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Apr 27 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge

The State,
Respondent,

vs.

Devin Zachary Elijah Ruttle,
Appellant.

Appellate Case No. 2019-001570

RETURN TO MOTION TO SUSPEND APPEAL AND FOR LEAVE TO FILE MOTION REGARDING DISQUALIFICATION OF JUROR, OR, ALTERNATIVELY FOR EXTENSION OF TIME TO FILE

Appellant seeks to suspend the appeal in order to file a Rule 29(b), SCRCrimP motion in the circuit court; or, in the alternative, for an extension of time in which to file the initial brief of appellant. (Motion, p. 1). Respondent, State of South Carolina, does not oppose the motion for extension of time. Respondent opposes the motion to suspend the appeal as the action appears futile – Appellant has failed to show any evidence that the motion could be timely filed. In support of this position, Respondent would respectfully show the Court:

1. Appellant was indicted on the charges of murder and unlawful possession of a pistol.[1] A jury trial was held September 10-13, 2018, before the Honorable J. Derham Cole. Richard W. Vieth, Esq., represented Appellant at trial. The jury found Appellant guilty as

[1] Appellant was also indicted for three drug charges that were not tried with the murder and gun charge. Appellant entered guilty pleas at the conclusion of the trial, and Judge Cole sentenced him for these charges, as well. (See Tr. pp. 624-25).

charged. (Tr. p. 596). On September 14, 2018, Judge Cole sentenced him to life imprisonment for murder, and one year on the gun charge. (Tr. pp. 624-25). Mr. Vieth moved for reconsideration within ten (10) days of sentence, see Rule 29(a), SCRCrimP; however, the motion was not denied until September 10, 2019. Mr. Vieth served the notice of intent to appeal on September 12, 2019.

2. New trial motions based on after-discovered evidence are required to be filed "within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence." Rule 29(b), SCRCrimP. Such a motion, however, cannot be made while an appeal is pending unless the appellate court suspends the appeal and grants leave to pursue the motion in the circuit court. *Id.* See also Rule 205, SCACR (appellate court had "exclusive jurisdiction" upon timely service of the notice of appeal).

3. Appellant has also moved to suspend the appeal and for leave to file a Rule 29(b) motion in the circuit court. (Motion, p. 1). The motion rests on an allegation that he has discovered that "Juror 92 did not disclose her various connections to Appellant and his family through both school and church, or the fact that Juror 92 had attended New Life Deliverance Worship Center and its weekly youth group meetings." (Motion, p. 3).

4. Appellant's father is Bunty Desor, a pastor at New Life Deliverance Worship Center. (Tr. p. 15). The State moved in limine to exclude any comments by the defense concerning Mr. Desor being a pastor of the church or "somehow trying to use that to influence the jury." (Tr. p. 15). Defense counsel did not argue the fact was relevant and Judge Cole did not find the matter relevant. (Tr. p. 16). Mr. Desor spoke at sentencing. Mr. Desor expressed

that he was a pastor, and that Appellant "was heavily involved in our youth group at our church." (Tr. p. 616).

5. Judge Cole asked the potential jurors: "Does any member of the jury panel or any members of your immediate family -- and for the purpose of all of my questions an immediate family member refers to a parent or a spouse or a child or a sibling -- parent, spouse, child or sibling. Do you or any members of your immediate family attend or have you ever attended the New Life Deliverance worship center…." (Tr. p. 43). The record does not reflect any response was given. Further, the record reflects that family members were asked to stand for the jury to see, to discover if anyone recognized such family member. Appellant concedes that his father was one of the individuals who stood. (Motion, p. 6).

6. "A new trial is required '*only* when the court finds the juror intentionally concealed the information, and that 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'." *State v. Coaxum,* 410 S.C. 320, 328, 764 S.E.2d 242, 245 (2014) (citing *State v. Woods,* 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)) (emphasis in original); *see also State v. Galbreath,* 359 S.C. 398, 403, 597 S.E.2d 845, 847 (Ct. App. 2004) (same). "As to allegations that a juror intentionally provided misleading, false, or incomplete answers on voir dire, a new trial is only necessary where the purposefully concealed information would have been a material factor in the party's use of peremptory challenges or would have supported a challenge for cause." *State v. Covington,* 343 S.C. 157, 164, 539 S.E.2d 67, 70 (Ct. App. 2000) (citing *State v. Kelly,* 331 S.C. 132, 146, 502 S.E.2d 99,106 (1998)).

7. Appellant's motion to suspend the appeal and for leave to file a Rule 29(b) motion should be denied because such action would be futile and would only work to delay the properly

pending appeal. First, the action cannot be considered timely filed. As noted above, Rule 29(b) requires a motion be made within in one (1) year of the discovery. The rule provides the time runs not just from actual discovery, but from "when the evidence could have been ascertained by the exercise of reasonable diligence. ..." *Id. See also State v. Dean*, 427 S.C. 92, 103, 828 S.E.2d 243, 249 (Ct. App. 2019), *reh'g denied* (June 21, 2019). Appellant does not present a colorable argument that the motion could be considered timely filed. Appellant asserts that Juror 92 knew him from church and school, and his father (a pastor) from church. He argues the Juror had graduated high school "only one year after Appellant ... and only two years prior to the trial," and "also attended church and weekly youth group at New Life Deliverance Worship Center where Appellant's father was and is the pastor and Appellant attended church...." (Motion, p. 7). He contends the Juror's "attendance at services and weekly youth group meetings at New Life Deliverance Worship Center was not a one time occurrence that might excuse a juror's forgetfulness" but that she had attended "over an extended three (3) year period from 2010 to 2013, a time shortly after New Life Deliverance Worship Center began its ministry and during which the congregation was smaller and more intimate." (Motion, pp. 7-8) (underscoring in original). He argues "we are again not talking about a juror failing to remember a person she saw once in passing decades ago" but "allegedly failing to remember the pastor of the church ... she regularly attended." (Motion p. 8). He concludes:

> Given both the recency of the subjects in question and the fundamental and lasting impact that school and church have in people's lives, it is patently unreasonable that Juror 92 failed to disclose 1) that she had a connection to Appellant through school, 2) that she had a connection to Appellant through church, 3) that she attended New Life Deliverance Worship Center, and 4) that she thought she had seen, recognized, knew, or had "any connection" to Appellant's father, the man who was her pastor for a period of three (3) years.
>
> [FN 2] After Appellant and his family learned that Juror 92 was in fact the same person who went to 2 high school with Appellant and attended New Life

> Deliverance Worship Center, Appellant's father reviewed photos and video from New Life Deliverance Worship Center's archives and discovered that Juror 92 appears in at least one photograph and two videos from New Life Deliverance Worship Center's services.

(Motion, pp. 8-9). But in that argument lies an important concession – Appellant knew or should have known *at the time of trial* that there was cause to question the Juror. The motion cannot be timely. Further, though Appellant alleges that Mr. Vieth has confirmed he would have requested "further inquiry into those connection, discussed the connections with Appellant," and that the information "would have been a material factor in Appellant's use of his" peremptory challenges, (Motion, pp. 9-10), there is no argument of disqualification. Further still, Appellant asserts he made the "discovery" he knew the Juror and the Juror knew him and his father, after the trial but "while a separate post-trial motion ... was pending." (Motion, p. 1). That motion had to have been made on or before September 24, 2018 (10 days from sentencing). It was denied on September 10, 2019. The instant motion was not made until April 16, 2020. If one could forgive *both Appellant and his father* for not recognizing an individual Appellant claims could only have *intentionally concealed her knowledge of them* through school and/or church, then the admitted knowledge during the pendency of the prior Rule 29 motion shows more than one year lapsed before attempting the instant motion. Consequently, for all these reasons, any suspension of the appeal would only unduly delay the proper appeal. The motion cannot be timely, and would be futile to file.

8. If, however, the Court should grant the motion to suspend the appeal for Appellant to return to circuit court to file on these allegations, Respondent respectfully request the Court order expedited proceedings. Respondent respectfully suggests a hearing be set within 60 days.

9. Appellant asserts, in the alternative, that he requires a thirty (30) day extension of time in which to complete his initial brief and designation of matter. (Motion, p. 11). Respondent does not object to the motion for extension of time.

WHEREFORE, based on the foregoing, Respondent submits Appellant's motion to suspend the appeal and authorize filing of a Rule 29(b) motion be denied, but does not object to a thirty (30) day extension of time in which to complete the initial brief of appellant and designation of matter.

Respectfully submitted,

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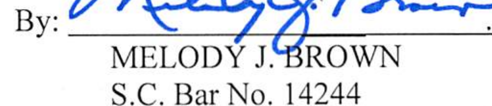

By: ______________________.
MELODY J. BROWN
S.C. Bar No. 14244

ATTORNEYS FOR RESPONDENT

April 27, 2020

Columbia, South Carolina.

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STATE OF SOUTH CAROLINA
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Appeal from Spartanburg County
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THE STATE,

RESPONDENT,

vs.

DEVIN ZACHARY ELIJAH RUTTLE,

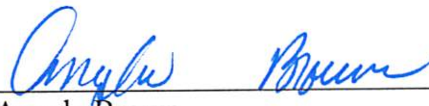
APPELLANT.

CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Motion to Suspend Appeal and for Leave to File Motion Regarding Disqualification of Juror, or, Alternatively for Extension of Time to File, and Certificate of Service has been forwarded to Appellant's counsel, Christopher T. Brumback, Esquire and Spencer D. Langley, via email today, April 27, 2020 to chris@brumbacklangley.com and spencer@brumbacklangley.com, and by depositing one copy of the same in the United States mail, postage prepaid, and addressed to his attorney of record: Christopher T. Brumback, Esquire and Spencer D. Langley, Esquire, 531 South Main Street, Suite 307, Greenville, South Carolina 29601.

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

This 27th day of April, 2020.



Angela Brown
Legal Assistant to Melody J. Brown
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Angela Bennett

From:	Angela Bennett
Sent:	Monday, April 27, 2020 4:52 PM
To:	'chris@brumbacklangley.com'; 'spencer@brumbacklangley.com'
Subject:	Devin Ruttle
Attachments:	02266808.pdf

Counsel, please find attached the Respondent's Return to Motion to Suspend Appeal and for Leave to File Motion Regarding Disqualification of Juror, or, Alternatively for Extension of Time to File in the matter of The State v. Devin Ruttle. The Return is being filed with the Court of Appeals on today, April 27, 2020.

Thank you,

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Angela Brown
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