ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

J. Mark Hayes, II, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT H. KOON,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the lower court erred in denying appellant's motion for a new trial on appellant's 1986 guilty plea to the Cudd-Lovelace burglary because a new witness/victim, Harry Lovelace, provided evidence that the burglary could have occurred in the daytime as opposed to the nighttime?

STATEMENT OF THE CASE

On June 17, 1986, appellant appeared before the Honorable Jonathan Z. McKnown in Cherokee County and pled guilty to four (4) counts of second degree burglary. A ten (10) year concurrent sentence was imposed on each charge. Gary P. Mallard, Esquire represented appellant on two (2) of the burglaries and Harry L. Cline, Esquire represented appellant on the other burglaries.

Appellant filed a Motion for a New Trial-Based on After Discovered Evidence on October 10, 2010 and Amended Motion for New Trial under SCRCrim 29 (B) dated June 25, 2011. A hearing was held on the motion on June 27, 2011, before the Honorable J. Mark Hayes, II. Appellant was present and was represented by Russell Racine, Esquire. Respondent was represented by Robin File, Esquire, Assistant Solicitor. Appellant testified in his own behalf and he presented the testimony of Gary Mallard, Esquire and Harry Lovelace.

On August 2, 2011, Judge Hayes issued an order denying appellant's Rule 29(b) motion.

This appeal follows.

ARGUMENT

The lower court erred in denying appellant's motion for a new trial on appellant's 1986 guilty plea to the Cudd-Lovelace burglary when a new witness/victim, Harry Lovelace, provided evidence that the burglary could have occurred in the daytime as opposed to the nighttime.

Appellant pled guilty to four (4) burglaries on June 17, 1986. Two (2) of the burglaries were on March 13, 1986, and Gary Mallard, Esquire represented appellant on those charges. The other burglaries occurred on March 28 and March 29, 1986, and Harry Cline, Esquire represented appellant on those charges. The March 28 burglary involved the Cudd-Lovelace Insurance Company. The March 29 burglary involved the Stylette Salon. Both businesses were in the same building. The affidavit in the arrest warrant for the Cudd-Lovelace burglary alleged that it occurred on or about March 28 and it occurred during the nighttime. The affidavit for the Stylette Salon alleged that it occurred on or about March 29 but it did not allege that it occurred in the nighttime.[1]

At the guilty plea the solicitor told the court that its recommendation was for appellant to serve ten (10) years. (R. p. 168, lines 7-9). The Court asked appellant if he broke into the Cudd-Lovelace Insurance Company in the nighttime and he replied in the affirmative. (R. p. 172, lines 15-19). Later, however, appellant said he had some witnesses that would say he was not at the scene of the crime. The court then asked, "Why are you pleading guilty then? You told me you were guilty. Are you guilty?' Appellant replied,

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[1] The Stylette Salon burglary conviction for second-degree burglary was vacated later because the indictment did not allege an aggravating factor such as nighttime. State v. Koon, 358 S.C. 359, 595 S.E.2d 459 (2004).

"I'm facing a lot of time; it would just be better for me to plead guilty." (R. p. 174, line 20-p. 10, line 17)[2]

The newly discovered evidence in appellant's case was the existence of a witness/victim that was previously unknown. This witness was Harry Lovelace.

At the hearing on the motion for a new trial pursuant to Rule 29 (b), SCRCrimP Harry Lovelace testified that his father and J. D. Cudd were the founding partners of the Cudd-Lovelace Insurance Company. Mr. Lovelace passed away about two weeks before the 1986 burglary. But the son, Harry Lovelace, said he was working in the business during the time of the burglary. He testified that the normal business hours were from 9 AM to 5 PM. Their office was in a triplex and next door was the Stylette Salon. The Stylette generally opened at 10 AM. He and Mr. Cudd had no idea a burglary occurred prior to Mr. Cudd's arrival on the morning of March 29. (R. p. 41, line 2 – p. 46, line 17). Mr. Lovelace said to his knowledge no one could say the burglary occurred at night. It was possible that the burglary occurred during the daylight hours. (R. p. 51, line 23 – p. 52, line 15). He said he sent a letter to the solicitor asking that appellant be sentenced for third degree burglary as opposed to second degree burglary because he did not think there was sufficient evidence to show that it occurred in the nighttime. (R. p. 54, lines 2-12).

Gary Mallard, Esquire testified that he represented appellant on the two (2) earlier burglaries that occurred on March 13 or 14 of 1986. (R. p. 20, line 7 – p. 21, line 21). He said the plea was a package deal on all four (4) burglaries for ten (10) years. (R. p. 24, lines

[2] The record does not indicate a factual basis for the Cudd-Lovelace burglary occurring in the nighttime. See, Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969).

8-16). Appellant negotiated the plea with the police even though he indicated he was not guilty. (R. p. 24, line 24 – p. 25, line 4). Mr. Mallard said the Gaffney Police misrepresented to appellant that they had conducted an analysis of mud found on his shoes with mud found at the crime scene and that it had matched when that was not true. He also said there was an incentive by the Gaffney police to change crimes that could have occurred on the same day on separate days. This is because S.C. Code §24-21-640 forbids parole being granted to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction for violent crimes. (R. p. 25, line 5 – p. 28, line 15) The police had also talked to appellant after he had retained Mr. Mallard and a letter was written to the police not to discuss the charges that appellant was being represented on. (R. p. 29, line 17 – p. 31, line 3). Mallard testified that he was present at appellant's guilty plea along with Harry Cline, Esquire who represented appellant on the Cudd-Lovelace burglary. He said Mr. Cline had since passed away. (R. p. 31, lines 7-17).

Appellant testified that the two (2) burglaries that occurred around the 13th and 14th of March were discovered at the same time and both were right next door to each other. But the police charged one on the 13th and the other on the 14th. (R. p. 72, line 11- p. 74, line 15). They did the same thing by charging different dates on the Cudd-Lovelace and the Stylette Salon burglaries that were also next door to each other and were discovered at the same time. (R. p. 78, lines 2-20). How could the police say they were on different days and that Cudd-Lovelace was in the nighttime and Stylette was not?

Appellant testified that he was told he would get ten (10) years if he pled guilty to the four (4) burglaries and he would get forty (40) if he did not. (R. p. 84, lines 19-25). His attorney, Harry Cline, did not get to interview witnesses of the Cudd-Lovelace burglary.

Mr. Lovelace had passed away and Mr. Cudd was too upset to talk. (R. p. 86, line 14 – p. 87, line 2). Appellant said he pled guilty because he did not want to risk incurring a lot of time. (R. p. 94, lines 1-8; R. p. 95, line 9 – p. 96, line 19).

Appellant said at the time of his plea he did not know that Mr. Lovelace had a son named Harry Lovelace and that he worked at the insurance company. (R. p. 100, line 10 – p. 101, line 5). He first learned of Harry Lovelace through some information his mother gave him before she passed away. There no longer was a Cudd-Lovelace Insurance Company. It had merged with the Coral Insurance Company. It took a while, but he finally found Harry Lovelace. He began to correspond with him. He found out that the burglary was discovered at 9:00 AM and it was on the same day as the Stylette burglary. (R. p. 102, line 24 – p. 106, line 7). Appellant also testified that what got him into looking at the facts and circumstances of his case was when he read Riddle v. Ozmint, 369 S.C. 39, 631 S.E. 2d 70 (2006) which came into his possession in 2009. The Riddle case dealt with police and prosecutorial misconduct in Cherokee County because of a failure to disclose evidence. (R. p. 110, line 17 – p. 115, line 11).

Appellant testified that he received Harry Lovelace's affidavit in the summer of 2010. He then filed his Rule 29(b) motion within 60 to 90 days. (R. p. 122, line 24 – p. 123, line 7). Rule 29(b) states that "A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence." The legal standard for a Rule 29(b) motion is that the evidence:

> (1) Would probable change the result if a new trial is had;
> (2) Has been discovered since the 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.

State v. South, 310 S.C. 504, 507, 427 S.E. 2d 666, 668-669 (1993); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

In addition to the above standard of review for a motion for a new trial, a trial judge has broad discretion, sitting as 13th juror, to grant a new trial when he is convinced that justice has not been done. Watson v. Town of Pendleton, 294 S.C. 155, 363 S.E. 2d 234 (1987). Also, when a defendant asserts his innocence at a guilty plea the court has to find a factual basis for the plea. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969).

The newly discovered evidence in this case was the existence of Harry Lovelace who was not known to appellant. He had knowledge that the Cudd-Lovelace Insurance Company closed at 5:00 PM and opened the next morning at 9:00 AM when the burglary just as easily have occurred in the daytime as opposed to the nighttime. The existence of Harry Lovelace and when the burglary was discovered as well as when the business closed the day before was never disclosed to appellant by the solicitor or the police. A guilty plea "cannot be truly voluntary unless the defendant possesses and understanding of the law in relation to the facts." McCarthy v. U.S., 394 U.S. 499, 89 S. Ct. 1166, 1171 (1969). What determines the validity of a guilty plea "is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 369 (1985), (citations omitted). Appellant could not make an intelligent choice among alternative actions open to him because he did not know of Harry Lovelace and when the burglary was discovered.

(1) The evidence in this case would probably change the result if a new trial is had.

There was no factual basis presented in this case to show that the Cudd-Lovelace burglary occurred in the nighttime. "A conviction based on an extra-judicial confession by the defendant cannot stand unless corroborated by proof aliunde of the corpus delicti." State v. Smith, 328 S.C. 622, 493 S.E. 2d 506, 508 (Ct. App. 1997); State v. Williams, 321 S.C. 381, 468 S.E. 2d 656 (1996). A jury could not convict appellant for second degree burglary because there is no proof beyond a reasonable doubt that the crime was committed in the nighttime. The State has to prove every element of crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979). The newly discovered evidence would change the result if a new trial was held.

(2) The newly discovered evidence has been discovered since trial.

Plea counsel tried to talk to Mr. Cudd about the burglary but he would not cooperate. There was no disclosure that Harry Lovelace existed. Thus, it was not known at the time of the plea that Harry Lovelace was a witness and had information surrounding the burglary time frame.

(3) The newly discovered evidence could not have been discovered before trial.

As discussed above, appellant's attorney could get no information from Mr. Cudd because he refused to cooperate. Appellant only had knowledge that Mr. Lovelace had died almost two weeks before the burglary. He had no knowledge that a Harry Lovelace existed and that he worked at the insurance company at the time of the burglary. This case arose around the same time as the case of State v. Riddle, 291 S.C. 232, 353 S.E. 2d 138 (1987), which was also out of Cherokee County. The Court subsequently found in Riddle v. Ozmint, 369 S.C. 39, 631 S.E. 2d 70 (2006), that the solicitor's office in that

county "maintained an unusual 'open file' policy in that they removed not only work product, but also 'other documents on a case-by-case basis.'" 369 S.C. at 46, 631 S.E. 2d at 74. So there's no reason to know what was in the solicitor's file concerning appellant's case. Harry Cline, Esquire appellant's attorney on the Cudd-Lovelace burglary is deceased and his file could not be found. At the time of the Rule 29(b) hearing, the current solicitor stated that he could not locate Detective Weaver who signed the affidavits on the Cudd-Lovelace and the Stylette burglary arrest warrants. (R. p. 131, line 17 – p. 132, line 3). Appellate counsel, as an officer of the court, would like for the court to know that Detective Weaver has been located. In the interest of justice and because appellant is serving a sentence of life without parole, this court may wish to remand this case for the limited purpose of finding out what Detective Weaver's testimony is as it relates to this case.

(4) The newly discovered evidence is material to the issue of guilt or innocence.

The newly discovered evidence in this case shows that the Cudd-Lovelace burglary occurred between the hours of 5:00 PM and 9:00 AM. That fact casts serious doubt as to whether the burglary occurred in the nighttime which was an essential element to the crime of second degree burglary to which appellant was charged as committing. This newly discovered evidence is material to the issue of guilty or innocence.

(5) The newly discovered evidence is not merely cumulative or impeaching.

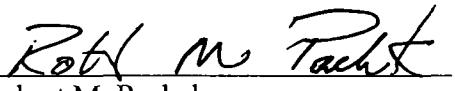
The newly discovered evidence establishes that the burglary may have occurred during the daylight hours. That is contrary to the charge of second degree burglary which requires it be in the nighttime. The evidence is not cumulative because the evidence and testimony of Harry Lovelace did not exist prior to appellant's hearing of the witness's

existence. Also, the evidence is not impeachment evidence as it is direct evidence that reflects the charge of second degree burglary.

CONCLUSION

Appellant's motion for a new trial should be granted or his case should be remanded to obtain the testimony of Detective Weaver.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of September, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 20, 2012

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of September, 2012.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.