THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Case No. 17-2405

The State of South Carolina.....Respondent,

v.

Desmond Sharmaine Collins.....Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CASES

STATEMENT OF THE ISSUE ON APPEAL

Did the trial judge erred when he ruled that an approximately 400 page cell phone report, which was generated by the Myrtle Beach Police Department and not disclosed to the defense until after the start of trial, was of no exculpatory value to the Appellant, when the record indicates the trial judge never reviewed the records before he made his ruling?

STATEMENT OF THE CASE

On June 24, 2016 Appellant was arrested for trafficking heroin in an amount between 14 and 28 grams. He entered a not guilty plea, and, on November 13, 2017, proceeded to trial by jury. On November 14, 2017, during Appellant's trial, the State informed the Court that the Myrtle Beach Police Department possessed a report that was produced by the department when it searched a cell phone seized from Appellant's car. The report was not disclosed to defense counsel before the start of trial.

The Court ordered the report to be turned over to defense counsel and adjourned for the day. The next morning, the State argued that the report contained no exculpatory material. Defense counsel asked for a mistrial on grounds that he needed more time to review the report that totaled over 400 pages. The Court ruled that the report contained no material exculpatory to Appellant and denied defense counsel's motion. After that ruling, the State and defense counsel reached a stipulation and the trial resumed. On November 15, 2017 the jury convicted Appellant and the Court sentenced him to 25 years in prison. Appellant filed a timely Notice of Appeal on November 20, 2017.

STATEMENT OF THE FACTS

At 10:45 p.m. on June 24, 2016, Officer Camacho of the Myrtle Beach Police Department stopped at a gas station to refuel is patrol vehicle. (Tr. p. 175, lines 19-21). While refueling, he saw a black sedan parked at a gas pump opposite him. He observed a driver and one passenger preparing to leave the gas station in the sedan. (Tr. p. 176, lines 3-19). He also thought he could smell the odor of marijuana coming from the sedan. (Tr. p. 175, lines 21-24). He contacted Officer Crews, who was in the vicinity of the gas station, and gave him a description of the sedan. (Tr. p. 176, lines 13-16).

Officer Crews got behind the sedan as it approached an intersection. (Tr. p. 47, lines 16-19). Officer Crews then observed two traffic violations and initiated a traffic stop. (Tr. p. 48, lines 2-13). As he approached the driver's window, Officer Crews testified that he smelled marijuana. (Tr. p. 49, lines 12-13). He identified Appellant as the driver. (Tr. p. 49, lines 9-11). Officer Crews ran Appellant's license while he waited for Officer Camacho to arrive as backup. (Tr. p. 49, lines 17-20). A third member of the Myrtle Beach Police Department, Officer Householder, arrived on scene after Officer Camacho. (Tr. p. 48, lines 25-25).

Once backup arrived, Officer Crews re-approached the sedan and asked the driver to step out. (Tr. p. 49, lines 17-20). Officer Camacho had the passenger exit the sedan as well. (Tr. p. 119, lines 11-12). With both Appellant and the passenger standing in front of Officer Crews' patrol vehicle, a search of the sedan began. (Tr. p. 119, lines 13-15). During the search of the passenger compartment of the sedan, Officer Crews located over $3,000 in a Dollar General bag stuffed in the driver side door. (Tr. p. 119, lines 21-25). On the floorboard of the driver seat, he found a large clear sandwich bag. Inside this bag was a tan powder substance that field tested positive for cocaine. (Tr. p. 128, lines 3-10). Inside the large clear sandwich bag was found another smaller bag that also contained a tan powder substance. (Tr. p. 120, lines 6-10).

Once Officer Crews discovered the tan powder substance he stopped his search and went back to confront Appellant with the substance he found laying loose on the driver side floorboard. Before he asked Appellant any questions, Officer Crews provided him Miranda warnings. (Tr. p. 120, lines 15-16). A brief conversation ensued and then Officer Crews put Appellant in the back of his patrol vehicle and continued his search of

the sedan. (Tr. p. 120, lines 19-20). The continuation of the search yielded a digital scale, (Tr. p. 136, lines 8-10), two marijuana "blunts," (Tr. p. 121, lines 19-24), and two cell phones, (Tr. p. 137, lines 11-15). According to Officer Crews, these phones were ringing "probably 75 percent of the time during the traffic stop." (Tr. p. 137, line 18).

After he completed his search of the sedan, Officer Crews again approached Appellant and reminded him of his Miranda rights. (Tr. p. 121, lines 8-15). He itemized the illegal items he found in the sedan. (Tr. p. 127, lines 23-25). In response, Appellant said "put it all on me." (Tr. p. 128, line 3). Officer Crews obliged and arrested Appellant for all the drugs seized from the sedan and took him to jail. (Tr. p. 138, lines 12). The passenger was allowed to walk away from the traffic stop because Appellant claimed ownership of the drugs. (Tr. p. 138, lines 16-19).

On March 8, 2017 the tan powder substance was sent to the South Carolina Law Enforcement Division (SLED) for testing. (Tr. p. 234, lines 24-25). SLED identified it as heroin. (Tr. p. 245, line 14). The large bag contained 11.7 grams of heroin and the smaller bag inside the larger bag held 3.62 grams of heroin. (Tr. p. 244, lines 11-14).

Defense counsel became involved in Appellant's case and he filed a "Rule 5 Brady motion" on September 20, 2016. (Tr. p. 25, lines 13-14). In response, the State never provided phone records. During cross examination, Officer Crews conceded that he did not know if any diagnostic tests were performed on the phones and admitted that documentation should exist if the phones had been analyzed. (Tr. p. 153, lines 13-19). At the close of Officer Crew's testimony, Judge Culbertson adjourned the trial until 2:00 p.m. (Tr. p. 173, lines 2-5). The State's next witness, Officer Camacho, also testified that he did not know if the phones had been examined. (Tr. p. 188, lines 5-7).

At the conclusion of Officer Camacho's testimony, the State finally informed the Court that it had previously been made aware of the fact that the Myrtle Beach Police Department did in fact perform a "cell phone dump." (Tr. p. 194, lines 18-19). The State also informed the Court that a report of the extracted data had been generated, (Tr. p. 195, lines 13-16), and further admitted the report was not disclosed to defense counsel. (Tr. p. 195, lines 17-19).

Judge Culbertson ordered the State to provide defense counsel with a copy of the information in the possession of the Myrtle Beach Police Department. (Tr. p. 198, lines 15-18). He recessed the trial until the morning of November 15, 2017. (Tr. p. 199, lines 17-19). When court reconvened the next morning, the State informed Judge Culbertson that it provided defense counsel with a "thumb drive" that contained "several .PDF files." (Tr. p. 202, lines 24-25). The State told the Court that a report had been run on only one of the phones. (Tr. p. 204, lines 3-10). The State also had present in the courtroom a member of the Myrtle Beach Police Department, Officer Curry, who the State said was able to address the "technical data" extracted from the phone. (Tr. p. 203, lines 1-3).

The State informed Judge Culbertson it has a reasonable belief that the phone the Myrtle Beach Police Department ran a report on belonged to Appellant. (Tr. p. 203, lines 17-18). When the trial judge asked about call logs, the State said that the report did not contain call log or text message information. (Tr. p. 204, line 23 - p. 205, line 6). The State said that it did not intend to use anything inculpatory found on the phone. (Tr. p. 204, lines 8-10). When asked if the report contained anything exculpatory, the State replied that it found no exculpatory information. (Tr. p. 203, lines 13-15). The State said

all it could identify were pictures, music files, and videos. (Tr. p. 204, lines 3-15). Because the State only turned over .PDF files to defense counsel, none of the videos on the phone could have been viewed by either the court or defense counsel.

Defense counsel inquired as to whether the State had turned over every report in its possession, (Tr. p. 205, lines 9-15), and asked for the opportunity to examine Officer Curry on the record. (Tr. p. 205, line 19). Judge Culbertson refused to allow defense counsel to examine the Officer Curry. (Tr. p. 205, line 20). Shortly thereafter Officer Curry tried to speak. He stated that the Myrtle Beach Police Department generated three reports. (Tr. p. 206, line 10). Judge Culbertson told the State to speak with Officer Curry and find out if defense counsel had been provided with a copy of everything. (Tr. p. 206, lines 13-16).

The State informed the Court again that it had turned over to defense counsel a "thumb drive" with pictures "and et cetera." (Tr. p. 206, lines 17-19). The State then made reference to a Blu-ray disc in its possession. According to the State, the Blu-ray disc "contains the blown-up pictures and they're on the Blu-ray disc because of the file size." (Tr. p. 206, lines 22-23). The State said the enlarged pictures would not fit on the "thumb drive" provided to defense counsel. (Tr. p. 206, lines 24-25). In other words, the State turned over truncated, thumbnail versions of the full size files in its possession to defense counsel instead of an exact copy of the information it possessed.

Defense counsel stated that the thumb drive he was given contained pictures of paperwork and what appear to be ledgers. (Tr. p. 208, lines 1-2). He said that he could not see what the ledgers contained but knew "the technology exists for me to blow that stuff up." (Tr. p. 208, line 3). Defense counsel argued that the ledgers, in the format

provided by the State, were too small to read. (Tr. p. 208, line 3). He argued the photos could be exculpatory to the Defendant for a variety of reasons, including the fact that the indecipherable ledgers could inculpate the passenger who was permitted to walk away as the dealer and solidify in the jurors minds the defense theory that Appellant was a junky who had been used by a drug dealer passenger to reduce his own exposure. (Tr. p. 208, line 12 to p. 211, line 11). Defense counsel made it very clear that, "I didn't get to see [the ledgers] and none of us are ever gonna get to see it now." (Tr. p. 211, lines 10-11).

Rather than provide defense counsel with a matching Blu-ray disc, the State provided the material in a format that made enlargement of the pictures impossible. Defense counsel also noted for the record that the report contained over 400 pages and that he stayed up late trying to go through it. (Tr. p. 211, lines 18-21). He reminded the Court he had the report for less than a day and the State had it in its possession for almost a year and a half. (Tr. p. 211, lines 21-23).

The State argued United States v. Agurs to support its position that the report was not material to Appellant's trial since Appellant was in constructive possession of heroin and admitted ownership of the heroin. (Tr. p. 212, lines 20-22). It also cited to Arizona v. Youngblood. (Tr. p. 212, line 23). Finally the State argued that a Brady violation did not occur. (Tr. p. 213, lines 11-24).

Before the Court ruled, defense counsel again stressed the fact that he did not know everything contained in the report. (Tr. p. 214, lines 24-25). Judge Culbertson then ruled the State was prohibited from using anything inclupatory contained in the report and also found that the report contained "nothing exculpatory to the Defendant." (Tr. p. 215, lines 8-11). However, nowhere does the record indicate that Judge Culbertson

evaluated the substance of the information contained in the report. Rather, he appears to have relied on the State's assertion that nothing contained in the report was exculpatory, despite the fact that defense counsel clearly stated "I do not know what's in it because we're in day three of trial and day two is when I learned about it." (Tr. p. 214, lines 24-25).

Before trial resumed, and in light of the Court's ruling, the State and defense counsel entered into a stipulation "that there was an extraction performed by the police on the SIM card and the micro SD card on the two phones that the police retained at the scene, but that there was no relevant information or no information relevant to this case derived from that extraction." (Tr. p. 226, lines 15-20).

Trial resumed and the jury returned a guilty verdict on November 15, 2018. The trial judge denied Appellant's motions and declined to reconsider any of the ruling made during Appellant's trial. (Tr. p. 303, lines 12-15). The trial judge sentenced Appellant to 25 years in prison. (Tr. p. 305, lines 19-21). Appellant filed a timely notice of appeal.

ARGUMENT

"The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.E.2d 215 (1963) (emphasis added). In this case, defense counsel filed a "Rule 5 Brady motion" on September 20, 2016. (Tr. p. 25, lines 13-14). Under long settled rules set forth by Brady and its progeny, the reversal of a conviction is required if the undisclosed evidence is material and its omission deprived the defendant of a fair trial, regardless of the State agency in possession of the evidence.

Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.") As Judge Culbertson correctly said, "well you might not have had [the cell phone report] in your office, but law enforcement had it, so the State had it." (Tr. p. 195, lines 20-21).

The definition of "material" is critically important to a proper analysis of whether Appellant's due process right to the fair trial was violated by the State. In defining "materiality," the United States Supreme Court has stated:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

State v. Freeman, 319 S.C. 110, 119, 459 S.E.2d 867, 873 (Ct. App. 1995) (quoting United States v. Agurs, 427 U.S. 97, ___, 96 S.Ct. 2392, ___, 49 L.Ed.2d 342, ___ (1976). Stated succinctly but without analysis, "evidence that is not produced pursuant to a general request for exculpatory material . . . will not justify a new trial unless it creates a reasonable doubt about the defendant's guilt." State v. Goodson, 276 S.C. 243, ___, 277 S.E.2d 602, ___ (1981).

In Goodson the trial judge failed to apply the proper standard before ruling on the issue of materiality. The defendant was convicted of housebreaking, grand larceny and safecracking, and the South Carolina Supreme Court heard the case twice. The

result of the Court's first consideration of the case was a remand of the case to General Sessions for a hearing on whether the information the State failed to disclose was material to the defense. State v. Goodson, 273 S.C. 264, 255 S.E.2d 679 (1979) ("[T]his case is remanded to [the trial judge] for the purpose of his evaluating the evidence at issue here in light of Agurs.").

The second Goodson opinion came after the trial judge found the information the State failed to disclose was not material. Goodson, 276 S.C. 243, ___, 277 S.E.2d 602, ___ (1981). The South Carolina Supreme Court reversed the trial judge's finding and ordered a new trial. Id. at ___, 277 S.E.2d at ___. The Court observed:

> As is to be readily noted from the language of Agurs, each case turns upon the strength of the evidence presented in the context of the entire record before the court. The court on review is given a delicate task. We must review the evidence but we do not at this stage pass upon the sufficiency of that evidence. The fact finder must establish the doubt in fact. Here we only determine whether the appellant's right to a fair trial has been impaired and if so direct a retrial of the matter.

Id. at ___, ___ S.E.2d at ___.

In the case at hand, the question is whether the State's failure to turn over the report generated by the Myrtle Beach Police Department in the middle of trial deprived Appellant of his due process right to receive a fair trial. The answer must be informed by the fact that the trial record indicates that the Court did not conduct a proper review of the report before determining it was not exculpatory. Appellant's case should therefore be remanded for an evidentiary hearing on whether the report was material to Appellant's defense.

The reason for the specific, limited relief requested by Appellant is not only due to the fact that the record indicates that the trial judge never reviewed the over 400 page

.PDF turned over to defense counsel during the trial, but also because the State turned over a "thumb drive" to defense counsel instead of a carbon, verbatim copy of the Blu-ray disc in its possession. Further, Judge Culbertson also denied defense counsel the opportunity to examine Officer Curry, who the State brought to court specifically to address the "technical data" that the report contained. (Tr. p. 203, lines 1-3). Defense counsel clearly stated he was unable to review the report in its totality, both due to time constraints and the fact that he could not enlarge the photographs of what appeared to be ledgers or accounting statements. Through all this, the State maintained that the report contained on the Blu-Ray disc in its sole possession was not exculpatory to Appellant. (Tr. p. 203, lines 13-15).

Turning to the arguments presented to Judge Culbertson, the State argued that the phone records were not material due to the fact that the State's theory of guilt was based on Appellant's constructive possession of trafficking weight heroin and Appellant's "put it all on me" statement meant that the drugs belonged to him. (Tr. p. 128, line 3). The State essentially maintained that nothing in the report could be exculpatory under its theory of guilt. Judge Culbertson appeared to be persuaded by this argument as he asked defense counsel: "How is that exculpatory to your client in a trafficking in heroin where the drugs are in the vehicle that [Appellant] is driving. (Tr. p. 208, lines 9-11).

However, the error in this question is apparent. The balance the Court must strike in reviewing potentially exculpatory evidence has already been quoted in Appellant's brief, but bears repetition.

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by

> evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already oquestionable validity additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Freeman, 319 S.C. at 119, 459 S.E.2d at 873 (Ct. App. 1995) (quoting United States v. Agurs, 427 U.S. 97, ___, 96 S.Ct. 2392, ___, 49 L.Ed.2d 342, ___ (1976).

This case needs to be remanded for an evidentiary hearing to be conducted after the State provides defense counsel with a carbon, verbatim copy of the Blu-ray disc in its possession and defense counsel has sufficient time to review the disc's contents. As the Court found in the first iteration of Goodson:

> United States v. Agurs [ ] indicates that evidence that is not produced pursuant to a general request for exculpatory material, such as that made here, will not justify a new trial unless it creates a reasonable doubt about the defendant's guilt. The trial judge does not appear to have applied this standard here. Thus, this case is remanded to him for the purpose of his evaluating the evidence at issue here in light of Agurs.

State v. Goodson, 273 S.C. 264, ___, 255 S.E.2d 679, ___ (1979).

Defense counsel for Appellant made a general request for exculpatory material. The State never turned over a report generated by the "dump" of a cell phone that the State possessed ever since the date of Appellant's arrest. In all probability, the fact that the State did not turn over the report until the middle of trial did impair the Appellant's right to a fair trial. At this juncture, Appellant submits that this Court is simply not in a position to rule on the question of whether a reasonable doubt as to Appellant's guilt was created by the report the was both generated by the State and withheld by the State.

As was ably argued by defense counsel, the passenger – who was not even arrested – appears to have been a drug dealer capable of using Appellant, a drug junkie, as a fall guy capable of saying "put it all on me." (Tr. p. 208, line 12 – 25).

CONCLUSOIN

Appellant's right to a fair trial was violated when the State turned over records in an inferior format to the records in its possession on the second day of a three-day trial. This case should be remanded for an evidentiary hearing to determine whether the "cell phone dump" report contained evidence exculpatory to Appellant. The record is clear that a full hearing on the exculpatory nature of the "phone dump" report never occurred..

Even if, in a light most favorable to the State, the Blu-ray disc contained nothing but full size photographs from Appellant's phone's memory card, the disc, according to the State, "contains the blown-up pictures and they're on the Blu-ray disc because of the file size. It obviously will not fit on the thumb drive." (Tr. p. 206, lines 22-25).

Until a full and fair hearing on that report generated by the Myrtle Beach Police Department, the validity of Appellant's conviction remains in question. To comport with due process, Appellant's case must be remanded to the trial judge for a full evidentiary hearing on whether the "phone dump" report was material to Appellant's defense.

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PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter on the following by depositing a copy of it in the United States Mail, postage prepaid, on May 21, 2018, to the address set forth below:

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Case Number: 2017-002405

Dear Madam Clerk,

Enclosed herewith please find a copy Appellant's Initial Brief, Designation of Matter To Be Included in the Record, and a Proof of Service.

Sincerely,

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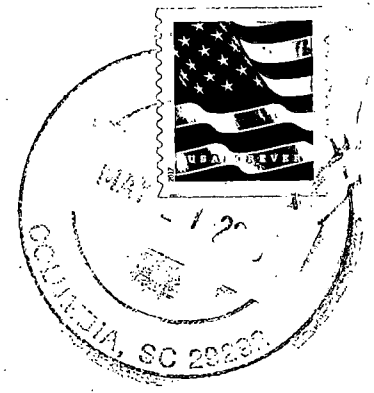

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