

RECEIVED

NOV 20 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Post-Conviction Relief

Danie Dewitt Hall, Circuit Court Judge

Common Pleas Case No.: 2018-CP-46-0933

Dwayne Housey, #328012,Appellant,

vs.

State of South Carolina,Respondent.

EXPLANATION PURSUANT TO RULE 243(C)

Appellant, in explanation pursuant to Rule 243 (c) would respectfully respond as follows:

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. Appellant was indicted at the November 2007 term of the York County Grand Jury for trafficking cocaine (2007-GS-46-02626). On April 21, 2008, Appellant proceeded to a jury trial before the Honorable Lee S. Alford. He was represented by John Delgado, Esquire, and the State was represented by Assistant Solicitors Jennifer Colton and Ashley Anderson. The jury found Appellant guilty of trafficking cocaine in the amount of more than one hundred grams, and he was sentenced to twenty-five years' imprisonment.

Appellant filed a timely notice of appeal on April 28, 2008. Via a letter to the Court of Appeals dated November 19, 2008, it became apparent that there was a disagreement on who

would represent Appellant on appeal. Mr. Delgado moved to be relieved as counsel and this motion was granted December 3, 2008. At that time, Appellate Defender Wanda H. Carter was appointed to represent Appellant. She perfected the appeal by filing a brief on April 14, 2009. A brief was filed by Assistant Attorney General Deborah R. J. Shupe on behalf of the State. In an unpublished opinion, the South Carolina Court of Appeals affirmed Appellant's conviction. *State v. Housey*, 2011-UP-026 (S.C. Ct. App., filed January 25, 2011). Remittitur issued February 10, 2011.

Appellant filed two prior applications for post-conviction relief. The first was in 2011 (2011-CP-46-1261), in which he alleged ineffective assistance of trial counsel and failure of trial counsel to object to prosecutorial misconduct, as well as other amended grounds. An evidentiary hearing was convened May 7, 2012 before the Honorable John C. Hayes. Appellant was represented by Brian Murphy, Esquire, and the State was represented by Assistant Attorney General J. Rutledge Johnson. Relief was denied via an order filed May 10, 2012.

This order was appealed via notice filed May 22, 2012. On January 31, 2013, Appellate Defender Susan B. Hackett filed a petition for writ of certiorari. The State filed a return on March 18, 2013. On November 4, 2014, the South Carolina Court of Appeals denied the petition for writ of certiorari. Remittitur issued November 20, 2014.

Before filing his second state post-conviction relief petition, Appellant filed a federal writ of habeas corpus on January 4, 2016 (5:16-CV-00019-RMG-KDW). The State filed a return and motion to dismiss on June 16, 2016. On August 23, 2016, the Honorable Kaymani D. West issued a report and recommendation suggesting that the State be granted summary judgment and Appellant's application be denied. Appellant filed his objection to this on September 6, 2016. A

week later on September 13, 2016, the Honorable Richard Mark Gergel adopted the report and recommendation, thus ending the case.

Appellant's second post-conviction relief application was filed in 2016 (2016-CP-46-02821) on September 23, 2016. On April 7, 2017, the State submitted a return and motion to dismiss. The Honorable Daniel Dewitt Hall issued a conditional order on April 10, 2017, then a final order dismissing Appellant's application on February 6, 2018.

This application, however, is substantially and materially different in that it deals solely with after-discovered evidence as allowed in S.C. Code Ann. § 17-27-45(c). The statutory language regarding this type of relief has been interpreted to mean that a defendant requesting a new trial based on after-discovered evidence must prove to the court that:

1. Is such as would probably change the result if a new trial was held;
2. Has been discovered since the trial;
3. Could not, by the exercise of due diligence, have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 611-12, 299 S.E.2d 854, 855 (1983); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

Here, Appellant presented a statement written by his co-defendant, Jemyle Wilson, a copy of which is attached hereto, in which Wilson claimed he had never seen Appellant deal, sell, or manufacture drugs. He further stated that his testimony to the contrary at Appellant's trial was a result of pressure from "the man" (presumably law enforcement and/or the solicitor's office) to testify that Appellant was at fault. Now, however, he admits that he "was very afraid and willing to get the blame off [himself]," so "out of fear and ignorance to the law, [he] willingly complied to whatever [the state] wanted to be set free of [his] wrongdoings."

Appellant understands the post-conviction relief court's holdings regarding recantation testimony and its inherent unreliability. Conversely, though, Appellant disagrees with the court's analysis of the *Hayden* factors regarding whether this statement constitutes newly discovered evidence that should be reviewed. The court took great pains to split hairs about what exactly the statement said or did not say compared to Wilson's testimony at trial. Appellant argues that this is contrived and flawed. Wilson's new statement that he never saw Appellant deal, sell, or manufacture drugs can and should only be viewed as contradictory to his trial testimony that he acted as a courier for Appellant's drug sales. Rather than acknowledging this, the State and the court point out that the statement does not *explicitly* state that he *was not* selling drugs, just that Wilson never witnessed it.

In the same vein, the statement cannot be seen as merely impeaching because it is the opposite of what was stated at trial. The current issue is the content of the statement, which is a direct contradiction of what was said at trial, along with a satisfactory explanation as to why it was said. Though it may impeach his prior testimony, it is certainly not *merely* impeaching. Nor, similarly, is it cumulative as held in the order. Though evidence regarding Wilson's credibility was offered at trial that, again, is not the point of this statement. Material evidence is offered in the statement that had a probability of altering the result at trial. Having an involved witness testify to a completely opposite story could have a tremendous effect on a trial. It speaks directly to whether this issue deals with Appellant's guilt or innocence.

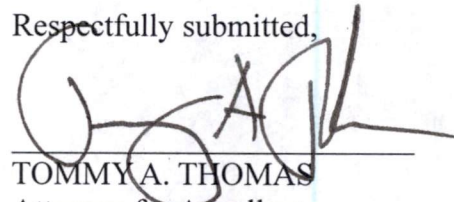
Lastly, at the time of trial, Wilson was still facing charges, as he stated. He had no incentive to be truthful at the time and, as such, his statement could not have been discovered before trial. The statement is the product of a change of heart after the fact, for which Appellant

is most grateful. In combination and separately, the *Hayden* factors are clearly met and a new trial is warranted.

To the PCR court, the State argued that these arguments were not enough to satisfy the standard in the cases of *Welch v. MacDougall* (246 S.C. 258, 143 S.E.2d 455 (1965) and *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965) because Appellant did not make a prima facie case showing he is entitled to relief. Appellant certainly argues otherwise, as evidenced in the paragraphs above and believes that the written statement along with the argument clearly demonstrate the necessity of a grant of certiorari to review the merits of this matter.

As such, Appellant is informed and believes that his appeal should be allowed to proceed in order to consider the weight and quality of this evidence and potential for vacation of his guilty plea under South Carolina Appellate Court Rule 243(c).

Respectfully submitted,



TOMMY A. THOMAS
Attorney for Appellant
7588 Woodrow Street
P.O. Box 88
Irmo, South Carolina 29063
803-732-5507

November 16, 2023