

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER GREENE III,

APPELLANT

APPELLATE CASE NO 2018-000189

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant appellant a directed verdict where Officer Ballentine did not disclose prior to trial that he identified appellant as the perpetrator based on recognizing appellant as his neighbor where Ballentine said he did not want to “write where I lived in the report,” since the prosecution’s failure to disclose this impeachment evidence deprived appellant of a fair trial?

STATEMENT OF THE CASE

Appellant was indicted by a Berkeley County Grand Jury on March 22, 2017, for the offenses of failure to stop for a blue light second offense and possession of cocaine base. R. 224 – 225; R. 5, ll. 13-15. He was tried before the Honorable D. Craig Brown and a jury, January 29 – 30, 2018. R. 1. Appellant was represented by John Church and Debra Littlejohn; the state was represented by Wilton McNeely and Bart Stegall. R. 2.

Appellant was found not guilty of possession of cocaine base, but was found guilty of failure to stop for a blue light. R. 202, ll. 9-18. Appellant was sentenced to five years' incarceration. R. 226. On February 2, 2018, appellant filed a motion to reconsider his sentence, which was denied without a hearing. R. 223.

This appeal follows.

STANDARD OF REVIEW

“Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). “Unless there is a total failure of **competent evidence** as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” *Id.* at 139, 708 S.E.2d at 776-777 (emphasis added). “On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state.” *Id.* at 139, 708 S.E.2d at 777; *see also State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court’s denial of the directed verdict motion. *Hepburn*, 406 S.C. at 416, 753 S.E.2d at 409.

ARGUMENT

The trial court erred in refusing to grant appellant a directed verdict where Officer Ballentine did not disclose prior to trial that he identified appellant as the perpetrator based on recognizing appellant as his neighbor where Ballentine said he did not want to “write where I lived in the report,” since the prosecution’s failure to disclose this impeachment evidence deprived appellant of a fair trial.

Statement of facts

Officers with the Berkeley County Sheriff’s Office attempted to pull over the driver of a silver Honda minivan on October 1, 2016, because the license plate on the van had been issued to a Buick, not a Honda. R. 102, ll. 3-6; R. 103, ll. 7-14; R. 104, ll. 14-22. The driver failed to pull over after being signaled with blue lights and sirens. R. 106, l. 23 – 107, l. 11. Instead, the driver sped up to forty-five miles an hour¹ and drove about one-half mile before he pulled into a residence, got out of the van, ran off, and jumped over a fence. R. 107, l. 9 – 108, l. 25. Crack cocaine was found in the driver’s side door pocket of the van. R. 85, ll. 6-9; R. 144, ll. 16-24.

Appellant was arrested three weeks later. R. 66, ll. 13-17. The van was not registered to appellant, and officers never spoke with the van’s registered owner. R. 124, ll. 10-14; R. 128, ll. 17-19. No DNA or fingerprint testing was done on the van or on the box containing the drugs. R. 122, ll. 17-25. There was no video of the driver. R. 89, l. 16 – 90, l. 6.

Officer Ballentine identified appellant as the driver. R. 123, ll. 4-22. Officer Hayden wrote in his report that the driver was approximately **six feet tall**. R. 121, ll. 2-5. R. 121, ll. 2-12.

¹ The assistant solicitor incorrectly claimed in his opening statement that the driver was speeding at one hundred miles an hour, but this claim was not supported by the evidence. R. 39, ll. 4-6. Instead, Officer Hayden testified the driver reached speeds of forty-five miles an hour. R. 107, ll. 17-18.

Hayden changed the report to reflect the driver was **five feet eight inches tall** after appellant was later identified by Ballentine. R. 121, ll. 2-12; R. 123, ll. 21-22.

Officer Ballentine testified that he recognized the driver as living at the home where the van stopped. R. 53, l. 5 – 54, l. 9. Ballentine said he lived nearby and that although he had seen appellant “hundreds” of times when passing by, he did not include anything about recognizing appellant in his report because, “I really didn’t want to put where I lived in the report.” R. 49, ll. 19-21; R. 53, l. 11 – 54, l. 9; R. 68, l. 20 – 69, l. 8. Officer Ballentine admitted that he did not know what other persons living at the home looked like, and he did not know what appellant’s brother looked like. R. 73, l. 17 – 74, l. 4.

At the close of the state’s case, defense counsel moved for a directed verdict. “For failure to stop for a blue light[], we would make a motion for directed verdict.” R. 151, ll. 17-18. Defense counsel argued appellant was entitled to a directed verdict because the officer who made an in-court identification of appellant did not disclose in his police report that he knew the defendant. R. 151, ll. 18-23. “Most of the important stuff about knowing the victim [sic] was not in his incident report, and we would just ask that that be a directed verdict.” R. 151, ll. 20-23.

Discussion

Officer Ballentine’s statement that was able to identify appellant as the driver of the van based on seeing appellant “hundreds” of times was impeachment evidence since he did not report this prior to trial, and should have been disclosed to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The Due Process Clause of the Fifth and Fourteenth Amendments requires the prosecution to disclose evidence that is: in its possession; favorable to the accused; and material to guilt or punishment. U.S. CONST. amend. V; U.S. CONST. amend. XIV; *Brady v. Maryland*,

373 U.S. at 87; *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *State v. Kennerly*, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999).

Both impeachment evidence and exculpatory evidence fall within the *Brady* rule. *Bagley*, 473 U.S. at 676. This rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419 (1995).

The state's failure to disclose such "evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." *Bagley*, 473 U.S. at 678. If impeachment evidence is provided in time for cross-examination "there is not a reasonable probability the outcome of the trial would have been different had the statements been disclosed prior to trial." *Sheppard v. State*, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2004).

Here, the evidence was not provided in time for cross-examination—it was never provided by the prosecution at all. Rather, trial counsel only learned the impeaching evidence from Officer Ballentine during his direct testimony. The prosecution's failure to disclose this impeachment evidence deprived appellant of a fair trial.

Rule 19(a), SCRCrimP provides

On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of **competent evidence** tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight.

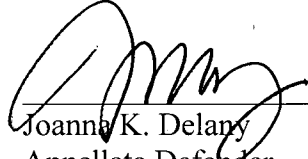
(emphasis added).

The trial court erred in denying appellant's motion for a directed verdict because there was a failure of competent evidence to prove that appellant was the driver of the van. Appellant

submits that Officer Ballentine's testimony was not competent evidence of guilt as it was not disclosed in time to allow appellant a fair trial. See *State v. Petit*, 144 S.C. 452, 142 S.E. 725, 731 (1928) (evidence is not competent if it is not proof which the law permits in the particular case); *Horry Tel. Co-op., Inc. v. City of Georgetown*, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014) (testimony improperly admitted over objection is not competent evidence).

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and sentence and remand for entry of a verdict of acquittal.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER GREENE III,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Greene III states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge D. Craig Brown, which was held on January 29 & 30, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Christopher Greene III.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 30th day of October, 2018.

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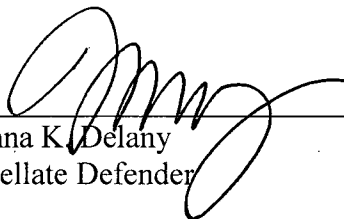
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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 30, 2018.



Joanna K. Delahy
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STATE OF SOUTH CAROLINA

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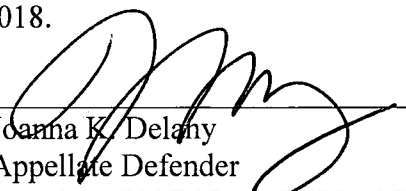
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CHRISTOPHER GREENE III,

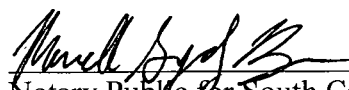
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Christopher Greene III, 264680, at Georgetown County Jail, 2394 Browns Ferry Road, Georgetown, SC 29440, this 30th day of October, 2018.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028.

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