

State of South Carolina
In the Court of Appeals
General Sessions Court
John C. Hayes, III, Circuit Court Judge

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JAN 22 2015
SC Court of Appeals

Appellate Case No.: 2013-000915

State of South Carolina,

Respondent,

Antonio Gordon,

Appellant.

Final Brief of Appellant

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Statement of issues on Appeal

Did the lower court abuse its discretion and commit error of law when it erroneously found that Rule 29(b), SCCrIMP motion cannot be filed by Appellant because he plead guilty?

As an alternative ground, Should this court strictly construe the affidavit requirement to prevent Appellant's claims where respondent's did not assert this ground in the lower court?

Did the lower court abuse its discretion and commit error of law when it did not understand the scope of review?

Did the lower court abuse its discretion and commit error of law when it found Appellant's evidence was not after discovered?

Statement of the case

This matter comes before the court by way of an appeal from an order denying the appellant's motion for a new trial based on after discovered evidence. The Appellant and his three co-defendants, Monta Gordon, Terrance McCreary and Gary Moffitt, were all prosecuted in connection with their involvement in the shooting. All of Appellant's co-defendants eventually cooperated with the State and intended to testify that the Appellant was the shooter. The Appellant ultimately pleaded guilty on July 16, 1999, to murder and attempted armed robbery, among other charges, and was sentenced to an aggregate forty years imprisonment.

Appellant subsequently filed A Rule 29(b), SCCrump motion for a new trial based on after discovered evidence. In this motion, the Appellant alleged two of his co-defendants, Monta Gordon and Terrance McCreary had recanted their earlier statements and asserted that Monta Gordon would admit to firing the shot that killed the victim and that McCreary would admit that M. Gordon, not the Appellant as previously stated, exited and reentered his vehicle with a firearm. Diaz made a statement identifying M. Gordon as the shooter.

On March 4 and 8, 2013, the motion was heard by the lower court. The Appellant, M. Gordon and McCreary all testified at the hearing, with both the Appellant and M. Gordon testifying that M. Gordon was the shooter and McCreary testifying M. Gordon exited and reentered the vehicle he was driven with a firearm. On April 22, 2013, the lower court filed an order denying the motion on several grounds.

Arguments

The lower court abused its discretion and committed error of law when it erroneously found that Rule 29(b), SCrimP motion cannot be filed by Appellant because he Pleaded guilty

The Circuit Court has the Power to entertain a motion for new trial based on After discovered evidence where the motion is made by someone who Pleaded guilty and there was no prior trial. The General Assembly has given the Circuit Courts such Power under S.C. Code Ann (17-28-30(B) - 100(B) - Rule 29(b), SCrimP.

Any ambiguity in Rule 29(b), SCrimP does not disappear when examining the source of Section 17-23-110 because that section conflict with section 17-28-30(B) - 17-28-100(B) which specifically states a defendant who Pleaded guilty can file a Rule 29(b), SCrimP motion. Where there are two statutes in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute. *Denman v. City of Columbia*, 691 S.E.2d 465 (2010). Appellant asserts that section 17-28-30(b) - 17-28-100(B) repeal section 17-23-110.

If the lower court's ruling stand Defendant's who Pleaded guilty and seeks to have their DNA tested under 17-28-30(B) cannot file a Rule 29(B), SCrimP motion under section 17-28-30(B) - 100(B) as the General Assembly has provided such statutory right and to allow those under 17-28-30(B) to file a Rule 29(b), SCrimP motion and to deny Appellant will be violation of Equal Protection of the law. S.C. Const Art. I, 13.

The Supreme Court reviewed a motion for new trial based on After discovered evidence on the merits even though the conviction was obtain through a guilty Plea. The Supreme Court specifically held that "motions of this character should be entertain and granted in order that wrongs done may be remedied". *State v. DeAngelis*, 256 S.C. at 369, 182 S.E.2d at 734. Therefore, the lower court abuse its discretion and committed error of law when it categorically found that Appellant could not file a Rule 29(b), SCrimP motion because Appellant's conviction was obtain through a guilty Plea. See Order at 18-19.

As an alternative sustaining ground, this court should not strictly construe the affidavit requirement to prevent Appellant's claims because Respondent did not assert this ground in the lower court which is deemed waived.

The respondent did not assert this claim in the lower court and is deemed waived Pursuant to *State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (noting that an argument must be raised and rule upon by a trial court to be preserved for appellate review).

The lower court abuse its discretion and committed error of law when it did not understand the scope of review and did not complete the analysis

It is the fix rule that credibility of newly discovered evidence offered in support of a motion for a new trial is a matter for determination by the Circuit Court Judge to whom it is offered. In him, not this court, resides the Power to weigh such evidence, and his judgment thereabout will not be disturbed except for error of law or abuse of discretion. *State v. Parker*, 153 S.E.2d 183 (1967).

The lower court found that all 3 witnesses was fabricating testimony and not credible. See Order at 20. The Court in *State v. Mercer*, 381 S.C. at 170, 672 S.E.2d 567, held that a motion for new trial based on after discovered evidence should not be denied simply because the witnesses supporting the motion lack credibility because a witness may lack persuasive credibility and still create reasonable doubt.

The lower court found Mercer "confusion and hard to work into its analysis" and then proceeded to find that the motion should be denied simply because it did not find the Appellant's witnesses credible. Order at 21. The respondent's however is asking this Court to make a credibility determination. The question before this Court is whether the lower court abused its discretion and committed error of law by not completing the Mercer analysis because Mercer directed the lower courts to look to the nature of the evidence supporting the motion and determine whether or not reasonable was created. By ignoring that directive the trial court erred. *Id.* 381 S.C. at 170, 672 S.E.2d at 567.

The lower court abused its discretion and committed error of law when it found that Appellant's Evidence was not after discovered.

The lower court found that appellant's evidence was not after discovered because the appellant had known from the day of the shooting that he was not the shooter. Order 22-23. This finding was erroneously as a matter of law because the appellant's motion was "not" based upon his assertion that he was not the shooter but was based instead on the newly discovered evidence that both Monta Gordon and McCreary, who were both set to testify against him and identify him as the shooter if he proceeded to trial, would now essentially testify that Monta Gordon was the shooter.

This evidence could not have been discovered by the exercise of due diligence because Plaintiff, the fact that they would identify Monta Gordon as the shooter could not have been known prior to trial because they were going to testify that the appellant was the shooter at his trial. Hearing Tr 63 line 13-14 - Page 91 line 20 - Page 92 line 1. See *U.S. v. Montilla Rivera*, 115 F.3d 1060 (1st Cir. 1997) (newly discovered evidence includes Co-defendant's testimony unavailable at time of trial). Therefore, under *Spann* principles the evidence was after discovered and could not in the exercise of due diligence have been discovered prior to trial. *Spann*, *supra*, 334 S.C. at 619, 513 S.E.2d at 99. Consequently, the lower court's ruling on this issue is controlled by error of law, *Spann* and should be reversed.

Conclusion

It is respectfully request that the trial Judge's ruling be reversed, that this Court determines that Circuit Courts have authority to grant a Rule 29(b) motion based on a guilty plea and that the States motion to restrict Appellant's future filing with this Court be denied because appellant has not been serve notice.

Respectfully submitted

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State of South Carolina
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Appeal from York County
General Sessions Court

John C. Hayes, III, Circuit Court Judge

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Respondent,

v.

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Appellant

Certificate of Service

I, Antonio Gordon, hereby certifies that I have served Appellant's Final brief on respondent at:

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by depositing copies in the mail with sufficient postage this
15th day of January, 2015.

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JAN 16 2015

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