

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Letitia H. Verdin, Circuit Court Judge

Appellate Case Number: 2014-001150

RECEIVED

MAR 31 2015

SC Court of Appeals

The State,

Respondent,

v.

Walter Jacob Merka,

Appellant,

REPLY BRIEF OF APPELLANT

William G. Yarborough, III
522 North Church Street
Greenville, South Carolina 29601
(864) 331.1612
Attorney for Appellant

TABLE OF CONTENTS

	Page
Argument in Reply.....	1
I. Did the State fail to turn over discoverable evidence before the Sentencing and Guilty Plea?.....	1-3
II. Did the Court have a duty to determine the Defendant's mental ability to enter a Guilty Plea.....	3-4
Conclusion.....	4
Certificate of Counsel.....	5

TABLE OF AUTHORITIES

Cases	Page
Council v. State 380 S.C. 159, 175 (2008).....	3
Gibson v. State 334 S.C. 515, 524 514 S.E. 2d 320, 324 (1999).....	1, 2
Hayden v. State 278 S.C. 610, 299 S Ed. 854 1983).....	3

Argument in Reply

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, the Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondent.

I. The State Failed to Turn Over Discoverable Evidence

The Prosecution failed to provide the Defendant with evidence which goes to sentencing, contrary to the argument outlined in the Brief of Respondent. The State failed to disclose information about the victim's reluctance to have the Defendant incarcerated. All information which is in possession of the prosecutor as it relates to guilt or sentencing is discoverable. The prosecution cannot 'cherry pick' which information it wishes to provide. The prosecutor believed incorrectly that they did not have to tell defense counsel that the victim did not want the Appellant to be incarcerated. Although that is the belief of the prosecutor, it is not consistent in this Court's ruling in *Gibson v. State* 334 S.C. 515 524 514 S.E. 2d 320, 324 (1999) where the Court stated that all discoverable evidence should be provided to defense counsel regardless of if it goes to innocence or to sentencing.

The defense counsel, upon learning about this difference in what the prosecutor believed he should turn over and what he must turn over, filed a Motion To Reconsider, in which both the prosecutor and the Judge misconstrued what the law is in this state. The Appellant believes the law is clear and the facts of this case as stated in the Brief of Respondent on page eight (8) are consistent with information which must be given to Defendant as part of a Brady Request.

The victim told the prosecutor, that she would like the Defendant to receive a Addiction Treatment Unit (ATU) sentence which would have allowed for drug treatment and would also have correlated to approximately three (3) years of drug treatment with early release, yet the

prosecutor said the victim wanted a substantial period of incarceration. This statement is clearly contradictory to the facts of the case regardless of what the Respondent or prosecutor have argued in both the Appeal and in the lower court proceedings. To then argue that this is harmless error takes away the important role defense counsel plays in determining strategy in criminal cases.

The Defendant/Appellant, based on information now before the Court, could have asked the victim to speak on behalf of the Defendant or written a letter for the Judge's sentencing decision. Quite frankly, as the counsel for the Defendant, we may have asked for a jury trial based on information provided by the victim. Instead, the prosecution, although they believe they were acting in accordance with the law, have made a decision for the Appellant which should have been left in the hands of defense counsel. It should not and cannot be the prosecutor's decision to either turn over or not turn over conversations concerning sentences either made to him or victim's advocate. It is clear in Gibson that all evidence which is in the prosecution's possession must be shared if it pertains to either guilt or sentencing. This allows for Defendant and defense counsel to analyze the case and make a decision on how to proceed. It cannot be the law in this state, as outlined in the brief of the Respondent, that this is the prosecutor's decision.

Numerous discussions were had, both with prosecutors and Victim's Advocates, with the alleged victim where she stated she did not want the Appellant incarcerated. Had that evidence been turned over to the defense, it would have allowed the defense attorney to decide how to go forward with the case. It is not the State's decision to turn over or not to turn over discoverable evidence to the defense, it is the defense's decision to decide what to do with it once it is given. The State cavalierly says, they could have called the victim here if they knew she was beneficial to the Defendant. The problem is that the State was the only one who knew. They had a duty to

disclose. Then to say that because a Motion To Reconsider was heard does not mean that there was not a Brady violation; intentional or not.

This Court has ruled consistently that evidence which goes to either guilt or sentencing is discoverable. Although the prosecutor in this case believes that he acted according to the rule, he was mistaken about what is discoverable. Clearly the victim's statement to both the prosecutor and victim's advocates should have been given to defense counsel. This case should be reversed for a new trial.

II. The Court Had a Duty to Determine the Defendant's Mental Ability to Enter a Plea of Guilty.

Here the Court is the safeguard and must keep the Defendant's rights in mind. If defense counsel misses a mental issue, the Court is the ultimate gate-keeper to determine mental stability. That is why courts ask defendants about these mental illnesses. Courts always ask, "Do you have any mental issues?" The reason courts have long asked these determining questions are clearly to protect and safeguard the mentally ill. This gives those with mental issues a chance to have their issues dealt with independently by the court.

Council v. State 380 S.C. 159, 175 (2008) reads, "People with emotional and mental issues may be less culpable than defendants who have no excuses." The Court failed to ask, and defense counsel failed to ascertain that Merka had mental health issues that should have been explored. The issue that is before the Court concerning discovery in Argument One would have also helped because the alleged victim in this case was concerned about Merka's mental health because she had a long history of dating him and dealing with the "ups and downs" of someone with mental health problems. It is clear from the record that the Court did not ask the Defendant about his

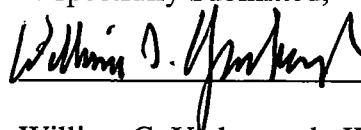
mental health. Contrary to what is argued in Respondent's Brief, this issue was not raised by the trial judge.

This country has had a long history of helping those less fortunate with mental health issues in the criminal court system. At the point it was discovered, and the problems with Discovery, the Appellant should have been allowed to withdraw his guilty plea as not being freely and voluntarily made. The evidence is both material and mitigating and should have allowed for a withdrawal of the plea. To argue that it is not material, as the Respondent's Brief argues, leaves one to question what would ever rise to that standard. Hayden v. State 278 S.C. 610, 299 S Ed 854 (1983). Clearly the fact that he had mental issues and that he was not able to fully help defense counsel during preparation for his trial would have at least alerted defense counsel to further examine the record and search for help from those who knew the Defendant, including the victim. Here there would have been little harm for a withdrawal of the plea since both the mental issues and the victim's wishes warranted a reduced sentence.

CONCLUSION

For all of the foregoing reasons, Mr. Merka respectfully requests this Court reverse his conviction and remand his case to the Circuit Court for a new trial.

Respectfully Submitted,



William G. Yarborough, III, Esq.
Law Office of William G. Yarborough, III
522 North Church Street
Greenville, South Carolina 29601
(864) 331.1612
Attorney for Appellant

Greenville, South Carolina

March 25, 2015

CERTIFICATE OF COUNCIL

I, William G. Yarborough, III, certify that on this date March 23, 2015, I served a REPLY Brief in this action upon: (1) Jennie Abbott Kitchings, Clerk of Court, Court of Appeals of South Carolina; (2) Mr. Alan McCrory Wilson at the S.C. Attorney General's Office; (3) Ms. Salley W. Elliott at the S.C. Attorney General's Office and (4) Mr. Allen Fretwell, Assistant Solicitor, Greenville County, Thirteenth Judicial Circuit Court, by mailing it to the Government Agents at their work addresses; depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Jenny Abbott Kitchings
Clerk of Court
Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211

Mr. Alan McCrory Wilson
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

Mr. David Spencer
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

Allen Fretwell, Assistant Solicitor
305 E. North Street
Greenville, SC 29601

RECEIVED
MAR 31 2015
SC Court of Appeals

Sworn to before me this 25th
day of March, 2015

William G. Yarborough, III
William G. Yarborough, III

Theresa Crouter-Bum
Notary Public for South Carolina

My commission expires: 3/20/24

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Letitia H. Verdin, Circuit Court Judge

Appellate Case Number: 2014-001150

The State,
Respondent,

v.

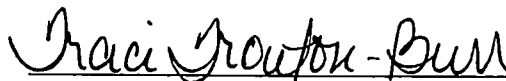
Walter Jacob Merka,
Appellant,

AFFIDAVIT OF SERVICE VIA US MAIL

I, Traci Trouton-Burr, certify on this date March 25, 2015, I served a Reply Brief in this action, dated March 25, 2015 on Assistant Solicitor Allen Fretwell by mailing it to him at his work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:


Allen Fretwell, Assistant Solicitor
Thirteenth Judicial Circuit
305 E. North Street
Greenville, SC 29601

Respectfully submitted,



Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 25
Day of March, 2015


Notary Public for South Carolina
My Commission expires: 4/9/24

RECEIVED

MAR 31 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Letitia H. Verdin, Circuit Court Judge

Appellate Case Number: 2014-001150

The State,
Respondent,

v.

Walter Jacob Merka,
Appellant,

AFFIDAVIT OF SERVICE VIA US MAIL

I, Traci Trouton-Burr, certify on this date March 25, 2015, I served a Reply Brief in this action, dated March 25, 2015 on Mr. David Spencer by mailing it to him at his work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

David Spencer
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

Respectfully submitted,

Traci Trouton-Burr

Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 25
Day of March, 2015

Glenn Flahive
Notary Public for South Carolina
My Commission expires: 4/9/24

RECEIVED

MAR 31 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Letitia H. Verdin, Circuit Court Judge

Appellate Case Number: 2014-001150

The State,
Respondent,

v.

Walter Jacob Merka,
Appellant,

AFFIDAVIT OF SERVICE VIA US MAIL

I, Traci Trouton-Burr, certify on this date March 25, 2015, I served a Reply Brief in this action, dated March 25, 2015 on Mr. Alan M. Wilson by mailing it to him at his work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:


Mr. Alan McCrory Wilson
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

Respectfully submitted,


Traci Trouton-Burr

Paralegal to William G. Yarborough, Esquire

SWORN TO before this 25
Day of March, 2015


Notary Public for South Carolina
My Commission expires: 4/9/24

RECEIVED

MAR 31 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Letitia H. Verdin, Circuit Court Judge

Appellate Case Number: 2014-001150

The State,

Respondent,

v.

Walter Jacob Merka,

Appellant,

AFFIDAVIT OF SERVICE VIA US MAIL

I, Traci Trouton-Burr, certify on this date March 25, 2015, I served a Reply Brief in this action, dated March 25, 2015 on Jennie Abbott Kitchings by mailing it to her at her work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211

Respectfully submitted,

Traci Trouton-Burr

Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 25
Day of March, 2015


Glenn Florine
Notary Public for South Carolina
My Commission expires: 4/9/24

RECEIVED

MAR 31 2015

SC Court of Appeals



UNITED STATES POSTAGE

PITNEY BOWES
02 1P \$ 001.82⁰
0001812653 MAR 25 2015
MAILED FROM ZIP CODE 29601

RECEIVED

MAR 31 2015

SC Court of Appeals

Jenny Abbott Kitchings, Clerk of Court
Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211