adele V. Patterson*, senior assistant public defender, for the appellee (petitioner).

*Opinion*

ESPINOSA, J. The respondent, the Commissioner of Correction, appeals from the judgment of the Appellate Court affirming the judgment of the habeas court, which granted, in part, the third amended petition for a writ of habeas corpus filed by the petitioner, H. P. T. The habeas court found that the petitioner's pretrial counsel had rendered ineffective assistance by failing to provide the petitioner with adequate advice regarding a pretrial plea offer and, on the basis of this finding, ordered the trial court to resentence the petitioner in accordance with the sentence proposed in the plea offer. *H. P. T. v. Commissioner of Correction*, 127 Conn. App. 480, 483–84, 14 A.3d 1047 (2011). The sole issue in this certified appeal is whether the Appellate Court properly affirmed the order of the habeas court, which provided a remedy for ineffective assistance of counsel during plea negotiations. See *H. P. T. v. Commissioner of Correction*, 304 Conn. 924, 41 A.3d 1053 (2012). We reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts and procedural history. “In 2002, the state charged the petitioner with various criminal offenses in two informations. Specifically, in docket number CR-02-0562000, the state charged the petitioner with one count of assault in the second degree in violation of General Statutes [Rev. to 2001] § 53a-60 (a) (2), two counts of assault in the third degree in violation of General Statutes § 53a-61 (a) (1) and one count of risk of injury to a child in violation of General Statutes [Rev. to 2001] § 53-21 (a) (1). In docket number CR-02-0563146, the state charged the petitioner with three counts of risk of injury to a child in violation of § 53-21 (a) (1) and one count of sexual assault in the second degree in violation of General Statutes (Rev. to 2001) § 53a-71 (a) (1).

“Attorney Thompson Page represented the petitioner throughout the pretrial phase of the criminal proceedings. On July 31, 2003, during a pretrial conference, the prosecutor offered that if the petitioner pleaded guilty to the charges of sexual assault in the first degree, risk of injury to a child and assault in the second degree, she would recommend a sentence of twenty-five years incarceration, execution suspended after twelve years, with ten years of probation (state's offer). Also during this pretrial conference, the court, *Solomon, J.*, made its own offer of twenty years incarceration, execution suspended after nine years, with twenty years of probation (court's offer). The prosecutor neither explicitly accepted nor rejected the court's offer, thus, acquiescing to its terms.

“In August, 2003, Page met with the petitioner to discuss the terms of the court's offer. Page did not, however, retain the services of an interpreter to assist

the petitioner, whose native language is Vietnamese, in understanding the terms of the court's offer and the charges to which he would be pleading guilty. Additionally, Page never advised the petitioner to accept the court's offer, and, on September 18, 2003, the petitioner rejected both the state's offer and the court's offer. Thereafter, in October, 2003, Page withdrew his representation of the petitioner, and the petitioner retained attorneys Michael A. Georgetti and Salvatore Bonanno to represent him throughout trial.

"In 2004, the matter was tried to a jury. On April 15, 2004, the jury returned a verdict, finding the petitioner guilty of one count of sexual assault in the second degree, one count of assault in the second degree, two counts of assault in the third degree and two counts of risk of injury to a child.<sup>1</sup> The petitioner was found not guilty of the remaining two counts of risk of injury to a child. On July 26, 2004, the court, *Keller, J.*, sentenced the petitioner to a total effective term of twenty-three years incarceration, execution suspended after thirteen years, with ten years of probation. The petitioner directly appealed to [the Appellate Court], and his conviction[s] [were] affirmed. See *State v. H. P. T.*, 100 Conn. App. 183, 917 A.2d 586, cert. denied, 282 Conn. 917, 925 A.2d 1100 (2007).

"The petitioner then commenced the present action for a writ of habeas corpus. In his third amended petition, filed November 18, 2008, he alleged, inter alia, that Page provided ineffective assistance of counsel by failing to communicate and to advise him adequately with respect to the court's offer.<sup>2</sup> More specifically, he alleged that because Page had 'failed to translate and explain' the court's offer, he 'so lacked an understanding of that offer that [he] . . . was unaware . . . it had even been made' until well after his criminal conviction[s] and sentencing. He further alleged that had Page 'adequately communicate[d] and . . . advise[d]' him to accept the court's offer, he would have accepted the nine year sentence and not proceeded to trial.

"Following the presentation of evidence, the habeas court issued a memorandum of decision, filed June 18, 2009, granting, in part,<sup>3</sup> the petition for a writ of habeas corpus. The habeas court concluded that Page's pretrial representation of the petitioner, particularly with respect to the plea negotiation process, amounted to ineffective assistance of counsel under *Strickland*<sup>4</sup> and its progeny. The habeas court reasoned that, given Page's deficient representation during pretrial proceedings, the petitioner was prejudiced by rejecting the court's offer, which carried a shorter term of incarceration than that which the petitioner received after trial. Nonetheless, finding 'no constitutional infirmity related' to the petitioner's conviction[s], the habeas court declined to vacate the jury verdicts and to remand the case for a new trial. Instead, the habeas court directed

the sentencing court to vacate the petitioner's sentence and to resentence the petitioner 'to a total effective sentence that may not exceed the court indicated sentence of twenty years to serve, execution suspended after the service of nine years, followed by twenty years probation.'" (Footnotes altered.) *H. P. T. v. Commissioner of Correction*, supra, 127 Conn. App. 481–84. The habeas court subsequently granted the respondent's petition for certification to appeal from the judgment of the habeas court.

On appeal to the Appellate Court, the respondent argued, inter alia, that the remedy ordered by the habeas court was improper because it usurped the trial court's discretion to determine the appropriate sentence. The respondent contended that the proper remedy is to remand the case to the trial court so that it can determine whether to accept the plea by the petitioner and, if so, impose the appropriate sentence based on statutory mandates and court rules.<sup>5</sup>

The Appellate Court rejected the respondent's argument. *Id.*, 488–89. After remarking that "the [habeas] trial court, *much like a court of equity*, has considerable discretion to frame a remedy, so long as that remedy is commensurate with the scope of the constitutional violations [that] have been established"; (emphasis in original; internal quotation marks omitted) *id.*, 489; the Appellate Court concluded that it could not "say that the habeas court improperly strayed from these principles in the present case." *Id.* Accordingly, the Appellate Court affirmed the judgment of the habeas court.<sup>6</sup> The respondent appealed and we granted the amended petition for certification limited to the following question: "Did the Appellate Court properly affirm the remedy fashioned by the habeas court for ineffective assistance of counsel during plea negotiations?"<sup>7</sup> *H. P. T. v. Commissioner of Correction*, supra, 304 Conn. 924.

The respondent argues that the remedy fashioned by the habeas court exceeds the requirements of the sixth amendment to the United States constitution, which guarantees the right to counsel.<sup>8</sup> The respondent contends that conferring the petitioner a right to a specific sentence, while bypassing the steps that normally would occur between the entering of a plea and sentencing, treats the violation as if it occurred at the sentencing stage, rather than at the time that the plea offer was rejected. Moreover, the respondent asserts, by imposing a specific sentence, the habeas court improperly circumvented the trial court's discretion to impose an appropriate sentence based on statutory mandates, common-law principles and court rules. The respondent maintains that the proper remedy, as set forth in *Lafler v. Cooper*, U.S. , 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), and *Ebron v. Commissioner of Correction*, 307 Conn. 342, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone v. Ebron*, U.S. , 133 S. Ct. 1726, 185

L. Ed. 2d 802 (2013), is to remand the case to the trial court to consider whether it should vacate the convictions and accept the plea offer, leave the original convictions intact or otherwise modify the convictions and sentence. We agree with the respondent and, therefore, find that the habeas court ordered an improper remedy.<sup>9</sup>

The question of whether the Appellate Court properly affirmed the habeas court's remedy for the petitioner's ineffective assistance of counsel claim presents a question of law, subject to plenary review. See *George M. v. Commissioner of Correction*, 290 Conn. 653, 659, 966 A.2d 179 (2009). In order to resolve that question, we turn to our recent decision in *Ebron v. Commissioner of Correction*, supra, 307 Conn. 342. In *Ebron*, the petitioner faced a maximum of forty-one years and four months incarceration after being charged with numerous criminal offenses in several informations. *Id.*, 345. The state's attorney offered the petitioner an effective sentence of six years incarceration if he pleaded guilty to some of the charges. *Id.*, 345. The petitioner's counsel informed him of his options regarding the plea offer, but did not recommend that he accept the offer. *Id.*, 346. The petitioner did not accept the offer, instead electing to plead guilty to several charges pursuant to the *Alford* doctrine.<sup>10</sup> *Id.*, 346–47. At the sentencing hearing, the court sentenced the petitioner to an effective sentence of eleven years incarceration. *Id.*, 347.

In *Ebron*, the petitioner filed a writ of habeas corpus, alleging, inter alia, that his trial attorney had rendered ineffective assistance by failing to advise him properly with respect to the state's offer. *Id.*, 347–48. The habeas court agreed, concluding that his trial counsel's performance was deficient and that the petitioner was prejudiced as a result. *Id.*, 348. As a remedy, the habeas court directed the trial court to vacate the petitioner's plea and afford him the opportunity to accept the state's offer. *Id.*, 348–49. If the petitioner chose to accept the offer, the trial court was to sentence the petitioner in accordance with the plea agreement. *Id.*, 349. The respondent appealed to the Appellate Court, which affirmed the judgment of the habeas court. *Id.*

In reversing the Appellate Court with respect to its decision affirming the remedy fashioned by the habeas court in *Ebron*, we relied on a recent case from the United States Supreme Court, *Lafler v. Cooper*, supra, 132 S. Ct. 1376. In *Cooper*, the habeas petitioner brought a claim of ineffective assistance of counsel after, on the advice of his trial counsel, he rejected a favorable plea offer that had been extended to him twice, and subsequently was convicted of several criminal charges following a jury trial. *Id.*, 1383. The habeas court in *Cooper* granted the petition, and ordered the reinstatement of the sentencing offer. *Id.*, 1384. The United States Supreme Court granted certiorari after the respondent challenged the decision. *Id.*

Recognizing that, in some instances, the appropriate result for a violation of a petitioner's right to counsel could be an evidentiary hearing to determine the appropriate term of incarceration, while in other cases the appropriate course of action would be to "exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed," the court in *Cooper* concluded that the appropriate remedy was to remand the case to the trial court, which could properly exercise its discretion to determine what the appropriate result should be. *Id.*, 1389.

In applying *Cooper* to the facts in *Ebron*, we concluded that "when a habeas court finds prejudice, then, in most cases, that court should order the trial court to determine the proper remedy in light of any information concerning the crime or the petitioner that would have come to light between the acceptance of the plea offer and the imposition of the sentence, such as a [presentence investigation report] or a victim impact statement." *Ebron v. Commissioner of Correction*, *supra*, 307 Conn. 358. In reaching this conclusion, we indicated that "the determination of the appropriate remedy will, in most cases, more properly be made by the trial court than by the habeas court because the former generally will have greater experience than the latter in crafting criminal sentences and, in some cases, may have access to information about the petitioner and the crime that is not available to the habeas court."<sup>11</sup> *Id.*, 358–59.

These recent decisions demonstrate that, regardless of whether a petitioner's successful claim of ineffective assistance of counsel during plea negotiations arises by way of a subsequent plea agreement or conviction after trial, the proper remedy remains the same in most cases, namely, remanding the case to the trial court, which is vested with the discretion to "place the habeas petitioner, as nearly as possible, in the position that he would have been in if there had been no violation" of his right to counsel. *Id.*, 363. Depending on the circumstances, the appropriate disposition may be merely resentencing of the petitioner. *Lafler v. Cooper*, *supra*, 132 S. Ct. 1389. In other instances, the trial court may need to consider "whether to vacate the convictions and resentence [the petitioner] pursuant to the plea agreement, to vacate only some of the convictions and resentence [the petitioner] accordingly, or to leave the convictions and sentence from the trial undisturbed." *Id.*, 1391; see also *Ebron v. Commissioner of Correction*, *supra*, 307 Conn. 362 n.17. In any event, the trial court is the proper court to make such decisions. See *Ebron v. Commissioner of Correction*, *supra*, 358–59.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the habeas court with direction to order the trial court to determine the proper remedy

in accordance with this opinion.

**In this opinion the other justices concurred.**

\* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. General Statutes § 54-86e.

<sup>1</sup> Although the terms of the plea offer would have required the petitioner to plead guilty, inter alia, to sexual assault in the first degree, that charge was never submitted to the jury.

<sup>2</sup> “Although the habeas corpus petition references specifically the state's offer, it is clear from the record that this reference is actually to the court's offer, as the petitioner testified that he would have accepted the ‘nine year sentence’ but for Page's ineffective assistance of counsel. As such, we analyze the petitioner's habeas corpus petition with respect to the court's offer only.” *H. P. T. v. Commissioner of Correction*, supra, 127 Conn. App. 483 n.5.

<sup>3</sup> “The petitioner also sought a writ of habeas corpus on the basis of the alleged ineffective assistance of counsel of Georgetti and Bonanno, as well as his appellate counsel. The habeas court, however, granted the petition only with respect to the ineffective assistance of Page during the pretrial phase of the criminal proceedings.” *H. P. T. v. Commissioner of Correction*, supra, 127 Conn. App. 484 n.6.

<sup>4</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>5</sup> It is implicit that the trial court would be required to vacate the petitioner's convictions before it could accept the plea agreement.

<sup>6</sup> The Appellate Court subsequently granted the petitioner's motion to terminate the automatic stay and remanded the case to the trial court to resentence the petitioner in accordance with the judgment of the habeas court. The petitioner was resentenced on April 26, 2012, to a total effective term of twenty years incarceration, execution suspended after nine years, with twenty years of probation.

<sup>7</sup> The respondent moved to amend the original petition for certification after the United States Supreme Court issued decisions in *Missouri v. Frye*, U.S. , 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012), and *Lafler v. Cooper*, U.S. , 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012), which resolved one of the issues raised in the petition.

<sup>8</sup> The sixth amendment to the United States constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

<sup>9</sup> Because we determine that the appropriate remedy is to remand the case to the trial court to determine the proper disposition, we need not address the respondent's other arguments that the habeas court's remedy fails to employ properly the principles of contract law governing plea negotiations and violates the victims' rights amendment of our state constitution.

<sup>10</sup> *v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. ed. 2d 162 (1970).

<sup>11</sup> The petitioner correctly points out that the Supreme Court in *Cooper* did not address the precise issue before us, namely, whether the habeas court or the trial court should determine the appropriate disposition. Because the petitioner in *Cooper* brought his initial claim of ineffective assistance of counsel through a direct criminal appeal; *Lafler v. Cooper*, supra, 132 S. Ct.1383; unlike the procedure in Connecticut where a petitioner must bring such a claim by way of a separate, civil habeas corpus action, the Supreme Court did not have the opportunity to determine to which court the case should be remanded. Thus, the petitioner argues, the Supreme Court's holding that remand to the state trial court was the appropriate remedy does not require the conclusion that a state habeas court cannot be the appropriate “state trial court.” In applying the holding of *Cooper* to our system of post-conviction proceedings in Connecticut, in *Ebron*, however, we resolved the issue when we determined that the trial court is, in most cases, the appropriate court to make such decisions.