

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

State of South Carolina,

vs.

Ashante Ishmael Wright,

Defendant.

) IN THE COURT OF GENERAL SESSIONS
) OF THE NINTH JUDICIAL CIRCUIT
) INDICTMENT NO.: 2006-GS-10-10690

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SC Court of Appeals

**ORDER DENYING DEFENDANT'S
MOTION FOR A NEW TRIAL BASED
UPON AFTER DISCOVERED EVIDENCE**

Date of Hearing: April 28, 2016
Presiding Judge: Deadra L. Jefferson
State's Attorney: Bruce Durant, Esq.
Defense Attorney: Russell Hilton, Esq.
Trial Counsel: Jason King, Esq.
Court Reporter: Denise Lauder

This matter comes before the Court on Defendant's Motion for a New Trial Based upon After Discovered Evidence, filed June 26, 2014 and received on March 2, 2016¹, pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure. The State filed their Return on November 19, 2015 and was received by this Court on March 2, 2016. A hearing on the Defendant's motion was held on April 28, 2016. Present at the hearing were Deputy Solicitor Bruce Durant on behalf of the State and Russell Hilton, Esquire on behalf of the Defendant. Also present were the Defendant Ashante Ishmael Wright and Sharon Johnson. The Defendant testified on his own behalf, and Sharon Johnson, a witness from the Defendant's trial, was called to testify. Walter Mitchell, a private investigator also testified.

PROCEDURAL HISTORY

¹ The Defendant's original motion was filed pro se on June 26, 2014. The Defendant did not serve the State or the Court with the Motion. Upon receipt of the Motion on March 2, 2016 the matter was set for a hearing on April 28, 2016.

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The Defendant is presently confined in the South Carolina Department of Corrections pursuant to an order of commitment of the Clerk of Court for Charleston County. The Defendant was indicted at the October 2006 term of the Charleston County Grand Jury for Murder Indictment Number: 2006-GS-10-10690. Jason King, Esquire, represented the Defendant. The Defendant proceeded to trial on January 28-30, 2008, after which a jury found him guilty as indicted. This Court sentenced the Defendant to confinement for fifty (50) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Robert M. Dudek, Esquire, of the South Carolina Commission on Defense, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals subsequently dismissed the appeal. State v. Wright, No. 2010-UP-127, 2010 WL 10079377 (S.C. Ct. App. Feb. 11, 2010). The Remittitur was issued on March 1, 2010.

The Defendant filed an application for post-conviction relief (PCR) on October 5, 2010. Respondent made its Return on February 3, 2011. An evidentiary hearing in to the matter was convened on January 11, 2012 and the Applicant was represented by Demal I. Mattson, Jr., Esquire. The Honorable Markley Dennis denied the PCR application and filed an Order of Dismissal on February 22, 2012. A Notice of Intent to Appeal was filed on April 16, 2012 by Demal I. Mattson, Jr., Esquire, on behalf of the Defendant. On June 6, 2013, the Remittitur from the Supreme Court of South Carolina was filed, denying the petition and granting counsel's request to withdraw.

FINDINGS OF FACT

1. Sharon Johnson ("Ms. Johnson") testified as an eye-witness during the Defendant's murder trial in which he was found guilty by a jury.

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2. Defendant alleged Ms. Johnson was not truthful when she implicated the Defendant in the crime.
3. Defendant provided a copy of a statement by Ms. Johnson, dated June 3, 2013, and notarized on December 13, 2014, stating the Defendant is innocent and her trial testimony was a product of witness intimidation.
4. The State argued the statement from Ms. Johnson dated June 3, 2013 upon which the Defendant's Motion relies, was obtained through duress, coercion and intimidation by member of the Defendant's family and is not reliable.
5. Since signing the June 3, 2013 statement, Ms. Johnson was interviewed on September 26, 2014 and confirmed that the information contained in her June 3, 2013 statement was not truthful and that her testimony in the Defendant's 2008 trial was the truth.
6. At the hearing on this motion Ms. Johnson testified two (2) men came to her home and asked her to come with them. She believes these men to be the brother and or cousin of the Defendant.
7. Ms. Johnson testified that she felt threatened and intimidated into going with the men and took two (2) of her children with her. She further testified that she took her two (2) children with her because she felt it would cause the atmosphere to be "calm."
8. Ms. Johnson further testified that she was taken to a funeral home on Old Meeting Street Road, where she was coached into writing an inaccurate statement. She testified that during the car ride the men kept telling her the Defendant "didn't do it" and he was willing to "take an attempted murder charge." She testified that they reinforced these statements to her upon reaching the funeral home. She further testified that she wrote down what they asked her to because she was concerned for her and her children's safety.

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not knowing the true intentions of these individuals. She testified that she moved from her previous Simmons Street address due to the animosity and fear she experienced post-trial. When moving she did not advise anyone of her new address. She further testified she found it troubling that these men knew her address and just showed up at her house unannounced. She further testified that she received threats all along receiving the most recent threats the day before this hearing.

9. She acknowledges meeting with Walter Mitchell at his office in Summerville. She testified she met with him because she just wanted to get it all "over with." She also testified that she simply told Mr. Mitchell what he and the attorney wanted to hear.

10. She acknowledges giving a statement to the Deputy and Assistant Solicitors Bruce Durant and David Osborne prior to the Defendant's trial. She further testified that she was confused with so many people coming at her. She denies ever being threatened with perjury charges. She testified that after the first statement she just decided to tell the "truth" to the authorities and by that point she didn't care one way or the other she just wanted to be left alone. She denies that she ever "recanted" her original statement. She confirmed that her original statement of what she witnessed regarding the Defendant's actions during this event were truthful and accurate. She further testified that she testified truthfully in the trial of the Defendant's case. She denied having any "problems" with the Defendant's family.

11. The statement procured by the Defendant's family from Ms. Johnson was contrived by force, threats, coercion and duress.

12. Walter Mitchell testified that he has been a licensed private investigator since 1993 after leaving his twenty-two (22) year employment with the South Carolina Law Enforcement

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Division (SLED). He testified that the Defendant's mom called him and as a result he some work on her son's case for her. He further testified that he met with Ms. Johnson in his office on August 4, 2014 and that she recanted her original story. His testimony does not reflect that he had any knowledge of the previous interaction Ms. Johnson had with the Defendant's relatives on or about June 3, 2013 or how her subsequent statement was procured.

STANDARD OF REVIEW

“A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge.” State v. Harris, 391 S.C. 539, 544-45, 706 S.E.2d 526, 529 (Ct. App. 2011). “The granting of a new trial because of after-discovered evidence is not favored” Id.

ANALYSIS

Rule 29(b) of the South Carolina Rules of Criminal Procedure provides for a new trial based on after-discovered evidence. State v. Hill, 359 S.C. 301, 597 S.E.2d 822 n.4 (Ct. App. 2004). The Defendant must overcome two hurdles in order to prevail on a motion for a new trial based on after-discovered evidence: timeliness and the requirements for after-discovered evidence.

First, the motion “must be made within a reasonable period of time after the discovery of the evidence” State v. Harris, 391 S.C. 539, 544, 706 S.E.2d 526, 529 (Ct. App. 2011). In State v. Harris, the Court of Appeals found that “[o]nly the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion.” Id.

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Here, Ms. Johnson's statement was dated June 3, 2013. The Defendant testified that while he knew of the existence of the statement, he did not receive a copy of the statement until much later in or about October of 2014. He further testified that he was on "lockdown" for six (6) months beginning in or about June 3, 2013 in connection with a stabbing that took place at the institution for which he was being investigated. He testified that he was not on lockdown status in or about December of 2013. He further testified that his brother sent him a copy of the statement. He further testified that it was his understanding that his brother or cousin had procured the statement from Ms. Johnson. After receiving the copy of the statement the Defendant testified he filed a motion as soon as he could. Defendant's Motion for New Trial Based on After-Discovered Evidence was dated June 24, 2014 and filed on June 26, 2014. The State contends the Motion should be dismissed because it was not timely filed. This Court finds that while the Defendant's Motion was not raised within one year of the statement being written, the Defendant's Motion was with raised within a reasonable amount of time as allowed by Rule 29(b). This Court finds the Defendant is not precluded from bringing his motion based on timeliness, and will address the merits of the Motion for New Trial Based on After-Discovered Evidence.

The second hurdle requires that the movant "show the evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (citing State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999)). The credibility of newly-discovered evidence is for the trial court to determine. Id. "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court

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in making a credibility assessment.” Id. “Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.” Id.

In Harris, the central issue was a matter of the credibility of the witnesses. 391 S.C. at 545, 706 S.E.2d at 529. The trial court found the Witness to be credible. Id. “It further found the circumstances surrounding [Witness's] giving the affidavit recanting his trial testimony, the time when the affidavit was given, and [Witness's] testimony during the hearing caused it to find the recantation testimony unreliable.” Id. at 544, 706 S.E.2d at 529. Thus, the trial court’s denial of Defendant’s motion for a new trial was affirmed.

This Court does not find the testimony of the Defendant credible, while finding the testimony of Sharon Johnson credible. Further this Court finds the testimony of Walter Mitchell neutral at best due to his limited knowledge of the facts and circumstances surrounding Ms. Johnson's recantation prior to her meeting with him on August 4, 2014.

Here, the Defendant has failed to meet his burden of proof to merit granting a new trial based on after-discovered evidence. As to the first element, the Defendant has failed to show, even by a preponderance of the evidence, that the evidence would probably change the result if a new trial were granted. Ms. Johnson testified at the hearing that two (2) men showed up at her home, whom she knew to be relatives of the Defendant, and asked her to accompany them in their car to an unknown location and for an unknown purpose. Ms. Johnson testified she felt coerced and threatened and took her two (2) children with her as a calming effect to the situation. Ms. Johnson and her children were taken to a funeral home on Old Meeting Street Road where she was "coached" by the two (2) men to write a statement recanting her earlier eye witness trial testimony. Ms. Johnson testified that she was coerced to write the statement and wrote what they wanted because she wanted out of the situation. Ms. Johnson’s fear and discomfort about

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testifying is evident by the fact that she moved from Simmons Street where the incident occurred shortly after the trial. Furthermore, if the evidence of Ms. Johnson's statement were presented during trial, it would be grossly prejudicial to the Defendant. Evidence of the Defendant's family pressuring her to change her testimony would destroy any credibility of the statement. Looking to all the circumstances surrounding the June 3, 2013 written statement this Court finds it is not such as would probably change the result if a new trial were granted.

As to the second element, the movant must show the evidence has been discovered since the trial. This Court concedes that the Defendant has proven this element by giving latitude to when the Defendant knew or should have known of the statement.

As to the third element, the Defendant has not proven he was unable to discover the statement before the trial by the exercise of due diligence. Ms. Johnson testified at trial and was vigorously cross-examined by Defendant's trial attorney Jason King, Esquire. Ms. Johnson did not write a contrary statement until confronted by the Defendant's family members. Furthermore, Ms. Johnson maintained her original testimony at this hearing. Thus, the Defendant has not proven that he couldn't have discovered this evidence before trial.

As to the fourth element, the Defendant has not proven the statement is material. Ms. Johnson's testimony remains consistent, with the exception of the June 3, 2013 statement procured by the Defendant's family. This Court finds Ms. Johnson's testimony credible that she was intimidated and fearful. Furthermore, this Court finds it credible that Ms. Johnson simply wrote what she was told to by the Defendant's relatives. This Court finds credible that Ms. Johnson would testify consistently with her original testimony and testimony at this hearing if a new trial were granted. Thus, the Defendant has not proven the statement is material.

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As to the fifth element, the Defendant has not proven the statement is not merely cumulative or impeaching. The Defendant's trial attorney Jason King, Esquire had a full opportunity to impeach and thoroughly cross examined Ms. Johnson during her testimony at trial. The Defendant has failed to prove that the eye-witness account was inaccurate or the result of coercion. Thus, the Defendant has failed to prove the evidence, if presented in a new trial, would be anything other than cumulative and impeaching.

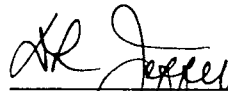
The arguments raised by the Defendant regard the credibility of witnesses, which is a question of fact and reserved for consideration by the finder of fact. This Court finds the statement procured by the Defendant's relatives from Ms. Johnson to be unreliable as there is evidence that it was the direct result of pressure, threats, coercion and duress and that she was coached into writing the statement. Furthermore, Ms. Johnson recanted the changed statement when speaking with the Solicitor's Office and during her testimony at this hearing. The Defendant has failed to meet his burden for a new trial to be granted based on after-discovered evidence.

CONCLUSION

Based upon the arguments presented, the applicable statutory and case law, a thorough review of the record, and balancing the equities of the parties, this Court finds the Defendant's Motion for a New Trial Based upon After-Discovered Evidence is respectfully **DENIED**.

IT IS SO ORDERED!

July 6, 2016
Charleston, SC


Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

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