STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenwood County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MIDREVIUS AMONE BROWN,

APPELLANT

APPELLATE CASE NO. 2013-002764

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Brown's motion to dismiss the case, or in the alternative to grant an appropriate continuance, based on counsel's inability to present a complete defense as guaranteed by the Sixth Amendment due to the state's actions. The gun the victim used to shoot at Appellant Brown was not in evidence as it was returned to the victim before defense counsel could test it. The state disclosed three days before trial the existence of six shell casings found at the scene. Therefore, defense counsel was denied the opportunity to have ballistics testing performed. All of the shell casings were 380 caliber and testing may have shown that the victim was the only person shooting. The late disclosure of potential witnesses at a nearby barbershop prevented counsel the opportunity to question them.

STATEMENT OF THE CASE

On July 12, 2013, the Greenwood County Grand jury indicted Midrevius Amone Brown on the charges of attempted murder and possession of firearm during a crime of violence. On November 18-22, 2013, Brown proceeded to trial before the Honorable Donald B. Hocker and a jury. Brown was represented by Shane Goranson and Thomas Adducci. The state was represented by Shannon Odom. Tr. 1. The jury found Brown guilty of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during a crime of violence. Tr. 254, ll. 1 – 23. Judge Hocker sentenced Brown to fifteen years on the ABHAN and five years on the weapons charge to run concurrently. Tr. 272, ll. 16 – 21. Brown's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On March 23, 2013, Kelvin Martin was driving home from work about 4:00 PM when he saw Appellant Midrevius Brown and another person on the side of the road. Brown allegedly flagged Martin down and waved for Martin to come over to them. There was a bit of bad blood between Martin and Brown due to previous problems between them. When Martin reached Brown, an argument ensues. Tr. 77, ll. 8 – 25; Tr. 88, ll. 16 – Tr. 90, ll. 10. Martin drove up beside Brown's car with the passenger side of each car adjacent to each other. Tr. 93, ll. 5 – 25.

During the argument which ensued, Martin claimed that Brown said: "I'm going to murder this fool." Brown then allegedly began shooting at Martin as Martin sat in his car. Martin then sped away. As he was leaving, Martin shot back at Brown with a gun his cousin purportedly left in Martin's car the night before. Martin then called the police. Tr. 94, ll. 1 – Tr. 95, ll. 25.

When the officers went to Martin's place, he told them about Brown shooting at him, but he did not tell them initially that he had fired back. Martin was a convicted felon and was not supposed to be around firearms. He did finally give the officer the gun he had shot. Tr. 96, ll. 1 – 12; Tr. 99, ll. 1 – Tr. 103, ll. 19.

Martin testified that the police found two shell casings in his car. Tr. 108, ll. 1 – 25.

Officer Wesley McClinton responded to the shooting on March 23, 2013. His job was to look for evidence. He collected six shell casings scattered around the parking lot where the incident occurred. He gave these shell casings to Officer Shockley. Officer McClinton also went into a nearby barbershop, Speedy's, and asked for any information any one might have about the shooting. He received no information from the patrons. Tr. 118, ll. 13 - Tr. 123, ll. 12.

On cross examination, Officer McClinton revealed that all eight shell casings were .380 caliber. Tr. 123, ll. 15 – 19. He failed to create a crime scene log but said he took pictures of the six shell casings. Defense counsel asked for the case to be dismissed because he did not receive the pictures. Tr. 128, ll. 1 – 25. Captain McAllister told the solicitor that no pictures were taken and the officer was mistaken. Tr. 130, ll. 7 – 17.

Officer Shockley testified that Officer McClinton gave the six shell casings to him. He showed the casings to Captain McAllister and then he and Captain McAllister took the six shell casings to city hall to be placed into evidence along with the two shell casings found in the victim's car. Tr. 138, ll. 1 – Tr. 139, ll. 25. Officer Shockley did not have ballistics testing performed on the shell casings. He did not have the shell casings tested for fingerprints. Nor did he write a report. He did write on the evidence log that he had found the six shell casings. Tr. 142, ll. 10 – 10.

Captain McAllister with the Greenwood Police Department responded to the incident by going straight to see the alleged victim, Martin. Tr. 151, ll. 1 – Tr. 152, ll. 8. He looked at Martin's car and removed the two shell casings from inside the car. He then placed these two shell casings with the other six that came from the parking lot at the scene near Speedy's Barbershop. Martin gave Captain McAllister the gun that he had shot at Brown that night. Tr. 163, ll. 1- Tr. 167, ll. 24.

On cross examination, Captain McAllister admitted that the evidence custodian returned the gun Martin used to Martin on May 29, 2013. Tr. 168, ll. 1 – 25; Tr. 184, ll. 1 – 12. Captain McAllister failed to have testing done on Martin's gun. No testing was conducted on the shell casings. Captain McAllister prepared the incident report. He admitted that there was nothing in the incident report about finding the six shell casings. It was "inadvertently" left out. Tr. 169, ll. 1 – Tr. 192, ll 17.

Kenya Griffin, the evidence custodian with the Greenwood Police Department, received the shell casings on March 24, 2014. The bag of eight shell casings was admitted into evidence without objection by the defense. The state rested its case. Tr. 197, ll. 14 – Tr. 199, ll. 14; Tr. 200, ll. 1 – Tr. 205, ll. 24.

Pretrial, defense counsel had made a motion to dismiss the case based on the untimely receipt of evidence from the state and the lack of other evidence. Counsel explained that he filed a Rule 5 discovery motion on April 18, 2013. Counsel received the incident report and criminal history from the solicitor on July 30, 2013. The next evidence received was on November 15, only three days before the trial. Counsel received the photo lineup, and the evidence log. That was the first time that counsel was made aware that the six shell casings had been found. Tr. 28, ll. 15 – Tr. 30, ll. 1.

Counsel argued that Brown's defense had been irreparably harmed by the state's actions. The gun used by the victim, Martin, was no longer in evidence and was not available for the defense to perform any ballistics testing. Counsel just learned of the six shell casings found at the scene. All eight shell casings were of the same caliber so they could all have been fired from the same gun. However, counsel could not tell if the evidence has exculpatory value because it was not available in time and the gun was not available. With ballistics testing, the case would have been either much stronger for the state or for the defense. The gun Brown allegedly used was never recovered. Tr. 31, ll. 1 – Tr. 35, ll. 25.

Counsel argued that there was no way to prepare a defense when he could not have ballistics testing done. The judge asked the state why the two sets of shell casings were not tested against each other to see if two guns were involved or to rule out the possibility that only one gun was involved. The solicitor responded that every investigation was different and it was not done in this case. Tr. 36, ll. 1 – Tr. 43, ll. 18.

The judge asked defense counsel what would be his preference: to go forward with the trial that day, or continue it to give counsel the opportunity to have ballistics testing done on the shell casings. Counsel's preference was to go forward with the trial and have the shell casings suppressed. Counsel made a second motion to dismiss based on spoliation of the evidence with the gun returned to Martin and the late disclosure under Rule 5 and Brady. Besides just learning of the six shell casings, counsel just learned the previous Friday of the potential witnesses at Speedy's. Tr. 44, ll. 1 – Tr. 49, ll. 25.

The judge denied defense counsel's motion to dismiss based on State v Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) because he could not find any bad faith on the part of the state. The judge admitted that there may have been some exculpatory value concerning the gun, but he did not think it met the necessary level. Tr. 56, ll. 3 – 11.

The judge then denied defense counsel's motion to suppress the six shell casings because discovery violation in itself did not require suppression because a 403 analysis had to be considered. He found that the probative value outweighed the prejudice. He allowed the six shell casings to be admitted. Tr. 57, ll. 8 – 25.

However, the judge stated:

> The third matter is concerning the shell casings. Now, this is the one I struggled with the most. I'm very concerned that law enforcement did not present the six shell casings. Certainly no fault with the solicitor's office, but I'm very concerned that the six shell casings were not disclosed to the defense until last Friday.

Tr. 57, ll. 8 – 17.

Defense counsel then asked for a continuance so he could prepare a defense if the shell casings were coming in. The judge then responded that he had previously asked counsel what he wanted to do if his motion to dismiss was denied, and counsel had said he

wanted to go forward. However, the judge acknowledged that counsel could change his mind. Tr. 57, ll. 25 – Tr. 60, ll. 20.

Counsel argued in response:

> I apologize for any misunderstanding. What I thought you were asking me and I thought my position was, if you're not going to dismiss, our position would be to suppress and go forward, and then---I don't think we contemplated what would happen if the shell casings were coming in.

Tr. 60, ll. 21 – Tr. 61, ll. 1.

The judge asked what he would do with the shell casings if he granted a continuance. Counsel had prepared a defense with the knowledge of the two shell casings found in the accuser/ victim's car. The defense was that the accuser was the only one who fired a gun. Since counsel just learned of the additional six shell casings, he had to reanalyze the case based on the new evidence. He may have to prepare a case of self-defense. Counsel said he could start back with the trial on Thursday. Tr. 61, ll. 2 – Tr. 62, ll. 10.

The judge denied counsel's motion for a continuance initially. However, after further argument, the judge granted a very short continuance until 2:00 the following day. Tr. 62, ll. 11 – Tr. 66, ll. 17.

ARGUMENT

The trial court erred in denying Appellant Brown's motion to dismiss the case, or in the alternative to grant an appropriate continuance, based on counsel's inability to present a complete defense as guaranteed by the Sixth Amendment. The gun the victim used to shoot at Appellant Brown was not in evidence as it was returned to the owner before defense counsel could test it. The state disclosed three days before trial the existence of six shell casings found at the scene. Defense counsel was thus denied the opportunity to have ballistics testing performed. All of the shell casings were 380 caliber and testing may have shown that the victim was the only person shooting. The late disclosure of potential witnesses at a nearby barbershop prevented counsel the opportunity to question them.

Rule 5, SCRCrimP, provides that the prosecution shall permit the defendant, upon request, to inspect and copy any documents, examinations, tests which are in the control of the prosecution which the prosecution intends to use as evidence in chief at trial. A Rule 5 violation is not reversible unless prejudice is shown. State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006).

The Due Process clause of the Fifth and Fourteenth Amendments mandate a defendant's fundamental right to a fair trial. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998).

In State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987), the Supreme Court ruled that the prosecution's nondisclosure of tape recordings of statements made by key state's witness in prosecution of defendants for conspiracy, armed robbery, kidnapping, and murder deprived defendants of fair trial requiring new trial.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court declared the suppression of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. State v Harvey Jones and Melissa Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) citing Brady v. Maryland, *supra.*

The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (Ct. App. 2004).

The Fourteenth Amendment secures all persons against any state action which results in either deprivation of life, liberty, or property without due process of law. U.S.Const. amend. XIV.

In Arizona v. Youngblood, 488 U.S. 51 (1988), the United States Supreme Court held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence did not constitute a denial of due process of law. Youngblood was accused of sexually assaulting and sodomizing a ten year old boy. The police collected a rectal swab for semen and the child's clothing. However, the police failed to refrigerate the clothing and failed to perform tests on the semen samples. None of their information was concealed from the respondent at trial, and the evidence was made available to the respondent's expert who declined to perform any tests on the samples.

In his dissent in Arizona v. Youngblood, id., Justice Blackmun wrote that a defendant was entitled to a fair trial, and not a "good faith" try at a fair trial.

The South Carolina Supreme Court held in State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), that to establish a due process violation based on the destruction of evidence, a defendant must demonstrate (1) that the state destroyed the evidence in bad

faith; or (2) that the evidence possessed an exculpatory value before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.

In State v. Adams, 304 S.C. 302, 403 S.E.2d 678 (Ct. App. 1991),Adams failed to make a showing that the evidence was exculpatory before the state lost it. Adams is distinguished because Adams was claiming the original breathalyzer test was not valid and it was lost. However, Adams had been given a copy of the results, and could testify as to his claim.

The South Carolina Constitution provides:

> The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or both.

S.C. Const. Art. 1, Sec. 14

The United States Constitution guarantees a criminal defendant the right to present a complete defense. Crane v. Kentucky, 476 U.S. 683 (1986); State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2006). Whether rooted in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, *supra.*

In Kyles v. Whitley, 514 U.S. 419 (1995), the United States Supreme Court held that in determining whether evidence not disclosed by the state was "material," in violation of Brady, cumulative effect of all the suppressed evidence favorable to the defendant is

considered rather than considering each item of evidence individually; and favorable evidence the state failed to disclose to the defendant would have made a different result "reasonably probable" in capital murder prosecution, and thus nondisclosure of evidence was a Brady violation.

In State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957), the Supreme Court held that malice can be inferred from conduct which is so reckless and wanton as to indicate a depravity of mind. By way of analogy, the police handling of the investigation here was so severely inappropriate to the point of being misconduct and bad faith when several major pieces of evidence were either not presented at all to the defense or not presented timely. Brown was severely prejudiced by the late disclosure of the six shell casings because he did not have time to test them against each other and could not test them with the accuser/victim's gun since it was missing. There was a "reasonable probability" that all of the 380 bullets were fired by the victim as the only real evidence against Brown was the word of the victim, a convicted felon whose "cousin" had conveniently left the unavailable pistol in his car the night before.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a dismissal of the case, or for a new trial.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of November, 2014.

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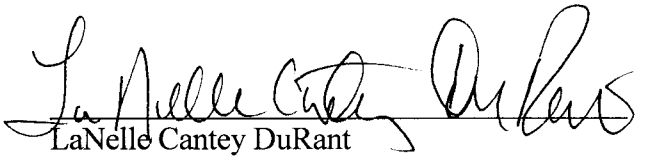
CERTIFICATE OF SERVICE

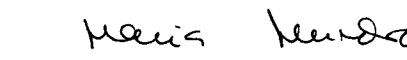
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Midrevius Amone Brown, #356939, Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of November, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of October, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.