STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CLARENDON COUNTY
Court Of General Sessions
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2025-000772

THE STATE, Respondent,

v.

GEORGE SMITH, Appellant.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER-STATEMENT OF ISSUE ON APPEAL

I. Whether the court properly found Counsel did not have an actual conflict of interest where Counsel's prior representation of Victim's brother did not present a situation with divided loyalties.

STATEMENT OF THE CASE

Appellant was indicted in August of 2008 by the Clarendon County Grand Jury for assault and battery with intent to kill, armed robbery, and possession of a weapon during a violent crime.

On December 8, 2009, Appellant proceeded to a jury trial and was found guilty as indicted. Judge Cothran sentenced Appellant to twenty years' imprisonment for assault and battery with intent to kill,[1] twenty-five years for armed robbery, and five years for possession of a weapon during a violent crime, with all sentences running concurrently.

On appeal Appellant argued the trial judge erred in sentencing Appellant to twenty-six years for assault and battery with intent to kill, which only carries a maximum sentence of twenty years. The State argued the issue was not preserved for review. The South Carolina Court of Appeals affirmed. State v. Smith, Op. No 2012-UP-350 (S.C. Ct. App. filed June 6, 2012). The remittitur was sent on June 25, 2012.

Appellant filed a timely application for post-conviction relief on August 22, 2012. An evidentiary hearing was held on September 10, 2014, before the Honorable Clifton Newman. Judge Newman issued an Order of Dismissal signed on September 21, 2016, and filed on November 3, 2016, denying and dismissing the application with prejudice. Appellant filed a timely Notice of Appeal of the denial of his post-conviction relief application on January 9, 2017. The Supreme Court denied the petition on April 19, 2018.

Subsequently, Appellant moved for a new trial pursuant to Rule 29(b), SCRCrimP. An evidentiary hearing was held on July 28, 2023, before the Honorable R. Ferrell Cothran, Jr. The motion was denied on April 16, 2025. Appellant filed a timely notice of appeal.

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[1] Although Judge Cothran originally sentenced Appellant to twenty-six years' imprisonment for ABWIK, at some point the sentence was changed to twenty years. (R. p. 193).

STATEMENT OF THE FACTS

Appellant's convictions arose from a shooting that took place on April 6, 2008, in Clarendon County. (R. p. 81). The victim had known Appellant, who went by Chips, for some time, but never considered him a friend. (R. p. 35; p. 66). The victim was walking home from a bar in the very early morning. (R. p. 63). He heard a gun click, looked, and saw Appellant behind him. (R. p. 33). Victim and his wife testified Appellant shot Victim in the leg. (R. p. 34; p. 70). Additionally, Investigator Burgess testified that Victim identified Appellant as the shooter shortly after the incident. (R. p. 85). Victim's wife was also able to identify Appellant out of a photographic lineup. (R. p. 88). Victim also stated Appellant demanded and took Victim's silver and gold neck chains. (R. p. 32; p. 39). Victim testified Appellant demanded money, but that Appellant did not have any to give. (R. p. 39). Victim stated that after Appellant shot him in the leg, he aimed the gun at the victim's face and pulled the trigger but the gun didn't fire. (R. p. 38).

Appellant was found guilty as indicted. Appellant was sentenced to twenty years' imprisonment for assault and battery with intent to kill,[2] twenty-five years for armed robbery, and five years for possession of a weapon during a violent crime, with all sentences running concurrently.

Subsequently, Appellant sought post-conviction relief on the ground that Counsel failed to properly advise Appellant of a conflict of interest. (R. p. 287). The court denied relief, stating Appellant failed to present any evidence of a conflict and noting Counsel stated he did not remember representing Victim's brother. (R. pp. 287-288). Appellant also raised five other issues regarding trial Counsel's alleged deficiencies. (R. p. 278). Ultimately, the court found Counsel was not ineffective. (R. p. 293). The PCR court noted the evidence against Appellant was

[2] As previously mentioned, that sentence was originally twenty-six years. (R. p. 193).

"overwhelming" as three witnesses identified Appellant as the attacker and two of them testified. (R. pp. 286-287).

At the hearing for a new trial on July 28, 2023, Appellant introduced a public index printout showing Victim's brother was arrested on April 24, 2009, and showing a disposition date of July 6, 2009. (R. p. 325). It was noted that Counsel represented Appellant in his jury trial in December of 2009. (R. p. 326). Appellant stated had he known of Counsel's previous representation he would have sought removal. (R. p. 327). Appellant's counsel stated at the hearing "I cannot really explain why this was not discovered at the appropriate time[.]" (R. p. 328). Appellant further argued that case law supported an examination on the merits. (R. p. 328). The court denied relief, noting that the prior representation was discoverable in 2009 and noting the representation was tangential and inconsequential to the case at issue. (R. pp. 336-337).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016). "On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). "A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978).

ARGUMENT

I. The court properly found Counsel did not have an actual conflict of interest because Counsel's prior representation of Victim's brother did not present a situation with divided loyalties.

Appellant alleges the court erred in failing to award a new trial because Counsel had an actual conflict of interest. Relief is not appropriate because the prior representation could have been discovered through reasonable diligence. Even so, Counsel did not have an actual conflict of interest because the prior representation was inconsequential and presented no competing interest.

Rule 29(b) of the South Carolina Rules of Criminal Procedure provides that "A motion for a new trial based on after-discovered evidence must be made within one 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. In order to warrant the granting of a new trial on the ground of after-discovered evidence, the movant must show the evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999). When the issue largely hinges on the issue of credibility, this Court has deferred the determination of the trial court. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court).

"The guarantee of conflict-free representation ensures that a defendant is provided assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations." People v. Yost, 184 N.E.3d 269, 275 (Ill. 2021).

The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993). Yet, a defendant need not demonstrate prejudice if there is an actual conflict of interest. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). In Duncan v. State, 281 S.C. at 438, 315 S.E.2d at 811 (1984), our Supreme Court set forth the following test to determine when an actual conflict of interest occurs:

> [W]hen a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.

Massachusetts courts have noted an "actual" conflict of interest arises where the independent professional judgment of counsel is impaired, by his or her own interest, or by the interests of another client. 30A Mass. Prac., Criminal Practice & Procedure § 19:29 (4th ed.). Their courts have also stated that "[b]ecause the range of interests and obligations that might conceivably give rise to a potential conflict is unlimited . . . the defendant carries a special burden to prove, without mere conjecture or speculation, both the existence and the precise character of the alleged conflict of interest." Com. v. Mosher, 920 N.E.2d 285 (Mass. 2010).

Our courts have found instances where counsel's interest and obligations went beyond mere speculation. See Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007) (ordering a new trial where attorney simultaneously represented a defendant and the defendant's father,

mother, and brother, all of whom were charged as accessories after the fact); State v. Gregory, 364 S.C. 150, 154, 612 S.E.2d 449, 451 (2005) (finding "Gregory's attorney had an actual conflict because he placed himself in a 'situation inherently conducive to divided loyalties' by simultaneously representing Gregory and the assistant solicitor who was handling his criminal case.").

First, as noted by the State and just as the circuit court judge found when denying relief, Counsel's representation could have been discovered through reasonable diligence in 2009. (R. p. 330). Rule 29 plainly requires the information not be ascertained through reasonable diligence and such information could have reasonably been obtained here. The court noted that the Public Defender's office had the capability to track case assignments at the time and anyone relevant to the case could have obtained the information presented here. Since the statute is clear and the information was available prior to trial, relief under this rule is not appropriate. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute").

Second, Appellant failed to establish an actual conflict because Counsel's representation did not present a situation with divided loyalties. The court properly noted that the representation of Victim's brother was "tangential and unrelated" to the case at issue. The mere fact that Counsel also represented Victim's brother at an earlier point in an unrelated matter does not establish Counsel had a duty to take action detrimental to Appellant's case. Courts have gone so far as to find that a mere relationship between Counsel and a Victim does not alone establish a conflict. People v. Yost, 184 N.E.3d 269, 281 (Ill. 2021) ("Because [counsel's] representation of the victim was not contemporaneous with his representation of defendant, we reject the appellate court's conclusion that a reversible per se conflict of interest exists as a matter of law."); White

v. State, 877 S.E.2d 649 (Ga. Ct. App. 2022) (finding counsel's connection to victim did not create actual conflict of interest).

Here, Counsel's alleged conflict does not go beyond conjecture or speculation. In fact, the representation was so tangential and inconsequential Counsel stated at the PCR hearing that he did not represent Victim's brother[3]. (R. p. 252). Nothing in the record establishes the relationship between Counsel and Victim's brother created an actual conflict such as the simultaneous representation situations presented in Staggs and Gregory. In fact, the representation of Appellant was several months after the representation of Victim ended. Accordingly, Appellant failed to show Counsel's representation presented an actual conflict.

Additionally, Counsel's alleged "lack of preparedness" does not show divided loyalties. Because Appellant has failed to establish a conflict of interest, allegations of deficiency are properly addressed through other avenues. Notably, the PCR court found Counsel was not ineffective and stated the evidence against Appellant was overwhelming. (R. pp. 286-287).

This Court should affirm.

[3] The court noted that it was reasonable to believe Counsel did not draw a connection between Appellant and Victim's brother due to the limed amount of time he represented Victim's brother.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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