

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Jan 13 2021

S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Post-Conviction Relief Judge
Daniel F. Pieper, Circuit Court Judge

Appellate Case No. 2019-0001493

JOE LEWIS HOLMES #244813,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

ISSUE PRESENTED ON CERTIORARI3

STATEMENT OF THE CASE.....4

STATEMENT OF FACTS...6

STANDARD OF REVIEW8

ARGUMENT9

The PCR court properly found that Petitioner failed to establish the information presented at the evidentiary hearing would change the result if a new trial were had where the testimony of Gaillard was not credible, the testimony of other witnesses would still implicate Petitioner if there were to be a new trial, and the substance of Gaillard’s testimony was cumulative to other evidence considered by the jury at Petitioner’s trial9

CONCLUSION.....13

ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Did the court err 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.

Respondent's Counterstatement of Issue on Certiorari

Did the PCR court properly find that Petitioner failed to establish the information presented at the evidentiary hearing would change the result if a new trial were had where the testimony of Gaillard was not credible, the testimony of other witnesses would still implicate Petitioner if there were to be a new trial, and the substance of Gaillard's testimony was cumulative to other evidence considered by the jury at Petitioner's trial?

STATEMENTS OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Petitioner was indicted at the January 1997 term of the Charleston County Grand Jury for murder (1997-GS-10-0606). H. Stanley Feldman, Esquire, represented Petitioner on that charge. Cameron L. Marshall, prosecuted the case. Petitioner proceeded to trial on October 20-22, 1997 before the Honorable Daniel F. Pieper, after which a jury found guilty as indicted. Judge Pieper sentenced him to confinement for life without parole (LWOP).

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Holmes*, Op. No. 99-MO-049 (S.C. Sup. Ct. filed June 25, 1999).

2000-CP-10-2042

Petitioner subsequently filed his first PCR application on May 30, 2000, alleging ineffective assistance of trial counsel, prosecutorial misconduct, and relief from judgment order. An evidentiary hearing into the matter was convened at the Charleston County Courthouse before the Honorable R. Markley Dennis, Jr. Petitioner was present and represented by Daniel A. Beck. By written Order dated March 28, 2002, Judge Dennis denied and dismissed the application.

2004-CP-10-0560

Petitioner then filed a *second* application for post-conviction relief on February 9, 2004 alleging that the trial court lacked subject matter jurisdiction. An evidentiary hearing into the matter was convened on January 18, 2005 at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Petitioner was present at the hearing and represented by Andrew Grimes, Esquire. Adrienne L. Turner of the South Carolina Attorney General's Office represented Respondent. On February 23, 2005, Judge Jefferson denied and dismissed the application with

prejudice. A timely Notice of Appeal and a Johnson Petition for Writ of Certiorari was perfected by Robert Pachak of the South Carolina Office of Appellate Defense. On September 27, 2006, the South Carolina Court of Appeals denied the Petition and dismissed the case.

2006-CP-10-4461

Petitioner filed a *third* PCR application on November 14, 2006, alleging ineffective assistance of PCR counsel. On April 10, 2008, the Honorable Roger M. Young, Sr., dismissed the action with prejudice.

2010-CP-10-5612

Petitioner subsequently filed a fourth application for post-conviction relief alleging:

1. “Does Petitioner have a created liberty interest in statutory state appointed PCR counsel?”
2. “The State’s Post Conviction Procedure process is an inadequate remedy for the hearing of federal constitutional claims.”
3. Were the jury instructions given in the instant case unconstitutional and burden-shifting in violation of due process?”
4. “Is Petitioner’s conviction unconstitutional under State v. Belcher?”

On March 17, 2011, by written Order, the Honorable Kristi Harrington dismissed the Application with prejudice.

2016-CP-10-6293

In his *fifth* and current PCR action, Petitioner is alleging the following grounds for relief:

1. Newly-discovered evidence.
 - a. Petitioner has recently discovered new evidence which should entitle him to a new trial.
 - b. “Alexander Gaillard will testify that he did not see me with a firearm. He will testify that he was threatened in order to get him to testify against me. I received this information from Mr. Gaillard shortly after December 14, 2015.”
2. Ineffective assistance of trial counsel and post-conviction relief counsel.
 - a. Trial counsel and post-conviction relief counsel failed to adequately investigate and prepare the case for trial and post-conviction relief hearing.
 - b. “Neither my trial counsel nor my PCR counsel ever obtained an expert on the issue of the trajectory of the bullet that killed Kenneth Washington. The bullet that killed Mr. Washington traveled from the right shoulder blade downward

through the aorta and into the fifth and sixth ribs. Appendix 470, 11 15-25. (Testimony Dr. Leigh Thorne) 702, (autopsy report). The path traveled by the bullet is inconsistent with the testimony which was that Mr. Washington was shot while running away from assailant.

On October 5, 2018 a hearing was held in Charleston County in front of Honorable Michael G. Nettles on the State's motion to dismiss the application. The Court dismissed Petitioner's ineffective assistance of counsel allegations and allowed him to proceed on the newly-discovered evidence grounds, specifically, on the recanted testimony of Alexander Gaillard.

On March 19, 2019, an evidentiary hearing was held before the Honorable Jennifer McCoy. Rauch Wise represented Petitioner and Benjamin Limbaugh, Assistant Attorney General, represented the State.

On June 21, 2019, Judge McCoy signed an order denying Petitioner's application for PCR. 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), SCRPC. On July 23, 2019, Judge McCoy signed an order denying Petitioner's motion.

STATEMENT OF FACTS

This case involves the murder of Kenneth Washington in Charleston County in the morning hours of July 19, 1996. The first witness to testify at trial was Mark O'Brien. O'Brien testified as to the events that took place at the green house next to Amoco on Rivers Avenue during the morning of July 19th, 1996. App. 86. O'Brien testified that he and Petitioner walked over to the area because no one else in the area was selling drugs. O'Brien and Petitioner approached the

group of people standing around who drugs and William Phillips (White Boy) said that the men around him did. Petitioner asked Phillips if they were “straight” and proceeded to buy a twenty dollar rock of crack cocaine. Shortly after, another man walked up and bought a five dollar rock of crack cocaine. This man proceeded to say that the crack cocaine was fake and Petitioner also said that his crack cocaine was fake. App. 87. O’Brien testified that Petitioner said that he wanted his money back and one of the men there, Antwan Venning, began walking towards the truck parked on Target Street. App. 87. O’Brien testified that the victim started moving behind Petitioner, heading back towards the same truck as Venning. App. 87. O’Brien testified that Petitioner said to the victim: “Don’t go out like that. I want my money back.” App. 87. O’Brien testified that as the victim was walking away, Petitioner ask Phillips if “You got your thing on you?” App. 87. Phillips handed the .38 caliber handgun to Petitioner and Petitioner shot three times at the victim. App. 87. O’Brien testified that he saw the victim flinch and asked Petitioner if he had hit him. O’Brien testified Petitioner responded: “No, I missed him. I would’ve had my gun I would have killed him.” App. 88. O’Brien testified that after the group ran away from the scene, he returned to see Phillips shooting at the vehicle where the victim had been shot. App. 92. Antwan Venning testified that when he walked up the victim and Petitioner were arguing about Petitioner being sold bad crack. App. 155. Venning testified that said that they don’t sell bad drugs, took the twenty dollar bill from the victim, and began to walk away. App. 155. Venning testified that Petitioner pushed him and said that he wasn’t going anywhere because he wanted his money back. App. 155. Venning testified that as the victim was about to get in the car he saw Petitioner shoot two rounds at him. App. 156. Venning testified that he did not know how it was that Petitioner came to possess the weapon and he did not see a gun in Petitioner’s hand when he began walking toward the truck. App. 183. William Phillips testified Petitioner got in an argument with the victim,

Phillips gave him his gun, and Petitioner started shooting at the victim. App. 318. Alexander Gaillard testified that he walked to the Amoco that night to get some beer. App. 264. Gaillard testified that he got the beer then sat outside for a while, that was when the victim and Venning arrived. Gaillard testified that he did not want to get in trouble, so he went inside the Amoco. App. 264. Gaillard testified that he heard the shots while he was in the Amoco and ran outside to see Petitioner with a gun in his hand. App. 264. Gaillard testified Phillips took the gun from Petitioner. App. 265. At the evidentiary hearing, Gaillard testified numerous times that he did not actually see Petitioner with a gun. App. 661, 662, 664. Further, Gaillard testified that he did not have a line of sight to the incident location when the incident occurred. App. 666, l. 16-25. Gaillard continued by testifying that he had no idea who shot a gun that night and that he was not in a position to see anyone with a gun. App. 667, l. 2-9.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. *Smalls*, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found that Petitioner failed to establish the information presented at the evidentiary hearing would change the result if a new trial were had where the testimony of Gaillard was not credible, the testimony of other witnesses would still implicate Petitioner if there were to be a new trial, and the substance of Gaillard's testimony was cumulative to other evidence considered by the jury at Petitioner's trial.

Petitioner contends 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. However, the PCR court was within its discretion in finding the testimony of Gaillard to not be credible, the testimony of other witnesses would still implicate Petitioner if there were to be a new trial, and the substance of Gaillard's testimony was cumulative to other evidence considered by the jury at Petitioner's trial.

The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentences in the interest of justice." S.C. Code Ann. §17-27-20(A)(4). If the Applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the Applicant or after the date the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An Applicant requesting a new trial based on after-discovered evidence after a conviction 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) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, “our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.” *State v. Monroe*, 381 S.C. 149, 168, 672 S.E.2d 556, 565 (2009). (citing *Porter*, 269 S.C. at 621, 239 S.E.2d at 643). “When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence.” *State v. Deese*, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing *State v. Fowler*, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)). Moreover, where the ground for a new trial is the recantation of testimony, the closest scrutiny should be applied, as this type of testimony is ordinarily unreliable. *State v. Wright*, 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977). Additionally, inconsistency in statements undermines the possibility that the result of a new trial would be different. *See Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001) (holding the Applicant failed to meet the requirement for a new trial such that the evidence would probably change the result if a new trial were granted when the witnesses upon which the newly discovered evidence was based made prior inconsistent statements and, therefore, was not credible). “The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such

evidence; and his judgment will not be disturbed except for error of law or abuse of discretion.”
State v. Corn, 224 S.C. 74, 77 S.E.2d 354 (1953).

First, the PCR court was within its discretion in finding the testimony of both Alexander Gaillard and Petitioner to not be credible. The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). The PCR court properly applied the case law cited above in finding Gaillard’s testimony to not be credible. Gaillard’s recantation testimony warranted the closest scrutiny and severely undermined the possibility of a different result if a new trial were had due to the drastic inconsistency. Gaillard’s trial testimony was that he witnessed Petitioner with a gun directly after the shooting occurred, now he is stating that he never saw Petitioner with a gun that evening. App. 661, l. 11-662, l. 23. Therefore, the lower court properly performed its gatekeeping role in determining the credibility of witnesses, applying the closest scrutiny to ordinarily unreliable recantation testimony.

Second, even if Gaillard’s recanted testimony was presented at a new trial, the testimony of Steven O’Brien and William Phillips still implicate Petitioner in the shooting of the victim. Thus, the recanted testimony would not probably change the result if a new trial were granted due to the testimony of these other witnesses from Petitioner’s trial. O’Brien and Phillips both testified at trial specifically identifying Petitioner as being the shooter. 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 shot three times at the victim. App. 86, l. 1-87, l. 20. William Phillips testified that he gave Petitioner his gun and saw Petitioner shoot at the victim four times. Phillips corroborated Gaillard’s original testimony with the above statement. Phillips’ testimony further corroborates Gaillards’ original testimony that he, Gaillard, and Simmons approached

Venning's vehicle, Phillips 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. Further, Gaillard's testimony, recanted or otherwise, is relatively inconsequential to the legal responsibility of Petitioner in the murder of the victim. The only significant difference in Gaillard's testimony is whether or not he saw Petitioner with a gun after the shooting had occurred. Gaillard's testimony at the trial and during the evidentiary hearing confirms that he was never a witness to the shooting itself and only bear witness to the events directly after the shooting. Therefore, even if Gaillard were to recant his testimony at a new trial the testimony of both O'Brien and Phillips would still directly implicate Petitioner in the murder. The lower court properly found Petitioner's alleged newly discovered evidence would not change the result if a new trial were granted considering the un-recanted testimony of these witnesses directly implicating Petitioner in the murder.

Third, and finally, the lower court properly found that the recanted testimony would be merely cumulative to testimony or evidence already presented to the jury at Petitioner's trial. Gaillard's recanted testimony during the evidentiary hearing was that he never saw Petitioner with a gun the evening of the incident and he never knew Petitioner to carry a gun. Gaillard further testified the only person he saw with a gun was Phillips. App. 661, l. 11-662, l. 23. App. 264, l. 21-15; App. 667, l. 7-9. In contrast, prior statements of direct witnesses to the incident, O'Brien and Venning, were presented to the jury and brought out that they previously did not put the gun in Petitioner's hands. O'Brien originally stated that he saw Phillips shoot the victim while he was on the ground. Antoine Venning also testified at one point during trial that he did not see Petitioner with a gun. App. 183. Further, Petitioner admits in his Petition that the only thing making the recanted testimony of Gaillard not cumulative to that of O'Brien's testimony is the fact that Gaillard was not under the influence of cocaine base. Being under the influence of cocaine base

has no bearing on the substance of the testimony, which presents cumulative information to the jury on the issue of who possessed the weapon and shot the victim. Therefore, PCR court properly found Gaillard's recanted testimony is cumulative to that presented during trial and would not affect the outcome if a new trial was had.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

BENJAMIN HUNTER LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

By: s/ Benjamin Limbaugh
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

January 13, 2021