RECEIVED
Oct 05 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable G.D. Morgan, Jr., Circuit Court Judge

DANIEL LEWIS CROWE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000368

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to grant a new trial based on newly discovered evidence in the form of a statement from Misty Horton Price, the daughter of the deceased, Eddie Horton, indicating that on the night of the fatal shooting Sherry Heaton, the wife of the deceased, and her brothers drugged Petitioner?

STATEMENT

In July of 1997, the Oconee County Grand Jury indicted Petitioner, Daniel Lewis Crowe, for murder, indictment #97-GS-37-702. On June 23, 1998, Petitioner proceeded to jury trial before the Honorable Gerald C. Smoak. N. Gruber Sires, Jr. represented Petitioner at trial. Susan Chappell prosecuted the case. The jury returned a verdict of guilty. Pursuant to S.C. Code §17-25-45, Judge Smoak sentenced Petitioner to life without parole. (App. p. 419). A timely notice of intent to appeal was filed and the direct appeal perfected. On July 20, 2000, the South Carolina Supreme Court affirmed the sentence and conviction. State v. Crowe, 2000-MO-102 (S.C.Sup.Ct. filed July 20, 2000). The remittitur issued August 7, 2000.

Petitioner's Common Law Petition for Writ of Certiorari, filed with the South Carolina Supreme Court July 27, 2021, references a letter in the clerk's office that indicates that an application for post-conviction relief [PCR] was sent on August 9, 2001. (App. p. 429). The filing date, however, reflects a date of August 21, 2001, one year and fourteen days after the remittitur issued. Over three years later on October 12, 2004, the State filed a return and moved to dismiss as untimely. Less than two weeks later on October 25, 2004, a hearing was held before the Honorable Alexander S. Macaulay. Richard H. Warder represented Petitioner at the hearing. On November 17, 2004, Judge Macaulay signed an order denying relief and dismissing the application. It appears that the application was dismissed as untimely. PCR counsel, however, failed to file a notice of intent to appeal and as a result, the transcript was not ordered and is no longer available. Footnote #15 on page 7 of the order of dismissal includes a contention by Petitioner that Judge Macaulay orally dismissed the PCR as untimely but granted a new trial based on newly-discovered evidence. (App. p. 614).

On April 26, 2005, Petitioner filed a second PCR application alleging newly discovered evidence. On June 13, 2005, the State filed a return and moved to dismiss as successive. On October 4, 2005, the Honorable J.C. Nicholson, Jr. signed a conditional order of dismissal. On October 19, 2005, Richard H. Warder, again representing Petitioner, filed a timely response to the conditional order of dismissal requesting an evidentiary hearing based on after discovered evidence. On November 2, 2005, Judge Nicholson signed a final order of dismissal finding that the after discovered evidence did constitute sufficient reason to show that the conditional order should not become final. As a result, the after discovered evidence claim was not addressed. On November 8, 2005, PCR counsel filed a timely notice of intent to appeal. On January 24, 2006, counsel filed the petition for writ of certiorari challenging the dismissal of the application as successive when there was an allegation of after discovered evidence. On January 4, 2007, the petition for writ of certiorari was denied.

On April 9, 2012, Petitioner filed a third PCR application alleging ineffective assistance of PCR counsel for failing to timely file the first PCR application, for failing to appeal the denial of relief on the first PCR application denying Petitioner full adjudication pursuant to S.C. Code §17-27-90. On August 19, 2013, the State filed a return and moved to dismiss as untimely, successive, and for failing to state a cognizable claim. On September 30, 2013, Judge Macaulay signed a conditional order of dismissal. Petitioner filed a *pro se* response to the conditional order of dismissal. On November 25, 2014, the Honorable R. Lawton McIntosh signed a final order of dismissal.

On December 5, 2014, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. Petitioner included a newly discovered evidence claim in the federal petition. On April 13, 2015, the State filed a return and motion for

summary judgment. On October 13, 2015, the Honorable Shiva H. Hodges issued a report and recommendation that the motion for summary judgment be granted. On February 5, 2016, the Honorable Bruce Howe Hendricks adopted the report and recommendation and granted the motion for summary judgment. Crowe v. Warden pf Perry Corr. Inst., No. CV 1: 14-3831-BHH-SVH (D.S.C. Feb. 5, 2016). On June 1, 2016, the United States Court of Appeals for the Fourth Circuit dismissed the appeal. Crowe v. Warden pf Perry Corr. Inst., 651 F.App'x 193 (4th Cir. 2016). On November 28, 2016, the United States Supreme Court denied the petition for writ of certiorari. Crowe v. Lewis, 137 S.Ct. 514 (2106).

On July 27, 2021, Petitioner filed a common law petition for writ of certiorari. (App. pp. 420-440). On August 16, 2021, the Stated filed a return. (App. pp. 441-458). On August 22, 2021, Petitioner filed a reply. (App. pp. 459-462). On September 22, 2021, the South Carolina Supreme Court granted the common law petition for writ of certiorari. (App. p. 463). On September 28, 2021, Petitioner filed an additional PCR application in conjunction with the common petition for writ of certiorari. (App. pp. 464-466). On July 19, 2022, the State filed a return and motion to dismiss. (App. pp. 467-485).

On August 25, 2022, an evidentiary hearing was held before the Honorable G.D. Morgan. Elizabeth Franklin-Best represented the Petitioner. Taylor Z. Smith and Lillian L. Meadows represented the State. In a written order signed February 23, 2023, Judge Morgan denied relief and dismissed the application. A timely notice of intent to appeal was served on March 7, 2023. This appeal follows.

ARGUMENT

The PCR judge erred in refusing to grant a new trial based on newly discovered evidence in the form of a statement from Misty Heaton Price, the daughter of the deceased, Eddie Horton, indicating that on the night of the fatal shooting Sherry Heaton, the wife of the deceased, and her brothers drugged Petitioner.

For the first time since his conviction in 1998, at a hearing before the Honorable G.D. Morgan, Jr. on August 25.2022, Petitioner finally had the opportunity to litigate an allegation of prosecutorial misconduct by violating Brady v. Maryland, 373 U.S. 83 (1963), and the existence of newly or after discovered evidence. The two issues both relate to a letter written on December 31, 1998, after the trial, by Misty Horton, the daughter of the deceased, Eddie Horton, indicating that, on the night of the fatal shooting, Sherry Heaton, the wife of the deceased, and her brothers drugged Petitioner. The letter indicates that the State was aware of the information prior to trial. The PCR judge found that Petitioner failed to demonstrate that the State either possessed or suppressed evidence that Petitioner was involuntarily intoxicated the night he shot and killed Eddie Heaton. The Brady violation allegation is not being raised in this appeal. This appeal relates solely to the letter as after or newly discovered evidence that warrants a new trial.

Misty Heaton, now Misty Heaton Price, the daughter of the deceased, testified at the PCR hearing. (App. pp. 507-523). Ms. Price testified that after her father's death her stepmother, Sherry Heaton, received a life insurance settlement. (App. p. 508, lines 3-11). During this time Ms. Price heard rumors about Petitioner being drugged and asked her stepmother about the rumors. When asked what Sherry Heaton said, the State lodged a hearsay objection that was sustained. (App. p. 508, lines 12-14). Ms. Price then identified a letter she wrote to then Solicitor George Ducworth on December 31, 1998, after the trial, and then gave to Charlotte Crowe, Petitioner's wife. (App. p. 513, lines 17-23; p. 436). In the letter Ms. Price wrote that her stepmother, Sherry Heaton, confided to her and her sister in secrecy that she and her brothers

drugged Petitioner, referred to as "Sonny," on the night he shot the deceased. (App. p. 436). On July 19, 2021, Ms. Price signed an affidavit confirming what she said in her 1998 letter. (App. pp. 434-435).

Charlotte Crowe, Petitioner's wife, testified at the PCR hearing. (App. pp. 523-525). Ms. Crowe remembered receiving the letter from Ms. Price in 1998. (App. p. 524, lines 6-9). On July 21, 2021, Ms. Crowe signed an affidavit recalling in 1998 when Misty Heaton [Price] told her that Sherry Heaton admitted that she and her brothers drugged Petitioner on the night he shot the deceased. (App. p. 439). In the affidavit she also recalled receiving the letter from Ms. Price. (App. p. 439).

Trial counsel, Gruber Sires, testified at the PCR hearing. (App. pp. 526-531). Trial counsel testified that if he had known about Sherry Heaton's admission that she and her brothers drugged Petitioner on the night of the shooting he would have used that information in his defense of Petitioner to impeach the testimonies of Sherry Heaton and John Smith [a brother] and to support a jury instruction on involuntary intoxication pursuant to S.C. Code §17-24-10. (App. p. 528, line 7 – p. 529, lines 1-12).

Jay Phillips testified at the PCR hearing and was qualified, over objection, as an expert in criminal investigations. (App. p. 55, lines 15-24). Phillips testified that there was evidence presented at trial that Petitioner exhibited super-human strength, felt no pain and was foaming at the mouth, all indications of the possible ingestion of the drug PCP. (App. p. 541, line 14 – p. 542, 543).

The statement from Misty Heaton Price that Sherry Heaton admitted that she and her brothers drugged Petitioner on the night of the fatal shooting constitutes newly or after discovered evidence requiring a new trial. In Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d

266, 267 (1993), the South Carolina Supreme Court wrote, "To obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching."

In the order of dismissal the PCR judge wrote, "Accordingly, this Court finds Applicant failed to meet the first prong of the Clark test for newly-discovered evidence because the testimony of Misty Heaton Price lacks sufficient credibility to determine that it would have changed the outcome of the trial. *See Hayden*, 278 S.C. at 612, 299 S.E.2d at 855-856 (finding the credibility of a witness is a factor in determining whether testimony will likely change the result of a new trial). Applicant's request for relief by way of this allegation is **DENIED**." (App. p. 650).

The PCR judge erred. First, while credibility of a witness is certainly a factor to take into consideration when ruling on a motion for new trial based on newly or after discovered evidence, in this case the PCR judge's credibility determinations went primarily to the Brady claim and whether the State knew that Sherry Heaton admitted to Misty Heaton Price that she and her brothers drugged Petitioner. (App. pp. 644-646). Ms. Price's statement, not whether the prosecutors knew about the statement, is the basis of the newly discovered evidence. The statement was memorialized in a letter in 1998, shortly after the trial. Ms. Price's testimony about the admission is far different from the testimony of the admitted liar, thief and drug dealer who claimed he conspired to frame the defendant in Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983). In contrast, Ms. Price had no reason to lie about her stepmother's admission. Her family was not in agreement with her decision to help the man who shot her father. (App. p.

514, line 13 – p. 515, lines 1-12). Ms. Price's testimony was sufficiently credible to meet the first prong of the Clark test.

Second, the PCR judge wrote, "Further, the probative value of the purported evidence at issue is minimal because the alleged statements made by Sherry Heaton according to Ms. Price constitute inadmissible hearsay." (App. p. 647). The probative value of the evidence is not minimal because trial counsel testified that he would have used the statements to impeach the testimonies of Sherry Heaton and John Smith [a brother] and to support a jury instruction on involuntary intoxication pursuant to S.C. Code §17-24-10. (App. p. 528, line 7 – p. 529, lines 1-12).

Third, the judge then appears to find Ms. Price's testimony was not credible because it was not corroborated by the evidence at trial. The PCR judge wrote, "Additionally, Ms. Price's credibility may be assessed not only by the aforementioned internal inconsistencies within in her statements and testimony,[1] but also by contrasting Sherry Heaton's purported confession against what are fairly solid facts." (App. p. 647). The judge then appears to weigh the evidence presented at trial that he believes undermines the involuntary intoxication claim. (App. pp. 647-650). As discussed by the expert at the PCR hearing, Jay Phillips, however, there was evidence presented at trial that Petitioner exhibited super-human strength, felt no pain and was foaming at the mouth, all indications of the possible ingestion of the drug PCP. (App. p. 541, line 14 – p. 542, 543). There was evidence presented at trial that supports Sherry Heaton's confession that she and her brothers drugged Petitioner. The other trial evidence weighed by the PCR judge does not render Ms. Price's statement not credible.

[1] As stated above, most of the "aforementioned internal inconsistencies" refer to the Brady claim not the statement itself.

The PCR judge wrote, "Aside from Mark Evans' trial testimony that Applicant was at some point 'foaming at the mouth,' Applicant did not present any evidence at the PCR hearing indicating he had been drugged or that he otherwise 'lost his ability to exercise independent judgment and volition while committing the crimes alleged against him' as a result of involuntary intoxication." (App. p. 648). Ms. Price's statement that Sherry Heaton admitted drugging Petitioner was presented at the PCR hearing and the fact that Petitioner did not present additional evidence of drugging at the PCR hearing does not render Ms. Price's testimony not credible.

In State v. Shands, 424 S.C. 106, 125, 817 S.E.2d 524, 534 (Ct. App. 2018), the South Carolina Court of Appeal wrote:

At trial, "[t]he law to be charged is determined from the facts presented." State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997).

> Involuntary intoxication may result from innocently consuming an intoxicant, through being tricked into it by another, or being forced to take it, or perhaps through unanticipated side effects of a prescription drug taken on orders of a physician. If [a jury] find[s] the defendant was given drugs or alcoholic beverages without his knowledge, and as a result, he lost his ability to exercise independent judgment and volition while committing the crimes alleged against him, then it would be [the jury's duty] to find the defendant not guilty.

RALPH KING ANDERSON, JR., SOUTH CAROLINA REQUESTS TO CHARGE—CRIMINAL § 6-4 (2012). However, "voluntary intoxication or use of drugs does not constitute a defense to a crime." State v. Hartfield, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990).

In Shands the Court of Appeals found the trial court did not err in refusing to charge involuntary intoxication because Shands voluntarily consumed moonshine. There is no evidence that Petitioner voluntarily ingested PCP. If the newly discovered evidence of Sherry Heaton's confession to drugging Petitioner had been introduced at trial, along with the other evidence of

intoxication presented at trial, the trial judge would have erred in refusing to charge the jury on the law of involuntary intoxication.

While great deference is given to the credibility determinations of the PCR judge, in this case the PCR judge's credibility determination as to Ms. Price's testimony constitutes an abuse of discretion as unsupported by the record. Petitioner met the five Clark factors required for a new trial based on newly discovered evidence. Ms. Price's statement that Sherry Heaton, her stepmother, admitted to drugging Petitioner would probably change the result if a new trial was granted. The statement was discovered after the trial. The statement could not have been discovered before trial. The statement is material to the issue of guilt or innocence. The Statement is not merely cumulative or impeaching. While the statement would be used to impeach Sherry Heaton and the brother, it would also support the jury instruction on involuntary intoxication. In summarizing what is required for a new trial based on after discovered evidence the Court of Appeals wrote, "Relief therefore depends upon the post-trial discovery of previously unknown, outcome-changing facts the moving party could not have, with due diligence, unearthed before trial." State v. Adams, 430 S.C. 420, 438, 845 S.E.2d 217, 226 (Ct. App. 2020). The after discovered evidence of Sherry Heaton's confession to drugging Petitioner requires relief in the form of a new trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of October, 2023.