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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

GABRIEL JON RIOS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2023-000378

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Statement of Issue Presented

Did the post-conviction relief judge reversibly err by granting a new trial based on newly-discovered evidence when the specific newly-discovered evidence involved, which consisted of an allegation an investigator involved in Rios's home invasion case committed misconduct when seeking a search warrant years after Rios's trial in a totally-unrelated case, merely could have been used as impeachment evidence and was not material to Rios's guilt or innocence and, thus, was not sufficient to satisfy the well-established legal requirements that must be met in order for a new trial based on newly discovered evidence to be warranted?

Respondent's Counterstatement of Issue Presented

Did the post-conviction relief court correctly grant Respondent a new trial based on newly discovered evidence where Respondent learned years after his trial that the lead investigator in his case, Lorin Williams, was fired from the Spartanburg County Sheriff's Office for using false information to obtain a search warrant in an unrelated case and when this evidence supported other evidence that Williams procured an unreliable identification of Respondent as the intruder during his investigation of the burglary in this case, since Respondent presented evidence that satisfied the five factor newly discovered evidence test?

STATEMENT OF THE CASE

Gail Holt woke up shortly before 7:30 on the morning of Saturday, August 14, 2010. After being awake “for a little bit,” Gail heard glass breaking. When she went to investigate, she encountered a man in her hallway. App. 107, l. 1 – 108, l. 3. Gail claimed she “immediately” recognized the individual as Gabe, a man who had previously worked for her husband both at his business and in the Holts’ home. App. 108, l. 4 – 109, l. 10. The man “held a sharp object” to her neck and forced her down the hall to her husband’s office. He demanded Gail open the safe stored in the closet. App. 109, l. 16 – 111, l. 16. When she was unable to open the safe, the man forced her into the master bedroom where he ordered her to lie down on the ground. He taped her hands behind her back. The man stole a gun from the bedroom and cash, a cell phone, and car keys from Gail’s purse. He then left in Gail’s car. App. 111, l. 14 – 114, l. 6. Gail freed her hands from the tape in “a few minutes” and then called her husband, Phil Holt. App. 114, ll. 4-14.

Phil Holt was working on a roof when his wife called him “hysterical.” He immediately got off the roof, got in his truck, and drove home. On the way, he called 911. Phil told the dispatcher that “somebody” had broken into his house, tied up his wife, and robbed them. He suggested the police “get there quickly.” He then hung up and called his wife back. App. 148, l. 23 – 149, l. 23.

Phil arrived home before the police got there. The 911 dispatcher called Phil back to try to obtain more information. Gail can be heard in the background of the recording. The dispatcher asked, “**Who is he? Do you know who he was?**” Phil responded, “**Don’t know.**” Applicant’s Exhibit No. 1 (CD of 911 Call) (emphasis added).¹

¹ The recording of the 911 call was not admitted or published at trial. Respondent alleged during his first PCR action that trial counsel was ineffective for failing to admit the 911 call to impeach Gail Holt’s testimony that she “immediately” recognized Respondent.

Deputy David Welch with the Spartanburg County Sheriff's Office was the first officer to arrive at the Holts' residence. He spoke to Phil Holt first. Phil did not know who the perpetrator was "at the time." Welch then spoke to Gail Holt. Gail described the perpetrator as "a black male, middle aged, with a ball cap." Gail did not tell Welch she knew the perpetrator nor did she name him.² App. 264, l. 6 – 266, l. 2.

Investigator Lorin Williams responded to the Holts' residence sometime after Deputy Welch. Gail Holt told Williams what happened and described the intruder. Williams testified that Gail eventually told him the intruder was Gabe, a man who had worked for her husband. Gail told Williams she had seen Gabe on "numerous occasions." App. 178, l. 1 – 180, l. 8. However, Williams wrote in his report that Phil Holt was the first person to name Respondent. Williams could not remember at the time of trial who was the first person to tell him Gail identified Respondent as the perpetrator or when he was first told Respondent was allegedly the perpetrator. App. 185, l. 16 – 186, l. 1.

That same day, Williams created a photographic lineup that included Respondent's photograph. He showed the lineup to Gail and Gail identified Respondent as the person she knew as Gabe who previously worked for her husband. App. 180, l. 9 – 181, l. 21; See App. 640.

Law enforcement determined the point of entry was the door from the carport into the kitchen. A window pane from this door was broken and there was shattered glass on the floor. App. 194, l. 25 – 195, l. 16. A latent fingerprint lifted from a piece of the shattered glass allegedly matched Respondent's right thumb. App. 236, l. 4 – 240, l. 23. However, Phil Holt testified that

² Notably, the state did not call Deputy Welch as a witness despite the fact that he was the first responding officer. This is likely because Gail Holt did not tell Welch she recognized the intruder. She merely provided a vague description of the man. Respondent presented Welch's testimony in his defense.

Respondent had previously worked inside the Holts' home painting, roofing, and installing a safe. App. 151, l. 24 – 152, l. 17.

Marie Ollinger, who lived “about seven houses away” from the Holts, went for a walk at 7:30 the morning of the burglary. At the start of her walk, Ollinger noticed an individual she had never seen before walking in the direction of the Holts' residence. She described the individual as an “unremarkable” black man of “average height.” Ollinger did not identify Respondent as the person she saw in the neighborhood. App. 164, l. 14 – 168, l. 4.

On August 14, 2010, the day of the burglary, Estar Byrd was living on Florida Avenue. She testified that she did not “really” know Respondent, but she let him use her landline phone from “time to time.” App. 269, l. 1 – 271, l. 6. Sonia Rios, Respondent's wife, testified that she received a phone call from her husband on Byrd's landline at 7:25 am on the morning of the burglary. Respondent's counsel at trial attempted to use phone records to verify this testimony but the state strenuously objected arguing the records had not been authenticated. The trial judge ruled the records could be used to refresh the witness's recollection, but could not be admitted unless they were properly authenticated. App. 273, l. 6 – 277, l. 5. Respondent argued during his first PCR action that trial counsel was ineffective for failing to properly authenticate and admit the phone records, which would have corroborated Rios's testimony. App. 579.

Curtis Jones, an investigator with the Public Defender Office, testified that the Holts' house on Perrin Drive was 5.2 miles from Estar Byrd's house on Florida Avenue and the drive between the two took about sixteen minutes. App. 282, l. 4 – 285, l. 5.

A Spartanburg County grand jury indicted Respondent on November 24, 2010 for first degree burglary, armed robbery, kidnapping, first degree assault and battery, grand larceny, and possession of a weapon during the commission of a violent crime. App. 566-574. His case was

called to trial on February 26, 2013 before the Honorable R. Lawton McIntosh, and a jury.³ App. 1. Timi Poulos and Russell Ghent represented the state. App. 1. Matthew Shealy represented Respondent. App. 1. The jury found Respondent guilty as indicted. App. 370, l. 18 – 371, l. 15. He was sentenced to forty years for first degree burglary, thirty years for armed robbery, thirty years for kidnapping, ten years for first degree assault and battery, and five years to be served consecutively for the weapons offense. App. 378, ll. 11-22. The aggregate sentence was forty-five years' imprisonment.

The Court of Appeals affirmed Respondent's convictions and sentence. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed Mar. 11, 2015).

On June 3, 2015, Respondent filed an application for post-conviction relief (PCR). App. 426. The state filed a return to this application dated February 11, 2016. App. 434-439. An evidentiary hearing was convened on January 30, 2017 before the Honorable Edward W. Miller. App. 440. Susannah Ross represented Respondent. App. 440. Caitlin Hastings represented the state. App. 440. By order filed March 27, 2017, the PCR judge denied Respondent relief. On April 11, 2017, Respondent filed a motion to alter or amend the judgment. App. 531-536. The state filed a return dated April 17, 2017. App. 541-543. On July 29, 2017, the PCR judge filed an amended order of dismissal thereby denying the motion to alter or amend the judgment. App. 544-564.

On January 16, 2018, Respondent filed a petition for writ of certiorari with this Court. App. 5575-592. The state filed a return on July 2, 2018. App. 593-614. By order dated July 16, 2018, this Court transferred the appeal to the Court of Appeals pursuant to Rule 243(1), SCACR.

³ The state chose not to try Respondent for grand larceny. The grand larceny indictment was dismissed on February 28, 2013. App. 563.

The Court of Appeals denied the petition for writ of certiorari by order dated April 10, 2019. App. 615. The remittitur was issued on April 26, 2019.

On July 17, 2019, Respondent filed a second application for post-conviction relief alleging newly discovered evidence. App. 618-632. On August 19, 2019, Respondent filed an amended application, which included as an exhibit a news article stating Investigator Lorin Williams was fired from the Spartanburg County Sheriff's Office after he used false information to obtain a search warrant. The article further stated that Solicitor Barry Barnette sent a letter to every member of the Spartanburg County Bar Association informing attorneys that his office was reexamining all current and past cases that Williams was involved with. App. 633-643.

The state filed a return and a motion to dismiss Respondent's application on February 10, 2021. App. 659-667. With the assistance of counsel, Respondent filed a second amended application on March 25, 2021 alleging in part that Investigator Lorin Williams tainted Gail Holt's identification of Respondent as the intruder. App. 676-677. A hearing was held on the state's motion to dismiss on April 5, 2021 before the Honorable Grace Knie. App. 678. Chelsey Marto represented the state. Rodney Richey represented Respondent. App. 678. By order filed April 26, 2021, Judge Knie denied the state's motion to dismiss and ordered an evidentiary hearing be held on the allegations raised in Respondent's second PCR application. App. 695-696.

An evidentiary hearing was held on October 18, 2022 before the Honorable Brian M. Gibbons. App. 698. Chelsey Marto represented the state. Rodney Richey represented Respondent. App. 698.

Respondent testified at the hearing that he worked for Phillip Holt, including at the Holts' home. He explained that he had also been around Gail Holt many times and that the Holts would

be able to “instantly” recognize him based on this relationship. After the Holts’ residence was burglarized, Phil Holt called 911. He told the dispatcher that they did not know the intruder. When the first responding deputy arrived at the Holts’ house, Gail Holt told the officer the intruder was a black man with a baseball hat on. Gail did not identify the intruder or tell the first responding deputy that she recognized him.

Respondent maintained that when Investigator Lorin Williams arrived at the Holts’ house, “the whole story changed.” Suddenly, the Holts identified Respondent as the man who broke into their house despite previously stating they did not know the person. Respondent asserted Williams suggested or mentioned Respondent’s name “in some type of way.” App. 705, l. 2 – 708, l. 21. He testified that if he (Respondent) was the perpetrator, Gail Holt could and would have identified him initially when asked by the 911 dispatcher and the first responding deputy. App. 710, ll. 13-25.

Respondent explained that Lorin Williams was fired from the Spartanburg County Sheriff’s Office after Williams used false information to obtain a search warrant. Respondent maintained that Williams “breached his duty to tell the truth under oath to a judge” and has no credibility. He asserted the identification of him as the perpetrator “was faulty” and Williams conspired to name Respondent as the individual who broke into the Holts’ home. App. 711, l. 3 – 712, l. 13. He testified Williams suggested or mentioned his name to the Holts who then went from we do “not know who the person was who committed the act” to “It was Gabriel Rios.” App. 716, l. 14 – 718, l. 19.

Lastly, Respondent explained that he “could not contest” Williams’s credibility during his first PCR action because he did not know at the time that Williams had been fired and was under investigation.

Matthew Shealy, Respondent's trial counsel, testified that there were "issues" with Gail Holt's identification of Respondent as the intruder. Shealy explained that he called Deputy Welch, the first responding officer, as a witness during trial. App. 738, l. 22 – 739, l. 4. Welch admitted that Gail Holt did not identify Respondent. Rather, she merely described the perpetrator as "a black male, middle aged, with a ball cap." Gail did not tell Welch she knew the perpetrator. See App. 264, l. 6 – 266, l. 2.

Shealy testified that while he did not "see any evidence of fraud on the part of Mr. Lorin Williams" while investigating Respondent's case, he did not know at the time "that Investigator Williams would lie to a judge." App. 738, ll. 17-21.

During the evidentiary hearing, Judge Gibbons listened to the recording of Phil Holt's 911 call several times. See Applicant's Exhibit No. 1 (CD of 911 Call).

By order filed January 6, 2023, Judge Gibbons granted Respondent post-conviction relief. App. 756-761. After citing to the standard set forth in State v. Spann, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999), the judge found Respondent met his burden of proof. The judge emphasized that Respondent discovered Investigator Lorin Williams had been fired for dishonesty after his trial, appeal, and first post-conviction relief action and the information was not discoverable before trial. He found the evidence is material and not simply cumulative or impeaching. Lastly, the judge concluded "the newly discovered evidence as to Williams's credibility is of the nature that it could have affected the outcome of the case. The investigator could have been impeached in a way that could have changed the outcome." App. 760-761.

On January 17, 2023, the state filed a motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRPC. App. 762-769. On February 13, 2023, a hearing was held before Judge

Gibbons on the state's motion.⁴ App. 770. At the conclusion of the hearing, Judge Gibbons denied the state's motion. He asserted, "It would be fundamentally fair to Mr. Rios, as well as the State, to try this matter where the jury gets to hear all of the relevant evidence, and that includes evidence that may have been tainted from a government witness." App. 782, ll. 19-23. He concluded Respondent is entitled to a new trial. App. 782, l. 3. The judge memorialized his ruling in a written order filed February 14, 2023.

The state timely filed a notice of appeal with this Court. The petition for writ of certiorari was filed on November 1, 2023. This return follows.

⁴ The cover of the transcript erroneously lists Judge Knie as the presiding judge. However, the hearing was held before Judge Gibbons.

ARGUMENT

The post-conviction relief court correctly granted Respondent a new trial based on newly discovered evidence where Respondent learned years after his trial that the lead investigator in his case, Lorin Williams, was fired from the Spartanburg County Sheriff's Office for using false information to obtain a search warrant in an unrelated case and when this evidence supported other evidence that Williams procured an unreliable identification of Respondent as the intruder during his investigation of the burglary in this case, since Respondent presented evidence that satisfied the five factor newly discovered evidence test.

The PCR court correctly found Respondent is entitled to a new trial based on newly discovered evidence. Respondent learned after his trial that the lead investigator in his case, Lorin Williams, was fired from the Spartanburg County Sheriff's Office for using false information to obtain a search warrant and, consequently, that the Seventh Circuit Solicitor's Office was reexamining all current and past cases involving Williams. The homeowner in Respondent's case, Gail Holt, initially stated she did not know the intruder and merely described him as "a black male, middle aged, with a ball cap." App. 264, 1. 6 – 266, 1. 2. However, remarkably, after Investigator Williams arrived at the residence and spoke with Holt, Holt suddenly claimed she recognized the intruder as Respondent, who had previously worked for her husband. The identification of Respondent as the intruder is certainly material evidence, which Respondent proved at the evidentiary hearing was tainted by Investigator Williams, who is anything but credible given he lied to a magistrate judge to obtain a search warrant in an unrelated case.

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The appellate court must defer

to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id. at 180-81, 810 S.E.2d at 839 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

“A motion for a new trial based on after discovered evidence is addressed to the sound discretion of the trial judge.” State v. Harris, 391 S.C. 539, 544-45, 706 S.E.2d 526, 529 (Ct. App. 2011) (quoting State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978)) (internal quotation marks omitted). “The credibility of newly discovered evidence is for the trial court to determine.” Harris, 391 S.C. at 545, 706 S.E.2d at 529 (citing State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)). “Only the trial court and not the appellate court has the power to weigh the evidence; the trial court’s judgment will not be disturbed except for error of law or abuse of discretion.” Id. (citing Porter, 269 S.C. at 621, 239 S.E.2d at 643). On review, the appellate court may not make its own findings of fact. The deferential standard of review constrains the appellate court to affirm the trial court if reasonably supported by the evidence. Id. (citing State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009)).

The standard to obtain a new trial based on newly discovered evidence is well established. “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.” Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993) (citing Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983)).

Here, the PCR court correctly found Respondent is entitled to a new trial based on newly discovered evidence. Respondent satisfied all five factors outlined above. The evidence concerning Investigator Williams could not have been discovered before Respondent's trial. It only came to light several years later when it was uncovered that Williams had used false information to obtain a search warrant. Specifically, Williams claimed he received information from a confidential reliable informant who had previously provided information to law enforcement that had been verified as truthful when the person claimed to be a confidential informant was not actually an informant. App. 656.

This evidence is material to Respondent's guilt or innocence because it relates to the reliability of the identification of Respondent as the intruder. See EVIDENCE, Black's Law Dictionary (11th ed. 2019) (defining material evidence as "evidence having some logical connection with the facts of the case or the legal issues presented."). Phil Holt told the 911 dispatcher that they did not know the intruder. Gail Holt, the only person home during the burglary, initially told Deputy Welch, the first responding officer, that she did not know the identity of intruder. She merely described him as "a black male, middle aged, with a ball cap." App. 264, l. 6 – 266, l. 2. However, miraculously, after Investigator Williams arrived at the home and spoke with the Holts, Gail suddenly claimed she recognized the intruder as Respondent, who had previously worked for her husband. The identification of Respondent as the intruder is certainly material evidence, which Respondent proved at the evidentiary hearing was tainted by Investigator Williams, who is anything but credible given he lied to a magistrate judge to obtain a search warrant in an unrelated case.

Moreover, the evidence of Williams's misconduct would probably change the result if a new trial is had. The only direct evidence of Respondent's guilt was Gail Holt's identification of

Respondent as the intruder. The newly discovered evidence questions the reliability of that identification given its timing and the role Investigator Williams played in the identification. In addition to Gail's identification, the circumstantial evidence against Respondent was minimal. Consequently, it is likely that if the jury learned of Williams's misconduct and the unreliability of the identification, the outcome of Respondent's trial would be different. More specifically, it is likely Respondent would be acquitted.

Lastly, unlike the state argued, the evidence is not merely impeaching. While the evidence would certainly impeach Williams's testimony, it is material, again, because it cast doubt upon the reliability of Gail's identification of Respondent as the intruder.

Respectfully, this Court should deny the petition for writ of certiorari. In the alternative, this Court should hold the PCR judge correctly found Respondent is entitled to a new trial based on newly discovered evidence.

CONCLUSION

Based on the foregoing argument, this Court should deny the petition for writ of certiorari. In the alternative, this Court should affirm the decision of the PCR court granting Respondent a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR RESPONDENT

This 14th day of March, 2024.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

GABRIEL JON RIOS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2023-000378

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Mark R. Farthing, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 14th day of March, 2024.

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR RESPONDENT