STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY

R. KNOX McHAHON, CIRCUIT JUDGE

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

V.

JUSTIN SIMMS,

APPELLANT,

CASE No.2013-002748

APPELLANT'S PRO SE BRIEF

JUSTIN SIMMS #358130
LEE CORRECTION INSTITUTION
990 WISACKY HIGHWAY/F4-B-2227
BISHOPVILLE, S.C. 29010

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STATEMENT OF CASE

On September 30th, 2010 a Florence County Grand Jury indicted Appellant for murder, attempted armed robbery and a weapon charge. On December 9th, 2013 Appellant was tried before the Honorable R. Knox McMahon and a Jury. Clemments represented State, Chevron Scott and Robert Stucks represented Appellant. The Jury found Appellant guilty and Judge McMahon sentenced Appellant to forty years for murder twenty years for attempted armed robbery and five years for weapon charge.

ARGUMENT

Whether trial court abused its discretion in allowing the State not to disclose material evidence under Brady and SCRCimp Rule 5?

The court incorrectly ruled that the state's failure to allow the defense to inspect the Ford Focus was not in violation of Brady v. Maryland, 373 U.S. 83(1963) SCRcrimp Rule 5. The state's compliance with Brady is a constitutional requirement. See State v. Kennerly, 331 S.C. 442(1991) the Brady 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.

Brady requires that the prosecution disclose evidence which is favorable to a defendant and material to guilt or punishment. See Pennsylvania v. Ritchie, 480 U.S. 39(1987) This rule applies to impeachment evidence as well as exculpatory evidence. See United States v. Bagley, 473 U.S. 667(1985) "Evidence is material under Brady only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, id, at 682,.

The materiality test is the same under Brady and under Rule 5 Kennerly, supra. A reasonable probability is a probability sufficient to undermine confidence in the outcome. i.d. at 682,. Once a defendant makes a threshold showing that the evidence sought is material within the meaning of Brady and Rule 5 the trial judge should conduct a hearing. See State v. Bryant, 307 S.C. 48(1992) Reversal of a conviction is required if the undisclosed evidence is material and the omission deprived the defendant of a fair trial. See State v. Jones, 325 S.C. 310(1995) SCRCrimp Rule 5(a)(1)(c) states:

"Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs tangible objects, buildings or places, or copies or portion thereof, which are within the possession , custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant."

Here, the defense counsel moved to not allow the introduction of photos of a Ford Focus that had been involved in the incident and was in possession of the state (Tr.Tr. pg. 56; lines 14-21) The car was examined by law enforcement and the state relied on forensic reports and pictures to prove that Appellant was the shooter. However, the car was released by law enforcement in February, 2010 back to the victim's family. The defense became aware of this fact when it contacted the state about examining the car. The defense made a Prima Facia showing that the withheld evidence was material. As defense counsel told the court. "The significance of the vehicle in summary is that it is the main item of evidentiary value in this particular case. That's the whole, that's the foundation of the entire case." (Tr.Tr. pg 59; lilnes 20-25; pg. 60; line 1) Additionally, he noted "Clearly to have an opportunity to physically examine the alleged vehicle in this particular incident, being able to have my people go out to examine it. That would be critical to our defense." (Tr.Tr. pg. 65; lines 22-25) At this point the trial court should have ordered the state to produce the undisclosed evidence for inspection Bryant, supra.

However, the court merely relied on the state's representation that nothing was exculpatory in the car and that the forensic evidence would prove their

case(Tr.Tr. pg. 57; lines 11-13) Even the state argued the evidence was material, telling the court "There's a couple of photographs that we think that certainly has great probative value where they ran a rod through two places where there was a shot from the front seat to the back seat(Tr.Tr. pg. 56; lines 24-25; pg. 57; lines 1-2) "We do not believe there's anything exculpatory there potentially and we didn't receive them until late yesterday and they had to be found(Tr.Tr. pg.57; lines 11-13) Further he stated, the importance of the pictures that were made in the day time of course where they would be instructive to the jury because they have the rods passing through the seat that demonstrates, it shows the path of the bullets and, and Mr. Bird and Mr. Lutcken put that in the report and will be testifying to that, your Honor(Tr.Tr. pg. 65; lines 2-7) The problem with non-disclosure of the evidence was that the defense never had a chance to do an independent examination of the actual car that the state introduced pictures of to convict Appellant. There were conflicting theories about whether state's witness Joshua Carraway was in the back or out of the car when the fatal shot was fired. A state witness Paul Bird testified that the back door had to be open when the shots were fired.(Tr.Tr. pg. 224; lines 5-18)

An examination of the car certainly could have led to impeachment evidence about the conflicting theories. The United States Supreme Court has ruled, for Brady purposes, in determining the materiality of non-disclosed evidence, an appellate court must consider the evidence in the context of the entire record, See United States, v. Agurs, 427 U.S. 97(1976) The Appellant's right to a fair trial was impaired because of the state's non-disclosure of material evidence. The court is to determine if the Appellant's right to a fair trial

has been impaired. See, State v. Osborne, 291 S.C. 265( )

The other evidence produce by the state was less than overwhelming against the Appellant. Only state's witness Joshua Carraway identified Appellant as the shooter. All other witnesses who were on the scene said Carraway came to the car and brandished a firearm for an attempt to rob victims. He had given at a minimum three different version of the events in statements to law enforcement. There was no weapon found and the state relied on the pictures and the forensics related to the car to convict Appellant. As the Solicitor said in his closing "...We've got undisputed facts to this forensic evidence that nobody can dispute." (Tr.Tr. pg. 515; lines 20-14)

Appellant was not given a fair trial because of the Brady violation and the conviction should be overturned.

ARGUMENT 2

Whether trial court should have granted Directed Verdict Motion?

The Due Process Clause of the Fourteenth Amendment permit the conviction of a criminal defendant only when the state proves every necessary fact "Beyond a Reasonable Doubt" in Re Windship, 397 U.S. 358(1970) At the end of trial, counsel moved for a directed verdict(Tr.Tr. pg. 475; lines 8-18; pg. 481; lines 1-7) which was denied and as such contend that the court was in error for doing so.

Accordingly, Appellant contends that the suppressed evidence violated his right to confrontation, when defense was not given opportunity to conduct cross-examination. See State v. Gathers, 369 S.E.2d 140(1988) The testimony at trial, reveals that some of the prosecution witnesses gave conflicting

theories about whether Joshua Carraway was in the car or out when he fired fatal shot. With the "trustworthiness approach" announced in Opper v. United states, 348 U.S. 83(1954); State v. Abraham, 759 S.P2d 440(2014) it is required that testimony be corroborated with forensic evidence in this case. Abraham id. Therefore, Appellant will address two factors under Opper to show how this suppressed evidence violated Brady and denied Applicant a fair trial.

1) CREDIBILITY

According to the evidence presented at trial, Mr. Joe, Mr. Simms and Mr. Carraway went to the Days Inn to sell drugs.(Tr.Tr. pg. 276; lines 17-20; pg.278; lines 2-13) However, it is not clear where defendant was when all of this was going on. Only Mr. Carraway identified Appellant as the shooter, but Mr. Carraway lied to the police numerous time on day of crime(Tr.Tr. pg. 418; lines 12-22) and Mr. Carraway also told police that he was with Jermaine, Curtis (Tr.Tr. pg. 420; lines 2-21) and at that time did not mention Appellant at all when questioned at hospital. Moreover, as noted that the only state's witness who places Appellant at crime scene must be scrutinized under the Opper. Id "Trustworthiness Approach" with other testimony. For instance, at trial Mr. Carraway testified:

Q: All right, what did he say about anybody getting shot?

A: Just like when he put the gun in the car and when Marcus shot he just pulled the trigger and it jammed on the first shot he ran. Tr.Tr. pg. 411; lines 21-25

However, Mr. Davis testified that:

Q: All right, can you tell us, tell the jury what happened?

A: Okay. When we pull up I call and he say he'd be right out so he sends somebody else. He sent somebody——

Q: How many people?

A: One I seen one person

Q: You saw one person?

A: Yes Sir. Tr.Tr. pg. 281; lines 13-20

Q: you just, and so its basically just one dude comes up and did he have a gun?

A: He he had a gun. Tr.Tr. pg. 304; lines 1-6

Without even referring to Mr. Graham's testimony, it is clear nothing corroborates the extra-judicial statement of Mr. Carraway. See State v. Person, 2012 W110829743. As such, Appellant contends Mr. Graham testimony corroborates the testimony of Mr. Davis where he said that:

Q: What were you focused on?

A: The gun in the front seat.

Q: All right, So somebody opened Marcus' door and yelled give it up?

A: Yes Sir. Tr.Tr. pg. 367; lines 13-17

The only testimony given by Mr. Carraway, is uncorroborated by testimony of two witnesses of the crime. Therefore, the "corroboration rule" requires that extra-judicial confession of co-defendant be corroborated by proof of the corpus delicti. See, State v. Osborne, 335 S.C. 172, 175(1999) This rule is satisfied if the trial testimony herein, provides sufficient independent evidence that corroborates the co-defendants extra-judicial statements. The word "Corpus Delicti" means "Body of Crime" Blacks Law Dictionary 9th Ed.

2009. Despite Mr. Carraway testimony that him and Mr. Simms was at car and Mr. Simms brandished a firearm. There are two critical pieces of testimony, which would allow a court to conclude Mr. Carraway evidence is untrustworthy. First, at trial Mr. Davis testified that:

Q: Okay what did he do on the other side?

A: He opened the door.

Q: All right and then what did he do?

A: Pulled the gun out. Tr.Tr. pg. 282; lines 1-4

Moreover, Mr. Carraway admitted that he was the only one who approached vehicle(Tr.Tr. pg. 396; lines 11-12) and was sitting behind Mr. Weaver. Also Mr. Davis testified that:

Q: All right, and--and he hit you?

A: Correct.

Q: All right, what was being said?

A: He just "Give it up." Tr.Tr. pg. 282; lines 12-15

Based on Mr. Graham, Mr. Davis testimony, it is reasonable to assume these two witnesses are referring to Mr. Carraway who admitted being only person approaching this vehicle(Tr.Tr. pg.430; lines 3-13) and corroborated by Mr. Graham, Mr. Davis direct and cross-examination testimony. Accordingly, no one else approached this car and if no one else came to this vehicle, in light of this evidentiary fact, the state has failed under Opper, Id. Abraham, Id., that together with such statements permits a reasonable belief Appellant aided or assisted Mr. Carraway in this crime. Nor can it be reasonably concluded on the basis of Mr. Joe's testimony, me and Mr. Carraway left vehicle together without more is not adequate proof of participation(Tr.Tr. pg. 353; lines

3-25; pg. 357; lines 17-25) See, State v. Hill, 234 S.E.2d 219(1977) Osborne, Id. at 180 N.9

In Hill, the appellant previously discussed the robbery with perpetrators, appeared at crime scene and may have viewed the commission of the robbery, but he was possibly unaware of the final planning and did not accompany the perpetrators as they committed the robbery. Hill Id at 221., Herein, there is no proof Appellant and Mr. Carraway discussed the robbery or knew anything about it.(Tr.Tr. pg.342; lines 3-11; pg. 353; lines 3-13) Despite coming to the crime and was probably standing around watching it, still there is not proof defendant engaged in any actions or discussed anything relating to what anyone was going to do. Person, Id. Osborne, Id. State v. Thompson, 64 7 S.E.2d 702(2007) since Appellant co-defendant was discredited, then the only testimony that can reasonably be deemed credible is Mr. Joe, Mr. Graham and Mr. Davis. As a direct consequence Mr. Joe told court that Appellant knew nothing about this crime(Tr.Tr. pg. 357; lines 22-25; pg. 342; lines 9-13)

This testimony negates a critical element, and with the corpus delicti "corroboration rule" neglected it is clear trial court committed error by denying both Brady and directed verdict motions Thompson, Id at 704. Simpson v. Moore, 627 S.E.2d 701(2006)

2) MATERIALITY/PREJUDICE

Suppression by prosecution of evidence favorable to the accused upon request violates Due Process where evidence is material either to guilt or to punishment irrespective of good faith or bad faith of prosecution. See State

v. Scott, 2006 Wl 7286628

The defense as noted moved to exclude these photos under Brady, and Under Brady the Appellant must meet three criterias in order to prevail is as follows:

1] That the evidence is favorable either because it is exculparoty or impeaching.

2] That the Government suppressed the evidence.

3] That evidence was material to defense, See, Stricklev. Greene, 527 U.S. 26 3(1999) United States v. Higgs, 663 F.3d 726(4th Cir.2011)

As counsel informed court that:

"Your honor, as it relates to the pictures that were just received on yesterday, I was there with the Solicitor when he got them. We'd already pulled the jury. I've already got my case prepared for trial and then these additional materials come up and I think in the spirit of Brady, your honor, I just don't believe that they should be admissible." Tr.Tr. pg. 66; lines 2-8

Thus, Appellant has satisfied the first two prong under both Strickler, Higgs, so the remaining question is how vehicle is material to the defense. We begin with pathologist, who testified that:

Q: Now can you please tell the jury where exactly he had gun shot wounds?

A: He actually had two gunshot wounds. The fatal gunshot wound was to his back, his right upper back just a little bit to the right of his midline. It wen into his back, went through the aorta, which is the main vessel bringing blood from the heart to the rest of body through aorta, also hit the airway and the left lung before it exited the front chest. Tr.Tr. pg. 193; lines 22-25; pg. 1 94; lines 1-6

Now Investigator McFadden testified that:

Q: Okay and what did you with regards to debriefing or discussing with the forensic officers what they had found and comparing physical evidence to what you had gotten in statements?

A: I asked him what they had because I'd explained to them from everybody's statement that it seemed like everybody saw everything they seen, everybody saw a different angle. So I had to ask them to explain it in what they found from then car because in fact paul Byrd was processing the car, him and Chief Lutcken and they explained to me that there was a shot from front to back from the passenger seat.

I asked him was there any shots from back to front and they said no, there wasn't a shot from back to front. So Shane Graham, his theory was that the person that shot was at the front door. Tr.Tr. pg. 458; lines 13-24

One would believe Mr. Graham testimony or theory, that the shooter was at Mr. Weaver's door waiving a gun(Tr.Tr. pg. 367; lines 13-17) or Mr. Carraway that Appellant was at Mr. Weaver's door with a gun and fired into car.(Tr.Tr. pg. 412; lines 1-9; pg. 431; lines 1-9) But all of this testimony is not corroborated by forensic evidence, as it is required before case is submitted to the jury. The proper standard of materiality must reflect our overriding concern with justice than with a finding of guilt. See Chavis v. North carolina, 637 F.2d 213(4th Cir.1980) Such finding is not permissible in case at bar, since it is not supported by evidence establishing guilt beyond a reasonable doubt, it is necessarily follows the omitted evidence creates a reasonable doubt that did not otherwise exist. Chavis, Id. When the pathologist testimony is supported my Mr. Adams(Tr.Tr. pg. 179; lines 13-17)

constitutional errors has been committed which means the omission must be evaluated in the context of entire record if there is nor reasonable doubt about guilt.

"The materiality standard for Brady claims is met when the favorable evidence could be reasonably be taken to put the whole case in such a different light to undermine confidence in the verdict" Banks v. Dretke, 540 U.S. 668(2004) Porter v. State, 629 S.E.2d 353(2006) The evidence from crime scene investigators, indicates as Investigator McFadden testified that;

"I asked him was there any shots from the back to front and he said no, there wasn't a shot from back to front. So Shane Graham, his theory was that the person that shot was at the front door. Squan theory was the person had to be in the back seat." Tr.Tr. pg.458; lines 21-25

Q: Do you recall if it was front to back or back to front what do you recall?

A: It was from front to back. Tr.Tr. pg. 242; lines 20-22

Q: Okay when you saw the bullet holes, what direction were they moving from? Back to front? Front to back? Top to the bottom?

A: Well, it appeared that they originated from the front passenger seat area.

Q: Okay, how many bullet holes did you see moving from front to back?

A: Three. Tr.Tr. pg. 212; lines 18=22; pg. 213; lines 1-3

When these crime scene investigators testified on direct examination, these bullets holes originated from front to the back(Tr.Tr. pg. 213; lines 7-12) clearly questions validity of all forensic evidence, as well as testimony of Mr. Carraway. As Mr. Weaver was shot in the back(Tr.Tr. pg. 59; lines 5-8) But also told the court that:

And it went from front to back, through the seat into the back seat and the

second one went from front to back at an angle through the seat, hit the rocker panel of the back passenger side door, which was open and--and exited the car. And then third shot went into the--into the seat from the front and was lodged in there and they retrieved it from the seat. Tr.Tr. pg. 64; lines 12-8

Either the court could conclude that pathologist, Investigator McFadden and Mr. Moore testimony contradicts testimony of Lieutenant Lutcken and Officer Byrd or their testimony contradicts or refutes pathologist, Investigator McFadden testimony.

For this evidence to satisfy Opper analysis, the forensic evidence must be corroborated with other evidence. So when as herein, the forensic evidence does not satisfy Opper "Trustworthiness Approach," then it is reasonable to conclude the suppressed evidence denied Appellant a fair trial. See, Porter v. State, 629 S.E.2d 353(2006) The impeachment value of this vehicle is clear, either Mr. Carraway is outside vehicle firing fun or inside car and refutes testimony of both Mr. Byrd and Lieutenant Lutcken. Who both said shots originated outside of car(Tr.Tr. pg. 213; lines 1-3) Either Mr. Carraway was outside or inside. Thus, Officer Byrd and Lieutenant Lutcken could not have been telling the truth. But the same can be said, as noted about Officer Moore,. Investigator McFadden and pathologist.

When determining whether suppression of vehicle is material under Brady, we consider the collective impact of the undisclosed evidence. See Kyles, Whitley, 514 U.S. 419(1985) Because Brady is founded upon a sense of fairness and justice, the focus in a Brady analysis is not on the misconduct of solicitor, but on the fairness of Appellant trial. As the court said in Gibson v. State, 334 S.C. 515(1999) that:

"If suppression of evidence results in constitutional error, it is because of the character of the evidence not the character of the Prosecutor." Gibson, Id. at 528

The questionable character of evidence, is on conflicting theories. However, defense never had an opportunity to examine evidence. Out State Supreme Court, has adopted the duty to preserve analysis of Arizona V. Youngblood, 488 U.S. 51(1988) in its jurisprudence Moses v. State, 390 S.C. 502(2010) While recognizing that the state does not have an absolute duty to preserve potentially useful evidence, our Supreme Court has held Appellant must either demonstrate either the state destroyed evidence in bad faith. Which the Appellant can not on basis of record prove. But state did destroy evidence that possessed exculparoty value that is apparent before the evidence was destroyed, then it is clear neither Mr. Carraway testimony or prosecution's theory can be supported by forensic evidence which creates a doubt about his credibility or prosecution's theory of case. (Tr.Tr. pg. 515; lines 22-24)

Wherefore, Appellant asks court to vacate conviction

Respectfully Submitted:

s/_____

Justin Simms/Pro Se

Date:_____day of_____, 20____,

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