THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ardon Percival Cato, II, Appellant.

Appellate Case No. 2016-002081

Appeal From Horry County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2018-UP-383
Submitted September 1, 2018 – Filed October 17, 2018

AFFIRMED

Ardon Percival Cato, II, pro se.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Anthony Mabry, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

PER CURIAM: Ardon Percival Cato, II, appeals the circuit court's denial of his motion for a new trial based on after-discovered evidence pursuant to Rule 29(b) of

the South Carolina Rules of Criminal Procedure. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999) (providing that an appellant seeking a new trial based on after-discovered evidence must show the 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 have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching"); *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) ("A [circuit court] has the discretion to grant or deny a motion for a new trial, and [its] decision will not be reversed absent a clear abuse of discretion."); *State v. Needs*, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998), *holding modified on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) ("The granting of such a motion is not favored and, absent error of law or abuse of discretion, an appellate court will not disturb the [circuit court's] denial of the motion."); *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the [circuit] court if reasonably supported by the evidence." (quoting *State v. Mercer*, 381 S.C. 149, 167, 672 S.E.2d 556, 565 (2009))); *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements.").

AFFIRMED.

HUFF, SHORT, and WILLIAMS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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SC Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions

Steven H. John. Trial Judge

Appellant Case # 2016-002081

State of South Carolina

County of Horry Respondent

v.

Ardon P. Cato II Appellant

INITIAL BRIEF OF APPELLANT

Ardon P. Cato II #316535

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Bennettsville, SC 29512

Pro Se Appellant

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OTHER AUTHORITIES

Rule 29(b)

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STATEMENT OF ISSUES ON APPEAL

1) DID THE TRIAL COURT ERR IN DISPOSING OF ORAL ARGUMENTS AND DENYING APPLICANT'S MOTION FOR A NEW TRIAL BASED ON AFTER DISCOVERED EVIDENCE?

STATEMENT OF THE CASE

Appellant Ardon P. Cato, II, proceeded as Pro Se Applicant, filled a Motion for new trial Based on After Discovered Evidence, pursuant to Rule 29(b) S.C.R. Crim. Pro. dated March 8, 2016, and was clocked stamped with the Horry County Clerk of Court on March 14 2016.

Respondent filed a Response to Pro Se Applicants Motion for New Trial based on After Discovered Evidence clock stamped April 6, 2016.

The Honorable Steven H. John issued an Order Disposing of Oral Arguments and Denying Applicants Motion for a New Trial Based on After Discovered Evidence dated July 18, 2016, filed July 19, 2016. Appellant received this order at Lieber C.I. Mailroom on July 29 2016.

Appellant filed a motion to Alter or Amend Judgement of the Order Disposing of Oral Arguments and Denying Applicants Motion for New Trial Based on After Discovered Evidence pursuant to Rule 59(e) of the S.C.R.C. P., dated August 5 2016, clocked stamped with the Clerk of Court on August 10, 2016.

The Honorable Steven H. John issued on Order Denying Applicants Motion to Alter or Amend Judgment Dated September 14, 2016, filed on September 15, 2016. Appellant Received this order at Evans C.I. Mailroom on September, 27 2016.

Appellant filed a Notice of Appeal to S.C. Court of Appeals dated October 3, 2016.

This is Appellant's initial Brief which proceeds as follows:

FACTS /ARGUMENTS

I) Trial Judge did err in Disposing of Oral Arguments and denying Appellant's Motion for a New Trial Based on After Discovered Evidence, failing to properly and correctly rule on the findings of the facts and conclusions of law on the issue of the guilty plea

Rule 29(b), S.C.R. Crim. Pro. Uses a five prong Spann test in regards to newly discovered evidence, stating that...(1) the newly discovered evidence is such that it would probably change the result is a new trial were granted.

The Respondent is claiming that the newly discovered evidence will not change the outcome of the guilty plea, arguing that the plea itself binds the Appellant to the charges despite the new facts presented.

The issue of the accused presenting newly discovered evidence after the guilty plea has been addressed in the justice system of South Carolina, particularly in Jamison v. State, Op. No 27454 (S.C. Sct filed October 22, 2014). The South Carolina Supreme Court sets forth the Interest of Justice standards in *Jamison*. This Court held that when examining new evidence from guilty pleas ".....establishing that,.....The new evidence is of such weight and quality that under the facts and circumstances of the particular case the Interest of justice requires Applicant's guilty plea to be vacated," Adding that".....the guilty plea may be withdrawn when necessary to correct a manifest injustice."

Quoting *Jamison*: [...we must reject the states claim that the waiver of the trial and admission of guilt encompassed guilty plea necessarily preclude....relief in all cases."]....*Jamison* quoting Riese, 192 P. 3d at 995 ("finding defendant may withdraw his guilty plea on the bais sof newly discovered evidence only when necessary to correct a manifest justice") Defendant, [" is bound by his plea and conviction... unless he can demonstrate the interest of justice requires that they be vacated."] (the newly discovered evidence is of such weight and quality that, under the facts and circumstances of that particular case, " the Interest of Justice" requires the defendant guilty plea be vacated") [Respondent has never argued that he pled guilty as a result of ineffective assistance of counsel"].

The present case is clear contrast from *Jamison* where Appellant clearly overcomes the burden *Jamison* could not. Appellant case separates from Jamison wherein Appellant indeed argued that his plea came as a result of counsel's ineffectiveness with a failure to properly investigate the ballistics evidence and advise his client of a constructed defense in the event of trial. (See Appendix pg. 49, line 19 pg 54, line 25. Attached is the testimony of Appellant Cato Exhibit #2 of this Brief where the Appellant's position of having no knowledge of the ballistics evidence is well documented, (Also, see Exhibit (G) of Appellant Rule 29 (b) Motion for New Trial Based on After Discovered Evidence attached as Exhibit #1 of this Brief, where Appellant

requested to SLED the Ballistics Report on March 27, 2007. SLED's office received the request on April 3, 2007. The PCR hearing was convened on April 3, 2007. At the time of the hearing Appellant was not in possession of the Ballistics Report. As a matter of fact, He was not in receipt of the report until May 3, 2007, a date well after the hearing was convened. Nevertheless, the PCR Judge left the file of the Ballistics evidence open for reference and review.)

Appellant's attorney who failed to properly investigate and advise his client of a constructed defense, was unaware or the inconstancies and/or ineffectiveness of his performances. Ultimately in Appellant's case there is a grave manifest injustice that needs to be corrected by the granting of a new trial in the interest of justice. The manifest injustice is that Appellant was by way of ineffective assistance of counsel convicted by an invalid Ballistics Report that erroneously pairs a .380 shell casing with a .9mm bullet. A .9mm bullet cannot come from a .380 shell casing. (See Exhibit (D) of Appellant's Motion for a New Trial Due to After Discovered Evidence. Attached as Exhibit #1 of this Brief.

Presently there is more than a scintilla of evidence that, had been exposed and/ or known to the defense, it would have been used to change the outcome of the Appellant's case. The Appellant was deprived of a fair and impartial proceeding by not being able to put on an affirmative defense due to his lack of access to evidence of a Ballistics Report that substantiates the accuracy for his role during the night in question.

As the facts and circumstances of this Appellant's particular case, the newly discovered evidence is of such weight and quality with witnesses on the scene hearing people actually plotting to do harm to someone, and then hearing shots fired from totally different directions, establishing the fact that there was someone, (who is not Appellant), on the inside of the club shooting and inflicting harm on the victims, (See Exhibits (A), (B), (D), (E) and(F) of Appellant's Motion for a New Trial based on After Discovered Evidence attached as Exhibit #1 of this Brief, wherein Appellant is positioned on the outside of the exit door in the front of the nightclub.)

This newly discovered evidence is material and necessary in the determination of correcting a manifest injustice. The newly discovered evidence, is evidence of material facts that pertains to the two shooter theory defense mentioned at Appellant's PCR Hearing. (See Appendix page 76, line 12- pg. 78, line 15, attached as Testimony of J. M. Long III Exhibit #3 of this Brief.) Appellant's attorney testified to not moving forward with, nor making appellant

aware of the relevant two shooter theory based on the Ballistics Report being valid and correct. Appellant's attorney was ineffective for failing to properly investigate the Ballistics report to see the errors in it, make his client aware of the discrepancies in the report, and advising his client of a constructed defense in the event of trial by using the invalid Ballistics Report to corroborate the two shooter theory.

(Note: The attorney who represented the Appellant, a Mr. J.M. Long, III was suspended from his law practice for indecently exposing himself as reported some 20-30 times on January 01, 2006 which was during the time he represented the Appellant. Thus proving he was not at all utilizing competency which is expected of reasonableness.) (See Article on J.M. Long, III attached as Exhibit #4 of this Brief.)

The manifest injustice would be to have appellant remain convicted of the charges when new evidence is presented that someone, (who is not Appellant), was inside the club shooting and inflicting harm on the victims. In addition, the Ballistics report cannot be used to unequivocally prove Appellant guilty of the charges. It is a manifest injustice to use the Ballistics Report that erroneously pairs a .380 shell casing and a .9mm bullet as a part of the record to unequivocally convict the Appellant of the charges.

As our justice system uses the lens of fundamental fairness, Appellants new evidence clearly meets the Interest of Justice standard in regards to the plea and a new trial with witnesses who were on the scene of incident hearing someone plotting to do harm to people, also hearing shots fired from totally different directions, establishing that there was someone, (who is not Appellant), on the inside of the club shooting and inflicting harm on the victims. (See Exhibits (A), (B), (D), (E), and (F); Analysis pg. 3-6, of the Appellants Motion for New Trial Based on After Discovered Evidence attached as Exhibit #1 of this Brief) This new evidence raises pertinent questions to be answered in a new trial. Those questions are: Who was on the inside of the club shooting and inflicting harm on the victims?... Where did that person go?... Why were there originally four victims with a total of (7) gunshots wounds?... with another fired bullet that (only) hit an upper wall, with no blood or body tissue? ...Why was each victim shot in different body parts while being situated in different areas of the nightclub?... Why were there two different types of ammunition erroneously paired on the Ballistics report?....With the new evidence presented, the Interest of Justice requires these question be answers in a new trial.

II) Trial Judge did err in Disposing of Oral Arguments and Denying Appellant motion for New Trial Based on After Discovered Evidence, failing to Properly and correctly rule on the findings of facts and conclusions of the law on issue of Appellant satisfying five prong criteria for Spann Test pursuant to Rule 29(b) S.C.R. Crim. Pro.

The newly discovered evidence clearly satisfies the five prong criteria of the Spann Test...

1) The newly discovered evidence not only warrants a new trial, it would change the result if a new trial were granted because it implicates the fact that while Appellant was standing on the outside of the exit door in the front of the nightclub,....(See Analysis pg. 3-6 of Appellants Motion for a New Trial Based on After Discovered Evidence; Also see Exhibits (A), (B), (D), (E), and (F) of Appellant's Motion for a New Trial attached as Exhibit # 1 of this Brief.) witnesses on the scene of the incident hearing someone plotting to do harm, and then hearing of shots fired from totally different directions establishes that someone was on the inside of the club shooting and inflicting harm on the victims with a deadly weapon.

The newly discovered evidence of hearing someone plotting to do harm, and the hearing of shots fired from totally different directions brings clarity to why the victims were shot in different body parts while being situated in different areas of the night club.

This newly discovered evidence answers the question, why are there two different types of ammunition erroneously paired in the Ballistics Report.

Together for the foregoing reasons, the new evidence of witnesses who were on the scene of incident having heard someone, (who is not the Appellant), on the inside of the club plot to do harm and heard shots fired from totally different directions, would change the result if a new trial were granted, because now there is more than a reasonable doubt, which can lead to Appellant being not guilty of the convictions.

2) Have been discovered since Appellants trial. Appellant was convicted on July 17, 2006. The evidence of Ms. Twila Beckman was discovered on June 22, 2015. The evidence of Mr. Willie Edwards was discovered on August 19, 2015. This evidence has been discovered approximately (9) years after Appellant's trial and was presented to the lower Court within the one year time limit, pursuant to Rule 29(b), S.C.R. Crim. Pro. (See Exhibits (A) and (B) of Appellant's Motion for a New Trial Based on After Discovered evidence attached as Exhibits #1 of this Brief.)

3) Could not in the exercise of due diligence have been discovered prior to trial... it was a chaotic environment, and credible witnesses were able to leave the scene of incident without being interviewed. The witnesses who were interviewed where unable to identify others who were there. There is no amount of due diligence that this evidence could have been discovered prior to trial. This can only come by way of newly discovered evidence.

4) This new evidence is evidence of material facts with witnesses on the scene of the incident hearing someone plotting to do harm to people, and hearing shots fired from totally different direction, which establishes that someone, (who is not the Appellant), was on the inside of the club shooting and inflicting harm on the victims. (See Analysis pg. 3-6; Exhibits (A), (B), (D), (E), and (F) of Appellant's Motion for New Trial Based on After Discovered evidence attached as Exhibit #1 of this Brief).

The new evidence is evidence of material facts because it raises critical questions to be answered in a new trial... Who was it on the inside of the club shooting and inflicting harm on the victims with a deadly weapon...Where did that person go?...Why were there originally four victims with a total of (7) gunshot wounds?...Also another bullet fired that only hit an upper wall with no blood or body tissue?...Why was each victim shot in different body parts while being situated in different areas of the nightclub?...Why were there two different types of ammunition erroneously paired in the Ballistics Report?

The newly discovered evidence is evidence of material facts that pertains to the two shooter theory defense mentioned at Appellant's PCR Hearing. (See Appendix pg. 76, line 12-pg. 78, line 15 attached as Testimony of J.M. Long, III Exhibit #3 of this Brief) Appellant's attorney testified to not moving forward with, nor making Appellant aware of the relevant two shooter theory based on the Ballistics Report being valid and correct. Appellants attorney was ineffective for failing to properly investigate the Ballistics Report to see the errors in it, make his client aware of the discrepancies in the Report, and advising his client of a constructed defense in the event of trial by using the invalid Ballistics Report to corroborate the two shooter theory.

5) The newly discovered evidence is not cumulative nor impeaching because no one has ever given testimony of hearing someone plotting to do harm, nor hearing shots fired from totally different directions. There were no sworn statements of such given under oath to accumulate or impeach.

CONCLUSION

After careful review of this Initial Brief, this court should find that the Trial Judge did err in disposing of oral arguments and denying Appellant's Motion for New Trial Based on After Discovered Evidence. Appellant respectfully request that this Court reverse the lower Courts decision and grant an Order for New Trial.

10/31/16
Date

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CERTIFICATION OF SERVICE

The undersigned certified that this Initial Brief complies with rule 208 S.C.A.C.P.

10/31/16
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DESIGNATION OF MATTER TO BE INCLUDED IN THE REORD OF APPPEAL

Appellant proposes the following be included in the Record on Appeal:

1) Appellants Motion for New Trial Based on After Discovered Evidence

   Exhibit (A)
   Exhibit (B)
   Exhibit (C)
   Exhibit (D)
   Exhibit (E)
   Exhibit (F)
   Exhibit (G)
2) Respondents response to Appellants Motion for New Trial Based on After Discovered Evidence
3) Order Disposing of Oral Arguments and Denying Appellants Motion for new Trial Based on After Discovered Evidence
4) Appellant Rule 59(e) S.C.R.C.P. Motion to Alter or Amend Judgement
5) Order Denying Appellants Rule 59 (e) S.C.R.C.P. Motion to alter or Amend Judgement
6) Testimony of Appellant Ardon P. Cato. II
7) Testimony of J.M. Long, III
   Appendix pg. 76, Line 12 – 78, line 15

8) Article on J.M. Long, III
9) Jamison v. State Opinion No. 27454
(SC Supreme Court Filed October 22, 2014)
10) Jamison v. State Appellate Case No. 2008- 106026
(No. 2012 -UP- 437, Decided July 18 2012)

I certify that this designation contains no matter which is irrelevant to this appeal.

10/31/16
Date

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