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Jan 18 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
The Honorable Perry H. Gravely, Post-Conviction Relief Judge
The Honorable R. Lawton McIntosh, Trial Judge

Op. No. 2021-UP-405 (filed November 17, 2021)

CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

THE STATE'S ISSUE PRESENTED

Did the Court of Appeals err in affirming the Post-Conviction Relief (“PCR”) court’s grant of relief to Christopher Eric Russell and denial of the State’s post-hearing motions when the PCR court’s finding of constitutional ineffectiveness was based upon a material typographical error in the trial transcript, an error that was brought to the PCR Court’s attention but still disregarded?

STATEMENT OF THE CASE

Respondent Christopher Eric Russell was found guilty by a jury of kidnapping, armed robbery, first-degree burglary, and conspiracy at the conclusion of his trial in February of 2013. The Honorable R. Lawton McIntosh (“trial court”) presided over the trial. Susannah C. Ross (“trial counsel”) represented Russell, and L. Mark Moyer of the Thirteenth Circuit Solicitor’s Office represented the State. The trial court sentenced Russell to imprisonment for life without the possibility of parole for kidnapping, armed robbery, and first-degree burglary, and for five years for conspiracy. App. 1-513.

Russell appealed, arguing that the trial court erred: (1) in allowing the rebuttal testimony from the courtroom deputy; (2) in denying Russell’s motion to suppress some evidence; and (3) in denying Russell’s motion for a mistrial after the solicitor challenged Russell’s alibi defense during closing argument. App. 609-11. The South Carolina Court of Appeals affirmed in an unpublished opinion. *Id.* Russel then filed a pro se petition for a writ of certiorari in this Court, arguing that the Court of Appeals erred: (1) in finding that the issue of the deputy’s testimony was not preserved for appellate review; (2) in finding that the trial court did not err in denying Russell’s motion to suppress because the search warrant contained false information; and (3) in finding that the trial court did not err in denying Russell’s motion for a mistrial after the solicitor challenged Russell’s alibi defense during the State’s closing argument. This Court dismissed Russell’s petition because Russell had not filed a petition for rehearing in the Court of Appeals before filing his petition for a writ of certiorari. App. 614-15. The Court of Appeals had already issued the remittitur on September 16, 2015. App. 612.

On June 1, 2016, Russell filed an application for post-conviction relief, to which the State

filed a return. On April 19, 2017, an evidentiary was held at the Greenville County Courthouse before the Honorable Perry H. Gravely (“PCR court”). R. Mills Ariail, Jr., represented Russell, and Lindsey A. McCallister of the South Carolina Attorney General’s Office represented the State. App. 630-701. On June 12, 2017, the PCR court issued an order granting PCR to Russell on the basis that trial counsel was constitutionally ineffective for failing to convey a plea offer to Russell, but the PCR court denied relief to Russell on his remaining claims. App. 702-12. The State moved to alter or amend the judgment, pursuant to Rule 59(e), arguing that the PCR court’s finding of constitutional ineffectiveness was in error because Russell failed to offer sufficient evidence that trial counsel failed to convey the at-issue plea offer to Russell and that Russell failed to prove that he would have accepted the offer even if it had been communicated to him and that he would have pleaded guilty without the State withdrawing the offer or a plea court refusing to accept its terms; but the PCR court denied the motion, finding that the State’s cited authorities did not support its argument and that the State had not presented additional evidence to support the prayed-for amendment. App. 713-18. The State then moved for relief from the judgment under Rule 60(b)(1), SCRPC, arguing that the State should be relieved from the judgment due because the PCR court’s findings were based upon an error made by the court reporter in the trial transcript that altered the meaning of the text. App. 719-22. The State attached to its motion the relevant page from the trial transcript as originally rendered by the court reporter and considered by the PCR court, a letter from the court reporter in which the reporter admits that she discovered the error in the transcript after reviewing it at trial counsel’s request, and the relevant page of the transcript after it was corrected by the court reporter. App. 725, 729, 730. The PCR court denied the 60(b) motion, finding that the correction confirms that the State extended plea offers to Russell, but not that trial

counsel communicated those offers to Russell. App. 732.

The State appealed the PCR court's grant of relief, and this Court transferred that appeal to the Court of Appeals. The Court of Appeals granted the State's petition for a writ of certiorari. Sup. App. 39. But, the Court of Appeals affirmed and then denied the State's petition for rehearing. Supp. App. 71-81.

This petition follows.

STATEMENT OF FACTS

On the night of December 20, 2010, Jeffrey 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 his side, and tied his hands behind his back. App. 85-86. The slimmer of the two intruders shoved a gun into Mr. Lyles' mouth, demanding to know where Mr. Lyles' money and safe were, and threatening to kill him if he did not tell them. App. 88. The men moved Mr. Lyles to a back bedroom, stole \$760 from his wallet and his watch and cellphone, and began ransacking the house, apparently trying to find the safe and money that they believed were in the home. App. 89-90, 94.

Meanwhile, Elaine 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. 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 slender man with the gun jumped out and forced her to the floor. App. 116. The granddaughter, whom the men had not seen, immediately ran to a neighbor's house to get help. App. 161-62.

The robber with the gun demanded that Mrs. Lyles tell him the location of the money and safe, threatening to kill Mr. Lyles, her husband, if she did not comply. App. 117. The man took \$200 from her, and both men continued ransacking the house. App. 118-19. By this time, the granddaughter and a neighbor, Jimmy 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 slender robber took off his mask and, when he turned his attention away from Mrs. Lyles, Mrs. Lyles got up and ran out the back door, too.¹ App. 122, 202. The slender 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 read his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and he admitted to being in possession of the Lyles' property. App. 193-94. He told the officers that he and his accomplice had believed that there was \$200,000 hidden inside the home. App. 199. He also told the officers that the vehicle they had used in the crime was parked on one street over. App. 244. But Williams repeatedly refused to name his accomplice. App. 200, 244-45.

Using the information that Williams had supplied, the officers located a white van parked in the driveway of a vacant residence on street away from the Lyles' home. App. 207. The van was removed from the scene, and investigators obtained a warrant to search it. App. 208-09, 225-26. Inside, the officers received a 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, Sergeant Dave Weiner of the Greenville County Sheriff's Office interviewed Williams again, and this time Williams identified Russell as his accomplice. App. 254-55. Sergeant Weiner also asked Weiner about the phones found in the van, and Williams

¹ Mrs. Lyles testified at trial that the skin tone, lips, and voice of the slender man matched those of Russell. App. 122, 144-46.

indicated that the phone plugged into the charger was Russell's. App. 255-56. Based on Williams' statement, Sergeant Weiner obtained a search warrant for the phone, a subpoena for the phone's records, and a warrant for Russell's arrest. App. 256-57, 259-60.

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

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

STANDARD OF REVIEW

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, 180, 810 S.E.2d 836, 839 (2018). “In reviewing decisions to grant or deny motions under Rule 60, SCRPC, the abuse of discretion standard applies. An abuse of discretion occurs when the ruling is controlled by an error of law, or when based on factual conclusions, is without evidentiary support.” Landry v. Landry, 430 S.C. 153, 160, 843 S.E.2d 491, 494 (2020) (citations omitted).

ARGUMENT

The Court of Appeals erred in affirming the PCR court's grant of relief to Russell because the PCR court's finding of constitutional ineffectiveness was based upon a material typographical error in the trial transcript, an error that was brought to the PCR Court's attention but still disregarded.

A typographical error in the trial transcript was essential to the PCR court's grant of relief to Russell, but the PCR court abused its discretion in declining to reverse the grant, even after the error was brought to the court's attention in a post-hearing motion. The Court of Appeals erred in affirming the PCR court's order denying the State's Rule 60(b) motion because its decision discounted the centrality of the error in the transcript to the PCR court's grant of relief. Because the grant of post-conviction relief is grounded on a transcription mistake made by the court reporter at Russell's trial, a mistake that has since been rectified by the court reporter but whose effect the PCR court and Court of Appeals have allowed to remain in effect, this Court should grant the State's petition and reverse the Court of Appeals.

This post-conviction relief case concerns only what happened in plea negotiations before Russell's trial and the words in a statement made by trial counsel at the time of Russell's sentencing. After the jury rendered the guilty verdicts, the trial court asked if trial counsel would like to say anything to the court, to which trial counsel was originally recorded as saying:

Judge, I would just say that Mr. Russell, in light of the fact that you have no ability to change the sentence here, is looking at life without parole. Mr. Russell has been offered opportunities to plead to life without parole on the table a number of times. He has consistently maintained his innocence in this case.

App. 510-11. The trial court asked if its belief if "that was an offer" that the State had extended to Russell that day during trial, and trial counsel confirmed that the trial court's belief was true. App. 511. Once the State verified that it had previously served Russel with notice that the State would seek a sentence of life without the possibility of parole, the trial court sentenced Russell to life.

App. 511-12. This was the version of the trial transcript that the PCR court considered when it grant relief to Russell. App. 707.

The PCR court also heard testimony from Russell. 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 Russell felt that it verified the credibility of his testimony. App. 640. Russell testified that he learned after trial through correspondence with the Thirteenth Circuit Solicitor’s Office that the State had extended a twenty-year offer to him. 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.

Trial counsel also testified before the PCR court. 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 occasion to try to persuade him 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 a life sentence on the table. App. 672. Trial counsel’s efforts in this regard were unsuccessful, though, because Russell was not interested in pleading guilty. 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 in them, “not guilty, all trial.” App. 686. Trial counsel affirmed that Russell told her that he was not interested in pleading guilty. App. 687.

In its subsequent grant of relief to Russell, the PCR court found: (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. The Court of Appeals later affirmed, finding that the PCR court did not abuse its discretion in denying the State’s motion to set aside the judgment 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.

The PCR court’s aforementioned findings were essential to its 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)). Since 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 are erroneous, too. Since the PCR court's findings regarding the Strickland prongs are erroneous, the Court of Appeals should have reversed. Now that the error in the transcript has been discovered, there the PCR court's findings are without evidentiary support.

As the State brought to the attention of the PCR court after it granted relief to Russell, there was an error in the trial transcript that the PCR court and the parties relied upon at the PCR hearing. Trial counsel's post-trial statement to the trial court, as corrected, reads as follows:

Judge, I would just say that Mr. Russell, in light of the fact that you have no ability to change the sentence here, is looking at life without parole. 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 in this case.

App. 730 (emphasis added). First, the PCR court should have granted the State's motion for relief from judgment because the trial transcript, as corrected, does not "confirm" Russell's testimony at the PCR hearing, and it is not "consistent" with it. Instead, the corrected transcript refutes Russell's testimony before the PCR court, and makes plain the lack of credibility in his testimony. This point is all the more salient because Russell, after having been in the courtroom at the end of his trial

and knowing what trial counsel actually said to the trial court, specifically asked the PCR court to consider the incorrect transcription on page 511 of the transcript as evidence of the credibility of his testimony. App. 640. In doing so, Russell not only gave demonstrably false testimony at the PCR hearing, but he used an innocent mistake on the part of the court reporter to knowingly mislead the PCR court. That is a brazen act of manipulation. See Ray v. Ray, 374 S.C. 79, 86, 647 S.E.2d 237, 241 (2007) (“We hold an act of perjury or concealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud.”). If this Court does not grant this petition, Russell’s manipulation will have paid off—for him.

To make the PCR court’s abuse of discretion all the more glaring, the original rendering of trial counsel’s statement to the trial court itself should have been met with skepticism from the PCR court. The State would have not “offered” for Russell to plead guilty in exchange for a sentence of life without the possibility of parole, as that was the maximum sentence that he would be facing if he were to be found guilty at trial. Such would have been no offer or deal at all. See State v. Wills, 409 S.C. 183, 196, 762 S.E.2d 3, 9-10 (2014) (Beatty, C.J., dissenting) (“[A] plea agreement is not simply a contract between two parties; rather, it implicates the integrity of the criminal justice system and requires courts to exercise judicial authority in considering the agreement.”); State v. Compton, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (Ct. App. 2005) (“It is generally recognized that . . . plea agreements are to be construed in accordance with general contract principles.”); Sauner v. Pub. Serv. Auth. of S. Carolina, 354 S.C. 397, 581 S.E.2d 161 (2003) (“The necessary elements of a contract are an offer, acceptance, and valuable consideration.”). It would have been unreasonable for the State to have made such an offer under

the circumstances, it would have been unreasonable for trial counsel to make such a statement to the trial court if such a so-called offer had been made, it was deceitful for Russell to point to the statement as evidence of his credibility, it was unreasonable for the PCR court to find that the statement was evidence of trial counsel's deficiency, and it was unreasonable for the PCR court and Court of Appeals to shield the grant of relief to Russell despite the discovery of the court reporter's mistake. The PCR court should have granted the State's motion because the correction in the transcript does not merely alter the meaning of trial counsel's post-trial statement to the trial court, but it reverses its meaning completely.

Second, the PCR court should have granted the State's motion because there is evidence that trial counsel conveyed the twenty-year plea offer 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. Trial counsel's statement to the trial court makes sense only if trial counsel had relayed plea offers to Russell that he had rejected. Any other interpretation of that statement is not reasonable under the circumstances. Indeed, it is clear from the context that trial counsel's statement was meant to inform the trial court—and reviewing courts like the PCR court—that Russell had rejected multiple plea offers, resulting in the imposition of the life sentences. Furthermore, the trial court pointed out just moments before issuing its sentence that Russell had rejected one or more plea offers that the State had offered to him *on that very day*. App. 730.

Third, the PCR court should have granted the State's motion because Russell's testimony that he would have accepted an offer of twenty years' imprisonment had he known of such an offer was not credible. On the contrary, trial counsel testified that "Russell was pretty adamant that he wasn't guilty . . ." App. 670. 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.

CONCLUSION

In conclusion, the PCR court granted post-conviction relief to Russell based upon a transcription error in the trial transcript that has since been corrected, but the PCR court and the Court of Appeals erroneously let the grant of relief stand. The PCR court’s abuse of discretion has allowed Russel to enjoy a windfall. See Lockhart v. Fretwell, 506 U.S. 364, 366 (1993) (holding that the petitioner’s sentencing proceeding was not rendered unreliable or fundamentally unfair when his attorney had failed to make an objection based upon authority that was subsequently overruled and that, to hold otherwise, criminal defendants would be granted “a windfall to which they are not entitled.”). This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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Christopher Russell,

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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 a true copy of the Petition for Writ of Certiorari, Supplemental Appendix and Appendix have 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 18th day of January, 2022.

s/Taylor Zane Smith
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Jan 18 2022

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

January 18, 2022

The Honorable Patricia A. Howard
Clerk of Court — SC Supreme Court
Post Office Box 11330
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(by email only)

RE: Christopher Eric Russell v. State of South Carolina
Op. No. 2021-UP-405 (filed November 17, 2021)

Dear Ms. Howard:

Enclosed is the original Petition for Writ of Certiorari, Supplemental Appendix, and Appendix in the above-referenced matter. I am submitting them for filing electronically. Please let me know if anything additional is needed.

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