



ALAN WILSON
ATTORNEY GENERAL

September 18, 2015

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Bryan D. Gibson, #233215 v. State of South Carolina
2002-CP-04-2465

RECEIVED

SEP 18 2015

S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. A copy of the order which is to be challenged on appeal.
4. Letter setting due date for Petition for Writ of Certiorari

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/ah
Enclosures

cc: Frank L. Eppes, Esquire
The Honorable Richard A. Shirley, Clerk of Court of Anderson County
The Honorable Christina T. Adams, Tenth Circuit Solicitor
SCCID, Division of Appellate Defense
David M. Tatarsky, Esquire
Trisha Allen, Victims Services

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
COURT OF COMMON PLEAS

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge
Case No. 2002-CP-04-2465

RECEIVED

SEP 18 2015

S.C. Supreme Court

BRYAN D. GIBSON, #233215,

Respondent,

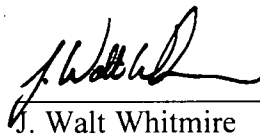
v.

STATE OF SOUTH CAROLINA

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order Granting Motion for Reconsideration Granting Petition for Post-Conviction Relief of the Honorable J. Cordell Maddox, Jr., Presiding Judge, signed August 17, 2015, filed August 20, 2015, and received by the State on August 24, 2015, in the matter of Bryan D. Gibson v. State of South Carolina, Case No. 2002-CP-04-2465.



J. Walt Whitmire
Assistant Attorney General
South Carolina Bar No. 100793
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Columbia, South Carolina 29211
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September 18, 2015

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
COURT OF COMMON PLEAS

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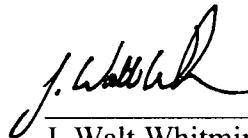
STATE OF SOUTH CAROLINA

Petitioner.

PROOF OF SERVICE

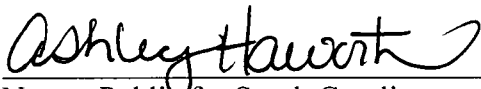
I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on September 18, 2015, to Frank L. Eppes, Esquire, his attorney of record, to the address below.

Mr. Frank L. Eppes, Esquire
Eppes & Plumblee, PA
PO Box 10066
Greenville, SC 29603



J. Walt Whitmire
Assistant Attorney General

SWORN to before me this
18th day of August, 2015



Notary Public for South Carolina.

My Commission Expires: 3-18-2023

A TRUE COPY

AUG 20 2015

Richard D. Hines
CLERK OF COURT

*STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT
) CASE NO.: 2002-CP-04-2465

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Bryan Douglas Gibson, Jr,)
)
 Plaintiff,)
)
 -vs-)
)
 State of South Carolina)
)
 Defendant.)

**ORDER GRANTING MOTION FOR
 RECONSIDERATION GRANTING
 PETITION FOR POST CONVICTION
 RELIEF**

Pursuant to South Carolina Rule of Civil Procedure 59, Petitioner Bryan Douglas Gibson, Jr. moved this Court to reconsider its Order dated April 19, 2011 denying the Post Conviction Relief Petition. This motion is made based upon the transcripts of the original trial which began on March 21, 1996 (hereinafter "Trial Transcript"), the Post Conviction Relief action held on or about May 30, 2001, the hearings of November 1 and December 8, 2005, and the hearing in this matter on October 6, 2010 (hereinafter "Transcript"). After careful consideration of the facts at issue and the tortured history of this case, the Court grants the motion for reconsideration, and grants the Petition for Post Conviction Relief.

FACTS

Brian Gibson was convicted of murder after a bar fight that ultimately led to an altercation in a parking lot where Gibson's single blow with a small knife on a key chain killed the victim, Chad Cole. Gibson, a large 20 year old man at the time of the incident, maintained his innocence at trial and testified that he was not the aggressor in the altercation. While the jury was charged on the law of manslaughter and self defense, the State argued that he had no other

witnesses to corroborate his testimony. See Trial Transcript at 671. Gibson was found guilty by the jury and sentenced to life in prison.

The original PCR hearing was held in 2001 and Mr. Gibson was represented by James R. Mann of the Greenville Bar. In that PCR, Mr. Gibson again testified as to what happened that night, and again no witnesses were provided to support his testimony. Mr. Mann's presentation consisted primarily of Mr. Gibson's testimony with very little argument. Gibson's trial counsel, Harold Lowry, testified at this proceeding as well; however since this proceeding, both Mr. Mann and Mr. Lowry have passed away.

At the motion hearing in this Post Conviction Relief matter, the Petitioner put forward two principal witnesses.

Darron S. Tester, the bouncer at the bar where the dispute occurred, testified to the following facts:

1. He broke up an altercation in the bar and, as was his practice for ending scuffles, asked one party to the incident (two individuals) to leave the bar and instructed the other party (two other individuals) to go back into the bar and stay. The two individuals that were asked to leave left without further incident. Transcript at 63 l. 13 - 64, l. 16
2. After that, one of the two people he told to go back inside the bar, Chad Cole, must have snuck back into the parking lot, because the next time Tester saw him, Cole was coming back inside and was bleeding from the neck. Transcript at 64, l. 18 - 65, l. 14.
3. Tester called 911. After law enforcement arrived and confirmed that he was the one who called 911, he was never questioned by law enforcement, the solicitor's office or lawyers for the Petitioner again. Transcript at 65, l. 14 - 66, l. 7.

This information corroborates Mr. Gibson's testimony that he was asked to leave the bar, that he did so peacefully, and that he was trying to go when Mr. Cole came outside to continue the altercation.

In addition, Kristy Jones testified at the PCR hearing before the Court. Ms. Jones had dated Chad Cole prior to the incident and was at the bar the night in question. Ms. Jones had never been asked to testify at trial, nor had she spoken with anyone from either of Mr. Gibson's previous counsels' office. Ms. Jones testified to the following facts:

1. Ms. Jones used to date the victim Chad Cole and he had a bad temper and frequently beat up people after they got into verbal altercations which were usually caused by Jamie Burgess' verbal abuse, Transcript at 52-53;

2. Ms. Jones left the bar that night with her date. They were accompanied by Bryan Gibson and his date, Transcript at 53, l. 17 - 54, l.3.

3. In the parking lot outside, Mr. Cole shoved Mr. Gibson, Mr. Gibson swung, and Mr. Cole started bleeding from the neck, See transcript at 56, line 11 - 57, line 10.

This testimony corroborates Mr. Gibson's: that he was not the aggressor, that Chad Cole hit him first, and that Mr. Cole was in the middle of a fight that he instigated, not an ambush by the Petitioner.

The above information is directly contrary to the prosecution's version of events at the trial. The prosecutor argued "Chad was not involved in it. Chad was absolutely not involved." Trial Transcript at p. 671, l. 15 -16. She later argued, concerning the actual incident in the parking lot when Mr. Cole was killed referring to the witnesses other than Mr. Gibson, "they said there were no threats, no violence, nothing." Trial Transcript at 673, l. 11 - 12.

Mr. Gibson's testimony has always been that, after an altercation inside the bar, he left at the request of a bouncer. Thereafter, Mr. Cole followed him into the parking lot where an altercation took place in which Mr. Cole was the aggressor. See, e.g. Trial Transcript at 536 - 550 and PCR transcript at 27-38.

The evidence at trial shows that Mr. Gibson testified on his own behalf and that his testimony was refuted by several witnesses, none of whom actually saw the events at issue first hand. With a nominal amount of work over ten years after the fact, present counsel was able to provide two witnesses that trial counsel for Mr. Gibson and the Solicitor completely ignored. These witnesses corroborate Mr. Gibson's testimony and make it substantially more likely that he would have been convicted of the lesser charge of manslaughter as the result of a fight in which he was not the principal aggressor. See *Strickland v. Washington*, 466 U.S. 668, 695 (1984)(stating prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.) The Court finds that but for the complete lack of investigation by both trial counsel and PCR counsel, the results of this proceeding would have been different.

STATUTE OF LIMITATIONS

Under S.C. Code § 17-27-45 (c) (1972 as amended), evidence of material facts not previously presented may be submitted within one year of the date of discovery of those facts, or the date when such facts could have been discovered by reasonable diligence.

The case at bar involves newly discovered evidence. This evidence is of the most compelling kind - it affirms Mr. Gibson's testimony and refutes both the prosecution theory of the case and the circumstantial testimony of several prosecution witnesses. Because of the timing of this application (within one year of the end of the previous application), the evidence

was actually discovered after the application was filed. See, e.g., Coats v. State, 352 S.C. 500 (2003)(Petitioner allowed to proceed with late filed PCR application within one year after Department of Corrections informed him that he was not eligible for parole).

The State's position is that with reasonable diligence these facts could have been uncovered by previous counsel; however, the application of the language of the statute places too severe a burden on Mr. Gibson because his entire PCR application is based upon the failure of previous counsel to provide him with reasonably diligent representation. Mr. Gibson contends that both his counsel and his PCR counsel did not exercise reasonable diligence in uncovering the facts that would verify his version of events at trial and during both his first PCR and this proceeding as well. Current counsel, in exercising reasonable diligence, has uncovered evidence that if presented at trial had a substantial likelihood of altering the outcome of the verdict. While this situation is novel and not directly addressed by the specifics of the PCR Statute, this Court finds that the evidence is both "after discovered evidence," and that the failure of both trial counsel and the original PCR counsel to exercise the due diligence to discover this evidence is sufficient grounds to grant this PCR and to disallow the State's claim regarding the Statute of Limitations.

SUBSEQUENT PCR APPLICATIONS

Pursuant to S.C. Code § 17-27-90 (1972 as amended), a ground for post conviction relief may be asserted in a subsequent PCR application if the Court finds that there was sufficient reason that the ground was not asserted or was inadequately raised in the original PCR. Thus, it is within the Court's discretion to allow this subsequent PCR if it finds sufficient reason.

Although the South Carolina Supreme Court discourages successive PCR applications, it has noted that "as with most broad rules, there have been exceptions." Aice v. State, 305 S.C.

448, 450 (1991) (citing several examples). For example, in Case v. State, 277 S.C. 474, the Court noted a unique combination of facts that warranted allowing successive applications. In Case, the applicant had filed a previous application without assistance of counsel. Later, with counsel, the applicant filed an application that was dismissed for successiveness by the trial court. After reviewing the entire record, and without noting any facts concerning the underlying trial, the Supreme Court decided that Mr. Case was entitled to a hearing on the second application. 277 S.C. at 413 - 414.

The Supreme Court does require that the applicant must point to facts and circumstances that demonstrate why the new grounds were not and could not have been raised in the first PCR application. Aice; see also Matthews v. Evatt, 105 F. 3d 907 (4th. Cir. 1997). Even in Land v. State, 274 S.C. 243 (1980), the landmark opinion on successiveness in South Carolina, the Supreme Court noted that when there is ample reason to permit a person to litigate again, it may be allowed. 274 S.C. at 246.

The case at bar is such a case. The evidence before this Court is that a twenty year old was involved in a bar fight and killed someone. For over 10 years the bouncer at the bar who tried to break up the fight before Mr. Cole's death was never questioned by anyone, law enforcement included. Now this witness has been found and can corroborate Mr. Gibson's testimony. This testimony is a critical piece of newly discovered evidence that should have been found at the earlier trial or the first PCR.

Likewise, Kristy Jones, the victim's former girlfriend testified both to his propensity toward violence, and to the fact that Cole shoved Gibson before the single fatal blow was struck.

The evidence before this Court suggests that Bryan Gibson has been sentenced to life in prison for his role in a bar fight that unfortunately led to Mr. Cole's death. Until now, neither of

his attorneys had found these witnesses, both of whom were from, and still live in, the Anderson area. Mr. Gibson has been incarcerated since his arrest – he was in no position to find these witnesses on his own. Only his counsel could have accomplished this on his behalf, and his former counsel did not.

Additionally, the failure of these previous attorneys to locate these witnesses and present this evidence at trial or the previous PCR hearing materially affected the outcome of both proceedings.

PROSECUTORIAL MISCONDUCT

The two new witnesses were both available to the prosecution and should have been identified and interviewed by law enforcement. Yet the prosecution made blanket statements that the victim was not involved in an altercation – “Chad was not involved in it. Chad was absolutely not involved.” Trial Transcript at p. 671, l. 15 -16. Further, the prosecutor later argued that the witnesses denied an altercation – “they said there were no threats, no violence, nothing.” Trial Transcript at 673, l. 11 - 12. The clear implication is that Mr. Gibson was required to bring forth witnesses to prove his testimony when the prosecution should have known this evidence was available, and that this evidence clearly supported a manslaughter charge. See e.g., Riddle v. Ozmint, 369 S.C. 39, at 47-48, 631 S.E. 2d. 70, at 75 (2006). In Riddle, the Court in reversing a denial of PCR because the prosecution had allowed a witness to testify falsely, pointed out that

a “prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.” Giglio v. U.S., 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The failure to correct false evidence is as reprehensible as its presentation. Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996). The PCR judge erred in concluding that the State was not obligated to correct

Jason's false testimony, and in failing to hold that this violation of petitioner's due process rights required that he be granted a new trial.

The Court held that due process was violated by the prosecutor's decision to stand by while a witness lied. Here, the fact that no one ever investigated the crime sufficiently to find the two witnesses that support Petitioner's version of events while the prosecutor argues that there are no witnesses indicates that for Mr. Gibson, the fundamental requirements of due process were not met.

CONCLUSION

This is not a case for exoneration. But it is a case that was wrongly handled by all parties. A 19 year old man became involved in an altercation not of his making. He made a rash decision to open a pen knife and he was found guilty of murder. This case is more than likely a manslaughter case. Mr. Gibson's attorneys failed him at both his trial and his initial PCR. The prosecutor won the case by calling him a liar and asking where his witnesses were. Now he has found the witnesses. For the reasons stated herein, this Court grants the Petition for Post Conviction Relief and directs that this matter should be remanded to the 10th Circuit Solicitors' Office for further disposition.

AND IT IS SO ORDERED



The Honorable Cordell Maddox
Judge, 10th Judicial Circuit

Dated 8/17/15
Anderson, South Carolina

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COMMUNICATIONS AND
GENERAL SESSIONS