STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2012-213607

THE STATE,

Respondent,

vs.

NOEL GRAY,

Petitioner.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II.

DID THE LOWER COURT PROPERLY DENY APPELLANT'S RULE 29 MOTION WITHOUT A HEARING WHEN THE PURPORTED EVIDENCE APPELLANT DISCOVERED HAD NOTHING TO DO WITH HIS GUILT OR INNOCENCE AND WAS NOT A MATTER FOR CONSIDERATION IN A RULE 29 MOTION

STATEMENT OF THE CASE

Respondent incorporates the statement of the case from Appellant's brief with one addition. On February 27, 2013, Appellant filed a third application for post-conviction relief alleging the same issue he does in this appeal. The third post-conviction relief action is pending in the Aiken County Court of Common Pleas.

ARGUMENT

I. Appellant's motion pursuant to Rule 29(b), SCRCrimP was untimely because it was not made within one year of the date the information could have been discovered.

Appellant was convicted of two counts of criminal sexual conduct with a minor after a jury trial that occurred on January 31 through February 2, 2005. He was sentenced to life without parole. (R.pp.307, 316). He thereafter pursued a direct appeal. The issue presented in his Final Anders Brief concerned the use of a prior conviction from Georgia to sentence him as a recidivist to life without parole. (R. pp.304-314). In his *pro se* response to the Anders brief, Appellant asserted the State engaged in prosecutorial misconduct, "unfair Prosecution tactics," making "Bias Remarks," presenting perjured testimony, violating the Interstate Agreement on Detainers, and offering improper testimony. (R. pp. 318-339). The appeal was dismissed by this Court in January 2008. (R. pp. 316-317).

Appellant then pursued two post-conviction relief (PCR) actions and appeals from post-conviction relief. In the first PCR action, Appellant alleged that he was entitled to a new trial based, *inter alia*, on ineffective assistance of counsel concerning claims unrelated to plea offers. (R. pp.388-394). He also presented many of the same claims in his application that he included in his pro se brief on direct appeal. The application was dismissed after a full evidentiary hearing. (R. pp.418-423). The Johnson appeal was also dismissed. (R.pp.438-451).

Appellant filed the second application for post-conviction relief in December 2011, alleging, *inter alia*, newly discovered evidence, and ineffective assistance of post-conviction relief counsel. (R.pp.487- 494) The application was summarily dismissed by Conditional Order of Dismissal dated January 20, 2012, and Final Order of Dismissal filed July 5, 2012. (R.pp.528-542; 615-617). No grounds were offered in support of the newly-discovered evidence claim. (R.p.489) Appellant appealed and the appeal is no longer pending.

Appellant filed a third application for post-conviction relief in the Aiken County Court of Common Pleas on February 27, 2013, in which he presents claims of prosecutorial misconduct, State interference, and that he received ineffective assistance of counsel because his trial attorney failed to convey plea offers. (R.pp.622-628). The action is currently pending in the Aiken County Court of Common Pleas.

On September 24, 2012, Appellant submitted a motion for new trial pursuant to Rule 29, SCCrimP, in the Aiken County Court of General Sessions asserting, *inter alia*, he was entitled to a new trial based upon after-discovered evidence; specifically, he claims that in October 2011, he "discovered" information relating to what he characterized as "plea agreements" that were not communicated to him by trial counsel before trial. He asserted that his trial attorney provided ineffective assistance concerning the plea offers and respecting numerous other matters. (R.pp.1-48). He stated that he discovered the information for the first time in trial counsel's response to his request for documents in 2011. (R.pp.1-48). He relied upon case law governing ineffective assistance of counsel and post-conviction relief as support for the motion. The motion for new trial was summarily denied by the Honorable Doyet A. Early, III, by order dated November 30, 2012. (R. pp.49-50).

Rule 29(b) states that "[a] motion for a new trial based on after-discovered evidence must 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**." Rule 29(b), SCRCrimP (emphasis added).

The documents in question were not requested or obtained until 2011. This information could have been discovered through the exercise of due diligence before or around the time of trial through due diligence by merely making the same request at an earlier time. See State v.

Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998); State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); State v, Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978); State v. Jones, 172 S.C. 129, 173 S.E.2d 77 (1934); State v. Ridgeway, 146 S.C. 255, 143S.E. 811 (1928). Appellant's motion was filed in 2012 after a trial in 2005. Appellant failed to make a prima facie showing that the motion was timely. Respondent submits that the matter was not timely pursued and Judge Early correctly denied the motion.

II. Appellant failed to present evidence going to his guilt or innocence and or any other ground that would be appropriate for a Rule 29(b) motion.

Appellant alleges that his discovery of two "plea deals" that his attorney never communicated to him supports his request for a new trial under South Carolina Rules of Criminal Procedure, Rule 29(b). [1] Rule 29(b), SCCrimP, provides:

> (b) New Trials Based on After-Discovered Evidence. A motion for a new trial based on after-discovered evidence must 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. A motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

This Court has acknowledged that the only post-verdict **fact-based** remedy available to a criminal defendant is a motion for new trial. State v. Johnson, 363 S.C. 184, 610 S.E.2d 305 (Ct. App. 2005); see also State v. Miller, 287 S.C. 280, 337 S.E.2d 883 (1985). "It is well settled that the granting of a new trial upon (the ground of newly-discovered evidence) is not favored and the trial judge's ruling thereabout is left largely to his discretion, the exercise of which will not be overturned in the absence of abuse of discretion." State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974); see also State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011)(stating that trial court's judgment respecting a motion for new trial will not be disturbed on appeal except for errors of law or abuse of discretion). A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

> (1) is such as would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before trial; **(4) is material to the issue of guilt or innocence;** and (5) is not merely cumulative or impeaching. Emphasis added).

[1] Respondent does not concede that Appellant was unaware of the plea offers.

Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983); State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993). Appellant contends that he meets all five elements, claiming that a guilty plea is somehow relevant to whether he was guilty or innocent. Respectfully, Appellant misunderstands the purpose and requirements of a Rule 29(b) motion.

A Rule 29(b) motion is filed when evidence relating to the guilt or innocence of a defendant is discovered. Id.; see also State v. Jones, 89 S.C. 41, 71 S.E. 291 (1911)(stating defendant failed to make the requisite showing for a new trial based upon newly-discovered evidence where he did not show the new evidence would not have changed the result if a new trial was provided). Here, Appellant asserts newly-discovered evidence in the form of ineffective assistance of counsel relating to trial counsel's purported failure to convey plea offers. Claims that trial counsel was ineffective in her representation at the trial level may only be presented in a post-conviction relief action and not in a motion for new trial in the Court of General Sessions. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000); State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986); State v. Carpenter, 277 S.C. 309, 286 S.E.2d 384 (1982). The allegation that trial counsel was ineffective for failing to convey plea offers is not relevant to the issue of guilt or innocence and was not proper for the Rule 29(b), SCRCrimP motion. See State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959)(stating that minutes of the parole board were not material to the issue of guilt or innocence). The information discovered also was not **evidence** for trial in any respect and would certainly not change the **result of the trial** if Appellant were granted a new trial. Appellant improperly attempted to use the Rule 29 motion to improperly circumvent PCR. The appropriate avenue for this claim is PCR, which Appellant subsequently filed and which is currently pending in the circuit court. (R. p.624). To the extent Appellant alleges that he received ineffective assistance of PCR counsel in counsel's

failure to pursue this claim in Appellant's first PCR action, Respondent submits that a claim in ineffective assistance of PCR counsel may not be pursued in State court. See Jason Kelly v. State, S.C. S. Ct. Order dated June 20, 2013. Appellant's suggestion that this matter should be remanded for a hearing is wholly without merit. The motion was defective on its face. Appellant failed to make present the necessary allegations with the requisite support setting forth sufficient claims of newly-discovered evidence to require a hearing. Because the ineffective assistance of counsel claim on appeal does not impact the guilt or innocence of Appellant and because Appellant failed to otherwise allege a matter that would be appropriate for Rule 29(b), SCRCrimP, this Court should affirm the circuit court's summary dismissal of the motion.

CONCLUSION

For the reasons stated, this Court should affirm the summary dismissal of the motion by the circuit court.

Respectfully submitted,

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September 17, 2013

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Doyet A. Early, III, Circuit Court Judge

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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September 17, 2013

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
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I further certify that all parties required by Rule to be served have been served. This 17th day of September, 2013.

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