

STATE OF SOUTH CAROLINA
IN THE SUPREME

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DEC 28 2016

Appeal from Charleston County

SC Court of Appeals

Honorable J.C Buddy Nicholson, Circuit Court Judge

SAMUEL BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO 2016-001477

ANDERS BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

Samuel Brown 254907
Appellant

MacDougal Institute
1516 Old Gilliard Rd.
Ridgeville S.C 29472

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S.C. SUPREME COURT

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Cases

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US v. Mitchell 915 F2d 521

State v. Williams 485 SE2d 812

Simmons v. State 788 SE2d 220

State v. Owens 552 SE2d 745

Riddle v. Ozmit 631 SE2d 70

Law

SCRIP -RULE 104

SCRIP- Rule Crime Proc. 5 (a) (1) (c)

SCRP- Rule 613

US Constitution Amendment 4

14th Amendment US Constitution

State v. Peay 321 SC 435, 468 se2d 509

Statement of Issues

Did state not allow defendant due process rights, under the Constitution 4th Amendment, by not disclosing exculpatory evidence, confidential informant package, in due diligence of time?

Did the judge err by denying motion for direct verdict where evidence of the elements of trafficking, 44-53-375, was insufficient?

Did judge err by over ruling counsel's objection of prosecution closing arguments due to facts not being in evidence?

STATEMENT OF THE CASE

In November 2012, the Charleston County Grand Jury indicted Samuel Brown, Jr., on the charge of trafficking cocaine more than ten grams but less than twenty-eight grams. App. 364-App. 365. On September 10-12, 2013, Brown proceeded to trial before the Honorable J.C. Nicholson, Jr. and a jury. Brown was represented by James W. Smiley and Laree Hensley. The state was represented by Randell Stoney and Stephanie Linder. App. 1.

The jury returned a verdict of guilty as indicted. The trial judge sentenced Brown to ten years imprisonment. App. 354; App. 366. Brown's trial attorney filed an untimely appeal which was dismissed. App. 308, ll. 3 – App. 309, ll. 4. On September 5, 2014, Brown filed an application for post-conviction relief (PCR). The state filed a return on November 6, 2015. An evidentiary hearing was held on April 18, 2016 before the Honorable Doyet A. Early. App. 353-App. 354. Brown was represented by William H. Nixon, and the state was represented by J. Rutledge Johnson. App. 276.

On June 21, 2016, Judge Early issued an order granting Brown a belated review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The PCR judge denied the PCR application otherwise and dismissed it with prejudice. App. 361-App. 362.

This brief is submitted pursuant to White v. State, id. accompanied by a petition for a writ of certiorari.

Argument

A portion of the confidential informant packet was given to counsel right before the jury selection. App 5- App 8 Informant name or identity was not known. Defendant was approached by informant the night before the incident as testified. App 111, 11.5-6 App 122, 11.4-9 App 129, 11.19-23. Counsel could not properly investigate confidential informant file in due diligence of time not allowing due process of defendant and committing a Brady violation. Rule 104 Questions due process of law The burden is upon the defendant to show facts and circumstances entitling to disclosure of a confidential informant. The Supreme Court held respectable of good or bad faith, suppression by prosecution of evidence favorable to defendant who has requested it violates due process where evidence is material or punishment. Brady imposes an affirmative duty on the prosecution to produce at the appropriate time evidence that is materially. to establish Brady violation undermines conviction, convicted defendant must show (1) evidence at issue favorable to accused, either because it is exculpatory, or because it is impeaching (2) state suppressed evidence either wil. fully or inadvertently (3) prejudice ensued Brady v. Maryland. Gibson v. State case falls into three distinct categories of Brady violations identified by Supreme Court in US v. Augurs. Gibson pretrial motion requested information of whatever form.....which tends to exculpate the defendant either through potential impeachment of any state witness any evidence which tend to exculpate the defendant either, or impeachment the credibility of any potential state witness. In specific request and general or no request situations favorable evidence is material, and constitutional error results from its suppression by the government if there is a reasonable

probability that had the evidence been disclosed to the defense, the result proceeding would be different. A reasonable probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of trial. The court must consider, respectfully, the suppressed evidence collectively not on an item basis. The informant was a participant in the transaction and his testimony was the only direct evidence. App 127, ll. 7-13 App 128 ll. 21-23 Where informant is a witness to a crime or directly participates in it, disclosure of his identity is a witness to a crime or directly participates in it, disclosure of his identity may be required, particularly where in a drug related crime, he is the only witness to a transaction. State v. Blyther Confidential informant testimonies were the only evidence that could show all the elements of trafficking. The state is ordinarily privilege from disclosing the name of confidential informant; however, the state may be compelled to reveal informant's identity, where the informant is either an active participant in a criminal transaction or material witness to question of the defendant guilt. In case involving a confidential informant a criminal defendant interest in access to certain evidence must be weighed against state states interest in protecting the identity and safety of the informant. Rule Crime Proc 5 (a) (1) (c) Documents and tangible objects, upon request of the defendant the prosecution shall furnish to defendant any material to preparation as evidence in chief at trial. Jim Smiley, counsel of defendant, admitted in PCR hearing he could not properly cross examine the informant. App 14, ll. 13- App 295 ll. 12, if defense did not know the informant, investigate or pre-interview they could not assert the informant planted the drugs. State v. Jenkins Pretrial interviews was necessary to obtain all the facts of intent,

impeachment, interest, identity, and exculpatory evidence. State v. Williams The informant engineered the buy bust from start to finish. Due process prevents convicted of even predisposed defendant. US v. Mitchell App 151, ll. 1-3 Informants were relinquished of charges of moral turpitude and also had convictions of moral turpitude during the time of the occurrence. App 122, ll. 21-25 App 334-337 There are three ways to impeach the credibility of a witness by collateral evidence (1) show that he was convicted of a crime of moral turpitude, not remote in time (2) has been guilty of conduct of that was subject to conviction (3) testimony bearing general reputation. The informant credibility should have been tested and/or the jury should be given proper informant instructions. Defendant needed all the exculpatory evidence to make an intelligent and reasonable choice to plea before the offer was taken off the table by state. Gibson v. State

Counsel made a motion for direct verdict because state was not able to establish the elements of trafficking in specific to show an actual exchange took place. Motion was denied. App 221, ll. 7-13 Motion for direct verdict should have been granted when jury would be speculating guilt. App 221, ll. 7-13 State v. Ballenger The state was not able to show all the elements of trafficking 44-53-375. Judge stated that defendant may be charged with lesser offence in his jury instructions. App 249, ll. 18 -24 Actual possessions occurs when drugs are found to be in the actual physical custody of the person charged with possession has dominion and control either over the drugs or premises upon which drugs are found. State v. Ellis The drugs and buy money was found in CI vehicle. App 137, ll. 7-16 No strip search was conducted the police testified. App 147, ll. 15-16 Only thing found on the defendant was a cell phone. App 152, ll. 13-17 The

defendant was never in the informant vehicle. Lab report stated there were no finger prints taken and no video of a transaction. App 95, ll. 17-18 App 165, ll. 15-23 The police stated they never saw a transaction. App 173, ll. 5-7 The only direct evidence in this case is testimony from an unreliable informant who state defendant threw the money back in the vehicle and handed him drugs. App 117, ll. 19- App 118, ll.2 The testimony of witness, whose testimony is unsupported by any forensic evidence, does not make this an overwhelming evidence situation. State v. Williams The police testify they saw a throwing motion but in the original police report they stated the CI said I threw something back in the vehicle. App 137 ll.6 Police could not identify if an object was thrown. US v. Blue 957 F2d 106 The search of the informant vehicle was contradicting. The witness testimony positively contradicted the facts can not be credited by court of jury. SCRJ Rule 613 There was not enough sufficient evidence to state informant did not bring the drugs. State v. Jenkins The CI stated he needed to set some one up to stay out of jail so he can see his baby born. App 151, ll. 1-3 App 131, ll. 19-23 State v. Diamond

Government failed to present sufficient evidence from which rational jury could reasonably find that a sale was negotiated as testified. The recording of the CI communicating with the police, then stating, as the defendant walked up is this "the good stuff". App.114, ll.21-4 App.115, ll.3 States witness stated to the jury that he heard a buy, from his experience, he knows how a buy sound. App 151, ll. 10-19 Defendant voice was not on the audio. The other audio, Exhibit 1, was never played in court. There was testimony by states witness that a buy agreement was on the audio. App 145 ll. 25 -App 146, ll.4 App.156, ll. 12-13 Counsel argued in his closing arguments, knowing what was

on the tape, there was no such agreement on the audio or proof of any sale on the audio. App 233, li. 2-10 App 238, ll. 6-9 State v. Hernandez The judge should have acquired the state to present the full context of the audio tape. State v. Peay It is established that a conviction obtained through use of false evidence known to be such by representatives of the state must fall under 14th amendment. The results obtain when state although no soliciting false evidence, allows it go uncorrected when it appears. Simmons v. State Defendant convicted of drug transaction was supported by informant testimony that he purchases drugs from them, as corroborated by tape recording. District court had wide latitude in determining proponent of the recording has adequately laid foundation from which jury could reasonably evaluate accuracy and credibility of contents. US v Wilson 115 f3d 185

Prosecutor's closing arguments was objected to by counsel due to the facts not being presented in evidence. The judge over ruled the counsel's objections. Prosecutor's argument inferred the police talked to his handler, talked about the target, how much money it will cost and stated that the defendant said he could get some marijuana which was all stated to be recorded. App 224, ll. 25-App 225, ll. 9 A prosecutor's deliberated of a court and jurors by presentation of known false evidence is incompatible with rudimentary demand of justice. The relevant question regarding any allegedly improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Riddle v. Ozmit, State v. Owens

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for a new trial.

Samuel Brown

Samuel Brown

Appellant

This 22nd day of December 2016

STATE OF SOUTH CAROLINA

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SAMUEL BROWN,

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Alicia Olive, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; The Honorable Jenny Kitchens, Court of Appeals of South Carolina, 1015 Sumter St., Box 11629, Columbia 29211; and a copy of the Anders Brief of Appellant pursuant to White v. State have been served on LaNelle Cantey DuRant, South Carolina Commission on Indigent Defense Division of Appellate Defense, PO Box 11589 Columbia, SC 29211-1589., this 22nd day of December, 2016.

Samuel Brown
Samuel Brown
Appellant

SUBSCRIBED AND SWORN TO before me

This 22nd day of November, 2016

Notary Public
SAMMY C WAY
NOTARY PUBLIC
SOUTH CAROLINA
Exp. 3/4/2024

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12-21-16

Dear Mrs. Jennings,

Can I have these documents stamped with a return copy. Enclosed is an envelope.

Thank you

Samuel Bunn