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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Aiken County

The Honorable Jocelyn Newman, Circuit Court Judge

THE STATE,

Respondent,

v.

TIMOTHY F. GREEN,

Appellant.

Appellate Case No. 2023-000961

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

Does the state's failure to preserve potentially exculpatory evidence combined with its failure to maintain proper records constitute a violation of due process under the South Carolina Constitution?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

Is a state constitutional due process issue preserved for appeal by general reference to a defendant's inability to conduct new DNA testing of cuttings from clothing where the circa 1985 cuttings were not located? Alternatively, does inability to conduct post-trial DNA testing allow a defendant to shift the burden of proof in a motion for a new trial?

STATEMENT OF THE CASE

Appellant, Timothy F. Green, was convicted by a jury in March of 1986 for the murder of his girlfriend's three-year-old child. This appeal is from the denial of a motion for a new trial heard in June of 2023.

The Murder Conviction

An Aiken County grand jury indicted Appellant at a December 1985 term for the child's murder. (*See* Att. 13, at 6; (1985-GS-02-847)). Jerry M. Screen, represented Appellant on the charge. A jury trial on the charge was held on March 5, 1986.[1] The Honorable Rodney A. Peeples presided. The jury found Appellant guilty of murder, and Judge Peeples sentenced him to imprisonment for the balance of his natural life. (*See* SR. p. 138-139).

DNA Testing Motion

On November 29, 2012, Appellant filed a motion seeking DNA testing. (R. p. 7). Appellant's blue shirt and trousers were admitted at trial. (SR. p. 36, 84). Trial testimony showed that the clothes were taken directly from Appellant, two days after the murder, with Appellant having confirmed that he was wearing the blue shirt on the day of the murder. (SR. p. 37). A SLED forensic serologist testified that there was "Group O" blood found on the shirt and on the pants. (SR. p. 40-42). However, given the time period at issue, DNA was not an available testing avenue. (*See* R. 57).[2] In September 2014, the Honorable Doyet A. Early, III, issued an order granting DNA testing. On January 15, 2016, SLED issued a report finding no DNA was

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[1] According to the assertions in the 2017 PCR action return, Appellant was initially tried by a jury on January 20, 1986, but the jury was unable to reach a verdict and a mistrial was declared. (*See* C/A 2017-CP-02-0064, Return and Motion to Dismiss, p. 1).

[2] In discussing the factual context during the new trial motion, Judge Newman made these observations: "No one would have known in 1985 to utter the acronym DNA" and reasoning that the new testing was attempted to determine if there was previously unavailable evidence, *i.e.*, "it's not about presenting the wrong evidence" during the trial. (R. p. 57).

available for analysis. (R. 95-96). A second order was issued in October of 2015 to examine the clothes for "vomit stains" and possible testing for DNA. Again, the results were that nothing to test detected. (R. p. 32-35; p. 95-96). Appointed counsel, P. Andrew Anderson, Esquire, took no further action.

2017 PCR Action

On January 17, 2017, Applicant filed a *pro se* application for post-conviction relief (PCR) and made a number of claims, including that Mr. Anderson was ineffective in failing to file a PCR action concerning the testing, and also alleging innocence based on the results. (*See* C/A 2017-CP-02-00064).[3] By consent order filed on March 30, 2021, the 2017 PCR action was stayed pending the outcome of the 2018 general sessions new trial motion.

The New Trial Motion

On April 8, 2018, while the PCR was pending, Appellant filed his new trial motion. (R. 7-10). The basis for the motion rested on the inability to conduct DNA testing that had been ordered. *Id.*

On June 14, 2023, a hearing was held on the new trial motion. The Honorable Jocelyn Newman presided. Applicant was represented by J. Falkner Wilkes, Esq. Judge Newman heard testimony, then also heard arguments by counsel for Appellant and counsel for the State. At the conclusion of the hearing, Judge Newman found denied relief on the record. (R. p. 78). No formal, written order followed. Appellant now appeals the denial of his motion.

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[3] The return to the 2017 application lists a number of prior challenges, including a direct appeal, *see State v. Green*, Op. No. 87-MO-114 (S.C.Sup.Ct. filed March 16, 1987); a 1988 PCR action; a 1989 federal habeas corpus action; a 1992 PCR action; a 1993 PCR action; and, a 2004 state petition for writ of habeas corpus. (*See C/A* 2017-CP-02-0064, Return and Motion to Dismiss, pp. 1-3). Applicant agrees with this history in his brief to this Court. (Appellant's Brief, Statement of the Case).

RESPONDENT'S STATEMENT OF THE FACTS

As noted above, an Aiken County jury convicted Appellant of murder. The jury heard the following in finding Appellant guilty:

The victim's mother, Phyllis Price, testified that she had three children in September of 1985, one was three-year old Caronica and one was four-year old Ebony. (SR. p. 43-44). Her son was so small he was not yet walking. (SORA. p. 15). Ms. Price testified that on the morning of the murder, Caronica had no bruises, nor did she express any "distress" or "appear to be ill." (SR. p. 45). Caronica and Ebony together went to Elizabeth Green's home, a neighbor in the apartment complex. (S.R. p. 44). Elizabeth is Appellant's sister. At the time, Appellant was Ms. Price's boyfriend and stayed with her. (SR p. 32, 85). Elizabeth's daughter, Erica, was in Elizabeth's home, and Elizabeth testified Caronica ("Ronica") and Ebony ("Poo") came over. Carolyn Johnson was also present, and Elizabeth testified that Carolyn asked the children to go to the back when Carolyn "had to get into some of her drugs." (SR. p. 86-87). Elizabeth also testified that she saw Appellant that morning and asked him to come over. She wanted to tell him that her mother was ill, and he should "call home." (SR p. 86).

Ms. Johnson testified she was at Elizabeth's home, drinking with Elizabeth when Appellant came over and also drank with them, talked, and even looked in the refrigerator and the stove. (SR. p. 16-17, 29). Then, Appellant went toward the back of the apartment where the children were. Somewhere around fifteen or twenty minutes later, he returned and "had Coronica laying on his shoulder and he told Liz that she was back on her bed asleep." (SR. p. 19). Appellant left with the child to go to Ms. Price's home. Ms. Johnson heard Ms. Price scream shortly thereafter. (SR. p. 19). Ms. Johnson and Elizabeth went outside and saw Appellant had "laid her down on the back porch" and asked for Ms. Johnson to "go get a cold compress to put on her head." (SR. p. 21). He was "rubbing her face and shaking her and calling out to her" and

even tried chest compressions to revive her. (SR. p. 21-22). She testified that she later saw blood in Elizabeth's home. (SR. p. 21). While she could not say whether Appellant "did anything" to the victim, she testified that he and the children were the only ones in the back. (SR. p. 30-31).

Ms. Price testified that Appellant came to her with Ronica and expressed he thought she was sleeping. (SR. p. 45). When Ms. Price looked at the child, she "saw blood coming out of her nose and mouth" and that was when she screamed. (SR. p. 45-46). She asked what was wrong with the child, and Appellant "said maybe she had took some poison." (SR. p. 46). He later said "maybe she took some worm medicine" such as that given to dogs. (SR p. 46). That was, actually, what he later called the hospital to suggest. (SR p. 46). However, Ms. Price testified that the worm medicine had been taken out of her house approximately a week before the victim died. (SR p. 47-48). Ms. Price confirmed the blue shirt (the one tested) was the shirt Appellant had on when carrying her child who was bleeding. (SR. p. 50).

While only four-years old, Erica Green, testified. (SR. p. 52-53). Erica stated that she and "Poo and Ronica" were jumping on a bed, and that Appellant was with them. However, Appellant left to go into the bathroom. "Ronica walked in on Timmy and Timmy said, "get out of here, Ronica", and she didn't, then Appellant kicked the victim in the stomach area. Victim began to cry. (SR. p. 55, 57). She also recalled Appellant said to the victim he was "going to beat your butt, Ronica." (SR. p. 57). Erica testified there was blood on the wall, and that victim began throwing up in the yard. (SR. p. 56).

The afternoon that Coronica died, Emma Simpkins was in an area close by the apartments, near a flagpole in the park. Appellant approached her and stated that he felt as

though he was being punished by God and if Caronica lived he wouldn't do anything wrong anymore." (SR. p. 34).

An investigator obtained Appellant's shirt and trousers for testing. Appellant confirmed the shirt was the one he was wearing on the day of the murder. (SR. p. 35-38). SLED forensic serologist Patsy Habben testified that she tested the shirt, right sleeve, and two other samples from the shoulder area, two revealed type O blood diluted by silva, but one shoulder-area sample was blood, but the testing was inconclusive on type. (SR. p. 40-41). Three other samples were negative. (SR. p. 41). Testing of the pants similarly showed type O, but not diluted, from the knee area. (SR. p. 42). On cross-examination, Appellant's attorney asked the percentage of individuals with type O, and Ms. Habben answered, "Approximately forty percent of the population." (SR. p. 43).

Forensic pathologist Dr. Joel Sexton, M.D., testified to the fatal injuries sustained, in addition to some minor injuries, "there was also some large bruises or contusions of the face. Both lips were swollen, the left eye was swollen and there was a large contusion on the right forehead. The internal examination revealed that in addition to these external injuries, there were multiple internal injuries ... bruises or contusions ... about three or four on the right side and three or four on the left side of the abdominal region plus one deep one here on the upper left chest. Internally, the organs, meaning the liver, the kidneys and other structures of that sort, also had injuries. Notably, a large laceration in the liver ... it was split in the middle and was bleeding from the large split ... In addition, there was injury to the small intestines ... Something had struck the child hard enough to press that portion of the body of the internal anatomy up against the interior and by pushing against the spine, had actually lacerated that portion of the small intestine. There was also injury to the pancreas ... All of this led to acute inflammation inside

the abdomen... So, in general the child had in the abdominal and chest region, primarily the abdominal region, contusions on the external surfaces, contusions in the muscle and tissue and injuries to the internal organs" and further "contusions of the scalp. Bruises where multiple injuries had occurred on top of the head, on the front of the head and on the back of the head" and "hemorrhage on the surface of the brain." (SR. p. 70-72). He opined that "[t]he abdominal and head injuries caused her death. The abdominal injuries caused internal hemorrhage, which in spite of the surgery that was performed, she went into shock and did not come out of the shock and died during surgery. So, the abdominal injuries primarily, but the head injuries certainly, contributed to the cause of death." (SR. p. 72). He further opined the injuries indicated they most likely were the result of "blows to this region of the body" and the injuries were inflicted "[o]n or about the day of death." (SR. p. 73). When asked whether worming medication, Piperazine, would cause the injuries, he indicated it would not, and it does not even enter the body's system but stays in the GI tract. (SR. p. 75, 82). Additionally, no Piperazine was found in the child's tissue samples taken at autopsy. (SR. p. 82).

Elizabeth Green testified for the defense. She indicated first no one was in the back area of the house with the children then recalled a friend of hers, "Fred Bailey," was in the house, though he did not go in the back where the children were. (SR. p. 90, 97, 99). She testified Appellant went to the back to use the bathroom but returned within "five to six minutes." (SR. p. 91). According to Elizabeth, Appellant left and returned, but on one return, the "children" called him. He went back and came out almost immediately, carrying the victim. (SR. p. 93). Elizabeth testified Erica told Appellant the victim had fallen out of bed. (SR. p. 93). She saw no blood on the child, but saw some blood on Appellant "because he had a cut on his arm." (SR. p. 94). She later saw Appellant trying to revive the child. (SR. p. 95).

Appellant also testified. He generally followed Elizabeth's testimony, and testified that the children told him the victim was "on the floor asleep," that he picked her up, and during the trip home, "she threw some kind of fling ... and her eyes were rolling back in her head...." (SR. p. 104). She threw up on his shirt, but he denied seeing any blood. (SR. p. 104-105).

Appellant's niece, Doris Green, testified she had seen Ms. Price hit "Poo" before. (SR. p. 114-115).

The jury rejected the defense and convicted Appellant of murder.

STANDARD OF REVIEW

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and" an appellate "[c]ourt will not disturb the trial court's decision absent an abuse of discretion." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citing *State v. Johnson,* 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons,* 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983)). "The deferential standard of review constrains" the reviewing court "to affirm the trial court if reasonably supported by the evidence." *Mercer*, 381 S.C. at 167, 672 S.E.2d at 565.

ARGUMENT

Appellant's state constitutional due process challenge is not preserved for appeal as it was not raised to Judge Newman during the new trial motion. Alternatively, the record shows that Judge Newman did not abuse her discretion in denying the motion for a new trial where there was no new evidence that could have changed the result at trial.

Preservation Issue:

Appellant's argument rests on an alleged violation of due process under the South Carolina Constitution. (Appellant's Brief, at iii.). However, Appellant did not argue that due process was violated, nor did he cite to the South Carolina Constitution in his argument before Judge Newman. (*See* R. p. 76-78).[4] The issue is not preserved for review.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge" and if not raised and ruled upon, "will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). "Constitutional questions must be preserved like any other issue on appeal." *State v. Langford*, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012); *State v. McWee*, 322 S.C. 387, 391, 472 S.E.2d 235, 238 (1996) (issue "not preserved for review because at trial, appellant never cited any constitutional basis"); *State v. Varvil*, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) ("[c]onstitutional arguments are no exception to the rule, and if not raised to the trial court are deemed waived on appeal") (citing *State v. Powers,* 331 S.C. 37, 501 S.E.2d 116 (1998)). The issue is procedurally barred and not available for review on the merits. However, even if available, the issue would not afford relief as the record shows that Judge Newman did not abuse her discretion in denying the motion for a new trial.

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[4] This is also consistent with Appellant's stated intent to show three issues which he listed: "One, do the test results now have any exculpatory value? Two, would any further testing be of benefit? And three, did SLED in 1985 in bad faith destroy the evidence knowing that someday it could be DNA tested ... or if there's any kind of bad faith." (R. p. 21; *see also* 48).

Alternative Merits Argument:

The application and subsequent order for post-conviction DNA testing was based on an "overbroad" belief that all material was available.[5] (*See* R. p. 18). While the pants and shirt as admitted in trial were preserved and available, the specific, small cuttings originally tested for blood typing were not admitted exhibits and have not been located. (R. p. 18; S.R. p. 3). The review of the clothes pursuant to the DNA testing order showed no available DNA for testing. (R. p. 19, 26-30, 45-47). Testimony at the new trial motion hearing also demonstrated that the clerk's office did not have any cuttings associated with original trial, nor did the sheriff's department have evidence or any records related to the evidence from 1985. (R. p. 58-66 and 67). Lt. Clay Adams noted in this testimony that "back then, SLED typically worked [Aiken] crime scenes." (R. p. 67, lines 15-17).

Applicant argued there was an absence of evidence and posited, "is Mr. Green entitled to relief if the State can't show what it did with the samples?' (R. p. 71). Applicant argued that if "the State loses it ... that would be grounds to support a new trial." (R. p. 71). He argued that since the State could not show what had happened to the cuttings, he was "entitled to relief and a new trial based on the presumption that it very well could have exculpatory value...." (R. p. 72).

"To prevail on a motion for a new trial based on after-discovered evidence, the moving party must show the evidence: (1) is such that it would probably change the result if a new trial

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[5] Notably, the burden is on the applicant for the testing to show the material is accessible to accomplish the testing: "(B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence: (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing; ...." S.C. Code Ann. § 17-28-90. Further, the applicant is required to show the "material sought to be tested would be material to the issue of the applicant's identity as the perpetrator" and should the testing be "exculpatory" would "probably change the result of the applicant's conviction...." § 17-28-90 (B)(4) and (5). As seen *infra*, Applicant does not meet any of these. However, since the motion at hand was made under Rule 29(b), SCRCrimP, the test remains that for a new trial.

were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching." *State v. Wakefield*, Op. No. 28210, (S.C.Sup.Ct. filed June 20, 2024)(Howard Adv.Sh. No 23 at 32) (citing *State v. Spann,* 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999)). Here, Appellant misses the first necessary step – showing that new evidence exists. He similarly fails to recognize that the burden is squarely on him, the defendant, and not the State. *Id.* Further, our Supreme Court's precedent finding that "[t]he granting of a new trial" based upon "after-discovered evidence is not favored," *State v. Irvin,* 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978), stands in stark contrast to Applicant's position that an inference is warranted that the after-discovered evidence, since he cannot locate and test it, would be exculpatory. *See also State v. Rhodes*, 44 S.C. 325, 327, 21 S.E. 807 (1895) (recognizing "the universally recognized doctrine is that applications of this kind should be scrutinized with great caution, in order to avoid delays, and prevent any obstructions to the administration of justice"). Even so, he asks this Court to rule not on the federal constitutional ground asserted in *State v. Reaves*, 414 S.C. 118, 777 S.E.2d 213 (2015), but on a state constitutional ground. (Appellant's Brief, at 10-11).

In *Reaves*, our Supreme Court conducted a due process analysis under federal precedent based on destruction of evidence for trial. 414 S.C. at 125, 777 S.E.2d at 217. It is not after-discovered evidence, new trial evaluation, and is inapposite as are those out-of-state cases cited in *Reaves* and in Appellant's brief as to a possible state constitutional due process violation. *See, for example, State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999) (focus on the trial not after-discovered evidence and a new trial motion). Indeed, in *Ferguson*, the Tennessee Supreme Court cited to *California v. Trombetta*, 467 U.S. 479 (1984) and the caution that necessary preservation is limited to that evidence that shows "exculpatory value that was apparent before the evidence

was destroyed...." 2 S.W.3d at 917 (citing *Trombetta,* at 488-489). This is not easily connected to "new" testing sought years after the trial, by a method not even available at the time, with an at most unknown value. However, as discussed above, Judge Newman was not asked to consider our state constitutional provision and craft a possible exception different from that in *Reaves.* Even so, she considered the evidence and potential for exculpatory value in context of the trial – the precise test outlined for new trial motions. *See Wakefield, supra, Mercer, supra, Spann, supra.*

Specifically, Judge Newman considered the arguments for relief offered were based in large measure on the fact that DNA testing was ordered, but, upon drilling down to specifics, it would appear that the materials (the cuttings) were not actually available and Appellant (as the applicant in the DNA testing motion) could not have shown the material was actually available. As a result, Appellant would not have been entitled to an order for testing of those cuttings had that been known. (R. p. 79).[6] Judge Newman then reasoned, "I don't think the - - the benefit of the doubt as to missing evidence or inconclusive testing 38 years later.... Entitles Mr. Green to relief." (R. p. 79). Notably, Judge Newman considered another portion of the Access to Justice Post-Conviction DNA Testing Act, the Preservation of Evidence Act, S.C. Code § 17-28-360, that addresses obligations to maintain certain evidence in certain cases. The legislative purpose was to secure material for later testing under the Post-Conviction DNA Testing Act. Notably, these Acts did not become law until January 1, 2009, long after Appellant's 1986 trial. Even so, S.C. Code Ann. § 17-28-360 provides that a "[f]ailure of a custodian of evidence to preserve physical evidence or biological material pursuant to this article does not entitle a person to any

[6] The State also correctly noted that Appellant could not show any potential value as several witnesses placed him with the victim at the time her massive injuries were sustained, and he admitted carrying her to her mother. (*See* SR. p. 21, 45, 55, 57, 93, and 104-105). Further, it was powerful testimony that Appellant concocted a "poison" story and admitted to feeling "punished" and promised he "wouldn't do anything wrong anymore," if the child lived. (*See* SR. p. 34. 46-48 and 82).

relief from conviction...." As Judge Newman found, that provision would not allow Appellant relief, which is a point she considered. (R. p. 78). Judge Newman denied relief. (R. p. 79). Essentially, Appellant showed no basis for the presumption that evidence would be exculpatory, thus, he cannot carry his burden under the new trial standard. There is no abuse of discretion in that ruling.

That said, though, the State maintains the argument on appeal is procedurally barred. Appellant is not entitled to have the issue heard for the first time on appeal. *Dunbar, supra.*

CONCLUSION

Based on the foregoing, Respondent submits that this Court should find the issue barred, or alternatively, without merit, and affirm the ruling of the lower court denying the motion for a new trial.

Respectfully submitted,

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