STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Appellate Court Case No. 2013-000975
Circuit Court Case No. 1998-GS-46-2847; 2849; 2850; 2851; 2852

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTONIO GORDON,

APPELLANT.

RECEIVED
MAY 28 2013
SC Court of Appeals

EXPLANATION PURSUANT TO RULE 203(d)(1)(B)(iv), SCACR

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ATTORNEY FOR APPELLANT

NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, respectfully submitting this explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. This explanation is made in response to this Court's letter to undersigned counsel dated May 16, 2013. The Appellant submits that this Court should permit this appeal to go forward. As an initial matter, the Appellant does not believe that Rule 203(d)(1)(B)(iv) applies to this appeal. The Appellant will first address the procedural and factual history of the case before turning to his argument that Rule 203(d)(1)(B)(iv) is inapplicable to this case. Finally, the Appellant will examine the merits of the Rule 203(d)(1)(B)(iv) analysis.

PROCEDURAL AND FACTUAL HISTORY

This matter comes before the Court by way of an appeal from an order denying the Appellant's motion for a new-trial based on after discovered evidence. The Appellant and his three co-defendants, Monta Gordon, Terrance McCreary, and Gary Moffatt, were all prosecuted in connection with their involvement in the shooting of the victim Erik Krenn. The State's theory of the case was that the Appellant was the shooter. All of the Appellant's co-defendants eventually cooperated with the State and intended to testify that the Appellant was the shooter. The Appellant ultimately pleaded guilty on July 16, 1999, to murder and attempted armed robbery, among other charges, and was sentenced to an aggregate forty-year imprisonment term.

The Appellant subsequently filed a Rule 29(b), SCRCrimP, motion for a new trial based on after-discovered evidence. In this motion, the Appellant alleged that two of his co-defendants—Monta Gordon and Terrance McCreary—had recanted their earlier statements and asserted that they were willing to tell the truth about the night of the incident. Principally, the Appellant averred that Monta Gordon would admit to firing the shot that killed the victim and

that McCreary would admit that Monta Gordon, not the Appellant as previously stated, exited and reentered his vehicle with a firearm.

On March 4 and March 8, 2013, the motion was heard by the lower court. The Appellant, Monta Gordon, and McCreary all testified at the hearing, with both the Appellant and Monta Gordon testifying that Monta Gordon was the shooter and McCreary testifying that Monta Gordon exited and reentered the vehicle he was driving with a firearm. On April 22, 2013, the lower court filed an order denying the motion on several grounds. In particular, the lower court found that:

1) Rule 29(b), SCRCrimP, motions may only be filed by defendants whose convictions are obtained through trials, not through guilty pleas; see Order at 18-19;
2) None of the witnesses possessed any credibility and that their testimony was completely fabricated; see Order at 19-20;
3) The guiding language for the standard of reviewing a Rule 29(b), SCRCrimP, motion set forth by State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) is "confusing and hard to work into [the] analysis"; see Order at 21;
4) The Appellant's claim is not after-discovered evidence because he has known from the day of the shooting that he was not the shooter; see Order at 22-23.

The Appellant asserts that each of these findings is reviewable on appeal. See Rule 203(d)(1)(B)(iv), SCACR.

RULE 203(d)(1)(B)(iv), SCACR, IS INAPPLICABLE TO THIS APPEAL

Rule 203(d)(1)(B)(iv), SCACR, provides in full:

> **(iv)** If the appeal is from a guilty plea, an Alford plea or a plea of nolo contendere, a written explanation showing that there is an issue which can be reviewed on appeal. This explanation should identify the issue(s) to be raised on appeal and the factual basis for

> the issue(s) including how the issue(s) was raised below and the ruling of the lower court on that issue(s). If an issue was not raised to and ruled on by the lower court, the explanation shall include argument and citation to legal authority showing how this issue can be reviewed on appeal. If the appellant fails to make a sufficient showing, the notice of appeal may be dismissed.

(Footnote omitted). The Appellant respectfully submits that this provision is inapplicable to this appeal, and that this Court should not dismiss this appeal pursuant to this provision.

Rule 203(d)(1)(B)(iv) applies to appeals from guilty pleas, pleas pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), and *nolo contendere* pleas. By its terms, then, Rule 203(d)(1)(B)(iv) applies to final judgments in all cases resolved by a plea. The Rule, however, is silent as to post-trial motions. The law distinguishes appeals from a final judgment and appeals from a post-trial motion for a new trial. Compare S.C. Code Ann. § 14-3-330(1) (vesting the Supreme Court with jurisdiction for appeals from "final judgments") with § 14-3-330(2)(b) (vesting the Supreme Court with jurisdiction for appeals from "orders ... grant[ing] or refus[ing] a new trial); see also State v. Wright, 228 S.C. 432, 436, 90 S.E.2d 492, 494 (1955) (finding that an appeal from a conviction was untimely but that an appeal from a motion for a new trial based on after-discovered evidence was timely). Given this well-established distinction and Rule 203(d)(1)(B)(iv)'s silence as to post-trial motions, the Appellant asserts that Rule 203(d)(1)(B)(iv) applies solely to appeals taken to challenge final judgments from plea proceedings, and does not apply to appeals from the entirely separate class of post-trial motions for new trials.

Furthermore, the reasoning behind the adoption of Rule 203(d)(1)(B)(iv) supports the Appellant's argument. Rule 203(d)(1)(B)(iv)'s focus is on the appellant's ability to raise the issue, not on the merits of the claim. Final convictions obtained through guilty pleas are rarely overturned because by appellate courts because "a guilty plea constitutes a waiver of

nonjurisdictional defects and claims of violations of constitutional rights," thereby severely limiting the appellate court's scope of review. State v. Rice, 401 S.C. 330, 737 S.E.2d 485 (2013). Therefore, Rule 203(d)(1)(B)(iv) serves to cull the wheat from the chaff as it will be the unusual case where there will be an arguable basis for appealing the final judgment. However, motions for new trials based on after-discovered evidence, however, are routinely heard by appellate courts on the merits because they involve several issues of fact and law that can be reviewed by the appellate courts. See generally State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999) (reversing denial of motion for a new trial based on after-discovered evidence on the basis that the trial court erred in finding that the evidence could not have been previously discovered through the exercise of due diligence); State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011) (finding motion for a new trial based on after-discovered evidence was properly denied by the trial court). Furthermore, motions for a new trial based on after-discovered evidence are motions made with final rulings by trial courts, which is all an appellate court needs before it can review the lower court's findings. Cf. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (finding that a Rule 59(e), SCRCP, motion is necessary to preserve issues which are not addressed directly in a PCR order); Caldwell v. Wiquist, ___ S.C. ___, 741 S.E.2d 583 (Ct. App. 2013) (same holding with regard to civil cases). Consequently, while Rule 203(d)(1)(B)(iv) serves a useful purpose for appeals from plea proceedings because of the limited nature of appeals from guilty pleas, it should not be applied to appeals from Rule 29(b), SCRCrimP, motions because those motions are decided by rulings which are fully reviewable on appeal.

RULE 203(d)(1)(B)(iv), SCACR, SHOULD NOT BAR THIS APPEAL

Assuming, *arguendo*, that Rule 203(d)(1)(B)(iv), SCACR, is applicable to this case, the Appellant respectfully submits that this Court should permit this appeal to proceed forward because there are several "issue[s] which can be reviewed on appeal." As a general matter the Appellant asserts that all of the lower court's rulings are reviewable as they are found in a twenty-four page order that engages in a detailed discussion of the merits of the Appellant's motion. In other words, since the motion was made and there is a final order denying the motion, the denial of the motion "can be reviewed on appeal." Rule 203(d)(1)(B)(iv), SCACR; see generally I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting a "long-established preservation requirement that the losing party generally must present both his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). In the event that the Appellant must make a further showing that not only that the issue "can be reviewed on appeal" but that the issue can be reversed on appeal, however, the Appellant asserts that each of the lower court's rulings for denying relief is reviewable as each ruling is grounded in errors of law and fact. Rule 203(d)(1)(B)(iv), SCACR. The Appellant will address each ruling in turn.[1]

A. The Lower Court Erroneously Found that Rule 29(b), SCRCrimP, Motions Cannot Be Filed in Guilty Plea Cases

The lower court categorically found that Rule 29(b), SCRCrimP, motions cannot be filed when the criminal defendant filing the motion pleaded guilty as opposed to proceeding to trial. See Order at 18-19. However, in State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971), the Supreme Court reviewed a motion for a new trial based on after-discovered evidence on the merits even though the conviction was obtained through a guilty plea. The Supreme Court

[1] Given the limited scope of Rule 203(d)(1)(B)(iv), the Appellant's discussion of each issues is necessarily more limited than that which would be presented in a full brief. See Rule 208(b), SCACR.

specifically held that "motions of this character should be entertained and granted in order that wrongs done may be remedied." Id. at 369, 182 S.E.2d at 734. The lower court attempted to distinguish DeAngelis by finding that case was decided on the basis of the criminal defendant's failure to attach affidavits to his motion. Order at 18-19. By finding that Rule 29(b), SCRCrimP, does not apply to guilty pleas, the lower court erred in ignoring the fact that DeAngelis actually ruled on the merits of the motion and erred in ignoring DeAngelis' clear directive that such motions "be entertained" by trial courts. 256 S.C. at 369, 182 S.E.2d at 734. Rule 29(b), SCRCrimP, motions can, therefore, be brought following guilty pleas. The lower court's finding to the contrary can be reviewed on appeal. See Rule 203(d)(1)(B)(iv), SCACR.

B. The Lower Court Did not Understand the Scope of Review

In State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009), the Supreme Court held that a motion for a new-trial based on after-discovered evidence should not be denied simply because the witnesses supporting the motion lack credibility "because a witness may lack persuasive credibility and still create reasonable doubt." 381 S.C. at 170, 672 S.E.2d at 567. The lower court found this language "confusing and hard to work into its analysis," and then proceeded to find that the motion should be denied simply because it did not find the Appellant's witnesses credible. Order at 21. The Appellant asserts that this finding is reviewable because Mercer directed the lower court to look to the nature of the evidence supporting the motion and determine whether or not reasonable doubt was created by the nature of the testimony regardless of the credibility of the witness giving the testimony. By ignoring that directive and by finding that the Appellant's motion should fail simply because his witnesses lacked credibility, the trial court erred. This finding can be reviewed on appeal. See Rule 203(d)(1)(B)(iv), SCACR.

C. The Lower Court Erroneously Found that the Appellant's Evidence Was not After-Discovered

The lower court found that the Appellant's evidence was not after-discovered because the Appellant had known from the day of the shooting that he was not the shooter. Order at 22-23. In other words, the lower court found that the evidence either (1) was discovered prior to trial; or (2) "could ... in the exercise of due diligence have been discovered prior to the trial." State v. Spann, *supra*, 381 S.C. at 619, 513 S.E.2d at 99. This finding is erroneous as a matter of law because the Appellant's motion was not based upon his assertion that he was not the shooter but was based instead on the newly discovered evidence that both Monta Gordon and McCreary, who were both set to testify against him and identify him at the shooter if he proceeded to trial, would now essentially testify that Monta Gordon was the shooter. Plainly, the fact that they would identify Monta Gordon as the shooter could not have been known prior to the trial because they were going to testify that the Appellant was the shooter at his trial. It is difficult to envision a clearer example of after-discovered evidence than the recantation of potential testimony, aside from actually recanted testimony. If the trial court's ruling is followed, recanted testimony can never serve as the basis for after-discovered evidence because someone, either the criminal defendant or the witness, would have known the truth before the witness testified falsely at trial. Consequently, the lower court's ruling on this issue is controlled by error of law, and can be reviewed on appeal. See Rule 203(d)(1)(B)(iv), SCACR.

D. The Lower Court Erroneously Denied the Motion on the Merits

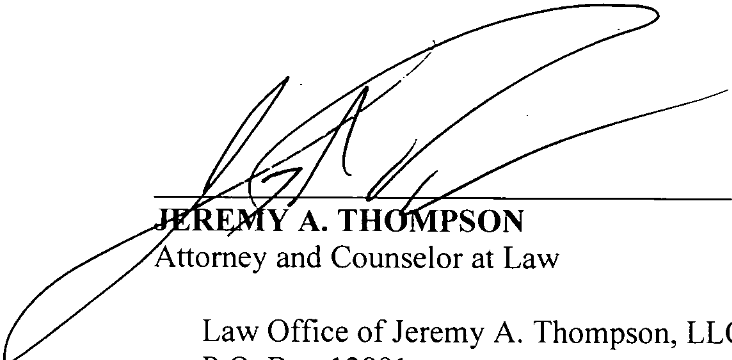
The lower court found that the Appellant's motion for a new trial should be denied because his witnesses were not credible and because all three witnesses were "fabricating testimony" in a concerted effort to give the Appellant a new trial. Order at 23. The Appellant asserts that this finding is erroneous for a number of reasons. First, the Appellant asserts that the

confession of a co-conspirator that he was the shooter would "create reasonable doubt" such that a new trial is warranted. State v. Mercer, *supra*, 381 S.C. at 170, 672 S.E.2d at 567. Second, the Appellant asserts that the lower court's misapplication of Mercer infects the factual findings such that the lower court's reasoning for denying the motion cannot be upheld. Third, the Appellant asserts that a review of the factual record, which will only be done in the event this appeal proceeds forward, will show that there are inconsistencies in the testimony given by all three witnesses, making it difficult for the lower court's conclusion of collusion to withstand serious scrutiny. After all, if the Appellant, Monta Gordon, and McCreary all conspired to free the Appellant through the giving of false testimony, their testimony should match word-for-word. It does not. Accordingly, the Appellant asserts that this portion of the lower court's ruling is erroneous. This finding can be reviewed on appeal. See Rule 203(d)(1)(B)(iv), SCACR.

CONCLUSION

Based on all of the above, the Appellant respectfully submits that this Court should either find that Rule 203(d)(1)(B)(iv), SCACR, is inapplicable to his case or find that the case should proceed because there are several "issue[s] which can be reviewed on appeal." Accordingly, the Appellant requests that this appeal be permitted to proceed forward.

Respectfully submitted,



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This 28th day of May, 2013.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
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John C. Hayes, III, Circuit Court Judge

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RESPONDENT,

v.

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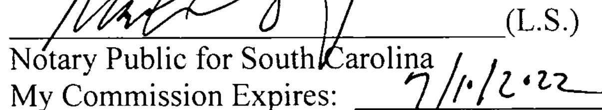
APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petition for a Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Salley W. Elliott, Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 28th day of May, 2013.

JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 28th day
of May, 2013.


_____________________(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/1/2022

LAW OFFICE OF
JEREMY A. THOMPSON
LLC

May 28, 2013

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: State of South Carolina v. Antonio Gordon; 1998-GS-46-2847; 2849; 2851
Appellate Case No.: 2013-000975

Dear Ms. Kitchings:

Enclosed please find the original and one copy of my Explanation Pursuant to Rule 203(d)(1)(B)(iv), SCACR, in the above-captioned action. I would appreciate your filing the original, clocking the copy, and returning the copy to me. A copy of the order pertaining to this case was enclosed with my Notice of Appeal. Please let me know if the Court requires anything else from me in this matter. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,

Jeremy A. Thompson
Attorney and Counselor at Law

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JAT/
Enclosure
cc: Salley W. Elliott, Assistant Deputy Attorney General (via U.S. mail) (w/ enclosure)
Robert M. Dudek, Chief Appellate Defender (via U.S. mail) (w/ enclosure)
Antonio Gordon, #259798 (via U.S. mail) (w/ enclosure)
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