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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

vs.

MIDREVIOUS BROWN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in denying the motion to dismiss the case for the alleged discovery violation or the "destroyed" evidence claim, and Appellant received a continuance and failed to move for a further continuance when the trial commenced again the following afternoon. Appellant never wanted further ballistics testing.

STATEMENT OF THE CASE

Appellant Midrevius Brown was indicted for attempted murder and possession of a firearm during the commission of a crime of violence. Brown proceeded to a jury trial on November 18-22, 2013, before the Honorable Donald B. Hocker. The jury found Brown guilty of assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of attempted murder and found Brown guilty of the firearm charge. Judge Hocker sentenced Brown to concurrent sentences of fifteen years' imprisonment for ABHAN and five years' imprisonment for the firearm charge.

STATEMENT OF FACTS

Kevin Martin (Victim) left work for his girlfriend's house. As he drove, he was flagged down by two people he knew as Dre and Bow Wow. Dre is Appellant Midrevious Brown. Victim turned around and drove back to Brown and Bow Wow. Brown was closest to Victim's vehicle. Victim remained in the car while talking with Brown. Brown and Victim started arguing. Then Brown said, "I'm going to murder this fool." Brown started shooting at Victim. Tr. pp. 89-95. Victim testified as follows about what happened when Brown started shooting:

> Well, when the first shots were fired I kind of ducked down in the seat and pulled off, and as I got to the intersection out there in the road I made a right and I looked over at him and my passenger – the passenger window was down so I fired two shots out the window and kept going. He was still shooting as I was pulling off.

Tr. p. 96, lines 3-8. The windows in his car were shot out and a bullet grazed the back of the trunk. Tr. pp. 96-99. Victim drove to his girlfriend's house and called the police. Victim had a third degree burglary conviction (Tr. pp. 116-117) and was concerned that as a felon, he would be in trouble if he told police that he shot a gun himself. So he initially did not tell police that he fired back or even had a gun. Tr. pp. 99-100. Victim picked the person he knew as "Dre" out of the photographic lineup. It was a photograph of Brown. Tr. pp. 101-103.

Officer Wesley McClinton went to the parking lot where the shooting occurred. He picked up two or three casings laying on the ground in the parking lot and found six casings total in that area. Officer McClinton went to a nearby barbershop where no one was able or

willing to provide any information. Tr. pp. 118-123. On cross-examination, Officer McClinton testified photographs were taken of the casings, but it appears he was confused on that point and was relying on imperfect recollections of hearsay when he offered that incorrect information to defense counsel. No photographs of the casings were presented at trial, and it does not appear that any such photographs exist. Tr. pp. 128-135; p. 200.

Officer McClinton gave Officer Leon Shockley the six casings. Officer Shockley took the casings to City Hall and placed them in the evidence room. Tr. p. 139. Captain Donald McCallister went to Victim's girlfriend's residence and observed the shot-out windows in Victim's car. Captain McCallister also found two casings in the car. He confronted Victim, advising him the facts did not add up on Victim's claims he did not have a gun. Victim then admitted he fired two shots, hence the two casings. He gave Captain McCallister the weapon he fired. Captain McCallister did not remember anything about the six casings and inadvertently left mention of them out of the incident report. Tr. p. 153, pp. 163-166; pp. 171-182; pp. 186-187. The gun was returned to the owner, Victim's cousin, on May 29, 2013. Tr. pp. 184.

ARGUMENT

The trial court did not err in denying the motion to dismiss the case for the alleged discovery violation or the "destroyed" evidence claim, and Appellant received a continuance and failed to move for a further continuance when the trial commenced again the following afternoon. Appellant never wanted further ballistics testing.

Brown raises Rule 5, SCRCrimP, and Brady[1] claims, and a claim the State should have preserved evidence, in connection with the arguably late discovery and disclosure by the prosecution of six shell casings recovered from the parking lot where the shooting took place. Brown claims the case should have been dismissed or a continuance granted so that the evidence could be tested. Brown received a continuance, and it became apparent that he never wanted further ballistics testing.

On the day of trial, Tuesday, November 19, 2013, Brown's counsel moved to dismiss the case based on Rule 5, Brady, and State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Counsel complained he did not find out about the existence of the six shell casings until four days before the trial. He also complained the gun that Victim fired was returned to the family in May. Counsel complained the shells could have been tested to see if they were fired by that weapon, but now they could not because the weapon was returned. Tr. pp. 29-33; see also pp. 46-47 (Rule 5 argument).

The prosecutor provided some additional background, explaining the trial was scheduled only twelve days ago (at the prosecutor's suggestion)[2] as a result of Brown's *pro*

[1] Brady v. Maryland, 373 U.S. 83 (1963).
[2] Hearing transcript dated November 7, 2013 (H. Tr.) p. 6, lines 17-19.

se speedy trial motion.[3] Meanwhile, the prosecutor was on her fifth consecutive week of court in two different counties and was scrambling in piecemeal fashion to prepare for trial. Tr. pp. 38-39. The prosecutor would later note: "I understand that [counsel] just found out about them last week. I just did too, and that's you know, my fault for not going over there sooner and looking for them." Tr. p. 54, lines 10-13.

The prosecutor noted the gun was returned to Victim's family and offered to request the family return the gun to law enforcement for testing. The prosecutor also noted the casings found in the car and the parking lot could be tested against each other. Tr. p. 40. The trial court indicated it was not inclined to dismiss the case but would consider a continuance to allow for any additional preparation. Tr. pp. 40-41. Trial counsel countered: "From what I understand, a little sandpaper on the firing pin will do wonders for a ballistic test." Tr. p. 41, lines 18-19. Counsel argued Brown's case was irreparably harmed. Tr. p. 42. Counsel remonstrated, "We are now seriously lacking in ability to present a defense because we can't have that gun tested." Tr. p. 42, lines 14-16. The prosecutor argued there was no bad faith on the part of law enforcement or the prosecution that required dismissal. Further, the prosecutor noted that even assuming the gun was altered, the casings could be tested, "the two against the six,"[4] to determine if they were fired by the same gun. Discovery was complicated by the fact that counsel was representing Brown on the charge, but Mr. Tinsley, a private attorney, was representing Brown on bond and was somewhat vague on whether he was ultimately also going to represent Brown on the charges. Tr. pp. 42-45; see H. Tr. p. 6,

[3] The trial court and prosecutor noted the motion was *pro se*. Tr. p. 41, lines 4-8. Brown was in jail from March 25, 2013. Tr. p. 41, lines 11-12.
[4] Direct quote: Tr. p. 43, line 7.

lines 17-24.

The trial court offered two options to counsel: "Go forward today along the lines of your client's request for a speedy trial, or continue it to give some additional opportunity for whether, you know, ballistics to – you know, ballistic testing on the shell casings and whatever else." Tr. p. 45, lines 15-22. Counsel chose to go forward but wanted to suppress the shell casings that were supposed to be exculpatory. Tr. p. 45, line 23 – p. 46, line 2. The trial court denied the motion to dismiss. Tr. p. 56, lines 3-11. The trial court also ruled it was going to allow the shell casings into evidence. Tr. p. 58, lines 9-21. Counsel changed his mind and asked for a continuance, but only until Thursday morning, to consider whether to present a self-defense case. Tr. pp. 59-62. The Court agreed with the prosecutor that the allegations have always been that Brown fired a gun and Victim fired a gun too. Tr. pp. 62-63. The prosecutor further responded as follows to the motion:

> I just don't feel like the self-defense would warrant a two day continuance. I can see more from the standpoint of they want to get the casings tested and we should continue it until December to give them time to get shell casings tested.

Tr. p. 63, lines 10-14. Counsel did not take up the prosecution's invitation for a longer continuance to have the casings tested.

The trial court denied the motion for the two-day continuance. Tr. p. 63. However, counsel later lamented he needed more time to prepare. Following an off-record conference, the trial court continued the case until 2 p.m., Wednesday. Tr. pp. 65-66. There was no indication when matters resumed Wednesday that counsel had inadequate time to prepare or needed further preparation. Tr. p. 68.

"A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). "Compliance with Rule 5 is a fact-based inquiry." Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012). Where the prosecution violates Rule 5, SCRCP, the trial court retains discretion to determine what remedy, if any, is appropriate. State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996) (finding under Rule 5, the court may order the offending party to permit discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or enter any other appropriate order the court deems just under the circumstances). In the instant case, Brown fails to establish an actual Rule 5 violation. Counsel became aware of the shell casings concomitantly with the prosecution. Additionally, absent testing the casings, which counsel seemed to want to avoid, it is unclear why additional preparation is necessary. Finally, nothing in the record suggests the one-day continuance, (as opposed to two-day continuance), was inadequate for counsel to prepare for trial.

Of course, nothing in the record suggests the possibility of a Brady violation. Brady v. Maryland, 373 U.S. 83 (1963) is based on the requirement of due process. To succeed on a Brady claim, the defendant must show: (1) the evidence was favorable to the accused, (2) it was in possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) was material to the guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999).

The mere possibility that an item of undisclosed information may be helpful to the defense in its own investigation is insufficient to establish constitutional materiality under Brady. United States v. Agurs, 427 U.S. 97, 109-10 (1976). "Materiality of evidence is

determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). For Brady purposes, the court's function is to determine whether the appellant's right to a fair trial has been impaired when viewing the non-disclosed evidence in the context of the entire record. State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987). In the instant case, the evidence is at least as likely to be inculpatory as exculpatory. It is certainly speculative to suggest that the casings were exculpatory. Brown wanted to avoid finding out the probative value of the shell casings by testing them against the two casings found in Victim's car.

The argument that the State had a duty to "preserve" the gun by not turning it over to the family also does not hold water. "The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant." State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (citations omitted). To establish a violation of due process, a defendant must demonstrate that the State destroyed the evidence in bad faith, or that the evidence had exculpatory value that was apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. Id. at 538-39, 552 S.E.2d at 307 (citations omitted). The gun did not have apparent exculpatory value, contrary to Brown's argument. It is undisputed that Victim discharged this gun and two shell casings found in the car came from this weapon. To the extent the six casings found in the parking lot should be tested, they can be tested against the two casings, although Brown obviously does not want this. Further, the gun could be retrieved and it is speculative to suggest that it would be tampered with. If the two casings in the car could not be matched

to this weapon, then one could question tampering, but Brown was only throwing out a red herring in an effort to get a windfall.

Ultimately, the question is whether the trial court erred in continuing the case until Wednesday afternoon instead of Thursday morning as originally requested. A trial court's denial of a motion for continuance is left to the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion resulting in prejudice to the defendant. State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Reversals from the denial of a defendant's motion for continuance are as "rare as the proverbial hens' teeth." State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). Nothing in the record suggests the continuance until Wednesday afternoon was inadequate. Accordingly, the convictions and sentences should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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March 20, 2015

STATE OF SOUTH CAROLINA

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Donald B. Hocker, Circuit Court Judge

STATE OF SOUTH CAROLINA, Respondent

v.

MIDREVIOUS BROWN, Appellant.

PROOF OF SERVICE

I, Norma Bigbee, 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: Lanelle C. Durant, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 20th day of March, 2015.

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