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**Nov 03 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

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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

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The State,

Respondent,

v.

Charles Barham,

Appellant.

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REPLY TO STATE'S RETURN AND OPPOSITION TO APPELLANT'S  
MOTION TO SUSPEND APPEAL AND GRANT LEAVE  
TO FILE A RULE 29(B) MOTION FOR A NEW TRIAL

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Appellant, Charles Brandon Barham, filed a motion 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. The State has filed a Return and Opposition to Appellant's Motion

to which Appellant submits this reply.

In the State's "Statement of the Case," the State raises the issue that Appellant did not raise a Rule 29(b), SCRCrP motion for a new trial based on after-discovered evidence even though he discovered the evidence in October 2019. The motion was not raised at that time because the affiant, Mikah Green, had not been interviewed and the information had not been verified. It would have been frivolous for Appellant's counsel to bring the information before the Court prior to verification of same. The was addressed in full in the Motion to Suspend the Appeal.

In its "Abbreviated Statement of Facts," the State gives an account of the evidence as elicited through testimony of biased witnesses, Floyd Owen, Jenny Baker, Jessica James, and Andrew Kusko, who had motives to fabricate Appellant's involvement in the charged offenses for their own protection and exoneration. Each of those witnesses initially lied to authorities. Each of those witnesses had personal stakes in giving testimony favorable to the State.

One of the State's factual assertions is simply not supported by the record. On page 5 of its return, the State asserts, "Video surveillance also captured Barham's truck lurking in the area of the Victim's home around the time of his murder." To the contrary, the vehicle to which the State refers was not positively identified by any witness as Appellant's truck. Rather, it was merely described as being similar to the truck Appellant had at the time. R. p. 218.

The State cites to various cases throughout its Return and Opposition. Appellant submits that many of these cases can be distinguished from the facts at hand.

The State refers to State v. Dean, 427 S.C. 92, 828 S.E.2d 243 (Ct. App. 2019), *reh'g denied* (June 21, 2019), State v. Adams, 430 S.C. 420, 845 S.E.2d 217 (Ct. App. 2020), and State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979), as authoritative to show that the new evidence is merely impeaching.

In Dean, the after-discovered evidence was evidence that the State withheld information about a deal Dean's co-defendant was receiving in exchange for his testimony at Dean's trial. In the opinion, the Court of Appeals refers to State v. Caskey as Caskey also involved leniency in exchange for testimony and whether or not that amounted to after-discovered evidence. The Supreme Court ruled that the statements in Caskey did not meet the requisite factors needed to grant a new trial because the contents of the conversation were practically identical to statements made by the solicitor at a pretrial conference. The Court found the statements to be merely impeaching and not material to the defendant's guilt or innocence. *Id.* at 329-30, S.E.2d at 739. The Court of Appeals in its opinion had distinguished Dean from Caskey, finding that the statements differed and the co-defendant was the only witness linking Dean to the burglary. There was no other evidence to link Dean to the crime. Thus, the testimony was material to determining Dean's guilt or innocence. State v. Dean, at 105, S.E.2d at 250.

In Adams, the after-discovered evidence was that the victim's mother, who was subject to the trial court's sequestration order, listened to portions of the trial through the courtroom door. State v. Adams, at 437. The court found that the mother's eavesdropping was pure impeachment evidence and that Adams did not demonstrate how her testimony was affected by her violation of the sequestration order. *Id.*, at 438.

In Appellant's case, the after-discovered evidence is not merely impeaching. As in Dean, the only evidence linking Appellant to the crime is the testimony of Owen. There were no fingerprints, hairs, or other forensic evidence to link Appellant to the murder. The after-discovered evidence is material to determining Appellant's guilt or innocence.

The state cites State v. Deese, 266 S.C. 534, 225 S.E.2d 175 (1976) as authority that the motion was not timely filed. However, Deese is distinguishable from the case at bar. In Deese, the after-discovered evidence was known **prior** to the trial.

Appellant's trial was in August 2019. Appellant did not discover that Owen had made these statements to Green until October 2019, two months **after** his trial.

The state cites State v. Rhodes, 44 S.C. 325, 21 S.E. 807 (1895) as authority that motions for new trials based on after-discovered evidence are disfavored. However, Rhodes can be distinguished. In Rhodes, a witness who testified at trial later recanted her testimony. Here, a third party with no affiliation with either Appellant or Owen, other than being housed in the detention center together, has come forward with information that was told to him by Owen himself.

The state cites to State v. Griffin, 100 S.C. 331, 84 S.E. 876 (1915) as a case in which the Supreme Court denied a motion for a new trial based upon affidavits from two inmates. However, the case does not detail what the affidavits said other than to state it contained declarations by the state's chief witness.

The state also cites State v. Marks, 70 S.C. 448, 50 S.E. 140 (1905). In Marks, the Court denied a motion for a new trial based on after-discovered evidence because the evidence was merely impeaching - a person was discovered who overheard one of the

state's witnesses making statements contradictory to his testimony. His testimony was in regards to whether or not the victim had a knife. This testimony was merely impeaching. Whether or not the victim had a weapon does not go to defendant's guilt or innocence.

The state cites to State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) as authority that the evidence could have been discovered with due diligence. In Freeman, defendant's attorney received a call the day after the trial was over stating there was another man in the field defendant was arrested in. The attorney called the solicitor and the solicitor advised that it was Marvin Walters and that Mr. Walters had testified before the Grand Jury and his testimony had been released to defendant's attorney in discovery.

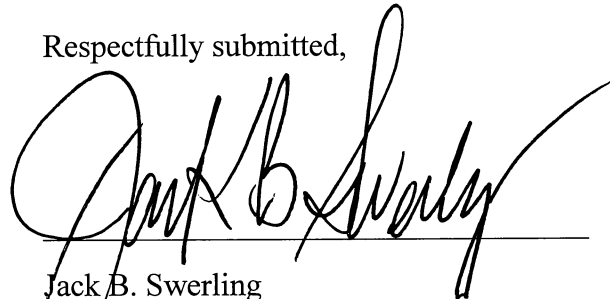
In Freeman, the evidence was provided to defendant's attorney prior to trial and he did not do his due diligence in thoroughly reviewing the discovery to uncover the evidence. Appellant did not have the evidence prior to trial, and no amount of due diligence would have uncovered it.

In State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), an officer testified at trial about a young boy hearing fussing and a gunshot while riding by the victim's house on the day of the murder. The identity of the boy was not determined until after the trial. The Court found that the evidence would not change the outcome at trial and that it was merely cumulative. The evidence in Needs was also available pre-trial, but was not discovered due to a lack of due diligence. Again, Appellant was unaware of the new evidence prior to trial and would not have been able to discover it using reasonable due diligence. Further, the statements made by Owen to Green are more than just merely cumulative or impeaching, but go directly to the issue of Appellant's guilt or innocence.

In State v. Prince, 315 S.C. 57, 447 S.E.2d 177 (1993), the victim's body was left unattended in an open garage in the funeral home for two days following the first autopsy. Defendant argued the body could have been tampered with. However, defendant attempted to discuss the handling of the body with funeral home employees prior to trial, showing he had some awareness the body had been mishandled. The Court denied his motion for a new trial as defendant was aware of the evidence prior to trial.

The authorities cited by the State are not controlling. The after-discovered evidence documented in the affidavit of Mikah Green makes the prima facie showing required under Rule 29(b) and the applicable caselaw. The Court should grant the motion, suspend this appeal, and allow the new trial motion to be heard in the lower court.

Respectfully submitted,



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PROOF OF SERVICE

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I, Kellie S. Reaves, am an employee of the Appellant, hereby certify that as per the Order of the Supreme Court of South Carolina entitled *RE: Operation of the Appellate Courts During the Coronavirus Emergency* (S.C. Sup. Ct. Order dated March 20, 2020, amended May 29, 2020), the Reply to State's Return and Opposition to Appellant's Motion to Suspend Appeal and Grant Leave to file a Rule 29(b) Motion for a New Trial have been forwarded to Respondent's counsel, J. Anthony Mabry, Senior Assistant Attorney General, via email today, November 3, 2021 to [amabry@scag.gov](mailto:amabry@scag.gov).

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

  
Kellie S. Reaves

Paralegal to Jack B. Swerling

November 3, 2021  
Columbia, South Carolina