RECEIVED
Sep 07 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Appellant.

Appellate Case No. 2017-002011

RETURN TO PETITION FOR REHEARING

Appellant, Jason Franklin Carver, filed a petition for rehearing on August 16, 2021, and an addendum to the petition on August 23, 2021. This Court has called for a response. Carver argues that the July 21, 2021 *per curiam* opinion that affirmed his conviction for murder reflects error in that this Court apparently "overlooked or misapprehended his arguments and evidence" on each of the 7 points decided.[1] (Petition, p. 1). Carver also suggest rehearing *en banc.* (Petition, p. 33). Respondent submits there is no error in this Court's opinion, and the murder conviction was properly affirmed.

1. The Court resolved that Judge McIntosh did not abuse his discretion in denying the motion for a new trial based on after-discovered evidence. Despite Carver's assertions, the evidence he offered simply did not support the necessity of a new trial. A party requesting a new

[1] This Court divided the separate arguments otherwise combined in Appellant's original four issues presented. (See generally FBOA, p. 1).

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,* 273 S.C. 325, 329 256 S.E.2d 737, 738-39 (1979). In particular, this Court found that the evidence offered was "not material and is merely cumulative to the evidence presented at trial…." (Opinion, p. 2). The facts of record, the relevant case law and the Rules of Appellate Procedure all support this Court's resolution.

In briefing to this Court, Carver pointed to various examples of perceived inconsistent *testimony* offered by co-conspirator Woodrow Curry. He again, in the petition for rehearing complains of the Curry testimony. (See Petition, pp. 12-18). At the most, Curry's testimony at Gambrell's trial is merely cumulative or impeaching. *See Caskey*, 273 S.C. at 330, 256 S.E.2d at 739 (denying new trial after finding "the alleged after-discovered evidence was at most merely impeaching of [witness's] credibility and not material to appellant's guilt or innocence."). Further, the hearsay testimony concerning statements made by the victim's neighbors regarding overhearing mention of "dirt bike" held no exculpatory value – the victim had gone to Gambrell's home to sell a dirt bike on the day of the murder so that the mention of "dirt bike" during the altercation is unsurprising and does not change the circumstances of the murder. *Caskey*, 273 S.C. at 329, 256 S.E.2d at 739 (holding that evidence sufficient to grant a new trial must be such as would probably change the result if a new trial was had). Further, evidence of victim's aggressive tendencies was explored at trial. (See R. p. 502, l. 20 – p. 504, l. 3; p. 511, l. 19 - p. 512, l. 9; p. 536, l. 2 – p. 539, l. 6; p. 713, l. 17 – p. 715, l. 10). Respondent notes Carver's argument to this Court that "Curry has offered too many conflicting and illogical statements for his testimonial

evidence to [be] considered reliable" and suggest this Court not rely on "incredible" testimony. (Petition, p. 17). However, this Court does not pass on the credibility, that is for the jury (at trial) or the judge (in the motion for a new trial). The relevant question is whether the trial court erred as a matter of law in denying the motion for a new trial. In short, there is no indication that Judge McIntosh erred. Carver has not demonstrated that any evidence that was not cumulative and/or simply impeaching was offered. Applying *Caskey*, it is clear that the lower court was well within is discretion in denying his new trial motion as the evidence failed to satisfy the necessary elements. *See generally State v. Wells*, 249 S.C. 249, 263, 153 S.E.2d 904 (1967) ("The trial judge has the power to weigh the credibility of newly discovered evidence offered in support of a motion for a new trial.").

To the extent Carver complains this Court did not more fully explain its decision, (see Petition, p. 12), there is no error in the Court's disposition. *See generally* Rule 220, SCACR. Further, each party carefully presented their positions in lengthy briefing. (See FBOA consisting of 49 pages; FBOR consisting of 48 pages). Carver has failed to show a misapprehended fact or error of law.

2. Though it is not clear that Carver contends the Court erred on this point directly, (see Petition, p. 18, and p. 26 "same argument applies with delay in sentencing of Curry"), the Court resolved that Judge McIntosh did not abuse his discretion in denying the motion for a new trial. Despite Carver's assertions, the evidence he offered simply did not support the necessity of a new trial. Again, the facts of record, and the relevant case law support this Court's resolution. As the Court correctly resolved, the record shows merely allowable prosecutorial discretion in bring charges against co-defendants. (Opinion, p. 2). Carver was indicted by the Anderson County Grand Jury for murder. (*See* R. p. 442, l. 23 – p. 443, l. 2). He elected to go through trial, as was his

right, and a jury of his peers found that the evidence presented at trial supported a conviction of murder under a "hand of one, hand of all," accomplice liability. The State acted within its broad discretion in charging Carver with murder and allowing an accomplice to plead to manslaughter. *See State v. Harry*, 420 S.C. 290, 297, 803 S.E.2d 272, 276 (2017 (affirming a petitioner's murder conviction under "hand of one, hand of all" theory of accomplice liability, despite the fact that codefendant shot the victim and later pled guilty to voluntary manslaughter). But those charging decisions and plea decisions – particularly within the province of the prosecution – did not deny Carver the right to a fair trial. Further, the deferral of sentencing for the co-defendant did not support or warrant the granting of a new trial. *State v. Wright*, 269 S.C. 414, 416, 237 S.E.2d 764, 766 (1977) ("An unsentenced codefendant is a competent witness for the State" and resolving "it is exceedingly clear to us that appellant has failed to demonstrate a denial of his Due Process rights in the court's allowance of … testimony before sentencing").

As to the recording of an investigative interview, the recording was not only turned over, but the trial court also adjourned early and allowed the defense additional time to review same. (*See* R. p. 465, l. 22 – p. 466, l. 1). "Rule 5(d)(2),2 as does its federal counterpart, FED.R.CRIM.P. 16(d)(2), gives the court a broad discretion in deciding what should be done where material that should have been produced in response to an earlier request does not become known until during or just before the trial." *State v. Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991). Consequently, the Judge McIntosh did not abuse his discretion in denying the motion as Carver was not denied a fair trial. The facts of record and relevant case law support the Court's resolution of this issue.

3. Next, the Court resolved that Judge McIntosh did not abuse his discretion in denying the motion for a directed verdict. (Opinion, p. 3). Carver argued a lack of evidence

establishing his presence at the scene for participation in a prearranged plan; however, evidence was presented to show that they did in fact act in concert. The State presented the testimony of codefendant Woodrow Curry to link Carver to the criminal scheme to rob and/or kidnap Steven Cameron. Furthermore, during Gambrell's interview with Law Enforcement, he specified that he told Curry and Carver to go let Cameron know that they were aware he had stolen the drugs and that he needed to pay. (R. 3: James-Milton-Gambrell-Second Interview- DVD: 12:30-16:40; 1 8:20-19:1 0.) Carver's complaints rest more in recasting the evidence in a light favorable to him, (see Petition, pp. 18-24), but that is not the standard for ruling on the motion. *See State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) ("[O]ur duty is not to weigh the plausibility of the parties' competing explanations."). The facts of record and relevant case law support the Court's resolution of this issue.

4. Likewise the Court did not err in rejecting Carver's due process argument based on a failure to allow a codefendant, Gambrell, to be called as a witness. Gambrell's defense counsel then testified that he anticipated that his client would invoke his Fifth Amendment Right. (R. p. 597, l. 22 – p. 598, l. 13). During *in camera* proceedings, Gambrell answered several preliminary questions, but eventually elected to exercise his Fifth Amendment Right. (R. p. 609, ll. 1-9). The trial court then released Gambrell. (R. p. 609, ll. 10-12). Through Carver requested that the trial court require Gambrell to invoke the Fifth Amendment on the stand in front of the jury, the trial judge denied that request. (R. p. 707, ll. 2-5; p. 708, ll. 10-12). As this Court resolved, *State v. Hughes,* 328 S.C. 146, 493 S.E.2d 821 (1997), is on point and controlling. (See Opinion, p. 4).

In *Hughes*, the Supreme Court of South Carolina held a witness may not be called solely for the sake of invoking his or her Fifth Amendment privilege against self-incrimination. *Id*. at 152–53, 493 S.E.2d at 824. Further, it is recognized that "[t]he right to present a defense is not

unlimited, but must bow to accommodate other legitimate interests in the criminal trial process." *State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). "Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." *State v. Lyles*, 379 S.C. 328, 343, 665 S.E.2d 201, 208 (Ct. App. 2009) (citing *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594). The facts of record and the established case law support the Court's resolution of this issue.

5. The facts of record and the established case law also support the Court's conclusion that Judge McIntosh did not abuse his discretion in denying the continuance motion. (Opinion, p. 4). As noted, the grant of such motions is an exceedingly rare event. *Id, citing State v. Colden*, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007) (whether to grant a motion for continuance is in the discretion of the trial judge: "Reversals for the denial of a continuance 'are about as rare as the proverbial hens' teeth.' ") (quoting *State v. McMillian,* 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). In briefing to this Court, Carver presented argument only on the co-defendant Grambrell's nephew, Quay Gambrell, not being available. (See FBOA, pp. 45-46). This Court appropriately limited the issue to the argument presented. (See Opinion, p. 4 n. 1). Carver's position fails, however, because he could show no new or novel points would have been raised had Carver been permitted time to locate witness. Defense Counsel's statements to the court indicated that Quay's testimony was merely cumulative to evidence already admitted. (*See* R. p. 708, l. 24 – p. 710, l. 15). Details concerning the victim's sale of the dirt bike to Quay Gambrell was before the trial court. (*See* R. p. 545, ll. 2-15; p. 562, l. 16 – 563, l. 13; p. 579, ll. 11-16; p. 600, l. 18 – p. 601, l. 16; p. 633, l. 15 – 638, l. 10; p. 644, ll. 10-16; R. 3: James-Milton-Gambrell-Second Interview-DVD).

"Where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996). Again, the facts of record and the established case law support the Court's resolution of this issue.

6. Similarly, the Court did not err in affirming the trial court's decision on the denial of Carver's request to recall a witness. (Opinion, p. 5). The Court limited the issue to Carver's argument as to one of the detective as that was the scope of the argument in Carver's brief. (Opinion, p. 5 n. 2). (*See also* FBOA, p. 46). Again, this is a discretion ruling. *See State v. Sullivan*, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981); see also Rule 611(d), SCRE ("After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court.").

7. Petitioner also complains that the Court did not reach certain errors because they errors were not preserved for appellate review. (See Petition, pp. 31-33; *see also* Opinion, p. 5). Carver argues that presentation of these issues were either "shut down by the trial judge," (Petition, p. 32, as to challenge to charges, or raised in the motion for new trial, (Petition, pp. 32-33). It is well within the province of this Court to determine if the issue were sufficiently raised and presented as to render the issue available for review on the merits. Additionally, the application of such rules actually promotes rather than detracts from reliability and fairness: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured." *State v. Torrence,* 305 S.C. 45, 66–67, 406 S.E.2d 315, 327 (1991). *See also Lambrix v. Singletary*, 520 U.S. 518, 525

(1997) ("A State's procedural rules are of vital importance to the orderly administration of its criminal courts…"). If an issue is not adequately raised, the appellate courts should find that the issue is not procedurally available for review on the merits. *See Kennedy v. S.C. Retirement Sys.,* 349 S.C. 531, 532–33, 564 S.E.2d 322, 323 (2001) (" 'Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.' " (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina 55 (1999))).* Carver shows no error in the Court's resolving that these issues were procedurally unavailable for merits review.

CONCLUSION

For all the above reasons, and those more fully argued and presented in the Final Brief of Respondent,[2] Carver has not shown an error in this Court's opinion. Consequently, rehearing is not warranted, and the petition should be denied

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

[2] Undersigned counsel for Respondent acknowledges that the initial brief of respondent in this matter was authored by, and submitted by, former Assistant Attorney General Samuel M. Bailey. Because Mr. Bailey is no longer with the Office, he does not appear in the listing of counsel. Even so, his work remains a fact in this case. As such, in making this response, undersigned counsel acknowledges to this Court that she has copied and relied on portions of the work submitted by Mr. Bailey for consistency within the appeal.

s/Melody J. Brown

BY:_____

MELODY J. BROWN
S.C. Bar 14244

September 7, 2021
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

RECEIVED
Sep 07 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JASON FRANKLIN CARVER,

Appellant.

Appellate Case No. 2017-002011

CERTIFICATE OF SERVICE

I, Melody J. Brown hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Certificate of Service has been forwarded to Appellant's counsel, Donald L. Smith, Esquire via email today, September 7, 2021 at attorneydonaldsmith@gmail.com.

I further certify that all parties required by Rule to be served have been served.

This 7th day of September, 2021.

s/ Melody J. Brown

Melody J. Brown
Senior Assistant Deputy Attorney General