

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Florence County

D. Craig Brown, Circuit Court Judge

DERRICK PRESCOTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001343

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The state's drug conviction against petitioner was obtained in violation of Brady v. Maryland, 373 U.S. 83 (1963), because petitioner was not allowed to view the videotape of the recorded transaction that gave rise to the distribution of crack cocaine charge in the case.

STATEMENT

Petitioner Derrick Prescott pled guilty to possession of a stolen pistol, possession of marijuana with intent to distribute, and distribution of crack cocaine (second offense) during the January 2011 term of the Florence County General Sessions Court before Judge Thomas A. Russo. Petitioner was sentenced to imprisonment for a period of two concurrent ten-year terms on the drug convictions and a five-year prison term on the pistol conviction. App. 1 – 18. Grayson Smith represented petitioner at the guilty plea hearing and Assistant Solicitor Patricia S. Parr appeared on behalf of the state.

On July 24, 2011, petitioner filed a PCR application with the Sumter County Office of the Clerk of Court. App. 20 – 28. The respondent filed a return and motion to dismiss. App. 29 – 32. A PCR hearing was convened on April 14, 2015, at the Florence County Courthouse before Judge D. Craig Brown. Petitioner was present at the PCR hearing and represented by Croom Hunter, and Assistant Attorney General Jonathan Waller appeared on behalf of the state. App. 34 – 68.

On May 15, 2015, Judge Brown signed an Order of Dismissal in the case therein denying PCR relief to petitioner.

Petitioner appealed. This petition follows.

ARGUMENT

The state's drug conviction against petitioner was obtained in violation of Brady v. Maryland, 373 U.S. 83 (1963), because petitioner was not allowed to view the videotape of the recorded transaction that gave rise to the distribution of crack cocaine charge in the case.

Petitioner pled guilty to possession of a stolen pistol, possession of marijuana with intent to distribute, and distribution of crack cocaine during the plea proceeding held in the case. With respect to the crack cocaine indictment, the solicitor apprised the plea judge of the facts in support of that charge as follows:

[T]his incident occurred on September 25th 2009. On that particular day, the defendant distributed a quantity of cocaine base to a confidential informant at his residence. And prior to going in, the C.I. was checked. And this was video-audio surveillance. He was captured on surveillance...him selling the amount of crack, which was one rock for \$40. App. 14, lines 11-21.

During the PCR hearing, petitioner testified that he made a request to see the videotape of the crack cocaine distribution transaction that allegedly depicted him on the tape as making the alleged sale to an undercover informant, but was denied an opportunity to view the videotape. App. 43, lines 2 – 10. Petitioner explained via his PCR testimony as follows:

Q: [D]id... [trial counsel] discuss what evidence the State actually had for each element of each of the three offenses?

A: The first two we did. Then when we got to the distribution part, I asked him - - like I was stating earlier, I said, well, y'all claimed that I was supposed to have sold to an undercover or whatever, then I would like to see proof of said purchase or whatever. And that when he brought to my attention that they don't show the videotape to me - - to the defendant or whatever, to the accused, but they would show it to him.

Q: Okay. So does your - - you're under the impression there was a - - there was a video of the sale?

A: Of transaction. Correct.

Q: Okay. Did you - - you did not see the video?

A: No.

Q: Okay. Do you know if [trial counsel] saw the video?

A: He told me he did.

Q: Okay. Did you see any pictures from the - - that might have been taken from the video?

A: Never.

Q: Okay. Did you hear any audio that might have been from the video?

A: No, I did not.

Q: Okay.

A: And I requested it too. App. 44, l. 23 – p. 45, l. 25.

Trial counsel testified during the PCR hearing and explained that he filed Rule 5 and Brady motions and viewed the videotape, but that it was the “Florence County Solicitor’s Office... policy that they would not show the videos with C.I.s on them to the accused ... [because] the underlying principle was that they didn’t want the defendant to recognize [the identity of the] C.I.s” in drug cases. App. 55, lines 16 – p.56, line 10. Counsel stated that he recognized petitioner on the videotape and that it was in his best interest to plead guilty. App. 57, lines 25 – p. 58, line 5; App. 59, lines 12 – 22.

The PCR judge ruled that “petitioner knowingly, intelligently, and voluntarily entered his guilty plea(s)...and presented no credible evidence to the contrary. App. 77.

Under Brady, a prosecutor must disclose to the defense evidence that is favorable to the accused and material to guilt or punishment; and that such evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense, then the result of the proceeding would have been different. See State v. Proctor, 358 S.C. 417, 595 S.E.2d 476 (S.C. 2001), **which overruled** State v. Proctor, 347 S.C. 587, 556 S.E.2d 418 (Ct. App. 2004). In Proctor, the South Carolina Court of Appeals held that the DNA “proficiency” testing data constituted discoverable Brady information that could have been used to impeach the expert witness who testified on the subject; but the South Carolina Supreme Court reversed and held that in light of the context of the trial where the victim identified the defendant as the perpetrator and where the DNA evidence matched the defendant’s bloodwork, then the nondisclosure of the “proficiency” results did not constitute material evidence in the case. However, in the case at bar, the videotape was evidence that was material to the state and the defense in that the videotape of the sale/buy of crack cocaine formed the primary basis for that state’s drug charge.

In State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (1998), *aff’d*, 337 S.C. 617, 524 S.E.2d 837 (1999), the Court held the following:

The Brady disclosure rule is grounded in the defendant’s fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments; and it requires the prosecution to disclose evidence that is...favorable to the accused and material to guilt or punishment.... and [that] evidence is material...if there is a reasonable probability that had the evidence been disclosed to the defense, [then] the result of the proceeding would have been different.

Also, compare the Brady violation in Gibson v. State, 334 S.C. 515, 514 S.E. 2d 320 (198), where the Court reversed due to ineffective assistance of counsel in connection with a Brady violation. In Gibson, where the state’s case hinged mostly on the statements given by two

eyewitness, the defendant was not informed of information in reference to the prosecutor's knowledge about how one key eyewitness' statement could not have been accurate (said witness' claim that she viewed the defendant point a gun at the deceased from where she stood was impossible), and also that the same eyewitness changed her statement about what she saw regarding the shooting in the case. This undisclosed information provided the basis for the PCR Brady violation claim because even though the defendant in Gibson pled guilty to voluntary manslaughter, the PCR judge's grant of PCR relief was upheld on appeal on the ground that the new revelations regarding the eyewitness' statement in question and her changed statement constituted material and exculpatory (i.e. impeachment) evidence that might have given the defendant pause about pleading guilty and instead given him a reason to "stand trial" and present his theory to the jury that the gun fired accidentally during the incident. Thus, there was a reasonable probability that defendant Gibson would have "chosen to stand trial instead of pleading guilty" had he been privy to the Brady information in his case.

Additionally, the Gibson Court also addressed the novel issue of whether a Brady violation could have impacted a guilty plea and a subsequent PCR proceeding as follows:

A defendant who pleads guilty usually may not later raise independent claims of constitutional violations. See Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97, 98 (1975) (stating "[t]he general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea"). However, "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); accord Gustine v. State, 325 S.C. 123, 127-28, 480 S.E.2d 444, 446 (1997) ("waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

When a defendant lacks knowledge of material evidence in the prosecution's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary. *Sanchez*, 50 F.3d at 1453; accord *White v. United States*, 858 F.2d 416, 420-22 (8th Cir. 1998) (adopting same principle); *Miller v. Angliker*, 848 F.2d 1312, 1319-20 (2d Cir. 1998) (adopting same principle); *Royal v. Netherland*, 4 F. Supp. 2d 540, 556 (E.D.Va. 1998).

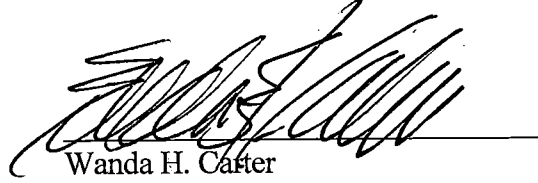
The government's obligation to make such disclosures [of *Brady* material] is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty. The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998). Accordingly, Gibson may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged *Brady* violation.

In the case at bar, the state's crack cocaine distribution case against petitioner hinged primarily on the state's videotape depicting the confidential informant purchasing drugs from one whom the state identified as petitioner. However, petitioner could not make an informed decision about pleading guilty because he was not allowed to view the videotape and assess the issue of the identity of the seller, which would have raised the question of whether he could explore the option of waging a mistaken identity defense at trial rather than electing to plead guilty by default to the crack cocaine distribution charge. Therefore, since the videotape in this case constituted Brady information that was material to the state's case and the case for the defense with respect to the issue of identity (or mistaken identity), then denying petitioner an opportunity to view of the videotape constituted a Brady violation; and but for the Brady violation, a reasonable probability exists that petitioner might have opted for a jury trial rather than entering a guilty plea on the distribution of crack cocaine charge.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition on the above-raised issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of January, 2016.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derrick S. Prescott #268843, at Palmer Pre-Release Center, 2012 Pisgah Road, Florence, SC 29501, this 6th day of January, 2016.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of January, 2016.


_____(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.