RECEIVED
May 01 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT

The Honorable D. Craig Brown
Circuit Court Judge

Case No. 2022-000339

CITY OF COLUMBIA,.....RESPONDENT,

v.

MARIE ASSA'AD-FALTAS, MD, MPH, ... APPELLANT,

INITIAL BRIEF OF RESPONDENT CITY OF COLUMBIA

Marshall S. James, S.C. Bar No. 80387
City of Columbia
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
(803) 737-4242
Marshall.james@columbiasc.gov

Counsel for Respondent City of Columbia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court properly find that the Magistrate Judge did not demonstrate judicial prejudice and thus was not required to recuse himself ?

II. Did the Magistrate Court properly deny Appellant's motion to transfer to the Circuit Court?

III. Did the Circuit Court properly find that the Magistrate Judge was correct in denying Appellant's motion to reopen because of an alleged *Brady* violation?

IV. Did the Circuit Court properly find that the Magistrate Judge was correct in denying Appellant's motion to reopen on the basis of after discovered evidence?

V. Did Appellant waive issues 1, 2, 3, 5, 6, 7, and 9 as outlined in her Revised Initial Brief because she failed to raise these issues to the Circuit Court?

STATEMENT OF THE CASE

On September 11, 2009, Appellant was charged with simple assault in Columbia, South Carolina. On April 25, 2013, she proceeded with a bench trial in Columbia Municipal Court before the Honorable Carl L. Solomon. Trial Tr. at 1-135. Theodore Lupton represented her. *Id.* David Fernandez represented the City of Columbia (herein after "City"). *Id.* Appellant was found guilty and sentenced to twenty days imprisonment. Trial Tr. at 90.

Appellant made a timely motion for a new trial. Appellant appealed her conviction to the South Carolina Circuit Court. On April 17, 2015, the Honorable Allison Lee affirmed Appellant's conviction in case number 2013-CP-40-3522. Appellant appealed to the South Carolina Supreme Court, and it affirmed her conviction and sentence on June 21, 2017. *See City of Columbia v. Assa'ad-Faltas,* 420 S.C. 28, 32, 800 S.E.2d 782, 783 (2017).

Appellant's motion for a new trial was stayed pending her appeals. The magistrate court ultimately heard Appellant's motion on February 4, 2019. *See* Hearing Tr. at 1-137. On February 27, 2019, the magistrate judge issued an order denying Appellant's motion. On March 8, 2019, Appellant appealed to the Circuit Court, and on February 9, 2022, the Circuit Court affirmed. Appellant filed the instant appeal on March 15, 2022.

STATEMENT OF THE FACTS

This case arises out of an incident between Appellant and her landlord Dinah Gail Steele ("Steele") that occurred at the Byron Rd. apartment complex in Columbia, S.C. where Appellant lived. Trial Tr. at 16-18. They had several disagreements regarding Appellant's ownership of an adjoining lot and other conflicts relating to eviction proceedings. *Id.* As a result of these disputes, Steele had given Appellant notice that she was going to inspect her apartment. *Id.*

On September 11, 2009, Steele was doing maintenance work on the apartment building when Appellant attempted to hand deliver written notice of her objection to inspection. Trial Tr. at 17-18. While handing Steele the documents, Appellant pushed

them into Steele's chest. *Id.* Steele called the police, and Appellant was arrested for assault on warrant number L-066971. On April 25, 2013, Appellant proceeded with a bench trial before Judge Solomon on the 2009 assault charge, was found guilty, and was sentenced to twenty days imprisonment. Trial Tr. at 90.

Appellant's motion to reopen was heard in Magistrate Court on February 4, 2019. Hr. Tr. at 1-137. During the hearing, Appellant called Teresa Knox ("Knox"), City Attorney for the City of Columbia, Dinah Gail Steele ("Steele"), and Charlene Crouch ("Crouch") as witnesses. Appellant also testified in support of her motion. Hr. Tr.at 53, 78, 87, 121.

STANDARD OF REVIEW

"A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge. The granting of a new trial because of after-discovered evidence is not favored, and this Court will sustain the lower court's denial of such a motion unless there appears an abuse of discretion." *State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d 195, 197-98 (1978). "For *Brady* purposes, in determining the materiality of nondisclosed evidence, an appellate court must consider the evidence in the context of the entire record. However, the court should not consider the sufficiency of the evidence. The court's function is to determine whether the appellant's right to a fair trial has been impaired." *State v. Taylor,* 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998).

ARGUMENTS

1. **The Circuit Court was correct in finding that Appellant did not demonstrate judicial prejudice and that the Magistrate Judge therefore properly declined to recuse himself from presiding over the motion to reopen.**

This Court should affirm the circuit court's ruling that the magistrate judge properly found that his recusal was not required. Order at 5, 10. Under the Code of Judicial Conduct, a judge must "disqualify himself in a proceeding in which his impartiality might reasonable be questioned." Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. This Court has held that:

> A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned. Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature.

Parker v. Shecut, 340 S.C. 460, 497, 531 S.E.2d 546, 566 (Ct. App. 2000), rev'd on other grounds by *Parker v. Shecut*, 349 S.C. 226, 562 S.E.2d 620 (2002) (internal citations omitted).

In response to Appellant's claim that the magistrate judge should recuse himself, the magistrate explained that he contacted the Office of Disciplinary Counsel, which advised him that recusal was not necessary. Hr. Tr. at 2, 3.

The circuit court was correct in finding that the magistrate judge exhibited no judicial prejudice or bias toward Appellant. *See* Order at 5. For example, the magistrate noted that most hearings on motions to reopen do not take very long. Hr.

Tr. at 22, ll. 20-21. The circuit court found that the magistrate judge gave Appellant ample opportunity during the hearing to catch her breath; to find necessary paperwork during the hearing; to search for points in support of her arguments in transcripts; to take breaks; to call witnesses; and to testify herself. Order at 5. Moreover, the transcript of the hearing on Appellant's motion to reopen runs to one hundred and thirty-seven pages and is evidence that the magistrate judge went to considerable effort to enable Appellant to present arguments and evidence in support of her motion. Accordingly, this court should affirm the circuit court's finding that the magistrate exhibited no bias or prejudice and was thus not required to recuse himself. Order at 5.

2. The Magistrate Court was correct in denying Appellant's motion to transfer the hearing from Magistrate Court to Circuit Court.

This court should affirm the magistrate court's denial of Appellant's motion to transfer. Hr. Tr. at 133, l. 9. In support of her motion to transfer, Appellant argued that a transfer would promote judicial economy, that the circuit court has broader subpoena power than the magistrate's court, and that with such broad subpoena power, she would be able to subpoena witnesses from other counties. Hr. Tr. at 5, ll. 8-15.

The magistrate judge denied Appellant's motion to transfer. Hr. Tr. at 133, l. 9. He noted that the circuit court ordered that the motion to reopen be sent to magistrate's court and that a motion to reopen is properly heard and ruled on at the judicial level where the original trial took place. Hr. Tr. at 6-7. The magistrate further

explained that he did not have the authority to transfer the matter to the circuit court. Hr. Tr. at 133, ll. 8-10.

3. The Circuit Court was correct in finding that Appellant failed to provide proof of a *Brady* violation.

Appellant's initial argument in support of her motion for a new trial is that the City of Columbia did not comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963); Hr. Tr. at 56, ll. 9-11. Appellant alleged that the City failed to disclose Charlene Crouch's criminal record when it turned over discovery at a November 17, 2009 hearing. Hr. Tr. at 48, ll. 9-16.

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87; *see also State v. Taylor*, 333 S.C. 159, 176-77, 508 S.E.2d 870, 879 (1998). In support of her *Brady* motion, Appellant called Teresa Knox, City Attorney for the City of Columbia. Ms. Knox testified that she was not the City Attorney at the time of Appellant's April 2013 trial. Hr. Tr. at 55, l. 20. When asked whether City Prosecutors are employed in the City Attorney's office, Knox answered that they are and that she is their supervisor. Hr. Tr. at 54-55. Appellant asked Knox whether new City Prosecutors take over a file after a former City Prosecutor leaves the City Attorney's Office, and Knox testified that they do. Hr. Tr. at 55-56. She further testified that City Prosecutors are custodians of the records contained in the City's files but not of the records in the Municipal Court's files. Tr. at 56, ll. 3-4. In addition, Knox testified that City Prosecutors would be responsible for producing documents

to which defendants are entitled. Hr. Tr. at 56, ll. 3-4. Knox further testified that she had no knowledge of what was in Appellant's file, and she suggested that the City's Chief Prosecutor, who was present in the courtroom for the hearing on Appellant's motion to reopen, would be the proper person to ask about information or evidence in City files. Hr. Tr. at 56, ll. 23-25. Appellant ended her examination of Knox and did not call the Chief Prosecutor to the stand for questioning. Hr. Tr. at 57.

Appellant also testified regarding the alleged *Brady* violation. Hr. Tr. at 124. The magistrate judge asked her about the alleged document that the City allegedly failed to provide. Hr. Tr. at 124, ll. 8. Appellant testified that it was a "document that said that [Steele] had no psychological effects and no need for a doctor" in the wake of Appellant's assault. Hr. Tr. at 124, ll. 9-10. The magistrate judge asked her if she raised the issue concerning the document at trial, and Appellant testified that her attorney prevented her from doing so. Hr. Tr. at 24, ll. 16-17. The magistrate judge stated that the proper avenue for a complaint about her attorney was the P.C.R matter that she previously filed. Hr. Tr. at 24, ll. 18-20.

The magistrate judge noted that Appellant raised issues that gave him concerns about whether Appellant was provided with complete discovery. Hr. Tr. at 133, ll. 3-8. Nevertheless, he found that Appellant failed to meet her burden of offering proof of a *Brady* violation and accordingly denied her motion to reopen on that basis. *Id.* The circuit court properly affirmed. Order at 10.

4. The Circuit Court was correct in finding that Appellant failed to produce after discovered evidence sufficient to justify granting Appellant's motion to reopen.

"A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge. The granting of a new trial because of after-discovered evidence is not favored, and this Court will sustain the lower court's denial of such a motion unless there appears an abuse of discretion." *State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978). To establish that a new trial is warranted, "[t]he movant must show that the evidence: (1) is such as would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." *State v. Pierce,* 263 S.C. 23, 32, 207 S.E.2d 414, 419 (1974).

In support of her motion, Appellant identified Dinah Steele, Charles White, Charlene Crouch, and Teresa Ingram as persons whom she argued were the source of after-discovered evidence that would be sufficient to justify granting her motion to reopen.

a. Dinah Gail Steele

The circuit court first addressed Appellant's motion to reopen as it applied to Steele. Order at 7. Appellant argued that Steele was either on medications during her April 25, 2013, simple assault trial and that those medications affected her competency to testify, or she was not on medications and thus lied under oath. Order at 8; Hr. Tr. at 10, ll. 15-17. In support of her claim that the case should be reopened because of Steele's testimony, Appellant requested that the court order the production of her medical records. Hr. Tr. at 10, ll. 12-21. The magistrate judge denied the

request for such an order, stating that he lacked the power to subpoena those records. Hr. Tr. at 11, ll. 1-3. The magistrate judge did offer Appellant the opportunity to question Steele, and Appellant did so. Hr. Tr. at 78-87. Appellant's questions covered such topics as when Steele changed her name, whether she suffered mental injury, and whether or not Appellant actually struck her in 2009. Hr. Tr. at 79 - 81. Appellant also asked Steele whether she was on meds during her April 2013 trial, and Steele testified that she was on Paxil at the time. Hr. Tr. at 82, l. 17. Appellant then asked who prescribed the Paxil, but the magistrate judge ruled that such a question was not relevant. Hr. Tr. at 82, l. 25. Appellant elicited testimony that the Paxil was prescribed in the emergency room and that she needed the Paxil after Appellant's assault and continued harassment. Hr. Tr. at 83, ll. 4-6, 22-23. Appellant continued with questions concerning whether it was explained to Steele that Paxil was an antidepressant, whether she could sleep at night, and whether she stopped crying. Hr. Tr. at 86, ll. 6-21. The magistrate ended this line of questioning and ruled that he did not see these questions or any of the questions that Appellant asked of Steele as being relevant to her motion to reopen. Hr. Tr. at 86, ll. 23-24.

In addition, the magistrate judge allowed Appellant to testify on this issue, and her testimony addressed Steele's medication. Hr. Tr. at 121-123. She testified that no reasonable physician would prescribe Paxil and that a physician in the emergency room would not be allowed to prescribe more than a three-day supply. Hr. Tr. 122, ll. 2-7. Appellant also testified that it was implausible that Steele was "constantly crying and [going] to the emergency room four months after she was handed a piece of

paper." Hr. Tr. at 122, ll. 9-11. Appellant further testified that she did not assault or strike Steele. *See* Hr. Tr. 122, ll. 11-12.

Appellant's apparent aim with respect to this testimony was to call into question Steele's credibility as it related to her competency, her medications, and whether she struck Steele. *See* Hr. Tr. 121-22. The magistrate judge ended this line of questioning and ruled that this testimony is irrelevant to the motion to reopen. Hr. Tr. 122, ll. 20-21. Appellant replied "it's relevant to rebut her testimony that I struck her." Hr. Tr. 122, l. 25. The magistrate judge responded that that issue had been adjudicated as Appellant had been found guilty of simple assault against Steele and that the conviction had been affirmed. Hr. Tr. 123, ll. 1-4.

In sum, the magistrate judge concluded that despite her examination of Steele, Appellant failed to produce any evidence that would meet the standard for after discovered evidence because the evidence Appellant elicited was merely impeaching. Hr. Tr. at 134. The circuit court properly affirmed this finding. Order at 10.

b. Charles White

Appellant contends that a 2009 letter from Charles White outlines an agreement that Crouch had with Steele. Hr. Tr. at 19, l. 23; Hr. Tr. at 31 ll. 1-16. Under the agreement, Crouch would testify untruthfully against Appellant if Steele would agree not to enforce a trespass notice against Crouch. Hr. Tr. 18, ll. 22-25; Hr. Tr. 19, ll. 1-5, ll. 23-24. Appellant asserts that Crouch would then be able to visit and provide sexual services to White, who was living in one of Steele's apartments on Byron Rd. Hr. Tr. 19, ll. 1-5.

White neither appeared nor testified at the hearing on Appellant's motion to reopen, and he was not subpoenaed. Hr. Tr. at 22, ll. 10-11. The magistrate judge ruled that what White may have written to Appellant in his letter was hearsay and would have been inadmissible at her April 2013 trial. Hr. Tr. at134, l. 13. He also found that the 2009 letter that White wrote was not after discovered evidence and therefore could not be used in support of her motion. Hr. Tr. at 134, l. 16-17. The circuit court properly affirmed the magistrate judge's findings. Order at 10.

c. Charlene Crouch

Appellant sought to elicit testimony from Crouch in support of her assertion that Crouch lied about her criminal record at Appellant's April 2013 trial and about the reason Crouch was placed on trespass notice at the Byron Rd. apartments. Hr. Tr. at 15, ll. 12-13. At the hearing on the motion to reopen, Crouch testified that she was arrested for public drunkenness on April 22, 2012, and that she pled guilty to that charge in May 2012. Hr. Tr. at 92, ll. 8-17. Appellant also asked Crouch about an assault second charge. Hr. Tr. at 97, ll. 18-19, ll. 21-22.

As for the public drunkeness conviction, the magistrate judge ruled that Appellant would not have been allowed to enter that conviction into evidence because it is not an impeachable offense. Hr. Tr. at 100, ll. 9-13. The magistrate judge also ruled that the assault second charge would not have been admissible at her April 2013 trial because Crouch was convicted of that charge three months after Appellant's trial. Hr. Tr. at 98, ll. 9-11, ll. 22-24.

Appellant explored other lines of questions with Crouch. For example, she asked whether Crouch was evicted from an apartment on Byron Rd.; whether Crouch was placed on trespass notice at the Byron Rd apartments; whether Crouch or Steele called the police after Appellant's assault on Steele; and whether Crouch received money from Steele or White. Hr. Tr. at 89, ll. 1-23; Hr. Tr. at 92, ll. 18-20; Hr. Tr. at 107, ll. 10-15, 23-25; Hr. Tr. at 90, ll. 13-14. The magistrate judge ruled that these questions were irrelevant to her motion to reopen and that Crouch was not a source of any after discovered evidence that would have supported Appellant's motion for a new trial. Hr. Tr. at 134, ll. 2-12. The circuit court properly affirmed the magistrate's findings. Order at 10.

d. Teresa Ingram

Appellant asserted that Teresa Ingram was "paid in the form of free rent by Dinah Steele to testify falsely against me." Hr. Tr. at 28, ll. 2-3; Hr. Tr. at 34, ll. 19-25. She also asserted that Ingram allegedly testified falsely against her in an unrelated harassment trial. Hr. Tr. at 28, ll. 9-10. Appellant asserts that Steele evicted Ingram because the allegedly false testimony failed to result in Appellant's conviction of harassment. Hr. Tr. 34, ll. 21-25. According to Appellant, this alleged scheme is proof that Steele lies. *Id.* Despite these assertions, the magistrate judge found that Ingram could have but did not testify at the April 2013 trial, and that evidence that Ingram might have provided could have been discovered before trial. Tr. 35, ll. 14-17; Tr. 134, ll. 17-18. The circuit court properly affirmed the magistrate's findings. Order at 10.

5. Appellant has failed to preserve and thus has waived issues 1, 2, 3, 5, 6, 7, and 9 as outlined in her Revised Initial Brief because she failed to raise these issues in the Circuit Court.

Appellant failed to raise issues 1, 2, 3, 5, 6, 7, and 9 in the circuit court; consequently, the circuit court did not rule on these issues. Appellant's Revised Initial Brief at 4-5.

According to the South Carolina Supreme Court,

> Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is 'axiomatic that an issue cannot be raised for the first time on appeal.' Imposing such a requirement on the appellant 'is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.' Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal.

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (internal citations omitted). Because Appellant failed to raise these issues below, the circuit court did not rule on them, and this Court should therefore deem issues 1, 2, 3, 5, 6, 7, and 9 waived.

CONCLUSION

Respondent City of Columbia respectfully requests that this Court affirm the decision of the circuit court concerning Appellant's motion to recuse, motion to transfer, and motion to reopen and rule that:

1. The circuit court properly found that the magistrate judge was not required to recuse himself because he did not demonstrate prejudice towards Appellant;
2. The magistrate court properly denied Appellant's motion to transfer her motion to reopen from magistrate court to circuit court;
3. The circuit court properly found that Appellant failed to provide proof of a *Brady* violation;
4. The circuit court properly found that Appellant failed to produce after discovered evidence sufficient to justify granting her motion to reopen;
5. Appellant failed to preserve and thus waived issues 1, 2, 3, 5, 6, 7, and 9 as outlined in her revised initial brief because she failed to raise these issues to the circuit court.

Respectfully Submitted,

S/ Marshall S. James
Marshall S. James, S.C. Bar No. 80387
Assistant City Prosecutor
City of Columbia
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
(803) 737-4242
Marshall.james@columbiasc.gov

May 1, 2023 *Counsel for Respondent City of Columbia*

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT

The Honorable D. Craig Brown
Circuit Court Judge

Case No. 2022-000339

CITY OF COLUMBIA,.....RESPONDENT,

v.

MARIE ASSA'AD-FALTAS, MD, MPH, ...APPELLANTS,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Appellant City of Columbia in the above-referenced matter complies with Rule 211(b), SCACR.

S/ Marshall S. James
Marshall S. James, S.C. Bar No. 80387
Assistant City Prosecutor
City of Columbia
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
(803) 737-4242
Marshall.james@columbiasc.gov

May 1, 2023 *Counsel for Respondent City of Columbia*