

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

October 5, 2018

RECEIVED
OCT 09 2018
S.C. SUPREME COURT

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

RE: Michael W. McCraw, SCDC # 358041, vs. State of South Carolina
Appeal of Case No. 2017-CP-41-96

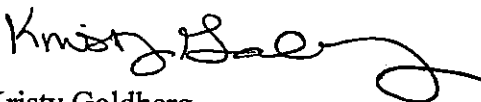
Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal. I was **retained** to represent Mr. McCraw on his PCR but I believe he wishes to be screened for **appointed counsel** on his Appeal. I would ask that the Office of Appellate Defense please provide an application for indigency for Mr. McCraw.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,


Kristy Goldberg

CC: Susannah Cole
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Michael McCraw, #358041
Broad River Correctional Institution
4444 Broad River Road

Columbia, South Carolina 29210

The Honorable Sheri Coleman
Clerk of Court
100 East Church Street
Saluda, South Carolina 29138

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 09 2018

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

S.C. SUPREME COURT

William A. McKinnon, Circuit Court Judge

Case No. 2017-CP-41-96

Michael W. McCraw, SCDC # 358041, Appellant

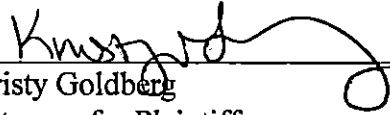
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Michael W. McCraw hereby appeals from the Order of the Honorable William A. McKinnon presiding Judge for the 11th Judicial Circuit, filed September 4, 2018 and received by counsel for the Applicant on September 7, 2018 in the matter of Michael W. McCraw v. State of South Carolina, Case No. 2017-CP-41-96.

October 5, 2018



Kristy Goldberg
Attorney for Plaintiff

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Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Susannah Cole
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 09 2018

S.C. SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Case No. 2017-CP-41-96

Michael W. McCraw, SCDC # 358041, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

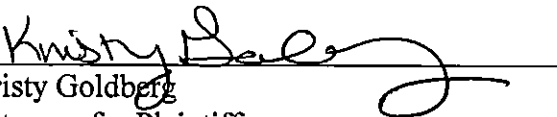
Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;

Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on October 5, 2018 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Susannah Cole
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211


Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

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Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Susannah Cole
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SALUDA) 2018 SEP -4 AM 9:18)
Michael W. McCraw,) CLERK OF COURT) C.A. No. 2017-CP-41-96
S.C.D.C. No. 358041,) SALUDA CO. S.C.)
))
Applicant,))
v.)) **AMENDED**
)) **ORDER PARTIALLY GRANTING**
State of South Carolina,)) **POST-CONVICTION RELIEF**
))
Respondent.))
_____))

Having considered the State’s Motion to Reconsider, the State’s motion is granted with regard to the timing of any motion to reconsider by Applicant McCraw, and denied in other respects. This amended Order is SUBSTITUTED for the earlier order in this matter. The amended order also clarifies that McCraw’s trial counsel was not ineffective, but his appellate counsel was ineffective.

AMENDED ORDER

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 10, 2017 and amended February 1, 2018. Respondent made its return on or about July 12, 2017. An evidentiary hearing was held on April 18, 2018, at the Lexington County Courthouse. Applicant was present and represented by Kristy Goldberg, Esq. and Assistant Attorney General Susannah Cole represented the Respondent.

Witnesses who testified at the hearing included the Applicant, Applicant’s trial counsel Ola A. Johnson, and Applicant’s former counsel Stanley Myers. Also testifying were witnesses Susette Berlin and Barbara Jones. The Court had before it Applicant’s Record on Appeal including the original trial transcript, Record on Appeal including the sentencing transcript, Appellate orders, the Saluda County Clerk of Court records, the South Carolina Department of Corrections records,

eleven exhibits offered by the Applicant, the PCR applications and the State's Return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Saluda County Clerk of Court. Applicant was indicted on October 1, 2013 by the Saluda County Grand Jury for Manufacturing Methamphetamine. Attorney Ola A. Jonson represented the Applicant during his trial which began October 8, 2013 before the Honorable Donald B. Hocker and a jury. The jury found the applicant guilty as indicted on October 10, 2013 and a sealed sentence was imposed due to the fact that the Applicant had failed to appear in Court on October 9 and 10. A bench warrant was issued for the Applicant's arrest. On December 2, 2013 the sealed sentence was opened and imposed by the Honorable Thomas Russo. The Applicant was sentenced to the maximum thirty years for this indictment.

Counsel orally made a motion to reconsider at this time, however, Judge Russo refused to reconsider the sentence at that time. *ROA p 98*. The Applicant thereafter filed a Motion to Reconsider before Judge Hocker which was ultimately denied. A timely Notice of Appeal was filed on the Applicant's behalf whereupon the Applicant was represented by Benjamin Tripp, Esq. The conviction was affirmed by Unpublished Opinion No. 2015-UP-540 filed November 25, 2015. A request for a writ of certiorari was also denied by Order dated September 22, 2016.

The Remittitur was issued September 26, 2016. Counsel for the Applicant filed a timely Application for post-conviction relief April 10, 2017, and a subsequent Amended Application on February 1, 2018. The Applicant proceeded on the following grounds for relief:

- a. Ineffective assistance of counsel Myers for failure to explain and relay details of plea offer and failure to assist the Applicant in accepting the plea offer before it was withdrawn by the State;
- b. Ineffective assistance of trial counsel for failure to alert Applicant as to a conflict of interest in a timely manner;

- c. Ineffective assistance of counsel for failure to object to indictment or request a continuance when the substance of the allegations against the Applicant changed;
- d. Ineffective assistance of trial counsel in failing to effectively object and preserve the record when multiple instances of inadmissible testimony was elicited through the testimony of Michelle Norris and failed to object to curative instruction offered;
- e. Ineffective assistance of trial counsel for failure to properly prepare case for trial and present a defense;
- f. Ineffective assistance of trial counsel due to the fact that the jurors were unable to hear trial counsel's cross examinations during at least the first full day of trial, page 234;
- g. Ineffective assistance of trial counsel for failure to object when Sergeant Billy Laney testified as to opinions without being qualified as an expert witness;
- h. Ineffective assistance of trial counsel for failure to object when the Court informed the jury that they could not consider the Defendant's failure to appear/testify but did not inform the jury that the defendant has no burden and they similarly could not consider the Defendants failure to present witnesses and evidence, leaving the jury with the impression that this could be considered in deliberations, page 92, 369;
- i. Ineffective assistance of trial counsel for failure to present any mitigation in regards to sentencing, page 390;
- j. Failure to effectively argue and present Motion to Reconsider Sentence;
- k. Failure to cite to South Carolina Code of Laws §44-53-420 and argue that the Applicant's sentence should not exceed one half of the punishment prescribed for the offense
- l. Failure of Appellate counsel to raise the issue of which Judge has the authority to reconsider the Applicant's sentence per State v. Smith, 276 S.C. 494 (1981);
- m. Failure to object when the Court instructed the jury that "possession of equipment or paraphernalia used in the manufacture" of methamphetamine is prima facie evidence of intent to manufacture.

During the evidentiary hearing counsel for the Applicant stated that allegation (h) would be withdrawn. Counsel for the Applicant also requested that allegation (j) be amended to include that counsel failed to effectively argue and present his Motion for a New Trial. This amendment was allowed without objection from the State.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This

Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Motion to Reconsider Sentence by Trial Counsel

The Applicant appeared in Court on October 8, 2013 when his jury trial began. The Applicant thereafter failed to appear on October 9 or 10. The jury convicted the Applicant as indicted on October 10 and Judge Hocker imposed a sealed sentence. A bench warrant was then issued for the Applicant.

The Applicant was arrested on October 17, 2013 and was brought to Court on December 2, 2013 for the sealed sentence to be imposed. On this date the Honorable Thomas Russo unsealed the envelope and imposed Judge Hocker's sentence of thirty years¹. Attorney Ola Johnson then moved for reconsideration of that sentence, to which Judge Russo replied "[w]ell, that would have to be before Judge Hocker. He imposed the sentence." ROA 98. The Judge continued, "I'm just reading it and what I think you might have to do is make that Motion for Reconsideration in writing and then it'll be passed on to Judge Hocker for his consideration²." Id.

It has been clearly established by the South Carolina Supreme Court that "the authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) "A judge is without authority to alter, amend or modify a sentence imposed by him (1) after the expiration of the term of court at which the sentence was imposed or (2) within the same term of

¹ The Applicant was facing a potential sentencing range of 10 – 30 years and the sentence imposed was the maximum possible sentence. SC ST 44-53-375.

² However, Judge Russo did calculate how much time the Applicant had served in jail on this charge and ordered that he receive credit for that amount of time.

court unless the State is afforded due notice.” Id. at 497, 201. “A sealed sentence does not become the judgement of the court until it is opened and read to the defendant.” Id. at 497, 201. Id. at 498, 202. Thus, in this case, Judge Russo was the “sentencing judge” as he is the judge who opened and imposed the sentence under Smith.

Just as in Smith, since Judge Russo refused to rule on the Motion to Reconsider, “it is apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law.” Id. at 498, 202. “It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.” Id.

Judge Russo clearly refused to exercise his discretion based on an erroneous view of the law. The State argues this error was not preserved by McCraw’s trial counsel, but the Court disagrees. Attorney Johnson made an oral Motion to Reconsider before Judge Russo, the correct judge pursuant to State v. Smith. Judge Russo refused to hear it, and Johnson then moved for reconsideration before Judge Hocker, specifically citing State v. Smith. That is sufficient. It does not matter that Judge Hocker did not address this argument at all in his Order or Supplemental Order, filed December 20, 2013 and January 2, 2014 respectively. It is not necessary for attorneys to ask for reconsideration of prior motions to reconsider (a “motion to reconsider the ruling on the motion to reconsider”) in order to preserve issues for appellate review. See, e.g., Pye v. Estate of Fox, 369 S.C. 555 (2006) (holding motions to reconsider are an exception to the normal rule that issues must be raised and ruled on to be preserved – and holding that raising an issue in a motion to reconsider is sufficient to preserve it for appeal whether or not the judge rules on that issue). In this matter, attorney Johnson moved for reconsideration before the correct court, and when rebuffed, filed for reconsideration with the court he was directed to file with, specifically citing the controlling case law. That is enough under Pye.

Appellate counsel Benjamin Tripp failed to raise this issue in the Applicant's appeal. Accordingly, this Court finds that Applicant's appellate counsel was deficient in failing to address this clear error of law. In its Motion to Reconsider, the State argues McCraw's application is defective as a matter of law because he did not present testimony from Tripp, the appellate lawyer, regarding his decision not to raise the State v. Smith issue. In a typical PCR case, involving judgment of counsel, this might be persuasive. Here, there was a clear and unequivocal error of law regarding the sentencing. Given McCraw was sentenced to the maximum permitted by law, this Court cannot conceive of a situation where an attorney would make a reasoned judgment not to address the sentencing issue. Appellate counsel was ineffective for failing to raise this issue on appeal.

This Court further finds that counsels' deficient performance 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; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984). Here, Judge Hocker specifically accused McCraw of attempting to "perpetrate a fraud upon the court" with his allegedly fake hospital excuse as a reason for denying the motion. At the PCR hearing, the nurse who signed the excuse testified that it was her signature on the hospital excuse and that it was legitimate. She further testified that, at the time, the hospital kept no records of excuses it issued – so when the hospital told Judge Hocker there was no record of McCraw's excuse, that statement was technically true but highly misleading. The hospital did not tell Judge Hocker the hospital had no records of any of the excuses the hospital had issued. Had Judge Russo heard the motion to reconsider the sentence rather than Judge Hocker, Judge Russo would not have had a highly misleading conversation with the hospital leading him to the understandable, but erroneous,

conclusion McCraw was attempting a fraud on the court. This Court believes there is a reasonable probability McCraw would not have received the maximum under those circumstances.

In its Motion to Reconsider, the State further argues that State v. Smith is undermined by State v. Campbell, 376 S.C. 212 (2008). This Court, as a lower court, has no authority to contemplate whether controlling precedent like State v. Smith is undermined sub silentio by other decisions and to disregard precedential decisions. State v. Smith is a decision of our Supreme Court, which plainly states the judge who opens the sealed sentence is the sentencing judge. This Court is bound by that decision. Further, the issue of whether Judge Hocker had authority over the case or not is not dispositive. Motions to reconsider must be directed to the sentencing judge. State v. Smith is clear that that judge is Judge Russo, on these facts.

Finally, the State argues it was error holding in abeyance McCraw's deadline to file a Motion to Reconsider the rulings adverse to McCraw. Upon reconsideration, the Court agrees this was error.

ALL OTHER ALLEGATIONS

As to all other allegations raised by the Applicant in his Amended Application and presented during the evidentiary hearing, this Court denies all grounds. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRC 71.1(e)). 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. This Court finds that the Applicant has not met his burden as to all remaining issues.

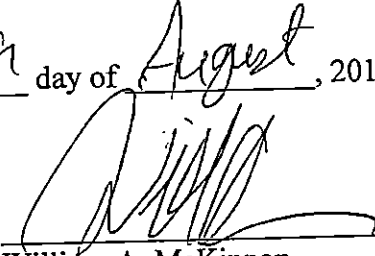
CONCLUSION

Based on the foregoing, this Court finds and concludes that Counsel was deficient in his representation of the Applicant and the Applicant was prejudiced by counsel's representation. Therefore, this PCR application must be granted only to the extent that the Applicant's indictment is remanded to General Sessions Court for the purpose of a Motion to Reconsider Hearing to be held before the Honorable Thomas Russo. The Applicant's conviction is not overturned. As to all remaining grounds, the Court adopts the reasoning set forth in the State's Return and additionally finds the Applicant failed to present evidence at the evidentiary hearing sufficient to carry his burden of proof.

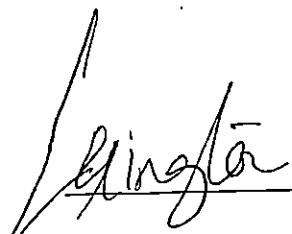
IT IS THEREFORE ORDERED:

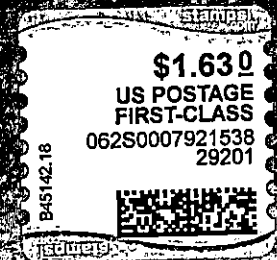
1. That the application for post-conviction relief be granted to the extent that the charges be remanded to General Sessions Court for the purpose of a Motion to Reconsider Hearing to be held before the Honorable Thomas Russo; and
2. Because the conviction is not overturned, that Applicant will continue to be housed at the South Carolina Department of Corrections during the pendency of this Motion.

AND IT IS SO ORDERED this 29 day of August, 2018.


William A. McKinnon
Presiding Judge
Eleventh Judicial Circuit

#2561


South Carolina.



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isty Grafton Goldberg, LLC
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The Honorable Daniel E. Shearouse
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