STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

GARY LANE PREWITT,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The lower court did not err in denying the motion for new trial based on a trial witness's purported recantation where the trial court simply did not find the recantation credible and found it would not have changed the result of a new trial.

STATEMENT OF THE CASE

Appellant Prewitt appeals the denial of his motion for new trial pursuant to Rule 29, SCRCrimP, on the basis of what Prewitt contends is after-discovered evidence. Prewitt was tried and convicted by jury of first degree burglary, assault and battery with intent to kill (ABWIK), petty larceny, and possession of a weapon during a violent crime in January, 1995. The Honorable E.C. Bunett, III, sentenced Prewitt to life imprisonment for burglary and concurrent sentences of twenty years imprisonment for ABWIK, five years imprisonment for the weapons conviction, and thirty days for petty larceny ROA. p. 401. Prewitt did not appeal his conviction or sentence.

Prewitt filed his first application for post-conviction relief (PCR) on October 5, 1995. Following an evidentiary hearing on March 19, 1996, the Honorable Edward Cottingham denied the application by order dated July 8, 1996. Prewitt appealed. Prewitt's petition for writ of certiorari was denied by the South Carolina Supreme Court on September 10, 1997. A subsequent federal petition for writ of habeas corpus was denied on September 30, 1999. The denial was appealed to the Fourth Circuit of Appeals which dismissed the appeal on March 16, 2000.

Prewitt filed his second PCR application on January 30, 2002, alleging after-discovered evidence. A hearing was held before the Honorable Wyatt T. Saunders, Jr., on October 9, 2003. The second PCR application was dismissed by order

dated November 17, 2003. ROA. pp. 494-500.

Prewitt filed a motion for new trial based on after-discovered evidence on October 27, 2012. On March 12, 2013, a hearing was held before the Honorable Clifton B. Newman pursuant to Prewitt's Rule 29 motion. Judge Newman denied the motion by order dated July 9, 2013. Prewitt appealed. The State's brief follows.

STATEMENT OF FACTS

The convictions stem from a burglary and shooting on July 22, 1994, occurring, as the lower court's order notes, at a house on "a remote rural back road in Newberry County." ROA. p. 3.

Joe Dixon was waiting on the porch of his house when he saw a green car going towards his neighbor's house. His neighbor was Randy Tinsley. Dixon went down to Tinsley's to let the people in the car know that Tinsley was not home. When he reached the house, he saw two men. One went running out the door and the other faced him. When Dixon asked the man what he was doing, the man pointed a pistol and shot Dixon in the chest. The man walked up and shot two more bullets into Dixon. ROA. pp. 556-563.

At trial, Dixon identified Prewitt as the shooter. ROA. p. 565. He previously picked Prewitt from a photographic lineup. ROA. p. 576. When asked if he was sure Prewitt was the shooter, Dixon responded, "I know it, because I don't forget nothing." ROA. p. 566, lines 5-7. Dixon described the shooter's hair as "kind of brown." ROA. p. 571.[1]

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1 Prewitt claims that Dixon "had difficulty differentiating photographs of people and automobiles." Br of Appellant p 7 Any confusion in the testimony was actually the product of unartful cross-examination

Randy Tinsley testified at trial and confirmed his house was broken into. He listed the items stolen from his home. ROA. pp. 534-542. Christy McGuirt testified that she and Dixon saw a light green faded car drive down the road while Dixon was waiting to be picked up. She told Dixon he could go down to Tinsley's to let them know the Tinsley's were not home. She heard shots. She called A.H. Walker, a neighbor, and when Walker arrived the two went down to the Tinsley house together to find Dixon laying in a pool of blood. ROA. pp. 544-551.

A.H. Walker testified that McGirt, who lived a half-mile away from him, called distressed, explaining what happened. Together, they found Dixon, who had been shot. ROA. pp 579-581. Walker testified that before McGirt called, he saw two white men in a pale green 70s Chevrolet driving down the road. ROA. pp. 582-583.

Kimmie Shipes testified that the same day as the burglary and shooting, she saw a man who she would identify as Prewitt at her back door. She lived approximately half a mile from Tinsley's house. She heard noise, like someone "piddling" around on the back porch. She opened the door to find Prewitt, who she had never seen before, on the porch. Prewitt asked if "Eddie" lived there and she responded that no one named Eddie lived at the house. Prewitt ran away and left with another person in a "blue or green"

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questions Dixon testified he had not seen Prewitt since the shooting, but later agreed he picked Prewitt's photograph out of a lineup This is not inconsistent, Dixon had not seen Prewitt in person since the shooting Further, Dixon was asked about the car and then about pictures "shown" by law enforcement Apparently, law enforcement showed Dixon pictures of automobiles, which defense counsel did not understand, leading to a confusing line of questioning

Q Okay And what did they ask you to do with these two photographs?
A Well, he asked --- well, he asked me what color of car it was and what kind it was
Q Well, did you identify one of these photographs as being my client?
A I didn't --- I told him it was a Chevrolet --- a dark green Chevrolet

ROA p 574, lines 6-13 On redirect, this was cleared up Law enforcement showed Dixon two pictures of a car and about ten pictures of different people ROA p 578

car she described as "a raggedy old car." ROA. pp. 586-591.

At the time, she was in high school and working at Ingles. ROA. p. 592. Shipes testified that with the light shining on him, his hair looked light, red-like Shipes admitted his hair looked brown at trial. ROA. p. 594. Shipes testified she was sure that the man on her porch was Prewitt. ROA. p. 595. She assisted law enforcement in creating a composite drawing of the perpetrator. ROA. p. 596.

Investigator Danny Gilliam investigated the burglary and shooting. He presented Dixon with a photographic lineup that included Prewitt.[2] Gilliam testified he had no problems communicating with Dixon. Gilliam also testified he did not suggest to Dixon who to pick out of the lineup. Dixon picked Prewitt's picture out of the lineup and was certain of his identification. ROA. pp. 601-602.

Gilliam also showed the photographic lineup to Shipes. After five or six minutes, Shipes pointed to Prewitt's picture and said "that's the man who came to my back door." ROA. p. 604, lines 18-19. When Gilliam asked her if she had any doubt, Shipes responded, "No, I do not. That is the man that came to my door." ROA. p. 604, lines 22-24.

Prewitt testified on his own behalf and his parents also testified in his defense. Prewitt claimed he was home sick that day. Prewitt claimed Gillaim tried to slam his hand "[b]ecause I tried to tell him, you know, go check with these people, you know. They got a green --- bluish green car, you know. Got --- **one of the boys looks just like**

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2 Prewitt seems to argue that a live line-up should have been used Br of Appellant p 9 Gilliam testified that a live line-up would be impractical because it would be difficult to gather a sufficient number of people in person who looked similar ROA p 608 So law enforcement used a photographic lineup instead of an in-person lineup to avoid suggestiveness As Gilliam noted "You can't just pick anybody out to put in a line up Each person has to have the characteristics of the next person, " ROA p 608, lines 16-23

me, is what somebody told me, you know. I'm just going by hearsay, because I was in the jail, you know." ROA. p. 625, line 20 – p. 119, line 1 (emphasis added).

Second PCR hearing transcript

At the hearing on Prewitt's second PCR application, Prewitt called three inmate witnesses, Yohance Hill, Mack Hill, and Richard Hill. Each of them indicated Prewitt showed them the composite drawing and each testified that the person in the composite looked like Michael Bostic, who each of them knew. Mack Hill testified that back in 1994, Bostic drove a grey primer colored Chevrolet Impala. ROA. pp. 438-454.

Rule 29(b) hearing

Prewitt called a number of witnesses, but states in his brief that only the testimony of two witnesses was relevant to his appeal, Kimmie Shipes Heaton (married since trial) and Gilliam. Gilliam's testimony was materially the same as his trial.[3]

The other witnesses who testified demonstrate the successive nature of the Rule 29 motion. They testified, like the three inmates at the PCR hearing, that the composite drawing looked like Bostic. Rule 29 hearing transcript (ROA.) p. 72; p. 113 (testimony by inmate witness); p. 156; pp. 161-162.

Prewitt relies on Shipes' "recantation" as the basis for his appeal. Shipes is now incarcerated for murdering her husband and serving a fifty-year sentence. ROA. p. 143. Shipes testified she saw two men at her house on July 22, 1994, the day of the burglary

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3 Prewitt attempts to inflate what must be considered only minor variances in testimony, considering eighteen years time elapsed since trial Prewitt then makes scandalous and unwarranted accusations against Gilliam about Gilliam's failure to mention by name people he spoke with in the community (Gilliam referenced one, perhaps unartfully, as a confidential informant) Of course, Gilliam would have been unable to testify at trial with specificity about the informants he spoke with that led him to Prewitt as a suspect Two of them were initial suspects, but their stories checked out, which Prewitt fails to mention ROA pp 549-550

and shooting. She testified she opened the sliding glass doors when she heard some tapping and discovered a man standing there. She could not recall if he said anything or not anymore.[4] ROA. p. 135. A composite artist rendered a drawing with her assistance. ROA. pp. 136-137. She claimed at the motion hearing she picked more than one person from the photographic lineup. ROA. p. 138-139.

In contrast, Investigator Gilliam denied Shipes picked out more than one person from the lineup and denied that he suggested who she should choose from the lineup. ROA. p. 93.

Shipes admitted composing a letter stating she would not be able to testify to the same facts now that she did at the original trial. ROA. p. 140. Shipes testified she was institutionalized from 1991-93, she was hallucinating and hearing voices, and refused medication. ROA. p. 140. She also claimed to feel pressure from police and family. She testified she wanted to please everyone. ROA. p. 141.

On cross-examination, Shipes confirmed that at some point, Prewitt's mother and sister came to visit her at prison. She also admitted she reported to the police that they were harassing her.[5] She admitted of being frightened of Prewitt at the time of trial, but she claimed she was no longer afraid of Prewitt. ROA. 152.

Over objection from the State, the trial court allowed Prewitt to enter a letter from

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4 At trial she testified he asked if Eddie was there ROA pp 588-589

5 At trial, on cross-examination, Shipes testified that Prewitt's mother and sister visited her at Ingles Shipes further testified as follows

> They showed me a picture of a man in a car, and I could see the side of the man's face, and they were asking me was I sure that it wasn't this man instead of their son, and I told them that to me it did not look like the man and they asked me if I would be willing to talk to their lawyers and they said that their lawyers could subpoena me into court or whatever if they needed me

ROA p 595, line 11 – p 596, line 1

Dr. Harry Morgan dated May 5, 1998, addressed to Shipes' attorney. The letter noted Dr. Morgan examined Shipes on December 12, 1997, and based on the examination and prior medical records, Dr. Morgan concluded that Shipes had a serious mental illness. The letter seems to have been work product from the time Shipes was facing the murder charges for which she is presently incarcerated. The letter finds that at the time of the incident (presumably a reference to the murder charge for which she is presently incarcerated), she suffered significant mental impairment. However, the letter does not discuss her mental state in 1994 when she confronted a man at her house, or in 1995 when she testified at Prewitt's trial. ROA. PP. 698-699.

ARGUMENT

The lower court did not err in denying the motion for new trial based on a trial witness's purported recantation where the trial court simply did not find the recantation credible and found it would not have changed the result of a new trial.

Prewitt argues the trial court erred in denying the motion for a new trial. The trial court did not err; the trial court properly exercised its discretion to find the evidence was insufficient to warrant a new trial. The trial court simply found the recantation was not credible.

In Hayden v. State, 278 S C. 610, 299 S.E.2d 854 (1983), the Supreme Court set out five requirements that a party needed to show to prevail on an after-discovered evidence claim:

> 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.

"A motion for new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Ivrin, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978). The credibility of newly discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) ("In [the trial court], not this court, resides the power to weigh [newly discovered] evidence"). "Only the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (citing Irvin); see State v. Needs, 333

S.C. 134, 158, 508 S.E.2d 857, 869 (1998) (noting the granting of a motion on after-discovered evidence is not favored and reviewing courts will not disturb the trial court's denial absent an error of law or abuse of discretion). "In this post-trial setting, our jurisprudence recognizes the gate-keeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) *quoted in* Harris.

The trial court made the following finding as to Prewitt's claim:

> In this instance, Heaton testified that she will recant her previous testimony at a new trial and will not be able to identify Prewitt as the person at her back door. This potential recantation is not after-discovered evidence and she can be impeached with her previous testimony. I find that her testimony at the original trial is more credible than her testimony at the hearing on Prewitt's Motion for a New Trial and that this potential recantation would not likely change the outcome if a new trial were held.

Order p. 7.[6]

The trial court's ruling was not error. First, Shipes' new testimony would not have changed the result of the trial. The trial court simply did not find Shipes' hearing testimony credible. This was not error. Prewitt's after-discovered evidence claim is predicated on Shipes' recantation. "Recantation of testimony ordinarily is unreliable and should be subjected to closest scrutiny when offered as a ground for a new trial." Porter, at 621, 239 S.E.2d at 643 (quoting State v. Whitener, 228 S.C. 244, 264, 89 S.E.2d 701 (1955)). While Shipes' described her demeanor as frail at the time of trial, the trial

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6 Prewitt raised two other claims of after-discovered evidence at the hearing (1) an alleged hearsay statement by Wayne Eubanks to Brayn O'Shields that Eubanks and Michael Bostic committed the burglary and (2) Randy Tinsley's identification of Bostic as the man depicted in the sketch Order p 6 These claims are not raised on appeal and are waived

transcript indicates otherwise:

> I could almost --- in the pictures that Mr. Gilliam showed me, it looked exactly like him in the pictures they showed me. I mean, we looked through tons of pictures, and all of them were all different, and the ones that he showed --- the one that I picked out, I could almost assure you that that was him in that picture.

ROA. p. 593, lines 6-12. Defense counsel requested Prewitt stand up and asked Shipes if she thought the suspect was taller than Prewitt, she said no. ROA. p. 594. Prewitt's family attempted to dissuade her from the identification prior to trial, but she stayed true to her original identification. ROA. pp. 595-596. In 1994 and 1995, Shipes was a high school student holding down a job at Ingles. In 2013, she was a convict serving a fifty-year prison sentence. Note Shipes only claims that presently, she can no longer identify Prewitt as the perpetrator; Shipes does not claim she testified falsely at trial. Merely because she has qualms, years later, fails to disprove her ability, years ago, to correctly identify Prewitt.

Judge Newman found Shipes' trial testimony was more credible than the recantation in concluding the recantation would not change the result of the trial, and under the standard of review, this was not error. See also Porter (finding no error in denying motion for new trial based on recantation by victim and another witness of shooting in which victim recanted his trial testimony and claimed to have been too inebriated to recall what happened on that day).

Further, the recantation is not evidence that could not have been discovered since trial. 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 Prewitt as the perpetrator. Accordingly, Shipes is not after-discovered evidence.[7]

Additionally, Shipes' recantation was not material to guilt or innocence. Dixon was the victim of the shooting and he positively identified Prewitt as the shooter. State v. Gambrell, 274 S.C. 587, 590-91, 266 S.E 2d 78, 81 (1980) (noting a victim's degree of attention is presumably acute during the commission of a violent crime). While there is some reference in the record that Dixon might have slight mental retardation, two witnesses confirmed he was of sound mind ROA. p. 127, pp. 155-156 (Tinsley testifying Dixon had a "sound mind," but that if you did not know him, you might think he is retarded). There is no evidence Dixon's identification was suggestive. Shipes' identification was merely cumulative to Dixon's identification.

Prewitt relies on the hearsay letter provided by Dr. Morgan to bolster Shipes' testimony. However, at most, the letter is merely impeaching. "[I]mpeaching must mean that which is outside the evidence already given, and impeaches that evidence; it may be by attacking the character, the motives, the integrity, or veracity of those who gave the testimony." Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938). Dr. Morgan's letter would not be admissible at trial as it was rank hearsay.[8] But even if admitted, the letter would merely be impeachment evidence. Finally, it does not prove that Shipes was incompetent to make an out-of-court identification or testify at trial.

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7 Further, the claim was not timely brought and could have been litigated in the second PCR Shipes whereabouts were well-known to Prewitt and his attorneys and investigators Prewitt even discussed Shipes' murder conviction at the PCR hearing ROA pp 431-435

8 Notably, Prewitt called nine witnesses at the motion hearing, but did not think it was important to call Dr Morgan, who would have been subject to cross-examination Judge Newman was not required to accept the facts in the letter as true, even if he did admit the letter at the hearing

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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ATTORNEYS FOR RESPONDENT

September 15, 2014

STATE OF SOUTH CAROLINA

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v.

Gary Lane Prewitt, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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September 15, 2014

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PROOF OF SERVICE

I, Norma Bigbee, 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: Jarrett S. Calder, Esquire, P.O. Box 3237, Myrtle Beach, SC 29578.

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

This 15TH day of September, 2014.

NORMA BIGBEE
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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

September15, 2014

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

Re: **State v. Gary Lane Prewitt**
Appellate Case No: 2013-001728

Dear Ms. Kitchings:

Enclosed please find the original and fourteen (14) copies of the **Final Brief of Respondent** along with **proof of service**, in the above-referenced matter for filing in your office. By copy of this letter, we are serving opposing counsel with this brief today.

Sincerely,

David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc. Jarrett S Calder, Esquire (2 copies)
Victim Services (with enclosure)