

FEB 03 2017

SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
IN THE COURT OF GENERAL SESSIONS)
FOR THE FIRST JUDICIAL CIRCUIT)

2016 DEC 30 PM 12:36

State of South Carolina,

vs.

Phillip Marion Turner,

Defendant.

Ceryll Graham
CLERK OF COURT
DORCHESTER COUNTY

ORDER DENYING DEFENDANT'S
RULE 29(B) MOTION

FILED - RECORDED
2016 DEC 30 PM 12:29
CHERYLL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

This matter is before the court on Defendant Phillip Marion Turner's ("Defendant") motion for a new trial based on after-discovered evidence pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure. After due deliberation, review of the motion and supporting documents, and hearing arguments on behalf each party, for the reasons stated below, this court denies Defendant's motion.

FACTS

Defendant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Dorchester County. Defendant was true bill indicted during the April 2007 term of the Dorchester County Grand Jury for assault and battery with intent to kill (Indictment No. 2007-GS-18-0261). Defendant proceeded to a trial by jury and was represented by Attorney Melissa Gay. On May 21, 2009, the jury convicted Defendant as indicted. The Honorable Diane S. Goodstein sentenced Defendant to twenty (20) years. A Notice of Appeal was filed with the South Carolina Court of Appeals and an appeal was perfected on Defendant's behalf by Attorney Katherine H. Hudgins. The Court of Appeals denied the appeal on May 2, 2012 and the remittitur was issued on May 21, 2012.

Defendant filed his first application for post-conviction relief on June 23, 2012, in which he alleged that his trial counsel rendered ineffective assistance of counsel in failing to properly

advise Defendant "in how to proceed through the guilty plea at two separate stages during the trial." An evidentiary hearing was convened on May 20, 2015 before the Honorable Maite Murphy, in which Defendant was represented by Attorney Davis J. Clayton Mitchell. At the hearing, Defendant testified on his own behalf. Also testifying was trial counsel Melissa Gay. Defendant's application for post-conviction relief was denied and dismissed with prejudice by Order dated September 24, 2015.

On November 13, 2015, Defendant filed a motion for a new trial based on after-discovered evidence pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure. In his motion, Defendant asserts the following grounds for relief:

Ground A: Did the Solicitor commit[] . . . a "procedural error" by unlawfully impaneling its Grand Jury the Statute of S.C. Code Ann. § 14-5-620(2)[?]

...

Ground B: Did the Trial Court lack subject matter jurisdiction to tried the Defendant on a No-Bill Indictment?

...

Ground C: The foreperson of the grand jury committed fraud upon the Court by signing the indictment before full panel was assembled of the Grand Jury.

...

Ground D: The Solicitor committed a Brady violation by failing to produce exculpatory evidence that [was] in the hand[s] of the . . . investigating agencies.

Defendant's motion was heard by this court on December 6, 2016, and the matter was taken under advisement.

DISCUSSION

A. Defendant's allegation that the Solicitor committed a Brady violation is successive and untimely, and, therefore, it is denied and dismissed.

S.C. Code Ann. § 17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on the applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 305 S.C. 448 (1991); see also Foxworth v. State, 275 S.C. 615 (1981).

This court finds that Defendant's allegation that the Solicitor committed a Brady violation could have been raised in the proceedings based on Defendant's prior application for post-conviction relief and, thus, the current application is successive. Defendant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief.

Therefore, Defendant's allegation of a Brady violation is denied and dismissed.

B. Defendant's remaining allegations in his Rule 29 motion are untimely, and, therefore, must be denied and dismissed.

Rule 29(b) of the South Carolina Rules of Criminal Procedure states, in pertinent part, the following:

A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence. . . Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

To prevail on a motion for a new trial based on after-discovered evidence, a defendant must show:

(1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence

has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching. E.g., State v. Needs, 333 S.C. 134, 157-58 (1998).

In his motion, Defendant makes no mention that any of the purported evidence has been discovered since the trial and that such evidence could not have been discovered prior to trial by the exercise of due diligence. In effect, Defendant's Rule 29 motion is merely another attempt at an application for post-conviction relief, which had been denied and dismissed with prejudice by the Honorable Maite Murphy by Order dated September 24, 2015. Failure of Defendant to meet this burden of showing that the evidence had been discovered since trial and that the evidence could not have been discovered prior to trial through the exercise of due diligence renders his allegations to be without merit.

Therefore, Defendant's remaining allegations are denied and dismissed.

C. Regardless, of the above, S.C. Code Ann. § 14-5-620(2), Defendant's indictment, and the Dorchester County Grand Jury Reports are all public record, and, therefore, are not "after-discovered evidence" within the meaning of Rule 29(b).

The theory of after-discovered evidence does not extend to evidence available or attainable from public record before the time of trial. State v. Allen, 276 S.C. 412 (1981); see also State v. Jones, 172 S.C. 129 (1933); 24 C.J.S. Criminal Law § 1454, p.179. The evidence upon which Defendant relies in Grounds A through C are all available or attainable from public record, and have been so since before the time of trial. Therefore, based on the above, Defendant's Rule 29 motion must be denied and dismissed.

D. Regardless of the above, S.C. Code Ann. § 14-5-620, under which Defendant asserts that he is entitled to relief in Grounds A and C of his motion, provides for the minimum terms of court scheduled for each county, and does not limit the ability of the Chief Justice of the Supreme Court to schedule terms of court as is necessary.

The judicial power is vested under Article V of the South Carolina Constitution, in the unified judicial system. Article V, Section 1, provides for the following: "The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law." With regard to setting terms of court, this power remains with the Chief Justice of the Supreme Court, who is the administrative head of the unified judicial system. See S.C. Const. Art. V, § 4 ("The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system."). The provision further states, in pertinent part:

[E]ach county shall be entitled to four weeks of court each year and such terms therefor shall be provided by the General Assembly. Provided, further, that the Chief Justice shall set a term of at least one week in any court of original jurisdiction in any county within sixty days after receipt by him of a resolution of the county bar requesting it. The Supreme Court shall make rules governing the administration of all the courts of the State.

Id.

In his motion, Defendant relies on S.C. Code Ann. § 14-5-620(2), which states the following:

The court of general sessions for Dorchester County shall be held at St. George on the third Monday in February, the second Monday in April, the fourth Monday in June and the second Monday in November for one week each.

Defendant contends that, because he was indicted in the month of April and convicted in the month of May, Defendant's indictment and subsequent conviction are null and void. However, the above statute merely provides for a minimum amount of terms of court that are to be scheduled in each

county, which is the responsibility of the General Assembly. The statute does not limit the ability of the Chief Justice of the Supreme Court to schedule additional terms of court pursuant to its constitutional power delineated in Article V, § 4.

As stated above, the Chief Justice has the power to set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. See also S.C. Const. Art. V, § 4 (The Chief Justice also has the power to "appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the State."). Although S.C. Code Ann. § 14-5-620(2) does not provide for Dorchester County general sessions terms of court at the time Defendant was indicted and ultimately convicted, the South Carolina Court Administration specifically scheduled general sessions terms of court during those weeks and it acted within their constitutional authority in doing so.

Accordingly, Defendant's argument that he was indicted and convicted out of term is without merit.

E. Regardless of the above, Defendant's indictment was true-billed, so his arguments in Ground B are without merit.

In his motion, Defendant states that the "Grand Jury render[ed] a No-Bill indictment." However, it is clear from Defendant's indictment and the Dorchester Grand Jury Reports from April 2007 that Defendant's indictment was reported as true billed. As stated above, to prevail on a motion for a new trial based on after-discovered evidence, a defendant must show: (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching. Needs, 333 S.C. at 157-58. In light of the Dorchester County Grand

Jury Reports and the face of Defendant's indictment, this court finds that Defendant fails to meet his burden of showing the five (5) factors above.

Therefore, Defendant's argument that the grand jury returned a no-bill indictment is without merit.

CONCLUSION

Accordingly, for the reasons stated above, IT IS ORDERED that Defendant's motion for a new trial pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure be, and hereby is, DENIED.

AND IT IS SO ORDERED.



Edgar W. Dickson
Presiding Judge, First Judicial Circuit

December 28, 2016
Orangeburg, South Carolina