

STATE OF SOUTH CAROLINA
In the Supreme Court

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APR 23 2018

On Writ of Certiorari to Greenville County
Perry H. Gravely, Post-Conviction Relief Judge
R. Lawton McIntosh, Trial Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-002256

CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

- I. Did the post-conviction relief court abuse its discretion in denying Petitioner's motion pursuant to Rule 60(b)(1), where the court's order of dismissal was based upon an error in the transcript which Petitioner did not discover until several months after the evidentiary hearing, after which the post-conviction relief court found trial counsel was constitutionally ineffective for failing to convey a plea offer of twenty years, granted Russell relief, and ordered Petitioner to resentence Russell according to the original plea offer?

STATEMENT OF THE CASE

Procedural History

Respondent Christopher Eric Russell (Russell) was indicted by the July 2011 term of the Greenville County Grand Jury for conspiracy (2011-GS-23-1118), kidnapping (2011-GS-23-1122), armed robbery (2011-GS-23-1123), and first-degree burglary (2011-GS-23-1124). App. 735-36, 739-40, 743-44, 747-48. Susannah Ross, Esquire, represented him. App. 1. On February 13, 2013, Applicant proceeded to a jury trial and was found guilty as indicted on all charges. App. 1, 512-13. The Honorable R. Lawton McIntosh sentenced Russell to confinement for five years for conspiracy and life without parole for each charge of kidnapping, armed robbery, and first-degree burglary. App. 512-13. The sentences are to run concurrently. App. 512-13.

A notice of appeal was filed on Russell's behalf and an appeal perfected pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Russell's convictions. State v. Russell, Op. No. 2015-UP-435 (filed on August 19, 2015). The Remittitur was issued on September 16, 2015. App. 612.

Thereafter, on June 1, 2016, Russell filed an application for post-conviction relief alleging trial counsel was ineffective for failing to convey a twenty-year plea offer to him prior to trial. App. 616-22. Petitioner made its Return on January 12, 2017, requesting an evidentiary hearing be held. App. 623-28. An evidentiary hearing into the matter was convened on April 19, 2017, at the Greenville County Courthouse. App. 630. Russell was present at the hearing and represented by R. Mills Ariail, Esquire. App. 630. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent. App. 630. Russell testified on his own behalf. App. 631. Petitioner presented testimony from trial counsel. App. 631.

On June 12, 2017, the post-conviction relief court signed an order granting post-conviction relief, finding trial counsel was ineffective for failing to convey a twenty-year plea offer to Russell prior to trial. App. 702-11. This order was filed by the Greenville County Clerk of Court on June 15, 2017. App. 702. Petitioner received copy of the order via U.S. Mail on June 19, 2017. App. 713. On June 29, 2017, Petitioner filed a motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRPC. App. 713-17. On July 21, 2017, the post-conviction relief court denied Petitioner's motion to reconsider. App. 718.

Thereafter, Petitioner received correspondence indicating trial counsel had contacted the trial court reporter, who reviewed the trial tapes and discovered an error in the transcript. App. 729. Petitioner then filed a motion pursuant to Rule 60(b)(1) asking the post-conviction relief court to reconsider its decision based upon the corrected transcript. App. 719-31. The post-conviction relief court denied Petitioner's motion by order filed October 12, 2017. App. 732-33.

Factual History

On Saturday night, December 20, 2010, Jeffrey Lyles (Mr. Lyles) was at home relaxing with a fire, when two armed men wearing camouflage clothing and police masks burst through his back door. App. 82-83, 85. The men identified themselves as police officers, shoved Mr. Lyles to the ground, kicked him in the side, and tied his hands behind his back. App. 85-86. The skinnier of the two men shoved a gun into Mr. Lyles' mouth, demanding to know where his money and safe were and threatening to kill him if he did not tell them. App. 88. The men then moved Mr. Lyles to a back bedroom, stole \$760 from his wallet, along with his watch and cellphone, and began ransacking the house apparently trying to locate the safe and money they believed to be there. App. 89-90, 94.

Meanwhile, Elaine Lyles (Mrs. Lyles) and her granddaughter were leaving work at the family's restaurant to go get something to eat, but when they were unable to reach Mr. Lyles on his cellphone, they drove to their home to check on him instead. App. 112-14, 154-55. Mrs. Lyles entered the home and walked down the hallway looking for Mr. Lyles. App. 115-16. As she did so, the skinny man with the gun jumped out and forced her to the floor. App. 116. The granddaughter, who had not been seen by the men in the house, immediately ran to a neighbor's house to get help. App. 161-62.

The robber with the gun demanded Mrs. Lyles tell him where the money and the safe were, threatening to kill her husband if she did not comply. App. 117. He took \$200 from her, and then both men continued ransacking the house. App. 118-19. By this time, the Lyles' granddaughter and a neighbor, Jimmy McDaniels (McDaniels), had called 911. App. 162, 170. The police arrived approximately two minutes later, and set up a perimeter outside the Lyles' home. App. 163, 170-71, 186, 188-89, 202.

Inside the home, the robbers noticed the arrival of law enforcement and began to panic. App. 120-21. The bigger man ran out the back door, discarding his pistol in the back yard as he did so. App. 189-90, 193. He was quickly apprehended with the help of a police dog and was identified as Antonias Williams. App. 189-90. The skinnier robber took off his mask, and when he turned his attention away from Mrs. Lyles, she got up and ran out the back door as well.¹ App. 122, 202. As she did, the skinny man fled out the front door and escaped into a nearby wooded area while the officers' attention was focused on Williams and Mrs. Lyles. App. 203.

Williams was Mirandized, and he admitted to being in possession of the Lyles' property. App. 193-94. He explained to officers that he and his accomplice believed there was \$200,000

¹ At trial, Mrs. Lyles testified that although she did not get a good look at his face, the skin tone, lips, and voice of the skinny man matched those of Russell. App. 122, 144-46.

hidden inside the home. App. 199. Williams also told officers the vehicle used in the crime was parked one street over. App. 244. However, Williams repeatedly refused to name his accomplice. App. 200, 244-45. Using Williams' information, officers located a white van parked in the driveway of a vacant residence one street away from the Lyles home. App. 207. The van was removed from the scene, and investigators obtained a search warrant for it. App. 208-09, 225-26. Inside, they recovered one cell phone next to the driver's seat, another cellphone plugged into the van's charging port, various police costume items, a stocking cap, and a pry bar. App. 248-51.

On January 5, 2011, Investigator Weiner interviewed Williams again, and this time Williams identified Christopher Eric Russell as his accomplice. App. 254-55. Investigator Weiner also asked Williams about the cellphones found in the van, and Williams indicated Russell's cellphone was the one plugged into the charger. App. 255-56. Based on Williams' statement, Investigator Weiner obtained a search warrant for the phone, a subpoena for the phone records, and a warrant for Russell's arrest. App. 256-57, 259-60.

Thereafter, on January 10, 2011, officers located Russell and arrested him after he attempted to flee on a bicycle. App. 195-97. When he was booked at the Greenville County Detention Center, he identified his mother as his next of kin and provided her phone number as part of the booking process. App. 277-78. Officers conducted a forensic examination of the cellphone identified as Russell's by Williams, and the same phone number Russell provided during booking was included in the cellphone's contact list as "Momma."² App. 263, 269,

Russell was indicted for first-degree burglary, kidnapping, armed robbery, and conspiracy, and proceeded to trial. App. 1, 735-36, 739-40, 743-44, 747-48.

² The cellphone was pre-paid, and no ownership information was available. App. 256-57.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, ___ S.C. ___, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Whether to grant or deny a Rule 60(b) motion is within the sound discretion of the trial judge. Raby Const., LLP v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). This Court's review, therefore, "is limited to determining whether there was an abuse of discretion." Id.

ARGUMENT

The post-conviction relief court abused its discretion in denying Petitioner's motion pursuant to Rule 60(b)(1), where the court's order of dismissal was based upon an error in the transcript which Petitioner did not discover until several months after the evidentiary hearing, after which the post-conviction relief court found trial counsel was constitutionally ineffective for failing to convey a plea offer of twenty years, granted Russell relief, and ordered Petitioner to resentence Russell according to the original plea offer.

In granting relief, the lower court found trial counsel was constitutionally ineffective for failing to convey a twenty-year plea offer to Russell prior to trial. App. 702, 705-08. The post-conviction relief court stated it specifically relied on the trial transcript, which confirmed Russell's testimony at the evidentiary hearing. App. 707. That transcript, however, was erroneous and has now been corrected. App. 729-30. Therefore, the post-conviction relief court's reasoning in granting relief is no longer supported by probative evidence, and the court abused its discretion in denying Petitioner's Rule 60(b)(1) motion.

Rule 60(b)(1) of the South Carolina Rules of Civil Procedure provides, "On motion and upon such terms as are just, the court may relieve a party. . . from a final judgment, order, or proceeding. . ." on the basis of "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), SCRCF. "This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427, 439 (2001). "[W]here there is a good faith mistake of fact, and no attempt to thwart the judicial system, there is basis for relief." Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (1986). The decision to deny or grant a motion pursuant to Rule 60(b) is within the sound discretion of the trial judge. Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013). "An abuse of discretion occurs when the order of the court is controlled by an error of law or *where the order is based on factual findings that are without evidentiary support.*" Id. (emphasis added).

In this case, the post-conviction relief court's order is based on factual findings that are without evidentiary support, as the trial transcript was incorrectly transcribed, and the transcript was the basis of the post-conviction relief court's decision to grant relief. At the evidentiary hearing, Russell testified the only offer ever communicated to him was to plead to life without parole, and he was unaware there was an offer of twenty years until he obtained copies of his file through a Freedom Of Information Act request after his conviction. App. 639-43. In contrast, trial counsel testified she received a plea offer of twenty years in writing from the solicitor in March 2011. App. 671. She testified it was her usual practice to convey all plea offers and discuss the ramifications with her clients, although she did not have any notes in her file confirming the practice was followed in this case, specifically. App. 672-73. Trial counsel testified it was her practice at the time to convey plea offers in person rather than in writing. App. 687. Trial counsel also testified the State served Applicant with notice of its intent to seek life without parole (LWOP) on December 8, 2011, and her notes reflect she made jail visits on December 5, 2011, and December 7, 2011, which she believed were attempts to persuade Russell to avoid LWOP by accepting the plea offer. App. 673.

Trial counsel testified she believed the transcript reflected a misstatement, and Russell was offered the chance to plead guilty *without* life without parole on the table, but Russell maintained his innocence throughout the case and did not wish to plead guilty. App. 686-87, 697. However, the post-conviction relief court found Russell's testimony to be credible specifically because it was supported by the trial transcript, which, as originally transcribed and presented to the court at the evidentiary hearing, reflected trial counsel stated during sentencing the State offered Russell "opportunities *to plead to life without parole* on the table a number of times." App. 511, 707. Relying on the original transcript, the order granting relief states "[t]his Court

finds the trial transcript confirms [Russell's] testimony. . . . Counsel's statement in the transcript is consistent with [Russell's] testimony that he was unaware of any offers except to plead to a sentence of LWOP. This Court finds there is no evidence that the offer of twenty years was conveyed to [Russell]." App. 707.

Following the evidentiary hearing, however, trial counsel contacted the court reporter from Russell's trial to challenge the transcript. App. 729. By letter dated September 12, 2017, the court reporter sent trial counsel a letter notifying her of an inadvertent mistake in transcription. App. 729. Specifically, the court reporter corrected her transcription of page 511, lines 4-6, so it now reads, "Mr. Russell has been offered opportunities to *plead without life without parole on the table* a number of times. He has consistently maintained his innocence on this case." App. 729-30 (emphasis added). The corrected version of the transcript reflects trial counsel's version of events that Russell was offered the chance to plead *without* life without parole on the table, rendering the post-conviction relief court's credibility finding in Russell's favor now unsupported by the evidence.

Nonetheless, the post-conviction relief court denied Petitioner's motion on the basis that the corrected transcript "confirms offers were made, but it does not confirm any offers were communicated to [Russell]." App. 732. However, the transcript reflects Russell, at the time of sentencing, did not dispute or correct trial counsel's statement that he had been offered the chance to plead to something less than life. App. 510-13. Furthermore, trial counsel's immediate next statement, "He has consistently maintained his innocence on this case," in the context of a discussion about plea bargaining, can reasonably be construed to mean Russell refused to accept a plea offer because it would require him to admit his guilt. App. 511. This is

further supported by trial counsel's testimony at the evidentiary hearing that Russell's "position was always that he was innocent, and he did not want to plead guilty." App. 674.

The post-conviction relief court's order clearly reflects a credibility contest between Russell and trial counsel, in which the transcript was the tiebreaker – because the transcript supported Russell's version of events, the court granted relief. App. 705-08. However, the transcript no longer supports Russell's testimony, and in fact, flatly contradicts it. App. 730. The only remaining evidence in the record to support the post-conviction relief court's grant of relief is Russell's own self-serving testimony that the twenty-year offer was not conveyed to him. App. 639-43. Trial counsel testified, however, her practice at the time was to convey all plea offers to clients in person, and she believed her two visits to the jail in days immediately prior to receiving the State's LWOP notice were an effort to persuade Russell to accept the plea and avoid a possible life sentence. App. 673, 687. This testimony as to trial counsel's usual practice is sufficient to refute Russell's testimony. See, e.g., Simuel v. State, 390 S.C. 267, 269, 710 S.E.2d 738, 738 (2010) (upholding post-conviction relief court's denial of relief where trial counsel testified he normally informed clients of their right to appeal after trial, and although he could not specifically recall informing Simuel, he probably did so); Fraiser v. State, 351 S.C. 385, 388, 570 S.E.2d 172, 174 (2002) (upholding post-conviction relief court's denial of relief where trial counsel testified her normal practice is not to discuss parole eligibility with clients, although she could not recall whether she discussed it with Fraiser).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The parties and the court reasonably relied on the accuracy of the transcript, as attested to in the court reporter’s accompanying affidavit. App. 514. However, the original version of the transcript was materially inaccurate. App. 729-30. The post-conviction relief court’s original findings of fact and conclusions of law center on an error made by a court administration employee, through no fault of either Petitioner or Russell, which has now been corrected. App. 729. The corrected version of the transcript actually confirms trial counsel’s testimony, not Russell’s, and therefore, the credibility finding made by the post-conviction relief court, on

which the grant of relief is based, is without evidentiary support because there is no longer any credible evidence of deficient performance. “[W]here there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief. Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). Russell is not entitled to resentencing predicated on a factual error, and therefore, the post-conviction relief court abused its discretion in denying Petitioner’s Rule 60(b)(1) motion for relief from judgment.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court’s denial of its motion for relief from judgment pursuant to Rule 60(b)(1).

Respectfully submitted,

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4/23, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H Gravely, Circuit Court Judge

Appellate Case No. 2017-002256

RECEIVED

APR 23 2018

S.C. SUPREME COURT

Christopher Eric Russell,Respondent,

v.

State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

I, Lindsey A. McCallister, certify that I have today served the within **Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in inter-agency mail and addressed to:

Wanda H. Carter, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 23rd day of April, 2018.



LINDSEY A. MCCALLISTER
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ATTORNEY FOR RESPONDENT



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ATTORNEY GENERAL

April 23, 2018

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APR 23 2018

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Christopher Eric Russell v. State of South Carolina
Appellate Case No: 2017-002256
Lower Court Case No: 2016-CP-23-3282

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petitioner's Petition for Writ of Certiorari** along with the Appendix in the above-referenced case.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar #79054

LAM/jacc
Enclosures

cc: Wanda H. Carter, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)