

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
General Sessions Court
DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED
Oct 18 2021

SC Court of Appeals

Case No. 2017-GS-40-07158
Case No. 2017-GS-40-07162
Case No. 2017-GS-40-07165
Case No. 2017-GS-40-07166
Appellate Case No. 2019-001981

The State,

Respondent,

v.

Charles Barham,

Appellant.

MOTION TO SUSPEND APPEAL AND GRANT LEAVE
TO FILE A RULE 29(B) MOTION FOR A NEW TRIAL

Appellant, Charles Brandon Barham, respectfully moves this Court for an order suspending the appeal in the above-referenced matter and granting leave to file a Motion for a New Trial based upon after-discovered evidence, pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure.

Appellant was indicted by the Richland County grand jury on charges of murder,

first-degree burglary, common-law conspiracy, and possession of a weapon during the commission of a violent crime. He was tried before a jury on August 26-30, 2019, in the Richland County General Sessions Court, with Judge DeAndrea G. Benjamin presiding. The jury returned a verdict of guilty with respect to all four charges.

Following the trial, the defense moved for a new trial based on alleged error committed by the court in the admission of certain evidence. The state filed a written response to this motion. The court heard and denied this motion on October 14, 2019.

At a sentencing hearing held November 18, 2019, Judge Benjamin sentenced Appellant to concurrent terms of 40 years for the murder and burglary convictions and five years for the conspiracy and weapon convictions. The defense moved for reconsideration of the court's sentence, and the court denied this motion by order dated May 26, 2020.

The case is now on appeal in this Court. The initial briefs have been filed, and the Record on Appeal is due to be served October 27, 2021.

FACTS

These charges arose from the shooting death of Charles Kusko in his home on the night of September 5-6, 2015, by Floyd Owen. Owen and Charles¹ were former lovers who had briefly lived together and who had remained friends after breaking up. They partied and did drugs together. In the early hours of September 6, the Sunday of Labor Day weekend, Owen broke into Charles's residence at 1710 Budon Court, Columbia, South Carolina. Owen went to Charles's bedroom and shot him twice in the head while he was sleeping.

¹ Charles Kusko and other members of his family are referred to in this motion by their first rather than last names, for clarity as to the identities of the various individuals involved in the events that were the subject of the trial testimony.

Owen admitted he committed these offenses. Charles's murder was discovered on Tuesday, September 8, after James Jones went to Charles's home to check on him. Jones observed a broken window and smelled an odor, and he called 911 because things did not seem right. Law enforcement officers arrived, entered the house, and found Charles's body.

Owen admitted he had a motive. Charles was threatening to report Owen to the Department of Social Services, thereby jeopardizing Owen's contact with his children. Owen was interviewed by Columbia police investigators the day after the body was found, September 9, and he lied and denied he had committed the crimes. He was questioned by the police again in 2017 after he was arrested for an unrelated armed robbery and gun charge, and he continued to lie to them and denied committing these crimes. He finally admitted to the break-in and murder in his third statement to the police, but even then he gave an account that was not consistent with his trial testimony.

Owen claimed Appellant provided the gun he used and drove Owen to Charles's home for the purpose of killing him, waited nearby as lookout while Owen went in, and drove Owen away after the shooting was over. Appellant denied any involvement in the events at Budon Court that night.

A week before Appellant's trial, Owen pleaded guilty to murder, burglary, conspiracy, and possession of a firearm in connection with the break-in of the residence and the murder of Charles, but he had not yet been sentenced. He was facing varying amounts of prison time for the offenses, including a potential life sentence. He was also facing additional time for the unrelated armed robbery and firearm charges. He had not been sentenced on these charges following his plea, pending his testifying in this trial against

Appellant, and he was hoping for more favorable treatment based on his cooperation and testimony against Appellant.

The defense suggested Owen implicated Appellant to protect his girlfriend, Jessica James. That contention was supported by evidence that the police had begun questioning James in 2017 and had threatened her with incarceration. When Owen ultimately gave a statement to police in 2017 confessing to the murder and implicating Appellant as well, he repeatedly asked law enforcement to keep James out of it.

The defense also suggested that Charles's brother, Andrew Kusko, fabricated information against Appellant to divert attention from himself. Charles and Andrew were brothers of Appellant's mother, Karin Jean Barham. Karin was disabled and required care givers, having been in an accident some years earlier that left her with traumatic brain injury. Over the years, various family members served as her care giver and handled her affairs through successive powers of attorney. At the time of these events, Charles was the person handling Karin's finances. Karin's brother Andrew believed Charles was misusing or stealing Karin's personal property and funds. He believed Charles had misused or stolen from her property and funds worth \$38,000 to \$39,000. In the months ahead of Charles's murder, Owen told Andrew, Charles was selling and throwing away Karin's things. Owen's doing so led to an ongoing dispute between Owen and Charles in July and August 2015, prior to Owen's murder of Charles on September 6, 2015.

Charles and Andrew had a history of angry disputes and an "up and down relationship." Andrew admitted having made statements that others would characterize as threats against Charles, including that he would choke him. On the Friday of Labor Day

weekend, September 4, an incident occurred between Charles and Andrew at Charles's residence. Andrew had gone there because of what Owen had told him Charles was doing with their sister's belongings. Charles told Jones what had occurred on Friday, September 4, including that he and Andrew had been fighting. Charles was agitated, upset, and physically afraid of Andrew. Charles called the police, and the police arrived and placed Andrew under a no-trespass notice. When Charles's body was found the next Tuesday, September 8, Jones told law enforcement Charles had said he was afraid for his life because he and Andrew were in a dispute over property.

On Tuesday, September 8, Andrew picked up his sister and took her to the Columbia Police Department to make a report about what Charles had been doing with her property. While the lead investigator was at the Budon Court address following the discovery of Charles's body, he received a call and learned Andrew was at the police department making a report against his brother Charles.

The defense contended it was Andrew, not Appellant, who put Owen up to murdering Charles and supplied the gun for that purpose. That contention was supported by Owen's girlfriend's statement to police that Owen told her "Midget" supplied the gun. Midget was Andrew's nickname.

The exact time of Charles's death was not pinpointed with certainty, but the pathologist who conducted the autopsy acknowledged it could have occurred within a 12-hour window on the night of September 5-6 through the morning of September 6. He believed the level of decomposition was consistent with death in the early morning hours of September 6, or could have been within a period of hours before or after the early morning

hours.

In its efforts to link Appellant to Owen's crimes that night, the state offered into evidence a video from the security camera system of a business near the Budon Court neighborhood. That video showed a truck similar to Appellant's white Chevy pickup truck in the area at approximately 5:04 and 5:10 a.m. on September 6. The state suggested this truck may have been Appellant's, in keeping with Owen's claim that Appellant drove him to the Budon Court residence for the purpose of having Owen enter and kill Charles. However, the occupant or occupants of the vehicle in the video were not discernible, and the presence of this truck in the video, if it was Appellant's truck, was consistent with Owen's having taken it while Appellant was asleep in Owen's apartment and driven himself to Charles's residence to commit these crimes.

Another vehicle appearing in the video at approximately 4:53 a.m. was similar in appearance to a Chevy Blazer, the make of vehicle then driven by Andrew. Despite the similarity of that vehicle to Andrew's, the known conflicts between Andrew and Charles, the altercation between the brothers to which police were called just two days prior to the murder, and information the gun came from "Midget," who was Andrew, the investigating officers never considered that the vehicle seen on the video might be Andrew's.

The state also introduced evidence attempting to show the whereabouts of various individuals near the time of the murder, through analysis of their cell phone records during the time period of the murder and the particular cell towers that handled their cell phone communications. The information obtained from Appellant's cell phone usage did not place him in the vicinity of Budon Court during the window of time in which the murder could

have been committed. However, the information the state offered that purported to pertain to Andrew was useless, because Andrew had given the police his wife's cell phone number, not his own, and law enforcement officials had not obtained cell phone records for Andrew's actual number.

Charles was a friend of Columbia lawyer Neal Lourie. Lourie owned the 1710 Budon Court residence where Charles was living and employed Charles as a handyman. Appellant at times worked with Charles on the projects he did for Lourie. Lourie testified Appellant came to him a week or two before Labor Day and said Charles had not paid him for work he had done for Lourie. On the Friday before Labor Day, Lourie asked Charles about it, and Charles said Appellant had been paid. Lourie testified Appellant called him again the day after Labor Day, and Lourie told him what Charles had said. Appellant testified Charles owed him \$1,900 for work he had performed. Lourie recalled the amount to be about \$2,000, consistent with Appellant's testimony. As Appellant noted, he expected to be paid for the work and would not have killed Charles over the delayed payment, since his doing so would have resulted in his never being paid.

Andrew and Owen imputed to Appellant a much greater monetary motive, an amount of \$5,000 they claimed Appellant said Charles owed him. However, that amount was contradicted by Lourie's testimony, which corroborated Appellant's assertion he was owed only \$1,900. Owen also claimed Appellant was upset about Charles's treatment of his mother and her missing money. To the contrary, the evidence established it was Andrew, not Appellant, who was upset and angry with Charles. Andrew believed Charles had stolen or misused as much as \$38,000 to \$39,000 of Karin's assets, going so far as to initiate police

action against him.

The state contended Charles's non-payment for Appellant's work was Appellant's motive for his alleged involvement in the crimes. However, Lourie testified about Appellant's demeanor when discussing being paid for his work. Appellant was not belligerent or upset and was not causing a scene. There were no threats between Charles and Appellant and no allegations of any physical violence between them. On the other hand, Lourie was aware of the disputes between Charles and Andrew and knew that Charles was agitated, upset, and afraid of Andrew. But Charles never expressed to Lourie that he was afraid of Appellant. Jones, who was also an employee of Lourie, knew of Charles's dispute with Andrew, that they had been fighting and Charles was upset, and that Charles feared for his life.

Some time after his initial statement to the police on Tuesday, September 8, Andrew gave the police information about a gun he claimed to have seen in Appellant's possession prior to Labor Day weekend. The bullets that killed Charles were .45 caliber bullets. They could have been fired from multiple kinds of firearms, including but not limited to revolvers, some lever action rifles, carbines, and short barrel rifles. Andrew claimed he had seen a gun Appellant had in his truck the Sunday before, and he thought it was a .40 caliber. The bullet he examined that came from that gun was cut off at the tip and had a hole in the top. However, the bullets that killed Charles and were found in his bed linens were semi-wadcutter, not hollow point. Andrew claimed he later asked Appellant about the gun, and Appellant said he no longer had it and had thrown it in a lake. Contrary to Andrew's implication that Appellant supplied the gun for this murder and then disposed of it, the

confessed murderer, Owen, testified he personally threw the gun he used to kill Charles into a field or woods after leaving the scene but before returning home.

Jessica James, Owen's girlfriend who was being questioned by the police in her own right and had been threatened with incarceration before she gave any information, testified Owen had confessed the killing to her and implicated Appellant as providing the gun and serving as lookout. Her trial testimony was contrary to her earlier statement to the police, in which she stated Owen said Appellant was merely with him. James also was inconsistent as to where Owen said he got the gun, initially insisting to the police it came from "Midget," who was Andrew. She acknowledged the state had subpoenaed her father for the purpose of having him influence her to testify.

Jenny Baker, who was serving a 20-year federal sentence for serious drug charges, was an admitted meth addict and drug trafficker, and was by Owen's account a liar, also testified. She claimed Appellant told her his uncle was a bad guy and deserved to be killed. She did not tell the police about this alleged conversation until after she was jailed over eight months later, in 2016, or over a year later, in 2017. She gave the statement to keep herself out of trouble and help herself with her own charges. She acknowledged she was hoping for a downward departure on her federal sentence as a result of her testimony.

Appellant testified in his defense. He denied any involvement in the crimes at the Budon Court address. He denied he was present or participated in any way. He did not own a firearm at the time of these crimes. He and Owen had been at Jenny Baker's the night before Owen killed Charles, and they had been drinking. Appellant did not think he had used cocaine but acknowledged he may have told the police he had. He and Owen both denied

they used meth, contradicting the testimony of Baker that they had. He and Owen had left Baker's house in the early hours of September 6 and returned to Owen's house, where Appellant went to sleep. When Appellant woke the next morning, Owen was already up and outside. Appellant's truck had been there when Appellant went to sleep, and he had set his keys down on the counter or floor with the other items from his pocket. Owen could have taken Appellant's truck to Charles's residence and committed the crimes while Appellant was sleeping. Owen had on multiple occasions in the past taken Appellant's truck without his permission. On two of those occasions, Appellant had filed police reports with respect to Owen's having taken his truck, a fact corroborated by the case investigator. No DNA evidence or other forensic evidence placed Appellant at the scene or implicated him in any way in the break-in and murder.

AFTER-DISCOVERED EVIDENCE

Following the conviction, Appellant learned that Floyd Owen exculpated Appellant and implicated himself alone in the crime. Appellant was approached in jail by Mikah Green in October 2019. Green had been previously housed in "H" dorm with Floyd Owen in the Alvin S. Glenn Detention Center in Columbia. Green informed Appellant that Owen said he "killed his boyfriend because the boyfriend touched his child." Owen stated he "drove a truck to the boyfriend's house, then walked up to the house and unlocked the door with a key that he had" to the house. Owen shot the boyfriend and made it look like someone broke in.

Rule 29(b), SCRCrimP, allows a defendant to move for a new trial if evidence was discovered after the verdict. Such a motion may be filed up to one year after the date of discovery or the date the evidence was available for discovery through reasonable diligence.

Such a motion is not allowed during the pendency of a direct appeal unless the appellate court suspends the appeal and grants leave to make the motion. The evidence on which Appellant's motion is based is a sworn statement of Mikah Green, obtained October 22, 2020, a copy of which is attached hereto as Exhibit I. Because the time for a new trial motion under Rule 29(b) will expire this week, if the appellate court has not ruled on this Motion to Suspend and For Leave by that date, Appellant will file the Motion for a New Trial in the lower court to meet that deadline, understanding that the Motion for a New Trial will not go forward unless the Court grants the request to stay the appeal. Appellant respectfully asks this Court to grant leave to have the new trial motion heard in the circuit court.

In order to obtain leave to seek a new trial based on after-discovered evidence, an appellant must make a prima facie showing that the new evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. See *State v. Prince*, 316 S.C. 57, 69, 477 S.E.2d 177, 184 (1993); *State v. Ford*, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990).

As indicated above, Green approached Appellant in jail stating that Owen had told him on at least three occasions about killing his boyfriend alone. Green stated Owen always used the word "I" and never once used the word "we."

Appellant was convicted August 30, 2019. A Motion for New Trial was heard and denied on October 14, 2019. The information provided by Green was given to Appellant in October 2019. On October 31, 2019, Stanley Myers, Appellant's trial attorney, emailed his

investigator, Keith Johnson, about going to talk to Green. According to Lindsey Barham, Appellant's wife, at some point Myers decided chasing down Green was not worth the time and informed Lindsey that his focus was on sentencing. Appellant was sentenced on November 18, 2019. The Motion for Reconsideration was filed November 19, 2019, and denied May 26, 2020, without argument. Undersigned counsel was retained to handle the appeal on November 26, 2019.

EFFORTS TO VERIFY AND DOCUMENT THE AFTER-DISCOVERED EVIDENCE

In early 2020, Appellant provided information to his wife, Lindsey Barham, that while incarcerated together at Alvin S. Glenn Detention Center, Owen had approached Barham on multiple occasions and stated he wanted to speak to Barham's counsel. On February 6, 2020, counsel spoke with Rhodes Bailey from the Richland County Public Defender's office, who had been appointed as Owen's counsel. Bailey advised that Owen had no interest in talking to Barham's counsel.

Counsel hired Investigator Kyle Taylor to conduct an investigation into the information Green provided to Appellant. On January 29, 2020, Investigator Taylor called Alvin S. Glenn Detention Center to set up a meeting with Mikah Green.

Counsel obtained information that Green was represented by the Richland County Public Defender's office on unrelated charges and that Green was at Alvin S. Glenn Detention Center. In February 2020, counsel's associate, Alissa Wilson, placed multiple calls to Rob Forney at the Richland County Public Defender's office to get permission to speak with Green, however counsel was unable to connect with Forney. In March 2020, COVID-19 caused mass shutdowns across the world, including the jails and prisons here in South

Carolina. From the end of March 2020 until early May 2020, counsel's office was operating with a staggered staff and open on a shortened schedule. The Alvin S. Glenn Detention Center was closed to contact attorney visits from March 2020 to July 2020 per Captain Bufford at Alvin S. Glenn Detention Center. Efforts to see clients have been difficult at best during the pandemic because of the danger of contracting COVID-19.

On April 13, 2020, counsel obtained a copy of the trial transcript.

On May 21, 2020, counsel emailed Rob Forney to get permission to speak with his client. Forney did not have an issue with counsel's speaking to Green, but wanted to talk to him first to ensure Green wanted to speak with counsel's investigator. Forney advised that communication with his client was difficult at the time.

On August 25, 2020, counsel followed up with Forney as the detention centers were open. At that time, Forney advised Green had retained Mike Duncan. Counsel contacted Duncan on August 26, 2020. Duncan went to visit Green on September 14, 2020, to discuss the matter with him. On September 17, 2020, Duncan gave permission to speak to Green.

Investigator Taylor went to visit Green on October 7, 2020. Investigator Taylor returned to Alvin S. Glenn Detention Center on October 22, 2020, to have Green sign an affidavit as to his statement concerning Appellant and Owen. Investigator Taylor returned on January 8, 2021, to show Green photographs of other inmates who were in "H" dorm that may have spoken with Owen.

On December 7, 2020, counsel subpoenaed a list of inmates in "H" dorm for the month of April 2019. On December 29, 2020, counsel subpoenaed a list of inmates in "H" dorm for the month of May 2019.

Lindsey Barham provided counsel additional names of people who may have spoken with Owen regarding the shooting.

Based on information of certain inmates, the following efforts were made.

On January 4, 2021, counsel contacted Ola Johnson to obtain permission to speak to Owen, as Johnson had recently been appointed as counsel for Owen. On January 6, 2021, Johnson declined counsel's request.

On January 12, 2021, counsel contacted Kat Hudgins to obtain permission to speak to her client, Kenneth Ray Gleaton. Hudgins declined to allow counsel to speak to Gleaton due to his pending appeal.

On January 13, 2021, counsel sent Preston Palmer a message asking if he was represented by an attorney and, if not, if he would speak to counsel about Owen. On January 22, 2021, Palmer denied counsel's request.

On January 26, 2021, counsel sent a letter to William Curtis Young, an inmate at Kirkland Correctional Institute. No response was received.

On January 30, 2021, Investigator Taylor spoke to Donovan Ryan Holman regarding information he had about Owen. Holman provided no additional information.

On February 4, 2021, counsel sent an email to Connie Breeden to obtain permission to speak with her client, Martin Dixon. On February 21, 2021, Breeden responded that she could not consent.

On February 17, 2021, Investigator Taylor spoke with Sonny Benjamin Allen at Alvin S. Glenn Detention Center. He would not tell Investigator Taylor what, if anything, Owen said to him.

On February 4, 2021, counsel contacted Tivis Sutherland for permission to speak to his client, Craig Lamont Cole. Sutherland gave permission to speak to Cole after resolution of Cole's case on February 17. On February 18, 2021, Investigator Taylor spoke with Cole at the Alvin S. Glenn Detention Center. Cole was able to provide information about other inmates who may have knowledge about Owen.

On February 23, 2021, counsel sent a letter to William Curtis Hicks, an inmate at Federal Correction Institution Gilmer. An additional letter was sent on August 10, 2021. Counsel has not received a response to either letter.

On March 23, 2021, Investigator Taylor spoke with Brodrick Wilson over video conference from Wateree River Correctional Institution. Wilson did not have any helpful information.

On April 1, 2021, counsel sent a letter to Gabriel Watts, an inmate at United States Penitentiary Lee. No response was received.

On August 17, 2021, counsel requested permission from Todd Rutherford's office to speak to his client, Jeremy Dale Palmer. On September 14, 2021, Rutherford granted permission and Investigator Taylor spoke to Palmer on September 16. Palmer did not provide any useful information.

Although Appellant obtained the information from Green in October 2019, it was not verified and documented by counsel until October 22, 2020, when Green signed an affidavit as to what Owen had told him. As shown above, counsel encountered various obstacles in contacting Green, including obtaining permission from his attorney, and shutdowns due to COVID-19. It would have been frivolous of counsel to file a motion without first verifying

the information and obtaining a sworn affidavit as to the substance of Owen's statements to Green. Counsel acted with reasonable diligence to perfect the Motion for a New Trial.

The information that Owen told Green he acted alone makes a prima facie showing for a new trial motion under Rule 29(b), and leave should be granted for the new trial motion to be heard. The information would probably change the outcome of the trial, in that it casts doubt on the veracity of Owen and his testimony, and would create a reasonable doubt as to Appellant's guilt; it was discovered after the trial; the information could not have been discovered prior to the trial with the exercise of due diligence; the evidence is material to the issue of Appellant's guilt or innocence; and it is not merely cumulative or impeaching.

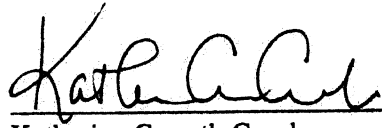
Therefore, Appellant respectfully requests that this Court suspend the appeal and grant leave for Appellant to file and argue his Motion for a New Trial in the circuit court.

AND WE SO MOVE


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Attorneys for Appellant

EXHIBIT I

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT OF STATEMENT

The undersigned, Mikah Nelson Green, being duly sworn, hereby states the following:

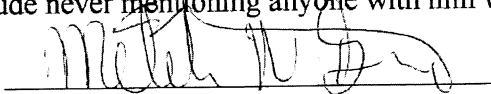
On April 1, 2019, I was arrested and taken to the Alvin S. Glenn Detention Center where I was eventually placed into "H" dorm. While I was in "H" dorm I met Floyd Owens. One day I was sitting at a table in "H" dorm with Floyd, "White Mike" and a guy name Kirk when Floyd said he was going to catch time for killing his boyfriend. Floyd said that he killed his boyfriend because the boyfriend touched his child. Floyd stated he drove a truck to the boyfriend's house, then walked up to the house and unlocked the door with a key that he had to the boyfriends' house. Floyd shot the boyfriend then made it look like someone broke into the house and killed the boyfriend.

Floyd said he was arrested for some outstanding charges but when they brought him in, they questioned him about the murder of his boyfriend. Floyd left DNA at the scene and that is what got him caught for murdering the boyfriend. Floyd said he confessed to the murder since he thought he was caught and was going to take a plea for 30 years.

On at least three occasions, I spoke with Floyd about killing his boyfriend. Every time Floyd told me the same story and always used the word "I" and never once used the word "We". I did not know the name of the person that Floyd shot except that his boyfriend was his lover.

A couple months later, I was placed in a dorm with Brandon Barham and we began to talk. Brandon said that he did not commit the crime that he was in jail for and was not involved. When Brandon was talking about the reason he was in jail, he never mentioned Floyds name to me and repeated that he was never involved in the crime. Because of how Brandon was telling his story, I thought the person who he might have been involved was a guy named Floyd. Brandon confirmed that it was Floyd that he was talking about regarding the crime.

Since it had been such a long time, I do not recall everything that Brandon said but know that Brandon always said that he was not involved in the crime he was charged with. I believe that Brandon was not involved, and that Floyd did the killing by himself from the way Floyd always told the story to me about the murder to include never mentioning anyone with him when he described how the murder occurred.



SWORN TO BEFORE ME this 22nd

Day of October, 2020.



Notary Public for South Carolina

My Commission Expires: August 30, 2022