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ORIGINAL
S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARCUS EVANS,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in denying Evans' motion for a new trial pursuant to Rule 29, SCRCrimP, which would require the circuit court judge to overrule the PCR judge's order which was appropriate since the PCR was heard in common pleas court, and the motion for the new trial in general sessions court; and the motion was based on the after-discovered evidence of the co-defendant admitting at his guilty plea, after his PCR was granted, that he was the shooter, and owned a .380 caliber weapon?

STATEMENT OF THE CASE

In February 2000, Evans was indicted on the charge of murder. On December 11 – 15, 2000, Evans and his co-defendant Ron Taylor proceeded to trial before the Honorable Thomas W. Cooper, Jr. and a jury. The jury returned verdicts of guilty for both men on the lesser charge of voluntary manslaughter. Evans was represented by Bryan Doby, and the state was represented by Debbie T. Nielsen, Assistant Solicitor. R. 1. Judge Cooper sentenced Evans to eighteen years and Taylor to fourteen years. Hearing R. 29, ll. 10 – 25. Evans' attorney filed a notice of appeal. The South Carolina Court of Appeals affirmed the conviction. State v. Evans, Op. No. 2002-UP-674. (Ct. App. filed November 5, 2002).

Evans filed an application for post-conviction relief (PCR) on March 31, 2003 which was denied by order dated June 3, 2005. An appeal was filed which was transferred from the Supreme Court to the Court of Appeals, and the Court of Appeals denied the petition for writ of certiorari on September 27, 2006. Evans filed a petition for writ of habeas corpus on September 20, 2007 which was dismissed as barred by the statute of limitations on July 14, 2008.

On April 4, 2007, Evans filed a subsequent PCR application. On December 11, 2007, the Honorable Clifton Newman issued a Conditional Order of Dismissal without prejudice. On August 12, 2008, Evans' attorney submitted a Response to the Conditional Order of Dismissal. A motion hearing was held before the Honorable George C. James, Jr. on April 2, 2009. On May 4, 2009 Judge James issued an order granting continuation for an evidentiary hearing. An evidentiary hearing was held before the honorable W. Jeffrey Young on April 26, 2010. Evans was represented by Tricia Blanchette, and the state was represented by Mary Williams, Assistant Attorney General. On July 31, 2010, Judge Young

issued an order denying Evans' PCR application and dismissing it with prejudice. Evans' attorney filed a notice of appeal. This case is pending on appeal.

On September 3, 2010, Evans' attorney filed a Motion for New Trial Based on After-Discovered Evidence Pursuant to Rule 29(b), SCRCrimP in General Sessions Court. A motion hearing was held on October 8, 2010 before the Honorable Howard P. King. Evans was represented by Tricia Blanchette, and the state was represented by John Gentry, Assistant Solicitor. On November 15, 2010, Judge King issued an order denying the motion for a new trial. Evans' attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The circuit court erred in denying Evans' motion for a new trial pursuant to Rule 29, SCRCrimP, which would require the circuit court judge to overrule the PCR judge's order which was appropriate since the PCR was heard in common pleas court, and the motion for the new trial in general sessions court; and the motion was based on the after-discovered evidence of the co-defendant admitting at his guilty plea, after his PCR was granted, that he was the shooter, and owned a .380 caliber weapon.

Marcus Evans, Ron Taylor, Travis Singleton, and Lamont Witherspoon¹ went to the Davis Country Club on November 14, 1999. There they saw Henry Scott, and arguing began outside the club. Witnesses heard gunfire, and Scott was killed with five gunshot wounds. (Judge Young's PCR order R. 1162) The firearms expert testified that fifteen casings were found at the scene. Five casings were from a .45 caliber weapon, and the other casings were from three different .380 caliber weapons. Two bullets were recovered from the victim which were from a single Highpoint semi-automatic weapon. Judge King's Order R. 1154.

At trial, Officer Dellinger testified that the victim's father brought a .45 weapon to law enforcement prior to trial which was the only weapon recovered. However, this weapon was not sent to SLED for testing to determine if it matched the casings from the crime scene. Motion for New Trial, R. 1153.

Judge Howard King granted Taylor's PCR application based on defense counsel's ineffectiveness in failing to object to Taylor's co-defendant's (Evans) alleged statement of

¹ Co-defendants Travis Singleton and Lamont Witherspoon were tried for related offenses.

his intent to kill Scott; and for failing to move for a mistrial or Brady violation when the victim's .45 gun appeared in the middle of trial. Judge King's Order Dated April 10, 2006 granting Taylor's PCR. The South Carolina Supreme Court denied the State's petition for writ of certiorari. Taylor v. State, Op. No. 2009-MO-021 (Filed May 4, 2009).

Evans filed a PCR application alleging ineffectiveness of trial counsel for failing to object to or claim a Brady violation based on the appearance of the victim's .45 gun during the trial for the first time. However, his PCR was denied. Judge Young's Order Dated July 31, 2010.; Motion for New Trial. R. 1052 -1055.

Following the grant of his PCR, Taylor appeared before the Honorable George James, Jr., and entered a guilty plea to voluntary manslaughter for a negotiated sentence of time served which was eight and one-half years. Taylor's Guilty Plea Transcript October 5, 2009, R. 1089 -1105. During his guilty plea, Taylor said he shot Scott and used a .380 gun. October 5, 2009 R. R. 1099, ll. 24 – R. 1104, ll. 19.

Evans filed a second PCR in April 2007 and Judge George James granted another evidentiary hearing which was held on April 26, 2010 before the Honorable W. Jeffrey Young. Motion for New Trial, R. 1050. Taylor testified at Evans' PCR hearing and admitted that he was the shooter. Taylor stated that he had purchased .380 pistol several months prior to the shooting. Sales Receipt Dated October 24, 2009; Judge Young's Order Dated July 31, 2010. Taylor said Evans did not know this until Taylor wrote a letter to Evans in April 2008. Judge Young's Order R. 1163. Young denied Evans' PCR application because he found that Taylor was not credible because Taylor knew he would not face further criminal prosecution and just wanted to help Evans. Judge Young also ruled that

Taylor's testimony would not change the outcome of the trial because Evans would still be convicted under the "hand of one is the hand of all" theory. Judge Young's Order p. 1166.

Evans' PCR counsel then filed a Motion for a New Trial Based on After Discovered Evidence pursuant to Rule 29, SCRCrimP, and was granted a hearing on the motion before the Honorable Howard King on October 8, 2010.

At the beginning of the hearing, defense counsel argued to the court that the major issue in Evans' case was a denial of fundamental fairness that was "shocking to the judicial sense of conscience." R. 2, ll. 1 – 17. Counsel cited the case of Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001) where Justice Waller wrote in his dissent that to "deny Johnson a new trial in the face of a confession by someone who was present when the murder was committed would be a denial of fundamental fairness shocking to the judicial sense of conscience and justice." Counsel argued this was the same issue in Evans' case. R. 2, ll. 18 – 25.

Counsel presented a motion and exhibits which included the transcript from Taylor's guilty plea after Judge King ruled that he did not want live testimony from witnesses. R. 65, ll. 1 – 13. The other documents counsel presented to the court included Judge King's Order granting Taylor's PCR; the SLED report indicating the two bullets retrieved from the victim were from a .380; the solicitor's letter to the attorneys for the defense relaying the results of the SLED ballistics report that the casings were from three different .380 weapons and one .45 weapon.; the chain of custody report; and the pawn shop receipt showing a .380 was bought by Taylor in February 1999. Supp. App. 14 – 41.

Counsel argued that the chain of custody showed that the victim's gun, the .45 caliber, was turned over to law enforcement prior to trial, but law enforcement did not turn it

over to the Solicitor's Office which was discovered at trial. Counsel told the judge that he granted the co-defendant's Taylor's, PCR based on this issue. Judge King then admitted that he did grant Taylor's PCR on this issue. R. 10, ll. 1 – 20.

Counsel argued on the second issue that Judge King granted Taylor's PCR on the same issue raised in Evans' PCR which was denied by Judge Young. R. 13, ll. 1 – 4.

Counsel argued that the third issue was the one of fundamental fairness where the co-defendant, Taylor, confessed at his guilty plea that he was the shooter, and that Evans did not know that Taylor had the .380 pistol. This was the first time this evidence was heard because Evans and Taylor were tried jointly and neither one testified. R. 13, ll. 4 – 24. She said that Taylor testified at Evans' PCR to this but Judge Young found a credibility problem with Taylor's testimony. R. 13, ll. 20 – 24.

When Judge King asked counsel how Evans could get around the accomplice liability issue if Taylor was the shooter, defense counsel replied that Evans would probably be convicted under the hand of one is the hand of all theory. But she argued, the jury that convicted Evans did not know about Taylor being the shooter and about the gun not being disclosed. R. 14, ll. 1 – 25; R. 15, ll. 1 – 25.

Counsel argued that she was really asking for resentencing based on the after discovered evidence, and not a new trial. Since the co-defendant Taylor received a time served sentence for voluntary manslaughter upon remand, Evans should receive a different sentence which would change the outcome of the case based on the new evidence. R. 16, ll. 1 – 25.

Counsel said she asked the PCR judge, Judge Young, for a ruling on resentencing, but his order held that resentencing was not an appropriate remedy, and he did not make a ruling on the merits. R. 17, ll. 1 – 10.

Judge King said he could not overrule Judge Young's order because one judge could not overrule another. R. 17, ll. 11 – 17. Counsel argued that she believed he could because the PCR was filed in civil court and the motion was filed in criminal court. R. 17, ll. 18 – 25; R. 18, ll. 1 – 13. Counsel argued that Judge Young's order was not final because he did not rule on the merits of the case, and she filed a Rule 59 Motion requesting that he rule on that issue, but he did not. She argued that the PCR order would not be final until the PCR appeal was final. R. 18, ll. 1 – 25; R. 19, ll. 1 – 21; R. 20, ll. 19 – 25; R. 21, ll. 23.

Counsel did state to Judge King that she had not filed an appeal of the PCR judge's order, but that she until October 21 to do so. R. 19, ll. 23 – 25; R. 20, ll. 1 – 17.

Judge King said her actions were premature until the PCR was finalized. R. 21, ll. 24 – 25. Counsel argued that she could not find anything that prevented a Rule 29(b) action from proceeding at the same time as a PCR. R. 22, ll. 1 – 25. Counsel again argued the issue of fundamental fairness. R. 24, ll. 16 – 25; R. 25, ll. 1 – 16.

The state argued that this motion was premature, but admitted that no appeal was on file yet. R. 26, ll. 9 – 22. However, the state argued that Evans needed to complete the appeal process first. R. 31, ll. 25; R. 32, ll. 1 – 25. He argued that the facts in Judge Young's order had been adjudicated. R. 38, ll. 15 – 25.

Judge King stated that Judge Young did not make a finding on fundamental fairness nor sentencing. R. 39, ll. 1 – 24.

Judge King ruled on the pieces of newly discovered evidence as related to the factors found in State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999) which are necessary to grant a new trial on after discovered evidence. These include: (1) the evidence is such that it would probably change the result if a new trial were granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to the trial; (4) the evidence is material; (5) the evidence is not merely cumulative or impeaching.

Regarding the chain of custody form which showed that the victim's gun was turned over to law enforcement prior to trial, Judge King ruled that when it came out at trial, Evans was on notice that the weapon existed and could have taken steps to learn when it was surrendered to the police. Evans could have discovered the Evidence Receipt through due diligence. See Judge King's Order R. 1152. The judge wrote that the gun was linked to the victim and would have been relevant only if self-defense was an issue but this was not raised at trial. Judge King's Order R. 1152.

On the issue of counsel not raising a Brady violation on law enforcement's failure to disclose receipt of the gun, Judge King ruled that one circuit court judge did not have the authority to set aside the ruling of another circuit court judge.

Regarding the issue of the Co-defendant Taylor's testimony that he was the shooter, Judge King ruled that Taylor's testimony was motivated by his desire to be "released from incarceration," and that generally recantation of testimony is unreliable. He wrote that this testimony would not likely have changed the result of the trial. Judge King's Order, R. 1153-1154.

Judge King ruled that the gun registration form only tied Taylor to one of the three .380 caliber pistols, and that Evans was ignoring the theory of accomplice liability presented at trial that the hand of one is the hand of all. Judge King's Order, R. 1154.

Concerning the issue that trial counsel believed that the evidence was material and outcome determinative, was trial counsel's opinion. Judge King wrote that the court disagreed with trial counsel that the evidence was material and would have affected the outcome of the trial. Judge King's Order, R. 1154. Judge King also ruled that the outcome for Evans would not be different because he could still be found guilty under the "hand of one is the hand of all" theory. R. 15, ll. 10 – 24; Judge King's Order, R. 1154.

In his order, Judge King relied on the case of Enoree Baptist Church v. Fletcher, 287 S.C. 602, 340 S.E.2d 546 (1986) for the rule that one circuit court judge cannot set aside the order of another circuit court judge. However, that case is distinguished from Evans' case because Enoree involved two judges in civil court in the same case. Evans' case involves one judge's order in civil court and one in general sessions court.

Enoree Baptist Church v. Fletcher, *id.* cites Rule 60, SCRCF for the proposition that one circuit court judge does not have the authority to set aside the order of another. However, Rule 60(b)(2), SCRCF, allows for a party to be relieved from a final judgment based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). Rule 59(b) allows a motion for a new trial to be made within ten days after the jury is discharged.

Regarding the disclosure at trial that the victim's gun was turned over to law enforcement prior to trial and this was disclosed at trial, Judge King erred in ruling that Evans could have discovered that fact prior to trial. In Brady v. Maryland, 373 U.S. 83

(1963), the United States Supreme Court held that the state had a duty to disclose material evidence favorable to the defendant, and this duty was also imposed on those acting on behalf of the government including the police. State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010). The duty was on the state to disclose, not on Evans.

Judge King held that Taylor's motivation to confess that he was the shooter was motivated by a desire to be released from incarceration. This was in error because Taylor had a negotiated sentence. No evidence was presented that he was required to admit that he was the shooter. Taylor's Guilty Plea Transcript October 5, 2009, R. 1090, ll. 1 – 11.

In Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001), the Supreme Court held that the defendant was not entitled to a new capital murder trial based on after-discovered evidence that another confessed to committing the offense as evidence was not such that it would probably change the result if a new trial were granted as the jury would not find the confessor credible, given her prior inconsistent statements. Two justices wrote strong dissenting opinions. Justice Pleicones wrote that the confession would probably change the result if a new trial were granted because "our system of justice reveres the probative value of confessions."

Justice Waller wrote in his dissenting opinion: "I believe to deny Johnson a new trial in the face of a confession would constitute a denial of fundamental fairness shocking to the judicial sense of justice."


Judge King found that Judge Young did not rule on the issues of fundamental fairness and resentencing. Therefore, Judge Young's order was not final related to these two issues. In the interest of fundamental fairness, Judge King should have issued an order

remanding Evans' case for resentencing on the basis of fundamental fairness as the shooter, Taylor, was receiving a lighter sentence than Evans.

CONCLUSION

Based on the above reasons, Judge King's order should be vacated and the case remanded for a new sentencing hearing, or in the alternative for a new trial, or in the alternative, for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender


ATTORNEY FOR APPELLANT

This 9th day of May, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 9, 2012



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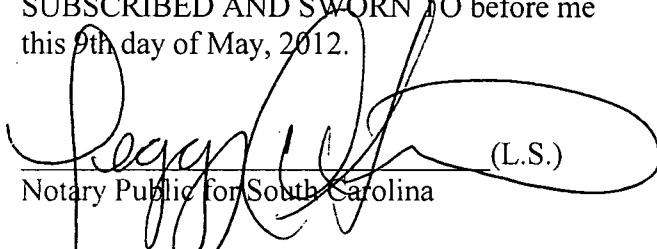
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mary S. Williams, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 9th day of May, 2012.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of May, 2012.



(L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017