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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2022-000324

THE STATE,

Respondent,

vs.

MARC YASIN MCKEIVER,

Appellant.

RETURN IN OPPOSITION TO "MOTION TO HOLD APPEAL IN ABEYANCE AND TO REMAND FOR A HEARING ON A MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE"

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In September of 2019, Appellant Marc Yasin Mckeiver was arrested after he sold a large quantity of methamphetamine to a confidential informant during the course of a controlled drug transaction. Notably, that transaction was recorded on a camera that had been hidden on the confidential informant, and, on the recording—which is currently before this Court—that was covertly captured of the transaction, the plastic baggies containing the methamphetamine appear

to visible in Mckeiver's hands just before the price of the drugs—$500—was discussed.[1] [2] (R. pp. 156-157; State's Ex. # 1 (Recording of Transaction)). In November of 2019, the Dillon County Grand Jury indicted Mckeiver for trafficking in methamphetamine in connection to that particular drug transaction.[3] On January 10, 2022, a jury trial was commenced in the Dillon County Court of General Sessions with the Honorable Paul M. Burch, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Mckeiver as indicted. Following the verdict, the trial judge sentenced Mckeiver to a mandatory twenty-five-year term of imprisonment and $50,000 fine. A few days later, Mckeiver filed a motion seeking a new trial, and, on March 10, 2022, the trial judge conducted a hearing on the matter in the Dillon County Court of General Sessions. At the conclusion of the hearing, the trial judge orally denied the new trial motion. Mckeiver then timely filed a notice of appeal. At present, Mckeiver's appeal is currently pending in this Court, all briefing has been completed, and the matter is fully ready for the Court's consideration.

II.

On June 6, 2025, Mckeiver—through appellate counsel—submitted a motion to this Court asking for his appeal to be held in abeyance and the matter to be remanded to the Dillon County Court of General Sessions for an evidentiary hearing on whether he should be granted a new trial based on after-discovered evidence. As support for that request, Mckeiver points

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[1] Although the recording contains both video and audio footage, the audio was muted during Mckeiver's trial because the confidential informant was murdered at some point after the transaction. (R. p. 143; pp. 154-155).

[2] After the transaction, the confidential informant was in possession of only $200 of the $700 in government funds that had been provided to him and, thus, $500 was gone. (R. p. 213; p. 215).

[3] According to law enforcement, that was *not* the only controlled drug transaction Mckeiver had been involved in, and, at the time of his trial, he had nine *other* pending charges stemming from four separate incidents. (R. p. 108; p. 366).

primarily to a sworn affidavit from Winter Bennett dated June 20, 2024,[4] while claiming its contents supposedly constitute newly-discovered evidence that would satisfy each and every one of the factors necessary to warrant the grant of a new trial, including the factor requiring the evidence to be something previously unknown that could not have been discovered pre-trial through the exercise of due diligence. More specifically, Mckeiver points to the portions of Bennett's affidavit claiming: (1) her brother was the confidential informant involved in Mckeiver's case;[5] (2) her brother gave her the pills in order to have Mckeiver arrested; (3) her brother convinced her to place the drugs in McKeiver's shoe box because her brother needed help with pending charges he was facing at the time, and she did so; and (4) she and her brother had access to Mckeiver's "social media."

III.

Pursuant to South Carolina law, "[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." Rule 29(a), SCRCrimP. And, significantly, an appellate court will *not* grant leave for an appellant to seek a new trial at the circuit court level during the pendency of an appeal *unless* the appellant first makes a prima facie showing to it of all the elements that must be established to obtain a new trial based on after-discovered evidence. State v. Prince, 316 S.C. 57, 69, 447 S.E.2d 177, 184 (1993); see State v. Ford, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990) ("[I]n order to obtain leave from this Court

[4] Mckeiver's current new trial motion constitutes the second time he has submitted and relied upon a post-trial statement from Bennett in an effort to obtain a new trial. (R. p. 393).

[5] That fact is in no way newly-discovered and was already brought out during Mckeiver's trial by Mckeiver's sister, who testified as the lone witness for the defense. (R. p. 275; p. 277).

to move for a new trial based on after-discovered evidence, an appellant must make a prima facie showing that a new trial is warranted.").

Newly-discovered or after-discovered evidence is "evidence of facts existing at time of trial of which [the] aggrieved party was *excusably ignorant*." State v. Haulcomb, 260 S.C. 260, 270, 195 S.E.2d 601, 606 (1973) (emphasis added). To obtain a new trial based on after-discovered evidence, a party must demonstrate the evidence: (1) would probably change the result of the proceedings if a new trial is granted; (2) was discovered after the trial ended; (3) could not have been discovered prior to trial; (4) was material to the issue of guilt or innocence; and (5) was not merely cumulative or impeaching. State v. Taylor, 333 S.C. 159, 176, 508 S.E.2d 870, 879 (1998). Importantly, the granting of a new trial based on newly-discovered evidence is disfavored in South Carolina, and a party seeking a new trial on such a basis must satisfy a *heavy* burden in order to be entitled to one. State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998); see State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197-198 (1978) ("The granting of a new trial because of after-discovered is not favored, and this Court will sustain the lower court's denial of such a motion unless there appears an abuse of discretion."); see also United States v. Wilson, 624 F.3d 641, 660 (4th Cir. 2010) (explaining new trials based on newly-discovered evidence should only be granted *sparingly* and in the *rare* circumstance the evidence weighs heavily against the jury's verdict).

IV.

Here, even accepting every single word in Bennett's latest post-trial statement submitted on Mckeiver's behalf as the absolute truth, that information could not and does not satisfy the required elements necessary for Mckeiver to be able to obtain a new trial based upon it. Critically, that is true because, in the affidavit itself, Bennett directly affirmed *she told Mckeiver*

the pills were being stored in his house for money and *alerted Mckeiver of where the pills were hidden so he would know where to retrieve them from when her brother arrived to get them*.[6] Thus, Bennett's affidavit does *not* contain information refuting Mckeiver's knowledge of the methamphetamine pills in his home and does *not* contain information suggesting Mckeiver did not actually retrieve the methamphetamine pills from where they were hidden and hand them over to the confidential informant; instead, it simply contains a claim Mckeiver did not know Bennett and the confidential informant had an ulterior motive concerning those pills. Based on that, Mckeiver—aside from not knowing of Bennett's and the confidential informant's hidden intentions—was aware on the very date of the incident the pills he was accused of selling to the confidential informant actually belonged to the confidential informant, was fully aware they were being stored in his home that day for pay, and was advised of exactly where they were being hidden in the home so he would know where to retrieve them from when the confidential informant came to collect them from him. Simply put, Mckeiver cannot legitimately claim he was "excusably ignorant" until now of things Bennett—who was on the defense's potential witness list from trial—directly told him years ago, and he likewise cannot claim Bennett was previously unavailable to him as a witness since—notwithstanding the fact he already included her on his potential witness list—Bennett did *not* say in her affidavit she would not have testified truthfully about what had supposedly occurred if she had been called as a witness during

[6] Specifically, in her sworn affidavit, Bennett stated: "Caine came to Asia's that night and gave me the bag of pills and I took them in the room he was staying in and put them in Duke shoe box. It wasn't until the next morning when Cain was calling to come get the pills *I told him that he brought them the night before* and he payed me to hold them because he didn't want to ride with them and *let Duke know where they was* so when Caine came *he could give them to him*." (Mckeiver's Latest New Trial Motion -- Attachment A, p. 1) (emphasis added). Significantly, Mckeiver obviously was the "Duke" Bennett was referring to in her most-recent statement submitted on Mckeiver's behalf. (R. p. 100; p. 109; p. 159).

Mckeiver's trial.[7] [8] Haulcomb, 260 S.C. at 270, 195 S.E.2d at 606; cf. United States v. Lofton, 333 F.3d 874, 876 (8th Cir. 2003) ("Lofton . . . argues that his new trial motion was in fact based upon newly discovered evidence because he was not aware of Espinosa's willingness to testify until after the trial. We reject this contention. Before trial, Lofton knew the relevant fact at issue—whether Espinosa had advised Lofton during the course of their travels that Espinosa was carrying illegal drugs in the vehicle. Knowing that fact, Lofton could have called codefendant Espinosa as a defense witness at trial."); United States v. Turns, 198 F.3d 584, 588 (6th Cir. 2000) ("The fact that Turns's sister now claims that she wants to testify for her brother does not mitigate Turns's deliberate choice of omitting her testimony at trial. If the district court's decision was allowed to stand, then other defendants would be encouraged to file motions for new trials based solely upon the existence of previously uncalled witnesses who, after learning of the defendant's conviction, state for the first time that they are willing to testify truthfully on the defendant's behalf. Such a precedent would also encourage defendants to hold a witness or two in reserve, knowing that if they lost at trial, they might get another chance by producing sworn affidavits from their reserve witnesses."); Rivera v. State, 673 S.E.2d 642, 644 (Ga. Ct. App.

[7] In an attempt to avoid that unavoidable reality, Mckeiver contends in his motion "*[t]rial counsel* . . . had no way of knowing that Ms. Bennett had planted the drugs to her brother (the CI) to conduct an investigation into this issue." (Mckeiver's Latest New Trial Motion, p. 8) (emphasis added). But that's not accurate. If what Bennett now claims in her latest post-trial statement was actually true, Mckeiver already knew prior to and at the time of trial the drugs were only being held in the house overnight for pay at the request of the confidential informant, would have known they were not his, and would have known he only retrieved them for—and distributed them to—the confidential informant after Bennett told him where in the house they were being covertly stored on the confidential informant's supposed behalf. (Mckeiver's Latest New Trial Motion -- Attachment A, p. 1). Therefore, all trial counsel had to do to learn of every fact contained in Bennett's affidavit other than Bennett's and the confidential informant's purported hidden motive was talk to his client.

[8] Obviously, Mckeiver was aware of Bennett's existence, and she was directly identified by defense counsel as a potential defense witness toward the outset of trial. (R. p. 10; pp. 277-278; pp. 298-299; pp. 303-304).

2009) ("[T]he proffer that Rivera made shows that the testimony and discovery information were merely newly available, rather than newly discovered, evidence.").

Therefore, Mckeiver has known since the day of the controlled drug transaction that led to his trafficking in methamphetamine charge everything he is alleging he now has only just recently learned through Bennett's latest post-trial statement *except* the purportedly true reason *why* the drugs he distributed to the confidential informant were in his home that day.[9] Cf. Prince, 316 S.C. at 69, 447 S.E.2d at 184 ("Here, Prince has failed to establish that this evidence could not have been discovered by due diligence. He attempted to discuss the handling of the body with the funeral home employees prior to trial; therefore, he obviously had some awareness that the body was mishandled. He made no attempt, however, to proffer the testimony of any of the employees at trial. Moreover, there is no showing that he adequately interrogated these employees prior to trial."). Under such circumstances, Mckeiver simply cannot as a matter of law prove the supposed newly-discovered evidence was previously unknown to him and could not have been discovered before trial through the exercise of due diligence as *required* for it to be possible for him to obtain a new trial based on that after-discovered evidence under long-standing South Carolina law.[10] See State v. Pierce, 263 S.C. 23, 32, 207 S.E.2d 414, 419 (1974)

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[9] Tellingly, along with his motion, Mckeiver did *not* include an affidavit from himself indicating when he learned of the information he is now relying upon as support for his latest new trial motion. See State v. DeAngelis, 256 S.C. 364, 371, 182 S.E.2d 732, 735 (1971) ("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.").

[10] It's also unclear how the version of events contained in Bennett's post-trial affidavit would be material to Mckeiver's guilt or innocence for the charged offense of trafficking in

("State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967), sets forth the well established *requirements* as to what the movant must show in order to obtain a new trial based upon after-discovered evidence." (emphasis added)). As a result, Mckeiver has failed to make even a prima facie showing of entitlement to a new trial based on after-discovered evidence as was and is necessary for him to be able to properly obtain leave to suspend his appeal and pursue a new trial motion at the circuit court level, and, therefore, his motion should and must be denied. Cf. Prince, 316 S.C. at 69, 447 S.E.2d at 184 (denying Prince's motion for leave to move before the circuit court for a new trial based on after-discovered evidence because Prince could not make the requisite prima facie showing since he failed to established the supposedly newly-discovered evidence could not have been discovered prior to trial through the exercise of due diligence); State v. Jennings, 40 S.C. 553, __, 18 S.E. 932, 932 (1894) ("The defendant in this case, having been convicted of murder, and having perfected his appeal from the judgment of the circuit court, now moves to suspend the appeal for the purpose of enabling him to move for a new trial in the circuit court upon the ground of after-discovered evidence. Under the well-settled practice of this court it is necessary that the appellant should make such a prima facie showing as would

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methamphetamine since—assuming that version of events was true—Mckeiver knew the confidential informant had stored pills in his home *for pay* to avoid having to have that contraband in his own vehicle and McKeiver apparently had no issues with that unlawful arrangement since he subsequently distributed the pills to the confidential informant from the location where he had been told they had been concealed when the confidential informant came over to collect them. See S.C. Code Ann. § 44-53-375(C) (defining trafficking in methamphetamine as—amongst other things—knowingly *delivering* ten grams or more of methamphetamine, knowingly *aiding or abetting* someone in connection to that amount of methamphetamine, or knowingly attempting to possess or *possessing* that amount of methamphetamine either actually or constructively). And, had that information truly been critical to the issue of whether Mckeiver was guilty or innocent of the crime for which he is currently incarcerated, it remains entirely unclear why—upon learning of it—Mckeiver's former trial counsel waited just over *eleven months* to reveal it to Mckeiver's current counsel. (Mckeiver's Latest New Trial Motion -- Attachment B, p. 1; Mckeiver's Latest New Trial Motion -- Attachment C, p. 1).

satisfy this court that this was a proper case for the granting of the motion submitted by the appellant. After a careful consideration of the affidavits upon which the motion is made, we cannot say that such a showing has been made. It is therefore ordered that the motion be refused.").

WHEREFORE, Respondent prays this Court will deny Mckeiver's "Motion to Hold Appeal in Abeyance and to Remand for a Hearing on a Motion for New Trial Based on After-Discovered Evidence"; decline to hold the appeal in abeyance; decline to remand the matter to the Dillon County Court of General Sessions to afford Mckeiver an unnecessary opportunity to pursue a meritless new trial motion; continue forward with its consideration of Mckeiver's appeal in the normal course without needless interruption; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Return in Opposition to "Motion to Hold Appeal in Abeyance and to Remand for a Hearing on a Motion for New Trial Based on After-Discovered Evidence" by sending an electronic copy via email to the address listed in AIS for the following individual:

Dayne C. Phillips, Esquire
dayne@pricebenowitz.com

I further certify all parties required by Rule to be served have been served.
This 16th day of June, 2025.

CAROLINE COLLINS
Administrative Coordinator