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SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Greenville County

Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAMES EDDIE BAILEY,

APPELLANT

APPELLATE CASE NO. 2014-002447

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant Bailey's request to charge the jury on the spoliation of evidence when the in-car video of Deputy Joseph Giovanni, who was one of the responding officers, was destroyed by the officers before it was viewed by the parties?

STATEMENT OF THE CASE

On October 22, 2013, the Greenville County Grand Jury indicted James Eddie Bailey on the charges of armed robbery (AR), kidnapping, possession of a weapon during the commission of a violent crime, and resisting arrest. October 8-10, 2014, Bailey proceeded to trial before the Honorable Steven H. John and a jury. Bailey was represented by Symmes Watkins Culbertson, and the state was represented by Allen Fretwell. October 8, 2014 Tr. 1. The jury returned verdicts of guilty on the four charges as indicted. Oct. 9, 2014 Tr. 203, ll. 20 – Tr. 204, ll. 24. Judge John sentenced Bailey to the required life without parole (LWOP) based on Bailey's prior convictions of AR in 1982 and ten counts of AR from 1996. Oct. 9, 2014 Tr. 207, ll. 7 – Tr. 214, ll. 21. Bailey's attorney filed a notice of appeal. This appeal follows.

## STATEMENT OF FACTS

On April 14, 2013, Appellant James Bailey entered the Dollar General Store on Poinsett Highway in Greenville just before closing time at nine o'clock pm. Sharon Taylor, the manager, was there as well as the cashier and Tom Nash who was Sharon's boyfriend. Oct 8, 2014 Tr. 46, ll. 17 – Tr. 47, ll. 6.

Bailey allegedly followed Ms. Taylor until he cornered her in an aisle, grabbed her hair, threw her on the floor, and held a knife to her throat. Bailey allegedly told her this was a robbery and he was going to kill her. He pushed on her throat with the knife until blood appeared. Ms. Taylor's boyfriend appeared. Bailey told him he wanted money so Tom Nash went to the cash register and got twenty-two dollars which he gave to Bailey. Oct. 9-10, 2014 Tr. 15, ll. 1 – Tr. 18, ll. 7.

In the meantime, the cashier had seen Bailey on top of Ms. Taylor so she called 911 and summoned the boyfriend, Tom Nash. When he gave Bailey the money, Nash told him he better leave because the police were coming. Bailey then left through the front door. Oct. 9-10, 2014 Tr. 18, ll. 5 – 22; Oct. 8, 2014 Tr. 47, ll. 1 – Tr. 48, ll. 18.

Deputy Nathaniel Emily was the first officer to respond to the incident. When he pulled up to the store, he saw Bailey and Nash at the door. Deputy Emily pulled his weapon and Bailey ran around the corner. He did see a knife in Bailey's hand. Deputy Emily was not the officer who arrested Bailey. Oct. 9-10, 2014 Tr. 76, ll. 1 – Tr. 81, ll. 9. A DVD of the in-car video from Deputy Emily's car that was operating at the time was introduced and published to the jury. Oct. 9-10, 2014 Tr. 65, ll. 1 – Tr. 68, ll. 22.

Officer Michael J. Giovanni heard the dispatch of the incident and joined in the chase of Bailey. He saw Bailey behind a church and yelled for him to stop. Bailey continued

to walk away. Deputy Giovanni pulled his taser and used it on Bailey. Other deputies arrived and assisted Giovanni. They finally subdued Bailey and found a knife in his hand. Oct. 9-10, 2014 Tr. 87, ll. 1 – Tr. 92, ll. 24.

Deputy Giovanni admitted that he had an in-car video that was operating that night. However, it was not turned over to the prosecution as evidence because Deputy Giovanni saw nothing of evidentiary value on the video. He viewed it and it only showed his driving to the scene. Bailey was not on that video. Oct. 9-10, 2014 Tr. 85, ll. 1 – Tr. 86, ll. 16.

Following the jury charges, there was no objection to the charges by either party. The following day when the trial resumed, defense counsel requested that the judge give the jury a charge on spoliation based on the fact that Deputy Giovanni's in-car video was not presented in evidence. Counsel said he should have requested it earlier but was requesting it then. Counsel made a motion for the charges against Bailey be dismissed. Oct. 9-10, 2014 Tr. 180, ll. 8 - Tr. 194, ll. 25.

The solicitor argued that a motion to dismiss was not proper and defense counsel should have requested the charge during the charging conference. Defense counsel responded that this was due process issue that could be raised anytime. The judge responded that there was no evidence that the state destroyed the evidence in bad faith. The judge refused to give the spoliation charge. Oct. 9-10, 2014 Tr. 195, ll. 1 – Tr. 198, ll. 23.

## ARGUMENT

The trial court erred in denying Appellant Bailey's request to charge the jury on the spoliation of evidence when the in-car video of Deputy Joseph Giovanni, who was one of the responding officers, was destroyed by the officers before it was viewed by the parties.

The Due Process clause of the Fifth and Fourteenth Amendments mandate a defendant's fundamental right to a fair trial. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998).

In State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987), the Supreme Court ruled that the prosecution's nondisclosure of tape recordings of statements made by key state's witness in prosecution of defendants for conspiracy, armed robbery, kidnapping, and murder deprived defendants of fair trial requiring new trial.

In Brady v. Maryland, 373 U.S. 83 (1963), the United State Supreme Court declared the suppression 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. State v Harvey Jones and Melissa Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) citing Brady v. Maryland, *supra*.

The Sixth Amendment provides an accused with the right to be confronted with witnesses against him. The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (Ct. App. 2004).

The Fourteenth Amendment secures all persons against any state action which results in either deprivation of life, liberty, or property without due process of law. U.S. Const. amend. XIV.

In Arizona v. Youngblood, 488 U.S. 51 (1988), the United States Supreme Court held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence did not constitute a denial of due process of law. Youngblood was accused of sexually assaulting and sodomizing a ten year old boy. The police collected a rectal swab for semen and the child's clothing. However, the police failed to refrigerate the clothing and failed to perform tests on the semen samples. None of their information was concealed from the respondent at trial, and the evidence was made available to the respondent's expert who declined to perform any tests on the samples.

In his dissent in Arizona v. Youngblood, id. , Justice Blackmun wrote that a defendant was entitled to a fair trial, and not a "good faith" try at a fair trial.

The South Carolina Supreme Court held in State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), that to establish a due process violation based on the destruction of evidence, a defendant must demonstrate (1) that the state destroyed the evidence in bad faith; or (2) that the evidence possessed an exculpatory value before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.

The Supreme Court held the proposition that Cheeseboro had to show bad faith on the part of the state. Bailey's case is distinguished because the evidence was never presented to him.

Cheeseboro is the wrong standard. It is impossible to comply with because how much evidence of misconduct is being demonstrated currently with camera recordings is difficult to determine. Therefore, the police should not be able to destroy evidence because in their unilateral opinion it had nothing of value.

In State v. Hutton, 358 S.C. 622, 595 S.E.2d 876 (2004), the Court of Appeals held that the state's failure to preserve the victim's unfinished initial statement to police officer did not violate due process, and the defendant was not prejudiced by the state's failure to preserve the statement. However, the Court wrote that although they could not find that the defendant was entitled to a dismissal of the charges, the Court wrote that they "cautioned the prosecution and law enforcement authorities that the destruction of evidence will be highly scrutinized."

In Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990), the Supreme Court approved the trial court's use of a spoliation charge even in the absence of evidence of intentional misconduct.

South Carolina Code Section 56-5-2953 ( C ) provides that a video recording must not be disposed of in any manner except for its transfer to a master recording for consolidation purposes until the results of any legal proceeding in which it may be involved are finally determined. Although 56-5-2953 concerns reckless homicide or driving while under the influence of intoxicating liquor, the premise is the same. Evidence in the form of a police video should be preserved.

In State v. Adams, 304 S.C. 302, 403 S.E.2d (Ct. App. 1991), Adams was claiming the original breathalyzer test was not valid and it was lost. However, Adams had been given a copy of the results, and could testify as to his claim. Bailey never had the evidence nor a

copy nor the results so he could not determine if it was exculpatory or not. The police handling of the investigation was so severely inappropriate to the point of being misconduct and bad faith. The police conduct was a violation of his due process right to a fair trial.


In State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011), the Supreme Court, citing State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989), ruled that a request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused. 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. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010).

The trial judge erred in not giving the requested jury charge on spoliation. There was evidence in Deputy Giovanni's testimony that the in-car video was not presented as evidence. It was only his word that there was nothing significant on the video. Bailey did not have a chance to view it to determine if this was accurate. This was prejudicial to Bailey.

CONCLUSION

Based on the above, Bailey's convictions and sentences should be reversed and his case remanded for a new trial.

Respectfully submitted,

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

Steven H. John, Circuit Court Judge  
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THE STATE,

RESPONDENT,

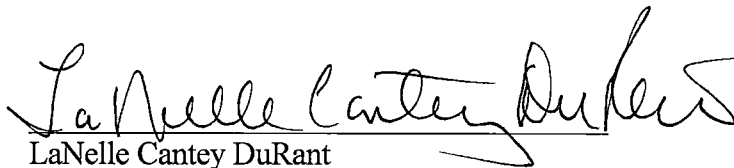
V.

JAMES EDDIE BAILEY,

APPELLANT

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CERTIFICATE OF SERVICE  
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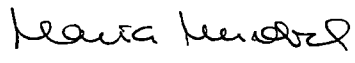
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. James E. Bailey, #114196, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 30th day of June, 2015.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 30th day of June, 2015.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.