Serial: 206582

IN THE SUPREME COURT OF MISSISSIPPI

No. 2015-DR-01138-SCT

MARLON LATODD HOWELL A/K/A MARLON COX ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

Now before the Court is the "Motion to Order New Trial Based on Newly Discovered Evidence; Alternatively, Motion for Leave to File Petition for Post-Conviction Relief Based on Newly-Discovered Evidence" filed by Marlon Latodd Howell. Also before the Court are the Response filed by the State of Mississippi and the Reply filed by Howell.

Howell was charged with capital murder in 2000. At trial, he put on an alibi defense. He was convicted by a jury and was sentenced to death. This Court affirmed the conviction and sentence in ***Howell v. State***, 860 So.2d 704 (Miss. 2003)(***Howell I***). Howell then sought post-conviction relief pursuant to Miss. Code Ann. § 99-39-1, et seq. This Court granted the petition in part on limited issues. ***Howell v. State***, 989 So. 2d 372 (Miss. 2008)(***Howell II***). After a hearing in the remanded proceedings, the trial judge denied Howell's petition and his request for a new trial. This Court affirmed. ***Howell v. State***, 163 So. 3d 240, 263 (Miss. 2014)(***Howell III***).

Howell has now filed a second petition for post-conviction relief in which he argues that he is entitled to a hearing or a new trial as a result of newly-discovered evidence and the State's violation of its discovery obligations under ***Brady v. Maryland***, 373 U.S. 83 (1963).

He now claims that previously unknown alibi witnesses have come forward and that the State suppressed information about a witness prior to trial.

Howell presents an affidavit from Lasonja Gambles who claims that she was with Howell several hours before the murder. He also submits a sworn statement from Gambles's mother who corroborates portions of Gambles's affidavit. Gambles contends that Howell called her in the early morning hours and asked her for a ride. Gambles claims that she drove Howell from New Albany to his father's house in Blue Mountain. According to Gambles, she had known Howell "for a long time" before the night of the crime. Gambles swears that Howell knew her phone number on the night of the murder. Gambles further states that she corresponded with Howell by mail around the time of Howell's trial. Howell, therefore, must have known an address where Gambles could be reached.

Howell's direct appeal concluded in 2003 when the mandate issued in ***Howell I***. In death penalty cases, the petition for post-conviction relief generally must be filed within one year of the completion of the direct appeal. Miss. Code Ann. § 99-39-5(2)(b). See also ***Havard v. State*****,** 86 So. 3d 896, 899 (Miss. 2012). The failure to file post-conviction claims within the time period amounts to a waiver of relief unless the claims presented are excepted from the time bar. M.R.A.P. 22(c)(5)(I). The petition presently before the Court was filed in 2015. Unless Howell is able to show that he meets an exception to the procedural bar, this petition is untimely.

Additionally, Miss. Code Ann. § 99-39-27(9) prohibits successive petitions for post-conviction relief. Howell's first petition was ultimately denied. See ***Howell II*** and ***Howell***

III. Absent an applicable exception, successive motions for post-conviction relief are procedurally barred. ***Rowland v. State***, 42 So.3d 503, 507 (Miss. 2010).

Howell argues that his current petition is excepted from the procedural bars as it is based on newly discovered evidence. A valid newly discovered evidence claim would be excepted from the procedural bars. Miss. Code Ann. §§ 99-39-5(2)(a)(I) and 99-39-27(9). To meet the exception, Howell must present evidence which was not discoverable at trial that would have caused a different result. For reasons discussed in more detail below, we find that the alleged "new" alibi witnesses are clearly not new to Howell and that this exception is unavailable to him. Howell has not shown that the present filing should be excepted from the procedural bars. We therefore find that the petition should be denied.

Notwithstanding the procedural bars, we find that the claims raised in the motion fail on the merits. Howell now argues that the State committed a ***Brady*** violation by not disclosing the identity of his own alibi witness. In her affidavit, Gambles asserts that an unidentified police officer told her not to get involved. Gambles does not claim that she provided a statement of any kind to the unknown officer.

In order to establish a ***Brady*** violation, Howell must prove: (1) that the government possessed evidence favorable to the defense; (2) that he did not possess the evidence and could not have obtained it through reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that there is a reasonable probability that the outcome of the trial would have been different if the evidence had been produced. ***King v. State***, 656 So.2d 1168, 1174 (Miss.1995) (citing ***United States v. Spagnoulo,*** 960 F.2d 990, 994 (11th Cir.1992)). See

also ***Howell v. State***, 163 So. 3d 240, 250 (Miss. 2014)(***Howell II***); ***Havard v. State***, 86 So.3d 896 (Miss. 2012).

We find that Howell clearly can not show that he did not know about Gambles. He therefore clearly fails the second prong of the ***Brady*** test. If we assume that the assertions in the affidavit are true, Howell and Gambles were well-acquainted. He knew her name, her phone number and her address. With minimal diligence, the defense could have contacted Gambles and her mother and could have called them to testify at trial if it had so chosen. Howell makes no attempt to explain why he should not be charged with knowledge of a witness who admits that she had known him "for a long time." We therefore find that no ***Brady*** violation occurred and that Howell is entitled to no relief on this claim.

Howell also claims that due process requires a new trial "when newly-discovered alibi witnesses swear that the accused was not present at the time of the murder and where the State's case – even before discovery of the alibi witnesses was suspect for many reasons..." For purposes of the post-conviction relief statutes, "newly discovered evidence" is:

> evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence.

Miss. Code Ann. § 99-39-5(2)(a)(I). See also § 99-39-23(6). As discussed above, Gambles and her mother were known to Howell at the time of his trial. This evidence was discoverable at trial and is not "newly discovered." Howell could have told his trial attorneys about these purported alibi witnesses. In no sense were they "newly-discovered" witnesses. We find no due process violation here.

Finally, we decline to address Howell's attempts to re-litigate issues related to recanted testimony. Those claims have been raised and rejected in prior proceedings. See ***Howell II*** and ***Howell III***.

After due consideration, we find that Howell's petition for post-conviction relief should be denied.

IT IS THEREFORE ORDERED that the "Motion to Order New Trial Based on Newly Discovered Evidence; Alternatively, Motion for Leave to File Petition for Post-Conviction Relief Based on Newly-Discovered Evidence" filed by Marlon Latodd Howell is denied.

SO ORDERED, this the 21st day of July, 2016.

/s/ Josiah Dennis Coleman

JOSIAH DENNIS COLEMAN, JUSTICE

WALLER, C.J., RANDOLPH, P.J., LAMAR, KITCHENS, KING, MAXWELL AND BEAM, JJ., AGREE.

DICKINSON, P.J., AGREES IN RESULT ONLY.