

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of General Sessions

Appellate Case No. 2025-000772

The Honorable R. Ferrell Cothran, Circuit Court Judge

State of South CarolinaRespondent,

v.

George Smith.....Appellant.

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FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On December 8, 2009, George Smith was convicted after a jury trial before the Honorable R. Ferrell Cothran of assault and battery with intent to kill (ABWIK), armed robbery, and possession of a gun during the commission of a violent crime. He was sentenced to twenty-five years' imprisonment. Harry Devoe represented him at trial. The victim in the case was Kelvin Black.

Mr. Smith suspected that, during the course of his representation, Devoe simultaneously represented a member of the victim's family, Brodtus Black, a conflict Devoe never disclosed to him. Although Mr. Smith attempted to raise this issue as grounds for post-conviction relief (PCR), Devoe testified at the hearing that he had never heard of Brodtus Black before that day, and PCR counsel was unable to locate records to evidence the conflict. The PCR court ruled Smith failed to prove the conflict and denied relief. ROA 287-288.

In March 2019, Mr. Smith obtained evidence that Devoe had an actual conflict and filed a pro se motion for a new trial pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure on September 26, 2019, and accompanying memorandum October 17, 2019. ROA 299-319. After no action occurred on the filed motion, Smith retained the undersigned counsel. Counsel then filed an amended Rule 29(b) petition on August 29, 2022. An evidentiary hearing was held at the Clarendon County courthouse on July 28, 2023. The motion was denied on April 16, 2025.

This appeal timely follows.

ARGUMENT

- I. **The circuit court erred in not granting George Smith a new trial pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) when Smith proved at the evidentiary hearing that his trial counsel operated under an actual conflict of interest during the pendency of his representation.**

Relevant Facts

On April 6, 2008, in Clarendon County, South Carolina, Kelvin Black was shot in the leg during a robbery. The alleged assailant was George Arsenio Smith, known to the victim by the nickname "Chips." ROA 30. According to testimony, Smith approached Black on a lit path while Black was walking home from a club, demanded money at gunpoint, and shot Black in the leg when he continued walking. ROA 32. Black then returned home, where his wife saw the suspect and later identified him.

Kevin Black testified that on April 6, 2008, while walking home from a bar between 2-4:00am, he encountered "Chips" who demanded Black's chains and money while holding a black handgun. ROA 30, 31. On cross-examination, Black admitted that he "had a lot of drinks" that night at the bar. ROA 42. Tasha Cannon, Black's wife, confirmed that she heard a disturbance and saw "Chips" outside her apartment shortly after the shooting. ROA 66.

Investigator Burgess described his role in processing the crime scene and interviewing witnesses. He confirmed that Black immediately identified the shooter as "Chips" and later confirmed the identification in a photo lineup. Burgess explained how the photo lineup was

composed and confirmed that Smith was not apprehended until two months later. He detailed the discovery of blood at the scene and several shell casings, including a live round. Burgess acknowledged the gun was never recovered, and no forensic testing linked Smith to the scene. On cross-examination, the defense challenged the reliability of the photo identification and pointed to the lack of physical evidence (e.g., no fingerprints, DNA, or firearm recovery). ROA 78- 104.

At the hearing on the new trial motion, Smith testified that after his PCR hearing, he obtained proof that his trial counsel, Mr. Devoe, represented Brutus Lamonte Black, the victim's brother, in another matter. ROA 324. He identified an entry from the public index that showed that Devoe represented the defendant and that evidence was entered into the record. ROA 325. Devoe represented Brutus Lamonte Black at the same time he represented Smith in this case. ROA 326. Smith testified that, had he known of that relationship, he would have wanted trial counsel to be replaced with another attorney. ROA 327.

“To prevail on a motion for a new trial based on after discovered evidence, a defendant must show (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching.” *State v. Needs*, 333 S.C. 134, 157–58, 508 S.E.2d 857, 869 (1998).

“To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance.” *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). “An actual conflict of interest occurs where an attorney

owes a duty to a party whose interests are adverse to the defendants.” *State v. Gregory*, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). “[T]he sixth amendment requires that **a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client.**” *Id.* at 150, 612 S.E.2d at 450–51 (quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979)). “[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief.” *Staggs v. State*, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007).

Here, Mr. Smith’s trial counsel, Harry Devoe, had an actual conflict of interest when he undertook to represent both Mr. Smith and Brodtus Black—the brother of the victim in Mr. Smith’s case. Brodtus Black was arrested April 28, 2009, and pleaded guilty July 6, 2009, to various drug charges; Devoe was his counsel of record. ROA 311. Devoe’s deficient representation reveals how these divided loyalties dampened the ardor of his defense. The entirety of his representation was colored with a lack of preparation or real understanding of the issues. He admitted at the PCR hearing that the trial was called “with no notice” the day before it started but said he did not request a continuance because he was “prepared enough” to go to trial. ROA 249-251. Devoe did not even bring to the trial court’s attention that the trial was called without warning because the judge was a former solicitor, so Devoe supposed the judge would just know. ROA 255.

Hardly ready for trial, Devoe’s lack of preparedness is apparent. The State’s case was based entirely on eye-witness testimony—there was no deoxyribonucleic acid or other forensic evidence. ROA 208. Yet Devoe did not provide any meaningful defense. He failed to investigate a potential

alibi witness, Levi Lang, with whom Mr. Smith was staying at the time of the robbery¹ and although Devoe testified Mr. Smith's mother and family were going to "get some witnesses" he had no idea why the witnesses did not show up for trial except for the fact that the trial was called without notice. ROA 196, 249. He never requested a continuance or, apparently, looked for witnesses himself. Importantly, although this was an eyewitness case, Devoe failed to meaningfully challenge the credibility of Brodtus Black's family members—namely the victim Kelvin Black and Kelvin's wife Tasha Cannon. Mr. Smith had other charges pending against him also involving Cannon that were ultimately dismissed, and Mr. Smith wanted Devoe to bring that to the jury's attention as motive for identifying him as the shooter. ROA 205-08, 272.

And although where there is an actual conflict of interest, a defendant need not prove prejudice, Devoe's deficient representation was prejudicial. Even though he had been a public defender for well over a decade, Devoe failed to challenge the illegality of the twenty-six-year sentence Mr. Smith received for ABWIK, despite the fact that the statutory maximum is twenty-years' imprisonment. He instead only asked the court to reduce the sentence to the (still illegal) twenty-five-years' imprisonment the judge had given Mr. Smith for the armed robbery conviction. The judge declined and stated "the fact that he doesn't - - - didn't have a significant records and he is that young, is the only reason I didn't max him." ROA 149. The judge was entirely mistaken on the sentencing framework and was under the impression he was giving a favorable sentence based on Mr. Smith's age, so Devoe's failure to clarify the law was undoubtedly detrimental to his

¹ At the PCR hearing, Devoe testified "[t]he first time I ever heard of Levi, uncle, is today." ROA 248. However, he similarly states he "[n]ever heard the name Broadus [sic] before today," ROA 252, whom he represented. ROA 311.

client. Had the judge known the actual outer sentencing limits of the ABWIK charge, he may have modified the sentences to reflect the leniency based on age he thought he was doing.

CONCLUSION

The Court should remand for a new trial.

Respectfully submitted,

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