ORIGINAL

BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

RECEIVED
DEC 3 1 2013
SC Court of Appeals

Appellate Case No. 2013-000302

State of South Carolina.....Respondent,

v.

Brandon Wingard.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR BY FAILING TO SUPPRESS AN INCULPATORY ORAL STAEMENT MADE BY APPELLANT IN RESPONSE TO INTERROGATION BY LAW ENFORCEMENT WHEN THE STATEMENT WAS NOT DISCLOSED TO APPELLANT IN A TIMELY MANNER?

STATEMENT OF THE CASE

On November 27, 2012, the Fairfield County Grand Jury indicted Brandon Wingard (Appellant) for Receiving Stolen Goods ($2000 or Less)(Third Offense Property Crime). Attorney William Frick (Frick) sent a Notice of Representation and Request for Discovery Materials to Assistant Solicitor Riley Maxwell (Maxwell) on August 30, 2012. R.p. *___. On February 4, 2013, the State called the case to trial before the Honorable Howard P. King and a jury. After jury selection, the Court recessed until February 6, 2013. The Clerk of Court swore the jury on February 6, 2013, and the jury convicted Appellant on the same day. Immediately following the trial, Judge King sentenced Appellant to five (5) years incarceration. This appeal followed.

STATEMENT OF FACTS

On August 9, 2012, the Fairfield County Sheriff's Office (FCSO) was investigating a possible larceny from 115 Walnut Street in Fairfield County involving tools and copper wire. Tr. 88. As part of their investigation, on August 10 2012, deputies with the FCSO executed a valid search warrant at Appellant's residence at 1614 Cammack Rd. in Fairfield County. Tr. 92, ll. 1-19. Six to eight deputies responded to execute the search warrant where they found Appellant alone at the residence. Tr. 93, ll. 15-16. Appellant allowed deputies to enter the residence without incident. Tr. 93, ll. 19-21.

Upon entering the residence, Investigator Jeff Talbert (Talbert) told Appellant the reason for the intrusion, handcuffed him, checked him for weapons, and sat him on a couch in the living room. Tr. 93, ll. 19-25. Appellant was not under arrest at this point in time, however, he was secured on the couch and was not permitted to leave. Tr. 93, ll. 21-22; 99, ll. 23-25, to 100, ll. 1-15. Following a protective sweep of the home, Talbert began reading a search warrant to Appellant. Tr. 94, ll. 7-8. While Talbert was reading the affidavit portion of the search warrant, Appellant stated, "he had gotten the tools from a black guy." Tr. 54, ll. 10-13; 98, ll. 22-25, to 99, ll. 1-4. After hearing this, Talbert finished reading the search warrant and immediately read Appellant his *Miranda* rights. Tr. 99, ll. 7-22.

After advising Appellant of his *Miranda* rights, Talbert questioned him about the statement he had just made. Tr. 101, ll. 23-24. Talbert asked Appellant who the "black guy" was and where he had met him. Tr. 52, ll. 3-14; 101, ll. 23-24. Appellant responded that he met the man "in town," and that he "was a crackhead." Tr. 102, ll. 4-9. The search continued for some time after Appellant made these two statements. Tr. 55, ll. 24-25 to 56, 1-6. Deputies arrested Appellant before leaving the residence. Tr. 55, ll. 24-25, to 56, ll. 1-6.

On August 30, 2012, Frick filed a discovery request on behalf of Appellant. R.p. *____. It is undisputed that Frick received a discovery packet from the State on or about September 14, 2012. It is also undisputed that this discovery packet, nor any other discovery packet, mentioned Appellant's oral statements to Talbert that he met the man he received the tools from "in town" or that he "was a crackhead." Tr. 68, ll. 15-25, to 72, ll. 19. A jury was selected for trial on February 4, 2013, however, the Court recessed after the jury was selected and the jury was not sworn until February 6, 2013. R.p.*___; Tr. 18, ll. 5-25 to Tr. 23, ll. 1-22. On February 5, 2013, the day after the jury was selected, but the day before the jury was sworn, the State informed Frick of Appellant's oral statements to Talbert for the first time. Tr. 68, ll. 15-25, to 72, ll. 19.

ARGUMENTS

1. DID THE TRIAL COURT ERR BY FAILING TO SUPPRESS AN INCULPATORY ORAL STAEMENT MADE BY APPELLANT IN RESPONSE TO INTERROGATION BY LAW ENFORCEMENT WHEN THE STATEMENT WAS NOT DISCLOSED TO APPELLANT IN A TIMELY MANNER?

Rule 5 of the South Carolina Rules of Criminal Procedure outlines the discovery requirements in criminal cases. Rule 5, SCRCrimP. Rule 5(a)(1)(A) provides that "[u]pon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph...the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent." Rule 5, SCRCrimP. Absent a court order to the contrary, the prosecution is required to respond to defendant's request for discovery "no later then (sic) thirty (30) days after the request is made...." Rule 5(a)(3), SCRCrimP. Additionally, Rule 5(d)(2) provides that "the court may...prohibit the party from introducing evidence not disclosed...." Rule 5, SCRCrimP.

a) Appellant's Oral Statement was Not Disclosed in a Timely Manner

Appellant's statements to Talbert that he met the man he received the tools from "in town" and that he "was a crackhead" were not disclosed to Appellant in accordance with Rule 5. Appellant made the statements to Talbert on August 10, 2012, but he State did not disclose them to Frick until February 5, 2013, well outside of the thirty-day time limit provided by Rule 5(a)(3). R.p*____; Tr. 68, ll. 15-25, to 72, ll. 19. In addition to waiting almost six (6) months to disclose the statements to Frick, the State waited until the day after a jury was selected to hear the case. Tr. 68, ll. 15-25, to 72, ll. 19; 102, ll. 4-9. While this Court may find that Rule 5(a)(3) does not establish a strict time limit for disclosure of all evidence, it should find that Rule 5 requires the State to disclose all known evidence in a timely manner so the defense may properly prepare for trial.

b) Appellant's Oral Statement Met Rule 5's Requirements for Disclosure

It is undisputed that Appellant's oral statements to Talbert were made by the defendant, and that the State intended to use them at trial. The State's intent to use the statements at trial is evidenced by the fact that it offered the statements into evidence. Tr. 102, ll. 4-9; 135, ll. 19-25, to 136, ll. 1-2; 62, ll. 1-7. Additionally, the statements were made to a person known by Appellant to be a prosecution agent. Tr. 102, ll. 4-9; 135, ll. 19-25, to 136, ll. 1-2; 62, ll. 1-7. Appellant made the statements to Talbert, an investigator with the FCSO, who arrived with at least 5 other deputies to execute a search warrant. Talbert told Appellant the reason for the intrusion, placed him in handcuffs, and read him his *Miranda* rights. Tr. 93, ll. 19-25; Tr. 99, ll. 7-22.

In State v. Easler, the South Carolina Supreme Court addressed the issue of what amounted to an "interrogation." 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997). The Easler Court held that "[i]nterrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police that police should know are reasonably likely to elicit an incriminating response." Easler, 327 S.C. at 127, 489 S.E.2d at 621. *See also* Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); State v. Chandler, Op. No. 2012-UP-557 (S.C. Ct. App. filed October 10, 2012). The Court held that there was "clearly interrogation" in Easler because the police officers knew their questions "were likely to elicit incriminating responses." Easler, 327 S.C. at 127, 489 S.E.2d at 621.

In the case at bar, after reading Appellant his *Miranda* rights, Talbert expressly questioned Appellant about his prior oral statement that "he had gotten the tools from a black guy." Tr. 101, ll. 23-2. It was in direct response to this express questioning that Appellant told Talbert that he met the man "in town" and that he "was a crackhead." Tr. 102, ll. 4-9.

c) Knowledge of Appellant's Oral Statement Is Imputed on the State

The knowledge of evidence within the possession of law enforcement is imputed on the prosecution. See Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); Sullivan v. State, 880 So.2d 481 (Ala.Crim.App. 2003); Ex Parte Hunter, 777 So.2d 60 (Ala.2000)("Alabama law imputes to a prosecutor knowledge of information supplied by an investigating officer's testimony"). In Barbee v. Warden, the Fourth Circuit Court of Appeals held that the prosecutor's lack of knowledge of evidence in no way neutralized the effect of the evidence, and therefore had was no excuse for any nondisclosure. 331 F.2d at 846. The Barbee Court stated: "[f]ailure of the police to reveal such material in their possession is equally harmful to the defendant whether the

information is purposely, or negligently, withheld. And it makes no difference if the withholding is by official other than the prosecutor. The police are also part of the prosecution...." Id.

In the case at bar, Talbert's knowledge of Appellant's statements that he met the man "in town" and that he "was a crackhead" was imputed on the State. While this Court may disagree that the State's nondisclosure of the statements warrants their suppression, it should find, however, that the State had knowledge of the statements were made.

d) Appellant's Oral Statement was Prejudicial

The South Carolina Supreme Court has held the trial court's failure to suppress evidence for a Rule 5 violation is not reversible error unless prejudice is shown. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981). The Court has also routinely held that evidence of drug use is prejudicial to the defendant. *See* Jackson v. State, 329 S.C. 345, 352, 495 S.E.2d 768, 772 (1998)(referring to possession of crack cocaine as "a crime of moral turpitude"); State v. Adams, 322 S.C. 114, 119, 470 S.E.2d 366, 369 (1996)(acknowledging the "great possibility that unfair prejudice may result from evidence of a criminal defendant's past use of cocaine"); State v. Smith, 309 S.C. 442, 447, 424 S.E.2d 496, 499 (1992)(evidence of defendant's drug use should be excluded when unrelated to crime at issue); State v. Bolden, 303 S.C. 41, 44, 398 S.E.2d 494, 495 (1990)(evidence of use of crack cocaine is more prejudicial than evidence of use of marijuana); State v. Coleman, 301 S.C. 57, 60, 389 S.E.2d 659, 660 (1990)(evidence that defendant was a social user of cocaine was prejudicial); State v. Major, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990)(referring to possession of cocaine as "a crime of moral turpitude").

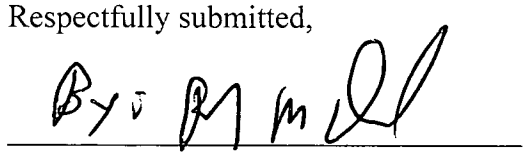
The Supreme Court of New Hampshire addressed the prejudicial effect of evidence of drug use in State v. Costello, 159 N.H. 113, 977 A.2d 454 (N.H. 2009). In Costello, the State moved to introduce evidence that the defendant was a heroin addict. 159 N.H. at 117, 977 A.2d at 456. The State conceded that evidence of his heroin addiction, together with other evidence, "would be relevant to show that [the defendant] entered [the victim's] home with the intent to steal." Id. The New Hampshire Supreme Court held that the inference the defendant's heroin addiction imparted on the jury was that "because the defendant is a drug addict he has the general intent to steal, and because drug addicts steal, it is safe to conclude that this particular drug addict is the unknown culprit in this case." Costello, 159 N.H. at 121, 977 A.2d at 459. The Costello court ultimately upheld the conviction based on the trial court's limiting instruction to the jury. 159 N.H. at 123, 977 A.2d at 461(finding the danger of unfair prejudice did not substantially outweigh the probative value of the evidence).

To convict a defendant of receiving stolen goods, the State must prove that the defendant knew or had reason to believe the goods in question were stolen. S.C. Code Ann. § 16-13-180 (Supp. 2012). Accordingly, the jury in the case at bar must have found that Appellant knew or had reason to believe the tools he received were stolen. Just as the New Hampshire Supreme Court feared that the jury in Costello may infer that the defendant may have the intent to steal because "drug addicts steal," the jury in the case at bar may have inferred likewise. Appellant concedes that his statement to Talbert that he met the man "in town" was not prejudicial, however his statement that the man "was a crackhead" was prejudicial. The jury could have easily believed that because the man "was a crackhead," he was likely to deal in stolen goods.

CONCLUSION

For these reasons, this matter should be reversed and a new trial ordered.

Respectfully submitted,



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December 31st, 2013.

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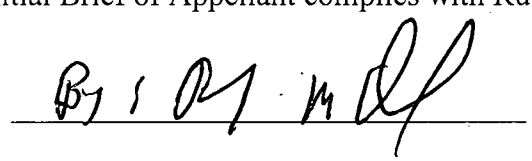
CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief of Appellant complies with Rule 208, SCACR.



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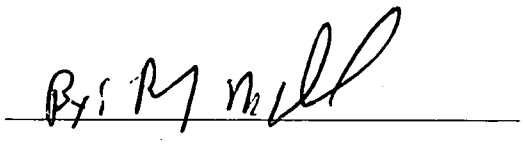
DESIGNATION OF MATTER TO BE INCLUDED ON APPEAL

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

1. True billed Indictment (2012-GS-20-0370);
2. Notice of Representation and Request for Discovery Materials (2012-GS-20-0370);
3. Verdict Form (2012-GS-20-0370);
4. Notice of Appeal;
5. Cover Page of Trial Transcript;
6. Tr. 18-23;
7. Tr. 30-38;
8. Tr. 47-76;
9. Tr. 87-118;
10. Tr. 126-145;
11. Tr. 146-151;
12. Tr. 162-183;
13. 199-214.

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

By: 

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AFFIDAVIT OF SERVICE

Personally appeared before me, Robert M. Dudek, who, after being duly sworn, deposes and says that he is employed with the South Carolina Commission on Indigent Defense, Appellate Division. That on December 31, 2013, he did hand deliver two copies of the Initial Brief of Appellant and Designation of Matter to be Included on Appeal in the above case to Sally Elliott, Office of the Attorney General.

By: RMD

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SWORN to and Subscribed
Before me this 31st day
of December, 2013.

Notary Public for South Carolina
My Commission expires: October 30, 2022