STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Tanya A. Gee, Circuit Court Judge
Barbara Jo Wofford-Kanwat, Magistrate Court Judge

Appellate Case No. 2015-002576

THE STATE, ...RESPONDENT,

v.

GERALD J. NAGY, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3922

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

1701 Main Street
Third Floor
Charleston, SC 29201
(803) 576-1802

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The magistrate court and circuit court properly found the State complied with the requirements of Brady, Rule 5, SCRCrimP, and all other applicable rules and guidelines.

STATEMENT OF THE CASE

On November 15, 2014, Appellant was issued Uniform Traffic Ticket G-14408 for speeding. On June 4, 2015, Appellant proceeded to a bench trial before the Honorable Judge Barbara Wofford-Kanwat. Appellant represented himself; South Carolina State Trooper Jonathan Oxandaboure represented the State. The magistrate judge found Appellant guilty as indicted and ordered him to pay $81.50. Appellant appealed the conviction to the circuit court, and a hearing was held on November 6, 2015, before the Honorable Tanya A. Gee.[1] Appellant again represented himself; Assistant Solicitor Joseph Berry represented the State. The circuit court judge affirmed the conviction.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

[1] The first page of the transcript of the circuit court hearing erroneously lists the Honorable Casey L. Manning as the presiding judge.

STATEMENT OF FACTS

On November 15, 2014 at 10:20 a.m., Trooper Oxandaboure observed Appellant's vehicle driving noticeably faster than his own. He noticed that his speedometer indicated his vehicle was traveling approximately 55 mph, so he began adjusting his speed to try and match Appellant's pace. He was not able to match Appellant's speed until he accelerated to 80 mph. At that point, he reduced his speed so that he could use his radar gun on Appellant's vehicle. Trooper Oxandaboure obtained a reading on his radar gun, and then initiated the traffic stop and issued Appellant a speeding citation. (Tr.Vol.I.pp.14, 16–17).[2]

Pretrial Hearing

On June 4, 2015, Appellant's case proceeded to trial. Immediately prior to trial, a hearing was held on Appellant's motion to dismiss the case for the State's purported non-compliance with his discovery requests. Appellant claimed Trooper Oxandaboure failed to provide responses to several of his discovery requests, specifically noting the State failed to provide: (1) a witness list;[3] (2) information regarding his Speed Measurement Device (SMD) certification; and (3) information regarding the radar gun used. Based on the alleged deficiencies, Appellant requested the magistrate judge dismiss the case or, in the alternative, prohibit Trooper Oxandaboure from introducing evidence not specifically listed in discovery responses, including Trooper Oxandaboure's testimony. (Tr.Vol.I.pp.1–3).

Trooper Oxandaboure informed the magistrate judge that he provided Appellant with the video of the traffic stop, his SMD certification, and a copy of the traffic citation. He claimed he did not provide Appellant with a formal witness list because he was the only witness testifying,

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[2] Throughout this brief, the State will refer to the trial transcript as "Tr.Vol.I" and the circuit court transcript as "Tr.Vol.II."

[3] At the hearing, Appellant claimed he did not receive a list of the witnesses, their dates of employment, and any special training they may have received. (Tr.Vol.I.p.3).

and that Appellant possessed all his contact information. He noted his agency uses radar guns on the guns to ensure that their vehicles have calibrated speedometers, but did not have any specific documentation regarding the accuracy of the speedometer of his vehicle. (Tr.Vol.I.pp.3–5, 8–9).

The magistrate judge informed Appellant that Rule 5 did not require the State to provide Appellant with responses and materials for every discovery request Appellant made, and found Trooper Oxandaboure provided Appellant with the required Rule 5 disclosures as he had given Appellant all relevant materials in his possession. Accordingly, he found dismissal of the case was inappropriate. He agreed with Appellant that Trooper Oxandaboure would be prohibited from presenting evidence outside the scope of the provided discovery. However, the magistrate judge found Trooper Oxandaboure was permitted to testify as he was the officer who wrote the ticket and his contact information was provided to Appellant. (Tr.Vol.I.pp.6–7, 11–12).

Magistrate Court Trial

Trooper Oxandaboure testified to the events of the traffic stop, including the uses of his speedometer and radar gun to confirm Appellant was driving approximately 20 mph over the speed limit. (Tr.Vol.I.pp.14, 16–17).

Appellant objected to the testimony regarding the speedometer reading and radar gun, stating he did not receive information regarding the radar, make, model, serial number, and certification service records in the discovery[4] and any information pertaining to these items should be suppressed. Trooper Oxandaboure claimed he told Appellant the make of the radar, and that the manual pertaining to the radar was not in his agency's possession as it was kept by the South Carolina Criminal Justice Academy. Again, the magistrate judge found Trooper Oxandaboure provided Appellant with all documents and material required under Rule 5 and

[4] Appellant's discovery motion requested various information regarding the radar gun, including: (1) the identity of the manufacturer; (2) model; (3) serial number; (4) service record; (5) owner's manual; (6) operator's manual; (7) certification of accuracy; and (8) information tracing its chain of custody. (Mot. for Disc. of Evid. 3).

denied Appellant's motion to suppress the testimony regarding the speedometer and radar gun. (Tr.Vol.I.pp.14–16).

Trooper Oxandaboure resumed his testimony, and the magistrate judge asked him about the training he received in identifying speeding vehicles. Appellant objected to the magistrate judge asking the question, arguing such information should not be in evidence as Trooper Oxandaboure failed to provide discovery responses concerning the training he received in the academy, certifications, and continuing education requirements related to his skills. However, Appellant conceded that the information could come up if Trooper Oxandaboure testified about his training, at which time he would cross examine him on the subject. The magistrate judge overruled the objection, noting the magistrate court rules allow for judges to ask relevant questions in pro se cases. Trooper Oxandaboure clarified that his SMD certification was proof of his training and skill in this area. (Tr.Vol.I.pp.16–17).

At the conclusion of Trooper Oxandaboure's testimony, Appellant declined to cross-examine him, testify, or otherwise present his own evidence of the case. Accordingly, the magistrate judge found Appellant guilty of speeding and ordered him to pay the $81.50 fine. (Tr.Vol.I.pp.18–19).

Appeal to the Circuit Court

Appellant appealed to the circuit court, and a hearing in his case was held on November 6, 2015. Appellant argued there were "many issues and errors" in the trial but focused on: (1) the magistrate judge allowing the trooper to testify as a witness, despite the State's failure to list him as a witness during discovery; (2) the State's failure to respond to the majority of his discovery requests; (3) the magistrate judge allowing Trooper Oxandaboure to testify that he "clocked" Appellant using his car, despite the State's failure to provide Appellant with discovery pertaining to the radar gun and speedometer in Trooper Oxandaboure's vehicle; (4) the magistrate judge directly questioning Trooper Oxandaboure

during the trial, which Appellant contends violated the rules of the court and aided the State in building its case; (5) the magistrate judge basing his decisions to deny Appellant's motions "on Rule 5 to the exclusion of everything else," including case law mandating that Trooper Oxandaboure to answer his discovery requests; and (6) the magistrate judge "cut [him] off" without allowing him to provide justification for his motions. Appellant's prime contention was that Trooper Oxandaboure did not have to provide information relating to all of his discovery requests, but that he had to make an affirmative declaration saying he did not want to provide responses to the discovery or that he did not possess the items, but the magistrate judge "continually overruled [him]" and prevented the trooper from making such a statement. (Tr.Vol.II.p.4, line 5–p.14, line 4).

However, Appellant repeatedly stated he was not "arguing the capability of the radar unit." He admitted that if the trooper had used the radar gun correctly it would have been accurate. (Tr.Vol.II.p.8, line 14–p.9, line 3; Tr.Vol.II.p.10, line 18–p.11, line 2; Tr.Vol.II.p.16, lines 4–19).

The State countered by arguing the evidence Appellant sought was not material and there was no reasonable probability that the information Appellant sought in discovery would have been material to the ultimate disposition of his case. (Tr.Vol.II.p.14, line 7–p.15, line 14).

Ultimately, the circuit court judge found Appellant failed to provide evidence that the magistrate judge committed any errors of law. Accordingly, the circuit court judge dismissed the appeal and affirmed the order of the magistrate judge. (Tr.Vol.II.p.21, lines 13–22).

ARGUMENT

The magistrate court and circuit court properly found the State complied with the requirements of Brady, Rule 5, SCRCrimP, and all other applicable rules and guidelines.

Appellant argues the circuit court judge erred in affirming the ruling of the magistrate judge, claiming the magistrate ignored United States Supreme Court precedent, statutes, the magistrate's court rules, and the rules of discovery. Appellant contends that due to these errors, he was unable to defend himself against his traffic citation. The State disagrees with Appellant's allegations of error. Trooper Oxandaboure provided Appellant with all of the discovery materials in his possession, and the magistrate judge acted properly and within his discretion throughout the pre-trial hearing and trial.

"In criminal appeals from magistrate . . . court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception." State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); S.C. Code Ann. § 18-3-70 (2014) ("The appeal [from the magistrate court in a criminal case] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law."). In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

Generally, a trial judge may interrogate witnesses only "[w]hen required by the interests of justice." Rule 614, SCRE. However, in magistrate's court, "[t]trials should be conducted in an informal manner" in which the South Carolina Rules of Evidence apply, but are "relaxed in the interest of justice." Rule 13, SCRMC. Notably, the South Carolina Supreme Court has upheld the practice of law enforcement officers acting as both prosecutor and witness in misdemeanor traffic offenses in magistrate's court, and that such behavior does not constitute the unauthorized practice of law. State v. Rainwater, 376 S.C. 256, 258, 657 S.E.2d 449, 450 (2008).

Under Rule 5(a)(1)(C), SCRCrimP:

> 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 portions 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.

Under Rule 5, SCRCrimP, the trial court has discretion to determine what remedy, if any, is necessary to protect a defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996). The remedy, or determination that no remedy is required, will not be reversed absent an abuse of discretion. See Newell, 303 S.C. at 476, 401 S.E.2d at 423 (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 261 at 16 (2d ed. 1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion)).

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held "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." Brady, 373 U.S. at 87. The Brady disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence. United States v. Bagley, 473 U.S. 667 (1985); Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Hyman at 45-46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97 (1976); Hyman at 46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2ds at 356. Thus, "A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004); see also Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

"In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record." State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). "[E]vidence is material 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). This Court in Kennerly further explained: "In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220; see also, State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010) ("Evidence is not considered 'material' if the defense discovers the information in time to adequately use it at trial."). Further, "[t]he lack of demand . . . [of a continuance] is often taken as strong evidence that the discovery violation has not been prejudicial." 5 Wayne R. LaFave, et. al, Criminal Procedure § 20.6(b) (3d. ed. 2010); see also, Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant's mistrial motion and holding the defendant was not prejudiced by the prosecution's failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (the trial court's failure to suppress evidence of a defendant's oral statements because the prosecution did not disclose the statements pursuant to Rule 5, SCRCrimP, despite a timely request for them, was upheld where the defendant was permitted to view and copy the prosecution's file and did not request a continuance or recess to review the prosecution's file).

Rule 5, SCRCrimP and Brady

Appellant argues the magistrate erred in allowing Trooper Oxandaboure to testify regarding his use of the speedometer in his vehicle and his radar gun because the trooper failed to provide materials relating to these items in his discovery responses. However, Rule 5 and

Brady only require the prosecution provide the defendant with discovery and evidence in the possession of the prosecution. Here, Trooper Oxandaboure provided Appellant with the video recording, the citation, and a copy of his SMD certification. These were the only items in Trooper Oxandaboure's possession, and the only ones he mentioned at trial. Nothing in the record indicates Trooper Oxandaboure had any additional documents or items pertaining to the actual use of the speedometer or radar gun. As stated by the record, the user manual for the radar gun was actually in the possession of the Criminal Justice Academy, not his agency. Moreover, the record also indicates Appellant was informed Trooper Oxandaboure would be a witness at trial, as his name was listed on the traffic citation and Appellant frequently spoke with him prior to the trial.

Furthermore, there is no indication in the record that the "missing" evidence was exculpatory or otherwise material to Appellant's conviction. Appellant requested written records concerning the speedometer and radar gun on the off-chance of discovering some issue with the accuracy of the devices themselves or their use by the officer. However, Appellant admitted to the circuit court judge that he did not doubt the accuracy of the radar gun, only whether Trooper Oxandaboure used it properly when clocking his speed. Trooper Oxandaboure provided Appellant and the magistrate judge with a copy of his SMD certification, showing he was properly trained in the use of such devices. Such evidence was more than adequate in establishing that Trooper Oxandaboure used the devices correctly. See State v. Brown, 344 S.C. 302, 308–09, 543 S.E.2d 568, 571 (Ct. App. 2001) (finding testimony regarding CJA training and testimony regarding proper use of radar gun established reliability of radar gun in determining defendant was speeding), overruled on other grounds by State v. Oxner, 391 S.C. 132, 705 S.E.2d 51 (2011). If Appellant sought to challenge the reliability of the radar gun, he

should have cross-examined Trooper Oxandaboure or called his own expert witness to testify at trial. See id.

Magistrate Court Rules

Furthermore, the magistrate judge's actions did not violate South Carolina law. The Magistrate Court Rules are clear, trials should be conducted informally and the South Carolina Rules of Evidence should be "relaxed in the interest of justice." Rule 13, SCRMC. Trooper Oxandaboure provided Appellant with the only discoverable items in his possession, including the traffic citation which listed him as the officer issuing the ticket. Although the trooper did not provide formal responses to Appellant's request, he provided him more than enough information to prepare for trial.

Additionally, the magistrate judge's questions did not, in any way, unjustly impact the trial. During the trial, the magistrate judge independently asked Trooper Oxandaboure two questions: (1) his training for investigating speeding violations, and (2) what documentation he had supporting that training. These questions related to the SMD certification, which were given to Appellant during the discovery process.

Moreover, the magistrate judge was asking these questions as a benefit to Appellant because one of Appellant's central issues before and during trial was the trooper's abilities to accurately use his equipment to determine speeding. However, Appellant's objections focused on perceived discovery violations, and not on the substance of the qualifications. Appellant also failed to ask any questions regarding the trooper's qualifications during cross-examination. Thus the magistrate judge's questioning put the substance of the qualifications on the record and aided in Appellant's defense. Accordingly, the magistrate judge's questions were merited by the "interests of justice." See Rule 614, SCRE; Rule 13, SCRMC.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: _____
William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

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THE STATE, ...RESPONDENT,

v.

GERALD J. NAGY, ...APPELLANT.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Gerald J. Nagy
Mail Stop 149
911 Old Barnwell Road
West Columbia, South Carolina 29170

I further certify that all parties required by Rule to be served have been served.
This 9th day of November, 2016.

Keely Carter
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-7239

ALAN WILSON
ATTORNEY GENERAL

November 9, 2016

Gerald J. Nagy
Mail Stop 149
911 Old Barnwell Road
West Columbia, South Carolina 29170

RE: State v. Gerald J. Nagy
Appellate Case No. 2015-002576

Dear Mr. Nagy:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services