

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
Marion O. Hanna, Municipal Judge
Allison R. Lee, Circuit Court Judge
Perry H. Gravely, PCR Judge

RECEIVED

Apr 20 2020

S.C. SUPREME COURT

Appellate Case No. 2019-000708

Marie Assa'ad-Faltas,

Respondent,

v.

State of South Carolina,

Petitioner.

AMENDED PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did the PCR court err by granting summary judgment in concluding the CMC conviction for contempt of court on May 18, 2011, was invalid and the CMC had no authority to issue any conditions relating to psychiatric treatment because trial court error is not a valid claim for PCR?

- II. Did the PCR court erroneously find there was no evidence in the record showing that Faltas accepted the conditions of the bond despite the circuit court's order finding Faltas agreed to the conditions of the bond was in the record?

- III. Did the PCR court err in granting summary judgment by relying on a prior PCR hearing record where a previous PCR court vacated its order granting relief issued after that hearing because the previous PCR court did not allow the State to cross-examine the one witness presented or allow the State to present any defense to the allegations and incorrectly applied the prejudice analysis?

STATEMENT OF THE CASE

Dr. Marie Assa'ad-Faltas (Faltas) was convicted of one count of contempt of court and one count of contempt by Municipal Judge Marion O. Hanna in the City of Columbia Municipal Court (CMC) on March 28, 2011. (App. 38). The CMC sentenced Faltas to serve ten days in the Alvin S. Glenn Detention Center (ASG) for contempt of court and fifteen days for contempt of a court order. (App. 38). Faltas appealed.¹

On March 30, 2011, Faltas appealed her convictions and sentences to the Richland County Court of Common Pleas. (App. 33-37). Simultaneously, Faltas moved for her sentences to be stayed pending the appeal. (App. 35-37). On April 6, 2011, a hearing regarding “[Faltas’s] motion for an appeal bond to stay the sentences for [her] convictions” convened in the CMC before Judge Hanna. (App. 43-57; 74-76). Faltas was transported from ASG to the CMC; however, Faltas waived her presence, in writing, and was represented by Orin G. Briggs (Counsel) of the Briggs Law Firm. (App. 43; 74).

The CMC granted Faltas an appeal bond with conditions, against Faltas’s wishes.² (App. 74-76). The CMC also stayed Faltas’s sentence and ordered she be released from ASG upon the payment of a \$1,000 cash bond pending conclusion of the appeal. (App. 74). The CMC based the price of the appeal bond on a finding that Faltas was “a flight risk due to her status as a resident immigrant, and no familial ties to this area. . . . as surety for [Faltas] promising to ‘defend the

¹ These contempt charges are not the basis for the underlying PCR action; rather, the basis for PCR stems from a third contempt charge for failure to comply with the conditions placed on the appeal bond.

² Faltas, through Counsel, advised the CMC “she cannot and would not agree to those conditions on the bond. . . . her preference would be the court just not issue a bond based upon her unwillingness to cooperate.” (App. 51).

appeal at the next term of the Court of Common Pleas' for the Fifth Judicial Circuit" (App.

74). The CMC additionally placed conditions upon Faltas's appeal bond, ordering:

1. [Faltas] is to participate in regular weekly sessions with a psychiatrist for a period of one (1) year, or until the conclusion of the pending appeal for this matter . . . [;]
2. [Faltas] must abide by the October 6, 2010, [CMC order] which places constraints upon [Faltas's] access to City of Columbia buildings and personnel[;] and
3. [Faltas] is to immediately surrender possession of her passport to the [CMC] pending conclusion of the appeal in this matter.

(App. 75).

The CMC clarified its original sentence to be an aggregate twenty-five day sentence—consecutive sentences of ten days for contempt of court and fifteen days for contempt of court order. (App. 75). The CMC further instructed ASG the sentence was to be served day for day “with no credit provided for good behavior or for any other reason.” (App. 75).

On May, 18, 2011, a rule to show cause hearing convened at the CMC. (App. 106; 111-51). While still represented by Counsel, Faltas was again held in contempt of court, this time for failing to comply with the terms of her appeal bond—failure to see a psychiatrist and failure to surrender her passport. (App. 170-72). This contempt charge is the basis of the underlying PCR action.

On May 31, 2011, Faltas appealed to the Richland County Court of Common Pleas. (App. 153-65). The CMC entered its written order holding Faltas in contempt of court on June 6, 2011. (App. 166-68). The CMC amended its order “for purpose of correcting scrivener's error” on June 25, 2011. (App. 170-72). Faltas supplemented her appeal on June 15, 2011. (App. 174-79).

On June 23, 2011, Counsel wrote Judge Hanna regarding possible modification of the appeal bond conditions. (App. 180-89). On July 1, 2011, Chief Administrative Municipal Judge

Dana D. Turner advised Counsel it “[would] consider attempts by [Faltas] to seek counseling as a good faith effort to comply with [the CMC’s] order requiring the same.” (App. 190).

Faltas’s appeal hearing convened on May 9, 2012, before Circuit Court Judge Alison R. Lee at the Richland County Courthouse. (App. 191-220). On September 17, 2012, the circuit court affirmed Faltas’s convictions and sentences. (App. 221-25). Faltas filed a motion to reconsider on September 27, 2012. (App. 226-33). The circuit court denied the motion on October 19, 2012. (App. 234-35). Thereafter, Faltas, through Counsel moved to refund the appeal bond on December 12, 2012. (App 236). Faltas’s appeal bond was refunded on December 13, 2012. (App. 237).

On July 9, 2013, Faltas moved to be appointed counsel so she could appeal the circuit court’s decision, or, alternatively file a PCR action. (App. 238-39). On November 8, 2017, Judge Clifton Newman granted Faltas’s request to be appointed counsel so she may pursue a belated appeal or timely PCR action. (App. 241-46).

Faltas commenced the underlying PCR action on November 8, 2017. (App. 247-51). On December 5, 2017, Faltas moved to relieve her appointed PCR counsel, and she again moved to relieve appointed PCR counsel on December 12, 2017. (App. 252-66; 67). The State made its return and motion to dismiss on January 18, 2018. (App. 268-77). Faltas amended her allegations, through appointed PCR counsel, on January 23, 2018. (App. 278-80). Chief Administrative Judge Jocelyn Newman granted Faltas’s motion to relieve counsel on January 26, 2018. (App. 281-84). On March 5, 2018, Faltas, through appointed standby counsel, supplemented her amended allegations. (App. 285-87). A hearing into the matter convened before Circuit Court Judge Brooks P. Goldsmith on March 22–23, 2018. (App. 288-438).

Faltas was present and appeared *pro se* with Christopher S. Truluck as standby counsel. Assistant Attorneys General Jessica E. Kinard and Johnny E. James, Jr. represented the State.

(App. 288). Faltas called Counsel to testify at the hearing. Judge Goldsmith allowed Faltas to question Counsel on direct; however, Judge Goldsmith did not allow the State to cross-examine Counsel. (App. 321-438). At the end of the hearing, Judge Goldsmith orally granted relief “on all the grounds argued and stated by [Faltas],” without allowing the State the opportunity to cross-examine Counsel or present any witnesses or evidence in defense of the allegations. (App. 437-38). Judge Goldsmith submitted an order granting relief on all grounds on April 10, 2018. (App. 440-47).

The State timely moved for reconsideration pursuant to Rules 59 and 60, SCRCPP, on April 20, 2018. (App. 448-56). Faltas filed a return in opposition to the State’s motion on April 30, 2018. (App. 457-72). The State moved to strike Faltas’s return to its motion as a *pro se* filing on May 4, 2018. (App. 473-76). Faltas then filed a memorandum in opposition to the State’s motion to strike. (App. 477-80). On May 21, 2018, Judge Goldsmith vacated his order granting relief, ordered a new PCR hearing, and recused himself from presiding over any further proceedings involving Faltas. (App. 481-84). On May 18, 2018, after Judge Goldsmith signed his order vacating the grant of relief, but before it was filed, Faltas moved for reconsideration. (App. 485-88). Faltas supplemented her motion to reconsider on May 22, 2018. (App. 489-91). Faltas then moved for summary judgment and for relief based on the State’s post-trial conduct. (App. 492-508). Thereafter, on May 31, 2018, standby counsel filed a document entitled “Notice of Motion for Reconsideration of Recusal Submitted by Standby Counsel in Support of [Faltas’s] Previously Submitted Motion.” (App. 509-12). Faltas then filed another motion to reconsider on May 31, 2018. (App. 513-520). The State filed a return to Faltas’s motions to reconsider recusal, and vacation of the court’s previous order; and response to Faltas’s motion for summary judgment. (App. 521-29). Faltas filed a reply to the State’s response to her motions on June 15, 2018. (App.

530-32). Simultaneously, Faltas moved to relieve standby counsel. (App. 533). On June 13, 2018, Judge Goldsmith denied Faltas's motions to reconsider his recusal. (App. 534-36).

The State then moved for summary judgment on July 31, 2018. (App. 537-62). Thereafter, Faltas filed her opposition to the State's motion for summary judgment combined with her renewed / supplemented motion for Rule 11 sanctions on the State. (App. 563-88). A hearing on the cross-motions for summary judgment convened on August 10, 2018, at the Richland County Courthouse before Judge Perry H. Gravely. (App. 589-637). Faltas appeared *pro se* with Christopher S. Truluck as standby counsel. Assistant Attorney General Johnny E. James, Jr. represented the State. On August 23, 2018, Faltas moved to recuse Judge Gravely. (App. 638).

On November 27, 2018, Judge Gravely granted Faltas's motion for summary judgment, and denied the State's motion for summary judgment. (App. 639-50). The State moved pursuant to Rule 59(e), SCRPC, for the PCR court to alter/amend, and reconsider its grants of summary judgment and relief on December 7, 2018. (App. 651-56). On December 10, 2018, Faltas filed her opposition to the State's Rule 59(e) motion, requested for the PCR court to rule on her additional sustaining grounds, and requested the PCR court consider imposing Rule 11 sanctions on the State's counsel. (App. 657-82). The PCR court denied the State's Rule 59(e) motion on April 1, 2019. (App. 683-86). The State appealed. (App. 687-88).

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

Section 17-27-70 of the South Carolina Code provides for summary judgment when there is no genuine issue of material fact which would necessitate an evidentiary hearing. Subsection 17-27-70(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

“Where cross motions for summary judgment are filed, the parties concede the issue before [the court] should be decided as a matter of law.” *Wiegand v. U.S. Auto. Ass’n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

“In assessing prejudice under *Strickland*, the question *is not* whether a court can be certain counsel’s performance had no effect on the outcome” *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). “Instead, *Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Id.* (quoting *Strickland*, 466 U.S. at 696). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

ARGUMENT

- I. The PCR court erred by granting summary judgment in concluding the CMC conviction for contempt of court on May 18, 2011, was invalid and the CMC had no authority to issue any conditions relating to psychiatric treatment because trial court error is not a valid claim for PCR

The PCR court erred by granting summary judgment in concluding the CMC's contempt of court order from May 18, 2011, was invalid and in finding the CMC had no authority to issue any conditions relating to psychiatric treatment because trial court error is not a cognizable claim for PCR. Therefore, certiorari should be granted, and the PCR court's decision should be reversed.

It is well settled that a PCR action does not serve as a substitute for a direct appeal, and an issue that could have been raised at trial or on appeal is not cognizable as a basis for relief. S.C. Code Ann. § 17-27-20(b); *see also Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). "Allegations of trial court error are not cognizable on PCR." *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

First, the PCR court granted Faltas summary judgment based on trial court error. Specifically, the PCR court found "the CMC exceeded its statutory authority in issuing an Appeal Bond which added conditions other than a monetary bond or payment of the fine as required by [section] 14-25-95." (App. 644). However, "Allegations of trial court error are not cognizable on PCR." *Roscoe*, 345 S.C. at 20, 546 S.E.2d at 419. In sections 1 and 2 of its order, the PCR court made no reference to ineffective assistance of counsel. (App. 643-46). Therefore, the PCR court erred as a matter of law because it based its grant of PCR on trial court error which is not cognizable on PCR. *See Roscoe*, 345 S.C. at 20, 546 S.E.2d at 419.

Further, the PCR court erred in concluding the bond conditions were invalid because whether the bond conditions were valid is a direct appeal issue. The PCR court found "the CMC

had no authority to issue any conditions relating to psychiatric treatment.” (App. 645). This conclusion is clearly a finding of trial court error which is not cognizable on PCR. *See Roscoe*, 345 S.C. at 20, 546 S.E.2d at 419. Because trial court error is not a cognizable claim on PCR, the PCR court erred as a matter of law. Certiorari should be granted as to this issue and the PCR court should be reversed.

II. The PCR court erred in finding there was no evidence in the record showing that Faltas accepted the conditions of the bond despite the circuit court’s order finding Faltas agreed to the conditions of the bond was in the record

The PCR court’s finding there was no evidence in the record that Faltas accepted the conditions of the bond is contradicted by the record because the circuit court’s order finding Faltas *did* agree to the bond conditions was part of the record. The PCR court erred because its finding no evidence in the record supported that Faltas accepted the conditions of the bond effectively overruled the circuit court’s finding as to this issue on appeal.

The PCR court found “there is no evidence before this court that such terms were accepted, except a signed receipt of the \$1,000 paid to the CMC. But the receipt did not contain the terms of the bond.” (App. 644). This finding of no evidence is explicitly contradicted by the record. Indeed, on appeal, the circuit court found Faltas agreed to the conditions of the bond. (App. 131). Specifically, the circuit court stated, “[Faltas] cannot now complain that *the condition to which she agreed* now violates her constitutional rights as she had the opportunity to object before the condition was imposed.” (App. 225) (emphasis added). The circuit court’s order was part of the record before the PCR court; therefore, the PCR court erroneously found there was no evidence presented that Faltas accepted the conditions of the bond.

Arguably, the deferential standard of review should not apply to this case because both parties moved for summary judgment. *See Wiegand*, 391 S.C. at 163, 705 S.E.2d at 434 (“Where

cross motions for summary judgment are filed, the parties concede the issue before [the court] should be decided as a matter of law.”) However, even applying the deferential standard of review, this finding should be reversed because there is clearly evidence in the record showing Faltas accepted the terms of the bond. Therefore, certiorari should be granted and the PCR court’s order should be reversed as to this issue because the PCR court’s finding there was nothing in the record showing Faltas accepted the conditions of the bond is contradicted by the record.

III. The PCR court erred in granting summary judgment by relying on a prior PCR hearing record where a previous PCR court vacated its order granting relief issued after that hearing because the previous PCR court did not allow the State to cross-examine the one witness presented or allow the State to present any defense to the allegations and the PCR court incorrectly applied the prejudice analysis

The PCR court erred in granting summary judgment finding Counsel ineffective at the April 6, 2011, bond hearing. The PCR court found that Faltas waived her presence at the bond hearing in writing. (App. 646). However, even though Faltas waived her presence, the PCR court found, “[Counsel], without specific authority, should not have even conceded or even allowed the consideration of any terms beyond the scope of an appeal bond as provided for in S. C. Code [Ann.] [section] 14-25-95.” (App. 646). The PCR court found there was no genuine issue of material fact as to ineffective assistance of counsel stating, “Upon review of the record, there appears to be some confusion on how the conditions on the bond came about . . . but clearly, [Counsel] did not assert proper objections to the conditions except to state that [Faltas] did not consent to the conditions.” (App. 647) (citing App. 340-53). The PCR court erred by making these factual findings based upon a prior PCR hearing transcript where that PCR court, Judge Goldsmith, realized it erred by not allowing the State to cross-examine Counsel or present any defense to the allegations. (App. 481-84).

In Judge Goldsmith’s order vacating his order granting relief, he stated:

[The State] allege[d] several errors committed by [this court] including that [this court] ruled from the bench prior to conclusion of [Faltas's] case and without conducting a full evidentiary hearing as required by the Uniform Post-Conviction Procedure Act. The court agrees with this allegation and finds that [the State] was denied [its] right to present evidence.

(App. 481). Judge Goldsmith then appropriately vacated his order and remanded for further proceedings. (App. 481). The PCR court erred because its factual finding was based on an incomplete record as recognized by Judge Goldsmith when he vacated his order granting relief.

The PCR court further erred in its *Strickland* prejudice analysis. The PCR court concluded, “And as seen by the subsequent contempt charges, [Faltas] was prejudiced by this failure.” (App. 481). First, Counsel’s actions did not contribute to Faltas being held in contempt for failing to comply with the bond conditions. As the circuit court stated on appeal, “The evidence reveals [Faltas] did not surrender her passport as required by the order and she did not present evidence that she met with a psychiatrist for counseling within the requisite time period.” (App. 224). It was clear to the circuit court, on appeal, that Faltas’s actions, not Counsel’s led to the contempt charge.

Even if Counsel was allegedly deficient in accepting the bond conditions, Counsel did nothing to cause Faltas to be held in contempt for failing to comply with those conditions. The record is clear Faltas knew of the conditions before being held in contempt, and she chose not to comply with the conditions because she did not want to. It was not until she was held in contempt that she complied with the CMC’s order. Therefore, Counsel’s performance could not have prejudiced Faltas because it was Faltas’s own decisions not comply with the bond conditions that resulted in her being held in contempt. Faltas cannot show prejudice resulted from Counsel’s performance. Therefore, the PCR court erred in granting summary judgment on this basis. Certiorari should be granted, and the PCR court should be reversed.

CONCLUSION

Based on the forgoing, certiorari should be granted because the PCR court erred as a matter of law in granting relief based on trial court error which is not cognizable on PCR. Further, the PCR court erred because it relied on an incomplete record to make its factual findings to support its conclusions of ineffective assistance of counsel. Therefore, certiorari should be granted and the PCR court should be reversed. Further, a remand in this case is not necessary because Faltas cannot show any prejudice resulted from Counsel's alleged deficiency. Counsel's actions did not lead to the contempt charge, Faltas challenges in this action; Faltas's own actions did. Therefore, certiorari should be granted, the PCR court should be reversed, and PCR should be denied

Respectfully submitted,

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