STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County
On Writ of Certiorari to the Court of Appeals
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2012-213344

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

KEVIN JEROME GILLIARD,

Petitioner.

Opinion No. 2012-UP-351 (S.C. Ct. App. filed June 13, 2012)

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE PRESENTED

The Court of Appeals properly affirmed the denial of Petitioner's request for a spoliation jury charge based on the circuit court's findings the charge was not warranted in this case because the State did not intentionally destroy the booking room videotape, and there was no indication the videotape contained exculpatory evidence.

STATEMENT OF THE CASE

Respondent concurs with Petitioner's procedural history of the case.

STATEMENT OF FACTS

On July 28, 2009, the Anderson County Grand Jury indicted Petitioner Kevin Jerome Gilliard ("Petitioner") on one count of trafficking between twenty-eight and one hundred grams of crack cocaine. (Record on Appeal [R.], pp. 115-116). The matter was called for a jury trial on December 7, 2009, before the Honorable J. Cordell Maddox, Jr., Circuit Court Judge.

Prior to trial, Petitioner advised the court a videotape of the booking process during which the crack cocaine was found had been destroyed, and requested a jury instruction allowing an inference the videotape contained exculpatory evidence. The State responded that the arresting officer did request a copy of the videotape, but the detention center failed to make one before the videotape was recycled. The State argued a jury instruction was not warranted because both officers who were present in the booking room when the drugs were found were going to testify, and Petitioner could argue to the jury about the missing videotape. The court indicated it would not give an instruction regarding destruction of evidence, but Petitioner could question the witnesses about the videotape. (R., pp. 7-11). During his opening statement to the jury, Petitioner talked at length about the missing videotape. (R., pp. 31-32).

Deputy Brandon Surratt ("Surratt") of the Anderson County Sheriff's Office testified he was on patrol on April 19, 2009, when he saw a car run a stop sign. There were two men in the car, and during the subsequent traffic stop, Surratt determined the driver's license was suspended. Further, Surratt detected a strong odor of marijuana coming from inside the car. (R., pp. 32-35).

Petitioner, a passenger in the car, had his right fist clenched, and for safety

reasons, Surratt asked him to open his fist. When Petitioner opened his hand, Surratt saw a marijuana cigarette in it, and Petitioner admitted he smoked it earlier. Surratt placed both the driver and Petitioner under arrest, but was only able to do a quick pat-down of both men for possible weapons because he was the only officer on the scene at the time. During Petitioner's pat-down, Surratt felt something in his right pants pocket, and determined it was a bag of marijuana. (R., pp. 35-37).

Surratt put both men in the back of his patrol car and transported them to the Anderson County Detention Center.[1] As part of the booking process, Deputy Andrew Lunz ("Lunz") of the Detention Center conducted a more thorough search of Petitioner, who initially refused to move his legs apart. When Lunz finally forced Petitioner's legs apart, he and Surratt saw a clear plastic baggy fall out of his pants leg. Surratt picked it up, and the substance inside field tested positive for crack cocaine. Subsequent testing determined it was 44.63 grams of crack cocaine. (R., pp. 36-47, 65-71, 74-75, 78).

Surratt testified he mistakenly stated in the incident report he found the crack cocaine when he put Petitioner under arrest during the traffic stop, but the crack cocaine **was** discovered pursuant to a subsequent search incident to that arrest. He further testified his trial testimony regarding discovery of the cocaine was accurate. (R., pp. 43-63).

After Petitioner was booked, Surratt asked the Detention Center supervisor on

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[1]Officers found 2.9 grams of crack cocaine, a half pound of marijuana, scales and a .45 caliber pistol inside the car. Petitioner and the driver were both originally charged in connection with all the drugs and contraband, including the crack cocaine found on Petitioner. The driver pled guilty to the charges related to the drugs and contraband found inside the car, but denied any knowledge of the drugs found on Petitioner. The State dismissed the charges against Petitioner related to the items from the car. (R., pp. 3-5).

duty that night to make a copy of the surveillance videotape from the booking area. When he went back to get the videotape for court, however, he learned the officer did not make a copy, the videotape had already been taped over, and there was no way to retrieve the footage from when Petitioner was booked. (R., p. 77).

Lunz testified about the booking process and his search of Petitioner. He stated the crack cocaine fell out of Petitioner's pants during the booking search, and Surratt immediately took custody of it. He further testified he did not do a separate incident report regarding the crack cocaine because Surratt immediately took possession of the it, and he knew Surratt was doing a report. He did notify his supervisor at the detention center that the drugs were found during the booking search. (R., pp. 65-71, 74-75).

During the jury charge conference, Petitioner again requested a charge allowing the jury to infer the videotape would have contained exculpatory evidence, but **conceded** the State did not destroy the videotape in bad faith. The court denied the requested charge, stating it was meant for evidence that was purposely destroyed. (R., p. 80). Petitioner then argued in closing that the missing videotape made the State's entire case suspect in light of the discrepancies between Surratt's incident report and his trial testimony. (R., pp. 85-88).

The jury convicted Petitioner as charged, and the circuit court sentenced him to twenty-five years incarceration and a $50,000 fine. (TT, pp. 168-175; R., pp. 102-109). This appeal followed.

By unpublished opinion filed June 13, 2012, the South Carolina Court of Appeals affirmed Petitioner's conviction, holding the circuit court properly refused the spoliation jury instruction request "because there was no evidence the State acted in bad faith, and

Petitioner failed to show the exculpatory value of the destroyed videotape." (Appendix, pp. 1-2). The Court denied Petitioner's Petition for Rehearing by Order filed October 9, 2012. (Appendix, p. 11). On January 11, 2013, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, which this Court granted by Order dated January 16, 2015.

ARGUMENT

The Court of Appeals properly affirmed the circuit court's ruling that a spoliation jury charge was not warranted in this case because the State did not intentionally destroy the booking room videotape, and there was no indication the videotape contained exculpatory evidence.

Relying on civil case law and a law review article discussing that law, Petitioner contends the circuit court erred in denying his request for a spoliation of evidence jury charge, and the Court of Appeals erred in analyzing the issue using case law regarding spoliation charges in criminal cases. 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 where the crack cocaine was discovered.

While minimally acknowledging relevant case law on the spoliation issue in the criminal context, Petitioner asserts those cases involved constitutional due process, and contends case law regarding spoliation charges in the civil context is controlling.[2] This assertion ignores case law specifically relating to such charges in criminal cases, as well as major differences between criminal and civil cases.

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 472-73 (2004); State v. Ward, 374 S.C. 606, 649 S.E.2d 145, 149 (Ct. App. 2007). "An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 584 (2010).

In State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973), the defendant requested

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[2]Petitioner essentially concedes destruction of the videotape did not rise to the level of a constitutional violation.

a jury charge stating: "where the State had witnesses known only to it and under its peculiar control and did not produce them, that their testimony would be presumed to be against the State." *Id.* at 521. This Court noted the adverse inference rule had been recognized in criminal cases, but there were no cases in which it had actually been applied, and expressed "grave doubt as to the propriety" of the adverse inference rule in criminal cases. Significantly, the Court stated: "[c]ertainly, a charge of this proposition to the jury on behalf of either the State or the defense is not warranted except under **most unusual circumstances**." *Id.* at 522 (emphasis added); *see also* State v. Simmons, 267 S.C. 479, 229 S.E.2d 597, 598 (1976) (court should exercise greater caution in permitting an adverse inference comment in criminal cases).[3]

In State v. Breeze, 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008), the defendant requested an adverse interest charge against the State based on the State's inadvertent destruction of drug evidence, citing Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990), as support. In affirming the circuit court denial of the requested charge, the Court of Appeals found Kershaw was "clearly distinquishable" because it was a civil case, and noted the requested charge was "remarkably similar" to the language used in Kershaw. *Id.* at 252.[4]

Thus, current South Carolina jurisprudence does not support a spoliation charge in criminal cases absent extraordinary circumstances. The State submits no such circumstances exist in this case, and the circuit court did not abuse its discretion in refusing to give a spoliation jury charge. The circuit court's ruling is further supported

[3] Petitioner states spoliation charges are "routinely" given in criminal cases, but cites absolutely no authority for that statement.

[4] The Court further found, without deciding, any error in refusing the charge was harmless. Id. at 252-253.

by the spoliation analysis actually used 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. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300, 307 (2001); State v. Moses, 390 S.C. 502, 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, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

Petitioner attempts to avoid the analysis in these cases by arguing they relate to due process claims rather than spoliation. While the cases do approach the issue in context of a due process challenge, they address the spoliation issue, and the analysis is no less relevant to determining whether an adverse inference charge is appropriate in a particular case.

In this case, there is no statutory or constitutional requirement that detention centers videotape the booking process. At best, the videotape was "potentially" useful evidence, more for the State than Petitioner, and the State did not have an absolute duty to preserve it. Therefore, Petitioner must show either bad faith by the police, or that the videotape had "readily apparent" exculpatory value before it was taped over.

Petitioner does not contend the videotape was intentionally destroyed to avoid revealing exculpatory evidence. Rather, the undisputed evidence established Surratt

asked the jail to make a copy of the videotape, and he did not know jail personnel failed to do so until the tape had already been taped over. (R., p. 77). Significantly, Petitioner's counsel specifically stated he did **not** think the videotape was destroyed in bad faith. (R., p. 80). Thus, Petitioner clearly cannot meet the first prong of the spoliation analysis.

Nor can Petitioner show the videotape had any exculpatory value, much less "readily apparent" exculpatory value, before the jail re-used the tape. On the contrary, both Surratt and Lunz testified about how Lunz found the crack cocaine while searching Petitioner at the jail pursuant to his arrest for possession of marijuana. Surratt also testified his incident report incorrectly indicated the crack cocaine was seized at the traffic stop location, but he reiterated the search at the jail was incident to Petitioner's arrest during the traffic stop, so it all arose from the initial traffic stop. (R., pp. 40-45, 50-51, 54-58, 62, 66-71).

Significantly, Petitioner did not, and does not, dispute the crack cocaine was found **on his person**, but merely speculates finding the drugs on him at the jail was a stronger scenario for the State than finding them on him at the traffic stop site because the co-defendant was not present at the jail. This is nonsensical. The stronger scenario for the State was that the crack cocaine was found **on Petitioner's person**, regardless of whether it was found at the traffic stop site or at the jail.

Further, Petitioner's contention the State should be treated just like any party in a civil case ignores monumental differences between civil and criminal cases - the burden of proof and presentation of evidence. Civil parties must prove their case by only a preponderance of the evidence, and neither party has a constitutionally protected right not to present evidence. In criminal cases, however, the State must prove its case beyond a

reasonable doubt, and the defendant has an inviolate right not to present evidence.[5] Therefore, in criminal cases, the State is **not** the same as a civil litigant, and trying to apply the civil law regarding spoliation jury charges to criminal cases is the epitome of trying to put a square peg in a round hole.

Petitioner asserts he was entitled to a spoliation charge because the videotape was no longer available. Mandating a spoliation charge under the circumstances of this case effectively eviscerates the limits established in Youngblood, and adopted by the courts of South Carolina in Cheeseboro, Mabe and Moses. In essence, defendants would be entitled to a spoliation jury charge, even in cases where the State was not required by law to preserve the evidence at issue and there was no indication of exculpatory value, simply because the evidence was destroyed. Such a result imposes an unwarranted burden on the State, which will face the negative inference of a spoliation charge based on nothing more than a defendant's conclusory claim the destroyed evidence **might** have helped the defense, which flies in the face of the caution urged in Batson, Simmons, and Breeze.

Petitioner referenced the missing videotape in his opening statement, questioned witnesses about it, and argued extensively in closing that the missing videotape created reasonable doubt. (R., pp. 29-32, 74-75, 85-89). The circuit court properly instructed the jury it was the sole judge of the facts and the witnesses' credibility. (R., pp. 18-19, 88-93). The Court of Appeals properly analyzed the issue in light of applicable law, and its opinion should be affirmed.

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[5]The State is prohibited from even alluding to an adverse inference from the defendant's failure to present evidence.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits the Court of Appeals opinion upholding the circuit court's ruling should be affirmed.

Respectfully submitted,

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March 17, 2015

STATE OF SOUTH CAROLINA
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Opinion No. 2012-UP-351 (S.C. Ct. App. filed June 13, 2012)

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Brief of Respondent by depositing three copies in the United States mail, postage prepaid, addressed to:

Wanda H. Carter
Deputy Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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I further certify that all parties required by Rule to be served have been served.

This 17th day of March, 2015.

Sally B. Ellison

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ALAN WILSON
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March 17, 2015

Wanda H. Carter
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Re: The State v. Kevin Jerome Gilliard
Appellate Case No. 2012-213344

Dear Ms. Carter:

Enclosed are three (3) copies of the Brief of Respondent, with proof of service, in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

cc: Honorable Daniel E. Shearouse (original and fifteen copies enclosed)
Honorable Jenny A. Kitchings (enclosure)