

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable D. Craig Brown, Circuit Court Judge

REGINALD CANTY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002316

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR judge err in refusing to grant relief based on newly discovered evidence in the form of testimony from a co-defendant, who did not testify at trial, and was tried jointly with Petitioner and convicted but when the conviction was later reversed on appeal, the co-defendant pled guilty, told the plea judge Petitioner was not involved, and then testified at the PCR hearing that Petitioner was not involved in the robbery or murder?

STATEMENT

In September of 2008, the Sumter County Grand Jury indicted Petitioner Canty and a co-defendant, Daniel Deangelo Jackson, for murder and armed robbery, indictment 2008-GS-43-993. On August 8, 2011, Petitioner and Jackson proceeded with a jury trial before the Honorable William Jeffrey Young. Garryl L. Deas represented Petitioner at trial. John P. Meadors prosecuted the case. The jury returned verdicts of guilty on both counts for both Petitioner and Jackson. Judge Young sentenced Petitioner to concurrent thirty (30) year sentences for each charge. Judge Young sentenced Jackson to life without parole for murder and thirty (30) years for armed robbery. Petitioner appealed his sentence and conviction and the direct appeal was perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Reginald Canty, Op. No. 2014-UP-208 (S.C.Ct.App. June 4, 2014).

On January 13, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on March 4, 2015. Petitioner filed four amendments to the PCR application. On March 31, 2017, an evidentiary hearing was held before the Honorable D. Craig Brown. Lance S. Boozer represented Petitioner at the PCR hearing. Ruston Wesley Neely represented the State. In a written order signed October 5, 2017, Judge Brown denied relief and dismissed the application. A timely notice of intent to appeal was served on November 6, 2017. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to grant relief based on newly discovered evidence in the form of testimony from a co-defendant, who did not testify at trial, and was tried jointly with Petitioner and convicted but when the conviction was later reversed on appeal, the co-defendant pled guilty, told the plea judge that petitioner was not involved, and then testified at the PCR hearing that Petitioner was not involved in the robbery or murder.

On January 12, 2008, a pizza delivery man, William J. Flexon was shot to death in front of an abandoned trailer next to the trailer where Petitioner's mother lived in the O.C. Mobile Home Park. At the time, Petitioner was sixteen years old, had a seventh grade education and no prior record. (App. p. 1252, line 9 – p. 1253, lines 1-20). Petitioner was identified from video surveillance from a grocery store where the pizza order was placed on a payphone. Investigators questioned Petitioner and he provided several statements. Petitioner told Investigator West with the Sumter County Sheriff's Department that co-defendant, Daniel Jackson,¹ "approached him and asked him whether he wanted to make any money by robbing a pizza man ..." (App. p. 631, lines 16-17). According to the investigator, Petitioner told Jackson, yes. (App. p. 631, lines 17-18). The investigator testified at trial:

Reginald [Petitioner] then stated he asked his cousin Desmond Canty to take him and another person [Jackson] to the store, Cherryvale Grocery, where he stated that another person [Jackson] made a phone – made a telephone call to Sambino's Pizza Restaurant. Reginald then stated that they went inside the store, and he wanted to buy some batteries, but did not – they did not have the kind he wanted. Reginald stated that the other person [Jackson] bought a Debbie snack cake and left the store.

(App. p. 631, line 18 – p. 632, lines 1-2). Petitioner told the investigator that they went back to the trailer park where Petitioner went to his house and Jackson walked to the back of the trailer

¹ As Petitioner and Jackson were tried together, Jackson was referred to at trial as "another person."

park. (App. p. 632, lines 4-7). Petitioner then told the investigator that he watched from his porch as the pizza delivery man pulled up to the abandoned trailer home where he was met by three males with hoodies. (App. p. 638, line 19 – p. 639, lines 1-4). Jackson was one of the three men and Petitioner did not know the other two. (App. p. 639, lines 4-6). A struggle ensued over a rifle and the pizza delivery man was shot. (App. p. 639, lines 6-10).

Petitioner stated that “it was not supposed to happen like that.” (App. p. 632, lines 16-17). Petitioner maintained that he did not participate in the shooting but believed that it was an accident. (App. p. 633, lines 11-22). Several days after the incident, a damaged 30-30 rifle was found in the Clarendon County home of Jackson’s aunt, Andrea Russell (Russell), along with a styrofoam container capable of holding twenty 30-30 cartridges. (App. p. 543, lines 10-23; App. p. 545, line 21—Tr. 548, line 24). A spent 30-30 shell casing was later located at the same residence inside of a peanut butter jar. (App. p. 548, line 25 – p. 550, line 25). Another casing was found under Petitioner’s bed at his mother’s trailer. (App. p. 735, line 8—Tr. 738, line 1; p. 753, line 19—p. 755, line 10). Neither Petitioner nor Jackson testified at trial. The jury found both Petitioner and Jackson guilty of murder and armed robbery.

Jackson testified at Petitioner’s PCR hearing. (App. pp. 1311-1326). Jackson testified that his conviction was reversed on direct appeal in 2014. (App. p. 1312, lines 1-25). On remand, Jackson pled guilty to murder and armed robbery and received a thirty year sentence instead of the life sentence originally imposed. (App. p. 1313, lines 2-21). Jackson testified that during his guilty plea he told the judge that Petitioner had nothing to do with the murder and armed robbery. (App. p. 1315, lines 16-24). At the PCR hearing Jackson testified that Petitioner had no involvement stating, “So the only thing I did was make him get his cousin to take me to the grocery store so I can make the phone call in order to fulfill my plans that night.” (App. p. 1316, lines 22-25). Jackson’s

testimony at the PCR hearing was consistent with Petitioner's statement to police. Jackson also testified that he forced Petitioner to ask the cousin to drive Jackson to the Grocery Store. (App. p. 1316, line 17 – p. 1317, lines 1-3). Jackson testified that he “put a lot of fear in a lot of brothers, young brothers, at the time.” (App. p. 1316, lines 19-21). Petitioner testified at the PCR hearing that when Jackson talked about the robbery, Petitioner was unsure if he was serious. (App. p. 1310, lines 4-8). Jackson confirmed that at first the idea of robbing the pizza delivery man was a joke. (App. p. 1316, lines 8-9).

In the order of dismissal the PCR judge wrote:

Further, this Court finds Jackson's testimony was completely unreliable and lacking in credibility. At the PCR hearing, Jackson claimed Applicant was never part of the armed robbery. He claimed Applicant never agreed to aid or assist in the crime. Jackson admitted there were no potential consequences for his testimony at the hearing because his appellate process was finished. He also claimed he wanted to take the witness stand at his own trial so he could admit he committed the crime and Applicant was not involved, but was scared of getting the death penalty. Jackson gave no explanation for the rifle under Applicant's bed, the shell casing in the peanut butter jar in Applicant's house, or Applicant's inconsistent statements to law enforcement. Jackson's change of heart from pleading not guilty and proceeding to trial to testifying he wanted to plead guilty and testify that Applicant was innocent is, in essence, a recantation. “[R]ecantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.” State v. Wright, 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977).

(App. pp. 1368-1369). The order is factually incorrect. The rifle was not found under Petitioner's bed. Instead, the rifle was found at Jackson's aunt's home. While there was a shell casing found under Petitioner's bed, the shell casing found in the peanut butter jar was found at Jackson's aunt's home. Jackson's testimony at the PCR hearing was not a recantation. Jackson did not previously provide any statement or testimony to recant.

The PCR judge also wrote, “Applicant presented no evidence Jackson's testimony would have a reasonable probability the result of the trial would have been changed. Jackson's testimony did not relieve the damning evidence found in Applicant's home or the multiple

conflicting statements he gave to law enforcement. Therefore, Applicant failed to show Jackson's testimony would probably have changed the result of the trial." (App. p. 1369). The PCR judge erred. Viewing the evidence as it was presented at trial, not as it is mischaracterized in the order of dismissal, Jackson's testimony probably would have changed the result of the trial.

In Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018)(fn. 2 omitted), the South Carolina Supreme Court wrote:

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

The order in the present case contains both findings of facts and conclusions of law. While the PCR judge made a finding of fact in regard to Jackson's credibility, the finding is not supported by the record. Jackson's testimony at the PCR hearing was consistent with the statements Petitioner provided to law enforcement. Jackson's testimony was not a recantation. This Court should review the legal conclusion that Petitioner failed to show that Jackson's testimony would probably have changed the result of the trial de novo and reverse the finding of the PCR judge. Reversal is required under an abuse of discretion standard as well because the conclusion is not supported by the record, especially in light of the factual errors contained in the order.

Petitioner is entitled to relief pursuant to S.C. Code Ann. § 17-27-20(A)(4) as there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. In Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014), the South Carolina Supreme Court wrote:

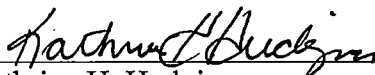
Traditionally, in South Carolina, “ ‘[t]o obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.’ ” McCoy v. State, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013) (quoting Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993)).

In Jamison the Court found that the traditional, five factor newly discovered evidence test is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a **guilty plea**. In contrast, the traditional five factor test is applicable in the present case as Petitioner went to trial. Applying the traditional factors, Jackson’s testimony at the PCR hearing constitutes newly discovered evidence requiring a new trial.

The record supports a finding that Jackson’s testimony would probably change the result if a new trial is ordered. As discussed above, his testimony that Petitioner was not involved and that at first the robbery idea was a joke is consistent with Petitioner’s statements to the police. Based on Petitioner’s statements, his involvement was limited to asking his cousin to take Jackson to the grocery store to use the payphone and order the pizza. Jackson’s testimony was discovered after trial during the subsequent guilty plea and could not have been discovered before trial. Jackson’s testimony was material to innocence and not merely cumulative or impeaching. Petitioner is entitled to a new trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of June, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

Honorable D. Craig Brown, Circuit Court Judge

REGINALD CANTY,

PETITIONER

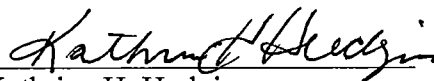
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STATE OF SOUTH CAROLINA,

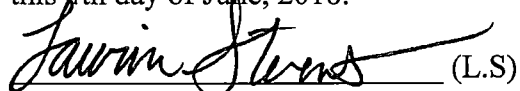
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Reginald Canty, #347341, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 4th day of June, 2018.


Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 4th day of June, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.