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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN JEROME GILLIARD,

PETITIONER

APPELLATE CASE NO. 2012-213344

BRIEF OF PETITIONER

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ISSUE PRESENTED

The Court of Appeals erred in holding that the trial judge properly denied the request for a spoliation charge in response to the state's destruction of relevant evidence via a federal due process analysis because our state law allows jurors to regard evidence destroyed by the state as unfavorable to the state and favorable to the defense, particularly in a case such as this where there was ample reasonable doubt on the question of petitioner's guilt.

STATEMENT

Procedural History

On July 29, 2009, petitioner was indicted for trafficking in crack cocaine in an amount greater than twenty-eight grams, but less than one hundred grams. Petitioner was tried by jury during the December 2009 term of the Anderson County General Sessions Court before Judge J. Cordell Maddox and found guilty as charged. Petitioner was sentenced to twenty-five years in prison and ordered to pay a fine of $50,000. Petitioner was represented by Andrew Potter at trial.

On appeal, the South Carolina Court of Appeals issued an unpublished opinion affirming petitioner's conviction and sentence. See State v. Gilliard, Unpublished Opinion No. 2012-UP-351. (Ct. App. Filed on June 13, 2012). App. 1-2. On June 28, 2012, petitioner filed a petition for rehearing in the case. App. 3-10. On October 9, 2012, the Court of Appeals denied the petition for rehearing filed in the case. App. 11. On January 11, 2013, petitioner filed a petition for writ of certiorari requesting review of the Court of Appeals' decision in the case. On January 16, 2015, this Court granted petitioner's petition for writ of certiorari. This brief of petitioner follows.

Factual History

On April 19, 2009, Deputy Surratt of the Anderson County Sheriff's Department observed a silver Pontiac Grand Am run a stop sign. R. 33, ll. 20-25. Surratt initiated a traffic stop. The driver of the vehicle was Demetrius Robertson. Surratt observed petitioner seated in the passenger seat holding a partially smoked marijuana cigarette. R. 36, ll.1-7. Petitioner also had a small bag of marijuana in his pocket. Surratt took the two men into custody. Soon back-up arrived from both the Anderson County Sheriff's Department and Anderson City Police Department. Surratt then searched the vehicle. From pretrial testimony, it is evident that Surratt found 2.9 grams of crack

cocaine; approximately half of a pound of marijuana; scales; and a forty-five caliber pistol. R. 3-5. Also concerning the search, Surratt's incident report reads:

> "I went around to the passenger side of the vehicle and asked [petitioner] to step out of the vehicle. I advised him that he was under arrest. . . search incident to arrest I located inside [petitioner's] pants a clear plastic baggy containing an off-white colored rock-like substance weighing approximately fifty grams that did field test positive for cocaine base."

R. 55, ll. 5-7; R. 54 ll.13-17.

Surratt testified that according to the incident report, he found the clear bag of cocaine base before he took the petitioner to jail. R. 55, ll. 5-19. Petitioner was then arrested and transported to the Anderson County Detention Center.

Petitioner was booked by Deputy Lunz, a jailer at the Anderson Detention Center. The booking room was equipped with surveillance cameras. R. 75, ll. 10-13. Petitioner was allegedly searched in the booking room by Deputies Lunz and Surratt. A videotape was made of the search, but that tape was later destroyed. R. 75, ll. 18-24.

On April 23, 2009, Surratt obtained an arrest warrant for petitioner for the charge of trafficking in cocaine base. In the application for the arrest warrant, Surratt swore:

> "[Petitioner] did knowingly have in his possession approximately 49 grams of [cocaine base]. This was found during a lawful traffic stop. This incident occurred on Brown Street and Market Street, Anderson S.C." R. 113.

The traffic stop occurred at Brown Street and Market Street. R. 59, ll. 5-9.

Within ten days of the arrest, Surratt submitted a case summary to the solicitor's office. R. 56, ll. 9-15. Officers are instructed to fill in the facts of the case in chronological order so that a representative of the Sheriff's department can present the case to the grand jury. R. 56, ll.20-25; R. 57, ll. 1-3. In Surratt's case summary he wrote:

> "during the course of a traffic stop Demetrius Robertson and Appellant, search incident to arrest, were found to be in possession of approximately fifty-four grams of crack cocaine"

R. 57, ll. 4-8.

This testimony was used to indict petitioner for trafficking in cocaine base.

Before trial, Codefendant Robertson claimed responsibility for the 2.9 grams of crack cocaine; approximately half of a pound of marijuana; scales; and a forty-five caliber pistol. R. 3-5. Codefendant Robertson pleaded guilty to possession with intent to distribute cocaine. R. 4, ll. 24-25; R. 5, ll. 1-5. However, Codefendant Robertston denied he had possession of the forty-nine grams of cocaine base that was the basis of petitioner's trafficking charge. R. 4, ll. 13-17.

At some point prior to trial, Surratt's story on where he found the cocaine base inexplicably changed. In Surratt's new version of the facts, Lunz found the bag of cocaine base while searching Petitioner in the booking room, *not* at the point of arrest. R. 41-42. Likewise, Lunz also states that he found the cocaine base while searching petitioner. Lunz admits that according to detention center policy, if he found drugs on petitioner, he should have submitted an incident report regarding the search. R. 74, ll. 8-13. But Lunz chose not to submit an incident report regarding the alleged search. R. 74, ll. 22-24.

The alleged search at the booking room would have been videotaped. The detention center had a policy of only keeping the videotapes for a certain amount of time. At some point, Surratt allegedly requested a copy of the videotape. R. 77, ll. 1-7. Surratt claims that when he went back to obtain a copy of the video, he was informed that it had been taped over. R. 77, ll. 13-17. When petitioner's counsel became aware of Surratt's new version of the facts, he requested a copy of the video, but by that time, the video had already been destroyed. R. 8, ll. 2-8.

At trial, petitioner asked for a spoliation of evidence charge to be read to the jury. R. 8, ll. 8-14. The trial judge agreed that "[the destruction of the video] really should not have happened." R. 11, l. 7. But the trial court refused to instruct the jury on the destruction of evidence. Instead, he only allowed petitioner to question witnesses regarding the missing video. Petitioner renewed his request throughout the record and eventually the trial judge noted his arguments were all protected. R. 101, 1-7.

ARGUMENT

The Court of Appeals erred in holding that the trial judge properly denied the request for a spoliation charge in response to the state's destruction of relevant evidence via a federal due process analysis because our state law allows jurors to regard evidence destroyed by the state as unfavorable to the state and favorable to the defense, particularly in a case such as this where there was ample reasonable doubt on the question of petitioner's guilt in the case.

Anderson County Police Officer Brandon Surratt testified that petitioner was searched pursuant to a traffic stop that occurred on April 19, 2009, and that he (petitioner) had approximately fifty grams of crack cocaine in his possession at the time of the stop, which was before he was transported to the police detention center. Later, however, Surratt changed his story and testified that Officer Lunz found the crack cocaine on petitioner while they were inside the booking room at the detention center. However, neither Surratt nor petitioner's counsel could obtain a copy of a videotape of the search of petitioner in the booking room because it had been taped over, i.e. destroyed. Surratt's story *change about* where he found the crack on petitioner's person was suspicious. This suspicion was compounded when the corroborating witness, i.e., Lunz, *chose* not to properly document the alleged search. This story was further supported by codefendant Robertson who denied having any knowledge of the fifty grams of crack; which enabled him to plead guilty to

PWID instead of trafficking. The state contended that the latest version of the story was backed up by a videotape that was allegedly requested, but destroyed before petitioner was ever aware that it existed.

On appeal, petitioner argued that the trial judge erred in failing to issue to the jury the requested spoliation instruction allowed the jury to regard the destroyed state's evidence as unfavorable to the state, particularly since the jurors were asked to determine if the cocaine uncovered in the case was found on petitioner's person at the traffic stop as alleged originally, or at the detention center. This was a crucial question as petitioner's codefendant was at the scene at the traffic stop, and since petitioner pled not guilty, the implication is that the cocaine belonged to the co-defendant him rather than to petitioner. In other words, the state's case would have been stronger if the drugs had been found at the detention center and weaker if found at the traffic stop, but the state's position that the drugs were found on petitioner at the detention center is not provable by the state and not disproved by the defense because the videotape of the detention center booking was destroyed. Thus, the destruction of the video by the state prejudiced petitioner's defense because it denied him the opportunity to contradict the state's more air tight detention version of the facts.

Hence, the jury should have been instructed per a spoliation charge to view the destroyed unfavorably against the state in connection with its burden of proof and favorably on behalf of the defense in connection with its position that the state failed to prove petitioner's guilt beyond a reasonable doubt on the drug charge lodged against him by the state. Moreover, allowing petitioner to question the witness about the missing videotape and the story change regarding where the drugs were found did not cure the error because the jury heard only one side of the story (state's version), which was advantageous to the state and disadvantageous to the defense because the state's story was unrebuttable. This is precisely why a spoliation charge was needed in the case.

In the opinion issued by the South Carolina Court of Appeals in the case, the finding of no error in connection with the failure to give a spoliation charge follows:

> We find the circuit court properly refused Gilliard's request for a jury instruction because there was no evidence that the State acted in bad faith, and Gilliard failed to show the exculpatory value of the destroyed videotape. Moreover, Gilliard's counsel specifically stated he did not think the videotape was destroyed in bad faith. *See* *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process); *see also* State. V. Cheeseboro, 346 S.C. 526, 538-539, 552 S.E.2d 300, 307 (2001) ("The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.").

However, the Court of Appeals incorrectly decided the spoliation charge issue on federal constitutional law instead of state law. The sole issue presented before this Court was whether the trial court erred in refusing to instruct per a spoliation charge that the jury could infer that any evidence destroyed by the state would have been favorable to [the defense]. The issue of whether criminal juries should be advised of state law via a spoliation charge was encompassed within the question presented on direct appeal in the case because this is our state law. When a party fails to preserve material evidence for trial, an inference may be drawn that the evidence would have been unfavorable to that party. *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006). "The Courts of South Carolina have long recognized that a party is entitled to favorable presumptions about the contents of missing evidence when an opponent is responsible for the destruction of evidence that might otherwise be expected to have been relevant." Kevin Eberle, *Spoliation in South Carolina*, 19 S.C.Law. 26 (2007). South Carolina Courts have

primarily given spoliation charges in civil cases. *See, e.g.,* Stokes, Supra, 368 S.C. 515, 629 S.E.2d 675; Kershaw County Board of Education v. U.S. Gypsum, 302 S.C. 390, 396 S.E.2d 369 (1990). However, spoliation charges are routinely appropriate in criminal cases as well. In this case, a spoliation charge was appropriate; therefore, this Court should have found that the trial court erred in refusing the requested charge. Spoliation charges are given because when evidence is destroyed by one party, the other party is often incapable of proving what that evidence would show. Without an inference against the destroying party, *the jury is often left with only one side of the story.* That is what happened in appellant's case. Therefore, it was crucial for the jurors to know that they could draw a negative inference from the State's destruction of the videotape in question. *See id.,* 368 S.C. at 522, 629 S.E.2d at 679. In petitioner's case, the failure to instruct the jury on the spoliation of evidence was reversible error. If the state *chose* not to preserve material evidence in a criminal case, it should have been held to the *same* degree of accountability as a party in a civil case.

In this case, the Court of Appeals relied on Arizona v. Youngblood, 488 U.S. 51(1988), and State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) per the opinion. However, those cases interpret federal constitutional law rather than state law. Although this Court's opinion reconstructed the question presented as a due process issue, *it was not.* Petitioner expounded further on the nature of this issue when he argued the following:

> Although factually similar to some due process challenges, the issue on appeal is not predicated upon the due process jurisprudence relied upon by the state in the Brief of Respondent. Instead, the issue is whether a spoliation instruction similar to those approved Stokes or Kershaw should be given in a criminal case, or in other words, whether the state should be held to the same standard to preserve evidence in a criminal case as any party in a civil case. Petitioner's Reply Brief at p. 5.

Therefore, petitioner's claim, like the issue in Stokes, was governed by state law, and this Court's reliance on Youngblood and Cheeseboro was misplaced. Petitioner's question presented

might have seemed *superficially* similar to the due process claims in Cheeseboro, *but in* reality these issues are just as distinct as state hearsay jurisprudence is from cases interpreting the Confrontation Clause.

In the Brief of Respondent, the state opened its argument with the following:

> "Relying on civil case law and a law review article, [appellant] contends the circuit court erred in denying his request for a spoliation of evidence jury charge. He argues a spoliation charge was mandated by the state's failure to preserve the booking room videotape from the night he was arrested, and the differences between Surratt's incident report and his trial testimony regarding discovery of the crack cocaine. *This argument ignores applicable law regarding spoliation of evidence in criminal cases.*
>
> 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, 702 S.E.2d 395, 404 (Ct. App. 2010). " BOR 6. (emphasis added).

Thus, essentially, the Court improperly followed the state's suggestion to view the spoliation issue as a due process issue without recognizing the distinctions between the doctrine of spoliation and the issue raised in *Moses*. BOR 6-8. In Moses, the defendant, "argue[d] the trial court erred in *refusing to dismiss* the charges due to the failure of the state to preserve or disclose videotaped evidence." *Moses*, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (emphasis added). Moses argued that destruction of evidence was a *due process violation* that warranted *dismissal*. However, the argument was that he was entitled to *a jury instruction* based on a long standing doctrine in *common law*.

The *Moses* type due process challenge can readily be distinguished from the spoliation issue raised in *Stokes*. As previously argued by petitioner:

> "In *Stokes*, this court found that a decedent's estate, in a medical malpractice case, was entitled to a new trial against a hospital when the trial judge refused to instruct the jury on the spoliation of evidence. Prior to decedent's death at the

> hospital, nurses prepared a vital signs flow chart and taken blood from the decedent. Both of these items were either misplaced or destroyed. The trial judge denied the decedent's requested spoliation charge. That denial was reversible error. This Court also commented that, it was crucial for the jury to know it could draw a negative inference from the hospital's failure to produce evidence which would show how the decedent died." BOA 8-9 (citations omitted).

Stokes relied upon a common law doctrine rather than a due process analysis. Also, a jury instruction was requested in *Stokes*.

Although factually similar to some due process challenges, the issue on appeal was not predicated upon the due process jurisprudence relied upon by the state. Instead, the issue was whether a spoliation instruction similar to those approved *Stokes* or *Kershaw* should be given in a criminal case, or in other words, whether the state should be held to the same standard to preserve evidence in a criminal case as any party in a civil case.

Although petitioner's case arose from a criminal charge, the issue was essentially the same as the issue presented to this court in *Stokes*. The jurors were asked to determine if Surratt found the cocaine base on petitioner's person, but evidence essential to that determination was destroyed by the state. The destruction of the videotape by the state prejudiced petitioner by denying him any effective means of contradicting Surratt's second version of the facts.

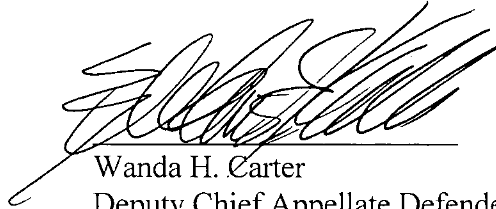
The fact that petitioner's case was criminal in nature and *Stokes* was civil in nature only prejudiced the petitioner more than the aggrieved party in *Stokes*. The essence of the rule is that the destruction of material evidence by one party makes the other party incapable of arguing his case. *See* Kevin Eberle, *Spoliation in South Carolina*, 19 S.C.Law. 26 (2007) ("The absence of evidence meant that the other party was hamstrung in the proof of his own case.") (*citing* *Halyburton v. Kershaw*, 3 Des 105, 3 S.C.Eq. 105 (1810)). Even without the missing evidence, the aggrieved party

in *Stokes* had experts who could testify to the probable cause of death. Petitioner did not have that option. A spoliation charge would have cured the problem.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court reverse his conviction and sentence and remand his case to the lower court for a new trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of February, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

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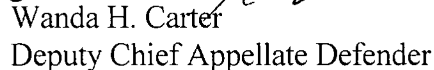
KEVIN JEROME GILLIARD,

PETITIONER

CERTIFICATE OF SERVICE

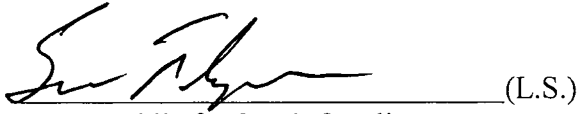
I certify that a true copy of the brief of petitioner, in this case has been served on Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kevin Jerome Gilliard # 275357, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 13th day of February, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of February, 2015.



(L.S.)
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My Commission Expires: October 30, 2022.