STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of General Sessions

George C. James, Circuit Court
Judge

Case NO. 2013-002735

Kevin Choice, 257223 Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

Kevin L Choice
Petitioner
Lee Corr. Inst
990 Wiscaky Hwy
Bishopville, SC 29010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in denying the Appellant's motion for a new trial based on after-discovered evidence pursuant to Rule 29(b), SCRCrimP?

STATEMENT OF THE CASE

On September 7, 1999, the Sumter County Grand Jury indicted the Appellant for murder, possession of a weapon during the commission of a violent crime, and for carrying a pistol onto ABC premises. On March 5-7, 2001, the Appellant proceeded to trial by jury. At the conclusion of the trial, the jury convicted the Appellant as charged. The Honorable Henry L. McKellar, presiding circuit judge, sentenced the Appellant to life imprisonment for the murder conviction and five years' imprisonment for each gun conviction, with the sentences to run concurrently.

On June 26, 2006, the Appellant filed a motion for a new trial based on after-discovered evidence with the Sumter County Clerk of Court. An evidentiary hearing was convened on this motion on November 21, 2013, before the Honorable George C. James, Jr., presiding circuit judge. By written order filed December 6, 2013, Judge James denied the Appellant's motion. This appeal follows.

STATEMENT OF FACTS ADDUCED AT TRIAL

In the early morning hours of September 3, 1998, Tony Rose, the victim, was killed by a single gunshot at the Diamond Club,[1] a bar and pool hall, in Sumter. The State's theory of the case was that the Appellant acted alone in shooting Rose.

Louis Jenkins, Rose's brother-in-law, testified that he went to the Diamond Club with Rose the night of the incident. R. p. 20, lines 4-18; Trial Tr. p. 55, lines 4-18. When they walked in, they saw the Appellant, who was already at the club. R. p. 21, lines 6-9; Trial Tr. p. 56, lines 6-9. After they were on their second beer of the evening, the Appellant called Rose to come talk to him. R. p. 23, line 16-p. 24, line 13. Trial Tr. p. 58, line 16-p. 59, line 13. Jenkins eventually followed along with another individual named Harry Spann, and he discovered that the Appellant and Rose were arguing. R. p. 25, line 5-p. 27, line 7; Trial Tr. p. 60, line 5-p. 62, line 7. The Appellant then pulled out a firearm and shot Rose once. R. p. 35, lines 11-24; Trial Tr. p. 70, lines 11-24. Jenkins was the only witness to testify at trial that he witnessed the Appellant shoot Rose.

Marion Howard, the owner of the Diamond Club, also investigated the argument and saw the Appellant, Rose, Spann, and Jenkins standing together, though they told him that everything was fine. R. p. 55, line 11-p. 56, line 18; Trial Tr. p. 90, line 11-p. 91, line 18. After he turned around, he heard one shot fired. R. p. 58, lines 4-6; Trial Tr. p. 93, lines 4-6. He then saw the Appellant with a firearm, and did not see any other individuals with a gun. R. p. 58, line 22-p. 59, line 2; Trial Tr. p. 93, line 22-p. 94, line 2.

Several private security officers had been hired to maintain security at the club that evening. George McQuilla, one of those officers, testified that he was outside when he heard the gunshot; when he turned toward the back door, he saw the Appellant coming out of the door and

[1] The club is referred to other names throughout the transcript, including the "Diamond Bar and Grill," "Diamond's," and the "Diamond Pool Hall." The indictment names the establishment as the Diamond Club.

he saw the Appellant putting a weapon in his waistband. R. p. 63, lines 9-23; Trial Tr. p. 98, lines 9-23. The Appellant then told McQuilla that there had been a shooting, but McQuilla circled behind the Appellant and pulled the gun out of the Appellant's waistband. R. p. 64, lines 6-22; Trial Tr. p. 99, lines 6-22. McQuilla then detained the Appellant until the police arrived. R. p. 65, line 10-p. 66, line 17; Trial Tr. p. 100, line 10-p. 101, line 17.

A shell casing and a projectile were found at the scene. R. p. 105, line 22-p. 106, line 15; Trial Tr. p. 140, line 22-p. 141, line 15. These items were tested against the firearm recovered from the Appellant, and both were conclusively matched to the gun. R. p. 178, lines 15-20; Trial Tr. p. 213, lines 15-20. Additionally, the Appellant had gunshot residue on the back of his hand. R. p. 131, lines 4-21; Trial Tr. p. 166, lines 4-21. Based on the gunshot residue pattern found on Rose's shirt, the shot could not have been fired from more than a foot away from Rose. R. p. 149, lines 11-16; Trial Tr. p. 184, lines 11-16.

A patron at the club, Sharon Bailey, testified that Rose asked her for a cigarette, then fell over after he was shot. R. p. 206, lines 5-16; Trial Tr. p. 241, lines 5-16. She further testified that both Spann and Jenkins were close to Rose, but that she did not see the Appellant nearby. R. p. 207, lines 15-23; Trial Tr. p. 242, lines 15-23.

The Appellant also testified in his defense. He testified that he had been drinking a lot the day of the shooting. R. p. 242, lines 16-21; Trial Tr. p. 277, lines 16-21. He saw Rose come into the club, but never talked to him. R. p. 244, lines 6-19; Trial Tr. p. 279, lines 6-19. As he was drinking and shooting pool, he heard the gunshot. R. p. 244, lines 20-25; Trial Tr. p. 279, lines 20-25. In the confusion, someone passed him the firearm and he put it in his waistband. R. p. 245, lines 5-14; Trial Tr. p. 280, lines 5-14. He testified that he did not know who shot Rose. R. p. 246, lines 3-6; Trial Tr. p. 281, lines 3-6.

ARGUMENT

I. The lower court erred in denying the Appellant's motion for a new trial based on after-discovered evidence.

A. How the Issue Arose Below

As noted above, although there was some circumstantial evidence tying the Appellant to the crime, the only direct evidence that the Appellant shot Rice came from Jenkins. In an affidavit dated March 24, 2006,[2] Jenkins stated that he did not witness the shooting because he "was in the restroom area is [sic] this Night Club." R. p. 402.[3] He further stated that he was pressured and coerced by his wife's family to testify falsely against the Appellant. R. pp. 402-403. He also stated that the lead prosecutor on the case threatened him to testify against the Appellant, even after he "had informed this Prosecutor, on several occasions, that he did not witness the actual events, or incidents that led to the demise of the victim." R. p. 403. Finally, he stated that he has borne "the weight of these false testimonials and his conscience can no longer permit those transgressions to go uncorrected." R. p. 404.

Based on this affidavit, the Appellant filed a motion for a new trial based on after-discovered evidence pursuant to Rule 29(b), SCRCrimP. However, Jenkins later recanted his recantation in a handwritten statement dated August 31, 2012. In this statement, he asserted that he was "standing by my trial testimony" and that he only signed the affidavit because he thought the Appellant "may have had more on what took place." R. p. 406.

At the Rule 29(b) hearing, Jenkins testified consistently with his handwritten statement, and testified that the testimony he gave at trial was accurate. R. p. 342, lines 13-18; Rule 29(b) Tr. p. 17, lines 13-18. He did admit, though, that he signed the affidavit in 2006 while housed with the

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[2] Though the affidavit is dated March 24, 2006, Jenkins' signature was notarized on March 23, 2006. See R. p. 406.
[3] Unless otherwise noted, all references to exhibits are to the exhibits entered at the Rule 29(b) hearing below, and not to the exhibits introduced at trial.

Appellant at Lee Correctional Institution. R. p. 337, lines 21-24; Rule 29(b) Tr. p. 12, lines 21-24. The Appellant also presented the testimony of Ronald Skipper, an inmate at Lee Correctional, who prepared the affidavit for Jenkins. He testified that he typed the affidavit based on the information given to him from Jenkins, and that he spent several hours talking to Jenkins directly without the Appellant present. R. p. 356, line 1-p. 357, line 10; p. 360, lines 1-3; Rule 29(b) Tr. p. 31, line 1-p. 32, line 10; p. 35, lines 1-3. The Appellant testified that Jenkins appR.ched him, and that Jenkins told him that it had weighed on his mind that his testimony had led to an innocent individual's incarceration. R. p. 373, lines 4-23; Rule 29(b) Tr. p. 48, lines 4-23.

Based on the affidavit signed by Jenkins, the Appellant contended that he should receive a new trial pursuant to Rule 29(b), SCRCrimP. See R. pp. 385-394; Rule 29(b) Tr. pp. 60-69. The lower court disagreed, concluding in its order denying the motion that the motion was without merit:

> In my view, there is a substantial questions [sic] as to whether there is now any "evidence" that has been discovered since the defendant's trial. It is true that the sole eyewitness recanted his testimony in his 2006 affidavit. However, he has now recanted his recantation two times, once in his 2012 affidavit and again in his testimony at the hearing. Neither side presented any case law on the issue of whether a recantation that itself has been recanted rises to the level of after discovered evidence.
>
> Even if the 2006 recantation is "after discovered evidence", this court concludes that the motion must be denied. While the information imparted in the 2006 affidavit is material and has been discovered since the trial, and while it is arguable the evidence could not have been discovered prior to trial by the exercise of due diligence, the motion must still be denied. The evidence imparted in the 2006 affidavit would likely not change the result of the trial, primarily because Mr. Jenkins' 2006 recantation has been drastically tainted by his own 2012 affidavit and by his hearing testimony, i.e., there have been two recantations of his recantation.
>
> ...

> For the foregoing reasons, the defendant's motion for new trial is denied.

R. p. 409. The Appellant now contends that the lower court's ruling was erroneous, and that the Appellant should receive a new trial.

B. Standard of Review

"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." Rule 29(b), SCRCrimP. "In order to warrant the granting of a new trial on the ground of after-discovered evidence, the movant 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 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). "'The granting of a new trial based on after-discovered evidence is not favored,' and this court will affirm the denial of such a motion unless the trial court abused its discretion." Id. (quoting State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978)).

C. Discussion

The lower court ruled that the second and fourth prongs of the Rule 29(b) inquiry were satisfied in this matter. See R. p. 409 ("[T]he information imparted in the 2006 affidavit is material and has been discovered since the trial.") The lower court also concluded that the third prong of the Rule 29(b) inquiry was likely met. See R. p. 409 ("[I]t is arguable the evidence could not have been discovered prior to trial by the exercise of due diligence.")[4] The lower court did not make a

[4] To the extent that the lower court concluded that the Appellant did not meet this prong, the Appellant contends that this ruling is clearly erroneous inasmuch as it would have been impossible for the Appellant to obtain Jenkins' favorable testimony prior to trial given his unfavorable testimony given at trial.

substantive ruling on the fifth prong—whether the evidence was merely cumulative or impeaching—but the Appellant asserts that this requirement is readily met. Although Jenkins did recant his affidavit twice, and would presumably stand by his most recent recantation at a retrial, Jenkins' affidavit would still be considered substantive evidence at a subsequent retrial under South Carolina law. See State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) ("Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination.") South Carolina's use of prior inconsistent statements as substantive evidence should also remove any doubt from the lower court's hesitation to classify Jenkins' recantation as "evidence" within the meaning of Rule 29(b), since the affidavit could be used as substantive evidence at a retrial.

Consequently, the only prong of the Rule 29(b) inquiry that remains in question, and the one that the lower court made its primary focus of its ruling, is the first prong: whether or not Jenkins' recantation would probably change the result of a retrial. The Appellant submits that the lower court used an improper standard to reach its conclusion. Accordingly, the Appellant contends that the lower court's conclusion is controlled by an error of law, and should be reversed. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law.")

The lower court found that the result at a new trial would not likely be different because Jenkins later recanted his affidavit. The lower court did not analyze the evidence at trial in light of the affidavit. This inquiry was improper because the lower court was required to review the evidence as a whole, with the recantation in mind, and determine whether it was reasonably likely that the Appellant would have still been convicted. See State v. Mercer, 381 S.C. 149, 170, 672 S.E.2d 556, 567 (2009) ("[W]e are sensitive to the notion that a mere finding of a witness's lack

of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt.") As the Supreme Court of Wisconsin has held, "[t]he correct legal standard when applying the 'reasonable probability of a different outcome' criteria is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." State v. McCallum, 208 Wis.2d 463, 474, 561 N.W.2d 707, 711 (1997). The Appellant contends that this inquiry is not dissimilar from that presented by the Supreme Court in Mercer, and the lower court did not conduct this inquiry in this case.

Utilizing the appropriate test, the Appellant should have received a new trial. Jenkins was the only individual to testify that he witnessed the Appellant shoot Rose. While it is certainly true that the Appellant ended up in possession of the firearm that shot Rose, the Appellant testified at trial that he was handed that gun during the confusion, and that he did not shoot Rose. This was not an implausible defense to the crime. Furthermore, the Appellant's testimony that he was not near Rose when the fatal shot was fired was corroborated by Sharon Bailey, a patron at the Diamond Club that evening. Even if Jenkins stood by his original testimony at a retrial, it is probable that the jury would have acquitted the Appellant had they also heard that Jenkins signed an affidavit stating that he was not near Rose when Rose was shot, and that he had been pressured to testify against the Appellant. Accordingly, the Appellant respectfully submits that he has met the final prong of Rule 29(b), and that he should be afforded a new trial.

CONCLUSION

The Appellent's Conviction for murder, possession of a weapon during the Commission of a violent Crime, and Carrying a pistol onto ABC premises should be reversed, and he should be granted a New trial based on after-discoverd evidence

Respectfully Submitted,

Kevin L. Choice

This 13th day of Sept. 2017.

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The Honorable Daniel E. Shearouse
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"Court Deadline"