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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable S. Bryan Doby, PCR Action Judge
2023-CP-10-04841

KANDY GILLIARD, #275605,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Kandy Gilliard appeals the denial of her post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable S. Bryan Doby, circuit court judge, on June 16, 2026, and was denied by written order issued filed on August 17, 2026.

Applicant received notice of the judgement on August 17, 2026.

/s Chelsey F. Marto
Chelsey F. Marto, Esquire
Attorney for the Applicant
The Law Office of Chelsey F. Marto, LLC
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(864)-404-5583

Other Counsel of Record:
Sydney Willingham, Esquire
Office of the Attorney General, State of SC
P.O. Box 11549
Columbia, SC, 29211-1549

Respondent.

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

Kandy Gilliard | Order Granting Respondent's Motion to Dismiss | 2023-CP-10-04841

Esquire, represented Applicant. Assistant Solicitors Dale DuTremble and Damon Cook prosecuted the case. The jury convicted Applicant as indicted, and Judge Lockemy sentenced Applicant to life imprisonment for murder and a concurrent sentence of ten years for strong-arm robbery.

Applicant filed a timely notice of appeal. Appellate Defender Robert Dudek perfected the appeal pursuant to Anders.¹ The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Gilliard, Op. No. 2004-UP-296 (S.C. Ct. App. filed May 5, 2004). The remittitur was issued on June 11, 2004. Applicant subsequently filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the Supreme Court denied Applicant's petition for rehearing.

FIRST PCR APPLICATION: 2005-CP-10-00619

On February 15, 2005, Applicant filed a PCR application alleging:

1. "Trial counsel was ineffective in preparing and representing me at trial."
2. "Lackadaisical effort by Appellate Defense Attorney Robert M. Dudek."

On March 14, 2007, and May 22, 2007, an evidentiary hearing was convened before the Honorable Roger M. Young, Sr.² Applicant was present at the hearing and represented by William Runyon, Esquire. Assistant Attorney General Jeanette Van Ginhoven represented the State. During the hearing, Judge Young ordered Applicant to be evaluated by the South Carolina Department of Mental Health. On July 23, 2007, Judge Young issued an order denying the PCR application.

SECOND PCR APPLICATION: 2012-CP-10-00383

¹ Anders v. California, 386 U.S. 738 (1967).

² During the first hearing, Judge Young ordered Applicant be evaluated by the South Carolina Department of Mental Health. According to Judge Young's final order Applicant was evaluated and found to possess the capacity to understand the proceedings against her and assist in her defense.

On January 17, 2012, Applicant filed her second PCR application alleging:

1. Subject Matter jurisdiction
2. “Dismissal of indictment, pre-indicmtent delays 18 USCA”
3. “Nolle Pross. 5th Amendment USCA”
4. “Self-Incrimination”
5. Ineffective Assistance of Counsel
 - a. “Attorney failed to charge jury on Nolle Pross. And indictments.”

On January 17, 2013, the Honorable Roger Young, Sr. issued a conditional order of dismissal. Applicant filed a response to the conditional order of dismissal alleging she was denied the right to appeal the dismissal of her previous post-conviction relief application. An evidentiary hearing on the matter was convened November 21, 2013. Applicant was present and represented by Christopher L. Murphy, Esquire. Assistant Attorney General Ashleigh R. Wilson represented the State. During the hearing, the State consented to the granting of an appeal pursuant to Austin v. State.³ A consent order was signed and filed by the Honorable Stephanie McDonald. In this order, the Court directed that the resolution of all the other allegations raised in the Applicant’s application be addressed in a separate order.

On April 15, 2014, a hearing convened to address the State’s outstanding motion to dismiss. On June 19, 2014, the Honorable R. Markley Dennis issued an order of dismissal denying and dismissing all claims in the application other than Applicant’s claim regarding her right to appeal the denial of her first PCR. That appeal was denied, and the remittitur was returned on January 4, 2017.

³ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

AUSTIN REVIEW OF FIRST PCR: 2005-CP-10-00619

Applicant filed a notice of appeal on June 25, 2014. On January 30, 2015, the South Carolina Supreme Court issued an order to reconstruct the proceedings of the first PCR. The reconstruction hearing was held on March 13, 2015, before the Honorable Roger M. Young. The record was reconstructed.

On September 14, 2015, Appellate Defender Wanda H. Carter filed a petition for writ of certiorari pursuant to Austin v. State and a petition for writ of certiorari in the South Carolina Supreme Court. By written order dated December 16, 2016, the South Carolina Supreme Court granted the petition for writ of certiorari pursuant to Austin v. State and denied the petition for writ of certiorari from the first PCR hearing. The remittitur was sent on January 4, 2017.

FEDERAL HABEAS CORPUS PETITION: 1:17-1029-TMC-SVH

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on June 5, 2017. Applicant set forth the following grounds for relief:

1. Due process violation; denied right to present witness(es).
 - a. The matter of [the] results of a polygraph came up during the original trial [as to] whether it was admissible, enter the preferred evidence; who took or engaged the polygraph test; nevertheless, the test (expert) giver (examiner) was not allowed, permitted to testify at the trial level; she assigned error on appeal therewith.
2. Denied the actual effective assistance of criminal defense trial counsel.
 - a. Criminal defense counsel failed to bring to criminal trial judge[‘s] attention the petitioner was unable to [assist] in her defense after [the] so-called co-defendant took [the] stand at trial; her defense [was that the] government must prove all element[s] of homicide under [the] criminal trial standard; there was apparent mental break in 2000 or 2001.

The State filed its return and motion for summary judgment on August 23, 2017. On October 17, 2017, the Honorable Shive V. Hodges, United States Magistrate Judge, issued the report and recommendation that the State’s motion be granted and Applicant’s petition be denied. Gilliard v. Stirling, 1:17-1029-TMC-SVH.

On November 7, 2017, the Honorable Timothy M. Cain, United States District Judge, adopted the Magistrate's report and recommendation granting the State's motion for summary judgment and dismissed Applicant's petition. Gilliard v. Stirling, 1:17-1029-TMC-SVH.

THIRD PCR APPLICATION: 2019-CP-10-00600

Applicant filed her third application for post-conviction relief on February 5, 2019, alleging the following grounds for relief:

1. "After Newly Discovered Evidence"
 - a. "Evidence that existed at the time of trial – yet then was unknown to Applicant whom later in which upon discovered evidence was found;"
2. "Violation 6th Amendment Rights,"
 - a. "Appellant Attorney failed to raise valid and preserved arguments relating to trial court errors in trial which led to denial of effective assistan[ce] of counsel;"
3. "Ineffective Assistan[ce] of Counsel,"
 - a. "Trial counsel failed to object to trial court allowing material evidence that was not examined into evidence/trial counsel failed to object to trial court allowing non expert witness to give an opinionated testimony in which mislead the jury – when asked about objection she declined to trial court."

The State filed a return and a motion to dismiss, requesting that the allegations be summarily dismissed based on untimeliness and successiveness. The Honorable Jennifer B. McCoy issued a conditional order of dismissal on July 10, 2020. Applicant did not file a response, and the Honorable Roger M. Young, Sr., issued the final order of dismissal on January 20, 2021.

CURRENT APPLICATION

Applicant *untimely* filed this fourth application for PCR on October 2, 2023, alleging the following grounds for relief:

"Applicant's co-defendant, Benjamin L. Johnson testified at Applicant's trial that Applicant was a knowing and active participant in the robbery during which the murder victim was killed. Applicant is informed and believes that Johnson has since recanted the testimony concerning Applicant that he gave at Applicant's trial such that he now asserts that Applicant had no foreknowledge of his intentions on the night of the incident and that Applicant played no role in the alleged crimes."

On June 16, 2026, Applicant, through PCR counsel, amended her application to submit “that they have newly discovered evidence consisting of an exculpatory affidavit from co-defendant Benjamin Johnson clearing Ms. Gilliard’s name.” Applicant requests relief in the form of a new trial.

ORDER GRANTING MOTION TO DISMISS

Respondent moved for summary dismissal alleging the records attached to the return and motion show that the application is barred by the statute of limitations, successive to Applicant’s previous applications, and for failing to make a *prima facie* showing of newly discovered evidence pursuant to S.C. Code Ann. § 17-27-20. A hearing was held on June 16, 2026, before the Honorable S. Bryan Doby on the sole allegation of newly discovered evidence. Applicant testified on her own behalf and presented the testimony of her co-defendant, Benjamin Johnson. Having reviewed the application, and the return and motion, this Court agrees the motion to dismiss should be granted and makes the following findings:

Newly Discovered Evidence

Applicant’s assertion that she is being held in custody unlawfully as a result of newly-discovered evidence, such that she should be entitled to a new trial, is without merit. Specifically, Applicant alleges that the affidavit presented by her co-defendant is exculpatory.

The Act states a person may institute a PCR action if “there exists evidence of material facts, not previously presented and heard, that require vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). The PCR application must be filed within one year of the date of actual discovery of the facts by the applicant, or within one year of the date on which the facts could have been ascertained through the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(C). An applicant requesting a new trial based on after-discovered evidence

following a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983); see Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993) (setting forth the five factors to be analyzed when considering a newly-discovered evidence claim) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)). However, the granting of a new trial based on after-discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); see also State v. David, 14 S.C. 428, 432 (1881) (“There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up . . .”).

Findings

This Court finds that Applicant has failed to meet her burden in demonstrating newly discovered evidence pursuant to Hayden v. State. Hayden, 278 S.C. 610, and Caskey, *supra*. Applicant failed to present any credible evidence to support her allegation. Benjamin Johnson was Applicant’s co-defendant in the crime she was convicted of in this case. Mr. Johnson entered a guilty plea to the same charges arising from the same incident Applicant was convicted of from January 2000, when Applicant and Mr. Johnson robbed a business. During that robbery, Mr. Johnson strangled the victim with an extension cord, causing her death by asphyxiation. His plea was entered on the same date as the beginning of Applicant’s trial. Mr. Johnson was sentenced to thirty years for murder. As the record reflects, Mr. Johnson testified at Applicant’s trial as to her involvement in the crime. (Trial Tr. pp. 435-483).

In support of her claims, Applicant presented an affidavit and Mr. Johnson's testimony at her PCR hearing. Case law holds that “[r]ecantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.” State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (quoting State v. Whitener, 228 S.C. 244, 264, 89 S.E.2d 701 (1955)). The affidavit and testimony, both presented by Mr. Johnson, directly contradicted one another. In his affidavit, Mr. Johnson writes, “Ms. Kandy Gilliard did not participate[] in murder or crime that occurred.” However, at the PCR hearing, Mr. Johnson testified Applicant was involved in the crime and that the two discussed the plan for the robbery on multiple occasions. Mr. Johnson also testified he is getting out [of prison] soon because he took the plea and therefore has nothing to lose. This Court finds the testimony of Benjamin Johnson *not credible* on this topic. As indicated by his own testimony at the PCR hearing, Mr. Johnson faces no detriment because he is already currently serving his sentence for the same crime and is set to be released soon.

Moreover, the jury was charged on the hand of one is the hand of all instruction in this case. (Trial Tr. pp. 947-948). Under the doctrine we refer to in South Carolina as “the hand of one is the hand of all,” the State proves the defendant guilty by proving he had a mutual plan or agreement with another person to commit one crime, and during the course of committing that initial crime, the other person committed a second crime they had not agreed to commit. State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017); see also Butler v. State, 435 S.C. 96, 97-98, 866 S.E.2d 347, 348 (2021) (“Under the theory the ‘hand of one is the hand of all,’ when two people join together to commit a crime, and during the commission of that crime one of the two commits another crime, both may be criminally liable for the unplanned crime if it was a natural and probable consequence of their common plan to commit the initial crime.”). So here, even if corroborated by his testimony at the PCR hearing, Mr. Johnson’s affidavit is insignificant.

Accordingly, Applicant's recent discovery —now more than two decades after her trial — is newly available and not newly discovered and could have been discovered before, during, or directly after her trial; thus, it fails the third prong, “could not by the exercise of due diligence have been discovered before the trial,” as required by Hayden, *supra*. See, e.g., United States v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007) (“Every element of this test . . . is essential, and a failure to establish any one element will defeat the motion.”).

Accordingly, this Court grants Respondent’s motion to dismiss the application based on Applicant’s failure to establish a *prima facie* case of newly discovered evidence.

[CONCLUSION PAGE TO FOLLOW]

CONCLUSION

IT IS THEREFORE ORDERED that, for the reasons set forth herein, Respondent's motion to dismiss is granted, and this action shall be dismissed with prejudice.

This Court notifies the Applicant that she must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That Respondent's motion to dismiss is granted;
2. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
3. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.



S. BRYAN DOBY
Presiding Judge 2784
Ninth Judicial Circuit

Bishopville, South Carolina



ALAN WILSON
ATTORNEY GENERAL

August 11, 2026

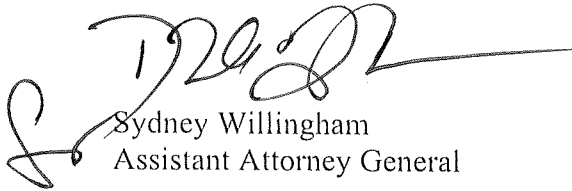
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: Kandy Gilliard, #275605 v. State of South Carolina
Case No. 2023-CP-10-04841

Dear Ms. Armstrong:

Enclosed for filing, please find the original Order Granting Respondent's Motion to Dismiss, signed by the Honorable S. Bryan Doby, for the above-captioned Post-Conviction Relief case. Please forward a time-stamped copy back to our office for our file.

Sincerely,


Sydney Willingham
Assistant Attorney General

SW/vh

cc: Chelsey F. Marto, Esquire