

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

DEC 22 2015

SC Court of Appeals

Appeal from Richland County

The Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN JULIUS SMITH,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

ARGUMENT IN REPLY 3

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014)..... passim

State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001)..... 10

State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007)..... 6

State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) 6

State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993)..... 3, 9, 10

State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011)..... 8, 9

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976) 10

Statutes

S.C. Code Ann. § 16-3-20..... 9, 10

S.C. Code Ann. § 16-3-95..... 8

Rules

Rule 29, SCRE..... passim

ARGUMENT IN REPLY

In the Brief of Appellant, Appellant John Julius Smith raised the following four issues:

I. Whether Appellant's case should be remanded for an evidentiary hearing and findings of fact in light of the intervening case of Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014), which articulated a new test for relief sought based on newly discovered evidence following a guilty plea?

II. Whether Appellant's case should be remanded for further findings of fact where the motion court's cursory Order of Dismissal is insufficient for appellate review?

III. Whether Appellant's guilty plea should be vacated and his case remanded for a new trial where the motion court erred in denying Appellant's request for new trial after Appellant showed that the newly discovered evidence met the traditional five-factor test?

IV. Whether Appellant's case should be remanded for further findings of fact where the motion court erred in finding that the standard for resentencing based on newly discovered evidence announced in State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993), applied only to capital cases?

As more fully discussed in Appellant's brief, this case involves a motion for new trial based on after discovered evidence following Appellant's guilty plea to infliction of great bodily injury upon a child. Appellant learned of documents that indicated that the minor child's injuries were not as severe as alluded to at the plea hearing such that they did not constitute "great bodily injury."

Impact of *Jamison* on Rule 29(b) Motions Based on After-Discovered Evidence

Respondent contends that Appellant improperly "conflates a Rule 29(b) motion for a new trial based on after-discovered evidence with a post-conviction relief proceeding."

Respondent's Brief, p. 7; Respondent's Brief, p. 11 n. 9. Prior to our Supreme Court's recent decision in Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014), the traditional, five-factor newly discovered evidence test applied in both contexts, after a trial and guilty plea. In Jamison, the Court announced a new two-part test that applies "when a PCR applicant seeks relief on the basis of newly discovered evidence *following a guilty plea*." 410 S.C. at 470, 765 S.E.2d at 130 (emphasis added). Though the Court only specified that its ruling applied in context of post-conviction relief, the purpose of creating the new test was related to the entry of the guilty plea and not the manner in which the after-discovered evidence was raised. Id. Thus, it is logical to expect that the new standard expressed in Jamison would also apply to a Rule 29(b) motion based on after-discovered evidence following a guilty plea.

Alternatively, the court may determine that a Rule 29(b) motion is not proper following a guilty plea and that such an action must be brought under the Uniform Post Conviction Relief Act. If that is the Court's determination, this matter of procedure should not impact Appellant since no such proscription was made prior to the filing of his Rule 29(b) motion and the filing of the Rule 29(b) motion was made on the advice of counsel.¹

¹ Indeed, for the reasons explained in Appellant's brief, post-conviction relief would likely be the more practical avenue to address new evidence discovered after the entry of a guilty plea. However, on the advice of counsel, Appellant in this case brought this action under Rule 29(b) as a motion for new trial. Respondent asserts that Appellant "voluntarily" withdrew his post-conviction relief application. Respondent's Brief p. 4 n. 1; Respondent's Brief, p. 8, n. 5. While Appellant admits that the application was withdrawn, he makes no concession that such withdrawal was knowing, intelligent, or voluntary.

Application of Traditional Five-Factor Test

Respondent argues that, despite the Court's ruling in Jamison, the traditional five-factor test regarding after-discovered evidence standard applies, even following a guilty plea. Respondent's Brief, p. 9. Several of Respondent's arguments in response to Appellant's showing that he met the five factor test warrant reply.

Respondent avers that Appellant could have waited for additional medical records before entering his plea. In support of that position, Respondent cites to the Public Defender's records, which Appellant attached to his pro se Supplemental Amendment to Rule 29(b) Motion. Respondent contends that they reflect that Appellant failed to follow plea counsel's advice against entering a guilty plea before the full extent of the child's injury was known. Thus, Respondent argues that the evidence could have been discovered prior to entry of the guilty plea if Appellant had followed his attorney's advice. Respondent's Brief, pp. 12-13.

Appellant notes that plea counsel's partial work log spans only from October 6, 2008 through November 17, 2008. R. 32 (Supp. Amdt. to Motion for New Trial). Appellant did not enter his guilty plea until December 18, 2008. The notes indicate that on November 13, 2008, Appellant and plea counsel discussed the need to wait for additional medical reports before entering a guilty plea. The result of that conversation was that plea counsel would ask the solicitor for updated medical reports and see if the solicitor was willing to make any plea offer. A phone call was made to the solicitor, who indicated she would look at the file, speak with the case worker, and call plea counsel back. There is no written indication of what occurred after that with the exception of the preparation of a Motion for Bond Reduction. Thus, it is unknown what, if any, updated information was provided to plea

counsel by the solicitor and what plea counsel's advice was to Appellant over a month later, on December 18, 2008, when he entered a guilty plea without negotiation.

Respondent further characterizes Appellant's averment that his case may have been called prior to the availability of the new medical reports as "rank speculation." Respondent's Brief, p. 13 n. 12. Instead, Respondent speculates that Appellant's case would not likely have been called prior to July 2009 and asserts that Appellant could have sought a continuance if his daughter's prognosis was still unknown at that point. Respondent's Brief, p. 13 n. 12. Though our Supreme Court has since held that the solicitor's exclusive control of the criminal docket violates the separation of powers, the solicitor's office was certainly wielding unfettered power over the scheduling of criminal cases when Appellant's charges were pending in 2008. See State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). Thus, the solicitor could have indicted Appellant as intended on December 18, 2008 and Appellant's case been called at any time thereafter. Further, the discretion of a trial court in determining whether to grant a continuance is well-settled. State v. Colden, 372 S.C. 428, 437, 641 S.E.2d 912, 917 (Ct. App. 2007) ("The granting or denial of a motion for a continuance is within the sound discretion of the trial judge. Our appellate courts have shown great deference to trial judges in this matter." (internal citations omitted)).

Rather than addressing the merits of Appellant's reasoned argument that the alleged conduct did not fit the statutory definition of "great bodily injury," Respondent dismissed Appellant's contention as "beyond belief." Respondent's Brief, p. 13 n. 11. Upon further review of the medical records, Appellant agrees that the records reflect that the minor child had a "small subdural hematoma." However, there was no indication in that report, or any other report, to indicate that the hematoma created a "substantial risk

of death.” See Respondent’s Brief, p. 17 n. 15; R. 106 (MR Brain W/P Contrast Final Report 5/8/08, part of Supplemental Medical Records filed under seal).

Respondent commented that “Appellant continues to exhibit the same callousness toward Victim as he did when he inflicted her injuries.” Respondent’s Brief, p. 13 n. 11. Respondent goes on to say that Appellant is not grateful for his daughter’s developmental achievements because he “reduces” the result of her injury to “minor speech issues.” Appellant is confident that this Court can see through these shallow attacks on the Appellant’s character. The Respondent’s personal opinion aside, Appellant’s exercise of his post-trial rights in light of after-discovered is not reflective of any nefarious feelings toward his child. Appellant referenced his love for his daughter four times during the plea hearing— and given Respondent’s unwarranted attack upon his character, he is compelled to add that his love for his daughter has not changed. R. 20, ll. 19-20; R. 21, l. 16; R. 22, l. 12; R. 22, l. 18-19.

Application of Jamison Test

It would be inequitable to impose a higher burden upon the Appellant yet give him no opportunity to present additional evidence to meet that higher standard. Thus, a further evidentiary hearing is necessary to determine if the after-discovered evidence in this case was (1) “discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea”; and (2) “of such a weight and quality that, under the facts and circumstances of that particular case, the ‘interest of justice’ requires the applicant’s guilty plea to be vacated.” Jamison, 470, 765 S.E.2d at 130. While the first factor encompasses several of the traditional after-discovered factors, the second “interest of justice” factor is distinct.

To the extent that this court does see fit to apply the Jamison test on appeal, Appellant relies on the Brief of Appellant and this Reply. Additionally, it is notable that Appellant told the plea court that he was not sure that the injury occurred while the minor child was in his care and specifically denied responsibility for the other injuries to the minor child. Rather than vacate his plea, the plea judge told Appellant that if he thought someone else was responsible, he should not have pled guilty, “but you pled guilty and accepted responsibility for this and you’re going to be punished for it.” R. 20, l. 17 – 24, l. 22. Further, the plea judge’s perceived severity of the injury undoubtedly played a role in his sentencing of Appellant. R. 25, ll. 7-14. The after-discovered evidence reveals that the injury was not so severe and that the child has no “protracted loss or impairment of the function of any bodily member or organ.” See S.C. Code Ann. § 16-3-95.

Propriety of Alternate Remedy of Resentencing

Respondent argued that “Appellant did not raise the resentencing issue until he sought to amend his Rule 29(b) motion at the motion hearing. Therefore, even assuming resentencing relief is available under Rule 29(b) in a non-capital case, it was not timely asserted in this case.” Respondent’s Brief, p. 16 n. 14. Respondent’s attempt to analogize State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011), to the present case is without merit.

Warren involved the filing of a timely motion to withdraw the defendant’s plea, which was later amended to request reconsideration of the defendant’s plea and *specifically abandoned* the motion to withdraw the plea. 392 S.C. at 239, 708 S.E.2d at 236. Warren did not involve after discovered evidence. See Rule 29(a), SCRE (“**Except for motions for new trials based on after-discovered evidence**, post-trial motions shall be made

within ten (10) days after the imposition of the sentence. “ (emphasis added)). Further, unlike Warren, Appellant did not abandon his original request for a new trial in making his alternative argument for resentencing. Both of forms of relief were premised upon the after-discovered evidence.

If this court accepts Respondent’s argument, a defendant is either required to file a baseless motion for resentencing within ten days of his sentence premised upon hypothetical after-discovered evidence that was not yet known to him, or is effectively prohibited from asking for resentencing based on after-discovered evidence because it would be outside of the ten day time period proscribed in Rule 29(a). See Jamison, 410 S.C. at 467-69, 765 S.E.2d at 128-29 (rejecting the State’s argument that once a defendant pleads guilty he is not entitled to PCR in the face of newly discovered evidence).

In the present case, the court retained the “authority to act ‘for the purpose of hearing and disposing of the motion.” Warren, 392 S.C. at 240, 708 S.E.2d at 236. Disposition of the Rule 29(b) motion included fashioning the proper form of relief, whether it be the full relief of a new trial or the partial, but still advantageous relief, of a resentencing.

As discussed more fully in Appellant’s Brief, resentencing is a proper alternate remedy in this case. Respondent argues that the standard for resentencing based on after-discovered evidence announced in State v. South , 310 S.C 504, 427 S.E.2d 666 (1993), is not applicable in this case because South was a capital case, involving a bifurcated sentencing hearing. S.C. Code Ann. § 16-3-20(B) provides for a separate sentencing proceeding where the State seeks the death penalty where “the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment.” Both

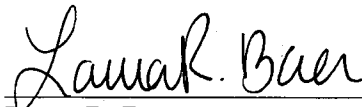
the State and defense counsel are also permitted to present argument for or against the sentence to be imposed. S.C. Code Ann. § 16-3-20(C) provides a list of statutory aggravating and mitigating circumstances but also authorizes the consideration of “mitigating circumstances otherwise authorized or allowed by law.” The consideration of non-statutory mitigating factors is not unique to capital cases. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976) (“For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.”).

“The goals of sentencing are to reflect the seriousness of the offense, promote respect for the law, provide appropriate punishment, deter criminal conduct, protect the public from the defendant’s criminal conduct, and provide the defendant with needed care or treatment.” State v. Brouwer, 346 S.C. 375, 388-89, 550 S.E.2d 915, 922-23 (Ct. App. 2001). Here, the plea hearing transcript reflects that the seriousness of the injury and potential harm to the victim were major factors in the Appellant’s sentence, as they would be in *any* case involving physical injury. The newly discovered evidence is thus “material to any mitigating or aggravating circumstances,” i.e. the extent and ramifications of the victim’s injury. South, 310 S.C. at 509, 427 S.E.2d at 670.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant John Julius Smith respectfully requests that his guilty plea be vacated and his case be remanded for a new trial or resentencing, or alternatively, that his case be remanded for a further evidentiary hearing and/or further findings of fact as ordered by this Court.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 22nd day of December, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 22, 2015

Laura R. Baer

Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

RECEIVED
DEC 22 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

The Honorable Robert E. Hood, Circuit Court Judge

RECEIVED
DEC 22 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOHN JULIUS SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 22nd day of December, 2015.

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 22nd day of December, 2015.

[Signature] (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.