STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Letitia Verdin, Circuit Court Judge

Appellate Case No. 2016-000701

Robert Shaver, #234875, ...Respondent,

v.

State of South Carolina, ... Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
SC Bar #101254

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

INDEX

QUESTIONS PRESENTED

I. Whether the post-conviction relief judge erred in finding Shaver satisfied his burden of proving that Mr. Smith was ineffective for failing to offer reasonable and sound advice regarding the original plea into drug court.

II. Whether the post-conviction relief judge erred in finding Shaver satisfied his burden of proving that Mr. Hancock was ineffective for failing to file a motion to reconsider for a downward departure.

III. Whether the post-conviction relief judge erred in finding that Mr. Hancock was ineffective for failing to order the plea hearing transcript.

STATEMENT

Robert Shaver ("Shaver") is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Shaver was indicted at the January 2011 term of the York County Grand Jury for Distribution of Schedule I Drug (Oxycotin) (2011-CP-46-0211) and Distribution of Schedule I Drug "Morphine" (2011-GS-46-0212). Phil Smith, Esquire, represented him. On March 31, 2011, Shaver pled guilty to both charges and was sentenced by the Honorable John C. Hayes, III, to a negotiated fifteen-year sentence on each charge suspended to Drug Court.

Shaver subsequently failed out of Drug Court. He was represented at sentencing by Bill Hancock, Esquire, and the negotiated fifteen-year sentences were imposed by Judge Hayes on November 29, 2012. Shaver did not appeal his conviction and sentence.

Shaver filed an Application for post-conviction relief on June 7, 2013 alleging ineffective assistance of counsel. The State filed a return on or about October 1, 2013. An evidentiary hearing into the matter was convened on August 1, 2016, at the Moss Justice Center in York, South Carolina. Shaver was present at the hearing and represented by Nathan Sheldon, Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General's Office represented the State. By an Order signed September 22, 2016, and filed September 26, 2016, the PCR Court granted relief on the grounds that Trial Counsel was ineffective for failing to offer reasonable and sound advice regarding the original plea into drug court and for failing to file a motion to reconsider for a downward departure. The State filed a Motion to Reconsider which was denied by an order dated February 22, 2017. The State received written notice of entry of this order on February 22, 2017. The State filed a notice of appeal. This Petition follows.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judges grant relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support her findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

ARGUMENT

I. The post-conviction relief judge erred in finding Shaver satisfied his burden of proving that Mr. Smith was ineffective for failing to offer reasonable and sound advice regarding the original plea into drug court.

On March 31, 2011, Shaver pled guilty to two counts of distribution of a Schedule I drug and was sentenced to Drug Court by the Honorable John C. Hayes, III. Phil Smith, Esquire, represented him on the plea.

At the PCR hearing, Shaver testified he asked Mr. Smith if he could help get Shaver into drug court. App. 37, l. 22. He testified he turned down the State's offer of a five-year cap. App. 38, ll. 1-5. Shaver also testified he accepted the plea into drug court with Mr. Smith in his office. App. 38, ll. 6-10. Shaver reiterated he had wanted to plead into drug court.

Mr. Smith testified he contacted Shaver five times prior to the plea. App. 45, ll. 21-22. He testified during their first conversation, Shaver indicated he wanted Mr. Smith to get him probation or drug court. App. 45, ll. 22-24. Mr. Smith testified he is familiar with drug court and has previously advised clients concerning drug court. App. 46, 3-12. Regarding the fifteen year sentence, Mr. Smith testified he does not have a specific note in his file but in his experience doing drug court pleas in York County, the potential sentence is always accepted before entering drug court. App. 48, ll. 1-7. Mr. Smith testified Shaver's case would have followed the same procedure and Shaver was made aware of the fifteen-year sentence, stating:

> He would have been, and I cannot state, specifically, because, obviously, we do not have a transcript, but I would imagine that the Court went over that with him, as well. I can say that always in counseling concerning drug court I have a conversation with my clients that if you could plea now and get some number of years, it if you go into drug court and then do not succeed, you are going to get a much higher sentence, so I would've had that conversation, the generic with him, in addition to discussion at the plea of the exact sentence.

App. 48, ll. 13-22. Mr. Smith further testified the majority of their conversations concerning drug court would have occurred toward the end of March and the day of the plea. App. 49, ll. 1-14. Again, Mr. Smith, testifying five and a half years after the plea, stated that he explained to Shaver the amount of time he would face if he failed out of drug court, testifying:

> The State: Okay. And again, you explained to him – is it correct that you explained to him what happens when he fails?
> Mr. Smith: Yes.
> The State: Okay. And did you explain to him the amount of time that he would get when he failed?
> Mr. Smith: That would be my practice. I don't have a specific note on it. I do have a note in the file that drug court, knew it to be 15 years, so that must've been communicated, but I — but I do not see it on his sentencing sheet and I do not have a specific note in my file concerning 15 years.

App. 49, ll. 15-25.

Since there was no transcript of the plea available, Mr. Smith recalled Judge Hayes's usual guilty plea colloquy since he has appeared before Judge Hayes for "thousands" of guilty pleas. App. 50, ll. 12-16. He testified Judge Hayes always goes over the potential sentence range and the negotiations. App. 50, ll. 20-25.

In its Order granting post-conviction relief, the PCR Court found Mr. Smith "likely did not communicate the possible punishment of [Shaver 's] plea into drug court and had he done so the outcome would have been substantially different in favor of [Shaver]." App. 68. The PCR Court found that the evidence of the fifteen year sentence in Counsel's file was inconsistent or unreliable. App. 68.

A. Mr. Smith's actions were not deficient.

The PCR Court erred in finding Shaver met his burden of proving that Mr. Smith was deficient for failing to offer reasonable and sound advice regarding the plea to drug court. The PCR Court ignored key testimony, including that Shaver sought a drug court sentence from the beginning of Mr. Smith's representation. The PCR Court also ignored Mr. Smith's testimony that

when he advises clients concerning drug court, he always tells his clients that they can plead guilty and get a certain number of years or they can get into drug court with the risk of potentially receiving a higher sentence if they fail out of drug court. App. 48, ll. 13-20. He testified he would have had this conversation with Shaver in general terms and then more specifically at the plea concerning the exact sentence. App. 48, ll. 20-22.

Given that Shaver's drug court sentence was the result of a negotiation, Shaver would be well aware of the terms of the sentence prior to the plea and at the plea hearing, just as Mr. Smith indicated. Mr. Smith told the PCR Court that after being in front of Judge Hayes "thousands" of times, he knows that Judge Hayes always explains a negotiated plea to a defendant. When asked if Mr. Smith explained what drug court entailed, Shaver replied that Mr. Smith was not familiar with drug court. This assertion is clearly refuted by the record, as Mr. Smith was a veteran public defender and former assistant solicitor who testified he is familiar with drug court and always advises his drug court clients by explaining the sentence they will receive if they fail out of drug court.

The PCR Court erroneously relied exclusively on Mr. Smith's notes in its determination that Shaver met his requisite burden of proof. The PCR Court noted only two documents in Mr. Smith's five-year old file indicate a fifteen year sentence in support of its finding. However, none of this supports a finding Mr. Smith was deficient in the advice that he gave to Shaver, particularly when considering the credible testimony from Mr. Smith himself.

Thus, there is a litany of evidence to show Mr. Smith properly advised Shaver concerning the drug court plea and the consequences of failing out of drug court, that Shaver desired drug court from the beginning of his charges and met with Mr. Smith to discuss this option. It is clear that Shaver was well aware of the drug court outcome but simply wants his original rejected plea

offer back. Accordingly, there is no evidence to support the PCR Court's finding that Mr. Smith was deficient in his advice.

B. The PCR Court's holding errs as a matter of law in determining Shaver established prejudice.

Moreover, the PCR Court did not correctly apply the Strickland standard in its evaluation of Mr. Smith's performance. In order for a defendant, after pleading guilty, to satisfy the prejudice prong of Strickland,

> "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty **and would have insisted on going to trial.**"

Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (emphasis added), citing Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)."

In this case, Shaver presented no testimony and the PCR Court made no findings Shaver would have insisted on going to trial but for Mr. Smith's alleged errors. The PCR Court found Shaver believed the suspended sentence upon failing out of drug court would be similar to the five-year plea that he had previously turned down. Shaver's only testimony centered around his desire for a more lenient sentence, his original rejected five-year plea offer to be reoffered, and that he supposedly did not realize he would get the negotiated fifteen-year sentence when he failed out of drug court. The record is devoid of any testimony from Shaver to indicate he would have rather proceeded to a trial. Prejudice is not shown when a defendant simply indicates that they were not properly informed about their plea or that they desire a lower sentence, but instead can only be shown by an applicant presenting testimony or evidence that he would have

proceeded to a trial but for the alleged errors. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001).

In fact, the only relevant testimony in the record indicates the following from Mr. Smith:

> [Shaver] indicated he didn't want to accept active time and wanted some other resolutions, but from the initial conversation with him, Mr. Shaver indicated that he wanted to see if he could get probation or drug court. [Shaver] never mentioned wanting to go to trial.

App. 47, ll. 9-13. Not only was there no evidence before the PCR Court to indicate that Shaver would have otherwise proceeded to a trial, the only relevant testimony indicates the contrary. Shaver never gave any indication at any point that he desired to face a trial on these charges.

Accordingly, there is no evidence to support the PCR Court's finding Shaver was prejudiced by Mr. Smith's actions. As a matter of law, the only way a PCR applicant can satisfy the prejudice prong of Strickland after a guilty plea is with evidence that applicant would not have pled guilty and would have insisted on going to trial. There is no evidence to support such a finding of prejudice in this case, and the PCR Court clearly erred.

II. The post-conviction relief judge erred in finding Shaver satisfied his burden of proving that Trial Counsel was ineffective for failing to file a motion to reconsider for a downward departure.

After failing out of drug court, Shaver was not represented by Mr. Smith but instead hired the late Bill Hancock. App. 40, ll. 17-18. On November 29, 2012, Shaver was brought before Judge Hayes to be sentenced to the previously negotiated fifteen-year sentence. At this sentencing hearing, Judge Hayes indicated he would impose the suspended negotiated sentences as he was required to do upon revocation of the drug court sentences. App. 7, ll. 1-5.

Mr. Hancock notified the court that he wished to seek a downward departure motion. App. 5, ll. 16-19. The assistant solicitor explained that Mr. Hancock was making this motion because Shaver had now indicated that he might be willing to provide assistance in a drug case

that he previously did not want to assist. App. 6, ll. 6-17. Mr. Hancock officially made the motion for reconsideration, and the court said it would give Mr. Hancock time to present an argument. App. 7, ll. 10-20.

The record reflects and Shaver testified at the PCR hearing that Mr. Hancock did not follow up and present argument on the motion to reconsider. App. 41, ll. 22-23. Shaver testified that he simply wanted Mr. Hancock to argue for less time. App. 42, l. 7.

In its Order granting post-conviction relief, the PCR Court found that Mr. Hancock was ineffective for failing to file a motion to reconsider. App. 69. The PCR Court also found that Mr. Hancock was ineffective for failing to order the transcript from the plea hearing, despite the fact that the issue of Mr. Hancock's failure to order the plea transcript was never alleged in Shaver's PCR application or by Shaver at the hearing.

The PCR Court clearly erred in finding that Mr. Hancock was ineffective for failing to file a motion to reconsider. Mr. Hancock made the motion before the court but did not follow up with a formal motion and argument.

A. A motion for a downward departure is not proper

First, to the extent that the PCR Court granted relief for Mr. Hancock's failure to file a downward departure motion, such a holding is incorrect as a matter of law. The only motion for a downward departure found in South Carolina's Code is found in S.C. Code Ann. § 17-25-65. This statute indicates the State, not defense counsel, is the party who must move for a sentence reduction. See S.C. Code Ann. § 17-25-65(C) ("A motion made pursuant to this provision shall be filed by that circuit solicitor in the county where the defendant's case arose.") Thus, it is an error of law to find Mr. Hancock ineffective for failing to do something which he has no statutory authority to do.

B. The PCR Court's finding that Mr. Hancock was ineffective for failing to file a motion to reconsider fails as a matter of law.

To the extent that the PCR Court granted relief for Mr. Hancock's failure to file a motion to reconsider the sentence, there is no evidence to support this finding.

First, there is no evidence that Mr. Hancock was deficient. The fifteen year sentence that Judge Hayes imposed upon Shaver's failing out of drug court originated as a negotiated suspended sentence. At the November 29, 2012, hearing before Judge Hayes, the judge imposed the previously negotiated suspended sentence. As Judge Hayes has had already sentenced Shaver and suspended this sentence based on Shaver's voluntary entry into the drug court program, Judge Hayes did not have discretion at the November 29, 2012 hearing to alter the sentence. Thus Mr. Hancock cannot be deficient for failing to file a motion asking the judge to do that which he has no authority to do. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency where "it would have been futile for Attorney to have made such arguments").

Furthermore, the PCR Court's finding is erroneous as a matter of law. To satisfy the prejudice prong of Strickland on a claim of failure to file a motion to reconsider, the PCR Court must find that such a motion would have been granted. See Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 (to show prejudice, an applicant must show that the result of the proceeding would have been different). There is no evidence in the lower court record, no testimony at the PCR hearing, and no evidence presented at the PCR hearing that would uphold the finding that a motion to reconsider would have been granted. Shaver has presented no new matter upon which to base a motion to reconsider sentence. Absent any non-frivolous basis for filing such a motion, Mr. Hancock cannot be ineffective in failing to do so.

Most importantly, this holding errs as a matter of law because the PCR Court's own findings regarding Mr. Hancock's failure to file a motion to reconsider seem to contradict its ultimate ruling on this issue. The PCR Court found that "[t]here is no way to say whether or not the Court would have reduced the sentence based on the reconsideration..." App. 69. Based on this finding, the PCR Court cannot find resulting prejudice and cannot find that the motion would have been successful as a matter of law.

Accordingly, the PCR Court clearly erred in finding that Mr. Hancock was ineffective for failing to file a motion to reconsider. His actions were not deficient as there was no evidence to support such a motion, there is no evidence that such a motion would have been successful, and the PCR Court's own findings that there is no way to say whether or not the motion would have been successful contradict its holding and misapplies the Strickland standard of review.

III. The post-conviction relief judge erred in finding that Mr. Hancock was ineffective for failing to order the plea hearing transcript as this issue was never before the PCR Court.

In the PCR Court's Order granting relief, the PCR Court found as follows:

> There is also nothing in the record that indicates Mr. Hancock ordered a transcript from the original guilty plea into drug court. As a result, Mr. Hancock was left with accepting the fifteen year sentence as being accurate. Mr. Hancock's failure to order a transcript to confirm the fifteen year sentence constitutes reversible error and prejudice.

App. 69. This allegation was not raised in Shaver's PCR application nor was it raised at any time by Shaver during the PCR hearing. The PCR Court clearly erred in making this finding as it was never before the PCR Court. The general rule is that issues must be **raised to** and ruled upon by the post-conviction relief court. See Marlar v. State, 375 S.C. 407653 S.E.2d 266 (2007), citing Pruitt v. State, 310 S.C. 254423 S.E.2d 127 (1992).

Even if this issue was properly before the PCR Court, there is no evidence to support the ruling. Mr. Hancock was under no duty to order the plea hearing transcript and there has been no showing that he was ineffective for failing to do so. There is no evidence in the record of any speculation as to whether Shaver's fifteen-year sentence was accurate. There is no evidence in the record that the solicitor, Mr. Smith, Mr. Hancock, or the judge (Judge Hayes presided over both of Shaver's lower court hearings) had any issue with the accuracy of Shaver's negotiated fifteen-year sentence. Thus Mr. Hancock was not deficient for failing to order the plea hearing transcript.

Most importantly, there is no evidence in the record to support the PCR Court's finding of prejudice. To find prejudice according to Strickland, the PCR Court must find that the outcome would have been different. There is no evidence whatsoever before the PCR Court, and no findings made by the PCR Court, that the outcome of Shaver's case would have been different had the plea hearing transcript been ordered. The PCR Court committed clear error by making such a finding.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief judge's erroneous granting of post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar No. 101254

By: _____
ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

June 30, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUN 30 2017
S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from York County

The Honorable John C. Hayes, Trial Judge
The Honorable Letitia Verdin, Post-Conviction Relief Judge

ROBERT SHAVER, #234875 RESPONDENT,

v.

THE STATE OF SOUTH CAROLINA, PETITIONER,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and Appendix** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mr. Nathan James Sheldon
The Law Office of Nathan J. Sheldon, LLC
PO Box 36682
Rock Hill, SC 29732

This 30th day of June, 2017

Jennifer Jennison
JENNIFER JENNISON
LEGAL ASSISTANT