

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Appeal FROM RICHLAND COUNTY

Jocelyn Newman, Circuit Court Judge

Timothy Green 324607

Appellant

v.

Yasmeen E Klein

Respondant.

Rule 243(c)

Timothy Green #324607

Trenton CI 3B 52

84 Greenhouse Rd

Trenton SC 29847.

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S.C. SUPREME COURT

Appellant comes before this Court because he filed a PCR Complying to SCRCP Rule 71.1 17-27-45(c) on grounds of Brady Violation / Newly Discovered Evidence, Stating Claims under the Uniform Post Conviction Procedure Act S.C Code Ann § 17-27-20(1)(4) (1.) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State; (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. Further, the PCR judge apparently overlooked the discovery Rule in Section 17-27-45(c) which allows the one year after the discovery of "material facts not previously presented and heard that require vacation of the conviction or sentence to file a PCR application.

Appellant argues he did not discovered that the murder weapon alleged by the state was not tested for any forensic analogy until Counsel's Case Log Sheet revealed that missing forensic reports was not attain to prepare a proper defense. The alleged murder weapon "Brick" is an essential element in how the victim died. Appellant promptly filed his PCR application after making that discovery because Appellant claims that he is entitled to the benefit of the discovery rule is not conclusively refuted by the record, the PCR judge erred by summarily dismissing Appellant's claim.

Appellant brings fourth Clark five prong test in which missing DNA forensic report, preferencely the alleged weapon (3) could not have been discovered before trial; and (4) is material to the issues of guilt or would establish the confidence of trial. Considering the RCSO Examination and Result report, the victims DNA "blood" was indicated on co-defendant clothes and not on the alleged murder weapon.

Appellant also argues that plea Counsel fell below Rule 407 rules

of Professional Conduct when she advise Appellant to plea guilty. Instead, Counsel should have advise Appellant to waive his right to a Speedy trial for initial investigation and properly prepare a defense. because the initial missing DNA forensic report may play a part at trial Appellant's Due Process was violated. Counsel's error in advising Appellant to plea wasn't knowing, voluntary, and intelligent because he wasn't aware of all potential evidence against him.

A defendant who enters a plea on the advise of Counsel may attack the voluntary and intelligent character of a plea only by showing that counsel representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for Counsel's errors the defendant would not have plead guilty but would insisted on going to trial. Roscoe v State 345 S.C.

Appellant was entitled to relief without needing to establish prejudice where plea Counsel advised Appellant to plea guilty to an offense unsupported by the facts. Jordan v State 406 S.C. 443 (quoting Staggs v State 372 S.C. 549 (2007))

When considering the stat's motion for summary dismissal where no evidentiary hearing has not been held the PCR judge must assume facts presented by the applicant are true and view those facts in light most favorable to the applicant, Leamon v State 363 S.C. 432. (citing S.C. Code Ann § 17-27-80) where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR application and those facts are not conclusively refuted by the record before the PCR Court, a question of fact is raised which can only be resolved by a hearing cf. Delaney v State 269 S.C. 555 (citing McCoy v State).

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Brady Violation.

Appellant also asserts a Brady violation were material was in the prosecutors possession. Two weeks before Appellant's trial, according to Counsel's case log sheet. Counsel requested multiple times for the missing reports and have the prosecution test the murder weapon (brick) for forensic DNA. Appellant could not have properly raised Brady in previous application wasn't aware that the state didn't test the (brick) for and forensic analyze until Appellant received Counsel's case log sheet revealing prominent disclosure. Appellant then calls into question, why did plea Counsel advise Appellant to plea guilty when missing DNA reports are still missing eight days before Appellant was schedule for trial! Clearly plea Counsel was not properly prepared for trial. Now Appellant can properly challenge his guilty plea under Brady.

In Gibson the defendant is entitled to make that decision with full awareness of favorable material evidence known to the government whether or not to "plea guilty". *US v Avellino* 136 F.3d 249 255 (2d Cir 1998) Accordingly, Appellant may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged Brady violation E.g. *Carter v State* 329 S.C. 355.

At original PCR hearing the state cross-exam Appellant about the evidence. See PCR tran pg 70 lines 15-25, pg 71. Appellant explain that the only evidence Counsel presented was pictures of the murder victim. Counsel even admitted at PCR hearing that Appellant didn't quite understand the position of the case see PCR trans pg 19 lines 15-25, pg 20 lines 1-6

When defendant lacks knowledge of material evidence in the prosecution possession the waiver of constitution right

cannot be knowingly and voluntarily. Sanchez, 50 F.3d at 1453
accord White v U.S. 858 F.2d 416 42-22 (8th Cir 1988)

Evidence is material under Brady if there is a "reasonable probability" that the result of the proceeding would have been disclosed. State v Proctor 358 S.C. 424.

Appellant argues that the indictment clearly states that Appellant on 7/7/2005 did killed W. Bush by striking him in the head with a brick..... Appellant also want to state for the record, according to Counsel's Case log sheet the state was planning on calling this case to trial together if Appellant don't plea guilty. Appellant Co-defendant wrote a statement to the police about what happen at the crime scene. Then again on April 7, 2007 admitting that Appellant wasn't the one who killed the victim, that he was the one who killed the victim only to make appellant carry guns from the store. He threaten Appellant if he didn't. See PCR trans exhibit

Citing the United Supreme Court:

The overriding theme of Brady cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play. In close cases, "the prudent prosecutor will resolve doubtful question in favor of disclosure. This is as it should be. Such disclosure will serve to justify trust in the prosecutor as the representative of a Sovereignty whose interest in a criminal prosecution is not that it shall win a case but justice shall be done. And it will stand to present or preserve the criminal trial as distinct from the prosecutor's private deliberations as the chosen forum for ascertaining the truth about criminal accusations.

The Constitution requires only that a defendant receive a fair trial, nor a perfect one. U.S. Const Am VI; State v Johnson 334 S.C. 78.

Due process requires (1) adequate notice (2) adequate opportunity for hearing (3) the right to introduce evidence and (4) the right to confront and cross-examine witness. Clear Channel out door v city of Myrtle Beach 372 S.C. 230.

Under the Equal Protection Clause of the Fourteenth amendment of the U.S. Constitution "a state may not deny to any person within its jurisdiction the equal protection of law. Town of Iva ex rel Zoning Admin v Halley 374 S.C. 537 Citing U.S. Const amend XIV §1

If Brady violation is found to have occurred PCR must be granted Gibson Supra.

Conclusion.

Appellant was entitled to relief without needing to establish prejudice where plea counsel advised Appellant to to plea guilty to an offense unsupported by the facts require vacate of sentence or a new trial.

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