

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Dorchester County

The Honorable Diane S. Goodstein, Circuit Court Judge

ORIGINAL

THE STATE,

Respondent,

v.

TIFFANY ANN SANDERS,

Appellant.

Appellate Case No. 2018-000210

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

- I. The trial court erred by denying Sander's motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer's testimony, that Sanders was not aware of, nor did she participate in the murder of the victim, was not available until this proceeding, and could not have been obtained at any earlier point.

- II. The trial court should have found that Sean Kammerer's affidavit constitutes after-discovered evidence, and granted Sanders a new trial.

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

- I. Was the trial court correct in denying Appellant's motion for a new trial because the exculpatory statements offered by Appellant's codefendant did not qualify as after-discovered evidence due to the fact that the codefendant was known to Appellant and available to testify at Appellant's trial?

STATEMENT OF THE CASE

Tiffany Sanders (“Appellant”) was indicted by the Dorchester County grand jury on a charge of murder. (R.pp. 109-10). Appellant was tried before the Honorable Diane S. Goodstein from August 3, to August 5, 2010. (R. p. 221). She was represented by Michael O’Neal, Esquire. (R. p. 221). Assistant Solicitors Harrison Bell, Esquire, and Mandy Kimmons, Esquire, prosecuted the case on behalf of the First Circuit Solicitor’s Office. (R. p. 221). At the conclusion of the trial, the jury found Appellant guilty as indicted. (R. p. 534; p. 574). Following the conviction, Judge Goodstein sentenced Appellant to thirty years in prison for murder. (R. p. 111; p. 544; p. 575). Appellant did not initially appeal her conviction or sentence. (R. p. 96; pp. 102-03). Appellant later filed an application for Post-Conviction Relief on August 3, 2011, and an amended application on August 24, 2011. (R. pp. 103-106). An evidentiary hearing was held on May 24, 2011, before the Honorable Deandrea G. Benjamin. (R. p. 124). Appellant was represented by Dale T. Cobb, Esquire, and Thomas R. Goldstein, Esquire. (R. p. 93; p. 106; p. 124; APCR). At its conclusion, Judge Benjamin granted Appellant a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but dismissed Appellant’s remaining claims by written order filed August 3, 2012. (R. pp. 112-123).

Appellant filed a petition for writ of certiorari from the dismissal of her PCR. (R. p. 63; APCR). The South Carolina Supreme Court denied relief in *Tiffany Sanders v. State*, Op. No. 2014-MO-049. (R. pp. 90-92). Sanders filed for rehearing that was then denied on January 22, 2015. (R. pp. 89-92; Denial of Motion for Rehearing).

On March 21, 2017, Appellant filed a motion for a new trial pursuant to Rule 29(b)-After Discovered Evidence. (R. p. 1). A hearing was held before Judge Goodstein on May 30, 2017. (R. p. 17). Appellant was represented by Elizabeth Franklin-Best, Esquire. (R. p. 12; p. 17). The motion was subsequently denied on February 5, 2018. (R. p. 61-62; Judge Goodstein’s Order).

Appellant filed notice of appeal on February 8, 2018, and Attorney Franklin-Best submitted Appellant's Initial Brief on August 20, 2018. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

Murder of Jesse Ham

On June 8, 2007, Appellant lured Jesse Ham through trickery into her car and drove him to a secluded location where her boyfriend, Sean Kammerer, shot Jesse four times with a pistol. (R. p. 577).

Earlier that day, Jesse Ham and three of his friends (Kevin King, David Hughey, and Brandon Frye) were walking down the street. (R. pp. 352-53; pp. 377-78; p. 392). As Appellant drove by, the group waved her down and asked what she was doing. (R. p. 354; pp. 377-78; pp. 393-95). Appellant retorted "Nothing with y'all," and drove off. (R. p. 354; pp. 377-78; pp. 393-95). Appellant was accompanied by her sister, Amanda Fender. (R. p. 379). Afterwards, Jesse and the group returned to Brandon's house. (R. pp. 392-93). Sean Kammerer, Appellant's co-defendant, called Appellant, asked her who she was with, and directed Appellant to bring Jesse to Publix. (R. p. 443).

Twenty minutes later, the group heard Appellant honking her horn in front of Brandon's house. (R. p. 354; p. 380; p. 395). She specifically asked for Kevin and Jesse but not by name. (R. p. 396). Jesse and Kevin met with Appellant, who asked them what their names were. (R. p. 135; pp. 380-81). At first Jesse and Kevin lied, telling her their names were Ben and Kyle, but Appellant insisted she knew a girl who urgently wanted to meet Jesse at a nearby McDonald's. Appellant pleaded with them for thirty to forty-five minutes to come with her. (R. pp. 366-56; pp. 381-86). Appellant also answered and talked on her cell phone several times during her interaction with Jesse and Kevin. (R. p. 356). Suspicious, Kevin put his ear to the phone while Appellant talked and heard a man's voice. (R. p. 356). However, when Jesse took the cell phone he heard a woman's voice. (R. p. 356). Jesse was hesitant, but decided to believe Appellant. (R.

p. 357). Kevin, concerned about his friend, sat in the back right passenger seat behind Jesse as Appellant started the car. (R. p. 357; pp. 370-72; p. 397). Appellant's sister rode next to Kevin behind the driver's seat. (R. p. 358).

As Appellant approached McDonald's, she drove around it once and drove to a nearby Publix/Tire King parking lot. (R. p. 358). She attempted to go in-between buildings, but a delivery truck blocked the alleyway. (R. p. 357). Appellant, still on the phone, stated "Oh, there's a delivery truck. I can't get behind there Okay." (R. p. 357). Appellant backed her car into an unlit, wooded area behind Publix. (R. p. 358). The car abutted the woods. (R. p. 357). Appellant was asked by the passengers to move the car to a more lighted area but Appellant refused and turned the car off. (R. p. 358). Appellant declared "No. We're not moving." (R. p. 359).

Appellant was described as acting 'shady like.' She was acting like everything was fine, but it was obvious she knew something was about to happen. (R. pp. 358-60). Kevin, now apprehensive, began to exit the car. (R. pp. 358-60; p. 373). Kammerer, who had been lying in wait, immersed and put a gun up against Kevin's stomach. (R. pp. 358-60; p. 373). Kevin knocked the gun away causing Kammerer to shoot between Kevin's legs. Kevin ran. (R. pp. 358-60; p. 373). As he ran between the buildings where the delivery truck was located, Kevin heard three to four shots behind him. (R. pp. 359-60). Appellant drove away after the shots started. (R. pp. 359-60; p. 422; p. 443). Jesse was shot four times, three in the back and one in the neck. He died at the scene. (R. p. 560).

At trial, Kevin explained that Kammerer and Jesse had been fighting for two to three years. (R. p. 364). Kammerer had been loudly telling everyone he was going to kill Jesse. (R.

p. 364; p. 183). It was also common knowledge that Jesse beat Kammerer with a bat. (R. p. 364; p. 403). Appellant was aware Kammerer wanted revenge. (R. p. 444).

In preparation for the murder, Kammerer, who did not have a license, had asked his friend Dejuan Jenkins to drive him. (R. p. 420). Kammerer directed Dejuan to park behind the Tire Kingdom because Kammerer was meeting his girlfriend there. (R. p. 422). Dejuan parked on one side of the Tire Kingdom building. (R. p. 422). They waited for Kammerer's girlfriend to arrive. Kammerer walked over to Appellant's car when Appellant arrived. (R. p. 424). After murdering Jesse, Kammerer got back into the car, and Dejuan took him home. (R. p. 424). Dejuan never informed the police about the shooting and later pled guilty to accessory after the fact. (R. p. 424).

Jessica Hans, a Publix employee, testified that she heard several loud pops while in the parking lot. (R. p. 415). When she looked in the direction of the pops, Jessica saw a person on the other side of the parking lot pointing a gun at the ground and eventually firing. (R. p. 415). Jessica also saw another person running between two buildings. (R. p. 415). After the shot was fired, Jessica saw the shooter disappear behind the side of the building. (R. p. 415). Thirty seconds later, a Jeep Cherokee pulled out from the same side of the building and exited the parking lot. (R. p. 416). Jessica did not remember seeing any other vehicles at that end of the parking lot. (R. p. 417). She noted that the delivery truck Appellant mentioned on her phone had recently pulled in to the parking lot. (R. p. 417).

Next, Appellant drove back to Brandon's house and told Brandon "something happened." (R. p. 397). Brandon rode in the car with her to the scene. (R. p. 397). While driving, Appellant told Brandon that she, Jesse, and Brandon had seen somebody come out of the woods and then Appellant drove off, leaving the boys behind. (R. p. 398). Appellant drove around the parking

lot a few times before dropping Brandon off back at his house. (R. p. 398). Brandon noted she seemed fake and had “alligator tears.” (R. p. 398). Concerned, Brandon called and asked David to go with him to the crime scene. (R. p. 398). He also instructed David to bring a gun. (R. p. 398). By the time the two of them arrived at the scene the police had cordoned off the area. (R. pp. 398-99). The police questioned both of them. (R. pp. 399-400). Afterwards, David threw the gun into a ditch. (R. p. 389). Brandon left in the middle of questioning and was chased down. (R. pp. 399-400). During a search, the police found marijuana in his pockets, and charged him with simple possession. Afterwards, Brandon went home. (R. p. 400).

The next day, the police brought Appellant in for questioning. She signed a confession admitting she took Jesse to the scene, but claimed she only took him there because Kammerer wanted to fight. (R. pp. 561-63). She also disclaimed knowledge that Kammerer had a gun. (R. p. 561-63). Kammerer pled guilty to murder before Appellant’s trial. (R. p. 288; p. 560).

Trial

The State charged Appellant with two alternative offenses: accessory before the fact to murder and murder. (R. pp. 570-77). If Appellant had been present at the scene of the murder, she would be guilty of murder, but if she had not been present, she would have been guilty of accessory before the fact of murder. Before trial, the parties stipulated that Kammerer murdered Jesse. (R. p. 560).

At trial, the State argued that, under the “hand of one, hand of all” accomplice liability theory, Appellant was guilty of murder. (R. p. 329). Appellant and Kammerer formed a common scheme to take Jesse to a secluded location and murder him. (R. pp. 327-28). The State presented testimony from Jesse’s friends Kevin King, David Hughey and Brandon Frye. Also, the State also presented testimony from Jessica Hans and Dejuan Jenkins as well as

testimony from two police officers, photographic evidence of the scene, and Appellant's written confession. At the close of the State's case, Appellant made a motion for directed verdict, arguing that the State had failed to prove malice. (R. pp. 445-48). The judge denied the motion. (R. p. 448).

Appellant did not present a case and renewed the directed verdict motion. (R. p. 455; p. 457). Also, she objected to the charge on accessory before the fact of murder, arguing the phrase "the crime of murder" should be used instead of "any crime." (R. pp. 517-18). The judge denied this objection. (R. pp. 519-20).

During deliberations, the jury asked the Court several questions. (R. pp. 522-33; pp. 345-348). After four hours of deliberation, the jury found Appellant guilty of murder. (R. p. 534). Appellant was sentenced by Judge Goodstein to thirty years in prison. (R. pp. 544-45).

Hearing Pursuant to Appellant's Rule 29(b) Motion

On May 30, 2017, Judge Goodstein held a motions hearing to determine the merit of Appellant's After-Discovered Evidence motion. At the hearing Appellant's counsel testified that she was retained by the Appellant soon after her period to file for federal habeas elapsed. (R. pp. 29-30). At this point Kammerer had exhausted his collateral remedies.¹ (R. p. 29). Counsel testified that she had since reached out to Kammerer. From this meeting, Kammerer agreed to write affidavits in which he attests that Appellant was unaware of the plot to murder Jesse. (R. p. 30). Judge Goodstein was careful to note that the "affidavits" were neither sworn to nor notarized. (R. p. 30). Nevertheless, Counsel indicated that Kammerer would be willing to testify and affirm the contents of the written statements. (R. p. 30). In response, the State objected to the motion on the ground that Appellant's circumstances did not meet the elements necessary to

¹ Kammerer pled guilty to the murder of Jesse. R. p. 35. He did not appeal his conviction. R. p. 33. He did file an application for post-conviction relief which he eventually withdrew. R. p. 34.

establish her Rule 29(b) claim. It was the State's position that Kammerer's testimony was available at Appellant's trial. (R. pp. 32-33). The State further presented that during the PCR evidentiary hearing Appellant and Trial Counsel testified that they engaged in discussions prior to trial on whether to call Kammerer as a witness. They eventually elected not to. (R. pp. 33-36; pp. 47-50).

In response to the State's argument, Appellant's counsel reaffirmed her position that Kammerer was unavailable to Appellant and Trial Counsel for the fact that, at the time of Appellant's trial, Kammerer had applied for PCR and was "in his own legal jeopardy." (R. pp. 39-40). Judge Goodstein asked Counsel for any case law which held that a potential witness is rendered unavailable when pursuing collateral remedies. (R, p. 45). Appellant's counsel indicated that she would search for such a holding. (R. p. 45).

Judge Goodstein then took the opportunity to note on the record that, on dismissing Appellant's PCR, the PCR Court concluded that trial counsel's failure to call Kammerer was strategy and not deficient performance. (R. pp. 43-44). She then presented the following line of reasoning:

I know that in your argument you have argued that the determination by the PCR Court that the decision not to call Mr. Kammerer was strategy. And that that was to a great or lesser extent integral to the court denying the PCR. It feels as though you are asking me to go behind that determination and make a different finding. And I just want to make sure that I give you an opportunity to address that because I do not believe that I can do that.

(R. p. 46).

To this, Appellant's Counsel responded:

So I don't know that you would have to go so far as to say I find that particular order to be inaccurate and I hereby overrule it. But I think that you're not -- I mean, this is a different procedure. I don't think that you're bound by, you know, a case that arose in a different procedural posture.

(R. p. 47).

Judge Goodstein elected to take the matter under advisement, but not before requesting the following from Appellant's Counsel:

I think that it is imperative that you be able to direct to me case -- South Carolina case law if it's available that substantiates the argument that is propounded that while this witness was known, he was not available because of his own legal circumstance. Because I'm unaware of such case law, but -- but, I certainly don't want to make a decision if it's there and I don't know about it. So I'm going to look for that. Do you think you can provide that in ten days?

Counsel responded that she would comply. (R. p. 56).

On February 5, 2018, Judge Goodstein issued a written order dismissing Appellant's motion for a new trial. In the dismissal Judge Goodstein indicated that she had considered memorandums provided by both parties. The order then sets forth in pertinent part: "Due to the Defendant's knowledge of Mr. Kammerer and the available legal means of obtaining his testimony at the time of trial, the testimony cannot be newly discovered evidence under the relevant definition." (R. pp. 61-62; Judge Goodstein's Order).

ARGUMENT

- I. **The Trial Court Was Correct In Denying Appellant’s Motion For A New Trial Because The Written Statements From Sean Kammerer Did Not Qualify As After-Discovered Evidence Due To The Fact That Kammerer Was Available To Testify At The Time Of Appellant’s Trial.**

Standard of Review

“[A] motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge . . .” *State v. South*, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1993).

“The denial of a motion for a new trial will not be reversed absent an abuse of discretion.” *Id.*

Analysis

Appellant begins her argument by claiming error in the trial court’s conclusion that Sean Kammerer was available to testify at Appellant’s PCR Evidentiary Hearing. However, the actual basis for the trial court’s dismissal was that Kammerer was known and available to testify *at Appellant’s trial*. To this point, the order of dismissal correctly states:

The fact that control is to be judged at the time of trial strengthens the State’s position. Mr. Kammerer pled guilty to his charges in 2008, and had been incarcerated in the South Carolina Department of Corrections for over two years prior to Defendant’s trial. As is the case for all guilty pleas, Mr. Kammerer was advised that he was surrendering his right to remain silent and his right against self-incrimination. Thus, he no longer enjoyed the privilege of refusing to testify upon the Court’s acceptance of his plea. Therefore, at the time of trial, Kammerer was available for Defendant to subpoena or attempt to interview. The reasoning behind Defendant’s decision to not call Kammerer to the stand during her trial is immaterial to the Court’s decision today. Due to the Defendant’s knowledge of Mr. Kammerer and the available legal means of obtaining his testimony at the time of trial, the testimony cannot be newly discovered evidence under the relevant definition.

(R. p. 62; Judge Goodstein’s Order, p. 2).

The trial court's reference to Appellant's PCR dismissal was to acknowledge the PCR court's determination that Appellant's failure to call Kammerer at trial was strategy. During Appellant's after-discovered evidence hearing, the State referenced Appellant's PCR to support its position that Sean Kammerer was known and available to testify at Appellant's trial. *See R. pp. 34-36.*

In her pursuit of post-conviction relief, Appellant raised a claim of ineffective assistance of counsel for failure to call Sean Kammerer at trial. At the PCR evidentiary hearing Appellant and trial counsel both testified that the issue of calling Kammerer as a witness at trial was considered and a decision was made in favor of not calling him. *See R. pp. 153-54; p. 190.*

In regards to Appellant's ineffective assistance of counsel claim, the PCR Court held:

[T]his Court finds that trial counsel articulated a valid strategic reason for not calling Kammerer as a defense witness based upon the uncertainty of what he might ultimately say when actually placed under oath on the witness stand. Counsel fully discussed this strategy with Applicant before trial and Applicant concurred. This was a legitimate concern and is one which was shared at the time by Applicant. This Court notes that it is still not known what Kammerer would have said at trial. It is only now after conviction and the lack of success of the original trial strategy respecting Kammerer that Applicant and trial counsel are second-guessing the strategy originally employed. This Court will not second-guess defense counsel's reasonable trial tactic. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also Demnsev v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005) and *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003). As noted above, trial counsel articulated valid strategic reasons for not calling Kammerer as a defense witness and used Kammerer's absence from trial to Applicant's advantage. Applicant has not shown that counsel was deficient in that choice of tactic or that she suffered the requisite prejudice. The allegation is without merit and is denied and dismissed.

(R. pp. 116-17).

The finding by the PCR court supports the trial court's dismissal of Appellant's new trial motion. A party requesting a new trial based on after-discovered evidence must show that the evidence (1) would probably change the result if a new trial was had; (2) has been discovered

since the trial; (3) could not have been discovered before the trial by exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *State v. Caskey, et al.*, 273 S.C. 325, 256 S.E.2d 737 (1979).

In the *Haydan v. State*, the South Carolina Supreme Court applied *Caskey* to circumstances similar to those presented by Appellant. 278 S.C. 610, 612, 299 S.E.2d 854, 855 (1983). In *Haydan*, the respondent sought a new trial based on after-discovered evidence. To support his claim, he presented the testimony of Leonard Horger. Horger had testified against the respondent during trial. At the after-discovered evidence hearing, Horger testified he had conspired to frame respondent and that the SLED agents planted the drugs. *Id.* The Court ruled that Horger's allegation that he had conspired to frame the Appellant did not meet the *Caskey* requirements, as evidence of the alleged setup was clearly known by and available to respondent at trial. *Haydan*, 278 S.C. at 612, 299 S.E.2d at 856. The Court concluded that "respondent failed to show that evidence of the alleged setup was discovered after the trial or could not by the exercise of due diligence have been discovered before trial." *Id.*

In the pending appeal, the record reflects that the evidence Appellant seeks to present was known and available to Appellant at trial. Therefore, Appellant's is unable to satisfy the second element *Caskey* that the after-discovered evidence has been discovered since the trial.

Alternatively, Appellant pleads for a finding that a witness is deemed unavailable to testify when they are pursuing collateral relief. Appellant presents that "[i]f the court's reasoning is allowed to stand, it will mean that criminal defendants, who plead guilty, effectively waive their rights to avail themselves of post-conviction relief remedies because they can be compelled by virtue of their guilty pleas to testify at a co-defendant's PCR conviction." (IBOA at p. 4-5). This argument has nothing to do with Appellant's current position or Appellant's rights. It

instead focuses on the perspective rights of Sean Kammerer. *Cf. State v. Hiott*, 276 S.C. 72, 78 (1981) (citing *U.S. v. Payner*, 447 U.S. 727(1980) (“The law is well-settled that these rights are personal and one person may not claim the rights of another.”)). Nevertheless, Appellant’s argument ignores the fact that Mr. Kammerer pled guilty to the murder of Jesse Ham, and as a result of the plea, Kammerer no longer had the right to avoid testifying. “[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.” *State v. Rice*, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing *Hyman v. State*, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). By entering a guilty plea, “[a]n accused [] waives the right to trial and the incidents thereof and the constitutional guarantees with respect to criminal prosecutions.” *Rivers v. Strickland*, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (citation omitted). “A defendant who pleads guilty simultaneously waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront his accusers.” *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

Courts that have had the opportunity to directly address the issue presented by Appellant have found that pending litigation does not render a witness unavailable. *See U.S. v. Thomas*, 492 F. App'x 690, 692 (7th Cir. 2012) (“But despite knowing that testimony from Murray could support his defense, Thomas did not attempt to subpoena Murray. Had Thomas sought to compel Murray's testimony, Murray might have resisted on Fifth Amendment grounds, but Thomas was nonetheless required to make the effort if he hoped to show due diligence.”); *U.S. v. Kamel*, 965 F.2d 484, 493 (7th Cir.1992) (“If there is possible evidence which would exonerate a defendant, he may not simply ignore it...”); *U.S. v. Levy-Cordero*, 67 F.3d 1002, 1018 (1st Cir. 1995) (“As

the district court noted, although Castro-Gómez' motion indicates that he is reluctant to testify, and that he desires protection from the court, it simply does not demonstrate that his testimony is unavailable. Indeed, the last sentence quoted above indicates that he anticipated being forced to take the stand and testify. Nevertheless, Forty-Estremera never sought to subpoena Castro-Gómez or compel him to testify. Under such circumstances, we conclude that the district court did not abuse its discretion in concluding that appellant failed to establish that Castro-Gómez' testimony was unknown or unavailable.”).

Lastly, during the new trial hearing, Appellant alternatively presented that Kammerer likely would not have testified had he been called by Appellant as witness at trial. However, Respondent posits that just because an individual refuses to testify at trial does not make his later testimony new evidence. Other courts have reached this conclusion as well. In *United States v. Dale*, the Court of Appeals for the D.C. Circuit persuasively held:

To obtain a new trial based on newly discovered evidence, a convicted defendant must offer evidence that “ ‘ha [s] been discovered since the trial.’ ” *Sensi*, 879 F.2d at 901 (quoting *United States v. Mangieri*, 694 F.2d 1270, 1284 (D.C.Cir.1982)). The unanimous view of circuits that have considered the question is that this requirement is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial. *See United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.1992) (“ ‘[W]hen a defendant who has chosen not to testify comes forward to offer testimony exculpating a codefendant, the evidence is not “newly discovered.” ’ ”) (quoting *United States v. Diggs*, 649 F.2d 731, 740 (9th Cir.), cert. denied, 454 U.S. 970, 102 S.Ct. 516, 70 L.Ed.2d 387 (1981)); *United States v. Gustafson*, 728 F.2d 1078, 1084 (8th Cir.) (finding no abuse of discretion in denying new trial motion based on probability that post-trial testimony of convicted co-defendants, who had agreed to provide government with information in return for lenient sentence, would deviate from their trial testimony and no longer implicate defendant-appellant), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984); *United States v. Metz*, 652 F.2d 478, 480 (5th Cir. Unit A Aug. 3, 1981) (rejecting contention that “ ‘newly available’ evidence is synonymous with ‘newly discovered’ evidence” and finding no abuse of discretion in denial of new trial motion based on co-defendant's post-conviction exculpating affidavits); *United States v. Jacobs*, 475 F.2d 270, 286 n. 33 (2d Cir.) (“[W]e fully agree with the judge's alternative ground [for denying a new trial motion], that a court must exercise great caution

in considering evidence to be ‘newly discovered’ when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify.”), cert. denied, 414 U.S. 821, 94 S.Ct. 131, 38 L.Ed.2d 53 (1973). We recently acknowledged this principle in the administrative context to hold that the National Transportation Safety Board had reasonably concluded the proffered testimony of an FAA inspector who had invoked his fifth amendment privilege at a pilot certification hearing but had since pleaded guilty to charges related to the hearing's subject-matter did not constitute “newly discovered” evidence under an NTSB rule so as to warrant reconsideration of the certification denial. *See Chirino v. NTSB*, 849 F.2d 1525 (D.C.Cir.1988). In light of our holding in *Chirino* and the holdings of the other circuits in the cited cases, we conclude it was not an abuse of discretion to deny a new trial based on Sweeney's post-trial testimony.

U.S. v. Dale, 991 F.2d 819, 839 (D.C.Cir.1993).

CONCLUSION

The record supports the trial court's finding that the evidence Appellant sought to present was known and available to Appellant at trial. Both Appellant and Trial Counsel supported this position during the PCR evidentiary hearing when they acknowledged their awareness of Kammerer and their decision to not call him as a witness. Clearly not calling Kammerer was an unsuccessful strategy. Appellant now seeks to go back and remedy this misstep by submitting Kammerer's testimony under the guise of after-discovered evidence. To permit relief under these circumstances would undermine Appellant's conviction and the PCR court's dismissal. The facts presented by Appellant simply do not satisfy the requirements under *Caskey*. For this reason, it is respectfully submitted that the dismissal of Appellant's Rule 29(b) motion be upheld and the appeal dismissed.


Respectfully submitted,

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January 30, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Dorchester County

The Honorable Diane S. Goodstein, Circuit Court Judge

THE STATE,

Respondent,

v.

TIFFANY ANN SANDERS,

Appellant.

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JAN 30 2019


SC Court of Appeals

Appellate Case No. 2018-000210

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 30th day of January, 2019.



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