

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge
2008-CP-40-7794

Gerald Smith,

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FEB 18 2014

Petitioner, **SC Court of Appeals**

vs.

State of South Carolina,

Respondent.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a hearing on the following points that this Court may have overlooked or misapprehended:

(1) As addressed by this Court in its opinion, the standard of review on the appeal of the denial of a post-conviction relief application is whether the PCR court's findings are supported by probative evidence. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Appellate courts give great deference to the lower court's findings of facts and conclusions of law. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d S.E.2d 353, 356 (2006). An appellate court gives great deference to a PCR judge's factual findings, because the reviewing court, unlike the PCR judge, lacks the opportunity to directly observe the witnesses. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265, 267 (1999); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). In the instant case, the PCR court's

findings that counsel was not ineffective was supported by testimony from April Sampson acknowledging that Smith did breach his agreement when he gave yet another version of events at the proffer. App. p. 169, lines 13-20. Further, she acknowledged there were problems with his proffer. App. p. 160, lines 15-24.

This testimony had to be weighed against Sampson's "admissions" that she should have objected when the State made a recommendation. However the PCR court was in the best position to determine the weight of her testimony claiming that she should have objected -- as opposed to her acknowledgement that Smith did not keep his part of the agreement -- in deciding whether counsel's performance was deficient. The reality is that defense counsel in PCR proceedings are often biased in favor of their past client, and the fact finder has to balance the validity of attestations by counsel that they erred against their more candid testimony and the reality of their actions. See Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999) (the issue of ineffectiveness is for the court to decide, so admissions of defective performance by attorneys are not decisive); Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007 (en banc)) (a trial court is not obligated to "accept a self-proclaimed assertion of trial counsel"). In the instant case, the PCR court's findings are supported by probative evidence, even if reasonable persons might disagree, and so the denial of relief should be affirmed.

(2) Further, the PCR court's finding that Smith was not prejudiced by the alleged deficiency of performance is also supported by probative evidence. Assuming Sampson's performance was deficient for failing to put on the record the plea agreement that the State would remain silent during sentencing and not make a recommendation, Sampson's actions minimize any prejudice from the omission to such an extent that it is

speculative at best that but for Sampson's actions, the outcome would have been different.

At the sentencing hearing, the prosecution asked for the maximum sentence, which was reasonable in light of the detriment Smith's proffer had on the prosecution's case against the co-defendant. App. p. 64. In response, Sampson made a spirited argument that Smith was consistent with law enforcement about his involvement. App. 65-67. Sampson questioned the prosecution's charging decisions in regards to Areheart. App. p.p. 68-69. Smith apologized to the court. App. pp. 68-70. A member of the victim's family told Smith she forgave him. Judge Lloyd sentenced Smith to twenty-seven years imprisonment taking into consideration Smith's efforts to help the prosecution as well as the problems Smith caused with his co-defendant's case. App. p. 71.

At the motion for reconsideration of Smith's sentence, Sampson advised Judge Lloyd that Sharpe kept the rebar to beat people who did not pay up for the illegal drugs. He was a gun-carrying drug dealer. App. p. 73. Sampson continued to argue that memory problems were what made trial preparation difficult, not Smith's willingness to cooperate (although the record strongly indicates memory played no part in Smith's credibility problems). App. pp. 74-76.

Judge Lloyd, who obviously gave the matter serious consideration, called the case the next day and reduced the sentence by three years. In so doing, noted: "[T]his is still a heinous act. And a lot of the circumstances of why we're here now and what you're complaining about is due to your own fault." App. p. 85, lines 19-22.

Sampson testified she was agreeable to have sentencing in front of Judge Lloyd because she had two clients in the past plead before Judge Lloyd where the victim was a drug dealer. They received lower sentences. Sampson understood that Judge Lloyd's view was that "because they were drug dealers . . . they were going to take that chance at being involved in illegal activity, then that's what they get, that was his perspective." App. p. 168, lines 1-5.

Further, Sampson testified she recalled chambers meetings where the judge was advised that the original plea agreement was an open plea in which the State was not going to take a position. App. p. 171. Accordingly, on this point alone, probative evidence supports the PCR court's findings that Smith was not prejudiced because whether or not it appears on the record in General Sessions, it appears Judge Lloyd was aware of the original agreement. Cherry, supra.

However, even if Judge Lloyd was truly unaware of this term, the remainder of Sampson's actions ensured no actual prejudice resulted from the alleged deficiency. See Huggler v. State, 360 S.C. 627, 602 S.E.2d 753 (2004) (noting "because we do not have the benefit of counsel's testimony as to why he limited cross and instead raised the inconsistencies during closing, we cannot scrutinize counsel's trial strategy. As a result, we focus on whether counsel's assistance prejudiced [Huggler's] case In light of the overwhelming evidence . . . and our findings that (1) [Huggler's] case was not prejudiced by the admission of the witnesses' written statements, and (2) counsel's decision to attack witness credibility in closing rather than in cross does not, on its face, constitute error, we find that there is not a 'reasonable probability' that but for counsel's error, the outcome of Respondent's case would have been different.")

CONCLUSION

For all of the foregoing reasons, this Court should grant the State's petition for rehearing, vacate its opinion, and affirm the PCR court's denial of relief.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 18, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Honorable L. Casey Manning, Circuit Court Judge

GERALD SMITH

PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the Petition for Rehearing on Petitioners Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to Robert M. Pachak, Esquire, Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 18th day of February, 2014.


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