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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
General Sessions Court

The Honorable D. Craig Brown, Circuit Court Judge

Indictment Numbers: 2011-GS-07-1398, 1399, 1423, & 1496
Appellate Case Number: 2014-002176

The State, ...Respondent

v.

Jujuan Habersham,.....Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

DID THE TRIAL COURT ERR BY FAILING TO DISMISS THE PROSECUTION OF THE APPELLANT DUE TO THE SUPPRESSION AND SPOLIATION OF EXCULPATORY IDENTIFICATION EVIDENCE?

STATEMENT OF THE FACTS AND THE CASE

During the early morning hours of June 19, 2011, two young adults were robbed at gun point as they left a food and beverage establishment in the waterfront park area of the City of Beaufort. Tr, p. 157, l. 5- p. 158, l. 21. Testimony indicated that they were approached by three males as the male victim escorted the female victim to her car. One of these males had a gun. The female victim handed over her purse with credit cards and five dollars ($5.00). The male victim did not have any items taken.

The Appellant was arrested on June 21, 2011. Tr., p. 39, l. 16. He was indicted for four charges: Armed Robbery, Attempted Armed Robbery, Possession of a Weapon During the Commission of a Violent Crime, and Unlawful Possession of a Firearm by a Person Convicted of a Crime of Violence. Indictments.

The Appellant was represented by the Fourteenth Circuit Public Defender Office. Appellant's trial counsel was his second attorney on the case. Tr, p. 107, l. 14-22. The assistant solicitor was the second prosecutor on the case. Tr, p. 107, l. 23- p. 108, l. 5.

The case had been previously noticed for trial. Tr, p. 121, l. 15- p. 122, l. 24. The second public defender prepped for both of these trial dates. The assistant solicitor handling the case during the first notice changed jobs and the trial was conducted by an assistant solicitor who only had the case for a small number of months.

Appellant's counsel raised four significant issues. First, he argued for the suppression of the statement the Appellant made to the detective. Tr, p. 37, l. 115-17. Second, he argued that a desired stipulation as to Appellant's prior conviction for a "crime of violence" rendered testimony regarding the details of that conviction inadmissible. Tr., p. 86, l. 10-14. Third, he argued for dismissal based upon the suppression, destruction, and late provision of exculpatory evidence related to identification evidence and missing photo lineups. Tr., p. 90-123. Finally, he argued to exclude a convenience store surveillance video and credit card purchase receipt on authentication grounds. Tr, p. 124, l. 1-2.

The trial court denied all of these motions.

Four witnesses testified for the State. Tr, p. 164-261. Two witnesses were

victims of the robbery, one was a responding officer and one was the detective who worked the case. The issue at trial was one of identity. Tr, p. 296, l. 21- p. 297, l. 18.

The two victims could not identify the Appellant. Tr, p. 90, l. 20- 91, l. 8. However, the State introduced a statement of the Appellant admitting involvement in the crime. Tr, p. 239, l. 11- p. 243, l. 19. Further, the State also introduced a convenience store video and a credit card receipt arguing that the Appellant used the female victim's credit card the day after the robbery in neighboring Jasper County. Tr, p. 229, l. 13-p. 233, l. 19.

During cross examination, the Appellant's counsel brought out the fact that the detective lied to the Appellant to induce him to confess. Tr, p. 254, l. 3-9. During interrogation, the detective told the Appellant that the victims picked him out of a photo lineup. In contrast, the detective testified at trial that neither victim picked the Appellant out of a lineup. Tr, p. 101, l. 8-16.

The detective testified he did not memorialize any reference to the lineup in his reports and did not preserve or enter any lineup cards into evidence. Tr, p. 117, l. 19-25. The detective was not clear as to what procedure he used, what warnings were provided or whether both victims were presented two different line up cards (one of Caucasian lineage and one of African lineage). Tr, p. 247, l. 5- p. 253, l. 23. He testified on direct that no one was picked from the lineups but on cross examination that he had no memory to dispute whether the male victim chose two or three people from the lineups. Tr, p. 234, l 18-20 & Tr, p. 252, l. 25- p. 253, l. 18.

In contrast, both victims recalled the lineup presentation differently. The female victim did not recall picking anyone from the lineup. Tr , p. 205, l. 5-21. The male victim indicated he picked "a few" subjects out of the lineup containing suspects of African descent. Tr, p. 183, l. 22- p. 184, l. 6.

The parties stipulated that the Appellant had been convicted of a crime of violence for purposes of one of the gun charges. Tr, p. 279, l. 22- p. 281, l. 3

The Appellant did not testify or present any evidence.

The jury returned guilty verdicts as to all charges on December 11, 2014. The

Appellant received concurrent sentences of 30 years, 20 years, 5 years and 5 years. Sentencing Sheets & Tr, p. 344, l. 1- p. 345, l. 9. The Notice of Appeal was filed on December 16, 2014 and this brief follows. Notice of Appeal.

STANDARD OF REVIEW

In criminal cases, "the appellate court sits to review errors of law only." *State v Bland*, 730 SE2d, 909, 911 (SC Ct App 2012)(internal citations omitted). The reviewing court is bound by the trial court's findings of fact unless they are clearly erroneous. *Id.*

ARGUMENT

BECAUSE THE TRIAL COURT ERRED BY FAILING TO DISMISS THE PROSECUTION OF THE APPELLANT DUE TO THE SUPPRESSION AND SPOLIATION OF EXCULPATORY IDENTIFICATION EVIDENCE, THIS COURT SHOULD REVERSE THE CONVICTIONS AND DISMISS THIS CASE WITH PREJUDICE.

The trial court erred by failing to dismiss the prosecution of the Appellant based upon the suppression and spoliation of evidence identifying third party suspects and exculpating the Appellant. Despite his factual finding that the suppressed and lost identification information was exculpatory in nature, the trial court overruled the Appellant's Motion to Dismiss because there was no showing of prejudice or bad faith. This ruling is erroneous because the proper legal standard was not applied.

Applicable Law

It is an established tenant of criminal jurisprudence that the state is obligated to disclose information to a criminal defendant when this information possesses either exculpatory or impeachment value in the defense of the criminal allegations. *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150, (1972), *Arizona v.*

Youngblood, 488 U.S. 51 (1988) and *Kyles v. Whitley*, 514 U.S. 419 (1995). Further, this duty extends to information which may lead to the discovery of such material. Finally, this duty is not affected by the ultimate admissibility of such evidence.

Beyond the suppression of exculpatory evidence, due process is also violated through the spoliation and destruction of exculpatory evidence. *Arizona v Youngblood.* This represents a constitutional duty above and beyond those imposed by the *Brady* line of cases. Generally, the destruction of evidence violates due process when done in bad faith.

As indicated by the *Youngblood* Court: "[t]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *State v Jackson*, 396 SE2d 101, 102 (SC 1990)(citing *Youngblood*). Stated another way, due process is violated when evidence is destroyed and that "evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." *State v Cheeseboro*, 552 SE2d 300, 307 (SC 2001)(quoting, inter alia, *Jackson*, at 103 (SC 1990). Thus, an inference of bad faith arises when the police destroy evidence that they knew or should have known possessed an exculpatory value and the defendant has no means of replacing this evidence.

Although an extreme remedy, the judiciary possesses the inherent supervisory authority to remedy such misconduct through the outright dismissal of criminal proceedings. *State v. Frye*, 897 SW2d 324, 330 (TX Crim App. 1995). Such a remedy is

particularly appropriate where the defendant can demonstrate prejudice from the misconduct for which no other sanction suffices. *US v Derrick*, 163 F3d 799, 806 (4th Cir. 1998)[1]. A court considering dismissal should also look at the deliberate nature of the misconduct involved. *US v. Samango*, 607 F2d 877, 882 (9th Cir. 1979). As stated by Ninth Circuit US Court of Appeals Judge Kozinski, : "[t]here is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." *US v Olson*, 737 F3d 625, at 626 (9th Cir 2013)(Kozinski, dissenting from denial of *en banc* rehearing).[2]

In a spoliation context, dismissal is the only remedy when a due process violation occurs because bad faith and prejudice have already been shown to prove the violation. In fact, courts have indicated that "when identity is an issue at trial, and the police permit the destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process. *State v Escalante*, 734 P2d 597, 603 (AZ Ct App, Div 1, 1986)(review denied 1987). Dismissal is the appropriate remedy unless the evidence against the defendant is so strong that a court can say, beyond a reasonable doubt, that the destroyed evidence would not have proved exonerating." *Id.*

For purposes of this appeal, two appellate opinions from South Carolina are of particular importance. In *State v Jackson*, the SC Supreme Court reversed a DUI

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[1]The court noted other ways to remedy misconduct such as "order[ing] the prosecutor to show cause why he should not be disciplined," "asking the Department of Justice to initiate a disciplinary proceeding against him," or "publically chastis[ing] the prosecutor by identifying him in its opinion." *Derrick*, at 807, n. 6.(Internal citations omitted).

[2]This echos comments attributed to Justice Donald Beatty that the court will no longer tolerate prosecutorial misconduct. See http://www.youtube.com/watch?v=7EHTFOCmQgU

conviction because of a due process violation concerning spoliation. Also, in *State v. Bland*, the SC Court of Appeals addressed a case involving the destruction of a photo lineup.

In *Jackson*, the SC Supreme Court reviewed a DUI conviction. There, the State destroyed a videotape and the breath test report after an initial dismissal but before the trial leading to Jackson's conviction. The SC Supreme Court reversed the conviction relying upon the then recent *Youngblood* decision.

The *Jackson* Court noted that the State was aware of the exculpatory value of the destroyed tape because the review of this tape served as the basis for the original dismissal. The *Jackson* Court characterized the tape as "material" in this regard. *Id*, at 102. Satisfying the second criteria for dismissal, the Court noted the value of the tape could not be replaced. *Id.*

In *Bland*, the South Carolina Court of Appeals affirmed a conviction for Attempted Armed Robbery, Attempted Burglary, and Possession of a Firearm during the Commission of a Violent Crime. In *Bland*, the Court considered whether the destruction of a photo lineup constituted a due process violation. The Court affirmed by finding that any exculpatory value was not apparent before the destruction.

The *Bland* Court specifically noted that no evidence suggested that Bland was even in the lineup. Id, at 911. It also appeared that the lineup was of such poor quality that no pictures were discernable. Id, at 911. Finally, the *Bland* Court noted that the State's witness was not sure she saw anyone clear enough to pick them from a lineup. Id, at 911.

Analysis

In the case at bar, the trial court incorrectly applied the *Youngblood* standard for bad faith. Tr, p.111, l. 14- p.113, l. 16 & p. 123, l. 10-15. The trial court did not note that awareness of the exculpatory nature of the identification evidence could suffice to show bad faith. Further, his ruling did not note that the prejudice analysis is replaced by proof consideration of whether the defendant had any other means of replacing the evidence.

Even though the detective testified pre-trial that no one was selected from the missing lineup, the male victim clearly testified during trial that he picked "one or two", or "a few", or "two or three" persons from the lineup containing suspects of African descent. Tr, p. 183, l. 22- p. 184, l. 6; p. 192, l. 12-14; p. 247, l. 25- p. 248, l. 9; & p. 253, l. 6-18. The State never provided the Appellant information about third party suspects being picked from the lineup before the male victim testified to that effect as the second witness in the trial. Tr, p. 101. l. 8- p. 102, l. 19.

In fact, the State never provided any indication that two separate lineups were presented[3]. Tr, p. 101, l. 8- p. 102, l. 9. While the State did print new copies of the lineup which contained the Appellant, the lineups did not show any markings identifying the third party suspects selected by the male victim. With the passage of time, the male victim and the detective were both clear that there was no way to determine whose picture was selected. Tr, p. 192, l. 7- p. 194, l. 7.

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[3]The female victim could not recall two different line-ups but believed it was only one lineup with a mix of subjects of both Caucasian and African lineage. Tr, p. 205, l. 14-18.

Bad Faith and Unretrievable, Lost Evidence

Evidence of bad faith and the unretrievable nature of the lost evidence was presented to the trial court. To begin, the detective made cunning use of the identification concern when interrogating the Appellant. His lie likely served as a catalyst in obtaining a confession, false or otherwise, but he only preserved the false statement about the identification while destroying all reference to the actual identification efforts and results.

Further, the detective and the executive branch failed to provide this material during the first time period in which this case was noticed for trial and appear to have provided only partial information before the second trial. This demonstrates a conscious effort to hide the information which was clearly learned by the second prosecutor as soon as she interviewed the victims. Tr, p. 90, l. 9- p. 92, l. 19 & p. 101, l. 8- p. 102, l. 19. Assuming the first prosecutor prepped the case when he noticed the trial the first time, he also learned of this exculpatory information but chose not to reveal it for strategic reasons.

The exculpatory value of the identification of third party suspects was apparent at the time of the presentation of the lineup to the victims. This fact satisfies the bad faith prong of the *Youngblood* analysis. The trial court erred when he ruled that no bad faith was demonstrated.

Because the identity of the third party suspects selected by the male victim was not memorialized, the Appellant had no other means of replacing this evidence. He could not point to a particular third party or obtain a jury instruction regarding third party guilt. Thus, the trial court erred in concluding that no prejudice was suffered from destruction

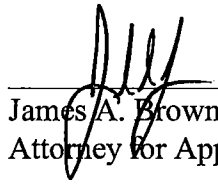
of the identification evidence.

Other negative results also ensued from the suppression and destruction of this information. The Appellant could not adequately investigate the involvement of the third parties, picked by the male victim, in the robbery. Tr, p. 98, l. 16- p. 99, l. 2. Also, the Appellant and his counsel could not adequately evaluate the strength or weakness of the case and weigh the evidence in a manner sufficient to make an intelligent and knowingly decision to reject a plea offer[4]. Tr, p. 99, l. 3-14 & p. 107, l. 8- p. 109, l. 7.

CONCLUSION

Thus, this Court should find the trial court's rulings erroneous and reverse the Appellant's convictions.

Respectfully submitted by:



July 31, 2015
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[4]In contrast to the 30 year, "no parole" sentence imposed after trial, the Appellant was previously offered a 10 year sentence to strong arm robbery as part of a plea deal. Tr, p. 357, l. 12-15.

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PROOF OF SERVICE

Counsel for Jujuan Habersham hereby certifies that he has prepared and served an Initial Brief of Appellant and Designation of Matter on this 3rd day of August, 2015, upon the State, by depositing a copy, postage pre-paid, in the United States Mail, addressed to Salley W. Elliot, South Carolina Office of the Attorney General, PO Box 11549, Columbia, South Carolina, 29211.

August 3, 2015

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