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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT ODELL BROWN,

APPELLANT

APPELLATE CASE NO. 2013-001411

SECOND AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Violating Appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, did the trial judge err in failing to require the prosecution to disclose the personnel file of the purported police officer victim where the file contained numerous instances of dishonest conduct, which would have been a basis for impeachment?

II. In violation of Appellant's right to a jury trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 14 of the South Carolina Constitution, did the trial judge err in failing to instruct the jury that in order to convict Appellant of attempted murder the jury must find that Appellant acted with a specific intent to kill?

STATEMENT OF THE CASE

On January 9, 2012, a Spartanburg County grand jury indicted Appellant for failure to stop a motor vehicle when signaled by an officer (2012-GS-42-359), and resisting arrest with the use of a deadly weapon (2012-GS-42-360). Later, on July 13, 2013, the Spartanburg County grand jury indicted Appellant for attempted murder and possession of a weapon during the commission of a violent crime (2012-GS-42-358). R. *(indictments). The state called the case to trial before the Honorable J. Derham Cole and a jury on June 17, 2013. Barry Barnette and Timi Poulos represented the state, and Clay Allen represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 460, line 20 – Tr. 461, line 6. Judge Cole sentenced Appellant to thirty years' imprisonment for attempted murder, five years' imprisonment for possession of a weapon, three years' imprisonment for failure to stop, and ten years' imprisonment for resisting arrest with a deadly weapon. He ordered all sentences to run consecutively, except the three-year sentence which was to run concurrently. Tr. 468, lines 7 – Tr. 469, line 11; R.*(sentence sheets).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On November 6, 2011, Spartanburg County Sheriff's Deputy John Doe¹ was patrolling the south side of Spartanburg County. Tr. 100, lines 6 – 23. Doe attempted to stop a blue Pontiac for speeding, but the Pontiac failed to stop. Tr. 101, lines 9 – 25. When the Pontiac finally stopped, the driver fled on foot. Tr. 102, lines 4 – 9. Doe chased the driver on foot. Tr. 102, lines 10 – 12. While the driver was attempting to go over a fence, his jeans got stuck preventing him from advancing. Tr. 102, lines 20 – 22. Doe and the driver wrestled over the top of the fence. Tr. 102, line 23. Doe claimed that when he turned his face toward the driver, he heard a loud bang and saw a flash. Tr. 103, lines 4 – 5. Doe further claimed that as he ran away, he heard two more shots sound out. Tr. 105, lines 12 – 14. Something struck Doe's left hip causing him to fall on the ground. Tr. 105, lines 15 – 16. As the driver approached Doe, Doe grabbed his gun and fired nine rounds. Tr. 105, lines 17 – 22. The driver then ran, and Doe chased again. Tr. 105, line 22 – Tr. 106, line 2. However, shortly after initiating the pursuit, Doe stopped pursuing and waited for backup due to his injuries. Tr. 106, lines 6 – 15. Doe was shot twice, once on the right side of his face and once in his left hip. Tr. 112, line 25 – Tr. 113, line 5. Although Doe had not placed this information in any report, he claimed during his testimony that while he was waiting for backup, he observed a burgundy Cadillac driven by the same male who assaulted him pass on the roadway. Tr. 140, lines 5 – 10; Tr. 141, lines 11 – 17.

Dr. Michael Orseck treated Doe at the hospital after the shooting. Tr. 146, lines 2 – 11. Dr. Orseck claimed that the gunshot wound to Doe's face was "possibly a life-

¹ John Doe is a pseudonym. In compliance with this Court's Order filed December 18, 2014, Appellant has proposed the use of the pseudonym "John Doe" in place of the police officer's name.

threatening wound” because if it were left untreated, Doe may develop a bone infection, which may be life-threatening due to its proximity to the brain. Tr. 148, lines 6 – 11.

The police tracked the Pontiac left at the scene to Crystal Lovett. Tr. 152, lines 5 – 9. Then, the police obtained a residential address and phone number for Lovett. Tr. 152, lines 10 – 18. The police tracked Lovett’s phone using the location of cell phone towers to Virginia, where officers spotted a car with the South Carolina license plate. Tr. 153, lines 12 – 21; Tr. 320, lines 21 – 24; Tr. 321, lines 6 – 25; Tr. 322, lines 13 – 24. After the car in Virginia stopped pursuant to law enforcement’s request, two individuals exited the car. Tr. 323, lines 20 – 22; Tr. 324, lines 2 – 5; Tr. 324, lines 15 – 24. However, a third person in the car drove away, and the police chased. Tr. 324, line 25 – Tr. 325, line 11. Eventually, the police executed a pit maneuver stopping the car. Tr. 326, lines 5 – 9. Appellant was removed from the car and arrested. Tr. 326, lines 17 – 18.

An individual, who had a studio near the vicinity of the shooting, claimed that on the evening of November 6, 2011, he heard loud shots and then Appellant arrived at his studio. Appellant was bleeding from a gunshot wound. Additionally, the studio owner claimed Appellant had a revolver in his possession. Tr. 253, line 10 – Tr. 255, line 23. When Appellant requested help, the studio owner provided him the keys to a burgundy Cadillac. Tr. 256, lines 2 – 8.

Lovett also claimed that on the evening of November 6, 2011, Appellant was driving her blue Pontiac. Tr. 270, lines 21 – 25. Later in the evening, she saw Appellant bleeding at his sister’s house. Lovett tried to care for Appellant’s wound. Tr. 273, lines 15 – 17; Tr. 274, lines 1 – 13. She, Appellant, and a third person left in a car to take Appellant to a

hospital. Tr. 274, line 18 – Tr. 275, line 12. However, the trio drove to Virginia where they were eventually stopped by police. Tr. 282, lines 20-23; Tr. 283, lines 23-24.

According to Lovett, during the car ride to Virginia, Appellant stated he had been stopped by police and ran on foot. The officer chased Appellant and the two “got into a tussle.” The officer hit Appellant in the head with a flashlight “and then he - - then he shot him. And then he got loose and ran and he shot him, the police shot him.” Tr. 278, lines 2-8. Lovett then detailed their car ride to Virginia, including phone calls she had with family members and the police. Tr. 277, line 11 – Tr. 282, line 21. Due to Lovett’s alleged involvement, she had been charged with accessory after the fact to a felony. Tr. 287, lines 19-21. She had pled guilty to the charge, but had not been sentenced. She faced up to fifteen years in prison, however. Tr. 288, lines 1-10. Lovett admitted that she hoped to benefit from her testimony. In fact, Lovett hoped to avoid a prison sentence at all through her testimony against Appellant. Tr. 288, line 15 – Tr. 289, line 15.

ARGUMENT

I. In violation of Appellant's right to a jury trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 14 of the South Carolina Constitution, the trial judge erred in failing to instruct the jury that in order to convict Appellant of attempted murder the jury must find that Appellant acted with a specific intent to kill.

Relevant facts

At the conclusion of the presentation of evidence, Appellant moved the court to charge the jury that attempted murder requires a specific intent to kill based upon the clear and unambiguous language of the statute. Appellant argued the statute required a specific intent to kill and malice aforethought. Appellant contrasted the old common law offense for assault and battery with intent to kill with the new statute of attempted murder to support his argument that attempted murder requires a specific intent to kill. Using the rules of statutory construction, which require giving each section of the statute meaning, Appellant argued the statute required a jury finding of a specific intent to kill. Tr. 393, line 9 – Tr. 394, line 11.

The prosecution presented no argument in opposition; however, Judge Cole denied the request. Tr. 394, lines 14 – 15. Judge Cole explained that although the old crime of assault and battery with intent to kill seemed to require a specific intent to kill and that initially case law required such, the case law developed and changed the requirement. Judge Cole stated that the appellate courts determined that assault and battery with intent to kill did not require a specific intent to kill; it simply required malice aforethought. Concerning the new statute for attempted murder, Judge Cole stated “it does appear to require a specific intent to kill.” Nevertheless, Judge Cole refused to require a specific intent to kill because

he believed the Legislature was codifying in the crime of assault and battery with intent to kill by creating the statutory offense of attempted murder. Judge Cole posited that in doing so, the Legislature did not intend to require a specific intent to kill based upon the development of the case law regarding assault and battery with intent to kill. Further, Judge Cole believed that because murder did not require a specific intent to kill then the offense of attempted murder should not require such a specific intent either. Thus, Judge Cole concluded that attempted murder required “simply a general criminal intent accompanied by malice aforethought.” Tr. 394, line 16 – Tr. 396, line 4.

Thereafter, Judge Cole instructed the jury concerning the crime of attempted murder as follows:

Section 16-3-29 of the South Carolina Code of Laws defines the crime of attempted murder, and that section provides that a person who with intent to kill attempts to kill another person with malice aforethought, either expressed or implied, is guilty of the offense of attempted murder.

Now, with regard to that particular section and the phrase intent to kill, you are instructed that proof of an intent to kill in the context of an attempted murder allegation does not require proof of a specific intent to kill on the part of the defendant, but it does require proof of a state of mind of conscious wrongdoing accompanying the intentional commission of an act or acts, the natural tendency of which is to destroy human life.

And the term intent refers to the state of a person’s mind which directs his actions towards a specific object or goal. And intent would include those consequences which represent the very purpose for which an act is done, as well as those consequences which are known to be substantially certain to result, whether actually intended or not.

And within the meaning of the statute the term attempts to kill refers to the intentional commission of an act – – and overt act or acts, the natural tendency of which is to cause death.

That intent to kill as the statute requires must also be accompanied by malice aforethought either expressed or implied.

Tr. 433, line 19 – Tr. 434, line 20 (emphasis added). The judge then instructed the jury regarding malice, an element of attempted murder. Tr. 434, line 21 – Tr. 437, line 11. At the conclusion of the jury instructions, Appellant renewed his request regarding an instruction on the specific intent to kill concerning the attempted murder charge. Tr. 449, lines 15 – 23.

During the deliberations, the jury requested to be re-instructed on attempted murder and the lesser included offense of assault and battery of a high and aggravated nature. Tr. 455, line 23 – Tr. 456, line 2; R.*(Court’s Exhibit #2). Judge Cole issued the same instruction as previously provided. Tr. 456, line 4 – Tr. 458, line 25. Appellant renewed his earlier objections following this reinstruction. Tr. 459, lines 15 – 17. Thereafter, the jury requested “a printed statement of attempted murder and assault and battery of a high and aggravated nature.” Judge Cole provided the jurors with the written instructions concerning the definitions of attempted murder and assault and battery of a high and aggravated nature. These written instructions included the same erroneous language concerning intent as the oral instructions. Tr. 459, lines 21 – 22; R.*(Court’s exhibit # 3).

Discussion

The Sixth Amendment to the United States Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed....” U.S. Const. Am. VI. The Fourteenth Amendment forbids states to “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Am. XIV. Pursuant to this Due Process Clause, the United States Supreme Court held an individual’s right to a jury trial pursuant to Sixth Amendment is applicable to the states. Duncan v. Louisiana, 391 U.S. 145, 149-150 (1968); see also State v. Warren, 273 S.C. 159, 255 S.E.2d 668 (1979).

Additionally, South Carolina's Constitution provides that "Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury." S.C. Const. Art. I, § 14.

The South Carolina General Assembly recently created the crime of attempted murder. Lawmakers defined the offense as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). The statute became effective on June 2, 2010. According to the Act, attempted murder replaced the common law crime of assault and battery with intent to kill: "wherever in the 1976 Code reference is made to the assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29." 2010 Act No. 273, § 7.C. Thus, the General Assembly was aware of the prior offense of assault and battery with intent to kill and the case law defining the common law offense.

Previously, assault and battery with intent to kill was defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Hinson, 253 S.C. 607, 611, 172 S.E.2d 548, 550 (1970). Although assault and battery with intent to kill was a common law offense, a statute provided for its punishment: "The crime of assault and battery with intent to kill shall be a felony in this state and any person convicted of such crime shall be punished by imprisonment not to exceed twenty years." S.C. Code Ann. § 16-3-620 (2009).

In State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), the South Carolina Supreme Court analyzed the offense of assault and battery with intent to kill and discussed the required elements of the offense. Based upon the traditional comparison of assault and

battery with intent to kill to murder – that if the offense would have been murder had the victim died – and the lack of a specific intent requirement for murder, the Court held “the logical inference is that, likewise, a specific intent is not required to commit” assault and battery with intent to kill. Id. at 14-15, 479 S.E.2d at 51. The Court explained that although the offense required both an intent to kill and malice, the offense did not require a specific intent to kill. Id. at 15, 479 S.E.2d at 51. Thus, the Court held it sufficient “if there is some general intent, such as that heretofore applied in cases of murder in this state.” Id.

In State v. Sutton, 340 S.C. 393, 398, 532 S.E.2d 283, 286 (2000), the South Carolina Supreme Court refused to recognize the offense of attempted murder. The Court explained that an attempt to commit murder requires a specific intent to kill. Specifically, the Court stated “[i]n general, ‘[a]ttempt is a specific intent crime.’” Id. at 397, 532 S.E.2d at 285 (citing 21 Am.Jur.2d Criminal Law § 176 (1998)). Further, the Court explained “[t]he act constituting the attempt must be done with the intent to commit that particular crime.” Id. (quoting 21 Am.Jur.2d Criminal Law § 176). “In the context of an ‘attempt’ crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense.” Id. at 397, 532 S.E.2d at 285. The Court then distinguished attempted murder from assault and battery with intent to kill: “Attempted murder would require the specific intent to kill and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not.” Id.

Repeatedly, South Carolina’s appellate courts have held that attempt crimes require specific intent to complete the acts comprising the principal offense. See State v. Green, 397 S.C. 268, 283, 724 S.E.2d 664, 671-672 (2012); State v. Reid, 393 S.C. 325,

329, 713 S.E.2d 274, 276 (2011); State v. Evans, 216 S.C. 328, 332, 57 S.E.2d 756, 758 (1950)(stating “[t]he law does not concern itself with the mere guilty intention, unconnected with any overt act”); State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942)(same); State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012); State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute’s language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm’n, 317 S.C. 434, 454 S.E.2d 890 (1995)). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The clear and unambiguous meaning of the statute concerning attempted murder is a requirement of specific intent: “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.” S.C. Code Ann. § 16-3-29 (emphasis added). If this Court determines the statute is ambiguous, then a review of South Carolina’s case law demonstrates the legislature intended to require a specific intent to kill when it created attempted murder. The Supreme Court had held repeatedly that attempted murder required

a specific intent to kill. In fact, our appellate courts had long maintained that attempt crimes are specific intent crimes. The legislature was aware of South Carolina's case law concerning attempted murder specifically, and attempt crimes in general. Therefore, the legislature understood that by creating the crime of attempted murder, the legislature was requiring a showing of specific intent.

This Court should reverse Appellant's conviction and sentence for attempted murder based upon the trial judge's erroneous instruction. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) ("To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."); State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007) ("A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues."); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("In making a harmless error analysis, [the Court's] inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.").

II. Violating Appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, the trial judge erred in failing to require the prosecution to disclose the personnel file of the purported police officer victim where the file contained numerous instances of dishonest conduct, which would have been fodder for impeachment.

Relevant facts

Prior to trial, Appellant moved to compel disclosure of impeachment evidence concerning three police officers involved in the case. R. * (motion to compel). Specifically, Appellant sought "portions of the personnel records of John Doe that would contain information concerning Mr. Doe's credibility." R. * (motion to compel). Thereafter, on May 9, 2013, Judge Cole heard argument on the motion. May Tr. 1. Appellant noted that Doe was the "only witness the state has to call to testify about the specific conduct" resulting in the charges. May Tr. 3, line 25 – May Tr. 4, line 5. Specifically, Appellant sought information related to credibility. May Tr. 4, lines 13-21; May Tr. 5, lines 1-4.

The prosecution objected to the request because "these are personnel files of these individual officers" and they were "entitled to some confidentiality from that standpoint." May Tr. 5, line 21 – May 6, line 1. Next, rather than arguing whether the information was subject to disclosure, the prosecutor argued inadmissibility by claiming that any information contained within the officer's personnel file was not relevant, and therefore, should not be disclosed. May Tr. 6, lines 6-23. Continuing to ignore the question of disclosure, the prosecutor argued the "prejudicial effect of that would be huge because it has nothing to do with this event." He then clarified he was referring to Rule 403, SCRE. May Tr. 6, line 24 – May Tr. 7, line 5. Finally, the prosecutor argued that even if the evidence were character

evidence under Rule 404, SCRE, then “it’s very strict liability how it could be used.” May Tr. 7, lines 6-13. The prosecutor then put the onus on Appellant to present “some evidence to prove there is something that is relevant there or have some reason to look at it.” May Tr. 7, lines 20-23.

Using the language employed by the prosecutor, the judge required Appellant to demonstrate what “type of information that would be in a personnel file that ... would be admissible in the course of the trial for the purpose of attacking the credibility of the witnesses.” May Tr. 8, lines 1-4. Appellant argued “write-ups concerning officers’ falsifying reports” would be an example of the type of information in a personnel file subject to disclosure. May Tr. 8, lines 12-14; May Tr. 9, lines 4-6. Appellant further argued that reports of excessive use of force by Doe would be particularly relevant in the case as that was a potential issue in the case. May Tr. 8, line 15 – May Tr. 9, line 3; May Tr. 9, lines 6-7.

Just as Appellant had argued in his written motion, Appellant orally argued that under Kyles v. Whitley, 514 U.S. 419 (1995), and United States v. Bagley, 473 U.S. 667 (1985), the defendant had “the right to investigate even credibility issues” and the state was obligated “to turn over ... information that may be - - that may tend to exculpate or may tend to mitigate the punishment.” May Tr. 9, line 12- May Tr. 10, line 21. At the conclusion of the pre-trial hearing, Judge Cole took the matter under advisement. May Tr. 12, lines 14-15.

After the hearing, Appellant filed a memorandum in support of his motion to compel disclosure of impeachment evidence. R. *(memorandum). Appellant again sought information concerning Doe’s credibility. This evidence was particularly important in this

case because Doe was “expected to be the only prosecution witness who [would] testify about the incident which led” to the charged offenses. In addition to the controlling case law cited by Appellant at the hearing, Appellant referred the trial court to Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). After the argument, Appellant had received several documents involving the discipline and termination of Doe from the Spartanburg Public Safety Department. The documents indicated his termination was “in part, for violating departmental policies for honesty.” R. *(memorandum).

When the case was called for trial on July 17, 2013, the trial judge re-visited Appellant’s motion for disclosure. The prosecutor, as requested by the judge, had obtained the personnel files and reviewed them “in order to determine if in his opinion there is any information contained in those files that would be subject to disclosure pursuant to Brady v. Maryland or Rule 5[, SCRCrimP].” Tr. 51, line 8 – Tr. 52, line 6. “[O]ut of an abundance of caution,” the prosecutor submitted two items to the judge for “an in camera review.” Tr. 52, lines 7-13.² Judge Cole reviewed the items and “determined that they are not discoverable” under Rule 5, SCRCrimP, and/or Brady and “that the information if provided would not likely result in the finding of any other relevant information that might be used in the course of the trial.” Tr. 52, lines 14-20.

According to the judge, he had a total of eleven sheets of paper, one from the sheriff’s department and ten from the city. Tr. 52, lines 21-25. He understood that

² The trial judge failed to follow the procedure outlined in Pennsylvania v. Ritchie, 480 U.S. 39, 58 (1987) and State v. Bryant, 307 S.C. 458, 415 S.E.2d 806, 808 (1992) requiring the trial court examine the undisclosed evidence to determine whether it contained material information. As a result of the trial judge’s failure to follow the constitutionally required procedure, the remaining portions of the personnel file of Doe, and the entirety of the personnel files of the other witnesses were not made exhibits.

Appellant had seven of those sheets, which he had obtained from another source. Tr. 53, lines 1-2. The judge stated that “three sheets of paper” had not been provided to the defense: one was “sort of just an introduction of what’s attached to it,” and “the other two sheets of paper are matters contained in the personnel file, in a personnel file.” Tr. 53, lines 3-11. Then, the judge explained “only those items that were presented to me for an in camera review and that are not in the possession of the defense, will be placed into an envelope and sealed” for review by an appellate court. Tr. 53, lines 12-18.³ Then, the judge held the personnel files would “not be introduced in the trial of this case because [he had] determined that they’re not relevant to anything and not likely to lead to any relevant information that would be admissible in the trial.” Tr. 53, lines 18-22.

The judge then clarified his ruling, stating the papers did not relate to this case or any other case or investigation engaged in or participated in by the person whose personnel file was reviewed. Due to the fact that the papers did not relate to the investigation of the current matter or to the investigation of any other matter, the judge determined they were not relevant and refused to permit Appellant to inspect the file. Tr. 54, line 18 – Tr. 55, line 5.

³ On September 19, 2014, this Court granted Appellant’s motion to transport the exhibit and unseal it to allow Appellant and the Attorney General to review the document. After review of the sealed exhibit, Appellant determined a meritorious issue existed related to the sealed exhibit. The order further provided that “[s]hould either party seek to include any portion of the sealed documents in their designation of matter to be included in the record on appeal, nothing prevents the other party from filing a motion to seal at that time.” The state moved to seal portions of the record on appeal and the briefs, but this Court denied the motion on December 18, 2014. However, this Court ordered the parties to redact personal identifying information and to use a suitable pseudonym for the police officer.

Evidence contained within the sealed exhibit

The sealed exhibit reveals several items of evidence bearing on Doe's credibility. On July 12, 2007, the Spartanburg Public Safety Department, Doe's former employer, suspended him for ten days without pay and prohibited him from engaging in secondary employment until January 1, 2008 because an internal investigation revealed Doe had violated several departmental policies. Those policies included (1) "Conduct Unbecoming, which includes but is not limited to, any criminal, dishonest or improper conduct," and (2) "Honesty, Employees shall not lie, give misleading information or falsify written or verbal communications in official reports or in their actions with another person ... when it is reasonable to expect that such information may be relied upon...." R*(Sealed Exhibit).

This suspension was the result of an investigation regarding "an allegation of false information in reference to time worked in secondary employment." During the investigation, Doe claimed initially he did not realize he had signed up to work at two different locations on the same day. He worked two hours at one location, and then moved to the second location to work the assigned hours there. However, Doe billed for hours worked at both locations "during the same period of time" constituting "fraud." Further, the investigation revealed that Doe left his secondary employment to assist with a homicide investigation, but failed to file a supplemental report. "Also during the investigation several issues were identified with [Doe's] bi-monthly time sheet." R*(Sealed Exhibit).

Less than a year later, on February 2, 2007, Doe was suspended for one day for failing to follow departmental policies relating to "Mobile Video/Audio Recording." Doe had informed another officer that he did not like the camera and there were times when he did not turn the system on. This violated the police department's policy and Doe suffered a

suspension as a result. R. *(Sealed Exhibit). Just a few short months later, Doe was reprimanded yet again. On June 30, 2007, Doe received a letter of warning for violating departmental policies by accepting gratuities. R. *(Sealed Exhibit).

On September 4, 2008, Doe was terminated from the Spartanburg Public Safety Department based upon his violation of several departmental policies, including (1) "Discretion/Committing Unsafe Acts," (2) "Honesty," (3) "Using Emergency Lights and Siren," (4) "Report Preparation," (5) "Vehicular Pursuits," and (6) "Mobile Video/Audio Recording." An investigation revealed that on July 24, 2008, Doe was "involved in a vehicle accident with a white Dodge pickup." The investigators reviewed Doe's in-car video of a traffic stop prior to the accident and learned there was no audio on the recording. Further, the recording ended while Doe was "following the vehicle across a grass field and through some trees." Doe's car slid into the suspect's vehicle causing damage to the police car. R. *(Sealed Exhibit).

In his written and audio recorded statements, which were not included in the materials reviewed by the judge, but portions were quoted in the report, Doe admitted to turning his camera off, but claimed he had been trained to do so whenever a car ran from him. He admitted that he pursued the truck when he should not have. He claimed he "caught" himself "and stopped at the side of the roadway." R. *(Sealed Exhibit).

Additional video from the same date showed Doe initiate a traffic stop of a black pickup, but the recording lacked any sound. The black truck did not stop and Doe pursued with his lights and siren. The truck ran through stop signs and crossed into oncoming traffic. Doe ended the chase due to traffic, and turned off the camera. R. *(Sealed Exhibit). Doe provided written and recorded statements regarding this incident as well. These were

not included in the sealed exhibit. The portions of the statement included in the report revealed that Doe knew the black truck was not going to stop, but he pursued it anyway. During the chase, a superior officer contacted Doe asking if he were chasing the black truck. Doe responded that he was not. According to the report, Doe defended the technical truth of the answer by stating that when his superior made the inquiry, he had let the truck go. He then seemed to backtrack when he admitted the superior officer told him to stop chasing the black truck if he were doing so, and Doe responded “ok” and “let the truck go on.” Additionally, Doe did not complete a report concerning his pursuit of the black truck. R. *(Sealed Exhibit).

This investigation prompted a review of all videos for Doe’s police cruiser. According to the report, there were 592 recordings, of which 195 contained no recording at all indicating Doe failed to use his body microphone as required by the department. R. *(Sealed Exhibit). Doe was terminated due to the results of the investigation and other “incidents in the past two years.” R. *(Sealed Exhibit).

Although the previous document revealed Doe was terminated, a “memo” of the same date showed the police department accepted Doe’s letter of resignation effective immediately. R. *(Sealed Exhibit). However, the sealed exhibit did not contain the letter of resignation. Presumably, the letter of resignation, along with numerous other documents, were part of the documents that the prosecutor alone determined were not subject to disclosure and required no subsequent review by the judge.

Following Doe’s termination from the Spartanburg Public Safety Department, he was hired by the Spartanburg County Sheriff’s Office. According to a handwritten note,

someone from the Spartanburg County Sheriff's Office spoke with Senior Officer⁴ regarding Doe's potential employment with the Sheriff. Senior Officer believed that Doe was "a good officer at times, but he believe[d] that he has a problem with police ethics while on duty." As a result, Senior Officer would not "honestly recommend" Doe for employment with the Sheriff. R. *(Sealed Exhibit).

Discussion

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held "that the suppression by the prosecution 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." Essentially, the Court held that prosecutors must disclose any evidence in the prosecutor's possession that may be favorable to the accused and material to guilt or punishment. Id.; See also Kyles v. Whitley, 514 U.S. 419 (1995); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006).

Evidence is favorable to the accused if it is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. A reasonable probability is one that undermines confidence in the outcome of the trial. Bagley, 473 U.S. at 678. Importantly, the Supreme Court held that "[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a

⁴ Appellant has redacted the name of the officer in light of Respondent's "concerns about public disclosure" of the officer's name. Appellant has replaced the name of this officer with the pseudonym, "Senior Officer."

preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles, 514 U.S. at 434. The "touchstone of materiality is a 'reasonable probability' of a different result." Id. (quoting Bagley, 473 U.S. at 678). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

A defendant need not request Brady evidence; it is incumbent upon the prosecutor to provide such evidence even without a request. United States v. Agurs, 427 U.S. 97, 107 (1976); see also Rule 3.8(d), RPC, Rule 407, SCACR.

In Kyles, 514 U.S. at 421, the Supreme Court held the duty "to disclose evidence favorable to the defense turns on the cumulative effect of all such evidence suppressed by the government, and ... the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." The Court granted a new trial to a defendant where the prosecutor failed to disclose potential impeachment evidence, including prior inconsistent statements by eyewitnesses. Id. at 441-445. Additionally, the prosecution suppressed statements by a key witness, whom the defense alleged was the likely killer, wherein the key witness's "various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation." Id. at 445.

In Giglio v. United States, 405 U.S. 150, 150 (1972), the defendant was convicted of passing forged money orders. The prosecution relied upon the testimony of the defendant's co-conspirator, who worked at the bank. The co-conspirator provided the only evidence

linking the defendant to the crime. Id. at 151. The co-conspirator testified against the defendant and claimed that he had received no promises for his testimony and believed that he may be prosecuted for his involvement. Id. at 151-152. However, the defendant discovered after the trial that a promise – the co-conspirator would not be prosecuted – was made to the co-conspirator by a member of the prosecutor’s office, but not the person who prosecuted the defendant. Id. at 152. The Supreme Court made clear the Brady rule extended to include impeachment evidence. The Court stated, “[w]hen the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within the general rule [of disclosure].” Id. at 154. Based upon the centrality of the co-conspirator’s testimony to the defendant’s prosecution and conviction, the Court reversed the defendant’s conviction. Id. at 155.

In Bagley, 473 U.S. at 670-671, the government’s two key witnesses were promised a sum of money for their cooperation. This information was withheld from the defense. Id. The Court made clear again that “[i]mpeachment evidence ... as well as exculpatory evidence falls within the Brady rule.” Id. at 676. Impeachment evidence is favorable to the accused because “if disclosed and used effectively, it may make the difference between conviction and acquittal.” Id. (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)). The Court held the possibility of a reward gave the two witnesses “a direct, personal stake” in the defendant’s conviction. Id. at 683.

In Riddle v. State, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), the South Carolina Supreme Court confronted a Brady violation arising during post-conviction relief (PCR) proceedings. Days before Riddle’s trial, a police officer interviewed a key witness in the case who provided a statement inconsistent with his previous statement. The prosecutor

failed to disclose this interview to Riddle. The PCR court held the statement was available to Riddle because he could have interviewed the officer who took the statement. Our Supreme Court disagreed, holding “[n]ot only is it unrealistic to require [Riddle] and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires.” As explained by the Court, “[t]he burden is on the solicitor to disclose material evidence which is exculpatory or impeaching.” Id.

The Ninth Circuit Court of Appeals held that when a defendant requests the personnel files of testifying officers, the prosecution must “disclose information to the defense that meets the appropriate standard of materiality If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in camera inspection and evaluation. United States v. Cadet, 727 F.2d 1453, 1467-1468 (9th Cir. 1984); see also, United States v. Henthorn, 931 F.2d 29, 31 (9th Cir. 1991)).⁵ The Court explained that the government has a duty to examine personnel files upon a defendant’s request for their production. Cadet, 727 F.2d at 1467.

The United States District Court for the Eastern District of North Carolina denied a defendant’s request to subpoena the employment and personnel files of the local police

⁵ To the extent the state raises claims that the files were not within its custody or control, this argument is unavailing. See United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992)(requiring the prosecutor to search the files within the custody of the local police department relating to the death of a police officer for Brady material, where the police officer’s testimony was plainly critical at trial); United States v. Perdomo, 929 F.2d 967, 970 (3rd Cir. 1991)(finding the prosecution’s failure to conduct a search of local Virgin Islands records to verify a witness’s criminal background did not excuse the failure to disclose the information as information was available to the prosecution if they had looked); Carey v. Duckworth, 738 F.2d 875, 877-878 (7th Cir. 1984)(stating that “a prosecutor’s office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case”); United States v. Auten, 632 F.2d 478, 481-482 (5th Cir. 1980)(imputing knowledge of a witness’s criminal history even where the prosecutor did not run an FBI or NCIC check on the witness).

officers involved in his case because under Brady and its progeny, the government was required to disclose evidence that could potentially be used to impeach or discredit a government witness. Thus, anything in the employment and personnel files of the officers that could be used to impeach the officers would be disclosed during the discovery process. United States v. Newby, 251 F.R.D. 188, 190 (E.D.N.C. 2008). Similarly, the Oregon Court of Appeals held a defendant was entitled to an officer's personnel records where the defendant was accused of assaulting the officer and the defendant sought to prove the officer was the aggressor by using supporting information in the file. State v. Fleischman, 495 P.2d 277, 282 (Ore. Ct. Appeals 1972).

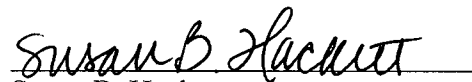
Appellant was entitled to inspect and copy the documents contained within the sealed exhibit because the documents bore on Doe's credibility. Specifically, the documents revealed multiple instances of dishonesty by Doe. This bore directly on Doe's credibility as the state's chief witness. Appellant's argument at trial was that Doe overreacted and shot first in contradiction of Doe's testimony. Tr. 416, lines 9-16. In support of Appellant's position that Doe was the aggressor, the video from Doe's car revealed that when Doe exited his vehicle, he immediately threatened to shoot Appellant. State's Exhibit #26.⁶ Additionally, Doe threatened to hit Appellant with his flashlight. State's Exhibit #26. Thus, Doe's credibility was central to the state's case. In fact, the jury requested to hear Doe's testimony again during deliberations. Tr. 453, lines 13-15. Furthermore, the documents also concerned Doe's failure to follow police departmental policy governing car chases, which was important in Appellant's case as the genesis of the interaction between Appellant and Doe was a car chase.

⁶ This Exhibit is on file with this Court.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and order a new trial.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

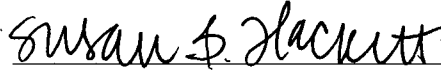
V.

ROBERT ODELL BROWN,

APPELLANT

CERTIFICATE OF SERVICE

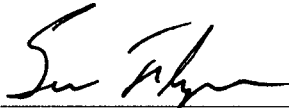
The undersigned attorney hereby certifies that a true copy of the Second Amended Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Ben Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Robert Odell Brown, #296975, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 29th day of April, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of April, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.