

INDEX

INDEX i

SC COURT OF APPEALS OPINION 1

PETITION FOR REHEARING.....8

ORDER DENYING PETITION FOR REHEARING14

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Gerald Smith, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-164866

ON WRIT OF CERTIORARI

Appeal From Richland County
Clifton Newman, Plea Judge
Reginald Lloyd, Sentencing Judge
L. Casey Manning, Post-Conviction Relief Judge

Opinion No. 5194
Heard October 15, 2013 – Filed February 5, 2014

REVERSED AND REMANDED

Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan Wilson, Assistant Deputy
Attorney General David A. Spencer, Assistant Attorney
General Megan Elizabeth Harrigan, all of Columbia, for
Respondent.

WILLIAMS, J.: Petitioner Gerald Smith ("Smith") appeals the post-conviction relief (PCR) court's order denying his application for PCR based on ineffective assistance of counsel during his guilty plea. We reverse the PCR court's order, vacate Smith's sentence, and remand for resentencing.

FACTS/PROCEDURAL HISTORY

Smith was indicted for murder.¹ Pursuant to a negotiated plea agreement, Smith pled guilty to the lesser-included offense of voluntary manslaughter in exchange for testifying against his codefendant. As part of the plea agreement, the State agreed to remain silent as to sentencing. However, this part of the plea agreement was not put on the record at the plea hearing, in part because Smith's sentencing was to be deferred until after his codefendant's trial.²

During the plea colloquy before the Honorable Clifton Newman ("the plea court"), Smith stated he understood the sentence for voluntary manslaughter was between two and thirty years' imprisonment and a voluntary manslaughter conviction was classified as a "most serious offense." Additionally, the plea court asked Smith whether "anyone promised [Smith] anything to get him to plead guilty to [manslaughter]." Smith responded the only promise was to reduce the charge from murder to voluntary manslaughter, which plea counsel confirmed. After Smith pled guilty, the solicitor provided the plea court with the facts of the case, summarized Smith's previous statements,³ and proffered Smith's testimony on the

¹ Although Smith's account of what transpired changed several times, he and his codefendant were accused of bludgeoning the victim to death with a piece of rebar in the victim's mobile home after a dispute over a drug deal.

² We are aware of the supreme court's holding in *State v. Thrift* that appellate review of a plea agreement is limited to the terms that are fully set forth in the record and that neither the State nor the defendant can enforce plea agreement terms which do not appear on the record before the trial judge who accepts the plea. 312 S.C. 282, 296-97, 440 S.E.2d 341, 349 (1994). However, we review Smith's PCR claim consistent with the supreme court's consideration of the same issue in *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000).

³ In the first statement to police, Smith claimed no involvement in the victim's murder. In his second account, Smith said he drove his codefendant to the victim's mobile home but did not go inside the mobile home. However, in his third account, Smith stated he went inside the home. In Smith's fourth statement to

record. At the conclusion of the hearing, the plea court retained jurisdiction and deferred sentencing until the solicitor prosecuted Smith's codefendant.

At the subsequent sentencing hearing before the Honorable Reginald Lloyd ("the sentencing court"), the solicitor put the negotiated plea agreement between the State and Smith on the record. The solicitor indicated the agreement (1) "reduce[d] the charge from murder to manslaughter" and (2) deferred sentencing to allow Smith to testify at his codefendant's trial for murder. The solicitor acknowledged Smith suffered drug-related memory impairment but claimed Smith "continually minimized his role" in the death of the victim. Furthermore, the solicitor indicated counsel for Smith's codefendant filed a motion to disqualify Smith from testifying at his codefendant's trial, which caused the solicitor major concerns about using Smith's testimony against his codefendant. The solicitor stated the State could not proceed against Smith's codefendant for murder because Smith failed to truthfully articulate his role in the murder. As a result, the State was forced to mitigate the codefendant's charge to accessory after the fact of murder. The solicitor then requested the sentencing court impose the maximum sentence upon Smith.

Plea counsel neither objected to the solicitor's sentencing request nor withdrew Smith's guilty plea. Instead, plea counsel requested the sentencing court give Smith credit for the time he had served and further asked the sentencing court to impose a ten-year sentence. The sentencing court initially sentenced Smith to twenty-seven years, taking into consideration Smith's efforts to help the solicitor as well as the problems Smith caused in his codefendant's case. Subsequently, plea counsel moved for the sentencing court to reconsider the length of Smith's sentence, and the sentencing court reduced Smith's sentence to twenty-four years' imprisonment.

Smith appealed his conviction, and this court dismissed the appeal on April 11, 2008. *See State v. Smith*, Op. No. 2008-UP-226 (S.C. Ct. App. filed April 11, 2008). Smith then filed an application for PCR, alleging ineffective assistance of counsel.

At the PCR hearing, Smith argued his plea counsel was ineffective because she failed to object or bring his plea agreement to the sentencing court's attention when

police, Smith alleged his codefendant started an argument with the victim because the victim would not sell the codefendant more drugs. In that statement, Smith admitted to hitting the victim over the head with a piece of rebar but stated his codefendant actually killed the victim.

the solicitor requested the court impose the maximum sentence. Smith claimed if he cooperated with the solicitor in testifying against his codefendant, the solicitor would reduce his charge to voluntary manslaughter. In addition, the solicitor would agree to an open plea and would remain silent as to sentencing, so Smith would likely receive "somewhere between eight and ten years. . . ." Smith stated he met with the solicitor for approximately four hours to prepare to testify at his codefendant's trial. Smith argued the solicitor knew he had drug-related memory issues from the beginning and that he had problems recalling details during his meeting with the solicitor because the incident happened three years prior. Smith told the PCR court he was shocked when the solicitor recommended the maximum sentence. Smith stated that had he known the solicitor was going to recommend the maximum sentence, he would have withdrawn his plea and let the jury "decide [his] fate."

Plea counsel also testified at the PCR hearing. She stated the solicitor's official plea offer was for voluntary manslaughter. She advised Smith that he could be sentenced from anywhere between two to thirty years, but she would request ten years because he would be assisting the solicitor. Plea counsel further testified she had done two previous pleas involving similar circumstances in front of the sentencing judge, and he had given the defendants about ten years when the murder involved a drug dealer, much like Smith's case. Moreover, plea counsel testified the solicitor was always aware Smith had memory issues because she told the solicitor about Smith's memory problems on the day the solicitor made the plea offer. Furthermore, plea counsel stated no one with the solicitor's office ever told her Smith's memory problems would be an issue.

Plea counsel testified she was surprised when the solicitor requested the sentencing court impose the maximum sentence at the sentencing hearing. She testified she recalled thinking the solicitor did not abide by the State's promise to remain silent because Smith was unable to uphold his end of the plea deal. Additionally, plea counsel acknowledged she made a mistake in failing to object or put on the record the portion of the agreement that the solicitor would remain silent on sentencing. She stated she was "a little taken aback" when the solicitor recommended the maximum sentence. Although she thought about having Smith withdraw his plea, she testified she had not come to court prepared to try the case that day.

After the hearing, the PCR court issued an order denying and dismissing Smith's application for PCR. Smith filed a motion pursuant to Rule 59(e), SCRCP, which the PCR court denied. Counsel for Smith filed a petition for a writ of certiorari. This court granted Smith's petition to review the following issue:

Did the PCR court err in failing to find plea counsel was ineffective for not objecting when the solicitor recommended Smith be sentenced to the maximum term of imprisonment in violation of the negotiated plea agreement with the State?

STANDARD OF REVIEW

In a PCR proceeding, the burden is on the petitioner to prove the allegations in the application. *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Thus, an appellate court gives great deference to the PCR court's findings of fact and conclusions of law. *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). However, a PCR court's findings will not be upheld if no probative evidence exists to support those findings. *Thompson*, 340 S.C. at 115, 531 S.E.2d at 296.

LAW/ANALYSIS

Smith argues plea counsel was ineffective for failing to object when the solicitor recommended the sentencing court impose the maximum sentence. We agree.

Trial counsel must provide reasonably effective assistance under "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Reviewing courts presume counsel was effective. *Id.* at 690. Therefore, to receive relief, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance prejudiced the applicant's case. *Id.* at 687. Prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

Smith must first establish his plea counsel's failure to object "fell below prevailing professional norms." We find Smith established counsel's performance was deficient and rely on the case of *Thompson v. State*, 340 S.C. 112, 116, 531 S.E.2d 294, 296 (2000), to support our conclusion. In *Thompson*, plea counsel failed to object after the solicitor recommended the maximum sentence in violation of the

plea agreement. 340 S.C. at 115, 531 S.E.2d at 296. Thompson was indicted for murder and pled guilty to voluntary manslaughter. *Id.* at 113, 531 S.E.2d at 295. Thompson testified at the PCR hearing that he chose to plead guilty because he was under the assumption the solicitor was not going to make a sentencing request or recommendation. *Id.* at 114, 532 S.E.2d at 295. In addition, Thompson's attorney testified she told him prior to the plea the solicitor was not going to make a sentencing recommendation. *Id.* Thompson's attorney also confirmed to the plea court that the solicitor had correctly and completely stated the plea agreement and there was nothing further that needed to be added regarding the plea negotiations. *Id.* at 116, 531 S.E.2d at 296. Our supreme court found there was a reasonable probability that Thompson would not have pled guilty but for his attorney's ineffective assistance because he entered his guilty plea in reliance on the sentencing range and the solicitor's agreement not to make any sentencing recommendations. *Id.* at 117, 531 S.E.2d at 297.

Like the attorney in *Thompson*, we find plea counsel's failure to object fell below prevailing professional norms. At the PCR hearing, plea counsel testified she told Smith the solicitor was not going to make a sentencing recommendation. Plea counsel admitted she made a mistake in failing to put all of the terms of the plea agreement on the record and in failing to object when the solicitor requested the maximum sentence. Further, plea counsel acknowledged she did not object when questioned by the sentencing court as to whether the solicitor had correctly and completely stated the plea agreement. Based on the foregoing, we find plea counsel's conduct to be deficient.

To establish a claim for ineffective assistance of counsel, Smith must also be prejudiced by his counsel's deficient performance. *See Strickland*, 466 U.S. at 690, 692 (holding a PCR applicant must prove counsel's deficient performance and resulting prejudice to establish a claim for ineffective assistance of counsel). We find the record shows that but for his plea counsel's deficient performance, Smith would not have pled guilty but would have insisted on going to trial. First, the record indicates both plea counsel and Smith intended to go to trial on the murder charge before the solicitor offered Smith the plea deal. It was only when the solicitor offered to mitigate the charge to voluntary manslaughter and agreed to remain silent on sentencing in exchange for his cooperation that Smith changed his mind about going to trial and pled guilty. Smith presented probative evidence that he attempted to uphold his end of the plea agreement by proffering his testimony at the plea hearing and by meeting with the solicitor for more than four hours on the eve of his codefendant's trial. Although the State argued Smith failed to uphold his end of the bargain, plea counsel testified she explained to the solicitor that Smith

had a memory problem. Further, no one at the solicitor's office ever indicated Smith's memory issues would be a problem, even after his proffered testimony and his codefendant's motion to disqualify.

Because Smith presented probative evidence that the solicitor's promise to remain silent at sentencing was a material term of the plea agreement, we likewise find there is enough evidence to demonstrate Smith would not have pled guilty if he had known the solicitor was going to make a sentencing recommendation. Accordingly, we hold plea counsel's failure to object amounted to ineffective assistance of counsel. *See Jordan v. State*, 297 S.C. 52, 54, 374 S.E.2d 683, 684-85 (1998) (granting PCR when defendant pled guilty based on belief that solicitor would not oppose or recommend probation and finding defense attorney's failure to draw the plea court's attention to solicitor's violation of plea agreement fell below prevailing professional norms).

CONCLUSION

For the foregoing reasons, we **REVERSE** the PCR court's denial of relief, **VACATE** Smith's sentence for voluntary manslaughter, and **REMAND** for resentencing on this charge consistent with the original plea agreement.

SHORT and THOMAS, JJ., concur.

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,

Petitioner,

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,

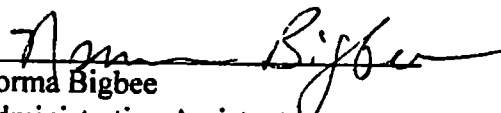
RESPONDENT.

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.


Norma Bigbee
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The South Carolina Court of Appeals

Gerald Smith, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-164866

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, Jr. J.

K. B. Wee J.

Paul W. Thomas J.

Columbia, South Carolina

cc:
Robert M. Pachak, Esquire
Megan Elizabeth Harrigan, Esquire
David A. Spencer, Esquire

FILED
March 21, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
Certiorari to Court of Appeals
and Richland County
L. Casey Manning, Circuit Court Judge

Gerald Smith,

Petitioner,

vs.

State of South Carolina,

Respondent.

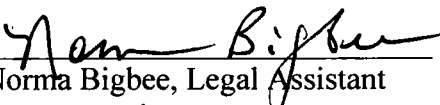
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Supplemental Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

Robert M. Pachak, Esquire
Appellate Defender
South Carolina Commission on Indigent Defense
P.O. Box 11589
Columbia, SC 29211-1589

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

This 30th day of June, 2014.


Norma Bigbee, Legal Assistant
For Respondent