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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2023-000392

The State,

Respondent,

v.

Richard Alexander Murdaugh,

Appellant.

**REPLY TO THE STATE’S RETURN TO APPELLANT’S MOTION TO SUSPEND
APPEAL AND FOR LEAVE TO FILE MOTION FOR NEW TRIAL**

Appellant Richard Alexander Murdaugh, hereby replies to the Return of the State to his Motion to Suspend Appeal and for Leave to File Motion for a New Trial. In the Motion, Mr. Murdaugh alleges the Colleton County Clerk of Court, Rebecca Hill, engaged in deliberate jury tampering for money and publicity. Mr. Murdaugh included several affidavits as exhibits to the Motion to show that the very serious allegations against Ms. Hill are not mere speculation but have sworn evidentiary support.

The State unfortunately has chosen to respond in bad faith to these serious allegations. The State wants an extension from this Court, so that it can conduct its “objective investigation” free from oversight and deadlines set by a trial court while denying Mr. Murdaugh any ability to participate in the process. But the State would be too embarrassed to directly ask an appellate court to retain jurisdiction over a factual dispute, instead of remanding it to a trial court that can

receive evidence, based only on its desire to conduct unsupervised factual discovery. So, the State invents a preposterous procedural requirement: to obtain the Court's permission to file a motion for a new trial in the trial court, Mr. Murdaugh must provide the Court an affidavit stating that as he sat in the courtroom during his murder trial, he was unaware of the Clerk of Court's jury tampering. There is no such requirement.

The requirement in Rule 29 of the South Carolina Rules of Criminal Procedure to seek leave from the appellate court to file a motion for a new trial when there is a pending appeal exists to allow the appellate court to manage its docket. For example, where a *prima facie* case for a new trial cannot be made—where a new trial would be unwarranted even if all the movant's factual allegations are true—remand would be a waste of time and effort. *See State v. Ford*, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990) (“In order to obtain leave from this Court to move for a new trial based on after-discovered evidence, an appellant must make a *prima facie* showing that a new trial is warranted.”). Even if a *prima facie* case is made, it might be undesirable to suspend an appeal that had already been briefed and argued to allow a new proceeding to be initiated. But in this case, briefing has not even begun because the trial transcripts have not yet been produced. Nothing has yet happened in this appeal. There is no reason not to suspend an appeal that has not yet begun. And an affidavit from a juror that the Clerk of Court told jurors not to believe the defendant when he testified in his own defense is, by itself, sufficient to establish a *prima facie* case for a new trial. *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993) (holding where “[t]here was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained . . . a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict”) (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir.

1960)); Mot. Exs. A & H to Ex. 1 (Affidavits of jurors stating that Ms. Hill told jurors not to believe Mr. Murdaugh's testimony).

Argument

After citing cases from the Nineteenth Century for no apparent purpose other than to imply any witnesses who do not say what the State would prefer are Mr. Murdaugh's "confederates" who "tend[] to perjury," the State proceeds to state the legal standard for obtaining a new trial based on after-discovered evidence and that the standard for remand is a prima facie case for a new trial. Return 1–2. The State then identifies certain elements identified in the legal standard to obtain a new trial that are not relevant to the Motion because they are not disputable on the facts of this case, and then claims the failure to establish those elements *by affidavit* submitted to the appellate court is a procedural defect in the Motion. The State identifies two such purported procedural defects.

First, the State claims a motion for leave to suspend an appeal so that a motion for a new trial may be filed requires an affidavit from Mr. Murdaugh stating that he did not know Ms. Hill was tampering with the jury during his trial. The Attorney General knows that is untrue.¹ In support, the State relies exclusively on an out-of-context, cherry-picked quote from *State v. DeAngelis*, a 52-year-old case that has never been cited for that proposition. 256 S.C. 364, 182 S.E.2d 732 (1971). *DeAngelis* affirmed a trial court's denial of a motion for a new trial, in which

¹ The Attorney General claims in the Return that this purported "procedural defect" prevents him from consenting to the Motion, which he would otherwise do. Return 3–4. If he really believed that, rather than mulishly seeking delay for delay's sake, he would have mentioned his concern the day before the Return was filed, when Mr. Murdaugh, his lawyers, and Deputy Attorney General Zelenka (who signed the Return) and Senior Assistant Deputy Attorney General Waters were all present before Judge Newman in a Beaufort County courtroom. Nevertheless, the undersigned obtained an affidavit from Mr. Murdaugh stating the obvious, that he did not know of the Clerk of Court's improper communication with the jury until after the trial concluded. The affidavit is attached as **Exhibit A** to this Reply.

the defendant sought a “new trial” as a device to challenge his own guilty plea that occurred after a jury was empaneled but before trial commenced. *Id.* at 368–69, 182 S.E.2d at 733. His motion for a “new trial” was supported only by two affidavits from other persons criminally involved in the crimes for which he was accused and one from his own attorney. *Id.* at 369–71, 182 S.E.2d at 734. The trial court determined that, among other issues, an affidavit was at least needed from the defendant, given that he was challenging his own decision to plead guilty, and it denied the motion for a new trial. *Id.* at 371, 182 S.E.2d at 734–35. The Supreme Court affirmed. *Id.* at 372, 182 S.E.2d at 735.

In 52 years, the fact-specific decision in *DeAngelis* has never been cited by any court for the proposition that a motion for a new trial always requires an affidavit from the defendant, regardless of the circumstances or the factual basis for the motion, nor for the proposition that an affidavit from the defendant is required merely to seek leave to file a motion for a new trial from an appellate court. The facts of *DeAngelis* are totally dissimilar from the jury tampering alleged here. Mr. Murdaugh does not need to provide an affidavit to make a prima facie case that he did not know the Clerk of Court was surreptitiously talking to jurors about his case while he was sitting at the defendant’s table in the courtroom, or in a holding cell in the courthouse, or in a cell in the Colleton County jail. The circumstances make the prima facie case—he did not know because there was no possible way he could know. Whether that circumstantial evidence is sufficient for Mr. Murdaugh to prevail is not an issue before this Court. *Id.* at 369, 182 S.E.2d at 734 (“It is the fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this [appellate] court, resides the power to weigh such evidence . . .”).

The State also claims Mr. Murdaugh's motion for leave to file a motion for a new trial is defective because it does not indicate how or when he learned of the allegations contained therein. Return 3. Again, the Attorney General knows that is not true. The "how" is that jurors and other witnesses spoke to Mr. Murdaugh's counsel after the trial. The "when" is on or about the dates on the affidavits regarding those interviews. Mot. Exs. A, F, H to Ex. 1 (affidavits from witnesses dated August 14, August 18, and August 13, 2023, respectively); Mot. Exs. B ¶ 1, J ¶ 1 to Ex. 1 (affidavits from defense paralegal regarding interviews with jurors stated to have occurred on August 6, 2023); Mot. Ex. G ¶ 2 to Ex. 1 (affidavit from defense attorney regarding Facebook download conducted at a witness interview stated to have occurred on August 18, 2023). That is sufficient for a prima facie case. If the Attorney General wishes to argue a new trial should not be granted because Mr. Murdaugh knew of the jury tampering during trial or because he could have learned about it during trial through due diligence, he must make that fact-based argument in the trial court in the first instance. But it is highly unlikely the Attorney General would make such an absurd argument in front of television cameras in a courtroom. He suggests it now on paper only for purposes of delay.

Finally, the State asserts that if Mr. Murdaugh's allegations are not supported by its own investigation, it would consent to remand. Return 3. Of course, if the State's investigation supports the allegations, it would be obligated to consent not only to remand but to a new trial. So, the State concedes there is no circumstance in which it will not consent to remand. This starkly exposes the dilatory purpose of the State's Return. The State admits it does not actually oppose the relief sought (remand), but first wants Mr. Murdaugh to spend weeks jumping through preposterous procedural hoops invented only for him. *Cf.* Rule 269, SCACR ("Where a[] . . . return is frivolous or *taken solely for the purposes of delay* . . . the appellate court may upon its own motion or that

of a party . . . impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.” (emphasis added)). The Court should disregard the State’s bad faith “procedural defect” arguments, deem the State’s response a consent to the Motion, and expeditiously grant it.

Conclusion

For the foregoing reasons and for those stated in Appellant’s Motion to Suspend Appeal and for Leave to File Motion for a New Trial, the Court should grant the Motion.

Respectfully submitted,

s/ Richard A. Harpootlian

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Phillip D. Barber, SC Bar No. 103421

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Attorneys for Richard Alexander Murdaugh

September 21, 2023

Columbia, South Carolina

The State v. Richard Alexander Murdaugh

Appellate Case No. 2023-000392

Reply to the State's Return to Appellant's Motion to Suspend Appeal and for Leave to File Motion for New Trial

EXHIBIT A

COURTESY OF
LUNA SHARK MEDIA

**STATE OF SOUTH CAROLINA
COUNTY OF COLLETON**

**COURT OF GENERAL SESSIONS
FOURTEENTH JUDICIAL CIRCUIT**

State of South Carolina,

Indictment Nos. 2022-GS-15-00592, -593,
-594, and -595

v.

Richard Alexander Murdaugh,

**AFFIDAVIT OF RICHARD
ALEXANDER MURDAUGH**

Defendant.

I, Richard Alexander Murdaugh, after being duly sworn, depose and state that I did not have any knowledge or information that the Colleton County Clerk of Court, Rebecca Hill, or anyone else, had communications with the jury during the trial in the above-captioned matter about the evidence, jury deliberations, and the other matters identified in the proposed Motion for New Trial filed as an exhibit in the Court of Appeals, until after the jury rendered its verdict and I was sentenced.

FURTHER AFFIANT SAYETH NAUGHT.



Richard Alexander Murdaugh

Sworn to and subscribed before me

this 21 of September 2023


Notary Public for South Carolina

Printed Name: M. Dawes Cooke, Jr.

My Notary Expires: Dec. 30, 2031

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PROOF OF SERVICE

I certify that on September 21, 2023, I served the reply to the State's return to Appellant's motion to suspend appeal and for leave to file motion for new trial by emailing it to its attorneys of record with the South Carolina Attorney General's Office, Creighton Waters (CWaters@scag.gov) and Don Zelenka (DZelenka@scag.gov).

Respectfully submitted,

s/ Richard A. Harpootlian

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

In re: The State v. Richard Alexander Murdaugh
Appellate Case No. 2023-000392

Dear Ms. Kitchings:

Enclosed please find the reply to the State's return to Appellant's motion to suspend appeal and for leave to file motion for new trial in connection with the above-referenced matter.

With warmest personal regards, I am

Sincerely,

s/Richard A. Harpootlian
Richard A. Harpootlian

/hm

Enclosure

cc: Creighton Waters, Esquire
Don Zelenka, Esquire
Jim Griffin, Esquire