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Jan 15 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL DAVID MORGAN,

APPELLANT

APPELLATE CASE NO. 2024-000152

ANDERS BRIEF OF APPELLANT

SARAH E. SHIPE
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion by denying appellant's motion to dismiss based on the state's failure to disclose *Brady*[1] and Rule 5, SCRCrimP evidence until the day of trial?

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1 *Brady v. Maryland*, 373 U.S. 83 (1963).

STATEMENT OF THE CASE

On July 13, 2023, a York County grand jury indicted appellant for trafficking methamphetamine, possession with intent to distribute psilocybin, possession of fentanyl, and failure to stop for blue lights. R. 360-365. On January 16-18, 2024, appellant's case was called to trial before the Honorable Daniel D. Hall and a jury. Christopher Bonds and Ugonna Udogwu represented appellant. Marina Hamilton and Landon Finnie prosecuted for the state. R. 1; R. 83.

The jury found appellant was not guilty of failure to stop for blue lights but was guilty of trafficking methamphetamine, possession with intent to distribute psilocybin, and possession of fentanyl. R. 350, ll. 5-25. Judge Hall sentenced appellant to concurrent terms of twenty-five years' imprisonment for trafficking methamphetamine, twenty years' imprisonment for possession with intent to distribute psilocybin, and time served for possession of fentanyl. R. 357, ll. 1-18; R. 366-371.

This appeal follows.

STANDARD OF REVIEW

The appellate court analyzes "the circuit court's ruling under an abuse of discretion standard." *State v. Lawton*, 382 S.C. 122, 127, 675 S.E.2d 454, 457 (2009). "A violation of Rule 5 is not reversible unless prejudice is shown." *State v. Landon*, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). "Admission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion." *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247 (2000)).

ARGUMENT

The trial court abused its discretion by denying appellant's motion to dismiss based on the state's failure to disclose Brady and Rule 5, SCRCrimP evidence until the day of trial.

Relevant facts

On April 26, 2023, appellant was stopped for failing to lower high beams late in the evening. R. 90, l. 8—91, l. 25. He pulled off the road at his home. R. 91, ll. 18-25. Appellant attempted to run away but was caught and placed under arrest. R. 95, ll. 10-20; 114, ll. 7-9. While the officer and appellant were away from his car appellant's wife can be seen in the dash camera video getting in the car. R. 112, l. 20—113, l. 18; 205, ll. 3-18. While searching for the keys to appellant's car officers found a plastic grocery bag under the car containing narcotics. R. 118, ll. 8-23; 119, ll. 12-25.

During pre-trial motions, defense counsel moved to require the state comply with Rule 5 and Brady. In response the solicitor asserted the state had complied. R. 53, ll. 9-21. Defense counsel asserted he found out there was "some type of forensic testing on the drugs regarding fingerprinting" and that he did not have that "material." R. 53, l. 25—54, l. 4. The solicitor admitted "Lori Kimball" informed the state there was no result so there was no report to produce to the defense. The court did not make any final ruling regarding the violation just stated, "testing was done, and it was inclusive" and that state's witnesses could be cross examined on the information. R. 54, l. 5—55, l. 25.

Appellant's trial was set to begin on January 16, 2024, the state indicated its readiness to begin. On January 17, after, yet another, technological difficulty in playing the state's evidence the trial court put the following on the record:

> The Court was informed last week that this case was ready for trial, both parties agreed that it was ready and so the solicitor,

through their office, docketed it for trial yesterday, which is the proper procedure. They have that authority to docket cases for trial, so the Court agreed to hear the case. The Court was assured that the case was ready, that it was a very short trial, would take -- in fact, I was told it may not even -- it would take a day. However, it has been a day, all day yesterday and we're at noon today. We haven't gotten through the first witness because of technological difficulties. I think that made for a possible review of this case in the future. I need to put it on the record that it was discovered yesterday that the evidence, the drugs in the case, was not examined by the defense until one week before trial and they discovered an issue of labeling. What was conveyed to the Court is that the State did not examine the drugs and the evidence in the trial until two days later, which would be five days before trial and the issue was presented yesterday about how to deal with the improper labeling of the drugs how that would be presented to the jury and go to the jury. That should have been resolved before Court. The case was not ready in regard to that evidence.

The State was -- revealed yesterday that the evidence had been fingerprinted. The defense indicated to the Court that's the first time they learned that the evidence had been fingerprinted was yesterday, in fact, during Court. That was -- certainly could possibly be exculpatory. I believe what was presented to the Court was that there was a -- the evidence had been fingerprinted; however, they were unable to lift any prints. That should have been revealed pursuant to Rule 5 discovery prior to trial.

In fact, again, under the rules that we're supposed to be all following the new recent Order of case management, cases are supposed to be, in essence, certified ready, discovery done, ready for trial when the case is placed on the trial docket 45 days before trial and then it even -- we have a second docket 20 days before trial; however, that was not revealed to the Defense until yesterday. The videos that were introduced into evidence would not work yesterday when the State attempted to publish those for the video -- those videos to the jury. Even after an overnight delay, the videos still would not play, which lead to the State copying those videos on another disk, which then lead to an issue of foundation and admissibility of the newly created copy. That seems to be possibly have been resolved by allowing the officer here in the courtroom to watch that video in its entirety. We'll where we go with that this afternoon. So with that, that's where we are procedurally. That's the basis for the delays.

R. 105, l. 7—107, l. 15.

State's witness, chemist Cynthia Mitchum testified when she received the psychedelic mushrooms (psilocybin) the "bag had been opened and [she] asked [an officer] what had happened and he said that they opened the bag to do a fingerprint analysis on the outside of the bag." R. 277, l. 24—278, l. 20.

At the conclusion of the state's evidence defense counsel renewed his request for dismissal arguing the state violated its *Brady* and Rule 5 discovery obligations when they failed to disclose "fingerprints analysis test" until the day of trial and continued to fail to provide the results. Counsel contended Lori Kimbell conducted the test and was not present to testify to the analysis or results. Counsel concluded the failure to disclose this evidence prejudiced appellant and the remedy was dismissal of the charges for the discovery violation. R. 280, l. 12—281, l. 6; 125, ll. 10-20.

The solicitor argued the motion should be denied contending the state discovered nothing from the testing of the drug bags for fingerprints. They argued they did not call Lori Kimbell the individual who conducted the analysis of the drug bags for fingerprints. They asserted there was no prejudice to appellant where there were no fingerprints found or testified to by a state's witness. R. 281, ll. 9-24.

The court found the state's failure to provide the evidence was "concerning," stating "they don't get to make the determination on whether it has any value as far as the defense case. . . [i]t could be viewed as exculpatory because they weren't - - the defendant's prints were not on what was tested." R. 283, ll. 16-25. The court further found it should have been turned over earlier but that it was not a sufficient basis to grant a dismissal and denied the motion. R. 283, l. 25—284, l. 7.

Discussion

The state failed to disclose material and exculpatory evidence in appellant's case and appellant was prejudiced by the failure.

The state must disclose evidence in its possession favorable to the accused and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). Exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). The state's failure to disclose *Brady* material is reversible error only when its omission deprives the defendant of a fair trial. *State v. Gunn,* 313 S.C. 124, 437 S.E.2d 75 (1993). *See also State v. Kirkpatrick*, 320 S.C. 38, 462 S.E.2d 884 (Ct. App. 1995) (due process requires disclosure by the prosecution, upon motion of the defendant, of evidence which would be favorable to the accused and which is material to guilt or punishment; evidence which may be used to impeach a witness's credibility is favorable to an accused and should be disclosed); *State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (dismissing claim of *Brady* violation for lack of sufficient record to assess prejudice of State's failure to comply with discovery request).

The rules of criminal procedure require the state, upon request by the defendant, must allow defendant to inspect and copy papers or documents in its possession or control which are material to the preparation of the defense. Rule 5(a)(1)(C), SCRCrimP; *State v. Gill*, 319 S.C. 283, 460 S.E.2d 412 (Ct. App. 1995), decision vacated on other grounds, 327 S.C. 253, 489 S.E.2d 478 (1997).

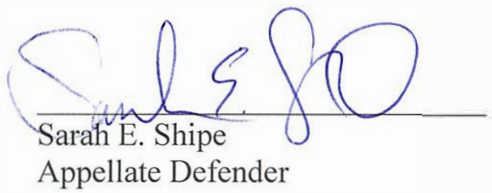
The requirements of Rule 5, as opposed to the constitutional dictates of *Brady*, are judicially created discovery mechanisms for use in criminal proceedings. *State v. Hill*, 360 S.C.

13, 598 S.E.2d 732 (Ct. App. 2004). The definition of "material" for purposes of Rule 5 is the same as the definition used in the *Brady* context. Impeachment or exculpatory evidence is material only if there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *State v. Hill*, 360 S.C. 13, 598 S.E.2d 732 (Ct. App. 2004).

The state failed to disclose evidence that they had the bag of drugs analyzed for fingerprints and claimed no fingerprints were found on the bag of drugs. This evidence was exculpatory and material where the grocery bag of drugs could have been placed under the car by appellant's wife. The state's failure to disclose the evidence violated both Rule 5, SCRCrimP and *Brady*.

CONCLUSION

By reason of the foregoing argument, appellant's convictions and sentences should be vacated, and this case remanded for a new trial.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of January, 2025.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael David Morgan states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Daniel D. Hall, which was held on January 16-18, 2024, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for Michael David Morgan.

Respectfully Submitted,

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s):
(2) Transcript January 16/18, 2024, Transcript January 17, 2024
(3) State's exhibit 1A (In-Car Video)
(4) State's exhibit 19 (BWC-Sgt. Grigg)
(5) Sentence sheets

I certify that this designation contains no matter which is irrelevant to this appeal.

Sarah E. Shipe
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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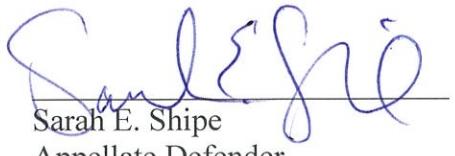
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Michael David Morgan, #376727, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 15th day of January, 2025.



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