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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

JUN 25 2015

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
General Sessions Court

The Honorable R. Markley Dennis, Jr., Circuit Court Judge.

Appellate Case Number: 2014-002176

Indictment Numbers: 2012-GS-07-01419 & 01548; 2013-GS-07-0906

The State, Appellee

v.

Joseph Bowers, Appellant

**AMENDED MOTION TO SUSPEND APPEAL AND GRANT
LEAVE TO FILE A RULE 29(B) MOTION FOR A NEW TRIAL**

THE APPELLANT BRINGS THIS MATTER TO THE ATTENTION of this Court seeking an order suspending the appeal in the above-referenced matter and granting leave to file a Motion for a New Trial based upon Newly Discovered Evidence, pursuant to SCRCrimP Rule 29 (b). On March 16, 2015, this Court denied a similar motion with leave to reapply for such relieve upon receipt of the trial transcript, which has now been received. This Amended Motion is based upon the facts and law presented below.

The Appellant was indicted in 2012 and 2013 for the charges of Murder, Attempted Murder, and Possession of a Weapon during the Commission of a Violent Crime. This matter was tried during the September 29, 2014 term of General Sessions in Beaufort with the Honorable R Dennis Markley presiding. The jury convicted the Appellant of Voluntary Manslaughter, Assault and Battery of a High and Aggravated Nature (ABHAN), and the Possession of the Weapon during the Commission of a Violent Crime (PWCVC) and he was sentenced to concurrent terms of 15 years, 15 years, and 5 yrs, respectively¹.

Following the Appellant's conviction, the Appellant learned that an individual named Terry (T-Dog) Thornton exculpated the Appellant and implicated himself as the shooter. The Appellant was not previously aware of this evidence. Further, the jury was not presented any evidence of T-Dog's exculpation of the Appellant or his implication of himself.

As a general legal context, Rule 29(b) allows a defendant to move for a new trial if evidence was discovered after the verdict. Such a motion may be filed up to one year after either the date of discovery or the date the evidence was available for discovery through reasonable diligence. Although such a motion is not proper during the pendency of a direct appeal, an exception is proper if the appellate court suspends the appeal and grants leave allowing such a

¹A Notice of Appeal was timely filed on October 6, 2014.

challenge.

To prevail in a Rule 29(b) context, a defendant bears the burden of production and persuasion. In order to prevail on such a motion, the defendant must show: 1) that the new evidence will probably change the result if the new trial is granted; 2) the evidence has been discovered since the trial; 3) this evidence could not have been discovered before the trial with the exercise of due diligence; 4) this evidence is material to the issue; and 5) this evidence is not merely cumulative or impeaching. See St v Harris, 706 SE2d 526 (SC Ct App 2011). A trial judge's ruling on such a motion is given substantial deference by a reviewing court.

As indicated above, following the Appellant's conviction, his family was contacted by a friend in North Carolina. This lady, Dana Hardin, told the family that she had learned of the Appellant's conviction and felt compelled to reveal a surreptitious recording of a third party confessing to the crimes for which the Appellant was convicted. This original recording and the device upon which it was recorded is now in the possession of undersigned counsel.

During this conversation, between Dana Hardin and Terry (T-Dog) Thornton, Mr. Thornton indicated that the Appellant (Opie²) was innocent. During the newly discovered recording, T-Dog states: "Opie ain't did shit." Newly Discovered Recording, 10:50. Just moments later, T-Dog admits that he was the actual shooter, stating: "Yea, squeezing at the top of the roof is on me now." Newly Discovered Recording, 12:33.

This contrasts with the evidence presented at the trial below.

During the trial below, the primary evidence establishing the guilt of the Appellant was a recorded call from the Defendant to his girlfriend made during pre-trial incarceration. See

² See Trial Transcript, September 1, 2014, p. 114, l. 3-4 ("You're going to come to know Joseph Bowers as Opie, or Joey.")

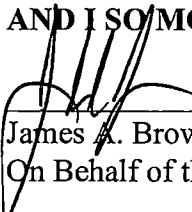
State's Exhibit #39. The State argued that this call contained a confession by the Appellant that he fired the shots at issue. Trial Transcript, September 30, 2014, p. 114, l. 15-16 ("...he tells us he's one of the gunmen in a phone call to his girlfriend."). The Defense argued that the conversation did not contain such an admission. Trial Transcript, October 1, 2014, p. 378, l. 24-25 ("That may or may not say that he shot a gun.").

Supporting the fact that the discussion on the call was not clear is the jury's inquiry during trial concerning the existence of a transcript of this call. Trial Transcript, October 1, 2014, p. 326, l. 1-6. As no such transcript existed, the jury was left to divine the contents based upon this ambiguous recording. Further, the trial court suggested the recording was susceptible to multiple interpretations. In his ruling upon the Appellant's Directed Verdict motions, the trial court stated that the phone call "...could mean that he didn't shoot anybody." Trial Transcript, October 1, 2014, p. 379, l. 23-24. The fact the Appellant was only convicted on lesser charges and received a moderate sentence supports the fact that this evidence was less than conclusive.

Should the Court agree with the Appellant's portrayal of the newly discovered evidence, then the Appellant would not only meet his burden but, in fact, would be innocent of the charges for which he was convicted.

Therefore, Appellant respectfully requests that this Court suspend the appeal and grant leave for the Appellant to file and argue his Motion for a New Trial in the circuit court.

AND I SO MOVE


James A. Brown, Jr.
On Behalf of the Appellant

June 22, 2015

Law Offices of Jim Brown, P.A.
1600 Burnside St, Suite 100
P.O. Box 592
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(843) 470-0003

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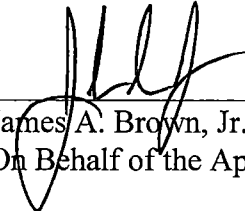
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No: 2014-002176

The State,Respondent
v.
Joseph Bowers,Appellant

PROOF OF SERVICE

I certify that I have served a copy of this Amended Motion to Suspend Appeal and Grant Leave to File Rule 29(b) Motion for a New Trial on the State of South Carolina, by depositing a copy of this Motion in the United States Mail, postage prepaid, on June 22, 2015, addressed to its attorney of record, Assistant Attorney General Salley W. Elliot, at South Carolina Attorney General's Office, P.O. Box 11549, Columbia, SC 29211



James A. Brown, Jr.
On Behalf of the Appellant

June 22, 2015

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STATE'S OPENING

1 Lucas Morgan over here, armed with a Glock. We've got Joseph
2 Bowers over here, armed with a Glock.

3 You're going to come to know Joseph Bowers as
4 Opie, or Joey. Both unload their clips into crowds of
5 people. This is a melee. This is chaos. This is a gun
6 battle.

7 You're going to hear from witnesses in the
8 community. Those witnesses saw different things. They were
9 in different places, ducking and dodging the bullets. This
10 was chaos.

11 But what's going to be clear is that they were
12 all witnesses to an act of senseless violence, senseless
13 violence that left four people, four victims, in its wake.

14 It's also going to be clear that Joseph Bowers
15 was one of the gunmen. In fact, he tells us he's one of the
16 gunmen in a phone call to his girlfriend.

17 At the end of this case, I'm going to ask you
18 to speak the truth, follow the law, and hold Joseph Bowers
19 responsible for the choices that he made that night. I'm
20 going to ask you to return guilty verdicts on all charges.
21 Thank you.

22 THE COURT: Ms. Campbell.

23 MS. CAMPBELL: May it please the Court?

24 THE COURT: Yes.

25 DEFENDANT'S OPENING

1 aware of the standard. Suspicious got to be more than
2 suspicion, it's either got to be by direct evidence or
3 substantial circumstantial evidence. So, you've cited
4 the cases which set forward that proposition. You
5 don't need to read it, I'm very cognizant of the
6 standard.

7 MS. CAMPBELL: Okay. Thank you.

8 THE COURT: And I'm sorry to interrupt you, but
9 I'd like for you to just talk about why that applies
10 here.

11 MS. CAMPBELL: As to the murder indictments for
12 Dante Bailey and for Michael Morgan, I'll speak to
13 those first.

14 THE COURT: All right.

15 MS. CAMPBELL: There is no direct evidence that
16 Joseph Bowers fired a gun on 6/21/2012, save a single
17 jail phone call.

18 THE COURT: Yeah. Well, that's unfortunately, for
19 purposes in the light most favorable to the State,
20 direct evidence.

21 MS. CAMPBELL: And I'll explain why I believe it's
22 not even direct evidence, if I may.

23 THE COURT: Sure.

24 MS. CAMPBELL: That may or may not say that he
25 shot a gun. The State would advance for Your Honor,

1 that the substance of the statement is, I ain't killed
2 the boy, I only shot the boy, which is in essence a
3 denial of killing anyone, and at best an admission
4 that, to his own internal belief, that he may have shot
5 someone.

6 THE COURT: Well, the problem I have with going
7 there is that really goes to a weight situation. But
8 more important, the -- in fact, I've read several cases
9 this morning, I think a couple of them decided in
10 September that talk about merely stating, for instance,
11 they said, I didn't mean to kill them or I didn't
12 intend to hurt them, that that isn't enough to negate
13 it. It's still a matter for the jury, so I appreciate
14 that. I mean, it's just -- I understand there are
15 different ways to construe that. There's no question
16 about that.

17 But that's where it stops. I can't do that
18 because I'd be stepping over the boundary by doing so.
19 If it exists, I can't -- you're certainly entitled to
20 argue that, and the jury may conclude that. But for me
21 to do that, I'm not weighing the evidence and --
22 basically agree with you, but that doesn't mean that
23 you kill somebody. Frankly, it could mean that he
24 didn't shoot anybody.

25 This case has some significant problems.

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June 22, 2015

The Honorable Jenny Abbott Kitchings
Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Joseph Bowers
Indictment Numbers: 2012-GS-07-01419 & 01548; 2013-GS-07-0906

Ms. Kitchings:

Under cover of this letter, find enclosed a copy of the Amended Motion to Suspend Appeal and Grant Leave to File Rule 29(b) Motion for a New Trial, attachments to include a DVD of a video recording, as well as transcript pages, and the Proof of Service with regard to the same. Thank you for your assistance with this matter.

Sincerely,

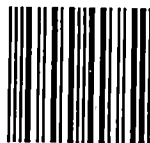

Jim Brown

with enclosures as indicated above

cc: Salley W. Elliott, Sr. Asst. Deputy Attorney General, w/enclosures
Joseph Bowers, w/enclosures



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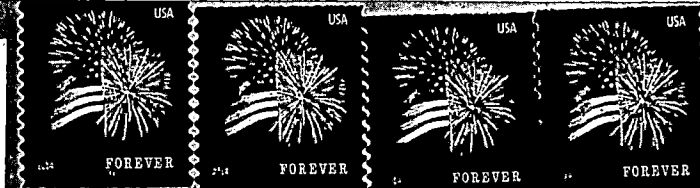


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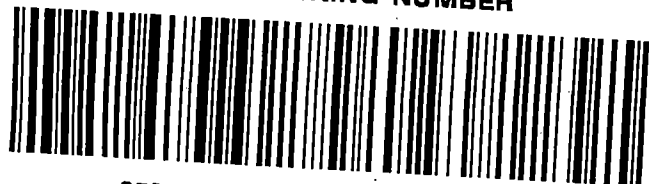
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