STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
G. Thomas Cooper, Jr., Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

GREGORY V. SMITH

APPELLANT

APPELLATE CASE NO. 2012-213666

PRO-SE BRIEF OF APPELLANT

GREGORY V. SMITH #353524
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P.O. Box #205
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PRO-SE APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATMENT OF ISSUES ON APPEAL (Pg.)

STATEMENT OF THE CASE

On January 23, 2012, a Kershaw County grand jury indicted Appellant Gregory Smith for murder and manufacturing methamphetamine. R.*.[1] On October 22, 2012, Appellants case proceeded to trial before the Honorable G. Thomas Cooper Jr. and a jury. Neil Riley represented Appellant and Ron Moak[2] and Brett Perry represented the State. Tr. 1.

The jury found Appellant guilty on both counts. Tr. 706, ln. 14-21. After a separate sentencing hearing, the trial court sentenced Appellant to thirty years for the murder charge and five years concurrent for the methamphetamine charge. Tr. Dec. 12, 2012 at 20, ln. 11-20.

1. The grand jury also indicted Appellant for manufacturing marijuana, but the State dropped the charge before trial Tr. 14, ln. 24- Tr. 17, ln. 20.
2. Deputy solicitor Ron Moak was fired on December. 10. 2012 for misconduct involving alcohol, upon information and belief.

ARGUMENT

I. APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS NOT ALLOWED TIME TO SELECT AN ATTORNEY OF HIS OWN CHOOSING.

On the Facts

The State alleged that on May. 28, 2011, Appellant shot and killed Deborah Tyler in her trailer home. Gregory Smith was arrested, within hours after arrest, the Appellant was taken from Kershaw County Detention Center to the Sheriffs Office for an in custody interrogation, upon arrival he was met by Lt. Christopher Phillips, Detective, and an attorney William Tetterton Esq. The attorney was allegedly called to represent the Appellant by Brett Perry a deputy solicitor for the 5th Judicial Circuit in Kershaw County, which is per-se a conflict of interest. See Supp. Rec. on App. Pg. 1095.

The attorney informed the Appellant that he was facing 40 years on the drug charges alone, but if he made a video statement that the alleged shooting was an error in the heat of the moment, the attorney promised a fifteen year plea deal.

The Appellant in his diminished capacity, being overwhelmed by the circumstances, reluctantly agreed. After sufficient time, the Appellant decided to reconsider his descision, contacted Tetterton, on Aug. 8. 11 via fax informing the attorney he was going to begin his own defense, in reality had already began in July of 2011, See Rec. on app. pg. 849-850, confession recant, See Rec. on app. pg. 848, Opening Statement. On Aug. 8. 11, fax was sent from the detention center. See Rec. on app. pg. 1038 and 1039, two days later Tetterton and Perry conspire together, to put together, a new motion of discovery, See Supp. Rec. on app. pg. 1096. Five days later Lt. Phillips drafts up a fraudulant search warrant, See Rec. on app. pgs, 755, 756, 757 and 758.

The Appellant contends at this point there is an irrebuttable conspiracy that has developed between the attorney, solicitor and investigator.

On August. 15. 11, then-Lieutenant Phillips of Kershaw County Sheriff's Office executed an invalid search warrant on Appellant's cell at 12:00 pm.

II. APPELLANT WAS DENIED DUE PROCESS OF LAW BECAUSE HE SOUGHT TO DECIDE WHETHER TO WAIVE COUNSEL AND PREPARE HIS OWN DEFENSE BUT WAS NEVER AFFORDED THE CHANCE.

In the SLED Report Attachment 8, See Rec. on app. pgs. 787-930, clearly shows the 80 days of Appellants notes and intentions to go to trial throughout the entire record. The record clearly shows in the privileged documentation from his then attorney, where he underlined case laws and legal language, Rec. on app. pgs. 795, 796 and 800. The Appellant was denied the option to represent himself when on Aug. 15. 11, the State seized Appellants legal materials from him while he was in pre-trial detention, claiming a valad search warrant, which in fact was fraudulent. See Attachment #1, Rec. on. app. pg 757, Affidavit of Phillips claiming a random drug test that had positive results for amphetamines, when in fact results were negative. See Rec. on app. pg. 1087. One can only reasonably conclude that while acting under "color of law" that gross official misconduct has occured.

On or around July. 18. 12 in the District Court of South Carolina, the Appellant requested #1. Copies of all documents which include all personal correspondance and legal documents and writings, See Supp. Rec. on app. pg. 1097, Additionally, request #6 to produce documents that authorize you [Phillips] to confiscate Appellants legal discovery and legal notes that outlined his planned defense in his upcoming trial. Phillips replied that he was acting under a legal warrant but wasn't sure whether or not he could obtain a copy. See Supp. Rec. on app. pg. 1099. The records clearly show that the illegally seized material was held from the Appellant, until well after the State had presented thier case, which in fact should be considered "Extrinsic Evidence". When the investigators and solicitors both withheld Extrinsic evidence proves that the Appellant was deprived the oppotunity to present his case and therefore there was never a real contest, but a fraud upon the court has occured and the Appellant seeks vacated judgement.

III. DID THE TRIAL JUDGE ABUSE HIS DISCRETION WHEN HE PROCEEDED TO MAKE FINDINGS OF FACT ON THE VERY MATTERS WHICH INQUIRY COULD REASONABLY HAVE BEEN EXPECTED TO ILLUMINATE?

The Appellant contends that the trial judge had erroneously believed he had no authority to permit record to be supplemented. The judge states "I thought the solicitors office might have those things. I don't---its not my job to present the evidence". Tr. pg. 607 5-7. The judge declared "my responsibility is to make sure both sides, the State and the defendant get a fair trial. Tr. pg. 607, ln. 22-24.

In this case, the trial judge declined to investigate allegations of intentional with holding of evidence, the investigation team and solicitor deliberatly with held a search warrant [entirely], and the Appellants defense plans until it was far too late to be useful. Judge Cooper failed to determine the extent of the misconduct. The defense raised the issue of a search warrant. Tr. pg. 601, ln. 25, Tr. pg. 602, 1-4 and put on record a diligent attempt to obtain

the warrant before trial. See request #6 Supp. Rec. on app. pg. 1098, 1099. Additionally, a copy should have been presented at the time of search. The judge ordered an investigation after the Appellant was found guilty. Tr. pg. 723 ln. 11-16.

IV. DID THE TRIAL COURT JUDGE ABUSE HIS DISCRETION WHEN HE RECEIVED FINDINGS OF OFFICIAL MISCONDUCT AND PROCEEDED TO SENTENCE APPELLANT?

On Oct. 25. 2012, Judge Cooper ordered an investigation to be conducted by SLED. On Dec. 12. 2012, The defense had inquired about the investigations into allegations and whether or not the Court would make available SLED's findings. Tr. pg. 744, ln. 11-18. The report clearly shows proof of official misconduct that would have been benefitial to the defense, that would lead to fruitful discovery.

Judge Cooper not only denied but further withheld "Extrinsic Evidence". The Appellant contends the integrity of the entire judicial system is called into question by conduct such that was engaged by Judge Cooper.

V. DID THE TRIAL COURT JUDGE ERR WHEN HE REFUSED TO ALLOW APPELLANT TO OBJECT?

The Appellant contends when the trial court judge stated that he was ready to procede to bring in the jury, further stating, "I don't think anything you [Appellant] could say would stop me from doing that." Tr. pg. 614, ln. 19-25, and then by stating, "I'm not going to listen to him." Tr. pg. 616, ln. 7. The record clearly shows vicious, inflammatory arguement that resulted in prejudice.

According to Chief Justice Jean Toal in the South Carolina Appellate Court Practice, the III. ISSUE PRESERVATION AT TRIAL.(5) Other Exceptions. The failure to timely object does not waive an issue for appellate review where such an objection would have been futile. See State v. Pace, (holding to make contemporaneous objection to judges comments excused where judges tone and tenor made it clear that any objection would have been futile.) The Appellant was allowed to object post trial, beginning on Tr. pg. 715, ln. 11, pg. 716, 717, 718, 719, 720, 721 and pg. 722.

According to the aforementioned rule, the eight page objection which is backed up by case laws supporting allegations of the intentional official misconduct should be considered an issue for appellate review.

DISCUSSION

Appellant is asking the Court to reverse the judgement, on the basis that he was denied the right to a lawyer of his own choosing. See Powell vs. Alabama, 287 U.S. 45, 53 S.Ct. 55, (1932)(reversing conviction because of, among other things, defendant's were appointed lawyers before given an opportunity to hire thier own.)

Under Rule 3.8(b) S.C.A.C.R. Special Responsibilities of a prosecutor, make reasonable efforts to assure the accused has been given reasonable opportunity to obtain counsel.

Under Rule 7.3 S.C.A.C.R (comment 1),

The prospective client, who may find it difficult to fully evaluate all available alternatives with reasoned judgement and appropriate self-interest in the face of the lawyers presence and insistance upon being retained instantly. The situation is fraught with the possibility of undue influence, intimidation, and overreaching. See Colorado vs. Connelly, 479 U.S 157, 107 S.Ct. 515, (U.S. 1986)(holding that the Federal Constitution requires a court to

to suppress a confession when the defendants mental state, at the time he confessed, interfered with his "rational intellect" and his "free will" the very admission of the evidence in a court of law being sufficient state action to implicate the due process clause of the United States Constitution.)

The Appellant contends that government officials pusuant a fraudulant warrant seized his legal documents. See State vs. Hill, 245 S.C. 76, 138 S.E 2d 289. (holding a search warrant issued on basis on information and belief stated affiant had been informed by informer but set forth no other sources of affiants information was nullity.)

The warrant was issued in violation of Article 1, Section 16 of the Constitution of South Carolina as well as the Fourth Amendment to the Constitution of the United States and not issued in conformity with sections 4-414 and 4-415 of the Code of Laws of South Carolina with the result of the warrant a nullity.

See U.S. vs. Fisher, 711 F 3d 460, CA 4(Md) (2013)(the Supreme Court held that

government misrepresentations constitute impermissible conduct. Unquestionably, if defendant had proof of officers misconduct, a fraudulant warrant, he would have filed a motion to suppress, and the motion may well have been sucessful, without the testimony thier likely would have been no prosecution at all.)
See State vs. Ellefson, 224 S.E 2d 666, 266 S.C. 494 (S.C. 1976)(holding when a pretrial detainee remains in custody, he isn't disrobed of his constitutional rights and laid bare for the zealous investigation of the case. He is cloaked with the presumption of innocence.)(Additionally, the searched impinged upon the Appellants First Amendment right as incorporated by the Fourteenth Amendment, to be able to communicate without the uninvited ears and eyes of the government.)
See Black vs. United States, 385 U.S 26, 87 S.Ct. 190, 17 L.Ed 2d 26 (1966), (It is certainly true that where there is gross misconduct of the part of the government, no predjudice need be shown.)

In this case the Appellant can show with "reasonable probability" that a member of the prosecution team intentionally eaves dropped on confident-ial defense plans, solicitor Ron Moak made the statement "Your Honor, we "anticipate" the argument that the defendant was under the influence of "meth fumes". Tr. pg. 72 ln 4-6. In Attachment 8 in the SLED report under "Confession Recant" the Appell-ants intention at that time was to claim "meth fumes" in other words "deli rious from chemicals", not from ingestion of drugs. See Rec. on app. pg. 850.
In State vs. Quattlebaum, 338 S.C 441, 527 S.E 2d 105 (2000)(deliberate prosectorial misconduct raises a irrebuttable presu-mption of prejudice. The content of the protected communication is not relevant. The focus must be on the misconduct.)
Because a deputy solicitor of the Fifth Circuit Solicitors Office eavesdropped on privileged defense plans and mater-ial between his attorney, reversal of Appellants conviction and disqualification of the Fifth Circuit to prosecute the

Appellant at his new trial. The courts bear the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among members of the bar, and for protecting and defending the constitutional rights of the accused. The integrity of the entire judicial system is called into question by conduct such as that engaged in by the deputy solicitor and investigating officers in this case. The participation at trial of a prosecutor who eavesdropped on the accused and his attorney tarnishes us all. We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice.

20K947K Law key: Refusal to Exercise Discretion. Ruling which reveals that trial judge who was vested with discretion did not, in fact, exercise discretion, is error of law. Appealing party is entitled to have matter considered and passed on as discretionary matter where trial judge clothed with discretion rules as a matter of law. In this case, the trial judge declined to investigate

allegations of intentional withholding of evidence, extrinsic evidence which is per se fraud upon the court.
See Chewning vs Ford Motor Co., 354 S.C. 72, 579 S.E 2d 605 S.C(2003)(holding the intentional concealment of documents by an attorney constitute "extrinsic fraud" and allows a judgement to be set aside due to fraud upon the court, as such conduct by an attorney effectively precludes the opposing party from having his or her day in court.) Because fraud upon the court is an affront to the administration of justice, a litigant who has been defrauded need not establish prejudice in order to set aside a judgement.

Fraud upon the court is a "serious allegation" involving corruption of judicial processes itself. There is no statue of limitations when a party seeks to set aside a judgement due to fraud upon the court. Bryan vs. Bryan, 220 SC. 164, 66 S.E. 2d 609 (1951)(holding extrinsic fraud is necessary in order to secure equitable relief vacating a prior judgement.)

In this case, the existance of extrinsic evidence, See Attachment's 1 and 8 in the SLED report, is again, proof of fraud upon the court. "Extrinsic Evidence" is fraud that induces a person not to fully present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic evidence on the theory that the fraud prevented a party from fully exhibiting and trying his case, there never has been a real contest before the court on the subject matter of the action.

The fifth amendment protects us all from illegal searches and being put in prison without due process. The government must follow the law.

CONCLUSION

For the foregoing reasons, Appellant Gregory V. Smith respectfully requests reversal of his convictions, his sentence vacated and disqualificaton of the 5th Judicial Circuit to retry his case.

Respectfully Submitted,
Gregory V. Smith

GREGORY V. SMITH

PRO-SE APPELLANT

This 24th day of March, 2014.

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DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL

Five documents to support factual background.

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

March. 24. 2014

Gregory V. Smith

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Pro-se Appellant

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CERTIFICATE OF SERVICE

The undersigned pro-se Appellant hereby certifies that a true copy of the pro-se brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esq., at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia SC. 29201 and a copy has also been served to The South Carolina Court of Appeals at 1015 Sumpter Street, Columbia S.C. 29201, on this 24th day of March, 2014

Gregory V. Smith
pro-se Appellant