

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2012-210830

RECEIVED

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TO COURT OF APPEALS

THE STATE,

Respondent,

v.

SCOTT T. LEE,

Appellant

**RETURN TO JUNE 10, 2013 *PRO SE* "MOTION FOR
LEAVE PURSUANT TO SCRCrim PRO. RULE 29(b)
AFTER-DISCOVERED EVIDENCE"**

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The Respondent, State of South Carolina, hereby make a response to the pro se "Motion for leave pursuant to SCCrim. Pro. Rule 29(b) After-Discovered Evidence dated June 10, 2013, received by the Court of Appeals June 17, 2013. The response is being made pursuant to the July 29, 2013 letter from the Clerk of Court requesting a response. The Respondent would oppose the motion for the following reasons:

I.

In his pro se motion, the Appellant, pro se, seeks leave to file a motion in the Florence County Court of General Sessions "based upon after discovered evidence" and "based upon prosecutorial misconduct.

Appellant asserts he has "just been made known of the location of the murder weapon in

my case and this weapon will completely disprove all of accusations of my murder charge.”

Within his document, he states “the Assistant Solicitor’s main witness is now known to have hidden the alleged murder weapon and is totally capable of producing it now.”

Concerning his claim of prosecutorial misconduct he seeks a remand based upon his assertion that he has reviewed the testimony in the transcripts and compared it with material given in his “motion for discovery” and claims the prosecution “used and allowed false accusations, a false theory, and a large amount of false testimony known to this Assistant Solicitor ... to be such without even attempting to correct any of this false evidence against me.”

He states that he “did not put a lot of detail in this motion for strategy reasons pertaining to my Rule 29(b) motion, but if you need me to be more specific or explain things in more detail simply let me know and I will do that immediately.”

II. Improper *Pro Se* Motion

At the outset, the Respondent asserts the motion should be dismissed because it is filed pro se where the Appellant is currently represented by appointed counsel, Kathrine Hudgins. While counsel on March 13, 2013 filed an Anders Brief of Appellant and a Petition to Be Relieved as Counsel, the Petition to be Relieved has not been granted a this time. Therefore, Ms. Hudgins currently remains as counsel.

Recently, in State v. Robert Koon, Appellate Case No. 2013-001356, Order (S.C.S.Ct. July 26, 2013), the South Carolina Supreme Court noted that an appellant’s pro se petition for rehearing was effectively a nullity, citing Miller v. State, 388 S..C 347, 697 S.E.2d 527 (2010). (Copy of State v. Koon attached). Miller was cited by the Court with the expressed statement

that: “We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed pro se by a party who is represented by counsel.” Koon, Id. fn. 3. Also, Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Respondent acknowledges that the current appeal is in a setting under this Court’s practice under Anders v. California, 386 U.S. 738 (1967). However, the right to file pro se pleadings is limited to a “pro se brief addressing the issues you believe the Court should consider in this appeal.” See April 5, 2013 Letter from Clerk to Scott Lee.

Respondent submits that this particular motion is outside of the Court’s directive and include matters that could (and should) be handled by counsel representing the Appellant since she has not been relieved. The issues asserted in the motion have nothing to do with whether the direct appeal has merit, but instead go to collateral issues unrelated to preserved issues in the appeal.

There is nothing to preclude appellate counsel from addressing with the Appellant the issues raised within his motion and their legal sufficiency under State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971), Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983) and Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001). In fact, Respondent is not aware whether these issues may have been addressed between counsel and the Appellant. This is the precise reasoning behind the court’s limitations on hybrid representation.

For this initial reason, the motion must be dismissed without consideration of the merits of the motion since it was not filed through counsel.

III.
Murder Weapon Issue

The Appellant asserts as a basis for his after-discovered evidence request that he has “just learned the location of the alleged murder weapon,” but fails to disclose its location in the motion or how he has developed this information.

The request must be denied because it fails to satisfy the requirement of State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971). In DeAngelis, the Supreme Court stated that an affidavit from the defendant was a condition precedent to a proper motion for new trial based upon after-discovered evidence. As the Court stated in DeAngelis which is particularly pertinent here:

As is heretofore stated, the appellant did not file his own affidavit setting forth the after-discovered evidence and the facts to which the witnesses will testify. It is essential to the consideration of a motion for a new trial based on after-discovered evidence that such motion shall be supported by an affidavit of the accused himself. Unless a valid and sufficient reason for the omission to file such an affidavit is shown, the affidavit of the accused must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence. An affidavit of the appellant's counsel showing these matters is not sufficient. [cites omitted]

State v. DeAngelis, 256 S.C. at 371, 182 S.E.2d at 735.

Here, there is no affidavit from Lee. Here, there is no fact set forth about what witnesses would testify. Here, there is no sworn statement by Appellant that he did not know the information at the time of trial or whether he used due diligence. In fact, he does not disclose with any particularity where the item is located or how he has learned this and how he knows that

the item is the murder weapon. Rather, in an unsworn pleading, he makes a veiled reference against an unidentified main witness who he claims knows the location. Under DeAngelis, the necessity of the affidavit is reasonable and appropriate. The request for new trial related to the location of the murder weapon must be dismissed.¹

At trial, the pathologist testified that the autopsy revealed that the victim's cause of death was from a single penetrating close range shotgun wound to the left temple. R.p. 235, ll. 13-14, 238, p. 250, ll. 1-6. These wounds also resulted in skull fractures. R.p. 236, l. 23. However, the pathologist could not tell from the examination of the wound if the shotgun was manipulated or sawed-off. R.p. 240, ll. 18-23. Dr. Presnell declared that she removed around 45 shotgun pellets from the wound as representative pellets. R. 241.

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Elijah Sherman testified that Scott Lee had come by his house at one point after the incident and was pointing his finger at two other guys - Keith (Odom) and "some other guy" as having done it. R.p. 269, ll. 5-25. Cynthia Welch testified that after the incident, Lee called her and told her he was trying to find out who hurt Mike. R. 282.

Shannon Bailey testified that she had seen Scott Lee with a shotgun before the crime. R. 300. She described it as a regular shotgun with a wooden handle. She said he shot it a few times into the woods while they were standing on the deck. R.p. 300, ll. 13-17. She stated she saw a piece of wood fall off the shotgun onto the ground around the left side of the deck. R. 300-01. She identified State Exhibit 34 as the wooden piece off the gun that she saw that day. R.p. 301,

¹ Respondent's below-signed counsel contacted appellate counsel Hudgins concerning this motion this week. He informed counsel Hudgins that he had learned the Appellant *pro se* had also written to the South Carolina Supreme Court and SLED concerning this murder weapon matter and advised her of a desire for a law enforcement agency to interview Lee concerning the as yet undisclosed location of the alleged weapon.

ll. 8-25. On cross-examination, Bailey was questioned concerning whether she saw Lee earlier on December 17, 2010 with a shotgun, whether it was the same day he sawed off the gun stock, and whether she had previously told law enforcement that she had seen him saw off the shotgun either a week or 3 to 4 days earlier [No], or whether the shotgun had sat in their den for 4 or 5 days prior to the event happening [Yes]. R.p. 312, ll. 1-20. She stated the shotgun was sawed off twice, but she did not know when the second time was. R.p. 312, ll. 18-25. On redirect, Bailey stated that the shotgun had already been sawed off when she saw it the first time and stated the piece of wood (State Exhibit 34) was what was sawed off in front of her. R.p. 318, l. 20 - p. 319, l. 4.²

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Jonathan Lee, the Appellant's brother testified that on the night of the incident he thinks he saw the gun after Scott had come home with blood over his body and clothes. R. 371-72. He thought it was sitting on the edge of the kitchen table, but could not be sure. R. 372. Jonathan Lee claimed he wanted to say that he saw it after that wrapped up and that Scott buried it in the woods and that his mother had him to get rid of it. R.p. 372, ll. 14-20. He stated Scott had mentioned later to Jonathan that "he did get rid of it." R.p. 372, ll. 21-23.

Jonathan testified that they had gotten the shotgun from his uncle's house while the uncle was in hospice before he died. R.p. 375, l. 18 - p. 376, l. 4. Jonathan had testified initially that "we" had retrieved the shotgun and shells from Uncle Bobby's house as they were packing it up after his death. R. 361-62. He stated it was a regular 12-gauge shotgun with a wooden stock and a long barrel. He stated they got it before December 17. He said he saw Scott test fire the

² Bailey had also described the evening of the incident seeing the victim's car at her place full of blood after Lee had arrived at their place. R. 298-98

shotgun a couple of times at his mother's house. R.p. 362, ll. 20-24.

Jonathan described Scott sawing off the shotgun and recalled Scott measuring it to make sure it was legal as opposed to illegal. R. 362-63. He recalled Scott sawing off around 10-12 inches off the barrel and around 6 to 8 inches off the stock. R.p. 363, ll. 7-16. He did not recall that it had been sawed off previously. R.p. 363, ll. 17-20. He recalled that Scott had used a tape measure and recalled a discussion about the legal length. R.p. 404, ll. 15-21. Jonathan denied that he helped Scott saw it off or that he held an end of the gun or saw for Scott. R. 404-05.

Jonathan testified that he never touched the gun after the Scott had brought the gun back to the house that night of the incident. R. 416. He denied that he took the gun over to a friend's house. Jonathan recalled that the gun had been put underneath the front porch and their mother told Scott to get rid of it. He recalled Scott either coming out of the woods with it or carrying it into the woods. R.p. 416, ll. 15-19. He recalled asking Scott about it and Scott telling him "it was gone, he had gotten rid of it." R.p. 416, ll. 18-20.

Investigator Chad Collins testified that during the investigation that they had learned from the autopsy that the victim had a single gunshot wound to the head, possibly from a 12 gauge shotgun at very close range. R.p. 475, ll. 13-23. He stated that they got a consent to search the Lee property from Lee's mother. R. 482-83. He said they were searching for any evidence that a vehicle had been at the residence with busted glass and possibly a shotgun. R. 483-84. They found some tempered glass on the ground. R. 485. He said they searched the entire grounds. He stated up underneath the porch they found what appeared to be a wooden gunstock six to eight inches long. R. 486. [This was State Exhibit 34].

Investigator Collins also testified in reference to a series of letters Lee had written

asserting that he did not kill the victim. R. 487-498. Within the letters he challenges the State's theory of the case and asserts inconsistent versions about who was involved and how the victim's death may have occurred. Within one of the statements, Lee wrote that while the perpetrators had the victim at gunpoint, "I got my hands on Mikey's sawed off 12 gauge" and describes firing, but missing the perpetrators and running into the woods. He describes when he thought the perpetrators were gone seeing the victim lying on the ground bleeding. R. 492-93.

The importance of the necessity of the DeAngelis affidavit is supported by this trial evidence and his various versions. Under Lee's various theories, it is unclear what he may define as the "murder weapon" since he describes possession of "Mikey's" shotgun as well as various perpetrators firing at them. At trial, the weapon under the State's theory was Uncle Bobby's shotgun and was last seen in Appellant's possession. The Appellant has failed to satisfy any condition precedent in his unsworn summary motion.

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IV. Prosecutorial Misconduct

In his second assertion for a remand for a Rule 29 after-discovered evidence hearing, he claims prosecutorial misconduct that has been developed by him comparing his discovery responses with the trial testimony. At the outset, like the weapon issue, his broad claim must fail for a remand for a hearing because Lee fails to specify what the "new evidence" is in an affidavit under DeAngelis. To the contrary, it appears from the face of his document that he was in possession of the material prior to the trial through discovery that he claims to contradict the trial evidence and may, in fact, have used the material in an attempt to impeach witnesses and the State's case. Importantly, he fails to specify what specific trial evidence is false and what

evidence should have been corrected by the trial prosecutor.

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. U.S. v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The knowing use of perjured testimony is subject to the materiality standard of review: "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682, 105 S.Ct. 3375. See Simpson v. Moore, 367 S.C. 587, 601, 627 S.E.2d 701, 708 (S.C.,2006)

As stated within his motion document, his claim arises from the disclosures to the defense prior to the trial, not any particular item that was not disclosed to the defense. This claim does not satisfy any condition of being "after-discovered" or that the defense did not know of its existence prior to the trial under DeAngelis; or evidence that "had been discovered since the trial," or "is not merely cumulative or impeaching" under Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1985).

Absent any specificity as to what alleged evidence he is claiming requires new consideration in the trial court, Respondents submit that the broad unspecified request as related to "prosecutorial misconduct" must be dismissed. He has failed to present a basis for a remand because he has failed to make a predicate showing.

CONCLUSION

For all the foregoing reasons, the Motion should be dismissed.

Respectfully submitted,

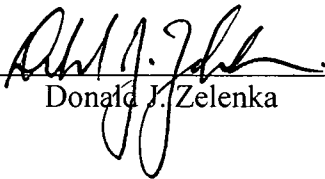
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ATTORNEYS FOR RESPONDENT

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Donald J. Zelenka

P.O. Box 11549
Columbia, SC 29211
August 8, 2013

The Supreme Court of South Carolina

The State, Respondent,

v.

Robert H. Koon, Petitioner.

Appellate Case No. 2013-001356

Lower Court Case No. 1986-GS-11-00289

RECEIVED

JUL 29 2013

ATTORNEY GENERALS
OFFICE

ORDER

By order dated January 30, 2013, the South Carolina Court of Appeals denied petitioner's request to proceed *pro se* in this matter, and it prohibited him from filing any further *pro se* motions or requests in this matter.¹ Subsequently, the Court of Appeals affirmed the denial of petitioner's motion for a new trial based on alleged after discovered evidence regarding his 1986 guilty plea in 1986-GS-11-00289. *State v. Koon*, Op. No. 2013-UP-216 (S.C. Ct. App. filed May 22, 2013).

Thereafter, the Court of Appeals refused to accept a motion to proceed *pro se* and a *pro se* petition for rehearing. This rejection was based on the earlier order of January 30, 2013. When no petition for rehearing was filed by petitioner's counsel, the Court of Appeals sent the remittitur on June 7, 2013.²

Under Rule 242(a) of the South Carolina Appellate Court Rules (SCACR), this Court will only review a final decision of the Court of Appeals, and a decision is not final for the purposes of review until a petition for rehearing or reinstatement

¹ See *State v. Roberts*, 364 S.C. 583, 614 S.E.2d 626 (2005) (finding that neither the federal or state constitution create a right to proceed *pro se* in an appeal from a criminal conviction).

² Before the Court of Appeals, this matter was assigned Appellate Case No. 2011-200608.

has been acted on by the Court of Appeals. Rule 242(c), SCACR. Since no proper petition for rehearing or reinstatement has been made and ruled on by the Court of Appeals in this matter,³ there is no final decision for this Court to review.

Further, when no petition for rehearing from counsel was received by the Court of Appeals, the Court of Appeals properly sent the remittitur. Rule 221, SCACR. The sending of the remittitur ended appellate jurisdiction over this case. *Wise v. S.C. Dept. of Corr.*, 372 S.C. 173, 642 S.E.2d 551 (2007). Accordingly, the petition for a writ of certiorari is dismissed.

 C.J.
FOR THE COURT

Columbia, South Carolina
July 26, 2013

cc: Mr. Robert Holland Koon, #227826
David A. Spencer, Esquire
Robert M. Pachak, Esquire
The Honorable Jenny Abbott Kitchings
The Honorable Brandy W. McBee

³ Since he was represented by counsel, his *pro se* petition for rehearing was effectively a nullity which did not prevent the remittitur from being sent. *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) ("Since there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. [citations omitted]. Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity. . . . We also take this opportunity to remind judges and clerks of court of our directive in *Foster* not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel."); see also *Jones v. State*, 348 S.C. 13, 558 S.E.2d 517 (2002)(no right to hybrid representation); *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998)(same); *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989) (same).

STATE OF SOUTH CAROLINA
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Appellant

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served Respondents **Return to Pro Se**
“Motion for Leave Pursuant to SCRCrim Pro. Rule 29(b) After-Discovered Evidence by

Intra-Agency mail on:

Ms. Kathrine Hudgins, Esquire
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

Scott T. Lee, #300606
Lieber Correctional Institution
P. O. Box 205
Ridgeville, SC 29472

by depositing a copy in the United States Mail this 8th day of August, 2013.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General