

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge
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JOE LEWIS HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001493
—————

PETITION FOR WRIT OF CERTIORARI
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ISSUE PRESENTED

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STATEMENT

Procedural history

Petitioner was indicted by a Charleston County grand jury in January 1997 for murder. App. 717. On October 20, 1997, petitioner proceeded to trial before the Honorable Daniel F. Pieper and a jury. App. 1. Petitioner was represented by H. Stanley Feldman, and the state was represented by Cameron Marshall and Glenn Churchill. App. 1. The jury found petitioner guilty, and Judge Pieper sentenced him to life without the possibility of parole. App. 603, ll. 2-4; 609, ll. 19-22.

The South Carolina Court of Appeals affirmed petitioner's conviction and sentence in an unpublished opinion. *State v. Holmes*, Op. No. 99-MO-049 (S.C. Sup. Ct. filed June 25, 1999).

Petitioner filed an application for PCR on May 30, 2000. An evidentiary hearing was held before the Honorable R. Markley Dennis, Jr. Judge Dennis signed an order denying PCR. Petitioner filed a second PCR application on February 9, 2004. An evidentiary hearing was held before the Honorable Deadra L. Jefferson. Judge Jefferson signed an order denying PCR on February 23, 2005. Petitioner filed a third application for PCR on November 14, 2006. On April 10, 2008, the Honorable Roger M. Young, Sr., signed an order denying PCR. Petitioner filed a fourth application for PCR on July 13, 2010. On March 17, 2011, the Honorable Kristi Harrington signed an order denying PCR. App. 696-98.

Thereafter, petitioner filed this application for PCR based on after-discovered evidence on November 21, 2016. App. 613-19. On March 18, 2019, an evidentiary hearing was held before the Honorable Jennifer McCoy. App. 650. Rauch Wise represented petitioner, and Benjamin Limbaugh, assistant attorney general, represented the state. App. 650.

On June 21, 2019, Judge McCoy signed an order denying petitioner's application for PCR. App. 696-706. Judge McCoy found the testimonies of Alexander Gaillard and petitioner

were not credible. Judge McCoy also found petitioner failed to demonstrate that Gaillard's recanted testimony, presented at PCR, would change the result, if a new trial were had, and found his testimony was merely cumulative or impeaching because the trial testimonies of William Phillips and Antwan Venning put the gun in petitioner's hands.

On July 2, 2019, counsel for petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCR, arguing the court's order failed to consider that the shooting could not have occurred in the manner described by the state, and therefore, the recanting or changing of any testimony would probably have caused a different result at trial. Counsel for petitioner also asserted the court made no factual findings in determining the testimony of Gaillard was not credible and it failed to state which portions of petitioner's testimony were not credible. App. 707-08. Additionally, counsel for petitioner contended the court referred to Gaillard's statements as inconsistent but failed to list any alleged inconsistencies on which the finding could be based. On July 23, 2019, Judge McCoy signed an order denying petitioner's motion. App. 714-15.

This petition for writ of certiorari follows.

ARGUMENT

The lower court erred by ruling petitioner was not entitled to a new trial on the basis of after-discovered evidence where a critical state's witness during petitioner's murder trial, Alexander Gaillard, recanted his trial testimony and testified at PCR that he did not see petitioner with a gun on the night of the shooting, and that he saw another person shoot the decedent since this after-discovered evidence probably would have changed the result of the trial and it was not merely cumulative or impeaching as the court incorrectly reasoned.

Relevant Facts

On July 19, 1997, police responded to a shooting incident on Target Street in Charleston. At the scene, police discovered the body of Kenneth Washington. App. 365, l. 21-366, l. 12. Police detained Maurice Simmons, Alexander Gaillard, and William Phillips in connection to the incident. App. 393, l. 21-394, l. 15.

Phillips was initially charged in the murder of Washington. In exchange for his testimony at trial, the state dropped Phillip's charge of murder, and he instead pled guilty to obstruction of justice and possession of a weapon by a convicted felon. He was sentenced to ten years' imprisonment suspended on time served with five years' probation. App. 316, l. 6-317, l. 3. Steven O'Brien, a bystander to the shooting, came forward and gave a statement to police implicating petitioner in the incident. App. 386, ll. 9-22. Petitioner was charged with murder and turned himself in to police on July 30, 1996. App. 425, ll. 13-18.

Trial

The state's theory at trial was that this was a drug deal gone wrong. The evening of July 18, into the early morning of July 19, Kenneth Washington and Antwan Venning went to a house to sell cocaine base and stayed there for several hours. The state alleged Washington sold

cocaine base to petitioner and they had a disagreement as to the quality of the drugs and as Washington and Venning attempted to leave petitioner shot and killed Washington. App. 71-72. At trial, the state called multiple witnesses claiming to have been bystanders to the shooting, including: Steven O'Brien, Alexander Gaillard, and William Phillips.

O'Brien claimed he and petitioner had been together most of the evening, "hustling" money to purchase cocaine base and then smoking cocaine base together. O'Brien alleged they bought cocaine base from Washington and petitioner did not think it was real. Petitioner confronted Washington and they argued. O'Brien testified that Washington and Venning began walking away towards Venning's vehicle parked nearby and petitioner got a gun from William Phillips and petitioner shot three times at Washington. App. 86, l. 1-87, l. 20. O'Brien's testimony is difficult to follow, but he admits that, at some point, not too much later he saw Phillips, from a distance, and Phillips appeared to be shooting into Venning's vehicle where Venning and Washington were. App. 92, ll. 1-21. O'Brien acknowledged that he initially told police he saw Phillips shoot at Washington. App. 115, ll. 9-23. O'Brien denied having made any deal with the state in exchange for his testimony. App. 119, ll. 4-8. However, it was revealed, not only was he was compensated financially for coming to police with information about the murder, the state agreed to use its "full power" to prevent O'Brien's parole from being revoked due to an unrelated charge. App. 111, 5-17; 149, ll. 6-150, l. 7.

Alexander Gaillard was also present at the incident. He claimed that while he did not see petitioner shoot at Washington, he saw him with a gun in his hand after hearing gunshots. App. 264, ll. 23-25. Gaillard said he saw petitioner give the gun to Phillips, and then petitioner fled. Gaillard testified that he, Phillips, and another individual, Maurice Simmons, approached Venning's vehicle, he stole a shotgun that was inside the vehicle, and stashed it at his home.

App. 264, l. 21-265, l. 24. Later that morning Gaillard, Phillips and Simmons were detained by police and questioned.

William Phillips admitted that he accepted a beneficial plea agreement in exchange for his testimony. App. 316, ll. 9-14. Phillips alleged petitioner got into an argument with Washington. Phillips says he gave petitioner his gun and saw petitioner shoot at Washington four times. Phillips claimed everyone scattered right after the shots, and then he came back later and got his gun back from petitioner. Phillips corroborated Gaillard's testimony that he, Gaillard, and Simmons approached Venning's vehicle, Phillip shot his gun at the vehicle, the three men took a shotgun from the vehicle, and they ran to Gaillard's house. App. 318-20; 323, l. 23-325, l. 14. Phillips confessed he disposed of the gun petitioner used before he was arrested. App. 348, ll. 7-19. Phillips admitted on cross-examination that his story had changed. App. 341, ll. 14-23.

SLED agent, Manuel Ortuno, testified Maurice Simmons' hands tested positive for gun shot residue. App. 446, ll. 20-23. Ortuno testified that, for Gaillard and Phillips, the particles were insufficient to determine the potential presence of particles. App. 446, l. 24-447, l. 2.

PCR hearing

Petitioner's sole allegation on PCR was the discovery of new evidence due to state's key trial witness, Alexander Gaillard, recanting his testimony. App. 653, ll. 12-17. Many years after petitioner's trial in 2015, Gaillard ran into a family member of petitioner's, Keith Gregory, and asked how petitioner was. When he heard that petitioner was still in prison Gaillard felt remorse and at petitioner's request contacted his attorney and submitted an affidavit recanting his trial testimony against petitioner, Court's exhibit one, which is on file with this Court. App. 655, l. 3-656, l. 14; 657, l. 14-658, l. 16.

Gaillard, both in his affidavit and at the evidentiary hearing, admitted he testified against petitioner because before trial the state agreed to reduce his pending strong-armed robbery charge to assault and battery of a high and aggravated nature. App. 658-59; Ct's exhibit 1, affidavit of Alexander Gaillard. Gaillard also said in his affidavit that he was only sixteen at the time of the incident and wanted to have his mother present while he spoke with police but that was not allowed. Ct's exhibit 1, affidavit of Alexander Gaillard. Gaillard insisted he never saw petitioner with a gun that evening and he never knew petitioner to carry a gun. Gaillard further testified the only person he saw with a gun that evening was William Phillips. App. 661, l. 11-662, l. 23; Ct's exhibit 1, affidavit of Alexander Gaillard.

Discussion

The PCR court's findings of fact are entitled to deference and will be upheld when there is any evidence of probative value to support them. *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Questions of law, however, are reviewed *de novo*, and this Court will reverse when the PCR court's decision is controlled by an error of law. *Id.*

In *Hayden v. State*, our Supreme Court reviewed the criteria necessary to grant a new trial on newly discovered evidence. The Court explained:

A party requesting a new trial based on after-discovered evidence must show that the evidence: (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, 611, 299 S.E.2d 854, 855 (1983).

Gaillard's testimony at trial, that he saw petitioner with a gun immediately after hearing shots, was extremely damning when considered alongside O'Brien's and Phillips' testimonies that they saw petitioner shoot at Washington. Gaillard's testimony corroborated the incredible

testimony of Phillips, who had every reason to be less than honest once he was offered a beneficial plea deal in exchange for his testimony against Gaillard. Gaillard's testimony, at trial, also made more credible O'Brien's ever-changing version of events. At the time Gaillard was a scared sixteen-year old, who was encouraged by the state to testify against petitioner.

If a new trial were had, Gaillard's testimony at PCR that he never saw petitioner with a gun the night of the shooting probably would change the result. At trial, the jury had before it the testimonies of Gaillard, O'Brien, and Phillips all putting the gun in petitioner's hands. Gaillard's recanted testimony puts the gun in Phillips' hands. O'Brien's first statement to police and cross-examination corroborate this version of the incident.

There was no question this information had been discovered since trial, as Gaillard testified that he ran into petitioner's cousin, Keith Gregory, in 2015. Gregory's testimony at PCR also verifies the timeline of discovery.

Furthermore, it was impossible for Gaillard's falsified trial testimony to have been discovered before trial, although defense counsel zealously cross-examined all of the state's witnesses regarding their motivation for their testimonies against petitioner. In the time since trial Gaillard matured from a scared young man into a responsible adult and decided he should do the right thing and tell the truth about what happened that night.

Gaillard's recanted testimony was material to the issue of guilt or innocence because if petitioner never had Phillips' gun in his hands, he could not have shot and killed Washington. Additionally, Gaillard now admitting that he saw Phillips shooting his own gun at Washington corroborates O'Brien's initial statement to police that he saw Phillips shoot at Washington. Phillips was the main suspect early on and was originally charged in the murder of Washington. Phillips never denied it was his gun that killed Washington or that he disposed of the gun after

the shooting. However, Phillips spun a fantastical story, at trial, in which he handed his gun to petitioner, then when Washington had been shot got the gun back back and got rid of it. Phillips disposal of the gun points towards his own guilt and not petitioner's.

While Gaillard's testimony at PCR was similar to O'Brien's first statements to police, it is more than cumulative or impeaching because it not only bolstered O'Brien's story, but it also came from a person not under the influence of cocaine base, which affects perception. Accordingly, Gaillard's testimony presented at petitioner's evidentiary hearing meets the requirements for a new trial based on newly discovered evidence as laid out in *Hayden*.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of August, 2020.