

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Case No. 1994-GS-36-616

The State,

Respondent,

v.

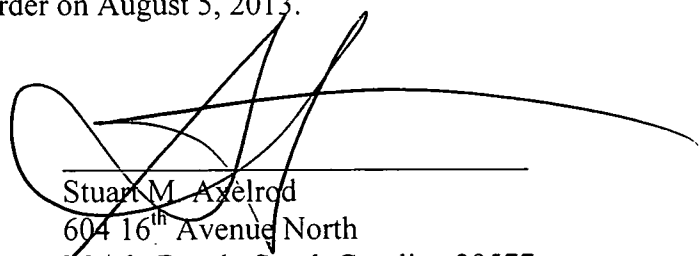
Gary Lane Prewitt,

Appellant.

-NOTICE OF APPEAL-

This appeal is taken from the order of the Honorable Clifton Newman, dated July 9, 2013 which denied appellant's motion for a new trial based on after discovered evidence. Appellant received written notice of entry of this order on August 5, 2013.

August 9, 2013


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* Counsel of Record on Appellant's Motion

Other Counsel of Record:
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SC Court of Appeals

sentenced to life in prison on the Burglary First Degree charge with concurrent sentences of twenty (20) years on the Assault & Battery with Intent to Kill, five (5) years on the Possession of a Weapon during the Commission of a Violent Crime, and thirty (30) days on the Grand Larceny. The Defendant is presently confined in the South Carolina Department of Corrections and did not appeal his conviction or sentence.

On May 15, 1995, the Defendant filed an application for Post-Conviction Relief (1995-CP-36-135). On March 19, 1996, an evidentiary hearing was held before the Honorable Edward B. Cottingham. By Order dated July 8, 1996, Judge Cottingham denied and dismissed the application. The South Carolina Office of Appellate Defense filed a Notice of Appeal on Prewitt's behalf and submitted a Petition for Writ for Certiorari. On September 10, 1997, the South Carolina Supreme Court denied the Petition. Prewitt filed a successive PCR application on January 30, 2002 (2002-CP-36-040) based in part on after-discovered evidence. On October 9, 2003, an evidentiary hearing was held before the Honorable Wyatt T. Saunders, Jr. By Order dated November 17, 2003, Judge Saunders denied and dismissed Prewitt's successive application.

On October 27, 2012, the Defendant filed a Motion for a New Trial Based on After-Discovered Evidence pursuant to Rule 29(b), SCRCrimP. In the Motion, Defendant offered as grounds the following items as new/after-discovered evidence: 1) a sworn statement by Kimmie Shipes Heaton recanting her previous testimony identifying Defendant; 2) written statements of Bryan O'Shields attesting that Wayne Eubanks, the husband of O'Shields' first cousin, confessed to O'Shields that he and Mike Bostic committed the crime for which the Defendant was incarcerated; and 3) written statements of Randy Tinsley, the owner of the burglarized home,

identifying Mike Bostic as the person depicted in the SLED composite sketch which had been used in the original investigation of this matter.

On March 12, 2013 a hearing took place at the Greenwood County Courthouse pursuant to Defendant's Motion. The Defendant presented testimony from Kimmie Shipes Heaton, Bryan O'Shields, Randy Tinsley, Detective Danny Gilliam, Christy McGuirt, A.H. Walker, Jr., Sandy Wicker, Investigator Nichole Edwards, and Investigator Pete Skidmore. The State did not call any witnesses.

STANDARD OF REVIEW

Rule 29(b), SCRCrimP mandates that a Motion for a new trial based on after-discovered evidence "be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence." In addition to the Rule 29(b) requirement, the South Carolina Supreme Court has held that in order for a Defendant to receive a new trial based on after-discovered evidence, the evidence must meet five specific requirements as in *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999): 1) the after-discovered evidence would probably change the result if a new trial was granted; 2) the evidence has been discovered since the trial; 3) the evidence could not have been found prior to trial with the exercise of due diligence; 4) the evidence is material; and 5) the evidence is not merely cumulative nor impeaching.

EVIDENCE AT TRIAL

At the Applicant's original trial, the prosecution presented the following evidence:

On July 22, 1994, a shooting occurred on a remote rural back road in Newberry County, which resulted in Joe Dixon being shot three times. Dixon testified at the trial that he was sitting on Christy McGuirt's front porch, waiting for a ride to Charleston to visit his brother, when he

saw two men in a green car drive pass the house and drive into the driveway of a neighbor's house. Dixon testified that he knew that the neighbor was not home. He further testified that he went to the neighbor's house to inform the men that the neighbor, Randy Tinsley, was not home. Dixon recounted that he went in the back door of Tinsley's house as one man was walking out of the house and saw the other man inside, and asked them what they were doing. At that moment, the man inside the house drew a weapon and fired the gun striking Dixon in the chest. The armed individual then walked up to Dixon and fired two more shots. Dixon was able to identify the shooter as Prewitt in a photo-lineup. On cross-examination, Dixon testified that the shooter wore a hat, but the little bit of hair Dixon saw was brown.

Christy McGuirt testified at the trial and was able to corroborate Dixon's account of that day. She testified that she was in the house while Dixon was on her front porch waiting for his ride to Charleston. She testified further that a green car with two white males passed by and Dixon went over to the Tinsley house. She then heard shots and went over to Tinsley's house to discover Dixon laying on the floor with gunshot wounds.

Another neighbor, A.H. Walker, testified that about thirty to forty five minutes prior to the shooting, he saw a green car with two white males driving slowly pass his house.

Kimmie Shipes Heaton (then Kimmie Shipes) testified she lived about half of a mile from Tinsley's house and that she was home when she heard someone in her back yard. She went to the back door and was surprised to find a man standing there. She testified that Prewitt asked her if "Eddie" lived there and she told him no because no one by the name of Eddie lived with Heaton. Further she testified that Prewitt walked around the house and got into a green or blue car with another individual. Heaton testified that the individual looked to have light hair, perhaps reddish, because of the way the sun was shining on him. She testified that the individual

was taller than her, maybe 5'2" or 5'3" or taller. She was able to help the police create a composite sketch of the man at her back door. After the burglary at the Tinsley's took place, Heaton identified Prewitt in a photo lineup as the man who was at her back door.

Prewitt testified on his own behalf and called his mother and father as alibi witnesses. Prewitt denied being on the scene.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety and considered the arguments presented at the hearing. Further, this court observed the witnesses presented at the hearing. The State moved to deny the Motion for a new trial as being successive to the argument that was denied at his second PCR hearing and for failing to meet the test promulgated first in *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999).

At the hearing, Prewitt presented a sketch generated by SLED with the cooperation of Heaton during the initial investigation of the burglary and shooting. This sketch was not introduced at original trial of this case. Also, Prewitt presented a booking photo of a man named Mike Bostic. Prewitt called Bryan O'Shields, a current inmate in the South Carolina Department of Corrections and his former cellmate to testify. O'Shields testified that he met Prewitt in the Department of Corrections and spoke with him about his case because he recognized his name from a conversation he had with his cousin's husband, Wayne Eubanks, in 2002. O'Shields explained that during a conversation at a family cookout, Eubanks told O'Shields that Bostic and Eubanks committed a robbery where a man was shot and that Prewitt was doing time for the crime that he did not commit. O'Shields further testified that he knew of Bostic and that, in his opinion, the SLED sketch looked like Bostic.

Heaton also testified at the hearing. She is currently confined in the Department of Corrections. At the hearing, she testified that she was mentally unstable when she first identified the man at her back door as Prewitt. She further testified that if she had to testify today she could not say that the man at her back door was indeed Prewitt.

Randy Tinsley, who was the owner of the home where the burglary was committed, testified that, in his opinion, the SLED sketch looked like Bostic. Sandy Wicker, who was not involved in any way in the trial of Prewitt, testified that the SLED sketch looked like Mike Bostic in her opinion.

The test for after-discovered evidence was set out in *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999). In that case, the Court held the following:

A party requesting a new trial based on after-discovered evidence must show that the evidence: 1) the after-discovered evidence would probably change the result if a new trial was granted; 2) the evidence has been discovered since the trial; 3) the evidence could not have been found prior to trial with the exercise of due diligence; 4) the evidence is material; and 5) the evidence is not merely cumulative nor impeaching.

Prewitt argues that the following evidence is after-discovered: 1) a sworn statement by Kimmie Shipes Heaton recanting her previous testimony identifying Defendant; 2) written statements of Bryan O'Shields attesting that Wayne Eubanks, the husband of O'Shields' first cousin, confessed to O'Shields that he and Mike Bostic committed the crime for which the Defendant was incarcerated; and 3) written statements of Randy Tinsley, the owner of the burglarized home, identifying Mike Bostic as the person depicted in the SLED composite sketch which had been used in the original investigation of this matter.

In this instance, Heaton testified that she will recant her previous testimony at a new trial and will not be able to identify Prewitt as the person at her back door. This potential recantation is not after-discovered evidence and she can be impeached with her previous testimony. I find that her testimony at the original trial is more credible than her testimony at the hearing on Prewitt's Motion for a New Trial and that this potential recantation would not likely change the outcome if a new trial were held.


Secondly, O'Shields' testimony that his cousin-in-law confessed to committing the crime along with Bostic is not after-discovered evidence and would not likely be admissible if a new trial were held. O'Shields' credibility would be in question as he is a former cellmate of Prewitt. O'Shields' testimony that he was told that two individuals committed crimes that Prewitt was convicted of by a jury of his peers without any further corroboration is not likely to change the outcome of a trial even if it was after-discovered evidence.

Lastly, although several individuals testified that they believe the person in the SLED sketch to be Bostic, Prewitt is not dissimilar from the individual depicted in the sketch. The sketch, however, is only a tool of limited purpose used by law enforcement for investigation where the identity of a suspect or suspects is unknown. Dixon and Heaton identified Prewitt from a photo lineup, more reliable than making an identification from a sketch, as Prewitt's witnesses have done at the hearing. Moreover, it would be cumulative to call several witnesses simply to testify that they believe the person in a SLED sketch is another individual without offering any further testimony and the jury is more than capable to decide that fact on its own if this type of testimony was deemed admissible.

I find that the evidence presented at the hearing on the Motion for a New Trial is not after-discovered evidence, is not competent evidence, and would not be admissible at trial and

IT IS THEREFORE ORDERED that the Motion for a New Trial based on After-
Discovered Evidence is hereby denied.

AND IT IS SO ORDERED.



Clifton Newman
Presiding Judge

July 9, 2013

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
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Clifton Newman, Circuit Court Judge

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Respondent,

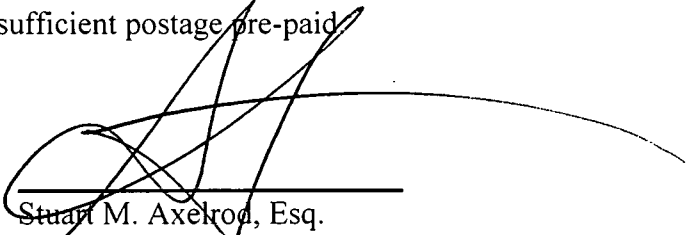
v.

Gary Lane Prewitt,

Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing Notice of Appeal upon the Respondent via U.S. Mail sent to Respondent's attorney of record, Dale Scott of the 8th Circuit Solicitor's Office at Post Office Box 516, Greenwood, SC 29649 with sufficient postage pre-paid.



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August 9, 2013

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina, Respondent, v. Gary Lane Prewitt, Appellant
Case No. 1994-GS-36-616

Dear Ms. Gee:

Enclosed for filing please find the original and one copy each of the following:

- Notice of Appeal;
- Copy of the Order from which this appeal is taken;
- Proof of Service upon the Respondent.

This appeal has been filed pursuant to instruction from Appellant, Gary Lane Prewitt. I have not, however, been retained to represent Appellant in these proceedings and ask that the Court relieve me of any further responsibility associated with this matter. Please let me know if you need anything further.

With kind regards, I am

Truly yours,

AXELROD & ASSOCIATES, P.A.

Stuart M. Axelrod, Esquire

cc: Dale Scott, Esq. (w/enc)
Gary Lane Prewitt (w. enc)

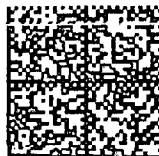
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