STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Sumter County
The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2014-000146

THE STATE,

Respondent,

v.

JEREMY SMITH,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not abuse its discretion in denying Appellant's request to suppress testimony concerning video viewed of the robbery viewed by witnesses. Law enforcement's failure to preserve a digital video from a store camera system did not violate Appellant's due process rights or right to a fair trial. There was no showing of bad faith on the part of the State, and the video had no exculpatory value.

STATEMENT OF THE CASE

Appellant Jeremy Smith was indicted for Burglary – Second Degree (Violent). (R. p. __, Indictment.) On January 15, 2014, he proceeded to a jury trial before the Honorable W. Jeffrey Young. Appellant was found guilty and sentenced to a term of ten years. (Tr. p. 152.) This appeal follows.

STATEMENT OF FACTS

Around 2:30 am on September 13, 2009, an alarm company placed phone calls to management of a Young's Market convenience store due to a break in. (Tr. pp. 57-58; pp. 75-76.) Manager Brandy Tilghman and assistant manager Jennifer Vandegrift went to the store. A large piece of asphalt had been thrown through the glass front door. (Tr. p. 58-60; pp. 76-78.) They immediately assessed that Newport cigarettes, blunt wraps, and cigars were missing. (Tr. p. 60; p. 76.)

Vandegrift, Tilghman, and an officer viewed the camera footage on the in-store system that night. (Tr. p. 60; p. 79.) The store's cameras captured a man approach the store on foot. (Tr. p. 61; p. 79.) The man threw a piece of asphalt through the front door. (Tr. p. 61; p. 79.) A camera just above the register captured the man's face. (Tr. p. 61.) According to Vandegrift, the man "looked up directly at the camera," and she could see his face clearly. (Tr. pp. 61-62.) Both Tilghman and Vandegrift recognized the man as a regular customer who would come into the store nearly every day. (Tr. pp. 62-64; pp. 81-82.) Both managers noted that the man wore a distinctive "grill," a piece of gold covering the teeth. (Tr. pp. 62-63; p. 83.) Tilghman recalled the man buying tobacco products, specifically Newport cigarettes, and Vandegrift recalled him purchasing blunt wraps. (Tr. p. 62; p. 82.) Unfortunately, neither manager knew the man's name at the time. The video showed the man taking cigarettes and blunt wraps and placing them in a bag. (Tr. p. 65; p. 79.) Vandegrift noted that as they watched the color video recording they had been able to freeze frames and even enlarge the shot to get a good look at Appellant. (Tr. p. 65; pp. 67-68; p. 70.)

The man came into the store as a customer approximately 36 hours later. (Tr. pp. 73-74.) Vandegrift asked for his identification when he made his purchase. She wrote the

name and address on her hand and called law enforcement after he left. (Tr. pp. 64-65.) When Appellant was arrested at his home he was wearing a gold grill. (Tr. pp. 93-94.) Appellant's home was less than a mile from the store, and a black bag recovered at Appellant's home was consistent with the one seen on the video. (Tr. p. 83; p. 93; p. 117.)

Both Vandegrift and Tilghman identified Appellant in court. (Tr. p.63; p. 81.) The investigating officer, Melissa Addison ("Addison"), who had watched the video in the store also identified Appellant in court. (Tr. p. 91-92.)

ARGUMENT

The trial court did not abuse its discretion in denying Appellant's request to suppress testimony concerning video viewed of the robbery viewed by witnesses. Law enforcement's failure to preserve a digital video from a store camera system did not violate Appellant's due process rights or right to a fair trial. There was no showing of bad faith on the part of the State, and the video had no exculpatory value.

"[R]ulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion." State v. Moses, 390 S.C. 502, 511, 702 S.E.2d 395, 399 (Ct. App. 2010). In the present case, the trial judge's denial of Appellant's request to suppress all testimony regarding what witnesses saw on the store's security video was not an abuse of discretion.

The camera system at Young's Market was motion activated. (Tr. p. 55; pp. 78-79.) Multiple cameras could be viewed on a single screen in the store. (Tr. p. 55; p. 78.) Recordings were saved on the system for 30 days. (Tr. p. 55; p. 85.) A user could access and view recordings on the system with a password. (Tr. p. 56.) A burner attached to the camera system allowed a user to transfer recordings to a DVD. (Tr. p. 56; pp. 84-85.) The employees followed the process to burn the recording from the system to the DVD. (Tr. p. 68; p. 85.) Even though they had issues with the burner in the past, they did not review the DVD after the process to ensure proper recording because the system did not allow for playback of the DVD. (Tr. p. 69; p. 85.) No evidence was presented that law enforcement was notified of any prior problems with the system. The DVD was given to the responding police officer and placed into the evidence locker. (Tr. pp. 30-31; p. 69; p. 85.) The investigating officer, Addison, also watched the video on the store's system the day after the burglary. (Tr. pp. 30-33; pp. 102-103.) Later, when the investigator attempted to view the DVD, there was nothing on it. (Tr. p. 31; p. 33; p. 96; p. 102.) The

investigating officer did seek technical assistance to attempt to view the video, but all attempts were unsuccessful. (Tr. p. 98, pp. 103-104.)

The Brady[1] disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Thus, an individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence, or was impeaching. Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). The State submits the solicitor did not suppress or otherwise fail to disclose evidence in his possession. The State cannot produce or disclose that which does not exist. Here, it was believed that the video from the store had been stored on a DVD. No one checked the DVD at the time the recording was made to ensure the file was on the DVD and readable. By the time it was determined the DVD did not contain the electronic file from Young's Market, the original data file in the store had been automatically deleted.

Rather, this case turns on the issue of preservation of evidence pursuant to Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). The Constitution imposes a duty on law enforcement to preserve evidence when that evidence is expected to play a significant role in the suspect's defense. See California v. Trombetta et al., 467 U.S. 479, 488 (1984). To meet the standard of constitutional materiality,

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

however, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." See Id. at 489. The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 518-519, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, supra; Moses, 702 S.E.2d at 403.

In this case, the surveillance tape of from Young's Market was neither of exculpatory value nor was it destroyed in bad faith. As Appellant acknowledges, the evidence shows the video was not burned to the DVD due to a technical flaw. Unaware that the downloaded contents were unusable, the responding officer placed the DVD into evidence. The State did not act to destroy the evidence. At best, the evidence establishes negligence where the DVD was not reviewed to ensure proper formatting of the data file. The system at Young's Market did not have capability to play back the DVD, so it could not be checked on site. (Tr. p. 69; p. 85.) There is no indication that the responding officer was informed of any technical issues with the equipment, and it appears from the record that similar recordings had been made and successfully viewed later from other burglaries at other businesses. (Tr. p. 32.) Given the system's problems in converting digital files, there is no indication that the file could have been saved even with further

efforts. This conduct does not equate to bad faith. As in Youngblood, police conduct which can at worst be described as negligent does not rise to the level of bad faith. Technical issues certainly do not amount to bad faith. Thus, Appellant clearly cannot meet the first prong of the spoliation analysis.

There is also no evidence that the video had any apparent exculpatory value. For the evidence to have had exculpatory value, Vandegrift, Tilghman, and Addison had to have fabricated their testimony. Without the video, Appellant was free to challenge the accuracy of the witness identifications. The situation in the present case was akin to that of an eyewitness to a crime – only the witnesses in this case had the opportunity to slow down the action and watch even more carefully.

In the absence of **any** evidence the State acted in bad faith, or the videotape had exculpatory value, the State was not required to preserve the videotape, and failure to do so did not violate Appellant's due process rights. Appellant contends witnesses should not have been allowed to testify to what they saw because the videotape was no longer available. To do so under the circumstances of this case would effectively eviscerate the limits established in Youngblood, and adopted by the courts of South Carolina, by requiring the State to preserve any evidence the defense might claim was "potentially" useful, even if there is no indication the evidence had exculpatory value. Such a result imposes an unwarranted burden on the State, which would allow dismissal of the entire case based on nothing more than a defendant's conclusory claim particular evidence might have helped the defense. For all these reasons, this argument is without merit.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Oct. 14, 2014

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Appeal from Sumter County
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THE STATE,

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PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 14th day of October, 2014.

Ellen DuBois

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RE: State v. Jeremy Smith
Appellate Case No. 20104-000146

Dear Ms. Caudy:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mary S. Williams
Assistant Attorney General
Bar # 76192

MSW/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services