

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

Certiorari to York County

Honorable Frank R. Addy, Circuit Court Judge

RECEIVED

APR 27 2017

S.C. SUPREME COURT

MICHAEL CHRISTOPHER KENNEDY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001595

JOHNSON PETITION FOR WRIT OF CERTIORARI

John H. Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 6

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

ISSUE PRESENTED

The PCR Court reversibly erred in denying Petitioner's claim for relief based on after-discovered evidence in the form of a sworn statement and testimony by his wife, Misty Williford, where she claimed sole responsibility for the theft of DVDs that was the basis for Petitioner's shoplifting charge.

STATEMENT

Introduction

On November 6, 2014, Petitioner and his wife, Misty Williford, went to the Rock Hill Wal-Mart around noon. App. 8, l. 13 – 11, l. 4. Once there, Petitioner and his wife grabbed shopping cart and walked to the store's DVD section. Petitioner and his wife then put a large number of DVDs in their shopping cart. *Id.*

According to the State, Wal-Mart loss prevention employees noticed the large number of DVDs in the cart and began to surveil Petitioner and Williford. *Id.* Loss prevention employees followed Petitioner and Williford across the store to the home goods sections where, at least one employee, claimed to see the two stuffing the DVDs from their cart into Williford's purse. *Id.*

Petitioner and Williford then proceeded to the self-checkout aisle where Petitioner paid for several DVDs. *Id.* As they left the store, the inventory control sensors next to the door activated. App. 10, l. 6 – 11, l. 4. Williford immediately fled into the parking lot. She was not apprehended. *Id.*

Petitioner did not run and, when confronted by police and Wal-Mart employees, he produced the receipt he had for the DVDs he had purchased at the self-check out. *Id.* Despite the receipts, Petitioner was arrested for shoplifting.

Due to a prior conviction for committing a lewd act, Petitioner is required to register as a sex offender and to renew his registration four times a year. App. 11, l. 5 – 13, l. 14. On November 4, 2014, York County Sheriff's Detective Strait conducted a residency check on Petitioner.

Detective Strait was "unable to verify" that Petitioner lived at his registered address. At the guilty plea hearing, the State claimed that Strait had spoken with a handyman working on the

house. The handyman allegedly stated that Petitioner and his wife were having the house renovated. *Id.*

When Petitioner was arrested for shoplifting from Wal-Mart, he told police that he lived at his mother's address, not his registered address. *Id.* Following his release on bond, Petitioner then failed to renew his registration in January, 2015 as required. *Id.* Petitioner was arrested in June, 2015. *Id.*

Indictment and Guilty Plea

On May 14, 2015, the York County Grand Jury indicted Petitioner for two counts of failure to register as a sex offender and one count of shoplifting, enhancement. App. 79 – 83. On May 27, 2015, Petitioner guilty before the Honorable Eugene Griffith. Petitioner entered an *Alford* plea to the one count of shoplifting and pled guilty to both counts of failing to register. Melissa A. Inzerillo represented Petitioner. Assistant Solicitor Erin M. Joyner represented the State. App. 1 – 29.

The State requested a “lengthy sentence.” App. 27, ll. 4-21. However, Judge Griffith sentenced Petitioner to four years for the shoplifting enhancement and a year and day for the two failing to register charges. App. 28, l. 10 – 29, l. 3. Judge Griffith also revoked Petitioner's probation in full, activating an eight month sentence. *Id.* All sentences were concurrent. *Id.*

PCR Application and Guilty Plea

On October 16, 2015, Petitioner filed an application for post-conviction relief (PCR) alleging that counsel was ineffective for failing to contact Williford or, in the alternative, that a notarized statement by Williford taking sole responsibility for the shoplifting constituted new evidence. Williford's sworn statement was attached to the PCR Application. App. 31 – 38. The State filed a Return on March 10, 2016. App. 39 – 43.

On April 19, 2016, an evidentiary hearing was held before the Honorable Frank Addy. App. 44 – 71. Assistant Attorney General Justin Hunter represented the State. Leah Moody represented Petitioner. Petitioner, Williford, and plea counsel testified.

Petitioner testified that he was innocent and was not initially interested in pleading guilty to the shoplifting charges. App. 47, l. 15 – 48, l. 4. With respect to Williford's sworn statement, Petitioner explained that "I was unable to receive any verification from her of her admission [to shoplifting] and the fact that I had nothing to do with the crime." App. 50, ll. 5-14.

Petitioner recalled that he denied knowing about the theft when talking with plea counsel. He admitted that he did not provide plea counsel with the name of the woman that appeared with him on video. App. 50, l. 15 – 52, l. 7.

Petitioner explained that he entered into an *Alford* plea because:

I ended up agreeing to do the *North Carolina versus Alford* plea simply because I will state that I am innocent of the crime, and I was informed that *North Carolina versus Alford* does not state that I'm actually admitting guilt to the crime, I'm just accepting the punishment for it was how it was explained to me, which is why I did it, take that punishment. But on had -- I had this [sworn statement been] available at that time, or had been able to get in contact with her, Misty Williford and had her to be able to actually appear at court I would not have taken that plea, I would have went to trial.

App. 51, ll. 3-13. Petitioner stated that Williford's sworn statement in combination with the video footage from the store's cameras would have allowed him to prevail at trial and that, had his attorney secured Williford's attendance, he would not have entered into a plea. App. 51, l. 14 – 53, l. 5.

Williford stated that, unbeknownst to Petitioner, she had taken DVDs from their shopping cart and stuffed them into her purse. She said that Petitioner was on other side of the shopping

aisle when she did this. She testified that Petitioner had no knowledge of the theft. App. 56, l. 20 – 58, l. 18.

Williford further testified that she first spoke with Petitioner about his arrest in December or January, approximately two months after the incident. App. 58, l. 4 – 59, l. 25. She admitted that “it would have been prudent” for her to come forward and explain the incident to police, but that “at the time obviously I didn’t care.” App. 59, ll. 1-2. Sometime after Petitioner pled, Williford pled guilty to misdemeanor theft and admitted her responsibility for the theft. She never contacted law enforcement to clear Petitioner. App. 60, l. 4 – 61, l. 25.

Plea counsel said that she knew Williford was the woman with Petitioner at the time he was arrested because she received copies of jail telephone calls between Petitioner and Williford. App. 64, l. 10 – 66, l. 14. Counsel claimed that Petitioner refused to allow her to contact Williford. Further, counsel recollected that Petitioner hastily agreed to plead guilty once Williford’s name appeared on the State’s witness list. *Id.*

Order of Dismissal

Judge Addy denied Petitioner’s application in a written order dated May 4, 2016. App. 72 – 77. The PCR court concluded that Petitioner had failed to prove that the sworn statement and testimony by Williford constituted new evidence. “This Court finds Applicant certainly could have, and did in fact come in contact with Ms. Williford prior to the plea.” App. 76. Thus, Petitioner could not claim that her statements constituted new evidence. *Id.*

ARGUMENT

The PCR Court reversibly erred in denying Petitioner's claim for relief based on after-discovered evidence in the form of a sworn statement and testimony by his wife, Misty Williford, where she claimed sole responsibility for the theft of DVDs that was the basis for Petitioner's shoplifting charge.

To prevail on a new trial motion, Petitioner must show the after-discovered evidence: "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching." *State v. Spann*, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999) (citation omitted).

In this case, the after-discovered evidence involves a sworn, notarized statement and sworn testimony at the PCR hearing from Petitioner's wife, Misty Williford, admitting that she was solely responsible for the theft of DVDs from the Rock Hill Wal-Mart. App. 56, l. 20 – 58, l. 18.

Such a complete confession would have very likely resulted in Petitioner standing trial and being acquitted of the shoplifting charge. App. 76. Petitioner stated that, had Williford been available and willing to testify, he would not have pled guilty and would have insisted on standing trial. App. 51, ll. 3-13. *See Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (counsel ineffective where victim was the sole witness and her identification of defendant as her attacker was crucial to the State's case, counsel failed to call emergency medical personnel who would have testified victim stated immediately after attack that she did not know her assailant).

Petitioner was only able to get Williford to admit her sole responsibility in October, 2015. App. 38. Williford admitted at the PCR hearing that she simply did not care to take responsibility for the shoplifting at the time that Petitioner was about to stand trial. App. 58, l. 4

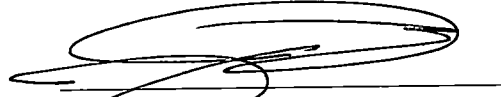
– 59, 1. 25. *Bannister v. State*, 509 S.E.2d 807, 809 (S.C. 1998) (“PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony . . . in order to establish prejudice from the witness' failure to testify”).

Williford's admissions are clearly material to Petitioner's shoplifting charges and not cumulative to any of the evidence that the State presented at the guilty plea. App. 8, 1. 13 – 11, 1. 4; *Cf. Johnston v. Belk-McKnight Co. of Newberry*, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938) (“[c]umulative evidence . . . supplements that which has already been testified”). Her admissions are also not merely impeaching.

Accordingly, the PCR Court erred in ruling that Petitioner failed to demonstrate that Williford's sworn, notarized statement and PCR hearing testimony admitting to being solely responsible for the shoplifting constituted new evidence.

CONCLUSION

For the foregoing reason, this Court should grant the petition with the ultimate relief of a new trial for Petitioner Crystal Turner.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of April, 2017.

STATE OF SOUTH CAROLINA

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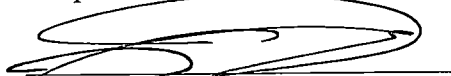
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael C. Kennedy states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Frank R. Addy, which was held on April 19, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve him as counsel for Michael C. Kennedy.

Respectfully Submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of April, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari 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."



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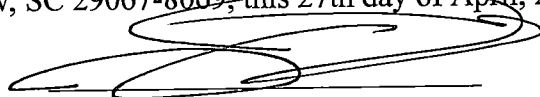
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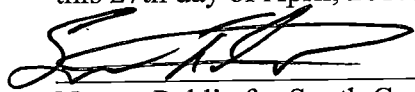
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael C. Kennedy, #296992, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 27th day of April, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 27th day of April, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022