STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JODY L. WARD,

APPELLANT

Appellate Case 2018-000402

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. When Appellant alleged that Juror 19 failed to disclose her familial relationship to a State's witness during *voir dire*, did the circuit court err in summarily dismissing Appellant's Motion for a New Trial Based on After Discovered Evidence?

STATEMENT OF THE CASE

Appellant was indicted by the Georgetown County Grand Jury for two counts of Murder arising from the shooting deaths of Wilford Brown and Elton Rutledge. On March 15, 2004, Appellant was called to trial before the Honorable Paula Thomas and a jury. R*(App. 199). Appellant was represented by Margaret Ann Kneece and J. Wesley Locklair. R*(App. 199). The State was represented by J. Gregory Hembree and Robert Bryan. R*(App. 199).

At the conclusion of the trial, Appellant was found guilty of both counts of murder. R*(App. 849) Appellant was sentenced life imprisonment. R*(App. 856-857).

Petitioner appealed his conviction. For the Appeal, Appellant was represented by Robert M. Dudek. Appellate counsel filed an *Anders*[1] brief. R*(App. 931- 941). Appellant filed a *pro se Anders* response on September 13, 2005. R*(Docket Entry 22-11, pg. 1-65). On January 26, 2007, this Court dismissed the direct appeal. R*(*State v. Jody Ward*, Opinion Number 2007-UP-048 (January 26, 2007)).

On April 14, 2007, Appellant filed a *pro se* Petition for Writ of Certiorari with the South Carolina Supreme Court. R*(Docket Entry 26-7). Appellant then moved to withdraw the Petition for Writ of Certiorari. R*(Docket Entry 26-9). The Petition for Writ of Certiorari was dismissed on July 5, 2007. R*(Docket Entry 26-10). Remittitur was sent on July 6, 2007. R* (Docket Entry 26-11).

On July 11, 2007, Appellant filed an Application for Post-Conviction Relief R*(App. 944-950). The State filed its return on October 5, 2007. R*(App. 956-958). An evidentiary hearing was convened on May 1, 2008 before the Honorable Steven John. R*(App. 1038). At the hearing, Appellant was represented by Bobby Frederick and the State was represented by Christina J. Catoe.

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[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Appellant's Application for Post-Conviction Relief was dismissed on May 15, 2008. R* (App. 1038-1053).

Appellant appealed the denial of the Application for Post-Conviction Relief. For this appeal, Appellant was represented by Robert Pachak. R*(Docket Entry 26-13). The Petition for Writ of Certiorari was denied on August 20, 2009. R*(Docket Entry 26-15).

On July 13, 2009, Appellant filed a subsequent *pro se* Application for Post-Conviction Relief. R*(Docket Entry 26-17, pg. 1-10). This application, for case number 2009-CP-22-1074, for PCR was dismissed on December 30, 2009 by the Honorable Benjamin Culbertson. R* (Docket Entry 26-20). Appellant appealed the denial of this application for PCR; however, that appeal was dismissed on March 15, 2010. R*(Docket Entry 26-23). Remittitur was sent on March 31, 2010. R*(Docket Entry 26-24).

On May 4, 2010, Appellant filed another pro se Application for Post-Conviction Relief. R*(Docket Entry 26-25). On July 10, 2010, this PCR application, 2010-CP-22-733, was dismissed. R*(Docket Entry 26-30). Appellant appealed the denial of this application for PCR; however, certiorari wad denied on August 18, 2011. R*(Docket Entry 26-33). Remittitur was sent on September 7, 2011. R*(Docket Entry 26-34).

On October 25, 2011, Appellant filed a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court. R*(Docket Entry 26-35). This Petition was denied on November 16, 2011. R*(Docket Entry 26-36).

On December 1, 2011, Appellant filed a Petition for Writ of Habeas Corpus in South Carolina District Court. R*(Docket Entry 1). This action was dismissed on March 20, 2013. R*(Docket Entries, 70, 73, 74).

On May 16, 2012, Appellant filed a *pro se* Motion for a New Trial Based on After Discovered Evidence. R*(2012-213222 Record, pg. 1-12). On July 31, 2012, this motion was denied by the Honorable Benjamin Culbertson. R*(2012-213222 Record, pg. 143-144).

Appellant Filed a *pro se* Notice of Appeal. R*(2012-213222 Notice of Appeal). On September 22, 2014, Natasha Hanna filed a Notice of Appearance on the Appeal for the limited purpose of filing a Motion to Suspend the Appeal and For Leave to File a Motion for a New Trial Based on After Discovered Evidence. R*(2012-213222, Notice of Appearance, Motion of Natasha Hanna). In an Order dated October 8, 2014, this Court denied the Appellants Motion to Suspend Appeal and For Leave to File Motion for a New Trial Based on After Discovered Evidence noting the following:

> We Note that pursuant to Rule 205, SCACR, "Nothing in these Rules shall prohibit the lower court...from proceeding with matters not affected by the appeal."

R*(2012-213222, 10/8/14 Order). On November 12, 2014, this Court affirmed the ruling on 2012 Motion for a New Trial Based on After Discovered Evidence. R*(*State v. Ward*, 2014-UP-402 (November 12, 2014)).

On October 30, 2014, Appellant, through his attorney Natasha Hanna, filed a Motion for a New Trial Based on After Discovered Evidence. R*(2014 Motion for A New Trial Based on After Discovered Evidence). On September 11, 2015, the Honorable Benjamin Culbertson filed a Form 4 Order denying Appellant's Motion for a New Trial Based on After Discovered Evidence. R*(Form 4 Order). On September 22, 2015, Ms. Hanna e-mailed Judge Culbertson, asking for a hearing. R*(Memorandum in Opposition to the State's Motion to Dismiss Defendant's Motion for a New Trial Pursuant to Rule 29(b), SCRCrimP, E-mail to Judge Culbertson, pg. 22-25).

A hearing was scheduled for December 10, 2015 before the Honorable Steven John. R*(Dec. 10, 2015, Tr. 1). At the hearing, Ms. Hanna was relieved. The Court ordered that Appellant be evaluated for competence to represent himself. R*(Order Feb. 2, 2016).

On September 8, 2017, Respondent filed a Motion to Dismiss [Appellant's] Motion for a New Trial Based on After Discovered Evidence. R*(Motion To Dismiss). Appellant, through counsel, submitted a Memorandum in Support of Defendant's Motion for a New Trial Based on After Discovered Evidence. R*(Memorandum in Opposition to the State's Motion to Dismiss Defendant's Motion for a New Trial Pursuant to Rule 29(b), SCRCrimP, E-mail to Judge Culbertson, pg. 30-48).

A Hearing was convened on October 2, 2017 before the Honorable Larry B. Hyman. R*(October 2, 2017, Tr. 1). Prior to the hearing, Appellant had requested to proceed *pro se.* however, at the hearing Appellant indicated that he wanted an attorney and the Court did not order him to proceed *pro se*. R*(October 2, 2017, Tr. 10, l. 15—14, l. 20).

After the hearing, the Court allowed briefing on the State's motion. R*(Defendant's Memorandum In Opposition to the State's Motion To Dismiss Defendant's Motion for a New Trial Pursuant to Rule 29(b), SCRCrimP). Appellant also renewed his motion to allow Mr. Ward to proceed *pro se*. R*(Motion to Reconsider Defendant's Motion to Proceed Pro Se).

In an order clocked on December 7, 2017, the circuit court granted the State's Motion to Dismiss and denied the motion to proceed *pro se*. R*(Order Dismissing). This appeal follows.

ARGUMENT

I. When Appellant alleged that Juror 19 failed to disclose her familial relationship a State's witness during *voir dire*, the circuit court erred in summarily dismissing Appellant's Motion for a New Trial Based on After Discovered Evidence.

Relevant Facts

During the Appellant's trial, the State alleged that Appellant shot Wilford Brown and Elton Rutledge in "a drug deal gone bad." R*(App. 766, l. 22—767, l. 7). The State argued that on August 2, 2002, Defendant borrowed his wife's Suzuki and meet up with Brown and Rutledge. The State alleged that Defendant then killed Brown and Rutledge with a 9mm handgun and buried their bodies. The State also alleged that Appellant dumped the Suzuki in Dawhoo Lake in Georgetown County to destroy evidence of the shooting. R*(App. 766, l. 22—798, l. 8).

Kevin Cooper was a key witness for the State against Appellant. R*(App. 452, l. 20—465, l. 27). Mr. Cooper claimed to have seen Appellant with one of the decedents prior to the shooting. R*(App. 459, ll. 7-15). Mr. Cooper allegedly overheard a conversation were Appellant was mad that he lost money. R*(App. 459, l. 16—460, l. 3). Mr. Cooper testified that Appellant asked him to go buy 9mm bullets. R*(App, ll. 460, ll. 3-20). This testimony ultimately would fit into the State's theory that Mr. Ward shot the decedents with a 9mm because they owed him money. R*(App. 766, l. 22—798, l. 8).

On October 30, 2014, Appellant, through his then attorney Natasha Hanna, filed a motion for a new trial based on after discovered evidence alleging the juror misconduct. In the motion, Appellant alleged that Marissa Cooper, Juror 19, failed to disclose a relationship State's witness Kevin Cooper. R*(Motion for a New Trial Based on After Discovered Evidence). Juror 19 was asked along with the other jurors, whether she was related by blood or marriage to any of the potential witnesses. R*(App. 253, l. 1—255, l. 15). At no point did Juror 19 respond to that she

was related to Kevin Cooper. R*(App. 255, l. 15). However, Appellant submitted an affidavit which supported his position that Juror 19 was related to Kevin Cooper. R*(Defendant's Memorandum In Opposition to the State's Motion To Dismiss Defendant's Motion for a New Trial Pursuant to Rule 29(b), SCRCrimP- Affidavit of Nicole Ward). Appellant alleged Juror 19 intentionally concealed this information. R*(Motion for a New Trial Based on After Discovered Evidence).

On September 8, 2017, the State filed a motion to summarily dismiss, Defendant's motion for a new trial based on after discovered evidence. In that motion, the State argued that Appellant's 2014 motion was filed in violation of Rule 29(b), SCRCrimP because Appellant had an appeal pending on a different Motion for a New Trial Based on After Discovered Evidence.[2] The State also argued that "the information cited by [Appellant] was known to [Appellant] and counsel or could have been ascertained by the exercise of reasonable diligence prior to and at the time of trial in 2004..." R*(States Motion to Dismiss, Page 2).

On October 2, 2017, hearing was convened before circuit court. The State argued that the relationship between Juror 19 and Mr. Cooper could have been known by Appellant at the time of trial. R*(Tr. 22, l. 13—23, l. 19). However, the State also took the position that Juror 19 and Mr. Cooper's relationship was so distant as not to arise to the level of juror misconduct. R*(Tr. 23, l. 20—24, l. 8).

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[2] This motion was filed while Appellant had an appeal pending from a previous unrelated motion for a new trial based on after discovered evidence. Appellate Case 2012-213222 concerns allegations of newly discovered evidence involving allegations that an individual named Michael Abner hired the two decedents to kill Defendant. R*(2012-213222 Brief of Appellant). Although Defendant's motion to suspend the appeal was denied by this Court, the order denying the motion to suspended the appeal indicated "Nothing in this order shall prohibit the lower court...from proceeding with matters not affected by this appeal." Since the subject matter of 2014 Motion does not deal with the same matters alleged in Appellate Case 2012-213222, the 2014 Motion was properly filed.

In it order granting summary dismissal, the circuit court found the following:

> The Claim before the Court must be reviewed under the standard set forth in *State v. Spann*, 334 S.C. 618 (1999)...The Court finds the information cited by the [Appellant] in the current motion, even if true, is not material evidence as to [Appellant's] guilt or innocence and would not change the result if a new trial were granted.

R*(Order of Dismissal, Pg. 3). The circuit court also found that Appellant could have ascertained the relationship based on the exercise of reasonable diligence. The circuit granted State's motion to summarily[3] dismiss Appellant's Motion for a New Trial Based on After Discovered Evidence.

Argument

The Supreme Court has found that juror misconduct is not based on the factors listed in *Spann*[4] but rather "is governed by a separate standard." *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627, (2013). "[A] new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Id.* "[E]valuating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing." *Id.*, 401 S.C. at 371, 737 S.E.2d at 628.

The circuit court applied the wrong standard in assessing whether to summarily dismiss Appellant's 2014 motion for a new trial. In its order of dismiss the circuit court found the following:

> Had a juror misconduct claim been captioned as yet another PCR application, the Supreme Court's more recent holding in *McCoy v. State*, 401 S.C. 363 (2013) may have applied and an evidentiary hearing on the claim applying the analysis set forth in *State v. Woods*, 345 S.C. 583 (2001)

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[3] Although in the order the circuit court writes "[A]s to the merits of the [Appellant's] motion..." Appellant was not allowed to call witnesses to address the merits of his motion. R*(Tr. 14, l. 21—15, l. 8). Therefore, this matter was summarily dismissed.

[4] *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999).

possible. However, that is of no import in the present matter.

R*(Order of Dismissal 2-3). However, *Woods* was properly brought in a motion for a new trial. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). Additionally, there are other cases where this issue was raised in a motion for a new trial. *See e.g. State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (1991); *State v. Sparkman*, 358 S.C. 491, 596 S.E.2d 375 (2004).

Moreover, the circuit court erred in summarily ruling that even if Juror 19 was related to Kevin Cooper it "would not change the result if a new trial were granted." R*(Order of Dismissal, Pg. 3). To the extent a harmless error analysis is proper in a case of juror misconduct, the harmless error analysis should only be made after a hearing. *See Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 451-452 (1954) ("We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.") Therefore, the circuit court erred by holding that Appellant was not entitled to a hearing on his motion because he had not filed it as a PCR action.

Additionally, the Court notes that Appellant could have discovered this relationship through "reasonable diligence." The standard of reasonable diligence requires a person to act after they are put on notice that they should act. *See Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) ("A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist."). A juror and a witness both having the common last name "Cooper" is not sufficient to put Appellant on notice that the two were related. To require defendants and defense counsel to do genealogical research on prospective jurors is not reasonable.

Therefore, the circuit court erred in summarily dismissing Appellant's motion for a new trial and this matter should be remanded for an evidentiary hearing.

CONCLUSION

For the foregoing reasons Appellant respectfully requests that this Court remand the case for a hearing on the Motion for a New Trial Based on After Discovered Evidence.

Respectfully submitted,

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ATTORNEY FOR APPELLANT.

This 2nd day of May, 2019.

STATE OF SOUTH CAROLINA
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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on the date below a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Respondent.

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May 2, 2019