STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
Jul 26 2021
S.C. SUPREME COURT

Certiorari to Court of Appeals
Larry Hyman, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

JODY L. WARD,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

Appellate Case No. 2021-000702

Tristan M. Shaffer (SC Bar # 77565)
P.O. Box 1027
Chapin, SC 29036
Phone: (803) 626-0188
tristan@shafferlawsc.com

ATTORNEY FOR PETITIONER

I N D E X

INDEX.. 1

ISSUE PRESENTED 2

STATEMENT OF THE CASE... 3

ARGUMENT 7

CONCLUSION 11

ISSUE PRESENTED

I. Does the "reasonable diligence" standard of Rule 29(b), SCRCrimP, require criminal defendants and their attorneys to do genealogical research on potential jurors to ensure they are not related to witnesses, and if not, did the Court of Appeals err in affirming the summary dismissal of Petitioner's Motion for a New Trial based on after discovered evidence?

STATEMENT OF THE CASE

Petitioner was indicted by the Georgetown County Grand Jury for two counts of Murder arising from the shooting deaths of Wilford Brown and Elton Rutledge. On March 15, 2004, Petitioner was called to trial before the Honorable Paula Thomas and a jury. ROA 2. Petitioner was represented by Margaret Ann Kneece and J. Wesley Locklair. ROA 2. The State was represented by J. Gregory Hembree and Robert Bryan. ROA 2.

At the conclusion of the trial, Petitioner was found guilty of both counts of murder. ROA 150. Petitioner was sentenced life imprisonment. ROA 159.

Petitioner appealed his conviction. For the Appeal, Petitioner was represented by Robert M. Dudek. Appellate counsel filed an *Anders*[1] brief. ROA 160-170. Petitioner filed a *pro se Anders* response on September 13, 2005. ROA 234-298. On January 26, 2007, the Court of Appeals dismissed the direct appeal. ROA 425.

On April 14, 2007, Petitioner filed a *pro se* Petition for Writ of Certiorari with this Court. ROA 299-313. Petitioner then moved to withdraw the Petition for Writ of Certiorari. ROA 314. The Petition for Writ of Certiorari was dismissed on July 5, 2007. ROA 315. Remittitur was sent on July 6, 2007. ROA 317.

On July 11, 2007, Petitioner filed an Application for Post-Conviction Relief ROA 171-177. The State filed its return on October 5, 2007. ROA 183-185. An evidentiary hearing was convened on May 1, 2008 before the Honorable Steven John. ROA 186. At the hearing, Petitioner was represented by Bobby Frederick and the State was represented by Christina J. Catoe. Petitioner's Application for Post-Conviction Relief was dismissed on May 15, 2008. ROA 186.

---

[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Petitioner appealed the denial of the Application for Post-Conviction Relief. For this appeal, Petitioner was represented by Robert Pachak. ROA 318. The Petition for Writ of Certiorari was denied on August 20, 2009. ROA 330.

On July 13, 2009, Petitioner filed a subsequent *pro se* Application for Post-Conviction Relief. ROA 331. This application, for case number 2009-CP-22-1074, for PCR was dismissed on December 30, 2009 by the Honorable Benjamin Culbertson. ROA 341. Petitioner appealed the denial of this application for PCR; however, that appeal was dismissed on March 15, 2010. ROA 357. Remittitur was sent on March 31, 2010. ROA 358.

On May 4, 2010, Petitioner filed another pro se Application for Post-Conviction Relief. ROA 347. On July 10, 2010, this PCR application, 2010-CP-22-733, was dismissed. ROA 355. Petitioner appealed the denial of this application for PCR; however, certiorari wad denied on August 18, 2011. ROA 357. Remittitur was sent on September 7, 2011. ROA 358.

On October 25, 2011, Petitioner filed a Petition for Writ of Habeas Corpus in this Court's original jurisdiction. ROA 359-384. This Petition was denied on November 16, 2011. ROA 385.

On December 1, 2011, Petitioner filed a Petition for Writ of Habeas Corpus in South Carolina District Court. ROA 202. This action was dismissed on March 20, 2013. ROA 386-424.

On May 16, 2012, Petitioner filed a *pro se* Motion for a New Trial Based on After Discovered Evidence. ROA 439-450. On July 31, 2012, this motion was denied by the Honorable Benjamin Culbertson. ROA 451-452.

Petitioner Filed a *pro se* Notice of Appeal. On September 22, 2014, Natasha Hanna filed a Notice of Appearance on the Appeal for the limited purpose of filing a Motion to Suspend the Appeal and For Leave to File a Motion for a New Trial Based on After Discovered Evidence. ROA 453-461. In an Order dated October 8, 2014, the Court of Appeals denied the Petitioners Motion to

Suspend Appeal and For Leave to File Motion for a New Trial Based on After Discovered Evidence noting the following:

> We Note that pursuant to Rule 205, SCACR, "Nothing in these Rules shall prohibit the lower court…from proceeding with matters not affected by the appeal."

ROA 462-463. On November 12, 2014, the Court of Appeals affirmed the ruling on 2012 Motion for a New Trial Based on After Discovered Evidence. ROA 464.

On October 30, 2014, Petitioner, through his attorney Natasha Hanna, filed a Motion for a New Trial Based on After Discovered Evidence. ROA 467-470. On September 11, 2015, the Honorable Benjamin Culbertson filed a Form 4 Order denying Petitioner's Motion for a New Trial Based on After Discovered Evidence. ROA 471. On September 22, 2015, Ms. Hanna e-mailed Judge Culbertson, asking for a hearing. Supp. ROA 42-43.

A hearing was scheduled for December 10, 2015 before the Honorable Steven John. ROA 473. At the hearing, Ms. Hanna was relieved. The Court ordered that Petitioner be evaluated for competence to represent himself. ROA 490-497.

On September 8, 2017, Respondent filed a Motion to Dismiss [Petitioner's] Motion for a New Trial Based on After Discovered Evidence. ROA 542-544. Petitioner, through counsel, submitted a Memorandum in Support of Defendant's Motion for a New Trial Based on After Discovered Evidence. Supp. ROA 21-68.

A Hearing was convened on October 2, 2017 before the Honorable Larry B. Hyman. ROA 498. Prior to the hearing, Petitioner had requested to proceed *pro se*. however, at the hearing Petitioner indicated that he wanted an attorney and the Court did not order him to proceed *pro se*. ROA 507, l. 15—511, l. 20.

After the hearing, the Court allowed briefing on the State's motion. Supp. ROA 21-68. Petitioner also renewed his motion to allow Mr. Ward to proceed *pro se*.

In an order clocked on December 7, 2017, the circuit court granted the State's Motion to Dismiss and denied the motion to proceed *pro se*. ROA 561.

On May 19, 2021, the Court of Appeals affirmed the circuit court. *State v. Ward*, (2-121-UP-184). A Petition for rehearing was filed on June 1, 2021. The Petition for Rehearing was denied on June 4, 2021. This Petition follows.

ARGUMENT

I. The reasonable diligence standard of Rule 29(b), SCRCrimP, does not require trial counsel to do genealogical research on potential jurors to ensure they are not related to witnesses, and therefore, the Court of Appeals erred in affirming the summary dismissal of Petitioner's Motion for a New Trial based on after discovered evidence.

Relevant Facts

During the Petitioner's trial, the State alleged that Petitioner shot Wilford Brown and Elton Rutledge in "a drug deal gone bad." ROA 98, l. 22—99, l. 7. The State argued that on August 2, 2002, Defendant borrowed his wife's Suzuki and meet up with Brown and Rutledge. The State alleged that Defendant then killed Brown and Rutledge with a 9mm handgun and buried their bodies. The State also alleged that Petitioner dumped the Suzuki in Dawhoo Lake in Georgetown County to destroy evidence of the shooting. ROA 98, l. 22—130, l. 8.

Kevin Cooper was a key witness for the State against Petitioner. ROA 83, l. 20—96, l. 27. Mr. Cooper claimed to have seen Petitioner with one of the decedents prior to the shooting. ROA 90, ll. 7-15. Mr. Cooper allegedly overheard a conversation were Petitioner was mad that he lost money. ROA 90, l. 16—91, l. 3. Mr. Cooper testified that Petitioner asked him to go buy 9mm bullets. ROA 91, ll. 3-20. This testimony ultimately would fit into the State's theory that Mr. Ward shot the decedents with a 9mm because they owed him money. ROA 97, l. 22—130, l. 8.

On October 30, 2014, Petitioner, through his then attorney Natasha Hanna, filed a motion for a new trial based on after discovered evidence alleging the juror misconduct. In the motion, Petitioner alleged that Marissa Cooper, Juror 19, failed to disclose a relationship State's witness Kevin Cooper. Supp. ROA 1-20. Juror 19 was asked along with the other jurors, whether she was related by blood or marriage to any of the potential witnesses. ROA 48, l. 1—50, l. 15. At no point did Juror 19 respond to that she was related to Kevin Cooper. ROA 50, l. 15. However,

Petitioner submitted an affidavit which supported his position that Juror 19 was related to Kevin Cooper. Supp. ROA 63-64. Petitioner alleged Juror 19 intentionally concealed this information. Supp. ROA 3.

On September 8, 2017, the State filed a motion to summarily dismiss, Defendant's motion for a new trial based on after discovered evidence. In that motion, the State argued that Petitioner's 2014 motion was filed in violation of Rule 29(b), SCRCrimP because Petitioner had an appeal pending on a different Motion for a New Trial Based on After Discovered Evidence. The State also argued that "the information cited by [Petitioner] was known to [Petitioner] and counsel or could have been ascertained by the exercise of reasonable diligence prior to and at the time of trial in 2004…" ROA 543.

On October 2, 2017, hearing was convened before circuit court. The State argued that the relationship between Juror 19 and Mr. Cooper could have been known by Petitioner at the time of trial. ROA 519, l. 13—520, l. 19. However, the State also took the position that Juror 19 and Mr. Cooper's relationship was so distant as not to arise to the level of juror misconduct. ROA 520, l. 20—521, l. 8.

In it order granting summary dismissal, the circuit court found the following:

> The Claim before the Court must be reviewed under the standard set forth in *State v. Spann*, 334 S.C. 618 (1999)…The Court finds the information cited by the [Petitioner] in the current motion, even if true, is not material evidence as to [Petitioner's] guilt or innocence and would not change the result if a new trial were granted.

ROA 563. The circuit court also found that Petitioner could have ascertained the relationship based on the exercise of reasonable diligence. The circuit granted State's motion to summarily[2]

[2] Although in the order the circuit court writes "[A]s to the merits of the [Petitioner's] motion…" Petitioner was not allowed to call witnesses to address the merits of his motion. ROA 511, l. 21—512, l. 8. Therefore, this matter was summarily dismissed.

dismiss Petitioner's Motion for a New Trial Based on After Discovered Evidence.

The Circuit Court's finding that "reasonable diligence" would have lead Petitioner to discover that juror Cooper and witness Cooper were related due to the fact that their last name is Cooper is an abuse of discretion.

The Circuit Court found that Petitioner could have discovered this relationship between Juror Cooper and Witness Cooper at the time of the trial through "reasonable diligence." The Court of Appeals found the following:

> The State provided Ward with a list of potential witnesses during voir dire in March 2004. At that time, the relationship between the juror and the witness could have been ascertained by the exercise of reasonable diligence.

State v. Ward, (2021-UP-184).

The standard of reasonable diligence requires a person to act after they are put on notice that they should act. *See Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) ("A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist.").

A juror and a witness both having the last name "Cooper"[3] is not sufficient to put Petitioner on notice that the two were related. To require defendants and defense counsel to do genealogical research on prospective jurors and witnesses is far greater than what should be considered reasonable diligence. *Cf. Cannedy v. Adams*, 706 F.3d 1148, 1169 (9th Cir. 2013) ("A lawyer cannot be deemed to have rendered ineffective assistance for failing to discover a witness who whose identity, location, or observations he does not know anything about. Lawyers are not

---

[3] According to the 2010 United States Census there are 280,791 Coopers in the country. Cooper is the 70th most common surname in the United States. See *Frequently Occurring Surnames from the 2010 Census* United States Census Bureau (available at https://www.census.gov/topics/population/genealogy/data/2010_surnames.html).

omniscient.”).

Essentially the Circuit Court and the Court of Appeals put forth an impossible standard for criminal defendants and their attorneys. Defendants are expected to search every witness family history for potential jurors with the same last names. This Court should grant certiorari to correct this unreasonable ruling.

The Circuit Court abused its discretion in summarily dismissing Petitioner’s Rule 29(B) motion because it was not filed as a PCR case.

This Court has found that juror misconduct is not based on the factors listed in *Spann*[4] but rather “is governed by a separate standard.” *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627, (2013). “[A] new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.” *Id*. “[E]valuating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing.” *Id*., 401 S.C. at 371, 737 S.E.2d at 628.

The circuit court applied the wrong standard in assessing whether to summarily dismiss Petitioner’s 2014 motion for a new trial. In its order of dismiss the circuit court found the following:

> Had a juror misconduct claim been captioned as yet another PCR application, the Supreme Court’s more recent holding in *McCoy v. State*, 401 S.C. 363 (2013) may have applied and an evidentiary hearing on the claim applying the analysis set forth in *State v. Woods*, 345 S.C. 583 (2001) possible. However, that is of no import in the present matter.

ROA 562-563. However, *Woods* was properly brought in a motion for a new trial. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). Additionally, there are other cases where this issue was raised in a motion for a new trial. *See e.g. State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (1991); *State v.*

Sparkman, 358 S.C. 491, 596 S.E.2d 375 (2004). This ruling is an abuse of discretion because it was based on an error of law.

The Circuit Court abused its discretion in summarily finding that Petitioner was not prejudiced by the juror misconduct without a hearing on the matter.

The circuit court erred in summarily ruling that even if Juror 19 was related to Kevin Cooper it "would not change the result if a new trial were granted." ROA 563. To the extent a harmless error analysis is proper in a case of juror misconduct, the harmless error analysis should only be made after a hearing. *See Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 451-452 (1954) ("We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.") Therefore, the circuit court erred by holding that Petitioner was not entitled to a hearing on his motion because he had not filed it as a PCR action.

Therefore, the circuit court erred in summarily dismissing Petitioner's motion for a new trial and this matter should be remanded for an evidentiary hearing.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Court grant certiorari and remand the case for a hearing on the Motion for a New Trial Based on After Discovered Evidence.

Respectfully submitted,

s/ Tristan M. Shaffer

Tristan M. Shaffer (SC Bar # 77565)
P.O. Box 1027
Chapin, SC 29036
Phone: (803) 626-0188
tristan@shafferlawsc.com
ATTORNEY FOR PETITIONER

---

[4] *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999).