State of South Carolina

In the Court of Appeals

Appeal from York County

John C. Hayes, III, Circuit Court Judge

The State,

Respondent,

v.

Brian Henry Davis,

Appellant

Appellate Case No. 2014-001107

Prose Brief of Appellant

Brian Henry Davis
Appellate Defender

Brian Henry Davis SCDC #332518
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Statement of Issue On Appeal

Whether Wanda Nelson, the Official Court Reporter failed to produce a true and accurate trial transcript? Whether the inaccuracies adversely affects the validity of appellant's review by the Court of Appeals? Whether Honorable John C. Hayes, III, the trial court failed to ensure compliance with 28 U.S.C.A 753 by allowing the trial transcript to be produced with inaccuracies that adversely affects appellant's review in the State Court?

Arguement

Wanda Nelson, the Official Court Reporter of the Sixteenth Judicial Circuit failed to produce a completely accurate verbatim record of the trial in which the inaccuracies adversely affects the validity of appellant's review by the Court of Appeals. John C. Hayes, the trial court failed to ensure compliance with the statute 28 U.S.C.A 753(b), which is the court's responsibility. Appellant can not produce a reasonable pro se brief on the Chain of Custody because the absence of substantial and significant portions of record concerning the chain. Court Reporter and Trial Court showed prejudice by violating appellant's Constitutional rights, denying appellant of liberty and due process.

From the beginning of Drug Chemist, Cynthia Mitchums testimony (p.134, line 12) until the objection by defense attorney Ashley Anderson to States attempt to have the evidence bag containing the white plastic grocery bag (State Exhibit #21) submitted into evidence (p.139, line 5) Mitchum never stated that she recognizes the signature of Ray Hamilton. Although the prosecuter stated that Ms. Mitchum received the bag and recognized the signature of Ray Hamilton. (p.144, lines 18-20) (p.149, lines 24-25) The trial Court also stated that Ms. Mitchum testified to recognizing the signature. (p.150, lines 15-16) Prior to page 150, there is not anywhere that has Ms. Mitchum saying she recognizes Ray Hamilton's signature, but the trial transcript does have Mitchum testifing to receiving the bag from Ray Hamilton in-person. (p.136, lines 15-16) This inaccuracy is not a mistake, but it is in ill-motive and is an effort to help the state establish a suffient chain of custody in review of the Court of Appeals.

On a second occasion the trial transcript was also inaccurate, whese while conducting cross examination with Dt. Thomas on stand, defense attorney asked Dt. Thomas "what time did you get to the Police Department and seal the evidence;" Dt. Thomas answered saying "I'm not sure what time I got back to the Police Department and sealed the evidence". On the trial transcript there is not a question asked by Defense nor a answer by Dt. Thomas concerning the time that the evidence was sealed. This question and answer is supposed to be near (p.129, line 9) but it's not. It has been deleted from the trial

This question and answer should be near (p.129, line 9) but it's not. It has be deleted from the trial transcript. I'm positive this question and answer occurred and the trial tape will prove it. Defense attorney Ashley Anderson is able to verify this fact. The trial transcript has Ms. Anderson stating several times that Dt. Thomas did not testify to what time he sealed the evidence. (R.p. 141, lines 13-15; R.p. 186, lines 9-19) This inaccuracy is not a mistake but it is in ill-motive and it's an effort to aid the State in establishing a sufficient Chain of Custody, in which would adversely affect appellant's review by the Court of Appeals.

On a third occasion, the trial court said the jury requested to hear Officer Vreeland's testimony again, concerning his statements of having binoculars and him mentioning hearing a bang. The trial transcript does not have the trial court saying specificly what the jury requested to hear. (R.p. 201, line 16-22) This inaccuracy was not by mistake, this is a no evidence case and its once again another effort to help to State.

The Court Reporter Act provides that each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method ... Proceeding to be recorded under this Section include (1) all proceedings in criminal cases had in open court. ..(28 U.S.C.A. 753) Upon the request of any party to any proceeding which has be so recorded who has agreed to pay the fee therefore, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request. The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made. The transcript in any case certified by the reporter or other designated individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken a proceedings had. (28 U.S.C.A. 753(b)) The reporters shall be subject to the supervision of the appointing court and the Judical Conference in the performance of their duties, including dealings with parties requesting transcripts, (28 U.S.C.A 753(c)) We have recognized that the requirement of a verbatim record of criminal proceedings is designed "to safeguard a defendant's right to appellate review", (U.S. v. Gillis, 473 F.2d, 549, 554) and that "noncompliance

(U.S. v. Gillis, 773 F.2d. 549, 554) and that "noncompliance with §753 seems fraught with potential for mistake and possible prejudice," (U.S. v. Snead, 527 F.2d. 590, 591) We have also stated that "the direction of §753 is simple and clear; the Statute should be obeyed." (U.S. v. Hanno, 21 F.3d. 42, 48) Responsibility to ensure compliance with the statute lies with the court, not the reporter or the parties, (U.S. v. Gallo F.2d. 1530); and accordingly violation of court reporter Act, entiles defendant to new trial, even absent showing of prejudice, where defendant has different counsel for direct appeal. (White v. State of Fla., Dept. of Corrections, C.A. 11 (Fla.) 1991, F.2d. 912, 112 S.Ct. 1274, 117 L.Ed.2d 500) Appealing party who contends that errors were made at trial may be prejudiced by lack of a complete record, in that reviewing court may be unable to rule on claimed errors; in such circumstances the failure to record may require court to reverse and order a new trial. (Calhoun v. U.S., C.A. 5 (miss) 1967, 384 F.2d 180)

In this case, Wanda Nelson, produced a verbatim record of the trial absent of significant portions. The appellant sent a mailed letter to the reporter on 9/29/14 requesting corrections to be made. The reporter sent a letter to appellant in response, saying she's unable to locate the files appellant requested and she never forwarded the inaccurate transcript to Appellant, therefore she cannot address the issue. The Trial Court failed to ensure compliance with §753. The Sixteenth Judicial Circuit also failed to ensure compliance with the Statute.

Statement of Issue on Appeal

Whether the trial court erred in admitting into evidence the crack cocaine (State Exhibit #21) seized at the time of appellant's arrest, when State failed to prove appellant being in possession of crack cocaine, and state failed to prove that the fungible item was handled in a secure manner nor did the State establish the identity of each person in the chain handling the evidence? Whether the trial court's error is prejudical?

Arguement

The trial court erred in admitting into evidence (State Exhibit #21) the white plastic grocery bag with red lettering containing crack cocaine, when the State failed to show proof of possession by appellant of the white plastic grocery bag with red lettering, State failed to prove the evidence was handled in a secure manner, and also failed to establish the identity of each person in the chain of custody handling the evidence. The trial court made a prejudical error in admitting the white like grocery bag into evidence which violates my rights under the Fourteenth and Fifth Amendements.

On June 27, 2013, the Rock Hill Police Department was conducting surveillance at Executive Inn because of concerns over drug activity there. Lt. Culbreath said he was parked across the street in a parking lot in his white, unmarked Tahoe. Investigator Vreeland was behind the inn in the tree line. (R.p. 54, line 7 - p. 58, line 8) Detective Thomas was by hiself in a unmarked vehicle, but didn't say where. (R.p. 112, lines 5-17) Investigator Vreeland said he saw appellant open the door to room 312. He saw the short portion of a clear bag and appellant motioning as to stick something in his pants. Appellant shut the door to room 312 and walked to the breezeway. Vreeland said he saw appellant stop at an ice machine, heard a bang, and saw appellant going into the front of his pants and come back out again. Vreeland saw a clear bag and he saw the bag get placed in the vicinity of the ice machine. (R.p. 88, line 2 - p. 90, line 1) He kept his eye on the machine until Dt. Thomas walked up to it and recovered the bag. (R.p. 95, lines 11-21) Initially, Dt. Thomas checked the bottom part where the ice would come through. Thomas was pulling out paper bags initially then Vreeland saw Thomas pull out a plastic bag and said thats it. (R.p. 108, lines 11-13; R.p. 76, lines 1-7) The bag was tested for finger-prints, but none were recovered. (R.p. 108, lines 14-20; R.p. 110, lines 12-17)

Detective Thomas testified next. He said Vreeland told him that he witnessed a male stash a white bag near an ice machine. Dt. Thomas went to the ice machine and stated searching for the bag. Eventually he found the bag. (R.p.112, line 14 - p.113, line 18) Later, he said it was a white like plastic grocery bag. (R.p.117, lines 4-7) Later, he said, a white plastic grocery bag with red letting is what he found stuffed inside the ice machine encasement. (R.p.128, lines 1-2) He said he did not take any photographs that night and there are no photos of the original condition he found it in. (R.p.129, lines 3-8) Dt. Thomas said after recovering the bag he immediately put it in his pants packet and kept it there until he was completely finished with his investigation on the street, and then went back to the Law Center and processed, filled out the evidence bags and forms, and then submitted it into evidence. (R.p.126, line 16 - p.127, line 25) He never testified to exactly or around what time did he sealed the evidence, or what time he got to the law center. (SEE PROSE BRIEF ABOUT INACCURATE TRANSCRIPT)

Evidence technician Rebecca Prior testified next. She said on June 28, 2013 she received, signed and barcoded the property bag that Ryan Thomas signed and submitted into the evidence locker on June 27, 2013. Prior said she signed it and put it in the proper bin and that was the last time she came in contact with the bag.

Prior said she signed it, put it in the proper bin, and that was the last time she came in contact with the bag. (R.p. 132, line 3- p. 133, line 22)

Drug Chemist Cynthia Mitchum testified next. She said that the bag came into her possession from Rock Hill P.D. on July 15, 2013. Later, she said she received it from Ray Hamilton and she knows this because she recognizes his signature. (R.p. 136 lines 6-19) (SEE PROSE BRIEF ABOUT INACCURATE TRANSCRIPT) Ray Hamilton work in the Evidence Room at Rock Hill P.D (R.p. 136, lines 17-19) Later Mitchum said Hamilton puts his initials on the evidence bags, not his signature. E.R.R.H is the way he signs the evidence bag, Evidence Room Ray Hamilton (Rp. 151, lines 5-14)

Trial court observed State's Exhibit Number 21 and said the Exhibit shows the chain of custody going from Dt. Thomas to Prior, from Prior to Mitchum. Trial court said State Exhibit #21 doesn't show another person being involved and there's testimony that someone esle handled the bag between Prior and Mitchum. (R.p. 148, lines 21-25) Trial court said Mitchum recognized the signature on the bag, Ray Hamilton's name doesn't even appear on the bag, let alone his signature. (R.p. 150, lines 3-19) E.R.R.H is written on the bag at the date of 7/15/13. The bag was transported from the Evidence Room in Rock Hill. (Rp. 136, lines 6-19) (R.p. 126, lines 23-25) (R.p. 131, lines 13-16)

The trial court stated that he is not sure he can find that the chain of evidence has been established as far as practical. (R. p. 154, lines 2-10)

At the conclusion of the Defense objection to States attempt to have the white grocery bag (State Exhibit #21) submitted into evidence, inasmuch as the inadequate chain of custody was defective. The trial court overruled the objection and admitted State Exhibit #21 into evidence. That ruling was a prejudical error in which affected the outcome of the trial. (Rp 139, line 3 - p. 154, line 24)

Fifth Amendment guarantee that a person cannot be deprived of liberty without due process law.

Fourteenth Amendment guarantee due process.

Rule 103(a) error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.

Denial of due process occurs when defendant in criminal trial is denied fundamental fairness essential to concept of justice. (State v. Hornsby 326 S.C. 121, 484 S.E.2d 869) RULE 6(6) For the purpose of establishing a chain of physical custody or control of evidence entered under part (A) of Rule 6 (Report of Chemical Analysis) a certified or sworn statement signed by each successive person having custody of the evidence that he or she delivered it to the

person stated is evidence that the person had custody and made delivery as stated without the necessity of the person who signed the statement being present in court provided ;(1) the statement contains a sufficient description of the sustance or its container to destinguish it ;and(2) the statement says the substance was delivered in substantially the same condition as when received.

Prosecution's failure to preserve potential exculpatory evidence as violating criminal defendant's due process rights under Federal Constitution [Supreme Court case (105 L.Ed.2d. 1041)] State failed to prove a sufficient chain of custody, and thus, the crack cocaine should not have been admitted into evidence; although State presented the testimony of the first and last links in the chain of custody, the state did not provide testimony from either of the intervening links in the chain, and the State did not submit the testimony of each individual who handled the evidence nor did the State comply with Rule 6 which allows the admission of sworn statements in lieu of the appearance of chain of custody witness. (State v. Chisolm 355 S.C. 175, 584 S.E.2d. 401) Custodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce sworn statements (State v. Chisolm 355 S.C. 175, 584 S.E.2d. 401)

Turning to the merits, this Court has long held that a party offering into evidence fungible items such a drugs or blood samples must establish a complete chain of custody as fas as practicable. (Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534, 537) Where an analyzed substance that has passed thraugh several hands, the identity af individuals who aquired the evidence and what was done with the evidence is established, and the manner af handling is reasonably demonstrated, no abuse of discretion by the trial court is show in admitting the evidence absent proof of tampering, bad-faith, or ill-motive. (State v. Taylor, 360 S.C. 18, 25, 548 S.E.2d 735, 738)

In this case, the State failed to show proof of possession by appellant of the white plastic grocery bag with red lettering. Appellant was only seen with a clear bag. Thus, the white bag belong to someone else and should not have been submitted into evidence.

In this case, the State failed to show proof that the evidence was handled in a secure manner from the time it was recovered to the time it was sealed. Officer Thomas recovered the white bag and put it in his pocket and keep it (the fungible) items in his pants pocket until he got back to the Law Center and sealed it in a Best Evidence Bag.

Thus, the officer's mishandling of evidence and having no knowlege as to what time he sealed it lead to conjecture and supposition. Therefore the fungible item, crack cocaine, should not have been admitted into evidence.

In this case, the State failed to establish the identity of each person having custody of the evidence. The State failed to provide a sworn statement of the unidentified successor that was not called to court by the State. Thus, an adequate chain of custody was not established as far as practicable and Exhibit #21 should no have been admitted into evidence by the trial court. This is a prejudical error that could have affected the outcome of the trial, and violates Appellant's rights under the fourteenth and fifth Amendments.

Statement Of Issue On Appeal

Whether the trial court erred in the charge to the jury on "Reasonable Doubt" instructions, when the trial court expressed his own opinion concerning the certainties in our world, which may have confused the jury of the definition of "Reasonable Doubt"? Whether this error is a prejudical error?

Arguement

The trial court erred in charging the jury reasonable doubt instructions when the trial court expressed his own moral opinion about the absolute certainties in our world. The trial court mislead and confused the jury on instructions of the meaning of a reasonable doubt, which is a higher degree of doubt than is required. The trial court deprived appellant of liberty and due process under the Fifth and Fourteenth Amendments. This prejudical error lead to conjecture and ultimately appellant's wrongful conviction.

The trial court charged the jury instructions on reasonable doubt saying" the state is not required to prove appellant's guilt beyond all or every doubt" and later said" there are very few things in our world the we can know with absolute certainty and our law does not require that in a case such as this." (R.p.191, lines 9-18)

In this case, the trial court's reasonable doubt instruction to the jury included the trial court's own moral opinion about the absolute certainties in our world, which confuses the jury and suggest a higher degree of doubt than is required. This suggests that if a juror has doubts and is not certain of Appellant's guilt, the juror may still find appellant guilty.

Such a charge is misleading in that it allows a juror to base a finding of guilt upon a subjctive feeling rather than upon an evaluation of the evidence (U.S. v. Drake, 673 F.2d. 15) Such a instruction "could mislead the jury into finding no reasonable doubt when in fact there is some." (Holland v. U.S. 348 U.S. 121, 99 L.Ed. 150) The Due Process Clause of the 14th Amendment "Safeguards against dilution of the priniple that guilt is to be established by probative evidence and beyond a reasonable doubt." (Taylor v. Kentucky, 436 U.S. 478, 56 L.Ed.2d 468) An instruction is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the due process clause. (Cage v. Louisiana, 498 U.S. 39, 112 L.Ed.2d. 339) Denial of Due process occurs when defendant in criminal trial is denied fundamental fairness essential to concept of justice (State -v- Hornsby 326 S.C. 121, 484 S.E.2d 869)

Conclusion

Under the 28 U.S.C.A 2254 (Habea Corpus), Appellant's sentence and conviction should be vacated and the case remanded for a new trial.

Sworn to and subscribed before me
this 9th day of October, 2014

(Notary Public of South Carolina)

My Commission Expires 2/24

WAY #7, WEST
lle, SC 29512

OCT 08 2014

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