

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 19 2018

Certiorari to Sumter County
D. Craig Brown, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-002316

REGINALD CANTY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Whether the PCR court correctly found Petitioner was not entitled to a new trial based on "newly discovered evidence" where the incredible testimony of Petitioner's co-defendant, who claimed nine years after the crime that Petitioner was not involved in the murder, did not constitute newly discovered evidence under South Carolina law?

STATEMENT OF THE CASE

Procedural History

Petitioner Reginald Canty is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. In September 2008, the Sumter County Grand Jury indicted Petitioner and his co-defendant, Daniel DeAngelo Jackson, for murder and armed robbery (2008-GS-43-993). Garryl L. Deas, Jr., Esquire, represented Petitioner on the charges. John P. Meadors, Esquire, prosecuted the case. On August 8-12, 2011, Petitioner and Jackson proceeded to a joint jury trial before the Honorable W. Jeffrey Young, after which the jury convicted both defendants as indicted. Neither Petitioner nor Jackson testified at trial. Judge Young sentenced Petitioner to thirty years' imprisonment for armed robbery, and thirty years' imprisonment for murder, to run concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction in sentence in an unpublished opinion filed on June 4, 2014, finding the trial court did not err in either admitting a photograph of the victim's gunshot wound or in denying Petitioner's directed verdict motion. State v. Reginald Canty, Un. Op. No. 2014-UP-208 (S.C. Ct. App 2014). The Remittitur was issued on June 23, 2014.

Petitioner filed a timely application for post-conviction relief on January 13, 2015 (2015-CP-43-00061). In his application, and in four subsequent amendments to the application, Petitioner alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
 - a. Failure to investigate
 - b. Failure to object to Belcher instruction
 - c. Failure to request lesser-included charge instructions
 - d. Failure to properly review discovery materials with Applicant
 - e. Failure to question investigator concerning resignation from Sheriff's office
 - f. Conflict of interest, Counsel was formerly forfeiture attorney for the Solicitor's office

- g. Breaking attorney-client privilege
- h. Failure to properly argue Batson motion
- 2. Newly Discovered Evidence
 - a. Codefendant recant trial testimony
- 3. Prosecutorial Misconduct
 - a. Manipulation of the docket
- 4. Ineffective Assistance of Appellate Counsel

Respondent submitted its Return on March 4, 2015. An evidentiary hearing was convened on March 30, 2017, at the Sumter County Courthouse before the Honorable D. Craig Brown. Petitioner was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office. At the PCR hearing, Petitioner withdrew the following allegations:

Failure to properly argue Batson motion,
Breaking attorney-client privilege,
Prosecutorial Misconduct,
Ineffective Assistance of Appellate Counsel, and
Counsel failed to question Investigator West concerning his resignation.

During the hearing, Petitioner testified on his own behalf and presented testimony from Daniel Jackson, his co-defendant. Respondent presented testimony of Garryl L. Deas, Jr., Esquire ("Trial Counsel"). Judge Brown denied and dismissed the application in an Order of Dismissal signed October 5, 2017 and filed October 20, 2017.

Petitioner filed a timely Notice of Appeal on November 6, 2017. The Petition for Writ of Certiorari and Appendix were filed on June 4, 2018. This Return to Petition for Writ of Certiorari follows.

Factual History

The charges at hand arose from the murder of William Flexon, a pizza delivery man, when he was hit and killed by two shots on January 12, 2008 at an abandoned trailer on Cherryvale Road in Sumter County. Petitioner and co-defendant Daniel DeAngelo Jackson lured the victim to this location in a robbery plot. The incident began at Sambino's, a restaurant owned by Tanya Knudson. Around 8:04 pm that night, Sambino's received a telephone call from a male voice ordering three large pizzas. App. 247-249. The caller specifically told Tanya he was calling from a pay phone. App. 248. The delivery was for an address at a lot in the O.C. Mobile Home Park on Cherryvale Drive. App. 252.

The victim, William "Bill" Flexon, took the order. Sumter County Deputy Sheriff Jennifer Thomas, who was eating at Sambino's, observed Flexon leave with the pizzas. App. 364. Shortly after she finished eating, Thomas received a call that shots were fired at Cherryvale Drive. App. 364. She left Sambino's, went to the lot at the O.C. Mobile Home Park, and found Bill Flexon's body on the ground. App. 365.

Law enforcement went to the nearby Cherryvale Grocery, which contained the closest payphone to Sambino's, and spoke with the manager, Eugene Mackovitch. App. 314. Mackovitch informed them that he sold a Little Debbie snack cake to two men that evening that he thought looked familiar but did not recognize. App. 321. He stated the two men then left the store and turned to the right of the building, where the payphone was located outside. App. 324-325. A video from the security camera showed the two men come into the grocery store, purchase the Little Debbie cake, and walk out of the door to the right. App. 319. The men were later identified as Petitioner and co-defendant Daniel Jackson. App. 349-352. After the shooting, a Little Debbie snack wrapper was found at the scene of the crime, on the side of the road near the entrance to the

lot where the shooting occurred. App. 446. The wrapper was found 137 feet away from the victim's body. App. 449.

Law enforcement went to the home of Andrea Russell, who is Jackson's aunt. App. 552. Jackson was at her apartment, but fled before the police arrived. App. 544. When the police left, he returned. App. 545. After Jackson returned, Andrea Russell called the Clarendon County Sheriff's Office and advised them she found a rifle under her futon that was not hers and asked them to come and get it. App. 503. Russell stated she discovered the rifle while vacuuming that day. Russell also stated she found shell casings inside a jar of peanut butter in her home that had not been there that morning. App. 548-549.

Evidence was presented Jackson called the wife of his uncle, Isaac Boyd, on January 13 asking to be picked up from the American Inn in Sumter. App. 564. Boyd testified he picked Jackson up and took him to Curtis Wheeler's house to pick something up. App. 565. While he stayed in the car, Boyd saw Jackson and Wheeler go to an abandoned trailer by the woods. App. 566. Jackson told Boyd he needed to pick up some clothes. Jackson returned to the car with a clothes basket, but Boyd did not realize there was a rifle in the basket until he got back to Sumter. App. 567. At that time, Boyd took Jackson to his aunt's house. This occurred on a Sunday night, but Boyd claimed Jackson asked him to lie and say it occurred Saturday night. App. 568.

During the autopsy, law enforcement learned there were two bullets removed from the victim. App. 906. Tracy Thrower, SLED forensics firearms examiner, determined the bullets came from two different firearms. App. 734. He opined one of the bullets came from the rifle located under the futon at Jackson's aunt's home. App. 739. He opined the other bullet did not come from the Winchester rifle because the bullet was too large in diameter. App. 740. He also opined the cartridge found in the peanut butter jar was fired from that Winchester rifle. App. 741.

In a consent search of Petitioner's house, law enforcement found a 30-30 shell casing in his room underneath his bed. App. 687. Investigator Burnish testified he recovered the 30-30 shell casing from underneath Petitioner's bed, had it sent to SLED, received information the shell casing was fired from the same rifle found at Jackson's house, and had warrants issued for Petitioner's arrest. App. 921.

Petitioner gave a series of statements to law enforcement, each different than the one before. In his initial statement, when Petitioner was only a potential witness, he denied any knowledge of the crime. In his next statement, he stated he was there, but did not take part in the crime. In the redacted January 15, 10:35 A.M. statement, Petitioner admitted to being at the Cherryvale Grocery with his cousin and another person, and the other person used the payphone to order pizza. App. 615-616. He went on to explain that when he got home, he sat on his neighbor's porch and saw a white man wrestling with a tall black man over a gun. He went on:

The black man told him to stop, and then I heard a gunshot. The other person was standing next to the van looking at the guys wrestle. The other guy had a handgun that looked like a revolver. After the gunfire, everyone ran. I ran in the house. I told my moms what I saw later on that night. I wasn't truthful to law enforcement at the beginning because I was nervous and scared because I never saw anyone get killed before.

App. 618, line 16-25.¹

On January 17, 2008 at 3:34 PM, Petitioner made another statement to Investigator West, with his mother, Dorothy Canty, present. App. 622-623. Investigator West stated he had advised Petitioner his first statement was inconsistent and he needed to be truthful. App. 631. Investigator West reported this new oral statement, in pertinent part, as follows:

¹ Notably, during his investigation, Investigator Burnish went to Petitioner's front porch and determined that, contrary to Petitioner's statement, he could not see the lot where the shooting occurred from the porch. App. 929. West also stated someone sitting on the porch of Petitioner's home would not be able to see the lot because of the foliage. App. 686; 711.

[Petitioner] began to say he stood in his yard by the gate and saw a black male struggling with the pizza man and another black male holding a revolver. I asked him how he knew it was a revolver, and it being dark with no lighting on, and he said there was a glare coming from the gun. **He then said-he then stated it was not supposed to happen like that. And I asked him what did he mean by that, and he said that the pizza man was not supposed to get shot. He stated it was an accident.** His mother then asked him how he knew it was an accident, and you said you weren't there. How you knew it was a revolver and it was dark outside. **Reginald then began to cry. He stated that he did not shoot and kill anyone. He kept saying it was a accident, and he kept saying he wasn't there. So, I asked him there is no way you can say it was a accident and you weren't there, and he put his head on the table and continued to cry.** Reginald then stated that the suspects ran away and he ran in the house.

App. 632, line 10 – 633, line 22 (emphasis added).

During this meeting, a written statement was prepared. The oral statement was written out onto a written statement form by Petitioner and was read by Investigator West aloud. App. 636-639. The written statement continues:

Toya left. I then went and sat on my porch until the pizza man came. I saw a silver in color Chrysler van pulled up, and it pulled up to the back where another person was-the other person was. The pizza man stayed in his vehicle for approximately 3 minutes, and he then-and then-he then got out and went to the abandoned residence, lot number 7, and saw the door open and turn around and went back to his vehicle real fast. The pizza man was met by three males with hoodies. Another person was one of the males, and I didn't-and I don't know who the other two were. The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop, and then the gun fired. After I saw the man got shot, I ran in the house and told my moms I heard a gunshot.

App. 638, line 19 – 639, line 10.

On January 25, 2008, Investigator West talked with Petitioner again with his mother present. App. 643. At this time, Petitioner wrote out another statement:

When we got home, another person went to the back of the trailer, and he wait at the back for the pizza man to come. When the pizza man came, they started to rob the man. The pizza man was trying to take the gun from another person, and this person said stop. And after he said stop, he shot the pizza man. It's a-then he stayed

there for a second. Then he ran. It looked like it was another person running away with the other person around the car.

App. 644, line 25 – 645, line 9.

Investigator West also spoke about his interview with co-defendant Jackson on January 16, 2008 at 9:03 PM. Investigator West stated he gave Jackson his Miranda rights, which Jackson waived. At that point, West served Jackson with a murder and armed robbery warrant. App. 652. After being served with the armed robbery warrant, Jackson asked, “how can I be charged with armed robbery if I did not take any money from the pizza man?” App. 915-916.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). For questions of fact, the standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the post-conviction judge's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984). Pure questions of law are reviewed de novo and appellate courts will reverse the PCR court decision only if its decision is controlled by an error of law. Id., Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). In post-conviction relief proceedings, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCPP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

The PCR court did not err in finding Petitioner was not entitled to a new trial based on “newly discovered evidence” where the incredible testimony of Petitioner’s co-defendant, who claimed nine years after the crime that Petitioner was not involved in the murder, did not constitute newly discovered evidence under South Carolina law.

Petitioner asserts he is entitled to a new trial based on his co-defendant’s new testimony that Petitioner was not involved in the crime, which he presented nine years after the murder at the PCR hearing. However, the PCR court correctly found Petitioner was not entitled to a new trial because the testimony does not qualify as “newly discovered evidence” under South Carolina law. Therefore, this Court should affirm the PCR Court’s denial of post-conviction relief.

The murder in question occurred in January, 2008. At the PCR evidentiary hearing, which was held over nine years later in March, 2017, Petitioner presented testimony from co-defendant Daniel DeAngelo Jackson. Jackson testified that he is currently serving a thirty year sentence for murder and armed robbery, and he was convicted of these charges at his joint trial with Petitioner. App. 1311. Jackson testified that he was originally sentenced to a life without parole sentence, but his conviction was overturned on direct appeal and he was ordered a new trial. App. 1312. Instead of proceeding to a second trial, Jackson pled guilty and received a thirty year sentence. App. 1312-1313.

Jackson went on to testify that he was guilty of the murder and armed robbery, but Petitioner “didn’t have anything to do with it. He was not even a part of it. He was never a part of anything that happened.” App. 1316, line 21-24. Jackson stated that Petitioner never agreed to aid and assist him in the crime, and he had no involvement in the robbery setup. App. 1316. He admitted that the only thing he did was make Petitioner get his cousin to take him to the grocery

store so he could make the phone call to fulfill his plan to lure the victim to the crime scene. App. 1316, line 22-25.

Jackson asserted that he did not have the chance to testify at his own trial, but if he had, he maintained he would have admitted that he was guilty but Petitioner was not. App. 1320-1321.² He explained that he was testifying today because “it’s the right thing to do.” App. 1324, line 9. Jackson admitted that his appeal was resolved, and there were no consequences to him claiming guilt for the entire crime at this point in time. App. 1324.

First, it should be noted that the PCR court found Jackson’s testimony was “completely unreliable and lacking in credibility.” App. 1368. The Order of Dismissal noted that “Jackson faced no potential consequences for his testimony. Jackson’s testimony he wanted to take the stand to admit his guilt and testify [Petitioner] was innocent is incongruous with his assertion of his right to a trial.” App. 1369. This credibility finding is important, as the lower court was in the best position to judge Jackson’s credibility. “This Court gives great deference to a PCR judge’s findings where matters of credibility are involved” because it lacks the opportunity to directly observe the witnesses. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)). “The credibility of newly-discovered evidence is for the trial court to determine.” State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011)(citing State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)). “Only the trial court and not the appellate court has the power to weigh the evidence; the trial court’s judgment will not be disturbed except for error of law or abuse of discretion.” Id.

The PCR court further found Jackson’s testimony did not qualify as “newly discovered evidence” because it did not meet all five factors of the “newly discovered evidence” test. App.

² Jackson did, however, recall the trial judge telling him that it was his decision whether or not to testify at trial. App. 1326.

1368-1369. The court specifically found the testimony would not have changed the outcome of the trial, noting “Jackson’s testimony did not relieve the damning evidence found in [Petitioner’s] home or the multiple conflicting statements he gave to law enforcement. Therefore, [Petitioner] failed to show Jackson’s testimony would probably have changed the result of the trial.” App. 1369.

Because the PCR court correctly held Jackson’s unreliable testimony did not qualify as “newly discovered evidence,” the denial of post-conviction relief should be upheld. In South Carolina, a party requesting a new trial based on after-discovered evidence 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). To be entitled to a new trial on this basis, Petitioner must show the evidence conforms to all five of these factors. Jackson’s testimony, however, does not.

As the PCR court held in its order, Jackson’s testimony probably would not have changed the outcome of the trial. Petitioner gave several conflicting statements, the final three all admitting some level of involvement in the crime. When pressed on his knowledge of the crime, Petitioner put his head down on the table and began to cry, admitting “it was not supposed to happen like that;” that “it was an accident,” and “the pizza man was not supposed to get shot.” He told Investigator West that he did not shoot and kill anyone, but West reported “[h]e kept saying it was

a accident, and he kept saying he wasn't there. So, I asked him there is no way you can say it was a accident and you weren't there, and he put his head on the table and continued to cry." App. 632, line 10 – 633, line 22.

Jackson's testimony also does not change the fact that law enforcement discovered a 30-30 shell casing underneath Petitioner's bed at his house, which was shot from the murder weapon, the Winchester rifle found at Jackson's aunt's house. App. 687; 921. This evidence was damning to Petitioner, and likely would not have been overcome by Jackson's incredible admission that Petitioner was not involved, which did not come out until nine years later, when Jackson had no more consequences to face. Accordingly, because it likely would not change the outcome of the trial in light of the evidence against Petitioner, this testimony fails to satisfy the first prong of the five-factor test for newly discovered evidence.

Although the testimony has been discovered since the trial, is material to the issue of guilt or innocence, and is likely not merely impeaching evidence, it cannot satisfy the third prong of the five-factor test, as the testimony could have, by due diligence, been discovered before the trial. If Jackson's admission were true, it could have been discovered before the trial. Jackson's refusal to offer this testimony until he no longer faced the threat of penalty does not alter the fact that he could have revealed this information sooner. He knew about Petitioner's alleged lack of participation in the crime before the crime even occurred. The testimony certainly could have been discovered sooner, and thus cannot meet the third prong of the five-factor test.

Because Jackson's testimony fails to meet all five factors of the test for newly discovered evidence, Petitioner is not entitled to a new trial on these grounds, and certiorari should be denied.

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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By: 
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Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

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Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 19th day of October, 2018


KAITLYN S. SLICE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

October 19, 2018

RECEIVED
OCT 19 2018
S.C. SUPREME COURT

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

Re: **Reginald Canty v. State of South Carolina**
Appellate Case No. 2017-002316
Lower Court Case No. 2015-CP-43-0061

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Julie A. Coleman
Assistant Attorney General
SC Bar No. 102214

JAC/ks
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)