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SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Edgefield County
The Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DAMEION E. THOMAS,

APPELLANT.

Appellate Case No. 2019-001794

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred by denying the Appellant's motion for continuance pursuant to Rule 7(b), SCRCrimP, where the Appellant's counsel gave an oath that the testimony of the witness was material to the support of the action or defense of the party moving, that the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony, has made use of due diligence to procure the testimony of the witness; and set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such relief, which denied Appellants constitutional right to confront his accuser.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Is the trial court's denial of Appellant's Rule 7(b), SCRCrimP motion for continuance rendered both moot and absent prejudice by the fact that Appellant's desired witness, Investigator Jimmy Smith, passed away eight days after the conclusion of trial?
- II. Was the trial court within its broad discretion to deny Appellant's motion for continuance pursuant to Rule 7(b), SCRCrimP, where the unavailable investigator witness was the state's witness for which the materiality of his testimony could be provided via other witnesses, where Appellant's argument for continuance was the perceived weakness of this particular witness were he to be cross-examined, and where the supposed testimony of the unavailable witness would ultimately constitute cumulative evidence?

STATEMENT OF THE CASE

Appellant was charged with two counts of murder (2017-GS-19-00063 & 00064). (R. p. 62, lines 5-11). A four day jury trial was held before the Honorable Frank R. Addy, Jr., on October 7, 2019 through October 10, 2019. Appellant was represented at trial by defense attorneys Everett K. Chandler and Benjamin R. Moore. The State was represented by Assistant State Solicitors Sutania Fuller and Robert E. McNair, III. (R. p. 1). At the conclusion of the trial, the jury found Appellant guilty on both charges. (R. p. 239, lines 2-13). Judge Addy sentenced Appellant to life imprisonment for both counts of murder. (R. p. 240, lines 12-18).

This appeal now follows.

STATEMENT OF FACTS

On October 9, 2016, at 6:43pm, the fire department received a call to respond to the Marigold Street home belonging to victim's Charles and Andrea Deas (hereinafter "Buddy" and "Andie", respectively) in Edgefield County. (R. p. 83; p. 67). The home was engulfed in flames. After extinguishing the flames emergency services searched the home and found the badly burned bodies of two dogs and two individuals. (R. p. 63-67). Both victims' bodies were found in the bedroom, where the fire is believed to have begun, given that it's the only room with the floor completely burned out. (R. p. 90-92). Emergency personnel also conducted a search for salvageable personal effects. In doing so the barrel of a .22 caliber gun was located sticking out of the mattress springs. (R. p. 74, lines 18-21; p. 82; p. 218, lines 5-21).

On October 11, 2016, an autopsy was performed on victims' bodies. (R. p. 93, lines 4-6). The autopsy revealed that both victims had been shot from behind in the upper torso and in the head with a .22 caliber firearm. (R. p. 234, line 2 through p. 238, line 10). After learning of victims' murders, Investigator Smith and Officer Harling further searched the burned out home and located

a .22 caliber shell casing. (R. p. 95, line 15 through p. 97, line 24). The following day, October 12, 2016, SLED was assigned to assist the Edgefield County Sheriff's Department with the investigation of the murder. SLED Agent Phillip Turner arrived in Edgefield on October 13, 2016, and began his assistance by reviewing the case with Investigator Smith. (R. p. 130, lines 1-21). Appellant was the victims' live-in roommate, friend, coworker, and possibly the last person to see victims alive. (R. p. 131, lines 1-14). On that basis Agent Turner concluded that Appellant was someone with whom he wished to speak. Investigator Smith, while in the presence of Agent Turner, contacted Appellant and arranged an opportunity to meet with him. Appellant agreed, and both Investigator Smith and Agent Turner met Appellant at a barbershop on Highway 23. (R. p. 130, line 18 through p. 132, line 25).

In their efforts to ask Appellant about what information he may have to assist the investigation, they also asked if they could collect the clothes he had worn that day in order to rule him out as a suspect. (R. p. 133, lines 1-22). Appellant agreed, but inquired as to what they would be looking for in his clothing and Agent Turner explained that they would be testing for gunshot residue (GSR), victims' blood, accelerants, and hydrocarbons. (R. p. 133, lines 1-25). Agent Turner testified that Appellant took a moment to consider this and then proceeded to provide an explanation for why his clothes may contain *each of these substances*. Each explanation came without questioning from the officers, and in fact required questioning by Appellant in order to understand what Agent Turner meant by "accelerants" and "hydrocarbons" before he could provide a respective excuse for each substance. Agent Turner also made sure to clarify that Appellant was insisting that all of these substances could have wound up on the same set of clothing. (R. p. 134, line 15 through p. 135, line 21). Agent Turner testified that Appellant accompanied both he and Investigator Smith to his cousin's home and his cousin's mother's home

in order to provide the officers with his various articles of clothing. Among the clothing collected, Appellant's shoes, long-sleeve t-shirt, and black pants all ultimately tested positive for gunshot residue. (R. p. 219, line 8 through p. 223, line 15). Appellant then went with Agent Turner and Investigator Smith to provide a recorded interview. (R. p. 145, line 8 through p. 147, 12).

The state produced the testimony of Appellant's cousin, Willie Paul Thomas, who provided a timeline of his interactions with Appellant on October 9th and testified at trial that contrary to Appellant's story, he had not burned any trash with Appellant during the time surrounding victims' deaths. (R. p. 190, line 15 through p. 200, line 21; p. 201, lines 2-11). The state also offered the testimony of Appellant's cousin Steven Glover who was with Appellant briefly on the day of the murder. From just ten feet away Mr. Glover overheard Appellant confess to a friend that he "fucked up" and that he "killed two people." (R. p. 208, line 22 through p. 209, line 22).¹

The State also produced the video surveillance footage from the Old Amoco station that shows Appellant driving Andie's Hyundai on the day of the murder and using Buddy's card to purchase cigarettes. Forensics discovered the presence of GSR residue on the steering wheel of the car. (R. p. 160, lines 9-12; p. 223, lines 9-15). In the video, Appellant was wearing black pants and a long sleeve gray t-shirt. (R. p. 183, line 16 through p. 186, line 2). Additional surveillance from Gary Street apartments showed Appellant later wearing a sleeveless shirt, as opposed to a long sleeve shirt, but showed him wearing the same pants. Regarding the topic of blue jeans and the possibility that Appellant changed clothes, Agent Turner testified that Appellant appeared to be wearing the black pants that were provided for testing and that the sleeveless shirt from the Gary

¹ Appellant's characterization of Mr. Steven as a "jailhouse snitch" is inaccurate. Mr. Glover is Appellant's cousin, overheard the confession outside of prison, and was approached by police for questioning after having been sentenced for an unrelated crime. Neither the timing nor the circumstances of his incarceration led to his knowledge of Appellant's crime and his decision to speak with law enforcement officers. (R. p. 205-213).

Street video may have been underneath the long-sleeve shirt from the gas station video. (R. p. 183, line 16 through p. 186, line 5). Based on the video evidence, Agent Turner testified that Investigator Smith's reference to blue jeans appears to simply be a mistake in the report. (R. p. 184, lines 5-12). By defense counsels' own admissions this video tape provided clear footage of the articles of clothing that Appellant was wearing around the time the murder is believed to have occurred. (R. p. 48, lines 3-10). Agent Turner testified that the clothing provided by Appellant was consistent with the video evidence. (R. p. 158, lines 2-22).

STANDARD OF REVIEW

"In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous." *State v. Nelson*, 431 S.C. 287, 847 S.E.2d 480, 489 (Ct. App. 2020), reh'g denied (Sept. 16, 2020) (citing *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). "The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant." *Id.* (quoting *Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006)). "An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

ARGUMENT

- I. The trial court's decision to deny the Rule 7(b) motion for continuance has been rendered moot and without prejudice because the desired witness died shortly after the conclusion of trial and well before any opportunity could have been taken to have him testify at trial on a later date.**

Investigator James "Jimmy" Smith, along with the assistance of other Edgefield County Sheriff's Department officers and SLED agents, conducted the investigation into the murder of Buddy and Andie Deas. The record shows that on October 2, 2019, the court was informed that

Investigator Smith had to be taken to the hospital for a serious medical issue. The State informed the court that they could proceed with their case via the testimony of other officers and witnesses and did not need Investigator Smith to make their case. In response, defense counsel moved for a continuance under Rule 7(b) of the South Carolina Rules of Criminal Procedure. (R. p. 3, lines 3-24). After hearing extensive argument on the motion, Judge Addy denied the motion for continuance and proceeded to trial. (R. p. 3, line 25 through p. 55, line 7). Appellant was convicted on October 10, 2019. (R. p. 239, lines 2-13; p. 1). Unfortunately, Investigator Smith passed away eight (8) days later, on October 18, 2019. His obituary was published in The Edgefield Advertiser on October 22, 2019. David T. Burnett, *James C. "Jimmy" Smith – Trenton, SC*, The Edgefield Advertiser, (Oct. 22, 2019), <https://www.edgefieldadvertiser.com/2019/10/james-c-jimmy-smith-trenton-sc/>.² Investigator Smith's passing renders Appellant's case moot, such that it is no longer a justiciable matter before this Court.

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Id.* (quoting *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). That is precisely the circumstance presented in this appeal. Appellant's desired relief is a reversal of the Appellant's conviction and the ordering of a new trial so that the *alleged* error of the court can be corrected. However, such relief is impossible as the desired witness is deceased. A reversal and order for new trial would not

² Counsel for Respondent checked this online record on October 22, 2020. Counsel also called the 11th Circuit Solicitor's Office on October 22, 2020, to confirm that this was indeed the same Investigator Jimmy Smith involved in Appellant's case.

correct a prejudicial error, it would merely and inappropriately award Appellant with a second trial under the same circumstances in which his first trial was previously conducted.

An appellant asserting an abuse of discretion by the trial court for denying a motion for continuance must demonstrate actual prejudice from the ruling. *State v. Babb*, 299 S.C. 451, 454, 385 S.E.2d 827, 829 (1989); *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). In the same vein of analysis regarding mootness, Investigator Smith's passing so soon after the trial renders it impossible for Appellant to demonstrate the necessary element of prejudice. To wit, even if a continuance had been granted the record shows that Investigator Smith would not have been available due to health complications that required his continued hospitalization and a delay of surgery beyond the week of trial. (R. p. 3, lines 3-19). As his death followed on October 18th, there is definitively no date in which Appellant's trial could have been conducted so as to have Investigator Smith available to testify. In extraordinary and obvious contrast to Appellant's mistaken argument, a continuance granted by Judge Addy *would not* have resulted in the availability of Investigator Smith at a later date. (Brief of Appellant, p. 20). Given that defense counsel conceded to Judge Addy that they had no alternative theories for Appellant's defense, a continuance would have resulted in defense counsel trying the case precisely as they did in October of 2019. (R. p. 46, lines 15-25). As such, no prejudice arises from Judge Addy's decision to deny the continuance.

Investigator Smith's hospitalization and death demonstrate that at no time was he a witness for whom a continuance would have made available at a later date. Thus, Judge Addy's ruling under Rule 7(b) is moot and without prejudice to Appellant. Such circumstances demand that Appellant's conviction be affirmed.

II. The trial court did not err in denying Appellant's 7(b) motion for continuance as the record demonstrates that Appellant's primary argument for continuance was based upon Investigator Smith's perceived weakness on cross-examination and not the factual substance of his testimony, and Investigator Smith was a state's witness who's substantive testimony was provided through other witnesses, rendering Investigator Smith potential testimony cumulative to Appellant's trial.

In the alternative to the mootness of the issue and Appellant's inability to demonstrate prejudice, Appellant has also failed to demonstrate that the trial court abused its discretion in denying the Rule 7(b) motion for continuance. Appellant has failed to demonstrate that the testimony of Investigator Smith is so material to his defense that he cannot proceed safely to trial in his absence. The court correctly found that the substantive testimony available through Investigator Smith could be offered and cross-examined through other witnesses, and as such the defense's strategy of attacking the sufficiency of the investigation could still be accomplished.

Rule 7(b) of the South Carolina Rules of Criminal Procedures sets forth that:

No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Additionally, “[o]ur courts have ‘repeatedly upheld denials of motions for continuances where there is no showing that any other evidence on behalf of the defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial.’”

State v. Nelson, 431 S.C. 287, 847 S.E.2d 480, 489 (Ct. App. 2020), reh'g denied (Sept. 16, 2020)

(quoting *State v. McKennedy*, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002)). The South Carolina Court of Appeals recent decision in *Nelson* further demonstrates that if the desired testimony can be reached through some other witness or source, then the evidence is merely cumulative and therefore failing the element of indispensable materiality under Rule 7(b). *Id.* at 493.

During the discussion of pretrial matters defense counsel made a Rule 7(b) motion to continue the trial to a later date due to the absence of Investigator Jimmy Smith; Investigator Smith had to be admitted to the hospital for a serious medical issue a few days before trial was set to begin. (R. p. 3, lines 3-10). Judge Addy heard arguments on the record from the state and defense counsel during open court. Judge Addy also took the time to have the court reporter record additional *ex parte* arguments in chambers from defense counsel so as to ensure that the defense's trial strategy was fully explained, but not unfairly divulged to the state. During that *ex parte* discussion, defense counsel conceded to Judge Addy the overall strength of the State's case against Appellant and made it known that their only trial strategy was to try and cast doubt upon the quality and sufficiency of the police investigation itself. (R. p. 33, 1-13). The overarching position taken by defense counsel in support of their motion was that they desired the opportunity to cross-examine Investigator Jimmy Smith out of a perceived belief that he would perform poorly on the stand, and thereby heighten the superficial appearance of a substandard investigation. (R. p. 43, line 11 through p. 44, line 8; p. 44, lines 21-24; p. 45, line 25 through p. 46, line 6).

The trial court found that while Appellant was not seeking continuance for delay, and understood defense counsel's arguments to be offered under oath, they had failed to satisfy the materiality requirement necessary under Rule 7(b) to warrant a continuance. The trial court noted that the context of the rule is to ensure a defendant has the opportunity to elicit the substantive testimony of an absolutely essential witness. The trial court gave examples of matters such as alibi

or third-party guilt, and distinguished such a function from Appellant's argument that Investigator Smith is not a good cop and might fumble his cross-examination if they have the opportunity to question him. (R. p. 44, line 21 through p. 45, line 18; p 50, line 25 through p. 51, line 11). In so finding, the trial court found that the subject-matter in question could be addressed through the examination of other witnesses, and therefore failed to satisfy the materiality element under Rule 7(b) of the South Carolina Rules of Criminal Procedure.

The motivation behind Appellant's desire to postpone trial is made apparent in the argument that stipulation to certain facts attributable to Investigator Smith was inadequate. (R. p. 43, lines 8-10). Their rationale was again on display in denying any advantage from demonstrating errors by Investigator Smith *in absentia*, such that he would not be present to provide an explanation. (R. p. 44, lines 14-25; p. 49, line 25 through p. 50, line 1). Appellant's argument therefore is not an under oath testament to the material testimony of what they expect Investigator Smith to say at trial; *they in fact do not know precisely what he will say*. They merely believe that whatever his responses may be, Investigator Smith will perform poorly in comparison to other witnesses who could address the same matters in his absence. Such is not the purpose of Rule 7(b) continuances. See *State v. Nelson*, 431 S.C. 287, 847 S.E.2d 480 (Ct. App. 2020), reh'g denied (Sept. 16, 2020) (finding indispensable materiality to a defendant's witness, who though absent, was the sole witness who provided a prior statement to police that she witnessed Victim seek out combat and shoot first at the defendant, both facts going directly to the trial issues of self-defense and mutual combat and were in no way cumulative to the evidence otherwise available).

Appellant has pointed to comments made by Investigator Smith in his report or matters for which they desired to cross-examine Investigator Smith:

- Investigator Smith's reference to Appellant wearing blue jeans; (R. p. 33, line 17)

through p. 34, line 3).

- Investigator Smith's reference to Appellant having changed clothes; (R. p. 34, lines 4-15).
- The testing of other articles of clothing well after the pants tested positive for GSR; (R. p. 35, line 4-15).
- Cross examination for the lack of an arson expert; (R. p. 36, lines 2-7).
- Why law enforcement waited to seek a warrant for Appellant's arrest until after the GSR results on his pants came back positive; (R. p. 36, lines 18 through p. 37, line 1).
- Kayleigh Lewis was mentioned in Investigator Smith's notes, but her interview summary comes in late, and she appears to Appellant to be a "too good to be true" witness; (R. p. 38, line 10 through p. 39, line 1).
- A likely typo regarding the time of day in the report: 6:15 or 16:15; (R. p. 42, lines 8-17).
- A missing photo, though Appellant conceded SLED was already involved when it was taken; (R. p. 41, lines 7-18).
- Appellant's consistency and cooperativeness; (R. p. 42, line 20 through p. 43, line 7).
- The perceived difference between Mr. Glover's witness summary and Investigator Smith's notes. (R. p. 24, 16-25; p. 49).

Investigator Smith's initial phone call to Appellant on October 11th is the only topic that cannot be directly attested to by Agent Turner or other witnesses, but the defense makes clear that the purpose for addressing that interview was to demonstrate cooperation with police and alleged consistency in Appellant's explanations. The substance of the interview is captured by the subsequent extensive recorded interview on October 13th, and the cooperation and consistency was

otherwise demonstrated in Appellant's agreement to meet with officers, his decision to voluntarily provide his clothing, and his decision to voluntarily provide the far more extensive recorded interview on October 13th. As such, the initial phone call is cumulative to the evidence presented at trial. Each of Appellant's alleged topics concerning Investigator Smith is either immaterial, clearly addressed by the evidence presented, cumulative, available to the defense to examine through other witnesses, or all of the above. (See for example: R. p. 173; 184; 224-233; 179-182; 280-281; 296-310; 57-61; 49).

State v. Nelson demonstrates both the purpose and application of Rule 7(b). The Rule exists to ensure that a defendant is able to present testimony to material matters that is simply unavailable from any other source due to the absence of a witness, and that such testimony is so essential it cannot be said to have provided the defendant a fair trial in its absence. *Id.* at 494. The hopeful weakness of one officer over another during cross-examination on the same subject matter does not satisfy Rule 7(b).

There is a staggering difference between the function of Rule 7(b), as is demonstrated in *Nelson*, and the applicable facts of this case. All of Appellant's claims offer minimal value to the defense and are easily addressed through other witnesses. As the solicitor points out at trial, their ability to fully present the state's case without Investigator Smith demonstrates his lack of materiality to the case, and the fact that the state does not have an obligation to put him on the stand at all. To the same end, this fact negates any argument that Appellant has been denied his right to confront his accusers. The evidence presented was properly authenticated and admitted by way of Agent Turner and the other witnesses against Appellant, and Appellant had the opportunity to confront each of those witnesses and the evidence against him. As such, there is no basis for a violation of Appellant's rights under the Confrontation Clause. See *Crawford v. Washington*, 541

U.S. 36, 50-51, 124 S. Ct. 1354, 1363-64, 158 L. Ed. 2d 177 (2004) (noting that the text of the Confrontation Clause reflects a focus upon witnesses who bear testimony against the accused and that the principle evil was to prevent the use of *ex parte* examinations of evidence against the accused. The state's ability to present evidence through other witnesses, *and not Investigator Smith*, removes Investigator Smith from the rights contemplated of the Confrontation Clause. Appellant's opportunity to cross the state's witnesses more than satisfied his Constitutional rights under the Sixth Amendment. U.S. Const. amend. VI.

The trial court was correct in concluding that the topics raised by Appellant were all able to be addressed by the cross-examination of other witnesses at trial. Though *Nelson* had not yet been decided, the trial court's decision and analysis was in lockstep agreement with the Court of Appeals as to the meaning of materiality under Rule 7(b) and the restraint needed from granting a continuance on the absence of testimony that would ultimately constitute cumulative evidence at trial. (R. p. 50-54). Appellant has failed to demonstrate an abuse of discretion by the trial court and his conviction and sentence should therefore be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

(Signature on following page)

Respectfully submitted,

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**STATE OF SOUTH CAROLINA
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The Honorable Frank R. Addy, Circuit Court Judge

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v.

DAMEION E. THOMAS,

APPELLANT.

Appellate Case No. 2019-001794

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 5th day of March, 2021.

s/ W. Joseph Maye
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