

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000975

Indictment Nos. 1998-GS-46-2847; 2849; 2850; 2851; 2852

THE STATE,

Respondent,

v.

ANTONIO GORDON,

Appellant

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SC Court of Appeals

Motion to Clarify Status of "Initial Pro Se Brief of Appellant"

And to Stay Pending Resolution of

Appellant's Motion to Be Furnished Transcript

The Respondent makes a Motion to Stay the filing of an Initial Brief of Respondent pending resolution of Appellant's pending "Motion to be Furnish Transcript" dated October 8,

2013 and resolution of the status of an "Initial Pro Se Brief of Appellant", received by this Office on October 22, 2013 with a certificate of service dated October 17, 2013.

I.

Status of Initial Pro Se Brief of Appellant

Respondent is informed that the Initial Pro Se Brief of Appellant has not been filed by the Clerk of Court of the South Carolina Court of Appeals as required under SCACR Rule 208(a) (1). Respondent is attaching a copy to this Motion. A review of the brief received by this Office reveals that there are no record citations in any manner in the brief other than to an order and makes reference to a "factual record", Brief, p. 10, although no reference to the record is made as required by SCACR Rule 208 (b)(4).

In addition, there is no "designation of matter" included or received as required by SCACR Rule 209.

Respondent submits that the Initial Brief of Appellant is deficient under the Rules of this Court and should be struck with leave to revise and file consistent with the Rule of this Court.

Respondent request the Court to resolve the status of the Initial Pro Se Brief of Appellant.

II.

Pending Appellant's Pro Se "Motion to Be Furnished Transcript"

Upon information and belief, the Appellant's pro se motion to be furnished a transcript of the Rule 29 motion hearing is still pending. Thus it is apparent, by the Appellant's own pending motion, that he has not reviewed or received the record of the hearing which is on appeal. This

is Appellant's responsibility under Rule 207. Respondent submits that this matter should be held in abeyance pending resolution of Appellant's motion.

WHEREFORE, Respondent has made these motions.

Respectfully submitted,

ALAN WILSON

Attorney General

JOHN W. McINTOSH

Chief Deputy Attorney General

DONALD J. ZELENKA

Senior Assistant Deputy Attorney General

S.C. Bar #5758

ATTORNEYS FOR RESPONDENT

By: 

Donald J. Zelenka

P.O. Box 11549

Columbia, SC 29211

November 18, 2013

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ATTACHMENT ONE

APPELLANT'S Initial Pro Se Brief of Appellant, received by Counsel October 22, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
COURT OF GENERAL SESSIONS
JOHN C. HAYES, III, Circuit Court Judge

STATE OF SOUTH CAROLINA, RESPONDENT,

V.

ANTONIO GORDON, APPELLANT.

INITIAL PRO-SE BRIEF OF APPELLANT

Appellate Case No. 1998-65-46-2847;
2850; 2851; 2852

Appellate Case No. 2013-000975

Antonio Gordon
ECI F4-B-209
610 Hwy 9 West
Bennettsville, SC
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SOUTH CAROLINA COURT OF APPEALS

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Statement of the Case

This matter comes before the Court by way of an Appeal from an order denying the Appellant's motion for a new-trial based on after discovered evidence. The Appellant and his three co-defendants, Monta Gordon, Terrance McCreary, and Gary Moffat, were all prosecuted in connection with their involvement in the shootings of the victim Erik Krenn. The state's theory of the case was that the Appellant was the shooter. All of the Appellant's co-defendants eventually cooperated with the state and intended to testify that the Appellant was the shooter. The Appellant ultimately pleaded guilty on July 16, 1999, to murder and attempted arm robbery, among other charges, and was sentenced to an aggregate forty-year imprisonment term.

The Appellant subsequently filed a Rule 29(b), ~~scrimp~~, motion for a new trial based on after-discovered evidence. In this motion, the Appellant alleged that two of his co-defendants - Monta Gordon and Terrance McCreary - had recanted their earlier statements and asserted that they were willing to tell the truth about the night of the incident. Principally, the Appellant averred that Monta Gordon would admit to firing the shot that killed the victim and that McCreary would admit that Monta Gordon, not the Appellant as previously stated, exited and reentered his vehicle with a firearm.

On March 4 and 8, 2013, the motion was heard by the lower Court. The Appellant, Monta Gordon, and Terrance McCreary all testified at the hearing, with both the Appellant and Monta Gordon testifying that Monta Gordon was the shooter and McCreary testifying Monta Gordon exited and reentered the vehicle he was driving with a firearm. On April 22, 2013, the lower Court filed an order denying the motion on several grounds.

STATEMENT OF ISSUES ON APPEAL

Did the lower court abuse its discretion and commit error of law when it erroneously found that Rule 29 (b), SCCrIMP, motions cannot be filed by Appellant because he plead guilty?

Did the lower court abuse its discretion and commit error of law when it did not understand the scope of review?

Did the lower court abuse its discretion and commit error of law when it erroneously found that the Appellant's evidence was not after-discovered?

Did the lower court abuse its discretion and commit error of law when it erroneously denied the motion on the merits?

THE LOWER COURT ABUSED IT
DISCRETION AND COMMITTED ERROR
OF LAW WHEN IT ERRONEOUSLY
FOUND THAT RULE 29(b), SCCRIMP,
MOTION CANNOT BE FILED BY
APPELLANT BECAUSE HE PLEAD
GUILTY.

The lower court abused its discretion and committed error of law when it categorically found that Appellant could not file a Rule 29(b), SCCRIMP, motion because the Appellant's conviction was obtained through a guilty plea. See Order at 18-19. However, in State v. DeAngelis, 256 S.C. 364, 182 S.E.2d 732 (1971), the Supreme Court reviewed a motion for a new trial based on after-discovered evidence on the merits even though the conviction was obtained through a guilty plea. The Supreme Court specifically held that "motions of this character should be entertained and granted in order that wrongs done may be remedied". Id. at 369, 182 S.E.2d at 734. The lower court attempted to distinguish DeAngelis by finding that case was decided on the basis of the criminal defendant's failure to attach affidavits to his motion. Order at 18-19. By finding that Rule 29(b), SCCRIMP, motion does not apply to guilty pleas, the lower court erred in ignoring the fact that DeAngelis actually ruled on the merits of the motion and erred in ignoring DeAngelis' clear directive that

Such motions "be entertained" by trial courts. 256 S.C. at 369, 182 S.E.2d at 734. Rule 29(b), scrimp, motions can, therefore, be brought following guilty pleas. The lower court finding to the contrary should be reversed.

**THE LOWER COURT ABUSED
DISCRETION AND COMMITTED
ERROR OF LAW WHEN IT DID
NOT UNDERSTAND THE SCOPE OF REVIEW**

In State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009), the Supreme Court held that motion for a new-trial based on after-discovered evidence should not be denied simply because the witnesses supporting the motion lack credibility "because a witness may lack persuasive credibility and still create reasonable doubt". 381 S.C. at 170, 672 S.E.2d at 567. The lower court found this language "confusing and hard to work into its analysis" and then proceeded to find that the motion should be denied simply because it did not find the Appellant's witnesses credible. Order at 21. The Appellant asserts that the lower court committed error of law and abused its discretion because Mercer directed the lower court to look to the nature of the evidence supporting the motion and determine whether or not "reasonable doubt was created" by the nature of the testimony regardless of the credibility of the witness giving the testimony. By ignoring that directive and findings

That the Appellant's motion should fail simply because his witness lack credibility, the trial court erred.
State v. Mercer, 381 S.C. at 170, 672 S.E.2d at 567.

THE LOWER COURT ABUSED IT
DISCRETION AND COMMITTED
ERROR OF LAW WHEN IT FOUND
THAT THE APPELLANT'S EVIDENCE
WAS NOT AFTER-DISCOVERED

The lower court found that Appellant's evidence was not after-discovered because the Appellant had known from the day of the shooting that he was not the shooter. Order 22-23. In other words, the lower court found that the evidence either (1) was discovered prior to trial; or (2) "could . . . in the exercise of due diligence have been discovered prior to the trial."

State v. Spann, *Supra*, 381 S.C. at 619, 513 S.E.2d at 99.

This finding is erroneous as a matter of law because the Appellant's motion was not based upon his assertion that he was not the shooter but was based instead on the newly discovered evidence that both Monta Gordon and McCreary, who were both set to testify against him and identify him as the shooter if he proceeded to trial, would now essentially testify that Monta Gordon was the shooter. Plainly, the fact that they would identify Monta Gordon as the shooter could not have been known prior to the trial because they were going to testify that the Appellant

~~was the shooter at his trial. It is difficult to~~
was the shooter at his trial. It is difficult to envision a clearer example of after-discovered evidence than the recantation of Potential testimony, aside from actually recanted testimony. If the trial court's ruling is followed, recanted testimony can never serve as the basis for after-discovered evidence because someone, either the criminal defendant or witness, would have known the truth before the witness testified falsely at trial. Consequently, the lower court's ruling on this issue is controlled by error of law, Spann, and should be reversed.

THE LOWER COURT ABUSED IT
DISCRETION AND COMMITTED
ERROR OF LAW WHEN THE LOWER
COURT ERRONEOUSLY DENIED THE
MOTION ON THE MERITS

The lower court found that the Appellant's motion for a new trial should be denied because his witnesses were "fabricating testimony" in a concerted effort to give the Appellant a new trial. Order at 23. The Appellant asserts that this finding is erroneous for a number of reasons. First, the Appellant asserts that the confession of a co-conspirator that he was the shooter would "create reasonable doubt" such that a new trial is warranted. State v. Mercer, supra, 381 S.C. at 170, 672 S.E.2d at 567. FN 1 Second, the Appellant

FN 1 New trial should be granted if affidavits would lead any reasonable mind to inference that newly-discovered evidence probably would change result. State v. Tripp, 130 S.E. 888

Asserts that lower court's misapplication of Mercer infects the factual findings such that the lower court's reasoning for denying the motion cannot be upheld. Third, the Appellant asserts that a review of the factual record, will show that there are inconsistencies in the testimony given by all three witnesses, making it difficult for the lower court's conclusion of collusion to withstand serious scrutiny. After all, if the Appellant, Monta Gordon, and McCreary all conspired to free the Appellant through the giving of false testimony, their testimony should match word-for-word. It does not. Accordingly, the Appellant asserts that this portion of the lower court's ruling is controlled by error of law.

Conclusion

Based on all of the above, the Appellant respectfully submits that this court should find that the lower court committed error of law and abused its discretion. Accordingly, the Appellant requests that this court order a new trial.

This 17th day of October 2013

Antonio Gordon
Antonio Gordon 259798
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610 Hwy 9 West
Bennettsville, SC 29512

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000975
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THE STATE,

Respondent,

v.

ANTONIO GORDON,

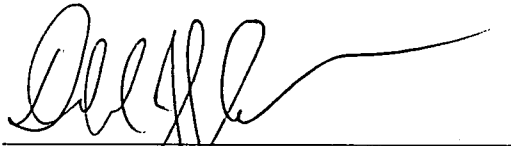
Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondent's Motion to Clarify Status of "Initial Pro Se Brief of Appellant" And to Stay Pending Resolution of Appellant's Motion to Be Furnished Transcript on:

Antonio Gordon, #259798
Evans Correctional Institution
610 Highway 9 West
Bennettsville, SC 29512

by depositing a copies in the United States Mail this 18th day of November, 2013.

A handwritten signature in cursive script, appearing to read "D. Zelenka", written over a horizontal line.

DONALD J. ZELENIKA

Senior Assistant Deputy Attorney General

Handwritten initials "M" and "x2" in the left margin.



ALAN WILSON
ATTORNEY GENERAL

November 18, 2013

Honorable Jenny A. Kitching
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: State v. Antonio Gordon
Appellate Case No. 2013-000975

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Motion to Clarify Status of "Initial Pro Se Brief of Appellant" and to Stay Pending Resolution of Appellant's Motion to be Furnished Transcript in the above-referenced case for filing. By copy of this letter, I am serving Appellant with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

Cc: Antonio Gordon, #259798

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SC COURT OF APPEALS