STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2017-000829

JUAN M. NIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Whether probative evidence supports the PCR court's finding that the Facebook conversation between Darryl Williams and Marcella Curry-Hooker does not qualify as "newly discovered evidence" to warrant a new trial because it would not change the jury's verdict if a new trial was had and is merely impeaching.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Bamberg County. Petitioner was indicted at the March 1999 term of the Bamberg County Grand Jury for first degree murder (1999-GS-05-0028) and armed robbery (1999-GS-05-0029). The charges resulted from the robbery and murder of Zola "Pat" Robinson, Petitioner's mother, on August 6, 1998 in Denmark, South Carolina. The deceased victim was found the following morning lying on the couch of the trailer in which she lived with Petitioner. The victim was struck thirteen times in the head with a hammer and died of cerebral injury caused by blunt force trauma. App. 128; 144; 150. The cash she had received from the bank on the day she was murdered was not found in her home or in the money purse she kept on her body. App 190. Two witnesses testified Petitioner was wearing a plaid striped shirt on the night of August 6, which description matched the bloody flannel shirt found in the laundry hamper in Petitioner's trailer. App. 177; 205; 241. Petitioner was with witnesses on the night in question, but left for a couple hours and returned with cash that he used to purchase drugs. App. 200; 682. On August 9, 1998, Petitioner gave a voluntary statement to law enforcement confessing to his mother's murder. App. 338-348.

Petitioner was represented on the charges by Joshua Koger, Esquire. Petitioner proceeded to a jury trial and was convicted. On March 10, 1999, Petitioner was sentenced by the Honorable Gary E. Clary to life without parole for murder and to a consecutive term of thirty years imprisonment for armed robbery. A notice of appeal was filed and an appeal perfected. Following an Anders[1] review, the appeal was dismissed. State v. Nimmons, Op. No. 2002-MO-051 (S.C. Sup. Ct. filed June 13, 2002). Petitioner's Petition for Rehearing was denied, and the remittitur was sent on August 7, 2002.

[1] Anders v. California, 386 U.S. 738 (1967).

2003-CP-05-0068

Petitioner filed his first application for post-conviction relief on May 1, 2003 (2003-CP-05-0068). Petitioner raised the following issues in his first post-conviction relief application:

1. Ineffective assistance of counsel.
   a. Failure to submit notice of alibi defense and present alibi witnesses.
   b. Failure to object to solicitor's closing argument.
   c. Failure to object to sentence.
   d. Failure to request a Jackson v. Denno hearing.
   e. Failure to subpoena Rowland Dowling.
   f. Failure to move for directed verdict for charge of Armed Robbery.
   g. Failure to request jury charge on alibi.
   h. Failure to object to solicitor's pitting of witnesses.
   i. "...failing to motion to reveal Rule 404(b), S.C.R.Evid., State v. Lyle, evidence."
   j. Failure to move for continuance.
   k. "...failing to subpoena the coroner/toxicologist as there was not time of death, which could have changed outcome of proceedings because witnesses observed different individuals entering victim's residence this particular night."
2. Ineffective assistance of appellate counsel.
3. Court lacked subject matter jurisdiction on Armed Robbery charge.

Respondent made its Return on September 11, 2003. An evidentiary hearing was convened on August 8, 2007, before the Honorable J. Michael Baxley. Petitioner was present and represented by Sherry Stoney, Esquire. Judge Baxley dismissed the application with prejudice by order dated September 18, 2007, and filed October 4, 2007. The South Carolina Supreme Court denied Petitioner's Petition for Writ of Certiorari on September 3, 2009. The remittitur was sent on September 21, 2009.

2009-CP-05-0200

Petitioner filed his second post-conviction relief application on October 2, 2009 (2009-CP-05-0200). In this application, Petitioner set forth the following grounds for relief:

1. "Was Petitioner denied his one bite of the apple when PCR counsel failed to [e]nsure that all grounds for relief were raised in Petitioner's prior PCR application and addressed at Petitioner's PCR hearing?"
2. "Was Petitioner denied due process of law and equal protection when trial counsel and PCR counsel failed to challenge the defects in the indictments that allowed Petitioner to be tried and convicted on defective instruments that have unduly prejudiced Petitioner and denied him of his constitutional rights?"
3. "Was Petitioner denied due process of law and equal protection when PCR counsel failed to raise the issue of trial counsel conceding Petitioner's guilt to the jury?"
4. "Was PCR counsel ineffective for failing to raise trial counsel's failure to ask the court that the sentences that were handed down be run concurrent as mandated by S.C. Code Ann. 17-25-50?

Respondent made its Return and Motion to Dismiss. In a Conditional Order dated May 24, 2010, the Honorable Doyet A. Early, III, found that the application should be dismissed based on the statute of limitations and successiveness; Petitioner was given twenty days in which to respond. After consideration of Petitioner's responses to the Conditional Order, a Final Order of Dismissal was signed by Judge Early on August 13, 2010, and filed August 17, 2010. Petitioner filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. In an order dated September 28, 2010, the Supreme Court dismissed the matter for failure to show an arguable basis why the determination by the lower court was improper pursuant to Rule 243(c), SCACR. The remittitur was sent on October 15, 2010.

2010-CP-05-0205

Petitioner filed a third post-conviction relief application on October 7, 2010 (2010-CP-05-0205). In this application, Petitioner set forth the following grounds for relief:

1. Ineffective assistance of appellate counsel.
    a. "Counsel failed to raise meritorious issues."
    b. "Counsel acted under conflict of interest."
    c. "Counsel failed to show-up or attend the PCR hearing."

Respondent made its Return and Motion to Dismiss on March 28, 2011 requesting the application be summarily dismissed as successive and barred by the statute of limitations. In a Conditional Order dated March 29, 2011, the Honorable Doyet A. Early, III, found that the application should be dismissed based on the statute of limitations and successiveness; Petitioner was given twenty days in which to respond. After receiving no response from Petitioner, Judge Early signed a Final Order dismissing the application on July 6, 2011 and entered on July 12, 2011. Petitioner did not appeal the denial of his third application for post-conviction relief.

2012-CP-05-131

Petitioner filed his fourth and current application on July 17, 2012, alleging he was being held in custody unlawfully based on the following allegations:

1. "Applicant is entitled to a new trial based upon the after-discovered evidence of his actual innocence wherein another individual admitted to commission of the crime for which Applicant was convicted."
    a. "On or about September 27, 2011, an individual sent an email to another member of Applicant's family in which that person admitted to the murder of Applicant's mother and that Applicant did not commit the crimes. Applicant was contacted and received this information in February 2012."

       "The email and affidavit(s) or deposition(s) of the person receiving the email and law enforcement authorities receiving the information to South Carolina authorities will be presented at the evidentiary hearing."

       "This evidence would change the result if a new hearing was held; it has been discovered within the past one (1) year; could not have been discovered before trial or the first post-conviction proceeding by exercise of due diligence; is material to the issue of guilt or innocence; and is not merely cumulative or impeaching. It is more likely than not no reasonable juror would have found Applicant guilty beyond a reasonable doubt."

Respondent submitted its Return and Motion to Dismiss on October 8, 2012. A Conditional Order of Dismissal was signed by the Honorable Doyet A. Early, III on October 11, 2012, and filed on October 17, 2012, provisionally denying and dismissing the application for post-conviction relief, but allowing Petitioner twenty days to set forth specific reasons why this

dismissal should not become final. Petitioner filed a response asking Judge Early to recuse himself for a conflict of interest. Judge Early issued an Order recusing himself from the case. Subsequently, the Honorable Clifton Newman granted Petitioner's Discovery Motion and ordered an evidentiary hearing.

An evidentiary hearing was convened on September 30, 2016, at the Orangeburg County Courthouse before the Honorable Edgar W. Dickson. Both parties waived venue to allow the hearing outside of the Second Circuit. Petitioner was present at the hearing and was represented by Janek Kazmirsky, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the hearing, Petitioner presented testimony from witness Darryl Williams. Following the hearing, both parties submitted memoranda to the PCR court for consideration. Judge Dickson issued an Order Denying Post-Conviction Relief signed on March 10, 2017, and filed March 24, 2017.

Petitioner filed a timely Notice of Appeal on April 3, 2017. Petitioner's Appendix and Petition for Writ of Certiorari were filed on November 6, 2017. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Probative evidence supports the PCR court's finding that the Facebook conversation between Darryl Williams and Marcella Curry-Hooker does not qualify as "newly discovery evidence" to warrant a new trial because it would not change the jury's verdict if a new trial was had and because the evidence is merely impeaching

Petitioner argues the PCR court erred in finding he had not met the five-factor test for newly discovery evidence to entitle him to a new trial. However, this issue is meritless, as probative evidence supports the PCR court's ruling that the evidence is not such as would probably change the result if a new trial was had and the evidence is merely impeaching. Accordingly, the evidence does not satisfy all five factors of the test that would entitle Petitioner to a new trial.

The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). "The granting of a new trial because of after-discovered evidence is not favored." State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197-98 (1978).

In order for an applicant to obtain a new trial on the basis of newly discovered evidence, the party requesting the new trial must show that the evidence (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of

guilt or innocence; and, (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

Relevant Background

Darryl Williams testified for the State at Petitioner's trial. The PCR court summarized Williams' involvement as follows:

> Williams is a cousin of [Petitioner], and the two grew up together. Williams testified that he and [Petitioner] saw each other at least five (5) days per week. Additionally, he stated that the victim, Zola "Pat" Robinson ("Pat") was like a mother to him and his family. Despite this, Williams testified against [Petitioner] at [Petitioner's] trial in 1999. During that testimony, Williams testified that he saw [Petitioner] the night of the incident, that [Petitioner] left a social gathering in which Williams attended, and that [Petitioner] came back later and had money with him that Williams had not seen before. He also testified that he had borrowed Pat's car the night of the incident and he returned it the next morning to his uncle, William Nimmons, who is now deceased. He stated that he was working at Piggly Wiggly at the time and needed to borrow her car. Williams was the last person in possession of Pat's vehicle before she was found murdered in her trailer that morning. Ultimately, [Petitioner] was convicted, namely due to a voluntary statement that he gave to law enforcement in which he admitted to beating his mother with a hammer and taking one-hundred and twenty dollars ($120.00) from her person.

App. 722. In 2011, Williams participated in a typed Facebook conversation with Marcella Curry-Hooker, a family member who he had known all his life. App. 613, line 10-16. When Petitioner became aware of the Facebook conversation, he filed the current application for post-conviction relief, alleging the conversation was newly discovered evidence that entitled him to a new trial. Petitioner asserted the conversation was a confession by Williams to killing the victim. The portion of the conversation in dispute read:

Williams:	he did what he say
Hooker:	he asked how is everyone and said you testified against him for the state and asked for money
Williams:	i had to there was going to lock my ass up if i did not i told the true

Hooker:	i told him sometimes we have to do what we have to do to get by
Williams:	i no it hurt me to do it but i did i did kill pat
Hooker:	boy take it with you
Williams:	my bad cuz my computer acting up i holla at u later got 2 do some work im at work no

App. 644 – 645. SLED began an investigation on Williams based on the Facebook conversation, and Williams gave a voluntary statement to SLED. Petitioner deposed Williams, and Williams testified at the evidentiary hearing. Williams' statement to SLED and the transcript of his deposition were introduced as exhibits at the hearing. App. 676; 646.

At the evidentiary hearing, Williams testified that in September of 2011, he worked at a residence hall supervising college students. He stated that he had the Facebook conversation with Curry-Hooker while he was at work at the residence hall. He stated that he was trying to pay attention at work and type at the same time, and he was distracted by his kids. App. 618-620. Williams testified that when he typed "I did kill Pat," it was a mistake because he was working at the time, trying to pay attention to the kids, and he really meant to write "I did not kill Pat." App. 619, line 22 – 620, line 4. He testified that in the last line of the Facebook chat, he wrote "My bad 'cause the computer acting up." He stated that there was a chance that the internet went down while he was trying to type his message, which is why he might have written this. App. 624-625. Williams testified that he did not kill the victim, and he told the truth in his trial testimony.

The PCR court held that, based on the evidence and testimony presented and the record before the court, the Facebook conversation between Williams and Curry-Hooker did not amount to newly discovered evidence that would entitle Petitioner to a new trial. App. 718. The

PCR court based this conclusion on its finding that Petitioner failed to prove two factors of the five factor test for newly discovered evidence under Hayden, 278 S.C. 610, 299 S.E.2d 854. App. 726. The PCR court also found Williams' testimony was credible and the purported "newly discovered evidence" was incredible and improbable under the totality of the circumstances. App. 725.

First, it is important to consider that the PCR court found Williams' testimony to be credible and the alleged "confession" in the Facebook conversation to be not credible. "Evidence, not known to accused at his trial, which will tend to prove that the crime of which he has been convicted was committed by another person, may be ground for a new trial. A new trial on this ground rests in the sound discretion of the trial court, and depends largely on the credibility of the new evidence. Where the newly discovered evidence is incredible and improbable under all the circumstances, the motion will be denied." State v. Fowler, 264 S.C. 149, 155-56, 213 S.E.2d 447, 450-51 (1975) (citations omitted).

This Court gives great deference to a PCR judge's findings where matters of credibility are involved. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010); Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). In its order, the PCR court noted that in this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment. State v. Porter. 269 S.C. 618, 621 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); see also State v. Deese. 266 S.C. 534, 538 (1976) (stating that the trial court is tasked with assessing the new evidence in a motion for a new trial); State v. Pierce. 263 S.C. 23, 33 (1974) ("The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit court judge to whom it is offered. In him . . . resides the

power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."). The PCR court went on to explain: "However, the Court is 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. State v. Mercer. 381 S.C. 149, 170 (2009). This sensitivity forms part of the Court's consideration. Id." App. 725.

The PCR court considered Williams' trial testimony, deposition testimony, statement to SLED, and testimony from the evidentiary hearing in making this determination, and found all his testimony was consistent. App. 725. "Williams never changed his story and consistently recalled the same facts from the day of the murder." App. 725. Accordingly, this Court should give great deference to the finding that "Williams was a credible and reliable witness." App. 725. From this finding, the PCR court drew the conclusion that, because Williams "consistently and directly disputed the newly discovery evidence presented at the evidentiary hearing," the newly discovered evidence was not credible. App. 725. The court based this finding on the fact that Williams made it clear in his testimony that the word "i did kill pat" were typed in error and he did not actually kill Pat. Williams' credible testimony about his mistake and the circumstances surrounding the error is probative evidence supporting the PCR court's ruling that the Facebook conversation "confession" was unreliable, improbable, and not credible.

Furthermore, the Facebook conversation does not meet the five factor test for newly discovered evidence. This Court has held that in order for an applicant to obtain a new trial on the basis of newly discovered evidence, the party requesting the new trial must show that the evidence (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered

before the trial; (4) is material to the issue of guilt or innocence; and, (5) is not merely cumulative or impeaching. Hayden, 278 S.C.at 611-12, 299 S.E.2d at 855. Here, the PCR court held that, while the Facebook conversation arguably met the standards delineated in parts (2), (3), and (4) of the Hayden test, the evidence "would not change the result if a new trial was had and the evidence is merely cumulative or impeaching," and therefore did not meet all five factors required to obtain a new trial. App. 726.

In order for this "newly discovered evidence" to have impacted the result of this trial, Petitioner would have had to successfully argue a third-party guilt defense to prove Williams murdered the victim, not him. The standard for presenting a third-party guilt defense is set forth in State v. Gregory, which explains:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534 (1941). The PCR cited to this standard and found that "[t]he evidence in this action for post-conviction relief has no value other than to cast a bare suspicion upon Williams." App. 727. The court found:

> Williams never admitted to any involvement in the murder and never confessed to killing the victim. Rather, Williams's testimony that he meant to type "I did not kill Pat" is plausible. When read in the context of normal conversation, and considering the informality of Facebook, the fact that Williams said that his testimony in 1999 was the truth, and Williams's testimony that he was distracted by his work and kids while typing, it is reasonable to assume that Williams made a typographical error.

App. 727. Accordingly, because this evidence does not meet the standard for third-party guilt, it would not be admissible at trial to support the defense.

The PCR court further found that, even if it were admissible, the Facebook "confession," which was disputed by the author, likely would not have countered the amount of the State's evidence against Petitioner. The evidence included multiple eyewitness accounts of Petitioner's clothing on the night of the crime which matched the bloody shirt found in his and the victim's home, the bloody hammer used to kill the victim, testimony of Petitioner leaving a social gathering and returning later with money he did not have before, and, most importantly, Petitioner's voluntary statement confessing to robbing and killing his mother by beating her in the head several times with a hammer. The State's evidence presented at trial as well as Williams' testimony denying any involvement in the death is all probative evidence supporting the ruling that this new "evidence" would not have changed the result of the conviction if a new trial was had, as required by Hayden for a new trial.

Finally, because the evidence would not admissible as evidence of third-party guilt, the PCR court correctly found the evidence is merely impeaching and is therefore insufficient to warrant a new trial for Petitioner. A new trial based on "after discovered evidence" requires a showing that the evidence is material to a claim of actual guilt or innocence and does more than merely impeach. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). Evidence is "impeaching" so as to bar new trial if it is outside the evidence already given and impeaches that evidence by attacking the character, the motives, the integrity or veracity of those who gave the evidence. Evatt v. Campbell, 234 S.C. 1, 106 S.E.2d 447 (1959). The PCR court held the Facebook conversation was merely impeaching because it does not counteract all evidence against Petitioner, but would only be used to call into question the veracity of William's testimony that he did not kill the victim. App. 727 – 728. Based on William's testimony, which is probative evidence supporting the PCR court's ruling, it is clear that the evidence could only be used to

impeach Williams' credibility at trial. Accordingly, the evidence does not fit the fifth and final factor of the newly discovered evidence test.

Therefore, because the evidence would not change the result of the conviction if a new trial were had and because it is merely impeaching evidence, the first and fifth prongs of the Hayden test are not met, and Petitioner is not entitled to a new trial based on newly discovered evidence. Because the PCR court's ruling is proper under the law and is based on probative evidence in the record, this Court should affirm the denial of post-conviction relief.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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March 19, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Bamberg County

The Honorable Edgar W. Dickson, Circuit Court Judge

JUAN M. NIMMONS, #256828

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. SQUIREWELL, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
Post Office Box 11589
Columbia, SC 29211

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

This 19TH day of March 2018.

CHANDRA E. SQUIREWELL
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ALAN WILSON
ATTORNEY GENERAL

March 19, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: **Juan M. Nimmons v. State of South Carolina**
Appellate Case No. 2017-000829
Lower Court Case No. 2012-CP-05-0131

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:ces
Enclosures

cc: Laura R. Baer, Esquire
Trisha Allen, Victim Services (letter only)