

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal From Cherokee County  
J. Mark Hayes, II, Circuit Court Judge

---

THE STATE,

Respondent,

vs.

ROBERT H. KOON,

Appellant.

---

**FINAL BRIEF OF RESPONDENT**

---

ALAN WILSON  
Attorney General

DAVID SPENCER  
Assistant Deputy Attorney General  
Bar # 68571

Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUES ON APPEAL ..... 1

STATEMENT OF THE CASE ..... 1

ARGUMENT

    The trial court did not abuse its discretion in denying  
    Appellant’s motion for new trial based on after-discovered  
    evidence. .... 2

CONCLUSION ..... 8

**TABLE OF AUTHORITIES**

**Cases:**

Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983). . . . . 3

Rollinson v. State, 346 S.C. 506, 552 S.E.2d 649 (2001) . . . . . 6

State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008) . . . . . 2

State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011) . . . . . 3

State v. Ivrin, 270 S.C. 539, 243 S.E.2d 195 (1978) . . . . . 3

State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985) . . . . . 5

State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) . . . . . 3

State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). . . . . 3, 5

State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) . . . . . 3, 7

State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993) . . . . . 7

## **STATEMENT OF ISSUE ON APPEAL**

The trial court did not abuse its discretion in denying Appellant's motion for new trial based on after-discovered evidence.

## **STATEMENT OF THE CASE**

Appellant Koon pled guilty to four counts of second degree burglary in 1986. One count was for the burglary of the Cudd/Lovelace Insurance Agency, which is the conviction challenged now by Appellant. Much of the procedural history for this case may be found in the Supreme Court's opinion in Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004). Koon filed an unsuccessful PCR application in 1987. He filed a 1997 PCR application challenging other charges, but amended the application to again challenge his 1986 plea. The circuit court required Koon to file a separate application to challenge the 1986 convictions and then conducted a hearing which included a claim of lack of subject matter jurisdiction for the guilty plea convictions. Subsequently, the Supreme Court, in the above referenced opinion, found that the plea court lacked subject matter jurisdiction over the Stylette burglary, which occurred in the same triplex and contemporaneously with the Cudd/Lovelace burglary. Koon received a life-without parole sentence for a 1997 conviction for second-degree burglary based on the prior second degree burglary charges from the 1986 plea.

The Supreme Court subsequently prohibited Koon from filing any further collateral actions challenging his 1986 burglary convictions in circuit court without first obtaining permission to do so from the Supreme Court, by order dated October 27, 2010. So Koon filed a motion for new trial based on after-discovered evidence under Rule 29, SCRCrP. A hearing was held at the Spartanburg County Courthouse on June 27, 2011 before the

Honorable J. Mark Hayes, II. Judge Hayes denied the motion by order dated August 2, 2011.

## ARGUMENT

### **The trial court did not abuse its discretion in denying Appellant's motion for new trial based on after-discovered evidence.**

Appellant Koon argues that the trial court abused its discretion in denying Koon's motion for new trial on the basis of Harry Lovelace's testimony that Koon's burglary of the Cudd/Lovelace insurance agency **could have** occurred during the daytime because the insurance agency closed at 5 p.m. and opened at 9 a.m.<sup>1</sup>

Lovelace was an employee and son of one of the two co-founders of the agency. The other co-founder, J.D. Cudd, is the one who reported the burglary to law enforcement, and the one who discovered the burglary. Lovelace was working at the agency. His father died roughly two weeks before the burglary. Cudd was retired, but started working at the agency again when Lovelace's father became ill. When Lovelace came to work the morning of March 29, 1986, Cudd had already discovered the business was broken into and was extremely upset. ROA pp. 41-44.

A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

---

<sup>1</sup> This is the only issue set out in the statement of issues. State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal."). Accordingly, Koon's baseless remonstrations of alleged law enforcement misconduct are not proper for this Court's consideration and appear to have been discussed by Koon only to muddy the waters and not as separate claims of after-discovered evidence. Further, those allegations clearly were raised or could have been raised in earlier collateral actions Koon has filed. The trial court found they lacked merit.

(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, 299 S.E.2d 854 (1983).

Granting a motion on after-discovered evidence is not favored and reviewing courts will not disturb the trial court's denial absent an error of law or abuse of discretion. State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998).

"A motion for new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Irvn, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978). The credibility of newly discovered evidence is for the trial court to determine. 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." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (citing Irvin). "In this post-trial setting, our jurisprudence recognizes the gate-keeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) *quoted in* Harris.

The trial court did not err in denying the motion for new trial. First, the trial court correctly found that Koon failed to meet his burden of showing Harry Lovelace could not have been found through due diligence. The trial court, in doing so, noted the following:

While Mr. Harry Lovelace may not have been known at the time of the plea, this Court cannot conclude that reasonable diligence would not have located him. The evidence pre-

sented was that Mr. Lovelace (the son of one of the original owners of Cudd and Lovelace Insurance Company) was working in Gaffney at the family business at the time of the original plea. A strong inference is presented that Mr. Cudd, and not Mr. Lovelace, was the witness with whom the police dealt with in their initial investigation. Mr. Lovelace's father, the co-owner, passed away shortly before the time of the break-in. Additionally, more than 20 years have passed since the original plea. The information presented at the hearing was that no one searched for Mr. Harry Lovelace until after the Defendant was released from his burglary sentence, committed subsequent crimes, and was years into serving his present life sentence. This Court finds that the present record, including Mr. Harry Lovelace's own testimony strongly indicates that Harry Lovelace could have been located with relative ease.

Order, third page.

The trial court did not err, as Harry Lovelace has remained continuously in Gaffney and remained in the insurance business since the time of the burglary. Lovelace could have readily been discovered through investigation. ROA. pp. 63-64. Indeed, the record indicates that Lovelace was discovered with relative ease years later when Koon attempted to do so and it would have been only easier to discover Lovelace's whereabouts prior to the guilty plea proceeding. Lovelace described how Koon contacted him as follows:

I received a call from him I guess in – it's been two or – maybe three years ago where he indicated that he had become aware of – my existence;

That – he told me that , you know, through – through the – the Cudd family and that, you know, that my – that – you know, through the – I – I think maybe Mr. Cudd's daughter-in-law had – had given him my name.

ROA. p. 63, lines 1-7. Koon testified that he and his family knew the Cudd family, and through them "discovered" Lovelace's existence. ROA. p. 101. Koon never explained why

he was unaware of the Cudd/Lovelace agency's business hours.

Koon could have as readily made a phone call to Lovelace years earlier and never provided a sufficient reason for not doing so. Accordingly, the trial court did not err in finding that the first prong of the after-discovered evidence test was not met. State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985) (finding new evidence could have been discovered through the exercise of due diligence where reason appellant did not have information from witness was appellant and her investigator failed to adequately question the witness during a pre-trial interview); See Needs, 333 S.C. at 158, 508 S.E.2d at 869 (finding unclear why defense counsel did not insist on speaking with witnesses prior to trial).

Further, the trial court correctly noted that the materiality of the evidence was insufficient. Lovelace testified that Mr. Cudd already discovered the break-in when Lovelace arrived at the agency. It is not known when Mr. Cudd arrived. All Lovelace could testify to was the business hours of the agency and that based on the business hours, the break-in presumably occurred while the business was closed. Lovelace readily admitted that he did not know if the break-in occurred in the day or at night. ROA. pp. 43-44; p. 61. Therefore, Lovelace's testimony is speculative at best and fails to establish that Koon was not guilty of a nighttime burglary. Accordingly, the trial court did not err in finding that the evidence was not material to guilt or innocence.

Twenty years later, this evidence is extremely underwhelming. In contrast, Koon admitted he committed the burglary in the nighttime during his 1986 guilty plea hearing, advising the plea court as follows:

Court: All right. I believe this is Mr. Cline's case; that on the

28<sup>th</sup> day of March 1986, did you enter into the Cudd/Lovelace Insurance Company, without consent, with the intent to commit a crime, in the nighttime?

Defendant: Yes, sir.

Court: What did you get out of there?

Defendant: Nothing, Your Honor.

Court: You was just looking. How did you get in?

Defendant: Through the side door.

Court: All right now, you tell me what kind of time you could get for breaking into a building in the nighttime with the intent to commit a crime. I'm not talking about somebody's home; I'm talking about a building like an office.

Defendant: Fifteen years.

ROA p. 7, line 15 - p. 8, line 3.

Given Koon's admission and the pure speculative nature of the allegedly after-discovered evidence, the trial court correctly determined that the evidence would not have changed the result. Koon pled guilty to this and three other burglary charges to gain the benefit of a sentence of only ten years imprisonment.<sup>2</sup> The plea court expressed its desire for Koon to get a far higher sentence. The nighttime element only became material for Koon when he committed new crimes and the burglary conviction was relied upon as one of the predicate serious offenses supporting Koon's life-without-parole sentence in 1997.

---

<sup>2</sup> Koon later claimed innocence during the plea, that he was only pleading to take advantage of the plea bargain. This, contrary to his argument, does not render his plea involuntary. Rollinson v. State, 346 S.C. 506, 552 S.E.2d 649 (2000) (finding plea bargains are based on contract principles and so an applicant may plead guilty to an offense he is not guilty of to capitalize on a favorable plea bargain).

Accordingly, the trial court correctly surmised that this testimony would not have changed the result at the time of the plea in 1986 had it been discovered. The credibility of newly discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977), see also State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993) (finding that newly discovered evidence that South had a tumor was not sufficient to establish that the evidence would probably affect the result of trial where South failed to establish the tumor rendered him legally insane and therefore, the trial court did not abuse its discretion).

Finally, Koon complains of bad or illegal motive on the police. The trial court, in its order, found that these claims lacked merit. The claims were based on what the trial court noted as “a stretch of . . . inferences”. ROA. p. 75, line 17.

The trial court properly assessed the claim of after-discovered evidence, and its findings are supported by evidence. The trial court did not abuse its discretion and its ruling should be affirmed.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

DAVID SPENCER  
Assistant Deputy Attorney General  
Bar # 68571

BY:



DAVID SPENCER

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

September 21, 2012

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal From Cherokee County  
J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Respondent,

vs.

ROBERT H. KOON,

Appellant.

---


**CERTIFICATE OF COUNSEL**

---

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON  
Attorney General

DAVID SPENCER  
Assistant Deputy Attorney General

By:   
DAVID SPENCER

Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

September 21, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal From Cherokee County  
J. Mark Hayes, II, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

Respondent,

vs.

ROBERT H. KOON,

Appellant.

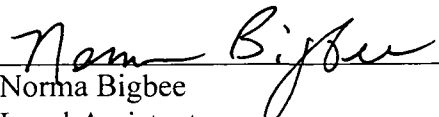
\_\_\_\_\_  
**PROOF OF SERVICE**  
\_\_\_\_\_

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 21<sup>st</sup> day of September, 2012.

  
\_\_\_\_\_  
Norma Bigbee  
Legal Assistant  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727