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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

Appellate Case No. 2017-002256

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CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

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**BRIEF OF PETITIONER**

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## **STATEMENT OF ISSUE ON CERTIORARI**

Did the post-conviction relief court abuse its discretion in denying Petitioner's motion pursuant to Rule 60(b)(1), for relief from the order granting Russell's PCR application based upon a mistake made by a third party, where the post-conviction relief court found trial counsel was constitutionally ineffective for allegedly failing to convey a plea offer of twenty years, granted Russell relief, and ordered Petitioner to resentence Russell according to the original plea offer, where the order was premised upon an error in the transcript regarding Counsel's statements to the trial court about the plea offer which Petitioner did not discover until several months after the evidentiary hearing?

## STATEMENT OF THE CASE

Respondent Christopher Eric Russell (Russell) was indicted at 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). Susannah Ross, Esquire, represented him. On February 13, 2013, Russell proceeded to a jury trial before the Honorable R. Lawton McIntosh, and the jury found him guilty as indicted. Judge McIntosh sentenced Russell to imprisonment for concurrent sentences of five years for conspiracy and life without parole for each charge of kidnapping, armed robbery, and first-degree burglary pursuant to section 17-25-45 of the South Carolina Code based upon his status as a recidivist offender.

A notice of appeal was filed on Russell's behalf, and an appeal perfected by David B. Morgen and Chief Appellate Defender Robert Dudek. Russell raised three issues: (1) whether the trial court erred by allowing rebuttal testimony of the courtroom deputy; (2) whether the trial court erred in denying Russell's motion to suppress; (3) whether the trial court erred by not granting a mistrial based on the solicitor's comments in closing arguments. 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 issued on September 16, 2015.

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. The State served its Return on January 12, 2017, requesting an evidentiary hearing be held to resolve the issues raised in Russell's application. An evidentiary hearing into the matter convened on April 19, 2017, at the Greenville County Courthouse before the Honorable Perry H. Gravely. Russell was present at the hearing and represented by R. Mills Ariail, Esquire.

By Order filed June 15, 2017, the post-conviction relief court granted post-conviction relief, finding trial counsel was ineffective for failing to convey a twenty-year plea offer to Russell prior to trial. On June 29, 2017, the State filed a motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCR, arguing Russell had not met his burden as to both deficiency and prejudice. The post-conviction relief court denied the State's motion to reconsider on July 21, 2017.

Thereafter, trial counsel informed the State she had contacted the trial court reporter after the evidentiary hearing regarding a possible error in transcription, and the court reporter reviewed the trial tapes and issued a corrected transcript. The State then filed a motion pursuant to Rule 60(b)(1), SCRCR, asking the post-conviction relief court to reconsider its decision based upon the corrected transcript. The post-conviction relief court denied the motion by order filed October 12, 2017.

## STATEMENT OF THE FACTS

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. pp. 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. p. 88. The men then moved Mr. Lyles to a back bedroom, stole \$760 from his wallet plus his watch and cellphone, and began ransacking the house apparently trying to locate the safe and money they believed to be there. App. pp. 89-90, 94.

Meanwhile, Elaine Lyles (Mrs. Lyles) and her granddaughter were leaving work at the family's restaurant to 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. pp. 112-14, 154-55. Mrs. Lyles entered the home and walked down the hallway looking for Mr. Lyles. App. pp. 115-16. As she did so, the skinny man with the gun jumped out and forced her to the floor. App. p. 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. pp. 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. p. 117. He took \$200 from her, and then both men continued ransacking the house. App. pp. 118-19. By this time, the Lyles' granddaughter and a neighbor, Jimmy McDaniels (McDaniels), had called 911. App. pp. 162, 170. The police arrived approximately two minutes later, and set up a perimeter outside the Lyles' home. App. pp. 163, 170-71, 186, 188-89, 202.

Inside the home, the robbers noticed the arrival of law enforcement and began to panic. App. pp. 120-21. The bigger man ran out the back door, discarding his pistol in the back yard as he did so. App. pp. 189-90, 193. He was quickly apprehended with the help of a police dog and was identified as Antonias Williams. App. pp. 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.<sup>1</sup> App. pp. 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. p. 203.

Williams was Mirandized, and he admitted to being in possession of the Lyles' property. App. pp. 193-94. He explained to officers that he and his accomplice believed there was \$200,000 hidden inside the home. App. p. 199. Williams also told officers the vehicle used in the crime was parked one street over. App. p. 244. However, Williams repeatedly refused to name his accomplice. App. pp. 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. p. 207. The van was removed from the scene, and investigators obtained a search warrant for it. App. pp. 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. pp. 248-51.

On January 5, 2011, Investigator Weiner interviewed Williams again, and this time Williams identified Christopher Eric Russell as his accomplice. App. pp. 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. pp. 255-56. Based on Williams'

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<sup>1</sup> 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. pp. 122, 144-46.

statement, Investigator Weiner obtained a search warrant for the phone, a subpoena for the phone records, and a warrant for Russell's arrest. App. pp. 256-57, 259-60.

On January 10, 2011, officers located Russell and arrested him after he attempted to flee on a bicycle. App. pp. 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. pp. 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."<sup>2</sup> App. pp. 263, 269.

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

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<sup>2</sup> The cellphone was pre-paid, and no ownership information was available. App. pp. 256-57.

## STANDARD OF REVIEW

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). This Court’s review, therefore, “is limited to determining whether there was an abuse of discretion.” Id. “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.

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (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. Id. at 180, 810 S.E.2d at 839 (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. at 180-81, 810 S.E.2d at 839-40. 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).

## ARGUMENT

**The post-conviction relief court abused its discretion in denying Petitioner’s motion pursuant to Rule 60(b)(1), for relief from the order granting Russell’s PCR application based upon a mistake made by a third party, where the post-conviction relief court found trial counsel was constitutionally ineffective for allegedly failing to convey a plea offer of twenty years, granted Russell relief, and ordered Petitioner to resentence Russell according to the original plea offer, but the order was premised upon an error in the transcript regarding Counsel’s statements to the trial court about the plea offer which Petitioner did not discover until several months after the evidentiary hearing.**

In granting post-conviction relief, the lower court found trial counsel was constitutionally ineffective for allegedly failing to convey a twenty-year plea offer to Russell prior to trial. App. pp. 702, 705-08. The post-conviction relief court’s order specifically stated it relied on the trial transcript, which, at the time of the evidentiary hearing, appeared to confirm Russell’s testimony rather than trial counsel’s testimony. App. p. 707. In filing its motion for relief from judgment pursuant to Rule 60(b)(1), SCRPC, based on a documented and uncontroverted mistake in this transcript, the State promptly informed the court of this error, explained how the grant of relief was erroneous in light of the corrected transcript, and asked the court to reopen the post-conviction relief proceeding and reverse its grant of relief. Without a hearing, the court summarily dismissed the motion. The lower court’s summary dismissal of the Rule 60(b)(1), SCRPC, motion, based on a documented and uncontroverted mistake, was an erroneous abuse of discretion and requires reversal from this Court.

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), SCRPC. “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, 404 S.C. at 10, 743 S.E.2d at 822. “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 denial of the Rule 60(b)(1), SCRCF, motion based on the mistake of a third party was an abuse of discretion. “When determining whether to grant relief, the factors to consider are: (1) the timing of the motion for relief, (2) whether the party requesting relief has a meritorious defense, and (3) the degree of prejudice to the opposing party if relief is granted.” Williams v. Watkins, 384 S.C. 319, 324, 681 S.E.2d 914, 916-17 (Ct. App. 2009). Additionally, the party making the motion must show a good-faith mistake of fact has been made. Id.

Here, the record clearly established the trial transcript presented during the evidentiary hearing contained a documented and uncontroverted mistake—a mistake that erroneously changed the meaning of what was discussed between trial counsel and the trial court, and one which goes to the very heart of the PCR court’s grant of relief. The State, along with Russell and the trial court, reasonably relied on the court reporter’s affidavit attached to the original transcript certifying its accuracy. App. p. 514. When the State realized a mistake in the transcript had been made, it immediately filed its Rule 60(b)(1) motion, well within the one-year timeframe set forth in the rule.<sup>3</sup> App. p. 719. Additionally, the State clearly had a meritorious defense to the allegation that trial counsel had failed to relay the plea offer as both trial counsel’s testimony and the

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<sup>3</sup> “The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.” Rule 60(b), SCRCF.

corrected transcript establish. See McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (Ct. App. 2008) (defining a meritorious defense as one “which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.”). Finally, Russell would not have been unfairly prejudiced if the PCR court had granted the motion, as by the trial court’s own analysis, it would have denied relief, using the transcript as a tiebreaker between Russell and trial counsel, if it had the correct version of the transcript at the evidentiary hearing. App. pp. 705-08; see also Hummell v. Hall, 868 F.Supp.2d 543, 561 (4th Cir. 2012) (““While setting aside the default judgment here would certainly be an unwelcome outcome from Plaintiff’s perspective, it cannot be said that it would represent *unfair* prejudice to him. Indeed, every time a court vacates a judgment, an invariable consequence is that a party is prejudiced, but that is ‘not the type of prejudice contemplated by the rule.’”) (citations omitted) (emphasis in original). Therefore, in this instance, denying the motion for relief from judgment based on this obvious mistake was a clear abuse of the PCR court’s discretion.

The PCR court’s denial of the State’s 60(b)(1) motion was an abuse of discretion which has allowed a decision premised on an error of law and without factual support to stand. The parties and the court reasonably relied on the accuracy of the transcript, as attested to in the court reporter’s accompanying affidavit. App. p. 514. However, the original version of the transcript was materially inaccurate, leading the PCR court to base its decision on a “fact” that was actually the opposite of how it appeared. App. pp. 729-30.

At the evidentiary hearing, Russell testified the only offer ever communicated to him was an offer to plead guilty 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. pp. 639-43. In contrast, trial counsel testified she received a plea offer of twenty years in writing from the solicitor in March 2011. App. p. 671. She explained 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. pp. 672-73. However, trial counsel testified it was her practice at the time to convey plea offers in person rather than in writing, and her notes reflected she made visits to the jail on December 5, 2011, and December 7, 2011, which she stated were attempts to persuade Russell to avoid a potential maximum sentence of life without parole (LWOP) by accepting the plea offer. App. pp. 687, 673. The State served Russel with notice of its intent to seek LWOP on December 8, 2011. App. p. 673.

The trial transcript, as originally transcribed and presented to the PCR court at the evidentiary hearing, reflected that trial counsel stated during sentencing the State had offered Russell “opportunities to *plead to life without parole* on the table a number of times,” thus seemingly supporting Russell’s testimony App. p. 511. However, trial counsel testified she believed the original 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. pp. 686-87, 697. The post-conviction relief court found Russell’s testimony to be credible specifically because it was supported by the record, and trial counsel’s testimony was not. App. p. 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. p. 707.

However, the corrected transcript 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. pp. 729-30 (emphasis added). Russell repeatedly asserts that even with the corrected transcript, trial counsel’s “testimony, and her notes, and her pre-sentencing remarks all corroborate [his] claim that this twenty-year plea offer was never communicated to him.” RPWC p. 7. Similarly, the post-conviction relief court denied the State’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. p. 732. However, the corrected 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. pp. 510-13. Importantly, the transcript also reflects there was another non-LWOP offer made *during* trial, which trial counsel testified at that point was a “straight-up” plea in exchange for the State withdrawing the LWOP notice. App. pp. 511, 687-88. 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. p. 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. p. 674.

The PCR court’s original order clearly reflects a credibility contest between Russell and trial counsel, in which the transcript was the tiebreaker – because the transcript seemingly supported Russell’s version of events, the court granted relief. App. pp. 705-08. However, the transcript does not support Russell’s testimony, and in fact, flatly contradicts it. App. p. 730. The only remaining evidence in the record to support the PCR court’s denial of the Rule 60(b)(1)

motion is Russell's own self-serving testimony that the twenty-year offer was not conveyed to him. App. pp. 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. pp. 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).

The PCR 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 the State or Russell, which has now been corrected. App. p. 729. The corrected version of the transcript actually confirms trial counsel's testimony, not Russell's, and therefore, the credibility finding made by the PCR court, on which the grant of relief is based, is without evidentiary support because there is no longer any credible evidence of deficient performance. By refusing to grant the Rule 60(b)(1) motion, the PCR court abused its discretion and allowed a decision to stand which was based on a "good faith mistake of fact" and, given the corrected record, is now without evidentiary support.

"[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, this

Court should reverse the PCR court's decision denying Petitioner's Rule 60(b)(1) motion and deny Russell post-conviction relief.

**CONCLUSION**

For all the foregoing reasons, the State requests that this Court find the PCR court abused its discretion in denying Petitioner's motion for relief from judgment pursuant to Rule 60(b)(1), SCRPC, and reverse the post-conviction relief court's denial of the motion and the grant of relief to Russell.

Respectfully submitted,

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