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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2017-001353

THE STATE,RESPONDENT

v.

JEROME WILLIAMS,APPELLANT.

FINAL BRIEF OF RESPONDENT

RECEIVED

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court judge in this matter properly denied and dismissed Appellant's purported Rule 60(b), SCRCP, motion for relief from judgment rather than transferring it to another circuit court judge in Greenville County where: (1) she appropriately construed Appellant's motion as a post-trial motion for a new trial based on after-discovered evidence under Rule 29(b), SCRCrimP, and handled it in the court of general sessions; (2) she alternatively and equally appropriately transacted business of the court of common pleas during her term of general sessions pursuant to Section 14-5-420 of the South Carolina Code; or (3) she appropriately recognized Appellant was not entitled to seek relief by filing a motion under Rule 60(b) because his underlying claim was one that exclusively must be brought by filing an application for post-conviction relief.
2. Whether circuit court had subject matter jurisdiction to rule on Appellant's purported Rule 60(b) motion for relief from judgment where it had the power to hear and determine cases of the general class to which the proceedings in question belong.
3. Whether the circuit court properly denied Appellant's purported Rule 60(b) motion for relief from judgment where that motion was untimely regardless of how it was construed, and where Appellant failed to carry his burden of presenting evidence proving the facts essential to entitle him to relief.

STATEMENT OF THE CASE AND FACTS

Prior Procedural History

Jerome Williams (Appellant) was indicted at the November 2001 term of the grand jury of Greenville County for two counts of grand larceny (01-GS-23-7889, & -7891). He was subsequently indicted at the February 2002 term for burglary in the first degree (02-GS-23-1576) and two counts of burglary in the second degree (02-GS-23-1563 & -1565). Appellant was represented by Ernest N. Irmby, II, Esquire. On June 19, 2002, he pled guilty as indicted. The Honorable **John C. Few** sentenced Appellant to thirty (30) years' imprisonment for first-degree burglary, fifteen (15) years' concurrent imprisonment for each count of second-degree burglary, and five (5) years' concurrent imprisonment for each count of grand larceny for an aggregate sentence of thirty (30) years' imprisonment. Appellant did not appeal his convictions or sentences.

On October 7, 2002, Appellant filed an Application for Post-Conviction Relief (PCR) in the Greenville County Court of Common Pleas. The State made a return to the Application on April 30, 2003, and an evidentiary hearing into the matter was convened on December 4, 2003, before the Honorable J. Michael Baxley at the Greenville County Courthouse. Appellant was present and was represented by Andrew R. McKenzie, Esquire. The State was represented by Christopher L. Newton, Esquire, of the South Carolina Attorney General's Office. In an Order Denying Post-Conviction Relief dated February 6, 2004, Judge Baxley denied and dismissed the Application with prejudice. (SROA p.1- p.5).

Appellant timely served and filed a notice of appeal and a *Johnson* petition for a writ of certiorari was submitted on his behalf by the South Carolina Office of Appellate Defense. In an

order dated July 8, 2005, the Supreme Court denied the petition and on July 26, 2005, it sent the remittitur to the lower court.

Current Matter

October 13, 2014, Appellant served a “motion to set aside judgment” pursuant to Rule 60(b)(3) & (5), SCRCP, and a memorandum in support of his motion on the Thirteenth Circuit Solicitor’s Office. He referenced indictment number 02-GS-23-1576 [first-degree burglary] and asked that “the Judgment of Conviction and sentence entered on June 19, 2002,” be set aside. (SROA p. 6-18). On October 24, 2014, Assistant Solicitor Betty Strom of the Thirteenth Circuit Solicitor’s Office served and filed a written reply to Appellant’s motion on behalf of the State arguing it was both untimely and without merit. On November 20, 2014, Appellant filed his October 13, 2014, motion in the Greenville County Court of General Session. In its reply, the State first argued jurisdiction was proper in the court of general sessions because Appellant’s challenge was related to his indictment, guilty plea, and criminal sentence, and asked that it be construed as a motion pursuant to Rule 29, SCRCrimP. Second, the State argued that however the motion was construed, it was untimely and without merit. (SROA p. 19-24).

On May 12, 2017, a hearing into the matter was convened before the Honorable Letitia H. Verdin at the Greenville County Courthouse. Appellant was present and appeared *pro se*. The State was represented by Assistant Solicitor Strom. At the conclusion of the hearing, after hearing arguments from both parties, Judge Verdin orally denied Appellant’s motion. In an order filed May 15, 2017, Judge Verdin found Appellant’s motion for relief from judgment was without merit and denied that motion. (SROA p. 25). On July 10, 2017, Appellant filed a *pro se* notice of intent to appeal with this court, and on February 5, 2018, he submitted his initial brief of Appellant. This Brief of Respondent now follows.

ARGUMENT

I.

The circuit court judge in this matter properly denied and dismissed Appellant's purported Rule 60(b), SCRCP, motion for relief from judgment rather than transferring it to another circuit court judge in Greenville County because: (1) she appropriately construed Appellant's motion as a post-trial motion for a new trial based on after-discovered evidence under Rule 29(b), SCRCP, and handled it in the court of general sessions; (2) she alternatively and equally appropriately transacted business of the court of common pleas during her term of general sessions pursuant to Section 14-5-420 of the South Carolina Code; or (3) she appropriately recognized Appellant was not entitled to seek relief by filing a motion under Rule 60(b) because his underlying claim was one that exclusively must be brought by filing an application for post-conviction relief.

Appellant contends the lower court erred in denying his self-styled motion to set aside judgment pursuant to Rule 60(b)(3) & (5), SCRCP, because it was convened as a court of general sessions rather than a court of common pleas. He argues the lower court was required to address his action as a civil matter by transferring it to the court of common pleas. Appellant asks that his case either be remanded directly back to the court of common pleas, or remanded to the court of general sessions with directions to transfer it to the court of common pleas. The State disagrees, submits Appellant's argument is entirely without merit, and submits his motion was properly denied and dismissed.

First, the circuit court judge in this matter properly denied and dismissed Appellant's purported Rule 60(b), SCRCP, motion for relief from judgment rather than transferring it to another circuit court judge in Greenville County because she appropriately construed it as a post-trial motion for a new trial based on after-discovered evidence under Rule 29(b), SCRCP, and then handled it in the court of general sessions. Appellant admits he filed his motion in the court of general sessions. Although he now claims his motion was "mistakenly" filed in the court of

general sessions, the State submits this affirmative action on Appellant's part should preclude him from complaining, for the first time on appeal, that it should have been transferred to the court of common pleas. This is particularly true where Appellant is likely only complaining because he did not obtain the result he desired at the hearing on his underlying claim. Indeed, by failing to move for a transfer before the lower court, Appellant failed to preserve this argument for appellate review and it should not be considered by this Court. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

In any event, the motion was properly construed as a motion under Rule 29, SCRCrimP, because Appellant is in fact seeking a new trial based based on a claim of after discovered evidence. Despite Appellant wording his allegation as a claim that his conviction was the result of a "fraud upon the court," his true claim is that "no Court of General Sessions had in fact been open on the indictment's February 19, 2002 date of return," and therefore his indictment is invalid, his subsequent guilty plea should be vacated, and he is entitled to a new trial. In other words, Appellant's challenge to his indictment and plea are a classic example of a claim that should be brought pursuant to Rule 29, SCRCrimP. Consequently, the lower court judge properly construed it as such, addressed the claim, and denied it as without merit.

Second, as an alternative ground to affirm, the circuit court judge in this matter properly denied and dismissed Appellant's motion for relief from judgment because she appropriately transacted business of the court of common pleas during her term of general sessions pursuant to Section 14-5-420 of the South Carolina Code. The South Carolina Code provides as follows:

The court of common pleas shall be open at all terms of the court of general sessions for the transaction of all business of regular terms of the court of common pleas except trial by jury

S.C. Code Ann. § 14-5-420 (2017). To the extent Appellant complains that he wanted his meritless and untimely motion addressed by the court of common pleas rather than the court of general sessions it effectively was, because the lower court judge had authority to transact the business of the court of common pleas while sitting during her term of the court of general sessions. Thus, the lower court properly addressed Appellant's motion and denied it as being without merit.

Finally, and as another alternative ground to affirm, the circuit court judge in this matter properly denied and dismissed Appellant's purported Rule 60(b), SCRCPP, motion for relief from judgment because she appropriately recognized Appellant was not entitled to seek relief by filing a motion under Rule 60(b) where: (1) his underlying claim was one that exclusively must be brought by filing an application for post-conviction relief and (2) that claim was barred by the statute of limitations. The South Carolina Uniform Post-Conviction Procedure Act (PCR Act) describes the claims which may be raised in an application for PCR. It provides in part:

Any person who has been convicted of, or sentenced for, a crime and who claims: (1) That the conviction or the sentence was in violation of the Constitution of the United States or th Constitution or laws of this State; (2) That the court was without jurisdiction to impose sentence; . . . (4) That there exists evidence of 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) (2014). It goes on to explain: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes place of all other common law, statutory or other remedies heretofor available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them." S.C. Code Ann. § 17-27-20(B) (2014). Finally, it sets a statute of limitations on the

filing of claims. S.C. Code Ann. § 17-27-45 (2014). In addressing the interplay between Rule 60(b), SCRCR, and section 17-27-45(B) of the PCR Act, our Supreme Court held that a petitioner was not entitled to seek relief based on an alleged new substantive constitutional standard by filing a motion under Rule 60(b), SCRCR. This was because he was attempting to raise a claim that could be raised in an application for PCR. *Hendricks v. State*, 387 S.C. 221, 222, 692 S.E.2d 892, 893 (2010). Similarly, Appellant attempts to seek relief under Rule 60(b) for a claim that is cognizable at PCR but which is untimely and successive under the PCR Act. The lower court properly addressed Appellant's motion and denied it under the timeliness restrictions in the PCR Act.

II.

The circuit court had subject matter jurisdiction to rule on Appellant's purported Rule 60(b) motion for relief from judgment where it had the power to hear and determine cases of the general class to which the proceedings in question belong.

Appellant argues the court of general sessions lacked subject matter jurisdiction to rule on his motion for relief from judgment because it was a civil motion filed pursuant to Rule 60(b) that could only be heard in the court of common pleas. As explained in argument I above, the circuit court judge in this matter properly denied and dismissed Appellant's purported Rule 60(b), SCRCR, motion for relief from judgment rather than transferring it to another circuit court judge in Greenville County for a variety of reasons. Regardless of whether that action was taken by the judge while she specifically acted as presiding judge of the court of general sessions, or while she was transacting the business of the court of common pleas, the lower court had subject matter jurisdiction over Appellant's motion and his argument should be rejected.

Subject matter jurisdiction is "the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442

S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)). “There is but one Circuit Court in South Carolina, with uniform subject matter jurisdiction ‘throughout the State.’” *Id.*, 314 S.C. at 238, 442 S.E.2d at 600 (citing *State ex rel. Riley v. Martin*, 274 S.C. 106, 111, 262 S.E.2d 404, 406 (1980) and S.C. Const. art. V, § 1). Here, the one circuit court in South Carolina had uniform subject matter jurisdiction to address Appellant’s motion for relief from judgment no matter how it was construed. His argument should be denied and dismissed and the lower court should be affirmed.

III.

The circuit court properly denied Appellant’s purported Rule 60(b) motion for relief from judgment where that motion was untimely regardless of how it was construed, and where Appellant failed to carry his burden of presenting evidence proving the facts essential to entitle him to relief.

Although the arguments raised in this appeal primarily focus on Appellant’s request that this matter be remanded for consideration before the court of common pleas, he also continues to advance the underlying claim that “no Court of General Sessions had in fact been open on the indictment’s February 19, 2002 date of return,” and therefore his indictment is invalid, his subsequent guilty plea should be vacated, and he is entitled to a new trial. The State submits Appellant’s allegations in this regard are both untimely and without merit under either the rules of criminal procedure or the rules of civil procedure, and therefore his motion was properly denied and dismissed by the circuit court.

Rule 29, SCRCrimP

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

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. A motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. 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.

Rule 29(b), SCRCrimP (emphasis added). In South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2017)); *State v. Needs*, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998). Appellant failed to make the requisite showing.

Neither in his argument to the lower court or in his brief on appeal does Appellant explain how the evidence at issue could not have been discovered before his plea through the exercise of due diligence, or how it could not have been discovered before his 2002 Application for PCR. This is likely because all of the information Appellant now relies upon was available and discoverable well before his June, 2002, plea. 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, 414, 279 S.E.2d 365, 366 (1981). In effect, Appellant's motion is merely another attempt at an application for PCR, where his first application was denied and dismissed with prejudice in a prior proceeding. Appellant could have attempted to raise his current allegations in his prior PCR. Thus, his motion was untimely under Rule 29(b), SCRCrimP, and was properly dismissed.

Appellant also fails to explain or demonstrate how the alleged newly discovered evidence is material to his guilt or innocence. Appellant pled guilty to the underlying charges. Thus, the

actions of the grand jury which indicted Appellant are not material to guilt or innocence. The lower court properly dismissed Appellant's motion under Rule 29(b), SCRCrimP.

Rule 60, SCRPC

In regard to Rule 60 motions for relief from judgment or order, the South Carolina Rules of Civil Procedure provide: "The motion shall be made *within a reasonable time*, and for reasons (1), (2), and (3) *not more than one year after* the judgment, order or proceeding was entered or taken." Rule 60(b), SCRPC. Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006). The appellate court's standard of review is therefore limited to determining whether the trial court committed an abuse of discretion. *Id.* at 551, 633 S.E.2d at 502-03. An abuse of discretion arises where the trial court's ruling is controlled by an error of law or where it is based on factual conclusions that are without evidentiary support. *Id.* at 551, 633 S.E.2d at 503. The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief. *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 267, 750 S.E.2d 615, 620 (2013). South Carolina requires a movant seeking relief under Rule 60(b)(3) to establish extrinsic fraud. *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004).

Appellant filed his motion well beyond one year after his conviction and sentence; therefore, his allegation of fraud is clearly untimely. Also, neither in his argument to the lower court or in his brief on appeal does Appellant explain how the alleged "fraud" he sought to raise in his motion could not have been discovered before his plea or "within a reasonable time" after his plea through the exercise of due diligence, or how it could not have been discovered before his 2002 Application for PCR. This is likely because all of the information Appellant now relies upon was available and discoverable well before his June, 2002, plea. In effect,

Appellant's Rule 60(b) motion is merely another attempt at an application for PCR, where his first application was denied and dismissed with prejudice in a prior proceeding. Appellant could have attempted to raise his current allegations in his prior PCR. Thus, his motion was untimely under Rule 60(b), SCRCP, and was properly dismissed.

Appellant also failed to present evidence to the lower court proving the facts essential to entitle him to relief. Instead, the State presented evidence disproving Appellant's allegation in the form of indictment number 02-GS-23-1576 [first-degree burglary], bearing the date February 19, 2002, and an October 16, 2001, Order issued by the Honorable John Few ordering the Grand Jury for Greenville County to convene on Tuesday, February 19, 2002. Furthermore, the "fraud" alleged by Appellant would be intrinsic fraud rather than extrinsic fraud because it is the subject of the motion he filed with the lower court challenging his conviction and sentence. Where appellant utterly failed to carry his burden of proof, the lower court could not have committed an abuse of discretion in denying his motion for relief from judgment. *BB&T v. Taylor*, 369 at 551-52, 633 S.E.2d at 502-03. Thus, the lower court properly dismissed Appellant's motion under Rule 60(b), SCRCP.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the circuit court's decision to deny and dismiss Appellant's motion to set aside judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

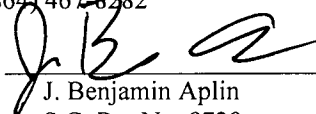
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PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Final Brief of Respondent* dated May 25, 2018, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certified that all parties required by Rule to be served have been served. This 25th day of May, 2018.



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