

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2013-000919

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

NATHANIEL GLENN, JR.,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Assuming the issue is preserved for review, the circuit court judge properly denied Appellant's new trial motion pursuant to Rule 29(b), SCRCrimP, without a hearing where the evidence Appellant claims is "after discovered" was available at the time of trial.

STATEMENT OF THE CASE

Appellant was indicted in December 2002 in Greenville County for trafficking in cocaine. Appellant proceeded to trial in July 2004 and was convicted as indicted. On July 13, 2004, the Honorable Edward W. Miller sentenced Appellant to twenty-seven (27) years for trafficking cocaine, second offense. A notice of appeal was filed with the South Carolina Court of Appeals, but Appellant subsequently elected to withdraw his appeal. The Court of Appeals issued an order of dismissal and remittitur on June 23, 2005. Appellant filed his first post-conviction relief ("PCR") application on February 20, 2006. An evidentiary hearing was convened on November 13, 2007 at the Greenville County Courthouse, and thereafter, the Honorable G. Edward Welmaker denied relief on December 27, 2007. Appellant filed a notice of appeal, but the appeal was denied and dismissed on May 28, 2009. Appellant subsequently filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina on August 13, 2009. Relief and a certificate of appealability were denied on April 26, 2011. Appellant then filed a second PCR application on November 18, 2009. A conditional order of dismissal was filed on April 5, 2010, and the matter was finally dismissed by order dated July 7, 2010. Appellant's motion for rehearing was denied by order dated August 3, 2010. Appellant filed a notice of appeal in the South Carolina Supreme Court, but the appeal was subsequently denied and the matter was remitted to the circuit court on February 1, 2011.

On May 19, 2011, Appellant filed a *pro se* motion for new trial pursuant to Rule 29(b), SCRCrimP. Subsequently, Appellant retained Tommy Thomas, Esquire, to represent him in the matter, and on January 14, 2013, counsel submitted an Amended Motion for New

Trial Based on After-Discovered Evidence Pursuant to Rule 29(b), SCRCrimP & SCRCP (b)(1), (3), & (5). On March 19, 2013, the State submitted a motion to dismiss Appellant's amended motion for new trial. On April 10, 2013, Judge Letitia H. Verdin filed an order denying relief on the basis that the evidence was not after discovered and that Appellant had previously filed two applications for post-conviction relief which had been denied. On April 23, 2013, Judge Edward W. Miller also filed an order denying relief. On April 24, 2013, Appellant's counsel filed a motion to alter or amend the judgment. On June 27, 2013, the State submitted a response. On July 25, 2013, Judge Verdin denied the motion to alter or amend on the basis that Appellant failed to file his post-trial motion within ten days of trial as required by Rule 29(a) and failed to provide the court with new evidence not considered at trial as required by Rule 29(b).

Meanwhile, on April 26, 2013, Appellant served a *pro se* notice of appeal from Judge Verdin's April 10, 2013 order. The case was assigned an appellate case number. Subsequently, this Court discovered that Appellant was represented by counsel. Following the filing of the motion to alter or amend and the order denying that motion, Appellant's counsel served another notice of appeal and requested that the appeal be consolidated with the *pro se* appeal filed by Appellant. On November 5, 2013, Appellant's counsel served a motion to be relieved as counsel. This motion was granted on December 17, 2013. By order dated January 21, 2014, this Court filed an order stating it was presuming Appellant was proceeding *pro se* and granting Appellant an extension of time in which to file his Initial Brief and Designation of Matter. Appellant subsequently served his Initial Brief and Designation of Matter on March 13, 2014.

ARGUMENT

Assuming the issue is preserved for review, the circuit court judge properly denied Appellant's new trial motion pursuant to Rule 29(b), SCRCrimP, without a hearing where the evidence Appellant claims is "after discovered" was available at the time of trial.

Appellant claims the circuit court judge erred in denying his new trial motion without a hearing because, he asserts, the "clerk's files of the confidential informant's criminal history record, the informant's testimony and the detective's testimony on July 13, 2004, amounts to after-discovered evidence under Rule 29(b), SCRCrimP." (Brief of Appellant, p. 7). Initially, the State would point out that the issue Appellant now raises on appeal is not the same issue Appellant's counsel raised to the circuit judge below in his amended motion for new trial.¹ (See Amended Motion for New Trial filed 1/14/13; Motion to Alter or Amend filed 4/24/13). Accordingly, the issue raised on appeal is not preserved for appellate review. See State v. Tucker, 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995) (a party may not argue one ground below and then argue a different ground on appeal).

Regardless, Appellant's contention on appeal is manifestly without merit because records in existence prior to trial, and testimony occurring at trial, cannot constitute "after-discovered evidence" because they were available at the time of trial. See Rule 29(b), SCRCrimP ("A motion for a new trial based on after-discovered evidence must be made within one (1) 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

¹ Counsel's amended motion for new trial did not adopt or incorporate Appellant's previous *pro se* filings or arguments. (See Amended Motion, filed 1/14/13; see also Motion to Alter or Amend, filed 4/24/13). Furthermore, since Appellant had no right to hybrid representation, when he elected to retain counsel to represent him below, his previous *pro se* filings arguably became "essentially a nullity." Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010).

of reasonable diligence.”); State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998) (“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. Haulcomb, 260 S.C. 260, 270, 195 S.E.2d 601, 606 (1973) (after-discovered evidence is “evidence of facts existing at time of trial of which [the] aggrieved party was excusably ignorant”); State v. Allen, 276 S.C. 412, 414, 279 S.E.2d 365, 366 (1981) (the theory of after-discovered evidence does not extend to evidence available or attainable from public record before the time of trial) (citations omitted); Anderson v. Leeke, 271 S.C. 435, 439-40, 248 S.E.2d 120, 122 (1978) (indicating that matters of public record are available to a diligent defendant); Hayden v. State, 278 S.C. 610, 612, 299 S.E.2d 854, 855–56 (1983) (evidence presented, which was known to the defendant at the time of his trial, cannot be considered “new evidence” for purposes of receiving a new trial).

Since Appellant failed to allege proper after-discovered evidence in support of his new trial motion, the circuit judge did not err by summarily denying the motion.² 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.”).

Appellant’s conviction should be affirmed.

² Appellant cites no authority for the proposition that a circuit court judge is required to provide a defendant with an evidentiary hearing regarding a Rule 29(b), SCRCrimP motion. Generally, post-trial motions may be determined on briefs filed by the parties without oral argument. See Rule 29(a), SCRCrimP; Rule 59(f), SCRCP.

In any event, Appellant's substantive claim is without merit. Appellant claims his exhibits show that Detective Lawson and the confidential informant lied at trial about the nature of the confidential informant's prior charge and about whether or not the charge was still pending. (See Brief of Appellant, p. 10-11). Appellant's exhibits refer to a possession of methamphetamine charge for which an arrest was made by the **Greenville County Sheriff's Department**. (See Appellant's Exhibits). However, at trial, the confidential informant testified about a distribution of cocaine charge for which an arrest was made by the **Greenville City Police Department**.³ (See R. p. 47-48). Thus, Appellant's argument that his exhibits reveal that Detective Lawson and the confidential informant testified falsely at trial is without merit.

³ Notably, Detective Lawson testified she never served an arrest warrant on the confidential informant for this charge, presumably due to his agreement to cooperate with police. (R. p. 24-26).

CONCLUSION

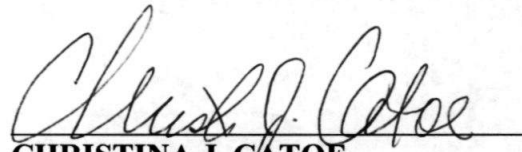
Based on the foregoing, the State requests that this Court deny and dismiss the appeal.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit


CHRISTINA J. CATOE

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ATTORNEYS FOR RESPONDENT

May 7, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2013-000919

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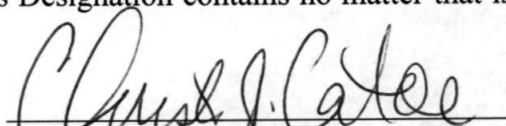
**RESPONDENT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

The Respondent submits that the following should be included in the Record on Appeal:

- (1) All motions (along with attachments or exhibits), responses (and attachments or exhibits), and orders filed in the Greenville Clerk's Office beginning with the May 19, 2011 motion for new trial;
- (2) Trial transcript, p. 24-26; p. 47-48.

ALL DOCUMENTS DESIGNATED SHOULD BE REDACTED IN ACCORDANCE WITH THE MOST RECENT SOUTH CAROLINA SUPREME COURT ORDER ON PERSONAL DATA IDENTIFIERS.

The undersigned hereby certifies this Designation contains no matter that is irrelevant to this appeal.


CHRISTINA J. CATOE

Office of Attorney General
Post Office Box 11549
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May 7, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2013-000919

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

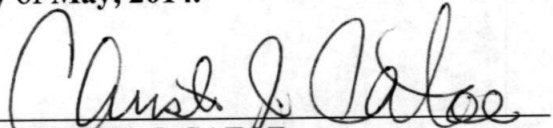
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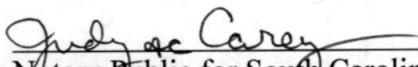
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case have been served upon **Nathaniel Glenn, Jr., # 303563**, Lee Correctional Institution, 1204 Each Church Street, Bishopville, South Carolina, 29010, this 7th day of **May, 2014**.


CHRISTINA J. CATOE
Assistant Attorney General

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SWORN to before me this 7th day of May, 2014.


Notary Public for South Carolina.
My Commission Expires: 5/11/2014

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MAY 07 2014

SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

May 7, 2014

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Nathaniel Glenn, Jr.
Appellate Case No. 2013-000919

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent**, along with the **Designation of Matter** and **Affidavit of Service**, in the above-referenced appeal, which I am serving on Appellant today.

Thank you for your attention to this matter, and please do not hesitate to contact me should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Assistant Attorney General
SC Bar No. 73562

CJC/

cc: Nathaniel Glenn, Jr., # 303563
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

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MAY 07 2014

SC Court of Appeals