

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Clifton B. Newman, Circuit Court Judge

Trial Court Case No: 1994-GS-36-616

THE STATE

Respondent

vs.

GARY LANE PREWITT

Appellant

REPLY BRIEF OF APPELLANT

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JUL 29 2014

SC Court of Appeals

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REPLY

I. Shipes's Recantation Withstands a Close Scrutiny Analysis

Respondent, in its Initial Brief, first argued that [t]he trial court's ruling was not error." (Resp. Initial Brief, p. 9). Respondent next asserted that "Shipes' new testimony would not have changed the result of the trial." Id. In support of these contentions, Respondent stated that "[t]he trial court simply did not find Shipes' hearing testimony credible." Id.

Appellant has previously acknowledged that the "[r]ecantation of testimony ordinarily is unreliable and should be subjected to closest scrutiny when offered as a ground for a new trial." State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1955) [quoting State v. Whitener, 228 S.C. 244, 261, 89 S.E.2d 701, 709 (1955)]. However, Appellant herein asserts that, contrary to existing judicial precedent concerning recantation testimony, Shipes's recantation, when viewed in conjunction with the medical and foundational evidence presented at Appellant's Rule 29(b) hearing, withstands this close scrutiny analysis. As such, Appellant contends that the trial court abused its discretion in denying his Motion.

Because Appellant must distinguish the present litigation with prior litigation concerning recantation testimony, one must compare the facts of prior appellate cases to the present case. Appellant notes that, in the past sixty years, South Carolina appellate courts have issued seven opinions concerning recantation testimony in the context of a Motion for New Trial Based on After-Discovered Evidence.

The first South Carolina appellate opinion is State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955). In Whitener, the new evidence consisted only of an affidavit, signed

by the victim, recanting her trial testimony. Id. The victim's recantation offered no substantive explanation for her original error. Id. The trial court dismissed Appellant's request for a new trial, specifically because the victim's recantation was contradicted by the testimony of at least nine State's witnesses. Id.

The second South Carolina appellate opinion is State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959). In Mayfield, the new evidence consisted of three affidavits from State's witnesses at Appellant's original trial. Id. The first affidavit, signed by R.M. Bullock, was not a repudiation of any prior testimony, but rather supplemented Bullock's trial testimony by corroborating the time frame of Appellant's alleged alibi. Id. at 29-31.

The second affidavit, signed by Earl Fleming, was a repudiation of his trial testimony. Id. at 30-31. In said affidavit, Fleming alleged that he had been promised parole if he testified against Appellant and was threatened with new charges if he did not cooperate. Id.

The third affidavit, signed by George Ray Hassie, was also a repudiation of his trial testimony. Id. at 28-29; 33. In his affidavit, Hassie, who was co-Defendant alongside Appellant and testified for the State at Appellant's original trial, indicated that he was promised a minimum sentence on his existing charges and a dismissal of his old charges in exchange for cooperating with law enforcement. Id. In determining Hassie's affidavit to lack credibility, the trial court noted that Hassie was Appellant's brother-in-law and incarcerated with him at the time of the recantation. Id.

The third South Carolina appellate opinion is State v. Parker, 249 S.C. 139, 153 S.E.2d 183 (1967). In Parker, the new evidence consisted of an affidavit from Alphonso Mack recanting his prior testimony at Appellant's trial. Id. at 141. Mack, a jailhouse

snitch, claimed that his original testimony, in which he attested that Appellant had confessed to the crime, was untrue. Id. The trial court found Mack's recantation unreliable, as it offered no substantive explanation for his original testimony. Id.

The fourth South Carolina appellate opinion is State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977). In Wright, the new evidence consisted of an affidavit from James Lazarus, an unsentenced co-Defendant who testified against Appellant at trial. Id. at 420-21. Wright's affidavit recanted his trial testimony, stating that he believed he would receive a lighter sentence if he cooperated with both the State and law enforcement. Id. The trial court, in making specific findings that Lazarus's affidavit was at least the third time his story had changed during the case's prosecution, found the affidavit to not be credible. Id.

The fifth South Carolina appellate opinion is State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977). In Porter, the new evidence consisted of affidavits from James Moore and Emmitt Williams, both of whom recanted their trial testimony. Id. at 620-21. At Appellant's original trial, both Moore and Williams testified that Appellant initiated a firefight with them and a third-party victim. Id. Both recantations indicated that, at the time of the incident, Moore was too intoxicated to recall the chronology of events leading up to the firefight. Id.

In the text of its opinion, the South Carolina Supreme Court opinion was silent as to whether Williams was intoxicated at the time of the firefight. Id. Additionally, the Supreme Court's opinion contained no text indicating that either Moore or Williams presented any objective medical or scientific evidence to corroborate their assertions. Id.

The trial court subsequently determined that the recantations were unreliable and denied Appellant's Motion. Id.

The sixth South Carolina appellate opinion is State v. Faulkner, 274 S.C. 619, 266 S.E.2d 420 (1980). In Faulkner, the new evidence was not presented in the form of a Rule 29(b) Motion, but rather during jury deliberations at Appellant's trial. Id. at 621-22. Appellant presented five witnesses who had confirmed his alibi defense. Id. During jury deliberations, Appellant's then-counsel informed the trial court that three of Appellant's alibi witnesses wanted to recant their prior testimony. Id. Appellant's then-counsel requested a mistrial. Id.

The Supreme Court's opinion is silent concerning the reasons given by the witnesses for their subsequent recantations. Id. However, the trial court allowed two of the three witnesses to recant their testimony, but denied Appellant's request for a mistrial on the grounds that Appellant "should not be allowed to profit from his own mistakes." Id.

The seventh South Carolina appellate opinion is State v. Harris, 391 S.C. 309, 706 S.E.2d 526 (S.C.App. 2011). In Harris, the new evidence concerned the recantation of Chad Moore, a co-Defendant at Appellant's original trial.

At Appellant's Rule 29(b) hearing, Moore testified that he was coerced into giving false testimony by Solicitor Mark Moyer, who threatened to imprison him for life if he did not cooperate. Id. at 542-43. Moore also testified that, in exchange for his testimony, Moyer agreed to reduce a first-degree burglary charge to second-degree burglary, run the sentence concurrently with an existing probation violation and drop Moore's kidnapping charge. Id.

When Moore was asked to explain his subsequent recantation, he stated that “I really didn't have a firm grasp of how, you know, legal proceedings were.” Id. He then stated that “I didn't, you know, really realize it wasn't really up to him, period, with what the sentence was, or for that matter any lengths of time that he couldn't give me anything. The Judge had to give it to me.” Id.

Contrary to Moore's testimony, Moyer testified that Moore's cooperation was both willing and eager. Id. at 544. Moyer also noted that Moore's testimony was similar to the victim's testimony about Appellant's involvement in the crimes for the subject matter of the appeal. Id. The trial court found Moyer's testimony more credible than Moore's and consequently denied Appellant's Motion. Id.

Appellant herein asserts that the facts of the seven appellate opinions cited above are distinguishable from the facts of the present case. Unlike the recantations in these prior cases, Kimmie Shipes's recantation is corroborated by the medical source statement of Harold C. Morgan, M.D., Shipes's examining psychiatrist. (Court's Exhibit 11, Rule 29(b) Hearing).

Dr. Morgan first noted that Shipes suffered from chronic and severe mental illnesses, which were noted to have existed from 1991 onwards. Id. Dr. Morgan indicated that Shipes's mental illnesses required “treatment with antidepressants and antipsychotic medication.” Id. He also noted that Shipes had a history of suicidal thoughts, hallucinations and psychotic features, for which she was admitted to various psychiatric hospitals on four separate occasions in 1991. Id.

Upon examination, Dr. Morgan described the impact non-treatment had on Shipes's thinking. Id. Dr. Morgan concluded that, when Shipes's mental illnesses were

left untreated, “her thinking, judgment and behavior were significantly impaired.” Id. At the time of her examination, when Shipes was not being treated her illnesses, Dr. Morgan unequivocally stated that Shipes’s “contact with reality is fragile.” Id.

Dr. Morgan’s medical source statement indicates that Shipes dropped out of mental health treatment in 1993. Id. Additionally, Dr. Morgan’s statement fails to document any further mental health treatment by Shipes post-1993. Id. Given the continuous existence of Shipes’s mental illnesses prior to Appellant’s trial, the chronic and severe nature of said illnesses, Dr. Morgan’s statements concerning Shipes’s mental status when left untreated and Shipes’s failure to obtain mental health treatment post-1993, the veracity of Shipes’s original trial testimony is necessarily called into question.

In recommending a course of treatment for Shipes, Dr. Morgan’s medical source statement indicated that, were she to receive continued treatment with medication and counseling in a stable and consistent environment, “she could become a productive citizen.” Id.

Subsequent to Appellant’s original trial, Shipes was admitted to the South Carolina Department of Corrections, where she is still incarcerated. (Rule 29(b) Hearing Transcript, p. 85). At Appellant’s Rule 29(b) hearing, Shipes testified that, as a result of her incarceration, she is currently medicated. Id. at 82. When Shipes’s hearing testimony is viewed in conjunction with Dr. Morgan’s medical opinions, it is clear that Shipes’s thinking and judgment are much clearer today than they were at the time of Appellant’s original trial. As such, the trial court should have determined Shipes’s Rule 29(b) hearing testimony more credible than her testimony at Appellant’s original trial. Because the trial court did not, Appellant contends this failure to be an abuse of discretion.

II. Shipes's Recantation Could Not Have Been Discovered Prior to Trial and is After-Discovered Evidence

Respondent contends that Shipes's recantation could have been discovered prior to Appellant's original trial, specifically noting that "Shipes was subject to cross-examination and could have been asked about her ability to perceive the suspect, whether or not she picked somebody else out of the lineup first and whether she felt under pressure from the community to pick [Appellant] as the perpetrator." (Resp. Initial Brief, pp. 10-11). Based on this assertion, Respondent alleges that Shipes's recantation is not after-discovered evidence. *Id.*

Appellant would again argue that the testimony elicited from Shipes at Appellant's Rule 29(b) hearing is, by its very nature, after-discovered evidence. (Rule 29(b) Hearing Transcript, pp. 76-95). At the original trial, Shipes identified Appellant as the man outside of her home immediately prior to the incident at the Tinsley home. (Trial Transcript, pp. 79-90). At Appellant's Rule 29(b) hearing, Shipes's March 2011 statement, taken over sixteen years after Appellant's original trial, was introduced into the record, wherein she recanted her prior identification. (Court's Exhibit 10, Rule 29(b) Hearing).

Additionally, Shipes testified that, were Appellant granted a new trial, she would not be able to identify Appellant as the man outside of her home on the morning of the Dixon shooting and Tinsley burglary. (Rule 29(b) Hearing Transcript, pp. 94-95). Based on these facts, Appellant asserts that, contrary to Respondent's arguments, Shipes's March 2011 statement and Rule 29(b) hearing testimony are after-discovered evidence.

As to Respondent's claim that the facts surrounding Shipes's recantation could have been discovered prior to trial, Appellant contends that the temporal limitations

between his arrest and trial, combined with existing South Carolina law, clearly indicate that the evidence presented at the Rule 29(b) hearing could not have been known at his original trial.

Appellant was arrested for the charges forming the subject matter of this appeal in August 1994. (Trial Transcript, p. 112). Appellant was tried only five months later, in January 1995. *Id.* at 1. Additionally, the original trial record establishes that Appellant and Shipes did not know each other prior to his arrest and subsequent trial. *Id.* at 82, 114. Consequently, Appellant had no knowledge that Shipes had been committed on four previous occasions. Shipes's mental instability only became public knowledge years after Appellant's original trial, when she was arrested for murdering her husband. (Rule 29(b) Hearing Transcript, p. 85).

Even if Appellant had reason to suspect Shipes was mentally ill, it is likely that he would not have been granted access to Shipes's confidential mental health records absent a compelling justification and specific insight into her mental capacity, pursuant to S.C. Code Ann. §44-22-100(A). Given that Shipes was a juvenile at during these periods of institutionalization and commitment, Appellant would likely need an even more compelling justification to unseal Shipes's confidential mental health records. (Trial Transcript, p. 80). Based on Appellant's lack of prior knowledge regarding Shipes's mental illness and the confidentiality of a patient's mental health records, Appellant could not have, through the exercise of due diligence, obtained Shipes's mental health records.

Because Appellant had no knowledge of Shipes's mental illnesses, and because he could not have obtained Shipes's mental health records prior to trial, there was no

rational basis for Appellant to inquire about her mental faculties. Furthermore, without any specific foundation for such inquiry, any objection to this line of questioning would most likely have been sustained by the trial court, pursuant to Rule 608(a), SCRE. Therefore, Respondent's claim that, at the original trial, Appellant could have cross-examined Shipes about the facts surrounding her recantation is without merit.

III. Respondent Conflates New Evidence with Explanatory Evidence

Besides the arguments presented above, Appellant contends that Respondent conflates "new" evidence with "explanatory" evidence akin to *res gestae*.

In the present matter, the new evidence is Shipes's recantation. Dr. Morgan's medical source statement, Shipes's hearing testimony regarding her history of mental illness and Shipes's hearing testimony about the suggestive nature of her original identification are necessary to explain, in both medical and lay terms, the reasons why Shipes's recantation is more credible than her original trial testimony. As such, if the Court were to adopt Respondent's position and hold that the above-mentioned "explanatory" evidence could not be considered by the trial court in assessing the credibility of Appellant's after-discovered evidence, this would put Appellant in a Catch-22.

Were Appellant, at his original trial, to impeach a State's witness using only the relevant facts and circumstances for which a sufficient evidentiary foundation exists, he would, in a subsequent Rule 29(b) Motion, be prohibited from presenting additional explanatory evidence not inquired about in the original trial, based on the assertion that it could have been elicited through the exercise of due diligence.

However, were Appellant, at his original trial, to conduct an exhaustive cross-examination of a State's witness, addressing any and all future contingencies, foreseen or unforeseen, Respondent could claim that any explanatory evidence submitted in support of Appellant's Rule 29(b) Motion was not after-discovered evidence and was cumulative in nature.

Pursuant to the Court's holding in State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999), the facts referenced in the hypothetical above would warrant a denial of Appellant's Rule 29(b) Motion. Appellant herein asserts that the only manner in which the trial court can, at a Rule 29(b) hearing, properly assess a witness's credibility is through the very type of explanatory evidence presented by Appellant.

IV. Shipes's Recantation is Material to Appellant's Guilt or Innocence

Respondent claims that Shipes's recantation "is not material to guilt or innocence." (Resp. Initial Brief, p. 11). In support of this contention, Respondent argued that "Dixon was the victim of the shooting and he positively identified [Appellant] as the shooter." Id. Additionally, Respondent states that Shipes's identification "was merely cumulative to Dixon's identification." Id. Contrary to Respondent's assertions, Appellant contends that Dixon's trial testimony was itself an indication of his mental retardation and unreliability and was thus not cumulative to Shipes's identification.

As previously noted, at Appellant's original trial, the State itself acknowledged Dixon's mental deficiencies. (Trial Transcript, p. 12). Dixon, though testifying that "he don't forget nothing," had to be corrected by the Solicitor when asked the day on which he was shot, as he initially gave the incorrect answer. Id. at 51, 58-59. On cross-examination, Dixon had difficulty differentiating pictures of automobiles with pictures of

people. Id. at 62-70. He also testified that he had not seen Appellant since the date of the incident, even though he later testified that he identified Appellant from a set of photos while hospitalized. Id.

Based on the State's own acknowledgements at Appellant's original trial, Dixon's first-grade education, his incorrect answer regarding the date of the incident and his inconsistencies on cross-examination, the "presumption of acuteness" cited to Respondent has been rebutted. State v. Gambrell, 274 S.C. 587, 590-91, 266 S.E.2d 78, 81 (1980). Because Dixon's testimony and identification should not be accorded this presumption, Shipes's recantation is all the more material, as her original trial testimony would be the only remaining evidence in support of Appellant's guilt.

Appellant, as previously outlined in his Initial Brief, notes that, during closing arguments at his original trial, the State emphasized the importance of Shipes's identification to a conviction. (Trial Transcript, pp. 153-59). After summarizing the testimony of Joe Dixon, the Solicitor stated that "[y]ou might say, well, is that all the State has is the word of Joe Dixon?" Id. at 154. The State, when discussing Shipes's testimony in closing arguments, made it clear that the answer to its previous question was "no."

During its closing arguments at Appellant's original trial, the State specifically mentioned the importance of her identification in validating the testimony of Dixon. (Trial Transcript, pp. 154-55). Shipes's identification of Appellant was presented as having been made independent of Appellant's investigation, as her trial testimony indicated she filed a separate police report after finding two men rummaging outside of her home immediately prior to the burglary and shooting. Id. at 89, 96-97.

Without Shipes's testimony, Dixon's testimony would stand alone, likely without any presumption of acuteness. Because this would affect the outcome of a new trial, there is no doubt that Shipes's recantation is material to Appellant's guilt or innocence.

V. **Dr. Morgan's Medical Source Statement is Admissible Evidence and is not Merely Impeaching**

Respondent first claims that Dr. Morgan's medical source statement diagnosing Shipes's mental illnesses is inadmissible hearsay. (Resp. Initial Brief, p. 11). In the alternative, Respondent argues that Dr. Morgan's medical source statement is merely impeaching. *Id.* Appellant first contends that, contrary to Respondent's position, Dr. Morgan's medical source statement falls within two exceptions to Rule 802, SCRE.

Pursuant to Rule 803(4), SCRE, statements made for purposes of medical diagnoses or treatment are not excluded by Rule 802 of the South Carolina Rules of Evidence. Dr. Morgan's medical source statement was drafted expressly for the purpose of diagnosing Shipes's mental illness and recommending a course of treatment. And because Rule 803, SCRE, does not require Dr. Morgan to be "unavailable" as a witness for his statement to be admissible, his non-presence at Appellant's Rule 29(b) hearing is immaterial.

Not only does Dr. Morgan's medical source statement qualify as an exception to the hearsay rule, pursuant to Rule 803, SCRE, Appellant contends that Dr. Morgan's medical source statement is a record of regularly conducted business activity, pursuant to Rule 803(6), SCRE.

Dr. Morgan's medical source statement was drafted in the form of a report and/or memorandum. (Court's Exhibit 11, Rule 29(b) Hearing). The statement pertains to Shipes's medical diagnoses and recommended courses of treatment made soon after Dr.

Morgan's mental health examination. Id. The statement was drafted by Dr. Morgan, who himself conducted Shipes's mental examination. Id. Given that Dr. Morgan is a psychiatrist, one can conclude that his office regularly drafts and file these types of statements for a plethora of reasons, including legal cases.

Furthermore, Shipes was a patient of Dr. Morgan's. Id. His medical source statement was written specifically for her benefit. Id. Pursuant to Rule 803(6), SCRE, she is qualified to testify as to its contents. As previously noted, because Rule 803(6), SCRE, does not require a declarant to be unavailable for this exception to be applicable, Appellant's failure to call Dr. Morgan as a witness is immaterial.

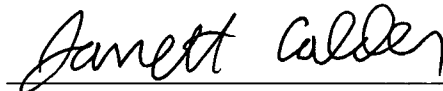
As to Respondent's claim that Dr. Morgan's medical source statement is merely impeaching, Appellant reiterates that the substance of Dr. Morgan's statement calls into question the veracity of Shipes's trial testimony. Given the importance of Shipes's identification to the State's case, her recantation, supported by credible medical evidence, casts serious doubt over Appellant's conviction. Based on these facts, Dr. Morgan's medical source statement is not merely impeaching.

CONCLUSION

Appellant, for the reasons stated in the Reply above, disputes Respondent's contention that the trial court did not abuse its discretion in denying Appellant's Rule 29(b) Motion. Accordingly, Appellant reasserts that he is entitled to an Order reversing the holding of the trial court, thereby granting him a new trial based on after-discovered evidence.

Dated this 28th day of July, 2014.

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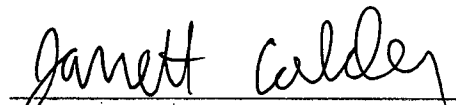
GARY LANE PREWITT

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief and Proof of Service on the Clerk of the South Carolina Court of Appeals, by depositing a copy of both in the United States Mail, postage prepaid, on July 28, 2014, addressed to the following:

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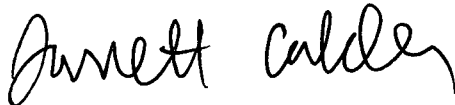
To Whom It May Concern:

Enclosed, please find the following documents:

- 1) Original and One (1) Copy of Appellant's Reply Brief;
- 3) Proof of Service for the Clerk of the South Carolina Court of Appeals; and
- 4) Proof of Service for the South Carolina Attorney General.

Copies of Appellant's Reply Brief and the Proofs of Service have been mailed to party copied below. If you need my assistance or have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Jarrett S. Calder, Esq.

GRAND STRAND LAW GROUP, LLC

cc: South Carolina Attorney General, Attn: The Honorable Alan Wilson, Esq.

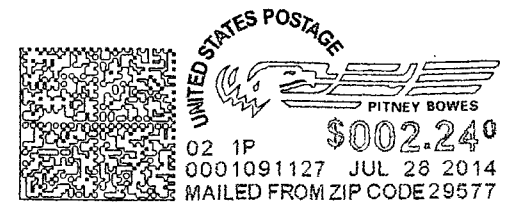
Enclosures

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