RECEIVED
Dec 20 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VICTORIA C. THREATT,

APPELLANT

APPELLATE CASE NO. 2023-000467

INITIAL BRIEF OF APPELLANT

GARY H. JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

Supreme Court Cases

Other Jurisdictions

Constitutional Provisions

Statutes

Rules

STATEMENT OF ISSUE ON APPEAL

1.

Whether the trial court erred in ruling that the due process protections contained in the South Carolina Constitution required a showing of bad faith before dismissal of criminal charges when the state destroys evidence that had been properly requested by the accused through discovery and which reasonably might be expected to play a significant role in their defense at trial?

2.

Whether the trial court erred in finding that agent Lugos had reasonable suspicion to justify a search of appellant's home under S.C. Code Ann. § 24-21-410 (2010) when such justification was based on the presence of money in appellant's purse for which a reasonable explanation was provided and disputed facts which Lugos made impossible for impartial resolution by deleting his body camera interaction with appellant?

STATEMENT OF THE CASE

Appellant, Victoria C. Threatt, was indicted for trafficking in methamphetamine, possession with intent to distribute marijuana, and possession of oxycodone by a Lexington County grand jury on August 8, 2022. R. p. *. She was tried before the Honorable Walton J. McLeod, IV, and a jury on March 13 - 15, 2023. Tr. 1. At trial, appellant was represented by Jean Popowski and Hanna Lapp. Kelly Oppenheimer and Player Long represented the state.

On March 15, 2023, the jury convicted appellant of all three charges. Tr. 402, l. 17 - 403, l. 9. Judge McLeod sentenced appellant to twenty-five years on the trafficking in methamphetamine charge and five years on each of the remaining charges. Tr. 409, l. 12 – 410, l. 4.

This appeal follows.

STATEMENT OF FACTS

Appellant is 54-years-old with substantial health problems. Tr. 140, ll. 10 – 11. She suffers from lupus with resulting sleep disorder and pain. Tr. 323, l. 16 – 324, l. 6. At the time of her arrest, appellant depended on her longtime companion, Clay Helms, for care needs. Tr. 323, ll. 6 – 15. Appellant was charged in the present case after admitting ownership of drugs found in a black bag in her home. Tr. 100, ll. 3 - 17. Appellant testified that she was not the owner of the bag in question, did not know where it came from, and confessed ownership of it solely to protect Helms from getting into trouble. Tr. 92, l. 22 – 96, l. 14.

At the time of arrest, appellant was on probation for a prior drug offense but had not been assigned a probation agent by Probation, Parole, and Pardon Services (PPP). Tr. 91, l. 23 – 92, l. 21. There were conflicting versions of the home visit conducted by supervisory probation officer Salomon Lugos on March 8, 2022.[1] Lugos performed the home visit based in part on policy and in part on an alleged tip from a confidential informant (CI) that appellant was selling drugs from the location. Tr. 41, l. 12 – 42, l. 2; 49, l. 17 – 50, l. 24. The nature of this CI is completely unknown, as appellant's counsel was not informed of their existence until just before trial since the various reports omitted any reference to a CI. Tr. 49, l. 12 – 50, l. 24. The trial judge discounted the existence of the alleged CI and indicated this alleged tip could be taken out of the equation in analyzing the legal issues involved. Tr. 130, ll. 14 – 18.

Lugos described his initial entry as having the door to the home opened only slightly and his view of the interior blocked by a person later identified as Gary Rowell. Tr. 43, ll. 2 – 20. Lugos also claimed Rowell lied about appellant being in the restroom since he observed her sitting

---

[1] Lugos completed appellant's intake forms for PPP, but was not her assigned probation officer. Tr. 91, l. 23 – 92, l. 21. During this process, Lugos told appellant she was "not going to make it" on probation. Tr. 92, ll. 8 – 21.

on a sofa close to the entry when the door was fully opened by Rowell. Tr. 61, l. 4 – 62, l. 20. Rowell, a neighbor with no connection to the crime charged, contradicted this version of events at trial, indicating appellant had been in the bathroom and was returning to the living area and had just started to sit down as he opened the door for Lugos. Tr. 327, l 3 – 328, l. 13. Rowell identified the drug bag as being brought into the home shortly before Lugos arrived by another neighbor, Melissa Gainey. Tr. 325, l. 5 - 326, l 19. Lugos knew Gainey, who was seated next to appellant when Lugos arrived and in close proximity to where the drug bag was found, and allowed her to leave the residence after asking Gainey if she was on probation. Tr. 63, ll. 11 - 17.

As Lugos conducted his "home visit," he immediately used a flashlight and began looking around the living area. Tr. 93, l. 20 – 94, l. 9. Lugos asked appellant to open her purse, which she did. Tr. 94, l. 16 – 95, l. 5. She had a "large amount" of cash, but explained to Lugos it was from her stimulus check since she did not have a bank account. Tr. 48, ll. 2 – 12. Lugos then asked about the black bag left in the seating area by Gainey as she exited the home.[2] Tr. 94, l. 3 – 95, l. 11.

Lugos and appellant clashed over what was said before Lugos ordered this bag opened. Lugos claimed appellant volunteered that there was a marijuana grinder in the bag before appellant opened the drug bag. Tr. 67, l. 25 – 68, l. 23. In contrast, appellant testified that she was not aware of what was in the bag and only opened it upon being told she could not refuse, even though she told Lugos it was not her bag. Tr. 94, l. 22 – 96, l. 17. As she unzipped the bag, she noticed the grinder in question and mentioned it being in the bag to Lugos. Tr. 105, ll. 7 – 17. Upon seeing the grinder and some clear bags containing white crystal substances, Lugos commanded appellant

---

[2] This bag was described as a "tool" bag that ultimately was found to contain the only drugs found during the search of the premises. Tr. 47, ll. 1 – 5; 95, ll. 17 – 21; 236, l. 22 – 237, l. 6.

and Helms to wait on the front porch for the police and called the Lexington County Sherriff's Department. Tr. 96, ll. 15 – 25. The sheriff's department obtained a search warrant based upon the information provided by Lugos. Tr. 84, ll. 20 – 22.

Luckily the factual disparities between these witnesses could easily be resolved, since Lugos' body worn camera recorded the entire encounter; from the front door encounter with Rowell, to allowing Gainey to leave, to his interactions with appellant. Tr. 56, l. 8 – 57, l. 20. To the benefit of appellant, her counsel requested discovery material early in the case, serving a motion under both Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5, SCRCrimP, for discovery shortly after the arrest on June 29, 2022. Tr. 116, l. 23 – 16. In fact, the state prepared responses to the discovery requests a month before they were even made, on May 5, 2022, demonstrating the state was diligent in complying with its discovery obligations. Tr. 319, l. 22 – 320, l. 11; R* Court's Ex. 5.

Unfortunately for appellant, PPP deleted the video sometime in *September of 2022* when Lugos failed to flag it as important in an ongoing criminal case. Tr. 52, l. 21 – 54, l. 22. Having deleted the video evidence, the state relied solely on the testimony of Lugos, contradicted by both appellant and Rowell on key points as discussed *infra*, as to the events that lead to the search of the drug bag. Lugos' report of the incident, completed March 11, 2022, was not supplied to defense counsel until January 13, 2023. Tr. 320, ll. 19-23; R* Court's Ex. 5. This report indicated the alleged existence of a CI for the first time and confirmed the existence of his body camera video. Tr. 320, ll. 19-23; R* Court's Ex. 5.

Defense counsel moved to dismiss the charges due to a violation of her due process rights under *Brady*, and for discovery violations under Rule 5 of the SCRCrimP. Tr. 117, l. 7 – 119, l.

19. Defense counsel also moved to suppress the drugs seized from Gainey's bag as an improper search lacking reasonable suspicion. Tr. 116, ll. 17 - 21. The trial judge denied the motions.

STANDARD OF REVIEW

"[W]ith the dawn of the technological age, appellate courts are no longer dependent on the trial court in our review of evidence." State v. Frasier, 437 S.C. 625, 632, 879 S.E.2d 762, 766 (2022).[3] "Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review." Id. at 633-634, 879 S.E.2d at 766. When this review encompasses the destruction by the state of evidence likely to be important to the due process rights of the accused, this Court should, as a matter of state constitutional law, "find that fundamental fairness requires this Court to evaluate the State's failure to preserve potentially exculpatory evidence in the context of the entire record." Commonwealth v. Henderson, 582 N.E.2d 496, 497 (Mass. 1991).

[3]The Court noted in Fraiser that the "most obvious example is the advent of body and dashcam footage, whereby this Court reviews the same video as the trial court." Id. at 632. 879 S.E.2d at 766. Due to the sole action of the state in this case, that opportunity has been denied this Court.

ARGUMENT

1. The trial court erred in ruling that the due process protections contained in the South Carolina Constitution required a showing of bad faith before dismissal of criminal charges when the state destroys evidence that had been properly requested by the accused through discovery and which reasonably might be expected to play a significant role in their defense at trial.

A. How the issue was raised at trial.

Counsel for appellant filed a motion to dismiss the indictment due to the destruction of the video from the body worn camera by agent Lugos due to the state's late disclosure of the existence of the video and its destruction due to the act of Lugos failing to preserve the video from PPP's automatic deletion of videos. Tr. 320, ll. 19-23; R* Court's Ex. 5. Defense counsel asserted the state's failure to preserve the video violated the "South Carolina Rules of Criminal Procedure, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 3 of the South Carolina Constitution, the right to present a complete defense, as guaranteed by Section 14 of the South Carolina Constitution." Ct. Ex. 5. The trial court conducted an evidentiary hearing concerning the nature of the body camera evidence, the discovery exchanges leading up to trial, and the video's destruction. The pertinent facts concerning this issue should not be in dispute.[4] Defense counsel timely requested discovery, and the video in question fell within the scope of those requests. Tr. 116, l. 23 – 119, l. 10. Agent Lugos had the ability to flag the video from his body camera as related to an ongoing prosecution which would have preserved

[4] The content and resulting importance of the video was disputed between the parties, but the essential facts surrounding its existence, deletion, and the discovery timeline were not disputed.

the video evidence. Tr. 201, ll. 1 - 14. Lugos failed to flag the video in this case, and it was deleted by the PPP computer system well after the filing of the discovery requests on behalf of appellant. Tr. 201, ll. 6 – 25. Defense counsel asserted dismissal as the appropriate remedy since, due to the nature of the disputed testimony between appellant, Lugos, and Rowell, the video evidence was irreplaceable since it would definitively resolve those disputed facts. Tr. 125, l. 11 – 127, l. 7.

B. The controlling law regarding destruction in possession of the government useful to a suspect's criminal trial.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. "A Brady violation occurs when the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment." State v. Durant, 430 S.C. 98, 107, 844 S.E.2d 49, 53 (2020).

"Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a *significant role in the suspect's defense."* California v. Trombetta, 467 U.S. 479, 488 (1984) (emphasis added). When that evidence has "an exculpatory value that was apparent before the evidence was destroyed" and was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means" then the accused has been deprived of due process and dismissal is the appropriate remedy. Id. at 489.

In contrast, when the evidence lacks apparent exculpatory value but instead may be classified as only potentially exculpatory, a showing of bad faith for a violation of due process under the United States Constitution is required. Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("We

therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."). Thus, under the Constitution of the United States, to "establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith [Youngblood], *or* (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means [Trombetta]." State v. Cheeseboro, 346 S.C. 526, 538–39, 552 S.E.2d 300, 307 (2001) (emphasis and brackets added).

The Youngblood prong of the analysis (requiring bad faith) was revisited in State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015). In Reaves, the South Carolina Supreme Court noted that "[a]lthough the record is replete with indications the police investigation was deeply flawed, the record also contains no indication these flaws were the product of more than mere negligence" and denied dismissal for various pieces of lost evidence, the value of which fell squarely under Youngblood's potentially exculpatory sphere. Reaves, at 129, 777 S.E.2d at 219. Importantly, our Supreme Court noted several states declining to follow the "bad faith" requirement from Youngblood under state constitutional grounds and noting the issue under the South Carolina Constitution was not before it:

> A number of state courts have declined to follow the bad faith standard established in Youngblood based on state law grounds. *See, e.g.*, State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999) ("Because we deem the preservation of the defendant's fundamental right to a fair trial to be a paramount consideration here, we join today those jurisdictions which have rejected the Youngblood analysis in its pure form."); State v. Osakalumi, 194 W.Va. 758, 461 S.E.2d 504, 512 (1995) ("As a matter of state constitutional law, we find that fundamental fairness requires this Court to evaluate the State's failure to preserve potentially exculpatory evidence in the context of the entire record."); Commonwealth v. Henderson, 411 Mass. 309, 582 N.E.2d 496, 497 (1991) ("The rule under the due process

> provisions of the Massachusetts Constitution is stricter than that stated in the Youngblood opinion."). *However, Reaves does not ask this Court to do so here; his argument rests solely on the Fourteenth Amendment to the United States Constitution.*

Reaves, 414 S.C. at 127, 777 S.E.2d at 217 (emphasis added).

In addition to the states referenced in Reaves, multiple other states have rejected the Youngblood "bad faith" requirement. *See* Lee v. State, 503 P.3d 811, 818 (Alaska Ct. App. 2021) ("Unlike the federal constitution, the Alaska Constitution does not require a finding of bad faith in order to establish a due process violation."); Hammond v. State, 569 A.2d 81, 87 (Del. 1989)("We remain convinced that fundamental fairness, as an element of due process, requires the State's failure to preserve evidence that could be favorable to the defendant '[to] be evaluated in the context of the entire record.'"); State v. Matafeo, 787 P.2d 671, 673 (Haw. 1990)("We believe the strict reading of the due process principles in Arizona v. Youngblood would preclude us, in cases where no bad faith is shown, from inquiring into the favorableness of the evidence or the prejudice suffered by the defendant as a result of its loss."); State v. Tiedemann, 162 P.3d 1106, 1115 (Utah 2007). ("[T]he culpability or bad faith of the state should be only one consideration, not a bright line test, as a matter of due process under article 1, section 7 of the Utah Constitution."); State v. Delisle, 648 A.2d 632, 643 (Vt. 1994) ("We believe, however, that Youngblood is both too broad and too narrow. It is too broad because it would require the imposition of sanctions even though a defendant has demonstrated no prejudice from the lost evidence. It is too narrow because it limits due process violations to only those cases in which a defendant can demonstrate bad faith, even though the negligent loss of evidence may critically prejudice a defendant.").

This case presents the vehicle to answer the question invited in Reaves of whether the bad faith requirement outlined in Youngblood should control under the South Carolina Constitution.

C. Due Process protections are greater under South Carolina's Constitution than the minimum due process protections established by the United States' Constitution.

South Carolina's Constitution should provide a greater degree of protection for due process rights than the United States' Constitution. The South Carolina Constitution provides greater protections and rights than the United States' Constitution in several areas. *See* Moore v. Stirling, 436 S.C. 207, 223, 871 S.E.2d 423, 432 (2022) ("The discussion in Pulley as to the Eighth Amendment is not controlling of a defendant's right to due process under our state constitution."); *see also* Planned Parenthood S. Atl. v. State, 438 S.C. 188, 199, 882 S.E.2d 770, 776 (2023) (holding South Carolinians enjoy "protection not found in the United States Constitution" to be secure from "unreasonable invasions of privacy"); State v. Counts, 413 S.C. 153, 174, 776 S.E.2d 59, 70 (2015) (holding police use of knock and talk to target homeowners must satisfy "the heighten privacy protection afforded by the South Carolina Constitution").

The language in Article I, Section 3 of the South Carolina Constitution related to due process largely mirrors the language used in the 14th Amendment to the United States Constitution.[5] However, Article I, Section 14 of the South Carolina Constitution guarantees the right of those charged with crimes to "be fully heard in his defense" which is language that is absent in the United States' Constitution. The additional protection for the due process rights under the South Carolina Constitution is in part rooted on this added protection once the criminal process

[5] *Compare* "[N]or shall any person be deprived of life, liberty, or property without due process of law" S.C. Const. art. I, § 3 *with* "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. IV.

begins. This "fully heard in his defense" clause and the added due process protection it provides has been previously recognized, though not as a specific expansion of due process beyond the interpretation offered by the Supreme Court of the United States. *See* State v. Nelson, 431 S.C. 287, 308, 847 S.E.2d 480, 492 (Ct. App. 2020) (noting forcing a trial when a key witness is unavailable could deprive the defendant of his right to be fully heard). Guidance can be provided by the South Carolina Supreme Court's decision in State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005)(examining whether Art. I, § 14 of the South Carolina Constitution provided a state constitutional right to proceed *pro se* on direct appeal). While noting that a criminal defendant "clearly does not have a federal constitutional right to proceed *pro se*" on direct appeal, the South Carolina Supreme Court found "that language such as that contained in Art. I, § 14 of the South Carolina Constitution does not apply to appeals" but that the appellate court may "in its discretion, allow an appellant to proceed *pro se* in an appeal from a criminal conviction." Roberts, 364 S.C. at 588–89, 614 S.E.2d at 629. The Roberts holding, and its examination of the issue as a separate state constitutional matter rather than solely controlled by the interpretation of the Fourteenth Amendment, supports the conclusion that Art. I, § 14 of the South Carolina Constitution provides even greater due process protections.

When the government destroys evidence connected with a criminal investigation under its sole control, this greater protection mandates a rejection of the "bad faith" requirement outlined in Youngblood. In its place, our Courts should follow the lead of other states who have rejected the bad faith requirement under state constitutional grounds. In those states, courts must first review the nature of the evidence and what duty, if any, existed to preserve it by the state. If such

a duty is found to exist, the courts should evaluate the appropriate remedy, including dismissal of the charges, for such violation.[6]

In State v. Ferguson, 2 S.W.3d 912, (Tenn. 1999), the Tennessee Supreme Court mandated courts review:

> "1. The degree of negligence involved; 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and 3. The sufficiency of the other evidence used at trial to support the conviction."

Id., 2 S.W.3d at 917.

In State v. Osakalumi, 461 S.E.2d 504 (W.Va.1995), the West Virginia Supreme Court applied virtually identical factors:

> (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

Id., 461 S.E.2d at 512. This Court should follow the lead of other states that have rejected the limited protections offered by the Youngblood framework and recognize that the South Carolina Constitution provides greater due process protections and when the government destroys evidence in its possession, bad faith need not be shown before a trial judge can dismiss criminal charges.

D. Under the South Carolina Constitution's due process protections, when evidence solely under the control and in the possession of the state that can reasonably be expected to play a significant role in the suspect's defense is not preserved and disclosed following proper discovery requests, the appropriate remedy is dismissal of the charges.

---

[6] The state never disputed the video was discoverable or that it should have been preserved. Instead, the state relied solely on the lack of bad faith in the failing to preserve the video and its lack of obvious exculpatory evidence. Tr. 120, l. 2 – 121, l. 16.

Defense counsel asserted her due process rights under Article I, § 3 of the South Carolina Constitution and her right to by fully heard under Article I, §14 of the South Carolina Constitution were violated by the state's destruction of the evidence of her encounter with agent Lugos. Ct. Ex. 5. As a remedy for the violation, counsel for appellant asked for dismissal as the appropriate remedy despite the state's agreement to a spoilation charge on the deleted video. Tr. 125, ll. 7 – 21. The trial court held that "the burden has been met as far as proving that the body cam evidence of Agent Lugos was exculpatory in nature or would have been exculpatory in nature to guilt. I realize the testimony from people who've testified here today it's a little different, but case law appears in this case to set a fairly high bar for an outright dismissal." Tr. p. 126, l. 23 - 127, l. 4. This ruling is an apparent reference to the Youngblood and Trombetta reasoning justifying dismissal only on a showing of bad faith or that the evidence "possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." State v. Cheeseboro, 346 S.C. 526, 538–39, 552 S.E.2d 300, 307 (2001).

As the trial judge erred in requiring bad faith and in failing to weigh the negligence of the state in failing to preserve the evidence with its impact on the due process rights of the appellant, this court should reverse. Tr. 126, l. 14 – 127, l. 7. Had the trial judge properly weighed the nature of the failure of the state to preserve the evidence and its implication on appellant's due process rights, dismissal would have been the correct remedy under the facts of this case.

The degree of negligence involved in the present case is high.

The state deleted the video evidence well after it was requested to be produced by appellant's trial counsel. Lugos was wearing a body camera and recorded the entire encounter; from the front door encounter with Rowell, to allowing Gainey to leave, to his interactions with

appellant. Tr. 56, l. 8 – 57, l. 20. Appellant's counsel requested discovery material early in the case, serving a motion under both Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5, SCRCrimP, for discovery on *June 29, 2022*. Tr. 116, l. 23 – 16. In fact, the state prepared responses to the discovery requests a month before they were even made, on May 5, 2022, demonstrating the state was in full knowledge of its duty to comply with its discovery obligations in this case. Tr. 319, l. 22 – 320, l. 11; R* Court's Ex. 5. PPP deleted the video sometime in *September of 2022* when Lugos failed to flag it as important in an ongoing criminal case. Tr. 52, l. 21 – 54, l. 22. Lugos' only explanation was that "we upload dozens and dozens of videos everyday, uhm, and, uhm, this video was not flagged for retention just because we've got so many videos that we have to label and review." Tr. 201, ll. 20 – 23.

The significance of the destroyed evidence was central to resolution of disputed facts.

As noted, the ownership of the "tool bag" was the primary issue at trial. Lugos and appellant clashed over what was said before Lugos ordered this tool bag opened. Lugos claimed appellant volunteered that there was a marijuana grinder in the bag before appellant opened the drug bag. Tr. 67, l. 25 – 68, l. 23. In contrast, appellant testified that she was not aware of what was in the bag and only opened it upon being told she could not refuse, even though she told Lugos it was not her bag. Tr. 94, l. 22 – 96, l. 17. As she unzipped the bag, she noticed the grinder in question and mentioned it being in the bag to Lugos. Tr. 105, ll. 7 – 17. Rowell identified the drug bag as being brought into the home shortly before Lugos arrived by another neighbor, Melissa Gainey. Tr. 325, l. 5 - 326, l 19. Lugos knew Gainey, who was seated next to appellant when Lugos arrived in close proximity to where the drug bag was found, and allowed her to leave the residence after asking Gainey if she was on probation. Tr. 63, ll. 11 - 17.

The interactions with all the occupants as Lugos arrived at the house would have been revealed by the deleted video. Lugos' version of events clashed with Rowell's version. Lugos described his initial entry as having the door to the home opened only slightly and his view of the interior blocked by a person later identified as Gary Rowell. Tr. 43, ll. 2 – 20. Lugos also claimed Rowell lied about appellant being in the restroom since he observed her sitting on a sofa close to the entry when the door was fully opened by Rowell. Tr. 61, l. 4 – 62, l. 20. Rowell, a neighbor with no connection to the crime charged, contradicted this version of events at trial, indicating appellant had been in the bathroom and was returning to the living area and had just started to sit down as he opened the door for Lugos. Tr. 327, l 3 – 328, l. 13. Lugos and the trial court relied upon this interaction at the door as a factor of Lugos' "reasonable suspicion" supporting his search of the tool bag and home. Tr. 61, ll. 4 – 12; 136, l. 25 – 137, l. 11.

The resolution of these disputes, both by the trial judge during the suppression hearing and the jury during deliberation, hinged on credibility. The destruction of the video, as a neutral "replay" of these disputed events, was significant.

The sufficiency of the other evidence used at trial to support the conviction.

Drugs were in fact found in the "tool bag" and the seating area located close to where appellant was seated when Lugos entered. Tr. 232, l. 3 – 233, l. 22. This was the same area occupied by Gainey before she vacated the residence after Lugos arrived. Tr. 325, l. 6 – 326, l. 19. Rowell testified this "tool bag" was brought into the residence by Gainey. Tr. 325, l. 5 - 326, l 19. While appellant did claim ownership of the "tool bag" she only did so to protect her longtime companion and caregiver from also being arrested and charged. Tr. 103, l. 22 – 104, l. 10. Rowell identified the drug bag as being brought into the home shortly before Lugos arrived by another neighbor, Melissa Gainey. Tr. 325, l. 5 - 326, l 19. Interestingly, Lugos knew Gainey, who was

seated next to appellant when Lugos arrived in close proximity to where the drug bag was found, and allowed her to leave the residence after asking Gainey if she was on probation. Tr. 63, ll. 11 - 17.

E. Conclusion.

The danger inherent in requiring a showing of bad faith before dismissal may be considered lies in its tacit acceptance of negligent, and even grossly negligent, conduct on the part of law enforcement.

> When negligence is sanctioned, corresponding behavior declines. If negligence is readily forgiven, it is no longer necessary to act reasonably. Indolence is rewarded. Evidence, it must be remembered, is the cornerstone of every criminal proceeding. Allowing its negligent destruction should be roundly condemned whenever it is encountered. Courts are, at our core, truth-seeking institutions. When we lose sight of that fact we should think of another line of work. We cannot on one hand meaningfully require proof beyond a reasonable doubt and on the other reward the State for its negligent destruction of evidence, making it markedly easier to meet its significant evidentiary burden.

State v. Sarbacher, 478 P.3d 300, 310 (Id. 2020) (Justice Stegner's concurrence in part). This Court should not reward the state for destroying video evidence of the initial encounter with an accused, particularly after such evidence has been properly requested as part of the judicial process. In this case, Article I, Section 3 of the South Carolina Constitution and Article I, Section 14 of the South Carolina Constitution dictate a departure from the bad faith requirement outlined in Youngblood. In this state, when faced with the destruction of evidence, our courts should balance the nature of the destruction and its impact on the due process rights of the accused to be fully heard. The trial court erred in failing to weigh the nature of the conduct against its impact on appellant's due process rights and erred in in not dismissing the charges against appellant.

2. The trial court erred in finding that agent Lugos had reasonable suspicion to justify a search of appellant's home under S.C. Code Ann. § 24-21-410 (2010) when such justification was based on the presence of money in appellant's purse for which a reasonable explanation was provided and disputed facts which Lugos made impossible for impartial resolution by deleting his body camera interaction with appellant.

Courts have long recognized the lowered constitutional protections of citizens subject to conditions of probationary releases.

> Probation is considered 'an act of grace' given to a person who is still serving the sentence of the court, and 'the revocation of this privilege of probation is more in the nature of an extension of the original proceedings.' In addition, section 24-21-410 of the South Carolina Code (Supp. 2017) provides . . . [before] a defendant may be placed on probation, he must agree in writing to be subject to a search or seizure, without a search warrant, based on reasonable suspicions, of the defendant's person.

State v. Ross, 423 S.C. 504, 511, 815 S.E.2d 754, 757 (2018) (internal citations omitted).

While the privacy interest of someone on probation is lower, it is not non-existent.

> Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

United States v. Knights, 534 U.S. 112, 121, (2001) (internal citations omitted). Knights was followed by Samson v. California, 547 U.S. 843, 857 (2006), which held that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 857. This blanket denial of any expectation of privacy for those on probation has been

rejected under by other states on state constitutional grounds. *See* State v. Short, 851 N.W.2d 474, 506 (Iowa 2014) ("The United States Supreme Court in *Griffin*, *Knights*, and *Samson* has engaged in innovations that significantly reduce the protections of the Warrant Clause of the Fourth Amendment. We decline to join the retreat under the Iowa Constitution. We hold that under article I, section 8, the warrant requirement has full applicability to home searches of both probationers and parolees by law enforcement. As a result, because evidence seized in this case was obtained unlawfully, the motion to suppress should have been granted."). As South Carolina's Constitution provides even more explicit protection against invasions of privacy than Iowa's Constitution, which mirrors the Fourth Amendment, the reasoning in State v. Short is compelling. However, that issue need not be addressed here as S.C. Code Ann. § 24-21-410 (2010) codifies the requirement that a citizen on probation may not be searched without a warrant unless the officer conducting the search has "reasonable suspicions." By statute, the protections outlined in State v. Short are followed in South Carolina.[7] The legislative intent to protect those on probation from suspicionless searches is supported by the Legislature's warning that such searches are a "means of reducing recidivism and [do] not authorize law enforcement officers to conduct searches for the sole purpose of harassment." S.C. Code Ann. § 24-21-410 (2010).

In the present case, Lugos lacked reasonable suspicion when he ordered appellant to open the tool bag. For an officer to have reasonable suspicion "'there [must] be an objective, specific

---

[7] It is possible for this Court to follow the guidance of State v. Short, 851 N.W.2d 474 (Iowa 2014) in full, requiring a search warrant before performing a search of a probationary's residence. S.C. Code Ann. § 24-21-410 (2010) mentions only the person, vehicles, and possessions, not residences. One's residence has always enjoyed heightened constitutional protection. *See* State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 69 (2015) ("Because the privacy interests in one's home are the most sacrosanct, we believe there must be some threshold evidentiary basis for law enforcement to approach a private residence."). Such a holding would require suppression of the drugs in the present case, as Lugos lacked reasonable suspicion, let alone probable cause, when the bag was opened.

basis for suspecting the person stopped of criminal activity.' While reasonable suspicion is not a high bar and 'is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for [conducting the search].'" State v. Frasier, 437 S.C. 625, 635, 879 S.E.2d 762, 767 (2022) (internal citations omitted).

The trial court found two aspects of the interaction leading to the search of the tool bag supported reasonable suspicion: the cash in appellant's purse and the manner the door was opened by Rowell. Tr. 136, l. 35 – 137, l. 8. When Lugos asked appellant to open her purse, she had a "large amount" of cash in it. Tr. 48, ll. 2 – 12; 94, l. 16 – 95, l. 5. A reasonable explanation was provided to Lugos by appellant for this "large amount" of cash, it was from her stimulus check since she did not have a bank account. Tr. 48, ll. 2 – 12. The interaction between Rowell and Lugos was disputed. Both gave different versions of the door being opened and their interaction as noted infra. The destruction of the video of the interactions as Lugos arrived was particularly harmful to a neutral evaluation of the basis for Lugos' suspicions. Had this video been preserved, the factual dispute as to the interaction between Lugos and Rowell would have been resolved. The trial court failed to properly weigh the state's negligence in destroying the evidence that would have resolved these disputed facts in determining reasonable suspicion existed.

As the search of the tool bag was conducted without reasonable suspicion, the search was a violation of S.C. Code Ann. § 24-21-410 (2010) and the evidence seized as a result of the illegal search should have been suppressed.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and the case remanded to the Lexington County Court of General Sessions for a new trial.

Gary H. Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of December 2023.