STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2013-CP-10-0634
	)	
	)	
David Rocquemore, #323014,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Presiding Judge:	The Honorable J. C. Nicholson
Applicant's Attorney:	James Falk, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Andrew Savage, Esquire Lauren Williams, Esquire
Date of Hearing:	January 14, 2015
Court Reporter:	Deborah Garrison

PROCEDURAL HISTORY

The Applicant was indicted in December 2005 in Charleston County for murder (2005-GS-10-8602) and possession of a weapon during the commission of a violent crime (2005-GS-10-8601). The Applicant was represented on these charges by Andrew Savage, Esquire, and Lauren Williams, Esquire. The State was represented by Deputy Solicitor Bruce Durant and Assistant Solicitors Brian Alfaro and Jennifer Shealy. The Applicant proceeded to trial on July 9-19, 2007. The Honorable Daniel Pieper presided over the trial.

On July 17, 2007, shortly after the trial reconvened for the afternoon, trial counsel told the Court that he learned over the weekend that Michael Nelson, an assistant solicitor who was not involved in the prosecution of the Applicant's case, had a cousin on the jury. (Trial Tran. 875:6-12). Trial counsel added that while speaking with Mr. Nelson, he also learned that Mr.

Nelson was "asked to leave the courtroom by Your Honor because of his relationship with the jury member." (Trial Tran. 875:19-22). The Court responded by telling counsel that Mr. Nelson "just assumed" that he told him to leave because of his relationship with a jury member and that he "generally told him to leave the courtroom". (Trial Tran. 876:2-6).

Trial counsel went on to report to the Court that there had been some communication between Mr. Nelson and the juror via text message and telephone throughout the trial. (Trial Tran. 876:15-20). The Court inquired of trial counsel about what he wanted the Court to do to remedy the situation. Mr. Savage responded that he wanted to have the juror dismissed. (Trial Tran. 877:15-18).

The Court went on to tell the parties on the record that he was "joking with Mr. Nelson when I told him to get out" and that he had no records or knowledge of the juror's relationship with Mr. Nelson. (Trial Tran. 878:1-7). The Court personally assured trial counsel that he would "never do such a thing" and that he "joke[s] around with all the people that work in this building every now and then, but that's about it." (Trial Tran. 879:11-20). Trial counsel told the Court that he was not seeking recusal of the Court based on the Court's communication with Mr. Nelson. (Trial Tran. 879:13-14).

Juror Davey, the juror in question, was then brought into the courtroom and questioned by the Court regarding his communication and relationship with Mr. Nelson. The juror conceded he did not disclose to the Court his relationship with Mr. Nelson and was removed from the jury. (Trial Tran. 880:7-884:19) One of the alternates was seated on the jury and the Applicant's trial continued. (Trial Tran. 888:1-13).

On July 18, 2007, trial counsel again brought up to the Court the issue regarding Mr. Nelson and the replaced juror. Mr. Savage told the Court that he was not questioning the Court's

granting of his request to remove the juror, but was concerned that the juror disclosed things to the other jurors based on is communications with Mr. Nelson that may have tainted the other jurors. (Trial Tran. 1077:12-1079:8).

The Court again stated that there was a faulty assumption that he already knew about the relationship between Mr. Nelson and the juror. (Trial Tran. 1079:17-24, 1086:19-21). The Court agreed to question Mr. Nelson on the record regarding his communication with the juror and poll the jury regarding any statements the removed juror may have made about his relationship with Mr. Nelson. (Trial Tran. 1100:12-1105:16). After questioning Mr. Nelson *in camera* and polling the jury, trial counsel moved for a mistrial based on a due process violation for the juror's failure to disclose the special relationship he had with the Solicitor's Office. (Trial Tran. 1160:6-164:18). This Court denied the Applicant's motion on the basis that the issue was resolved by the removal of the juror.

On July 19, 2007, the jury found the Applicant guilty of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. (Trial Tran. 1340:7-25). Trial counsel renewed the Applicant's motion for a mistrial and was given the opportunity to expand upon his arguments in support of his motion for a mistrial. The Court again denied the motion for mistrial and stated that he was still satisfied that the jury was not improperly tainted by the removed juror. (Trial Tran.1358:7-1359:16). The Court allowed the Applicant to submit as a court's exhibit a document from SunCom Communications that listed all the phone calls made by the dismissed jurors between July 6th and July 18th. (Trial Tran. 1359:9-15).

On July 23, 2007, the Applicant filed a Motion for Release of Records requesting the court issue an order releasing the cell phone records of Assistant Solicitor Nelson. A hearing

regarding the motion was held on July 24, 2007. By Order filed August 20, 2007, the Honorable Daniel Pieper denied the Applicant's request to release the records. The Court affirmed its ruling regarding whether any improper tainting of the jury occurred during trial and concluded that there was no likelihood continued proceedings on the matter would demonstrate any impact upon the Applicant's fair and impartial jury verdict.

The Applicant filed a timely Notice of Appeal. The Applicant was represented on appeal by Appellate Defenders Robert Dudek and Joseph Savitz. During the course of the Applicant's appeal, appellate counsel asked the Court of Appeals for an order releasing Mr. Nelson's cell phone records. By Order dated April 11, 2008, the Court of Appeals also declined to grant the Applicant an order releasing Mr. Nelson's cell phone records. On June 28, 2010, the Court of Appeals affirmed the Applicant's convictions and sentences. State v. Rocquemore, 2010-UP-331 (Ct. App. June 28, 2010). The Court of Appeals held "the trial court did not err in refusing to grant Rocquemore a mistrial based on the State's failure to disclose Mr. Nelson's relationship with the juror. Assuming, without deciding, that the trial [court] committed error, we find Rocquemore failed to demonstrate any prejudice." The Applicant filed a Petition for Writ of Certiorari in the South Carolina Supreme Court which was dismissed as improvidently granted on December 12, 2012. The Remittitur was issued on December 28, 2012.

The Applicant filed an application for post-conviction relief on February 1, 2013. On October 23, 2013, Assistant Solicitor Michael Nelson was suspended from the practice of law by the Office of Disciplinary Counsel based on his communications with the juror in the Applicant's trial. The opinion's narrative states the following:

> "At an interview with ODC on August 1, 2012, respondent was asked if the trial judge had asked him to leave the courtroom during the trial or during jury selection. Initially, respondent replied "[n]o." However, respondent then remembered that he went into the courtroom during the trial and the trial judge texted him and told him to leave.

Respondent stated the text occurred during a break in trial. He explained that, in hindsight, he assumed the trial judge was "messing with" him."

The Applicant amended his post-conviction relief application on November 25, 2014 to allege "recent discovery of material facts not previously presented and heard which require vacation of the conviction or sentence". The Applicant's pleading stated the alleged newly discovered evidence was the text message communication between Mr. Nelson and Judge Pieper where Judge Pieper told Mr. Nelson to leave the courtroom.

The Applicant served the Honorable Daniel Pieper with a subpoena to appear at the Applicant's post-conviction relief hearing. Assistant Attorney General Courtney Lowell, on behalf of Judge Pieper, filed a Motion to Quash the Subpoena on December 5, 2014. The Applicant filed a Return to Judge Pieper's Motion to Quash on December 8, 2014. After a hearing, the Honorable J.C. Nicholson partially denied Judge Pieper's Motion to Quash. The Court held that the Applicant would only be able to call Judge Pieper as a witness during his post-conviction relief hearing if the testimony of Michael Nelson indicated the presence of additional communications with Judge Pieper other than the one already reflected in the record. An evidentiary hearing was held on January 14, 2015. This Order follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record[1] in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. This Court finds the testimony presented by the parties to be credible.

[1] The record included the following: application for post-conviction relief, State's return, Charleston County Clerk's records, SCDC records, the Applicant's appellate court records, the trial and PCR hearing transcripts, Applicant's Exhibit 1 (a sworn affidavit from Lauren Williams), and memos from each party.

Newly Discovered Evidence

The Applicant claims he is entitled to a new trial on the basis of newly discovered evidence. The Applicant claims the newly discovered evidence is a text message communication between Mr. Nelson and the trial judge where the trial judge told Mr. Nelson to leave the courtroom. This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving the existence of newly discovered evidence warranting a new trial.

The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(4) (2007). It is well settled that a motion for new trial based on newly discovered evidence may be granted only if the movant shows that the evidence upon which the motion is based:

1. Is such as would probably change the result if a new trial was had;
2. Has been discovered since trial;
3. Could not by the exercise of due diligence have been discovered before trial
4. Is not material to the issue of guilt or innocence; and,
5. Is not merely cumulative or impeaching.

State v. Caskey, 272 S.C. 325, 329, 256 S.E.2d 737, 738-39 (1979) (emphasis added).[2] The South Carolina Supreme Court and Court of Appeals have both affirmed many times over the

[2] Georgia Supreme Court case Berry v. State is credited as first developing the multi-factor standard for newly discovered evidence adopted by most modern federal and state courts. 10 Ga. 511 (1851). The Berry court stated to satisfy the Court on the ground of newly discovered evidence, the movant must show "1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That is it so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only...5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness." Id. at 527. While the Berry case divided the newly discovered evidence standard into six

requirement that the movant prove all five prongs of the test outlined in Caskey in order to prevail on a claim of newly discovered evidence.[3] Therefore, the Applicant's failure to prove any one of the Caskey factors defeats a claim of newly discovered evidence.

This Court finds the Applicant is unable to prove all five of the Caskey factors. First, this Court finds the Applicant has failed to carry his burden of proving the communication between the trial judge and Mr. Nelson was material to his guilt or innocence[4]. At the evidentiary hearing, the Applicant conceded that he was unable to prove the materiality element of his newly discovered evidence claim. (PCR Tran. 66:2-5). This Court finds the trial judge's single communication with Mr. Nelson was in no way relevant to the jury's finding of the Applicant's guilt. See U.S. v. Quintanilla, 193 F.3d 1139, 1148 (10th Cir. 1999) ("Evidence which touches only issues tangential to defendant's defense cannot serve as an adequate foundation for granting a new trial.") This Court finds that while the trial judge's communication with Mr. Nelson may have been unwise, his conduct does not rise to the level of conduct that would have prejudiced the outcome of the Applicant's trial. This Court also finds it is particularly unlikely the communication was material to the Applicant's guilty or innocence since Mr. Nelson was not the solicitor prosecuting the Applicant's case. This Court finds the Applicant's inability to prove this prong of the Caskey test is a sufficient basis for the denial of post-conviction relief.

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elements, many federal and state courts including South Carolina have given the test five elements without changing the standard's substance.

[3] See State v. Wright, 228 S.C. 432, 438, 90 S.E.2d 492, 495 (1955); State v. Wells, 249 S.C. 249, 262-63, 153 S.E.2d 904, 911 (1967); State v. Pierce, 263 S.C. 23, 32, 207 S.E.2d 414, 419 (1974); State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 198 (1978); State v. Allen, 276 S.C. 412, 413, 279 S.E.2d 365, 366 (1981); Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983); State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668-69 (1993); Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993); State v. Freeman, 319 S.C. 110, 123, 459 S.E.2d 867, 874-75 (Ct. App. 1995); State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999); State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (emphasis added).

[4] For purposes of a motion for new trial based on newly discovered evidence, "material evidence" is evidence which is relevant and goes to the substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case. U.S. v. Riggs, 496 F.Supp. 1085 (M.D. Fla. 1980).

Since the Applicant is required to prove all five prongs of the Caskey test, this Court does not have to address the Applicant's ability to prove the remaining four prongs of the Caskey test to deny this application for post-conviction relief. However, this Court finds the Applicant has also failed to carry his burden of proving at least three of the remaining four Caskey factors.

This Court finds the Applicant has failed to prove the claimed "newly discovered evidence" would change the result if a new trial was had. This Court finds the Applicant has failed to present any evidence that the jury's verdict was influenced by the communication between Mr. Nelson and the trial judge. The record is also void of any disclosure of the communication to the jury during the trial. The initial discussion regarding the communication took place *in camera* and outside of the jury's presence. The record also reflects Mr. Nelson was not involved in the prosecuting of the Applicant's case on behalf of the State and had no involvement in the trying of the State's case. This Court finds the alleged newly discovered evidence does not tend to prove the crime was convicted by someone other than the Applicant and does not call into question the jury verdict.

This Court rejects the Applicant's argument that the alleged newly discovered evidence if known by counsel at the time of trial would have aided trial counsel's motion for mistrial. This Court finds it is unlikely evidence regarding the text message communication between the trial judge and Mr. Nelson would have aided the Applicant's motion for a mistrial. "A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). Based on the error and prejudice standard required for success on a motion for mistrial, it is unlikely the Applicant's "newly discovered evidence" would have aided counsel's prejudice argument for the Applicant's motion for mistrial. This is especially unlikely since the Applicant

has conceded that he is unable to show how the "new evidence" is material to his guilt or innocence and by extension affected the outcome of his trial. This Court finds the Applicant has failed to carry his burden of proving the alleged new evidence would have affected the outcome of his trial. This Court finds the Applicant's inability to prove this prong of the Caskey test is also a sufficient basis for the denial of post-conviction relief.

This Court finds the Applicant has also failed to carry his burden of proving the alleged newly discovered evidence has been discovered since trial. This Court finds the record is clear that the communication between Mr. Nelson and the trial judge was disclosed during the Applicant's trial. Not only was the communication disclosed, but the substance of the communication was also disclosed. Both trial and appellate counsel for the Applicant testified at the evidentiary hearing that they were aware of a communication between Mr. Nelson and the trial judge during the trial. (PCR Tran. 17:13-19, 18:10-14, 19:4-8, 19:13-23, 22:5-11, 23:19-23, 31:14-21, 39:13-18, 42:10-11). The record also reflects the trial judge disclosed to the parties on the record during the Applicant's trial that "he generally told Nelson to leave the courtroom." (Trial Tran. 876). The communication between Mr. Nelson and the trial judge was discovered during the Applicant's trial.

This Court does not find persuasive the Applicant's argument that he was unaware that the communication between the trial judge and Mr. Nelson took place via text message. This Court finds the form of the communication between the trial judge and Mr. Nelson is a distinction without a difference. Contrary to the Applicant's arguments, a text message communication does not lend itself to any more secrecy than any other private two-party conversation. This Court finds we do not have to speculate as to the substance of the text message between the trial judge and Mr. Nelson. Mr. Nelson confirmed the trial judge's

disclosure at the evidentiary hearing. Mr. Nelson testified the trial judge sent him one message telling him to get out of the court room. (PCR Tran. 57:23-25, 59:22-25). Because the trial judge disclosed the communication with Mr. Nelson during the Applicant's trial, the Applicant has failed to show that the evidence has been discovered since trial. This Court finds the Applicant's inability to prove this prong of the Caskey test is also a sufficient basis for the denial of post-conviction relief.

Finally, this Court finds the Applicant has failed to carry his burden of proving the alleged newly discovered evidence is not merely cumulative of impeaching. The Applicant's alleged newly discovered evidence is the communication between the trial judge and Mr. Nelson. As noted above, the trial judge disclosed this communication and its substance to the both parties on the record during the Applicant's trial. This Court finds the "new evidence" regarding this disclosure is merely cumulative to the trial judge's disclosure.

This Court finds the Applicant has failed to carry his burden of proving all five prongs of the newly discovered evidence standard outlined in Caskey. This Court finds the Applicant has failed to show how the trial judge's communication with Mr. Nelson affected the jury's verdict or the constitutionality of his criminal conviction. Therefore, this Court denies and dismissing this application for post-conviction relief.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12 day of MAY, 2015.

The Honorable J.C. Nicholson
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.