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Nov 30 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Greenville County

The Honorable R. Lawton McIntosh, Trial Judge
The Honorable Perry. H. Gravely, PCR Judge

Appellate Case No. 2017-002256

CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Appellant.

PETITION FOR REHEARING

On November 17, 2021, this Court issued an opinion affirming the PCR court's order denying the State's motion for relief from judgment, which was made pursuant to Rule 60(b)(1), SCRCPP, and in which the State prayed that the PCR court would set aside a finding that Christopher Russell's testimony was credible in light of the discovery of a typographical error in the transcript from Russell's trial that materially affected the meaning of the text, a discovery that was not made until after the PCR court had issued its order granting post-conviction relief to Russell. App. 721-22. In its opinion, this Court found that the PCR court did not abuse its discretion in denying the State's motion because: (1) the corrected transcript is not dispositive as to whether Russell's trial counsel conveyed to Russell a twenty-year plea offer; (2) Russell testified before the PCR court that he did not receive the twenty-year plea offer; and (3) the PCR court found that Russell's testimony about not receiving a twenty-year plea offer was credible.

Russell v. State, Op. No. 2021-UP-405 (S.C. Ct. App. filed November 17, 2021 at 1-2) (per curiam).

This Court, in affirming the PCR court's denial of the State's motion, overlooked or misapprehended the centrality of the error in the transcript to the PCR court's grant of relief to Russell. The error in the transcript was essential to the PCR court's factual findings. Those findings were: (1) that the trial transcript "confirms" Russell's testimony at the PCR hearing; (2) that trial counsel's statement to the trial court during the sentencing portion of trial was "consistent" with Russell's testimony at the PCR hearing that he knew of no plea offers but the offer for him to plead for a sentence of life without the possibility of parole; (3) that there is no evidence that a plea offer for twenty years' imprisonment was ever conveyed to Russell; and (4) that Russell's testimony that he would have accepted an offer of twenty years' imprisonment had he known of such an offer was credible. App. 707.

Those factual findings, in turn, were essential to the PCR court's findings that Russell had proven that trial counsel was constitutionally ineffective. After finding that Russell's testimony was credible and consistent with trial counsel's post-trial statement to the trial court, the PCR court "[a]ccordingly" found that trial counsel's performance was deficient in that she failed to convey the twenty-year plea offer to Russell. App. 730. After finding that Russell's testimony that he would have taken a twenty-year deal was credible, the PCR court "therefore" found that Russell had proven that he suffered prejudice from the alleged deficiency in trial counsel's performance. App. 730. "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the

applicant's case." Weldon v. State, Op. No. 5867 (S.C. Ct. App. filed Oct. 6, 2021) (Howard Adv. Sheet No. 35 at 59) (quoting Speaks v. State, 377 S.C. 396, 660 S.E.2d 512 (2008)). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Id. (quoting Strickland v. Washington, 466 U.S. 668 (1984)).

If the PCR court's factual findings were made in error, then the PCR court's findings that Russell proved both prongs of the Strickland test must be erroneous, too. If either of the PCR court's findings regarding the Strickland prongs are erroneous, this Court should reverse the PCR court's grant of relief to Russell. This Court, then, should reverse the PCR court's denial of the State's 60(b) motion and reverse the grant of relief to Russell because, now that the error in the transcript has been discovered, there is no probative evidence to support the PCR court's factual findings.

First, the trial transcript, as corrected, does not "confirm" Russell's testimony at the PCR hearing and is not "consistent" with it. Russell testified that he had no choice but to go to trial because "[his] plea was life without parole." App. 639. Russell denied that trial counsel had ever told him that the State had offered a plea deal to him. App. 639-40. Russell specifically mentioned that he wanted the PCR court to take note of page 511 of his trial transcript because he felt that it verified the credibility of his testimony. App. 640. Russell testified that he later learned that the State had extended a twenty-year offer and that he learned of the offer only through correspondence with the Thirteenth Circuit Solicitor's Office. App. 641-42. Russell insisted that trial counsel never told him about any plea offers except for an offer for life without

the possibility of parole. App. 643.¹ The corrected transcript shows that trial counsel told the trial court that Russell “[had] 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. 730. The corrected transcript does not “confirm” Russell’s testimony; it refutes it. The correction does not merely add a layer of nuance to trial counsel’s post-trial statement, it reverses the meaning of the statement entirely.

Second, there is evidence that the twenty-year plea offer was conveyed to Russell. Trial counsel’s statement to the trial court that Russell had been given chances to plead in exchange for a sentence “without life without parole on the table a number of times,” juxtaposed with her next sentence that Russell “[had] consistently maintained his innocence” is evidence that multiple plea offers more favorable to Russell than a sentence of life without the possibility of parole had been communicated to Russell, yet rejected by him. App. 730.² It was trial counsel’s practice to convey all plea offers to her clients and she believed that she visited with Russell at the jail on more than one day to try to persuade Russell to take the twenty-year deal offered by the State. App. 706-07. Trial counsel testified that she “certainly” would have discussed the twenty-year deal with Russell before trying his case with life without parole on the table. App. 672. It is true that trial counsel’s post-trial statement did not specifically reference a twenty-year deal, but the most logical inference is that trial counsel did inform Russell of the offer. On the other hand, it is not reasonable to conclude that trial counsel’s post-trial statement, as shown in

¹ It would make no sense for the State to offer a plea offer to Russell in an attempt to get him to plead guilty instead of going to trial when that offer was for the maximum punishment to which Russell would have been exposed if he had not taken the offer.

² Even the trial court knew that Russell had rejected a plea offer extended to him by the State on the day of trial. App. 730.

the corrected transcript, is evidence that trial counsel did not convey the twenty-year offer to Russell.

Third, Russell's testimony that he would have accepted an offer of twenty years' imprisonment had he known of such an offer was not credible. Trial counsel testified that "Russell was pretty adamant that he wasn't guilty" App. 670. Trial counsel testified that Russell's "position was always that he was innocent and he did not want to plead guilty." App. 674. Trial counsel testified that Russell "was not accepting the twenty years or even a straight-up with the mandatory minimum of ten." App. 674. Trial counsel testified that Russell was not interested in discussing potential sentences because "[h]e was saying he was not guilty." App. 686. Trial counsel's notes reflected that Russell wanted to go to trial because she had written, "not guilty, all trial." App. 686. Trial counsel affirmed that Russell told her that he was not interested in pleading guilty. App. 687. Because the PCR court found that Russell's testimony was credible because his testimony was "confirmed" by or "consistent" with trial counsel's post-trial statement, and the meaning of that post-trial statement upon which the PCR court relied has now been proven to have been the opposite of what was apparent at the time of the PCR hearing, the credibility finding has no evidentiary support. In light of the correction, no evidence from the trial transcript or from trial counsel's testimony supports the veracity of Russell's testimony. It is not only that Russell's testimony alone does not support the PCR court's credibility finding, but all of the evidence now, in light of the corrected error in the transcript, supports only a finding that Russell's testimony was not credible.

When reviewing the PCR court's findings of fact, this Court is to defer to those findings and uphold them if there is probative evidence in the record to support them. Buckson v. State,

423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018) (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)). In this case, there is no probative evidence to support the PCR court's factual findings. Trial counsel's testimony at the PCR hearing contradicted Russell's testimony. The corrected trial transcript now contradicts Russell's testimony and instead confirms the credibility of trial counsel's testimony. The PCR court's factual findings were in error. The PCR court's Strickland findings were therefore in error. The State respectfully urges this Court to reconsider this matter, grant rehearing, provide the State with an opportunity to be heard, vacate its prior opinion, and issue a new opinion that reverses the PCR court's factual findings.

Respectfully submitted,

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

By: s/Taylor Zane Smith
ATTORNEYS FOR RESPONDENT

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

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PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies that a copy of the petition for rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Wanda H. Carter, Esquire
wcarter@sccid.sc.gov

This 30th day of November, 2021.

s/Taylor Zane Smith
TAYLOR ZANE SMITH
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
taylorsmith@scag.gov



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ALAN WILSON
ATTORNEY GENERAL

November 30, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
(By email to ctapfilings@sccourts.org)

RE: Christopher Eric Russell v. State of South Carolina
Appellate Case No: 2017-002256

Dear Ms. Kitchings:

Enclosed with this letter is the State's petition for rehearing in the above-referenced matter, which I am submitting for filing and serving on opposing counsel by email. Please let me know if you need any additional information.

Sincerely,

s/Taylor Zane Smith
Assistant Attorney General
S.C. Bar # 103282

TZS/jj
Enclosures

cc: Wanda H. Carter, Esquire (by email only)
Victim Advocacy Division