

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Maite D. Murphy, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2016-UP-239 (S.C. Ct. App. filed June 1, 2016)
Appellate Case No. 2014-002171

State of South Carolina, Respondent,

v.

Kurtino Weathersbee, Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

INDEX1

QUESTION PRESENTED2

STATEMENT OF THE CASE.....3

ARGUMENT

The Court of Appeals properly affirmed the trial court’s denial of Petitioner’s motion for a new trial based on after-discovered evidence because the testimony he presented to support his contention that the witness perjured herself could be interpreted in such a way by the jury as to lend credibility to her testimony and the motion was not timely made.....4

CONCLUSION7

QUESTION PRESENTED

Did the Court of Appeals properly affirm the trial court's denial of Petitioner's motion for a new trial based on after-discovered evidence because the testimony he presented to support his contention that the witness perjured herself could be interpreted in such a way by the jury as to lend credibility to her testimony and the motion was not timely made?

STATEMENT OF THE CASE

A Richland County jury convicted Petitioner of armed robbery, kidnapping, and first-degree burglary following a trial before the Honorable James R. Barber, III, and he was sentenced to eighteen years' imprisonment on each conviction. Petitioner appealed, and on June 1, 2016, the South Carolina Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. *State v. Weathersbee*, Op. No. 2008-UP-017 (S.C. Ct. App. filed January 10, 2008). Petitioner filed an application for post-conviction relief on February 26, 2008, and an amended application on December 17, 2008. The Honorable L. Casey Manning denied relief. Petitioner appealed, but the Supreme Court denied his Petition for Writ of Certiorari on May 26, 2011. Petitioner then filed an application for post-conviction relief on August 15, 2011, alleging newly-discovered evidence, which the State moved to dismiss as untimely and successive. Petitioner withdrew his application, deciding instead to file a Notice of Motion and Motion for New Trial Based on After-Discovered Evidence on September 24, 2013. The Honorable Maite D. Murphy held a hearing on September 29, 2014, and denied the motion. Petitioner appealed the denial, and the Court of Appeals affirmed the decision in an unpublished opinion. *State v. Weathersbee*, Op. No. 2016-UP-239 (S.C. Ct. App. filed June 1, 2016). (App.62–63). Petitioner filed a petition for rehearing on June 7, 2016, which was denied on August 18, 2016. (App.64–67). A Petition for Writ of Certiorari to the Court of Appeals was submitted to this Court on September 16, 2016, and this Return follows.

ARGUMENT

The trial court properly denied Petitioner's motion for a new trial based on after-discovered evidence because the testimony he presented to support his contention that the witness perjured herself could be interpreted by the jury in such a way as to lend credibility to her testimony and the motion was not timely made.

On appeal to the Court of Appeals, Petitioner argued the trial court erred in denying his motion for a new trial based on after-discovered evidence, claiming he had produced records (allegedly not available at trial) that contradict the testimony of the State's chief witness, the victim. However, the unemployment records produced by Petitioner that show the amount and time the victim received unemployment benefits do not contradict her testimony. The State submits the trial judge correctly denied the motion and the Court of Appeals properly affirmed the trial court.

The granting of a motion for a new trial based on after-discovered evidence is not favored and, absent error of law or abuse of discretion, an appellate court will not disturb the trial judge's denial of the motion. State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998). For a defendant to prevail on such a motion, he must 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 prior to trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. Id. at 157-58, 508 S.E.2d at 869.

Petitioner argues the trial court abused its discretion by failing to properly review his motion under these factors. However, it was Petitioner's burden to show these things to the trial court in order to prevail, and he did not. Furthermore, the State disagrees that he would have been able to show that the evidence met the above factors. As to the first factor, it is unlikely the

evidence would change the result if a new trial were granted. As Petitioner himself conceded, the State did not have to prove why the victim had the money; it was sufficient for her to simply state what was stolen. Petitioner argues the jury's verdict would have been different because seeing this new evidence would have called into question the victim's credibility. However, Petitioner was able to effectively attack her credibility through cross-examination about the discrepancy between what was in the police report versus what she testified to at trial. Thus, Petitioner had the opportunity to call the victim's credibility into question before the jury even without this evidence. The jury was able to evaluate the victim's credibility, as instructed by the trial court, and found Petitioner guilty.

The third factor, that the evidence could not have been discovered prior to trial by the exercise of due diligence, is not met because even though the police report indicated that the victim's money came from a tax refund, Petitioner's counsel could have met with the victim to determine whether the money came from any other sources if he felt the origin of the money was material. Whatever the case, the trial judge properly determined the evidence was not material (the fourth factor) based on the fact that a victim does not have to prove where stolen money came from.

Lastly, the evidence was only cumulative because it supported the victim's testimony that part of the money was what she had been receiving as unemployment benefits, and it was merely impeaching because it was going to be used by Petitioner to discredit the victim's statement about the source of the money. For all of these reasons, the trial judge correctly denied Petitioner's motion for a new trial because he did not meet the criteria to prevail on such a motion. Needs, 333 S.C. at 157-58, 508 S.E.2d at 869. And the Court of Appeals properly affirmed the court's decision.

Petitioner's claim that the victim changed her testimony about the source of the money at trial is not supported by the record. As the trial judge astutely pointed out, the witness explained that her brother was the one who said the money came from a tax refund. She always maintained it came from her unemployment and from selling Avon. (App.26.)

Here, the trial judge appropriately found the evidence was not material. (App.39.) She noted Petitioner was able to use cross-examination to question the victim about what her brother had said about the source of the money versus what she said on the stand. (App.39.) The trial judge determined Petitioner had not provided anything to show the victim perjured herself. (App.39.) Furthermore, she found that because a victim is not required to prove exactly where money came from, whether someone could save money from two unemployment checks was not a material fact in issue. (App.39.) Finally, the trial judge relied on the fact that the jury was in the best position to judge the credibility of the witnesses. (App.39.)

The trial court also determined Petitioner's motion was not timely. Petitioner argues the motion was timely under Rule 29(b), SCRPC, because the actual discovery of the evidence was in May 2013. In his Motion for New Trial, Petitioner maintained that he received a copy of the victim's unemployment records from the S.C. Department of Employment and Workforce on May 17, 2013. (App.6.) However, according to Petitioner's own Statement of the Case, he filed his PCR application in August 2011, alleging newly-discovered evidence, which seems to indicate he would have known about the evidence at least as far back as 2011. He did not file his motion for a new trial until September 24, 2013, which was over two years later. The trial judge noted that the motion was "not really timely" but still ruled on it. However, even though the trial judge ruled on the issue, the motion was untimely and this Court can affirm on that ground alone.

CONCLUSION

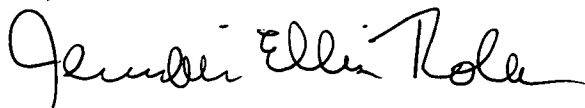
Respondent respectfully submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney David Belding, Esquire, P.O. Box 11964, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 14th day of October, 2016.



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