THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No: 2017-001488

THE STATE,

RESPONDENT,

v.

JAMAR ANTONIO HUGGINS,

APPELLANT.

FINAL BRIEF OF APPELLANT

Tricia A. Blanchette
Bar No. 74904

Post Office Box 2147
Leesville, SC 29070
(803) 908-3266

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

STATEMENT OF ISSUE ON APPEAL

THE LOWER COURT ERRED IN FAILING TO GRANT A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE.

STATEMENT OF THE CASE

During the March 2013 term of the Horry County Grand Jury, Appellant was indicted for burglary, kidnapping and armed robbery (2013-GS-26-1076, 1077, 1078). On September 15, 2014, Appellant was called to trial in Horry County in front of the Honorable Benjamin H. Culbertson. Appellant was represented by J. Reuben Long, III, Esquire. Donna Elder, Assistant Solicitor, represented the State. On September 17, 2014, Appellant was found guilty as indicted. The Honorable Benjamin H. Culbertson sentenced Appellant to concurrent terms of fifteen years, fifteen years and ten years for each charge.

A timely direct appeal was filed and perfected by Robert M. Pachak, Esquire, of the Office of Appellate Defense. On March 30, 2016, the South Carolina Court of Appeals affirmed Appellant's convictions and sentences. State v. Huggins, Op. No. 2016-UP-146 (S.C. Ct. App. filed March 30, 2016). The remittitur was issued on April 15, 2016.

A Motion for a New Trial Based on After Discovered Evidence, with Affidavit of Deaungela Montgomery, was filed on September 27, 2016. A hearing was conducted on June 13, 2017 at the Horry County Courthouse in front of the Honorable Benjamin H. Culbertson. Appellant was present and represented by Natasha M. Hanna, Esquire. The State was represented by Jimmy A. Richardson, II, Fifteenth Circuit Solicitor. Following the hearing, Appellant, through counsel, filed a Memorandum in Support of Defendant's Motion for a New Trial. On June 14, 2017, the Honorable Benjamin H. Culbertson issued a written Order, which was filed on June 15, 2017. A Notice of Appeal was filed, from which this Brief follows.

ARGUMENT

THE LOWER COURT ERRED IN FAILING TO GRANT A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE.

In pertinent part, Rule 29(b), of the South Carolina Rule of Criminal Procedure, provides:

> 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.

By way of the Rule 29(b), SCRCrimP, Motion at issue, Appellant alleged after discovered evidence and requested a new trial. To prevail on this claim a defendant "must show that 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 been discovered prior to trial; 4) is material; and 5) is not merely cumulative or impeaching." State v. Spann, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999) (citing State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983); State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011).

It is well established that the decision whether to grant a new trial rests within the sound discretion of the trial court, and the appellate court will not disturb the trial court's decision absent an abuse of discretion. State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). In State v. Mercer, 381 S.C. 149, 166-67, 672 S.E.2d 556, 565 (2009), the South Carolina Supreme Court explained:

> 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, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); State v. Deese, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976) (noting 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, 207 S.E.2d 414, 419 (1974) (quoting State v. Mayfield, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)) ("The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."). On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.

Often times, the matter of newly discovered evidence boils down to a credibility issue as discussed in State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009). Here, the lower court's written ruling reads in its entirety as follows:

> Defendant's Motion for New Trial due to newly discovered evidence is denied.
>
> At trial, Deaungela Montgomery testified that the defendant was not the person who committed the crimes with her and that she did not to identify the true co-perpetrator. Her testimony was impeached with her inconsistent prior statements given to law enforcement where she identified the defendant as the co-perpetrator of the crimes.
>
> The Defendant's Motion for a New Trial is based upon Deagungela Montgomery's identification of another person as the co-perpetrator after the defendant's conviction at trial. She states in an affidavit that she is no longer scared of the co-perpetrator and, therefore, identifies him by name (which she refused to do at trial).
>
> Such evidence is merely cumulative since, at trial, Deaungela Montgomery testified that the defendant was not the true co-perpetrator and that someone else committed the crimes with her. Also, the evidence could have been discovered prior to trial with due diligence. When Deaugela Montgomery refused to identify the true perpertrator at trial, the defendant did not press her on that issue or ask that she be required to identify who committed the crime with her. (At the time of Deaungela Montgomery's testimony at the defendant's trial, she had already pled guilty and been sentenced to one of the crimes in the case).
>
> See Hayden v. State, 278 S.C. 610, 278 S.E.2d 610 (1983) and Rule 29(b), SCRCrimP.

R. pp. 270-271.

As a threshold matter, it appears from the lower court's ruling that he found the evidence offered via the Affidavit and interview of Ms. Montgomery to be credible since he focused his written decision on the merits of the evidence.[1] It further appears that the lower court's denial hinged on two of five elements required to establish newly discovered evidence as is addressed in the final paragraph of the court's ruling. Therefore, Appellant will address those elements and urges this Court to find that the lower court erred in finding that the evidence offered "could have been discovered prior to trial with due diligence" and "is merely cumulative." R. p. 271.

Turning first to whether the evidence could have been discovered prior to trial in the exercise of due diligence, Appellant submits that the lower court committed an error of law and his reasoning is not supported by the record as his own statement demonstrates. The lower court concluded: "Also, the evidence could have been discovered prior to trial with due diligence." R. p. 271. Immediately, thereafter, the lower court reasoned: "When Deaungela Montgomery refused to identify the true perpetrator at trial, the defendant did not press her on that issue or ask that she be required to identify who committed the crime with her." R. p. 271.

The lower court's reasoning is reversible error for two reasons. First, the court's reasoning is erroneous as he is referring to discovery during the course of trial not prior to trial. No findings were made by the lower court regarding how this information could have been discovered, in the exercise of due diligence, prior to trial.

[1] If this Court finds that the lower court failed to make a credibility finding, Appellant would request that the matter be remanded to the lower court for such a finding. Credibility was addressed by counsel at the motion hearing and in detail in the Memorandum in Support of Defendant's Motion for New Trial. R. p. 236.

Secondly, the court's reasoning is erroneous because the evidence simply could not have been discovered prior to or during trial. As late as the night before trial, the State interviewed Ms. Montgomery, yet the State admitted being surprised by her trial testimony. Additionally, Ms. Montgomery made it clear at trial that she did not recall the home invasion. At the time of trial, it appears Ms. Montgomery's testimony was solely about her police interview and not a current independent recollection of the events in question.

In addressing the lower court's error, it is imperative to look at the facts of the case and the testimony offered at trial. It is uncontested that Deaugela Montgomery and two men went to the home of Angela Eckler looking for Adrian Moore on December 20, 2012. Thereafter, Ms. Montgomery went to the door, fully visible, and two men rushed into the home robbing and detaining Ms. Eckler and her twelve year old daughter against their will.

About three weeks later, Ms. Montgomery was interviewed. Detective Martin admitted that she informed him that she was using crack cocaine. R. p. 104. Through the interview, she identified "Junk" as one of the masked men in the home with a gun. She also identified Appellant, based upon a photograph provided by law enforcement, as "Junk." As was argued at the motion hearing, this identification was the result of admitted deception on the part of law enforcement. R. p. 253. Prior to obtaining the photo identification of Appellant, Detective Martin lied and showed Ms. Montgomery that she had been identified in a photo line-up by the victim, which had not occurred. R. pp. 105-108.

When Ms. Montgomery took the stand at trial, she testified that she could not remember the night in question, she could not remember her police interview, and after explaining that she was "on medication now," she stated, "I can't remember nothing really. R. p. 50, lns. 6-15, pp. 51-52. The State continued to question her lack of memory and asked what she told "somebody last night," to which she responded:

Question:	One of the armed robberies that you have been convicted for, I want to take you back to the one in December 2012.
Answer:	Uh-huh.
Question:	Do you remember that?
Answer:	Not really.
Question:	Okay. Do you remember going to a house on Memory Lane?
Answer:	Yes, ma'am.
Question:	And tell me about what happened when you went to that house?
Answer:	I can't really remember.
Question:	All right do you remember giving statements before?
Answer:	No. I'm on medication now. So I don't --- I can't remember nothing really.
Question:	All right. Do you remember talking to somebody last night, yesterday?
Answer:	Yes.
Question:	Okay. Well, tell us what you told him about this event.
Answer:	I told him about me and Tyjuan McKeithan going, planning a robbery and went to, I guess her name is Mariah Eckler.
Question:	Uh-huh.

Answer: And he called somebody but that – he don't look like the same guy.

Question: Do you remember telling him that it was Junk?

Answer: Yeah. I remember the name by Tyjuan but he doesn't look like the same person.

R.. p. 50, ln. 20 – p. 51, ln. 2.

She further explained that she did not even recall her police interview and then she was questioned at length regarding the information contained in her police interview not her independent recollection of the night in question. R. pp. 51 – 61. In response to the defense objection regarding questions about her police interview, the court responded: "She said she did not recall the incident. This is a different question. I'll allow it. Overruled. R. p. 51, lns. 9-12. Interestingly, the same court that found the evidence could have been discovered prior to trial, ruled at trial that Ms. Montgomery did not recall the incident at trial; thus, allowing her to be questioned about her interview and the information that she previously gave to law enforcement.

When asked about her identification of Junk during her police interview, she responded: "After they say – after they asked me was it Junk, I, I don't remember him. I don't know him." R. p. 51, lns. Thereafter, the following testimony was elicited:

Question: And you – do you deny that you made a statement?

Answer: I probably did because, I mean, I don't know. I don't know. I can't really remember nothing.

Question: Okay. Did you make a statement to police identifying Junk as the one who went with you and Ty to do an armed robbery?

Answer: I remember the name. So, yes, I did make the statement, but what I'm telling you is this is not the same person.

Question: Okay. Do you recall when you say that Junk with you that the person you identified as Junk was Jamar Huggins.

Answer: I guess because they asked me was it Junk and I assumed that it was Junk by the name. So I said it was him.

Question: And you described him at the time.

Answer: I don't remember describing him.

R. p. 52, lns. 1-14.

During the remainder of her testimony, she repeatedly responded that she could not identify Appellant as the perpetrator, she could not identify Appellant as Junk nor testify that he was involved. R. pp. 55-56, 58, 60-63. She also repeatedly explained that the information she gave in the interview was not the truth, but she could not remember the night in question or the interview very well. R. pp. 56-57, 59-60.

Specifically, on cross examination, counsel asked the following:

Question: Ms. Montgomery, this is not the person who went in that home invasion with you, is it?

Answer: No, ma'am. No, sir.

Question: It is not the person who went in the home invasion with you?

Answer: No, sir.

R. p. 62, lns. 2-7.

During her brief cross-examination, it appears Ms. Montgomery was able to recall that Appellant was not involved, but she never gave any indication that she had an independent recollection at trial of who was involved. By way of the written Order, the lower court held that trial counsel could have pressed her on the identity of the perpetrator and requested that she be required to identify the perpetrator, but a proper review of her testimony demonstrates that the trial court errantly focused on what he

would have like to have heard during the course of trial versus the limited capacity in which Ms. Montgomery was able to exercise recall during trial.

After Ms. Montgomery's testimony, the State requested a Jackson v. Denno hearing prior to calling Detective Martin to the stand. R. p. 76, lns. 16-24. In explanation, the State conceded: "I didn't foresee it, but after Ms. Montgomery's performance today on the stand, I think's it's necessary." R. p. 76, lns. Logically speaking, this explanation from the State demonstrates how discovery was impossible prior to trial if the State interviewed their own witness the night before trial and were still surprised by Ms. Montgomery's testimony.

By way of an interview and affidavit provided at the motion hearing, Ms. Montgomery explained that she was on heroin and crack and had trouble remembering the date of the crime. R. p. 233. In contrast to trial, she could now recall the facts of the night in question. She recalled being with Tyjuan McKeithan and, she called Jamar Huggins to use his car. R. p. 233. Appellant told her no. R. p. 233. Then, McKeithan called "Junk Jamar Huggins," and Appellant said yes. R. p. 233. She explained her plan with McKeithan to go to "Drake's" home, take him off and rob him. R. p. 233. She stated that they did not tell Appellant what was going on when they took his car, and they did not tell him what happened afterwards. R. p. 233.

She provided details of her interrogation and explained how scared she was due to the threats she received during it. R. p. 234. She recalled picking the circled picture of Jamar Huggins, so she would be left alone. R. p. 234. She stated that she never told law enforcement that Appellant sold drugs. R. p. 234.

Regarding the trial, she stated that Drake sat behind her during the trial. She felt "weird" and feels the "case was handled wrong." R. p. 234.

In a follow up interview, she stated that Jasamine Mitchell was the second man with her during the crime. R. p. 234. Mr. Mitchell threatened her and put in in fear for her family. R. p. 234. She explained that she was reluctant to tell police his name because of her fear and knowledge that he commits violent crimes. R. p. 234.

As is argued above, the lower court erred in finding that the evidence contained in the affidavit and interview could have been discovered prior to trial. What was discovered prior to trial by the State was not even consistent with Ms. Montgomery's testimony at trial, and Ms. Montgomery's testimony at trial clearly did not amount to an independent recollection of the facts as provided via the affidavit and interview. Furthermore, the lower court's reasoning shows that he actually found that the evidence could have been discovered during trial, which is also reversible error.

Turning to the lower court's finding that the evidence was merely cumulative, it is also clear from the record that this finding is reversible error. As is addressed above, Ms. Montgomery lacked an independent recollection of the facts at trial, and she now she has such a recollection, which is not cumulative to the evidence offered at trial. Additionally, the State fully impeached Ms. Montgomery with her interview and prior admissions, and her admission regarding the true perpetrator amounting to a complete confession falls outside the scope of mere impeachment testimony.

Also, as argued to the lower court, Ms. Montgomery was the only witness that implicated Appellant prior to or during trial. Ms. Eckler could not identify Appellant.

Therefore, the testimony of Ms. Montgomery is in no way cumulative to any other evidence offered at trial regarding the identification of the third perpetrator.

At trial, the lower court denied the motion for directed verdict, yet the lower court determined that it was a "close call" and noted that Appellant may prevail on the issue on appeal. R.. p. 176, lns. 9-21. As argued to the lower court, it is no longer a close call as Ms. Montgomery has now made a complete confession regarding her involvement in the crime at issue, which properly discloses the identity of the third perpetrator. Regarding confessions, the Supreme Court of the United States has held:

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257 (1991) (Internal citations and punctuation omitted). See Johnson v. Catoe, 345 S.C. 389, 401, 548 S.E.2d 587, 593 (2001) (Pleicones, J., dissenting). "Every practicable precaution should be taken to insure that a verdict really speaks the truth, for if it does not an innocent man may be imprisoned for years." Newsom v. United States, 311 F.2d 74, 79 (5th Cir. 1962) (Reversing the denial of a motion for a new trial based upon testimony of a witness stating that defendant was merely present during a sale of drugs and not involved as alleged at trial).

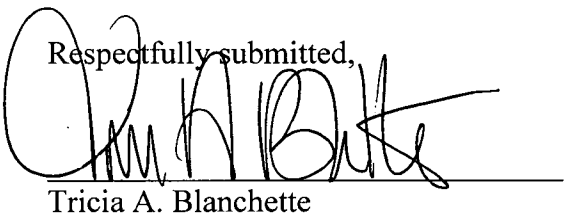
Here, the complete confession made by Ms. Montgomery was not discoverable prior to trial and is not merely cumulative evidence. As a result, Appellant urges this

Court to find that the lower court erred in denying relief and find that a new trial is required to ensure that an innocent man is not imprisoned.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the findings of the lower court and remand the case for a new trial.

Respectfully submitted,



Tricia A. Blanchette
Bar No. 74904
Post Office Box 2147
Leesville, South Carolina 29070
(803) 908-3266
Attorney for Appellant

June 13, 2018