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Sep 15 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Colleton County
Court of General Sessions
Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2023-000392

State of South Carolina,

Respondent,

v.

Richard Alexander Murdaugh,

Appellant.

**RETURN TO MOTION TO SUSPEND APPEAL
AND FOR LEAVE TO FILE MOTION FOR NEW TRIAL.**

On September 5, 2023, Appellant moved pursuant to Rule 29(b), SCRCrimP, to suspend his appeal and grant leave to file a motion for a new trial based on blend of mixed allegations broadly directed at the Colleton County Clerk of Court, Rebecca Hill (“the Clerk”). Respondent would show as follows:

“A motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion.” Rule 29(b), SCRCrimP. “There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury[.]” *State v. Mathis*, 174 S.C. 344, 177 S.E. 318, 320 (1934) (quoting *State v. David*, 14 S.C. 428, 432 (1881)). “[I]t would have a mischievous tendency, after all the evidence on the part of the state had been fully disclosed, to allow one, with his life in danger, an opportunity, by

the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice.” *Id.* (quoting *State v. Harding*, 2 S.C.L. (1 Bay) 267 (1800)).

To prevail on his request to suspend the appeal and have the matter remanded to the circuit court to proceed on a motion for a new trial based on after-discovered evidence, Appellant must show (1) the evidence in question is such as will probably change the results if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material to the issue of guilt or innocence; and (5) the evidence is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983); *see also State v. DeAngelis*, 256 S.C. 364, 371, 182 S.E.2d 732, 735 (1971) (Movant “must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discovery such evidence, or that he could not have discovered it by the exercise of due diligence.”). A *prima facie* showing of these factors is necessary before a remand to the circuit court can be granted. *State v. Butler*, 261 S.C. 355, 358, 200 S.E.2d 70, 71 (1973); *State v. Farris*, 51 S.C. 176, 28 S.E. 370 (1897); *State v. Green*, 46 S.C. 566, 27 S.E.2d 663 (1896). Additionally, “[i]t is essential to the consideration of a motion for a new trial based on after-discovered evidence that such motion shall be supported by an affidavit of the accused himself.” *DeAngelis*, 256 S.C. at 371, 182 S.E.2d at 735 (emphasis added). “Unless a valid and sufficient reason for the omission to file such an affidavit is shown, the affidavit of the accused must show that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence.” *Id.* “An affidavit of the appellant’s counsel showing these matters is not sufficient.” *Id.*

It may well be that suspension of the appeal and a remand for an evidentiary hearing will be necessary to properly resolve some of the serious claims raised by Appellant in the motion he intends to file. Objective investigation by SLED¹ remains ongoing, but the inquiry has already revealed significant factual disputes as to claims in Appellant's motion. If no credible evidence can be found to support the claims brought by Appellant, the State will be prepared to argue against the motion before the Honorable Clifton B. Newman on remand.

However, at present, Appellant's request for a remand is procedurally defective. A review of the motion does not reveal precisely when or how it is he learned of the claims he now raises, nor has Appellant provided the affidavit required by *DeAngelis*. Appellant's counsels have, however, made multiple statements to various media outlets indicating they were potentially aware of an issue with the jury at and about the time of trial. In a press conference on the steps of this this Court on September 5, 2023, counsel Harpootlian, responding to a question as to whether they saw the alleged conduct during the jury view or found out about it after the fact, replies "I think... we observed it... I was there, I watched it."² Later at that same press conference, when a reporter asked if they approached the jurors or vice-versa, Griffin replied that "[i]mmediately in the aftermath of the verdict, we had received information that we needed to look into what happened in the jury room."³ In one interview with Good Morning America on September 6, 2023, counsel Griffin states that "soon after the trial... actually, as soon as the verdict was rendered, we had gotten some indication from folks in the courtroom that there was

¹ Agents utilized by SLED for this purpose are separate and distinct from those who have otherwise investigated Appellant's numerous alleged crimes.

² Accessible at https://www.youtube.com/live/myuNfAevjAw?si=Vshu_NMu2-JLFxPf&t=200 at 3:19 as of September 12, 2023.

³ Accessible at <https://www.youtube.com/live/myuNfAevjAw?si=IVDeYxQDfv9LkwHT&t=311> at 5:10 as of September 12, 2023.

something untoward that had happened in the jury room. We didn't know exactly what, um, and we went on a campaign to find out what."⁴

Accordingly, the State is compelled to move to dismiss due to the procedural defect. The State would request the Court grant Appellant leave of 10 days to correct the procedural defect and establish precisely when and how it is he first learned of these allegations. In the event Appellant properly files, remand may be necessary for the trial judge, the Honorable Clifton B. Newman, to consider the credibility of the claims in light of the significant factual disputes which undermine the credibility of the claims.

Respectfully submitted,

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Sept. 15, 2023

⁴ Accessible at <https://www.goodmorningamerica.com/news/video/alex-murdaugh-attorneys-call-new-trial-102955711> at 0:12 as of September 12, 2023.

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THE STATE,

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vs.

RICHARD ALEXANDER MURDAUGH,

Appellant.

CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Motion to Suspend Appeal and for Leave to File Motion for New Trial, and Certificate of Service has been forwarded to Appellant's counsel, Richard A. Harpootlian, Esquire, Phillip D. Barber, Esquire, James M. Griffin, Esquire and Margaret N. Fox, Esquire via email today, September 15, 2023 to rah@harpootlianlaw.com, pdb@harpootlianlaw.com, jgriffin@griffinhumphries.com, and mfox@griffinhumphries.com.

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

This 15th day of September, 2023.

s/ Angela Brown

Angela Brown
Legal Assistant to Donald J. Zelenka
Deputy Attorney General