

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case Tracking No. 2017-002405

The State,

Respondent,

vs.

Desmond Sharmaine Collins,

Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. The issue of whether the trial court conducted a proper hearing into the alleged Brady violation by the State is not preserved for review on appeal because Appellant never objected to the procedure used by the trial court or requested any additional consideration by the court. Further, any issue related to the failure of the State to turn over the cell phone report is waived because Appellant agreed to a stipulation regarding the report at trial. Finally, Appellant has failed to establish any Brady violation because he has failed to establish any exculpatory value to the report or the contents of the phone.

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Appellant for trafficking in heroin between 14 and 28 grams. (True-billed Indictment; R.____). He proceeded to trial before the Honorable Benjamin H. Culbertson and a jury on November 13-15, 2017. The jury found him guilty as indicted, and the trial court sentenced him to twenty-five years in prison. Appellant served and filed a timely Notice of Appeal. (T.299; 305; R.____).

STATEMENT OF FACTS

Jeremy Crews, formerly an officer with the Myrtle Beach Police Department, was contacted by Officer Camacho. Officer Camacho smelled marijuana coming from a vehicle near where he was pumping gas and wanted Crews to initiate a stop of the vehicle. (T.115-116; 175-176; R.____). After witnessing several traffic violations, Crews stopped the vehicle driven by Appellant. (T.116-117; R.____). Upon approaching the vehicle, he immediately smelled marijuana. (T.117; R.____).

After detaining Appellant and a passenger, Crews began a search of the vehicle. During the search, he located a Dollar General bag containing a little over \$3000 in cash, a bag containing a light tan powdered substance in the driver's floorboard, and small marijuana blunts on either side of the vehicle interior. (T.119-121; 177; R.____). Crews explained the powdered substance would have been right where Appellant's feet were as the driver of the car. (T.122; R.____). After being Mirandized, Appellant told Crews "to put it all on me." (T.121; R.____). During the search Crews also found a scale and two cell phones. (T.135-137; R.____). The powdered substance later tested positive as heroin. (T.160; 244-245; R.____).

Both Crews and Camacho testified nothing was done with the cell phones. Later during trial, the State learned some files were obtained from one of the cell phones. (T.194; R.____). The State turned over a thumb drive containing all the files found on the cell phone. (T.202-203; R.____). The trial court found the State could not use anything found on the cell phone, and also found no violation in failing to turn it over because nothing was found to be material to Appellant's guilt. (T.208; 215; R.____).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

ARGUMENT

- I. **The issue of whether the trial court conducted a proper hearing into the alleged Brady violation by the State is not preserved for review on appeal because Appellant never objected to the procedure used by the trial court or requested any additional consideration by the court. Further, any issue related to the failure of the State to turn over the cell phone report is waived because Appellant agreed to a stipulation regarding the report at trial. Finally, Appellant has failed to establish any Brady violation because he has failed to establish any exculpatory value to the report or the contents of the phone.**

Appellant contends the trial court erred failing to conduct a proper hearing into whether the cell phone records in the possession of the State contained any material exculpatory evidence. He asserts the procedure used violated due process and that this Court should remand “for a full evidentiary hearing on whether the ‘phone dump’ report was material to Appellant’s defense.” The issue is not properly preserved for review on appeal. In addition, Appellant waived any objection to the phone records or any issue related to Brady by accepting the stipulation given to the jurors. Finally, Appellant has failed to meet his burden of establishing the records contained exculpatory or impeaching evidence material to his guilt.

Preservation

First, Appellant’s issue that the trial court failed to conduct a proper hearing on whether the evidence was material is not preserved for review on appeal. Appellant never objected to the procedure used by the trial court. Once the trial court found the photos and other evidence turned over by the State from the cell phone were not relevant, he never asked the trial court to further review the full size images, which the State indicated were in its possession on a Blu-ray disc. (T.206; R.____). At no time did Appellant maintain the trial court failed to conduct a “full evidentiary hearing” or violated his due process rights. Appellant asked for a dismissal or a

mistrial, but never indicated a need for a further hearing by the trial court. (T.207-212; R. ____). Accordingly, the issue is not preserved for review on appeal. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) (“For an issue to be properly preserved it has to be raised to and ruled on by the trial court.”); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

In seeking remand, Appellant cites significantly to State v. Goodson, 273 S.C. 264, 255 S.E.2d 679 (1979). The facts of Goodson demonstrate what Appellant’s counsel should have done in the instant case in order to preserve the issue and to have the case remanded for further consideration. The Court explained: “[A]ppellant moved for the trial judge to request the evidence at issue and examine it with him to see whether it would support a motion for a new trial. He also asked that this material be attached to the record for this appeal.” Id. at 265, 255 S.E.2d at 680. In Goodson, the defendant specifically asked the trial court to conduct a more thorough review of the evidence. In the instant case, even though the State had the Blu-ray disc containing all of the evidence available for review, Appellant never asked the State to display the photos or the trial court to review any of the pictures to determine whether they were material and exculpatory.¹ As a result, he should not be entitled to remand on appeal.

Waiver

Additionally, Appellant waived any issue he had with the failure to turn over the materials when he acquiesced in the stipulation at trial. After the trial court denied Appellant’s

¹ It is the Appellant’s duty to create a record sufficient for this Court to review his issues. See State v. Brockmeyer, 406 S.C. 324, 338, 751 S.E.2d 645, 653 (2013) (finding it impossible to evaluate the merits of an issue because the appellant failed to include the relevant material in the record on appeal); State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984) (“Failure to make an offer of proof precludes the appellant from raising the issue on appeal.”); State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999) (finding appellant has burden of presenting an adequate record which is sufficiently complete to permit this Court to review lower court’s actions).

motions for dismissal or mistrial, which he has not raised on appeal², the court offered a stipulation regarding the fact evidence was found on the cell phone. Appellant was offered the opportunity to either cross-examine witnesses regarding the additional material found on the cell phone or accept the stipulation. He accepted the stipulation and the trial court instructed the jury:

I do need to let you know that there has been a stipulation reached between the State and the Defendant, and I'll give you the law on stipulations when I charge you on the law in the case. Basically, the stipulation between the parties is 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. So, that is the stipulation. All you need to know at this point in time is that that is a factual matter that you have to take as a true fact, that they did perform an extraction on the SD card -- on the micro SD card and the SIM card but nothing relevant was found as a result of that extraction.

(T.226; R.____). After giving the stipulation, the trial court asked if either side had anything to add, and Appellant's counsel indicated "No, Your Honor." (T.227; R.____). Because Appellant agreed to the trial court's proposed remedy, he cannot argue on appeal the trial court committed any error. See State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007) (explaining an issue conceded at trial cannot be argued on appeal); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding appellant waived an issue for appellate review because he acquiesced to the trial court's ruling); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("[A] party cannot acquiesce to an issue at trial and then complain on appeal.").

² Appellant has not contended on appeal that the trial court erred in denying his motions for dismissal or mistrial. As a result, the trial court's denial of these motions is the law of the case. See Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."); State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

Merits

Finally, Appellant has failed to show how the trial court's procedure violated his due process rights or that the evidence obtained from the cell phones contained anything exculpatory and material. 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 South Carolina Supreme Court has found: "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). This Court has recently explained:

"The Brady disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." State v. Anderson, 407 S.C. 278, 286, 754 S.E.2d 905, 909 (Ct. App. 2014). "[A]n individual asserting a Brady violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or was impeaching." Id. at 287, 754 S.E.2d at 909. "Impeachment or exculpatory evidence 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." State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996).

State v. Davis, 420 S.C. 50, 62, 800 S.E.2d 138, 144 (Ct. App. 2017). The United States Supreme Court has emphasized:

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the

government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). As this Court has noted, the burden is clearly on Appellant to establish the evidence was favorable and material such that there existed a reasonable probability he failed to receive a fair trial.

In the instant case, Appellant never established any of the required showings.³ His arguments regarding the nature of the pictures removed from the cell phone were all rank speculation and hypotheticals. His discussions of the evidence included all hypotheticals prefacing his statements with limitations like "it could have said," "if it establishes," or "could've [] been very exculpatory" (T.208; 210; R.____). He admitted his arguments were "a little speculative" and acknowledged his possible theories of what the evidence contained "may seem farfetched" (T.209-210; R.____).

Appellant had the opportunity to view the full size pictures because the State had them in its possession during the hearing before the trial court. He never sought to show the trial court any picture or other file from the cell phone which may have contained exculpatory or material evidence. Instead, he relied solely on his argued speculation of what the pictures or other files could contain. In his brief, he never points to any picture or file which is exculpatory or even relevant to the question of whether the drugs found with Appellant belonged to him. As the United States Supreme Court stated: "The mere possibility that an item of undisclosed

³ Appellant argued to the trial court and to this Court what the evidence might show and claims he could not see enlarged versions of the pictures to know for sure their contents. However, the State had the full size copies in its possession at trial on a Blu-ray disc, and Appellant never asked to see the State's copies or to show them to the trial court. Further, since the photos and information came off of Appellant's own phone, he should know the contents of the pictures and be able to make more certain arguments regarding whether they have some exculpatory value.

information might have helped the defense, or might have affected the outcome of the trial, does not establish “materiality” in the constitutional sense.” United States v. Agurs, 427 U.S. 97, 109–10 (1976); Cone v. Bell, 556 U.S. 449, 491 (2009) (“It simply is not sufficient, therefore, to claim that ‘there is a reasonable possibility that . . . testimony might have produced a different result [P]etitioner’s burden is to establish a reasonable probability of a different result.’”)(quoting Strickler v. Greene, 527 U.S. 263, 291 (1999)). Even if some of his speculation came true, as the trial court noted, it would not be exculpatory in Appellant’s constructive possession case regarding trafficking in heroin when the drugs are found in the vehicle he is driving right at his feet. (T.208; R.____). Even if the drugs belonged to someone listed on the paperwork in the photos and Appellant was merely a mule, he was the mule in constructive possession at the time of the stop. Appellant failed to demonstrate a Brady or other violation occurred and as a result, the trial court properly denied his motions to dismiss or for a mistrial.

CONCLUSION

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

Respectfully submitted,

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August 28, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case Tracking No. 2017-002405

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The State,

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vs.

Desmond Sharmaine Collins,


Appellant.

PROOF OF SERVICE

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

T. Kirk Truslow, Esquire
T. Kirk Truslow, P.A.
413 79th Avenue N.
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I further certify that all parties required by Rule to be served have been served.
This 28th day of August, 2018.


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RE: State v. Desmond Sharmaine Collins
Appellate Case Tracking No. 2017-002405

Dear Mr. Truslow:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General
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Enclosures

~~cc: Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Advocacy Division

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