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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Perry H. Gravely, Post-Conviction Relief Judge
Honorable R. Lawton McIntosh, Trial Judge

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

CHRISTOPHER E. RUSSELL,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2021-001555

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

The Court of Appeals did not err in affirming the PCR judge's ruling that counsel was ineffective in failing to convey a twenty-year plea offer to the respondent, who ultimately received three LWOP sentences, because there was probative evidence in the record to support said ruling; and the Court of Appeals did not err in affirming the PCR judge's denial of petitioner's Rule 60(b)(1), SCRCR, motion filed after the submission of a corrected transcript because the effect of the corrected transcript, which was confusing and incomprehensible, was neither central to nor solely relied upon by the PCR judge in the order granting relief to the respondent as there were multiple factors and grounds presented and relied upon to support the PCR judge's ruling in the case.

STATEMENT OF THE CASE

The respondent Christopher Eric Russell was tried by jury during the February 2013 term of the Greenville County General Sessions Court and found guilty of kidnapping, armed robbery, first degree burglary, and conspiracy. Judge R. Lawton McIntosh presided over the trial. Susannah Ross represented the respondent at trial, and Assistant Solicitor Mark Moyer appeared on behalf of the state. The respondent was sentenced to five years on the conspiracy charge and life without parole on each of the remaining charges for which he was convicted. App. 1-513.

The respondent appealed and after briefing (see App. 515-608), his convictions and sentences were affirmed. See State v. Russell, Unpublished Opinion No. 2015-UP-435 (S.C. Ct. App. filed Aug. 19, 2015). App. 609-611. David B. Morgen, Esq. of Katten Nuchin Rosenman represented the respondent on appeal.

On June 1, 2016, the respondent filed a PCR application with the Greenville County Office of the Clerk of Court. App. 616-622. Petitioner filed a Return dated January 12, 2017, requesting that a hearing be held in response to the respondent's PCR action filed in the case. App. 623-628.

A PCR hearing was convened on April 19, 2017, at the Greenville County Courthouse before Judge Perry H. Gravely. App. 630 – 768. Attorney R. Mills Arial represented the respondent, who was present at the hearing, and Assistant Attorney General Lindsey A. McCallister appeared on behalf of the state at the hearing. App. 630-700.

On June 12, 2017, Judge Gravely signed an Order granting PCR relief to the respondent on the ground that trial counsel erred in failing to convey a plea offer to him, but denied relief on the remaining allegations of ineffective assistance of trial counsel in the case. App. 702-711. On June 29, 2017, petitioner filed a Rule 59(e) motion, which Judge Gravely denied by Order dated

July 21, 2017, and on September 20, 2017, petitioner filed a Rule 60(b)(1), SCRCP motion, which Judge Gravely denied on October 17, 2017. App. 713-718; App. 719-723; App. 732-733.

Petitioner appealed the PCR judge's rulings and filed a Petition for Writ of Certiorari on April 23, 2018. Supp App. 1-15. The respondent filed a Return to Petition for Writ of Certiorari on September 6, 2018. Supp. App. 17-28. Petitioner filed a Reply on October 5, 2018. Supp. App. 29-38. On October 28, 2020, the South Carolina Court of Appeals granted the Petition for Writ of Certiorari. Supp App. 39. Petitioner's Brief of Petitioner was filed on March 5, 2021. Supp. App 41-56. The Brief of Respondent was filed on May 5, 2021. Supp. App. 57-70. On November 17, 2021, the Court of Appeals affirmed the PCR judge's ruling in the case. Supp. App. 71-73. See Christopher Eric Russell v. State, Unpublished Opinion No. 2021-UP-405 (filed November 17, 2021). Petitioner filed a petition for rehearing on November 30, 2021. Supp. App. 74-80. The Court of Appeals denied the petition for rehearing on December 16, 2021. Supp. App. 81. On January 18, 2022, petitioner filed a petition for writ of certiorari with this Court. This return follows.

ARGUMENT

The Court of Appeals did not err in affirming the PCR judge's ruling that counsel was ineffective in failing to convey a twenty-year plea offer to the respondent, who ultimately received three LWOP sentences, because there was probative evidence in the record to support said ruling; and the Court of Appeals did not err in affirming the PCR judge's denial of petitioner's Rule 60(b)(1) SCRCR motion filed after the submission of a corrected transcript because the effect of the corrected transcript, which was confusing and in comprehensible, was neither central to nor solely relied upon by the PCR judge in the order granting relief to the respondent as there were multiple factors and grounds presented and relied upon to support the PCR judge's ruling in the case.

At trial, Jeffrey Lyles testified that when he opened the door at his house on December 18, 2010, he saw two men standing inside wearing masks and holding guns. Lyles stated that the men threw him to the floor and kept asking where the safe was located. Lyles stated that the men took $760.00, and his watch and cell phone from him. App. 78, l. 20 – App. 96, l. 11. Lyles' wife, Elaine Lyles, testified that she entered the house while the perpetrators were inside and that one of the gunmen told her to get on the floor (the other man had her husband detained) and kept asking about a safe until the police arrived on the scene. App. 110, l. 7 – App. 123, l. 21. At trial, Lyles made an in-court voice identification fingering the respondent as one of the perpetrators. App. 126; App. 146.

State's witness Antonio Williams testified at trial implicating the respondent in the events that transpired at the Lyles home. Williams explained that he and the respondent went into the Lyles home carrying guns and wearing masks, and that they put Jeffery Lyles on the floor and

commenced searching for money, but that he (Williams) was caught after the police arrived while the respondent escaped. App. 295, l. 20 – App. 320, l. 7.

During the PCR hearing, the respondent alleged that trial counsel failed to convey to him a plea offer that contained a twenty-year sentence in exchange for his guilty pleas. App. 634, l. 5-7; App. 664, l. 2-15. The respondent testified that trial counsel advised that he was facing LWOP (multiple LWOP) sentences if he went to trial so he saw point in pleading to the state's LWOP plea offers and knew nothing of the twenty-year plea offer. App. 639, l. 4-9. The respondent explained that he understood that he had an opportunity to plead to LWOP only (presumably one LWOP instead of multiple LWOP's), which was in effect not a good deal, and that he was forced into a trial because he had no knowledge that a twenty-year plea option existed in his case as counsel never communicated the twenty-year plea offer to him; and therefore, he never had an opportunity to "weigh [his] options." App. 639, l. 19 – App. 640, l. 1; App. 641, l. 7 – App. 642, l. 3. The respondent made it clear that although he was innocent, he was open to pleading in the event of an offer, but that he was not pleading to any LWOP offer in effect because that was illogical to him. App. 643, l. 2 -15; App. 643, l. 22 – App. 644, l. 22.

PCR RULING

PCR was granted to the respondent in this case because trial counsel erred in failing to convey the state's twenty-year plea offer to the respondent prior to trial. After the verdicts were returned at trial, the respondent received three LWOP sentences.

RESPONDENT'S PCR HEARING TESTIMONY

During the PCR hearing, the respondent alleged that trial counsel failed to convey to him a plea offer that contained a twenty-year sentence in exchange for his guilty pleas. App. 634, l. 5-7; App. 664, l. 2-15. The respondent testified that trial counsel advised that he was facing LWOP (multiple LWOP) sentences if he went to trial so he saw point in pleading to the state's LWOP plea offers and knew nothing of the twenty-year offer. App. 639, l. 4-9. The respondent explained that he understood that he had an opportunity to plead to LWOP only (presumably one LWOP instead of multiple LWOP's) which was in effect not a good deal, and that he was forced into a trial because he had no knowledge that a twenty-year plea option existed in his case as counsel never communicated the twenty-year plea offer to him; and therefore, he never had an opportunity to "weigh [his] options." App 639, l. 19-App. 640, l.1; App 641, l.7-App. 642, l.3. The respondent made it clear that although he was innocent, he was open to pleading in the event of an offer, but that he was not pleading to any LWOP offer in effect because that was illogical to him. App 643, l.2-15; App. 643, l.22-App. 644, l.22.

The trial transcript is consistent with the respondent's PCR testimony in that prior to sentencing, trial counsel advised the judge that "[the respondent]" has been offered opportunities to plead to life without parole." App 511, l.4-6. Later, that same portion of transcript text was re-transcribed to read that "[the] Respondent has been offered opportunities to plead without life without parole." App. 729. Petitioner admitted that he received the LWOP notice, but knew not of the option of a non-LWOP sentencing plea offer. App. 646, l. 10-16; App. 661, l. 22-25. Petitioner stated that trial counsel never conveyed or communicated to him the twenty-year plea offer that was presented to trial counsel by the solicitor in the case prior to trial. App. 661, l.22 –

App. 663, l. 23. Note the respondent's' PCR testimony that **"if she would have communicated that plea to me...I'd be doing twenty years" at App 656, lines 11-13.**

TRIAL COUNSEL'S PCR HEARING TESTIMONY

Trial counsel testified at the PCR hearing and admitted that she had the twenty-year plea offer noted in her case file for the respondent and that the twenty-year plea offer was submitted in the case on March 29, 2011, App. 672, lines 1-12; App 686, lines 3-17. Note that the respondent was arrested on January 10, 2011, and tried by jury on February 13, 2013. Trial counsel never testified that she remembered conveying the offer to the respondent, and admitted that she had no transmittal letter or any paperwork indicating that she made the plea offer known to the respondent, and further conceded that she had no notes or documentation in the file showing the she communicated thereafter to the respondent. Counsel added that petitioner asserted his innocence and did not want to plead guilty, and that she did not recall whether the respondent was amendable to pleading guilty if an offer for less than LWOP had been made to him. App. 667, l. 1-12. Regarding this matter, counsel could only assert that her usual practice was to convey plea offers by going down to the jail and discussing the offers with inmates, but that there was nothing in the file to show that this happened in the respondent's case. App 687, lines 4-16.

ORDER GRANTING PCR

The PCR judge ruled that because counsel recalled 1.) no specific discussions with the respondent about the plea offer, and 2.) had no notes to verify that she discussed the plea offer with the respondent, and 3.) because she stated at trial in effect that the only plea offers the respondent received were for life without parole, and 4.) the respondent testified that he was not aware of the plea offer, and 5.) the respondent testified that he would have accepted the offer,

and 6.) the offer yielded a substantial lower sentence than the three LWOP sentences he received at trial, then these multiple findings constituted proof via a preponderance of the evidence that "counsel's performance was deficient for failing to relay the plea offer of twenty years to [the respondent]" and that "[the respondent] was prejudiced by counsel's deficient performance" because he received three LWOP sentences at the close of his trial and was never afforded the opportunity to accept a twenty-year sentence per the plea offer instead. App. 705-708.

CORRECTED TRANSCRIPT

The transcript at App. 511, lines 1-6 reads as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times." The corrected transcript reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times." App. 729-730.

ANALYSIS

Despite the corrected transcript, the issue of counsel's failure to convey the plea offer remains supported by the record by a preponderance of the evidence shown at the PCR hearing. The transcript error that was corrected was of no such significant consequence in the case that it would have changed the PCR judge's ruling granting PCR in the case because the PCR judge relied on many factors in the case that led to the grant of PCR, and never relied solely on that portion of the transcript, neither corrected nor uncorrected, and because that portion of the transcript, neither corrected nor uncorrected, did not serve as a tie-breaker in the case. The difference between the transcript at App. 511, lines 1-6 that read as follows: "[the respondent] has been offered opportunities to plead to life without parole on the table a number of times," and the corrected transcript that reads as follows: "[the respondent] has been offered opportunities to plead without life without parole on the table a number of times," again was not

sufficiently significant to over shadow the other numerous factors that led to the PCR judge's grant of PCR or change the nature of the PCR judge's ruling in the case. App. 729-730.

Based on the record in the case at bar, it was obvious that counsel failed to advise the respondent of the twenty-year plea offer made either verbally or in writing. Counsel's testimony, and her notes, and her pre-sentencing remarks all corroborate the respondent's claim that this twenty-year plea offer was never communicated to him. The scrivener's error that supposedly indicated that counsel advised the respondent of the plea offer was of such little consequence that the difference in the words "opportunities to plead without parole," and "opportunities to plead without life without parole" had meaningless and confusing and incomprehensible interpretations, and as a matter of semantics, clearly did not evidence any viable translation that would nullify the respondent's showing of ineffective assistance of counsel for failing to communicate a plea offer and the PCR judge's finding of ineffective assistance of counsel in the case. The transcript clean-up via the alleged scrivener's error simply had no changeable bearing on the respondent's PCR showing or the PCR judge grant of PCR relief to the respondent.

It was clear that trial counsel erred in failing to convey the twenty year plea offer to the respondent, and that the respondent would have accepted the twenty-year plea offer had he known about it after being noticed of LWOP because any deal was better than life without parole. Furthermore, the respondent's statement in this regard, i.e., **"if she would have communicated to me...I'd be doing twenty years," at App 565, lines 11-13,** was sufficient to show prejudice. Moreover, the difference between receiving a twenty-year prison sentence rather than receipt of LWOP sentences would be sufficient to show prejudice in and of itself. Note that the applicant is not required to show objective evidence of actual prejudice because a

self-serving statement can prove prejudice. A PCR applicant's statement can be sufficient to satisfy prejudice. Jackson v. State, supra. See also Davie v. State, supra.

In granting petitioner's PCR application based on his allegation that he received ineffective assistance of counsel because counsel failed to convey a plea offer that would have yielded a substantially lower sentence than the three LWOP sentences he received at trial, the PCR judge ruled that because counsel recalled no specific discussions with the respondent about the plea offer, and had no notes to verify that she discussed the plea offer with the respondent, and because she stated at trial in effect that the only plea offers the respondent received were for life without parole, then these findings coupled with the respondent's testimony constituted proof via a preponderance of the evidence that "counsel's performance was deficient for failing to relay the plea offer of twenty years to [the respondent]" and that "[the respondent] was prejudiced by counsel's deficient performance" because he received three LWOP sentences at the close of his trial and was never afforded the opportunity to accept a twenty-year sentence per the plea offer instead. App. 705-708.

A defendant has a right to effective assistance of counsel during the plea-bargaining process. See Lafler v. Cooper, 566 U.S. --- (2012). See also Judge v. State, 321 S.C. 554, 471 S.E. 2d 146 (1196), overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a petitioner's statement that he was prejudiced by counsel's deficient performance at the plea-bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. Additionally, a guilty plea must represent a voluntary and intelligent choice among the alternative causes of action open to the defendant. Hill v. Lockhart, 474 U.S. 52 (1985). In Lafler v. Cooper, supra, counsel's incorrect advice led to the rejection of a plea offer in the case.

Moreover, the Sixth Amendment right to effective assistance of counsel extends to cases involving plea offers, particularly where plea offers lapse and where prejudice is shown to the extent that the defendant would have accepted the plea offer. Missouri v. Frye, 132 S.Ct. 1399 (2012). In Missouri v. Frye, counsel did not convey the plea offer to the defendant and as a result, the plea offer expired. Compare Davie v. State, 381 S.C. 601; 675 S.E. 2d 416 (2009), where the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer (due to counsel's error based on relocation and mail snafu) until after the plea offer had expired, and that he would have accepted that plea offer had it been communicated to him. See also, In Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (2014), where the Court held that counsel was ineffective in failing to extend the state's plea offer of ten years to the defendant prior to sentencing (which was when the defendant first heard of the offer) and that the defendant was prejudiced by counsel's deficient performance in this regard as he received a twenty-year sentence instead. In Bell, the defendant's case had been transferred to counsel, but the attorney who previously represented the defendant had an independent and separate file in the case containing a note indicating that a plea offer of ten years had been made, but said file had no notes or indication showing that said offer was conveyed to the defendant by either counsel who represented the client.

Again, note that the applicant is not required to show objective evidence of actual prejudice because a self-serving statement can prove prejudice. A PCR applicant's statement can be sufficient to satisfy prejudice. Jackson v. State, supra. See also Davie v. State, supra. In Jackson v. State, supra, the Court held the petitioner's testimony established prejudice where the issue was trial counsel's ineffectiveness in failing to inform the defendant that the offense of

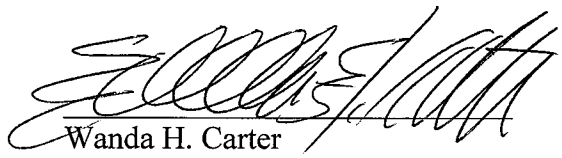
threatening a public official was a felony crime, and that despite the PCR judge's finding of no credibility on behalf of the applicant, nonetheless, the fact that the defendant's unrebutted evidence in the record that he would not have plead guilty if counsel had properly advised him of this was sufficient to establish prejudice. In Bell, the applicant stated that he would have taken the plea offer if he had known about it prior to the verdict and sentencing. The PCR judge in Bell found petitioner's testimony to be credible. Here, the respondent provided a better record than the record in Jackson v. State supra, and was squarely on point with Bell v. State, supra; and here, the PCR judge properly found that the respondent's testimony was credible, and that the respondent's position was unrebutted, and thus prejudice existed despite the scrivener's error, which in effect did not rebut the respondent's position as the corrected scrivener's error was unclear and not sufficiently definitive to rebut the respondent's PCR case and the PCR judge's findings in this matter. Also, compare Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), where the Court held that petitioner satisfied the prejudice prong where the only evidence presented in the record was petitioner's own testimony that had counsel not misinformed him that he would face a potential life sentence if he were found guilty at trial, then he would not have pled guilty.

In the case at bar, the PCR judge ruled properly in granting PCR relief to the respondent because trial counsel was ineffective in failing to convey a plea offer for a substantially lesser sentence, which the respondent would have accepted but for counsel's failure to communicate the same, and which violated the respondent's right to receipt of effective legal assistance in a criminal case as guaranteed under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). The respondent was prejudiced as a result of counsel's deficient representation in this regard because he would have accepted the twenty-year

sentence plea option had he been privy to the same and avoided the three LWPO sentences that were handed down to him at trial.

CONCLUSION

Based on foregoing argument, counsel for the respondent would request that this Court deny petitioner's petition for writ of certiorari and affirm the Order of the PCR judge's grant of post-conviction relief to the respondent in this case.



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ATTORNEY FOR PETITIONER

This 9th day of March, 2022.