

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Lee County
Honorable Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

vs.

MARCUS EVANS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not abuse its discretion in denying Appellant's Motion for New Trial based on After-Discovered Evidence.

STATEMENT OF THE CASE

Appellant Marcus Evans was indicted for Murder (2000-GS-31-0010). He was represented by Bryan Doby, Esquire. On December 11 – 15, 2000, Appellant and co-defendant Ron Taylor (“Taylor”) proceeded to a jury trial.¹ Appellant and Taylor were found guilty of Voluntary Manslaughter. Appellant was sentenced by the Honorable Thomas W. Cooper, Jr. to confinement for eighteen (18) years.

A timely Notice of Appeal was filed on Appellant’s behalf and an appeal was perfected. Appellant was represented in the appeal by Robert M. Dudek of the South Carolina Office of Appellate Defense. In the Final Brief of Appellant, he raised the following claims:

1. Whether the judge abused his discretion by allowing Stephen Johnson to testify appellant told the decedent at the Huddle House “ a few months before the incident at the nightclub” that” I’m going to be the one to put you in your grave.” since the unduly prejudicial effect of this testimony outweighed its probative value under Rule 403, SCRE given the facts of the case.

The South Carolina Court of Appeals affirmed Appellant’s conviction and sentence in an unpublished opinion. State v. Evans, Op. No. 2002-UP-674 (S.C. Ct. App. filed November 5, 2002). The Remittitur was sent on November 21, 2002.

Appellant subsequently filed an application for post-conviction relief (PCR) on March 31, 2003 (C.A. No. 2003-CP-31-0065). In his application, Appellant raised the following issues:

1. “Trial counsel was ineffective for Failure to assert Due Process Violations of Unnecessary Delay of initial appearance.”
2. Subject matter jurisdiction – Improper indictment.

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

The State made its Return on or about September 22, 2003. A “Motion and Memorandum of Law in Support of Amending Previously Submitted PCR Application” was filed in December 2003, alleging the following grounds for relief:

1. “Trial counsel was ineffective in failing to object to the highly suggestive photo identification procedure, out of court identification, held at the police station, and the court identification, when the out of court identification was so tainted as to require suppression of the in court identification.”
2. “The appellant’s trial counsel was ineffective for failing to move to squash the amended indictment, when there was no evidence on the grand jury report that the court convened to ‘true bill’ or ‘no bill’ this indictment. Additionally the trial court didn’t have subject matter jurisdiction to proceed with trial because there was no evidence to show the action was taken to the grand jury.”
3. “Trial counsel was ineffective for failing to make the timely objection to the prejudicial testimony of Steven Johnson, and the court erred in allowing this prior bad act and/or threatening testimony Johnson attested to, stand when it was obvious that the prejudice exceeded the probative value.”

Appellant also filed a “Supplemental Amendment and Memorandum of Law in Support of Application for Post-Conviction Relief” on June 3, 2004, alleging the following additional grounds for relief:

1. Ineffective Assistance of Counsel.
 - a. “...Counsel’s trial decision to not pursue self defense as an affirmative defense to the crime charged was an unreasonable trial strategy.”
 - b. “Applicant’s trial attorney was ineffective in failing to request a jury instruction of self-defense at trial.”
 - c. “Applicant’s trial attorney was ineffective in failing to conduct reasonable pretrial investigations and preparations.”
 - i. “...Counsel’s failure to obtain ballistic reports from the weapon delivered to law enforcement by the victim’s father constitutes ineffective assistance.”
 - ii. “...Counsel further failed to request a chemical swab of the victim’s hands for gunpowder residue.”
 - d. “Applicant’s trial attorney was ineffective in failing to object to the discovery violation of the solicitor.”

- i. "...The prosecution failed to disclose any tests, examinations, or information concerning the weapon delivered to law enforcement by the victim's father."
 - ii. "...The prosecution's failure to disclose the weapon prevented the defense from conducting independent examinations and tests."
2. Ineffective Assistance of Appellate Counsel.
 3. Denial of Due Process.

An evidentiary hearing was convened on December 16, 2004. Appellant was represented by Richard Blackmon, Esquire. Testimony was received from Marcus Evans and trial counsel Bryan Doby, Esquire. The Honorable B. Hicks Harwell denied and dismissed the application by written order dated June 3, 2005, and filed June 8, 2005. In his order he addressed the following claims:

1. Ineffective assistance of counsel in:
 - a. failing to meet with Applicant and for failing to go over discovery.
 - b. failing to argue self defense to the jury and to investigate the gun that was turned into the police by the victim's father.
 - c. requesting a lesser included charge of voluntary manslaughter and for not having a self-defense charge.
 - d. failing to talk to and call witnesses.
2. The Circuit Court lacked subject matter jurisdiction.

A Johnson Petition for Writ of Certiorari was submitted to the South Carolina Supreme Court on November 28, 2005 by Assistant Appellate Defender Robert Pachak.

In the petition, he alleged as the sole arguable ground:

1. "Whether there was any evidence to support the PCR judge's findings that defense counsel was not ineffective in failing to pursue a defense of self-defense?"

Petitioner submitted a *pro se* Petition for Writ of Certiorari asserting the following additional issue:

1. "Whether there was evidence to support the PCR judge's findings that defense counsel was not ineffective in failing to request a mistrial on the basis of a Brady violation?"
 - a. "...Petitioner contends that the prosecutor's concealment that a

firearm linked directly to the decedent, which had been turned in by the decedent's father, constitutes a Brady violation.”

On February 15, 2006, the South Carolina Supreme Court transferred the Petition to the South Carolina Court of Appeals. On September 27, 2006, the South Carolina Court of Appeals entered its order denying the petition and granting counsel's request to be relieved after review of the record pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The remittitur was sent on October 30, 2006.

Appellant filed a Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody dated September 20, 2007, in the United States District Court (C.A. No. 4:07-3217-PMD-TER). In his petition, Appellant raised the following grounds for relief:

1. “Actual and Constructive (Constitutional) Ineffective assistance of trial counsel.
 - a. “Counsel failed to fully investigate the facts.”
2. “Prosecutorial Misconduct.”
 - a. “It was later revealed that the weapon (pistol) that the ‘victim’ allegedly possessed the night of the incident in question was later turned in to police. However this information was not revealed to the defense until the day of the trial.”

The Respondent's motion for summary judgment was granted and the petition was dismissed as barred by the statute of limitations by order of the Honorable Patrick Michael Duffy dated July 14, 2008.

Appellant next filed a PCR application on April 4, 2007 (2007-CP-31-0075). In this application, Appellant set forth the following grounds for relief:

1. “Prosecutorial Misconduct ‘Brady Violation.’”
 - a. “Failure to turn over exculpatory evidence / firearm belonging to ‘victim.’”
2. “Actual and constructive Denial of ‘Due Process & Equal Protection’ of law.”
 - a. “It would be harmful error for the court to consider after discovered

Material evidence.”

3. “Ineffective assistance of appellate counsel.”
 - a. “Failure to argue ‘Brady violation’ on direct appeal.”

A Conditional Order of Dismissal was filed on February 4, 2008. In his Response to the Conditional Order of Dismissal Appellant raised the following additional grounds for relief:

1. “Newly Discovered Evidence: Inconsistent Ruling.”
 - a. Co-defendant’s PCR application was granted on a claim of ineffective assistance of counsel for failure to adequately cross-examine State’s witness, Inv. Dillenger, concerning the circumstances under which the deceased’s father turned over a gun attributed to his son. The order in that case is newly discovered evidence.
2. “Newly Discovered Evidence: Exculpatory Statement”
 - a. Statement from co-defendant Taylor.

An evidentiary hearing was convened on April 26, 2010, at which Appellant was present and represented by counsel, Tricia Blanchette, Esquire. In an Order dated July 31, 2010, and filed August 9, 2010, the Honorable W. Jeffrey Young denied and dismissed the application with prejudice. Appellant’s Motion to Alter or Amend was denied in an Order dated August 26, 2010, and filed September 1, 2010. Appellant has filed a Petition for Writ of Certiorari, and the matter remains pending.

Less than one month after Judge Young’s Order of Dismissal was filed in Appellant’s PCR matter, Appellant submitted a Motion for New Trial Based on After-Discovered Evidence Pursuant to Rule 29(b), SCRCrimP (“Motion”) dated September 7, 2010. In his Motion, Appellant set forth the same grounds for a new trial based on after-discovered evidence which had been submitted in his 2007 PCR application. A hearing on the Motion was convened on October 8, 2010, at which Appellant was represented by counsel, Tricia Blanchette, Esquire. In an Order dated November 15, 2010, and filed

November 16, 2010, the Honorable Howard P. King denied Appellant's Motion. This appeal follows.

ARGUMENT

The trial court did not abuse its discretion in denying Appellant's Motion for New Trial based on After-Discovered Evidence.

The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion. State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). A party requesting a new trial based on after-discovered evidence 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).

Appellant bases his current claim of newly-discovered evidence on his co-defendant Ron Taylor's guilty plea on October 5, 2009, in which Taylor claimed to have fired the shots that killed Henry Scott ("Victim"). Appellant also filed a PCR application setting forth the same claim based on an August 4, 2008, letter from Taylor. (Judge Young's Order, R. p. 1157). In the PCR action, Judge Young considered Taylor's plea and his in court and concluded that the testimony lacked credibility and that, even if believed, it would not change the outcome of trial as both Appellant and Taylor admitted firing at the victim. The two were tried under the theory of "the hand of one is the hand of all." Inasmuch as both Appellant and Taylor fired upon the victim, both committed the act, regardless of which shooter had fatal aim. Finally, the PCR court concluded that Taylor's admission that he was firing at victim was cumulative to testimony of several eyewitnesses who testified that Taylor was firing.

Judge King independently evaluated five aspects of Appellant's claim of newly-discovered evidence as follows:

1. Chain of custody form: Judge King noted that the fact that Victim's father had turned over a .45 caliber weapon was revealed at trial. Therefore, the issue could have been raised at trial or within one year thereof. Judge King further found that this evidence would only have been relevant had the defendants pursued a self-defense theory, which they did not. Judge King concluded that the form would not change the outcome of trial and was not material. Further, while not noted in Judge King's order, this issue was raised in Evans' first PCR application and his Federal Petition for Habeas Corpus.

2. Ruling granting post-conviction relief to co-defendant Ron Taylor: Judge King found that the circuit court's ruling in Taylor's PCR was not binding on another circuit court judge. In terms of newly discovered evidence, Judge King correctly found that the grant of Taylor's PCR is not material evidence in determining guilt or innocence of the underlying criminal offense.

3. Taylor's "testimony" at his plea: Judge King found that Taylor's "confession" during his plea colloquy was motivated by a desire to be released from incarceration and therefore lacking credibility. Judge King found that the statement would not change the result if a new trial was had. Judge King's finding is buttressed by Evans' prior admission of firing a weapon at victim. Under the theory of "hand of one, hand of all," both men would be guilty.

4. Gun registration for a .380 caliber pistol: Judge King noted that ten .380 bullets were found at the scene. The ten bullets had been fired from three different weapons. None of the weapons were ever found or tested. Judge King found that, at best, Taylor's

purchase of a .380 could potentially tie Taylor to one of the weapons. However, as multiple shooters were involved, under the theory of “hand of one, hand of all” the evidence would not change the outcome of trial. Notably, in his PCR action Appellant presented a letter from Taylor dated August 4, 2008, stating that he had purchased a .380 handgun. Therefore, this allegation would come more than one year after discovery in the context of this Motion.

5. Testimony of trial counsel that evidence was material and outcome determinative: Judge King rejected trial counsel Brian Doby’s statement that the evidence presented would have changed the outcome of trial.

Respondent submits that Judge King did not abuse his discretion in denying a new trial on any of these grounds. All of his conclusions are reasonable supported by the evidence. State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (S.C. Ct. App. 2011).

Judge King’s order does not reflect that he based his ruling on Judge Young’s denial of Appellant’s PCR. To the contrary, in one section of the order, while noting that “one circuit court judge does not have the authority to set aside the ruling or finding of another,” Judge King finds that

... the conclusions or orders of one circuit court judge are not binding on another. Each circuit court judge is free to make independent findings of fact based on a number of factors, including the judge’s view of the credibility and weight of the evidence. ...

(Judge King’s Order R. p. 1148). It is clear from this language that Judge King evaluated Appellant’s claims independently from Judge Young’s review. However, even if Judge King had found Judge Young’s order controlling, Respondent submits that such would be a correct basis for denial of the Motion for New Trial in the instant case. The parties in

both actions were the Appellant and the State. Appellant submitted identical evidence in both his PCR and in his Motion for New Trial, in fact relying on the PCR court's findings and evidence (e.g. Taylor's pawn shop receipt) in presenting his Motion. In so doing, Appellant effectively asked Judge King to grant relief that Judge Young had denied. While PCR is tried in the court of common pleas and a Rule 29, SCCrimP motion heard in the court of general sessions, in Appellant's case the evidence presented and relief sought are the same. Judge King would therefore have been correct to apply the rule that no circuit judge may set aside the order of another. In asking for the same relief in another forum based on the same evidence, Appellant is effectively "judge shopping." Moreover, such action should be estopped due to the same concerns for economy and finality of judgment that underpin doctrines like *res judicata*. See for example Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011)(the fundamental purpose of *res judicata* is to ensure that "no one should be twice sued for the same cause of action."); Steele v. Charlotte, C. & A.R. Co., 14 S.C. 324, 329 (1880)(there is no appeal from one Circuit judge to another), Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) (one Circuit Court Judge does not have the authority to set aside the order of another).

Appellant also argued at the motion hearing that he should be resentenced as a matter of fundamental fairness because Taylor was granted post-conviction relief and ultimately entered a guilty plea with a sentence of time served. On appeal, Appellant asserts that because Judge Young did not rule on this matter,² Judge King should have

² Judge Young found that Appellant had not shown that he was entitled to any relief through PCR. Therefore, Judge Young found that the question of what type of relief Appellant should receive need not be reached. Judge Young's Order.

ordered resentencing. Judge King did not address resentencing in his written order. Nonetheless, such relief would be inappropriate even if Appellant's Motion was granted. Rule 29(b), SCCrimP, provides a vehicle for the grant of a new trial, not a new sentence. Other vehicles exist for sentence reconsideration. A motion to reconsider sentence may be pursued pursuant to Rule 29(a) within 10 days of trial. A sentence may also be reduced for substantial assistance to the state pursuant to S.C. Code §17-25-65 (2010).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

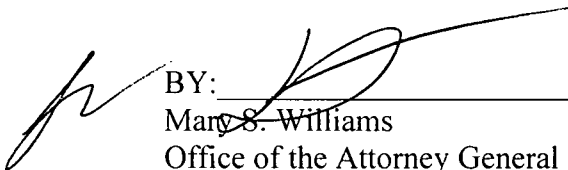
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May 9, 2012

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IN THE SUPREME COURT

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

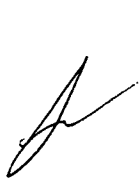
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May 9, 2012

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PROOF OF SERVICE

I, Lauren Meara, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 9th day of May, 2012.

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