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S.C. SUPREME COURT

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

Appellate Case No. 2021-001555

CHRISTOPHER ERIC RUSSELL,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

I. The Court of Appeals erred in affirming the PCR court’s denial of the State’s Rule 60(b) motion because the error in the trial transcript was significant and critically undermines the PCR court’s findings.

Russell argues now that “[t]he 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” Return to Petition for Writ of Certiorari at 8. On the contrary, the discovery of the error in the trial transcript proves that Applicant’s testimony before the PCR court was not credible. As the State argued in its Petition for Writ of Certiorari, the PCR court’s grant of relief to Russell depends upon the PCR court’s findings that Russell’s testimony before the PCR court was credible. The PCR court found that the trial transcript “confirm[ed]” the testimony that Russell gave at the PCR hearing. App. 707. In its order granting post-conviction relief to Russell, the PCR court also found that trial counsel’s statement to the trial court was “consistent” with Russell’s testimony at the PCR hearing. App. 707. It is imperative, therefore, that this Court consider the specific testimony from Russell that the PCR court found so credible. Russell testified at the PCR hearing that trial counsel “was ineffective for not even telling [him] about no plea.” App. 639. He testified that “[his] plea was life without parole.” App. 639. He testified that trial counsel did not tell him of any plea offers except for an offer for him to plead to life without the possibility of parole. App. 643. He testified that what was recorded on page 511 of the trial transcript—that trial counsel told the trial court at sentencing that Russell had been given chances to plead to life without parole on the table a number of times—was what trial counsel said to the trial court and “what she [had] always told [Russell].” App. 640. Russell offered up to the PCR court this statement from trial counsel as proof of the credibility of his testimony and of trial counsel’s failure to convey a twenty-year plea offer to him.

The problem with Russell’s testimony, and with the PCR court’s resulting findings and its refusal to vacate Russell’s ill-gotten relief, is that the transcript did not accurately record trial counsel’s statement to the trial court. Once the court reporter corrected her mistake, it was revealed that trial counsel had actually said that “Russell [had] been offered opportunities to plead *without* life without parole on the table a number of times.” App. 730 (emphasis added). The addition of that one word materially alters the meaning of the trial counsel’s sentence. The correction was not “meaningless,” “confusing,” “incomprehensible,” or “a matter of semantics,” as Russell argues. Return to Petition for Writ of Certiorari at 9. Russell indicated as much because he testified that he was forced to go to trial “to go fight for [his] life,” that he “wasn’t going to plead to life without parole,” and that he was forced to go to trial because he “wasn’t going to plead to no life.” App. 639. Russell, at the time of his PCR hearing anyway, appreciated the difference between a life sentence and a sentence that was shorter than all of the years of his life that he had remaining. Trial counsel appreciated the difference between life and a less-lengthy sentence because she “certainly would have” discussed the twenty-year plea offer with Russell before proceeding to “an LWOP trial.” App. 672. Trial counsel felt that her repeated visits to Russell at the jail right before he was served with notice that the State intended to seek a life sentence without the possibility of parole indicated that she had been trying to convince Russell to take the offer “in attempts to avoid that consequence”—meaning, the imposition of a life sentence. App. 673. The trial court appreciated the difference between a life sentence and something lesser because it pointed out, right before issuing a sentence, that Russell had turned down a plea offer *during trial on that very day*. App. 730. Russell was in his early forties when he was tried, and the difference between a life sentence and a lesser sentence could have amounted to decades of life in Russell’s case. The corrective

addition of the word “without” to trial counsel’s statement, contrary to the PCR court’s denial of the State’s Rule 60(b) motion, the Court of Appeals’ opinion, and Russell’s argument now, was not meaningless.

The correction also sheds light on Russell’s false testimony at the PCR hearing. Russell, who undoubtedly was standing next to trial counsel when trial counsel made the statement to the trial court, must have heard what trial counsel actually said. Nevertheless, he took full advantage of the court reporter’s transcription error and used her simple mistake to support his demonstrably false testimony before the PCR court. The transcript, once it was corrected, did not confirm Russell’s testimony, it proved the lie in it. Russell’s argument that the uncorrected transcription is consistent with the testimony that he gave at the PCR hearing only serves to prove the State’s point: if Russell’s testimony at the PCR hearing was consistent with a sentence in the trial transcript that has had its literal meaning essentially reversed through a correction from the court reporter, the only reasonable conclusion that can be drawn about Russell’s testimony is that it was false. Return to Petition for Writ of Certiorari at 6. When it maintained its grant of relief to Russell despite the discovery of the transcription error, the PCR court abused its discretion.

II. The Court of Appeals erred in affirming the PCR court’s denial of the State’s Rule 60(b) motion because, even before the court reporter corrected the trial transcript, Russell’s testimony was absurd on its face.

The PCR court’s decision not to reverse its grant of relief to Petitioner after the discovery of the transcription error and its subsequent correction had been presented to it only served to compound the error in its findings. Russell is now attempting to interpret his testimony at the PCR hearing in such a way so as to make sense of that which is nonsensical. Here are some examples: (1) Russell states that he “testified that trial counsel advised that he was facing LWOP (*multiple LWOP sentences*) if he went to trial”; (2) Russell states that he “explained that he understood that

he had an opportunity to plead to LWOP only (*presumably one LWOP instead of multiple LWOP's*); (3) Russell states that he “testified that trial counsel advised that he was facing LWOP (*multiple LWOP*) sentences if he went to trial”; and (4) Russell states that he “explained that he understood that he had an opportunity to plead to LWOP only (*presumably one LWOP instead of multiple LWOP's*) sentences if he went to trial”. Return to Petition for Writ of Certiorari at 5-6 (emphasis added). Russell’s new interpretation of his own testimony, which is unusual and quite dubious, is necessary for his response to the State’s argument that the PCR court should have found that Russell’s testimony was not credible even when the State had not yet made the PCR court aware of the transcription error. Petition for Writ of Certiorari at 14. Russell argues that he did not accept the State’s offer to plead guilty in exchange for a sentence of life without the possibility of parole because to do so would have been “illogical to him.” Return to Petition for Writ of Certiorari at 5. His testimony itself presented an illogical version of events to the PCR court. The PCR court accepted that version of events by accepting the uncorrected version of trial counsel’s statement to the trial court, even though trial counsel testified at the hearing that the uncorrected version of the statement did not match up with what actually happened during her representation of Russell. App. 706-07. Russell characterized the State’s alleged offer of LWOP as “in effect not a good deal.” Return to Petition for Writ of Certiorari at 5. The State submits that such would be no “deal” at all as it would make no practical difference to a defendant whether he served one life sentence or five. As noted in the State’s Petition for Writ of Certiorari, it is well-known that plea agreements are based upon contractual principles, so the PCR court should have found absurd Russell’s testimony that the Thirteenth Circuit Solicitor’s Office wanted him to plead guilty in exchange for his receiving the maximum possible sentence that he could have received even if he had been

convicted at trial. Instead, the PCR court uncritically accepted Russell's testimony and abused its discretion by denying the State's 60(b) motion, and the Court of Appeals erred by allowing the grant of relief to stand.

III. The Court of Appeals erred in affirming the PCR court's denial of the State's Rule 60(b) motion because the PCR court's and Court of Appeals' findings do not properly acknowledge the evidence before the PCR court.

Trial counsel had notice that the State was offering a twenty-year plea offer to Russell. App. 672. Trial counsel testified that she "certainly would have gone over that with [Russell] before going to, you know, an LWOP trial." App. 672. Trial counsel testified that she did not have "cover letter or anything like that" showing that she gave or sent "a copy" of the plea offer to Russell. App. 672. Trial counsel testified that she did not have any independent notes in her file indicating that she communicated the twenty-year plea offer to Russell, but she insisted that she "would have given a plea offer to someone before notice of life without parole . . . was filed." App. 672-73. Notably, trial counsel testified that she had not "been through the whole file because it's large. So there could be something in there." App. 673. Trial counsel testified that her records indicated that she visited Russell at the jail on multiple occasions immediately before the State served him with notice of its intent to seek a sentence of life without the possibility of parole, which she felt indicated that she was meeting with Russell at those times to try to convince him to avoid "that consequence." App. 673. 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 affirmed that she remember advising Russell that he would be served with an LWOP notice if he turned down the plea offers. App. 674. Trial counsel testified that she would have advised Russell of that because she was aware of his past criminal convictions. App. 674-75. Trial counsel testified as follows:

I think when I was talking to [Russell] about plea offers, you're just talking – that's the rest of my life, I can't, you know, he really wasn't about discussing twenty years or going to prison for a long time. He was saying he was not guilty. But I would have – this was a – I take life without parole very seriously. And I would have thoroughly reviewed that with him.

App. 686. Trial counsel testified that she usually goes to the jail to discuss plea offers with her clients, and she affirmed that that was something that she would do for clients. App. 687. She testified that it was not unusual for her to have a letter in her confirming that she had done so because, at the time when she represented Russell, she did not do so always. App. 687. She testified that she had since revised her policy so that she now “provide[s] a copy.” App. 687. She testified that she remembered that the State extended a last-minute plea offer either right before trial or during it for Russell to plead straight up in exchange for the sentence of life without the possibility of parole to be taken “off the table.” App. 687. She had a note in her file indicating that Russell “turned down a number of offers for lifting life without parole.” App. 687-88.

In response to a question from the PCR court, trial counsel testified that page 511 of the trial transcript (which had not yet been corrected at the time of the PCR hearing) contained a typo or else trial counsel had misspoken when Russell was being sentenced because she “certainly” meant that the State had extended offers to Russell that did not include life without the possibility of parole. App. 697. She testified that the solicitor “was willing to take that off the table in exchange for a guilty plea. App. 697. She testified that “Russell didn't want to do that.” App. 697.

The PCR court, in giving its initial impression on Russell's claim, referred to the trial transcript and trial counsel's uncorrected statement in there that, in the PCR court's words, “a life without parole was always on the table.” App. 700. In its order granting post-conviction relief to Russell, the PCR court noted that trial counsel “did not have any specific documentation or notes in her file confirming [that her practice of conveying all plea offers to her clients] was followed in

this case.” App. 706. The PCR court wrote that trial counsel “did not recall any specific discussions of the twenty-year plea offer with [Russell] in this case.” App. 706. The PCR court wrote that trial counsel’s notes about her visits to Russell at the jail did “not contain any specific indication that the twenty-year offer was conveyed or discussed at that time.” App. 707. The PCR court then found that the trial transcript confirmed the credibility of Russell’s testimony because it recorded trial counsel as saying that Russell had been afforded opportunities to plead “to life without parole on the table a number of times.” App. 707. The PCR court noted that trial counsel testified that she misspoke and meant to say that Russell had been offered chances to plead without LWOP on the table, but did not note that trial counsel testified that the transcript may have contained a typo, and apparently disregarded trial counsel’s testimony on this point. App. 707. The PCR court then found that there was no evidence that the twenty-year offer was communicated to Russell. App. 707.

Russell, echoing the PCR court’s error and possibly extending it further, argues that “it was obvious that [trial] counsel failed to advise [Russell] 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 [Russell’s] claim that this twenty-year offer was never communicated to him. Return to Petition for Writ of Certiorari at 9. The Court of Appeals, in its per curiam, erred in affirming the PCR court’s grant of relief by citing authorities indicating that it was deferring to the PCR court’s credibility findings and that it agreed with the PCR court that there was no evidence contradicting or conflicting with Russell’s testimony. Supp. App. 72.

The PCR court, the Court of Appeals, and Russell are incorrect that there is no evidence that trial counsel communicated the twenty-year plea offer to Russell. “Evidence of the habit of a person . . . whether corroborated or not and regardless of the presence of eyewitnesses, is relevant

to prove that the conduct of the person . . . on a particular occasions was in conformity with the habit or routine practice.” Rule 406, SCRE. The State presented evidence through trial counsel’s testimony that, though she had no specific records saying that she had communicated the twenty-year offer to Russell, it was her practice to communicate all plea offers to her clients. It was unreasonable to the PCR court to require such specific documentary evidence of trial counsel, particularly when she testified that she had not reviewed every single document in her large defense file. App. 673. Additionally, there is good reason that trial counsel would have been hyper-vigilant in communicating the twenty-year offer to Russell because she testified that she was particularly concerned about helping Russell avoid a sentence of life without the possibility of parole, and because Russell alleged to the trial court at the very start of his trial that trial counsel had represented him in a previous criminal case and had “misled” him about the range of possible sentences in that other case. App. 8-18. Furthermore, trial counsel’s testimony and notes indicated that she did communicate the offer to Russell because she testified: that Russell “was not accepting the twenty years or even a straight-up with the mandatory minimum of ten”; that she advised Russell that he would be served with an LWOP notice if he turned down the plea offers; that Russell wasn’t about discussing twenty years or going to prison for a long time because he maintained his innocence and felt that that amount of time would account for the rest of his life; that she had notes in her file indicating that Russell rejected multiple offers from the State that were less than LWOP; and that her statements as (erroneously) recorded on page 511 of the trial transcript was either a typo or failed to reflect what actually happened in her plea discussions with Russell. App. 674, 686, 697. Trial counsel’s testimony about Russell’s rejection of multiple plea offers that were not LWOP is evidence of the lack of credibility in Russell’s testimony that the

only plea offer that trial counsel told him of was LWOP. Though all of this evidence was perhaps not as specific as the PCR court demanded, it is evidence nonetheless.

The Court found that Russell had proven that he suffered prejudice from trial counsel's alleged failure to convey the twenty-year plea offer to him because it found credible that Russell's testimony that he would have accepted that offer had he known of it. App. 707. The PCR court gave no other justification for its prejudice finding. In affirming the PCR court's grant of relief to Russell, the Court of Appeals must have found that there was no evidence contradicting or conflicting with Russell's testimony, despite an acknowledgement that Russell's testimony was self-serving. App. 72. There was evidence contradicting or conflicting with Russell's testimony, though. Trial counsel's testimony that page 511 contained a typo or reflected a misstatement on her part that did not accurately reflect the true extent of her plea deal discussions with Russell was evidence that contradicted Russell's testimony that trial counsel told him of no offers but LWOP and his testimony that that page of the transcript proved that he was telling the truth. Trial counsel's testimony that Russell insisted on going to trial and maintained his innocence and rejected all plea offers extended to him, including offers that were not LWOP, was evidence that contradicted Russell's testimony.¹ The trial court's acknowledgement that it had either personally observed Russell reject a plea offer on the day of trial or had personal knowledge that he had done so is evidence that contradicts Russell's testimony. And the corrected version of page 511 of the trial transcript is evidence that contradicts Russell's testimony.

¹ Trial counsel's efforts on Russell's behalf were admirable despite her acknowledgement to the trial court that "it's certainly more difficult to defend somewhat uncooperative Defendant who doesn't want to work with me on things. And certainly, in the past few months, Mr. Russell has been uncooperative." App. 16.

CONCLUSION

The PCR court erred in granting post-conviction relief to Russell because it incorrectly found that there was no evidence that trial counsel communicated the twenty-year plea offer to Russell, incorrectly found that that Russell's testimony was credible and confirmed by the trial transcript, incorrectly found that Russell had proven he suffered prejudice due to trial counsel's alleged deficiency, and abused its discretion in denying the State's Rule 60(b) motion after being made aware of additional evidence that critically undermined its findings and grant of relief to Russell. The Court of Appeals erred in affirming the PCR court's orders and refusing to even acknowledge that there was evidence contrary to Russell's testimony. And Russell incorrectly argues now that the transcription error was meaningless, that his testimony was on its face logical of credible, and that the PCR court's grant of relief to Russell correctly took stock of the evidence. For all of the foregoing reasons, this Court should grant a writ of certiorari and reverse the Court of Appeals' opinion affirming the PCR court's denial of the State's Rule 60(b) motion and its erroneous grant of post-conviction relief to Russell.

Respectfully submitted,

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