THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

v.

Timothy E. Young..... Appellant.

FINAL BRIEF OF APPELLANT

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TABLE OF CASES

STATEMENT OF THE ISSUE ON APPEAL

Should Appellant's case be remanded to the trial court for further proceedings due to an error of law committed by the trial judge when he categorically denied Appellant access to all notes in a file maintained by a therapist, who testified for the State, on the basis that the notes contained in her file were non-discoverable material?

STATEMENT OF THE CASE

Appellant was arrested on February 25, 2009 and charged with both Criminal Sexual Conduct in the First Degree and Lewd Act on a Minor. The Grand Jury indicted Appellant on both charges. Appellant requested a trial by jury.

Before his trial Appellant sought access to any exculpatory material in a file maintained by a therapist, who was a witness for the State at trial. With consent from the State and Appellant the trial judge reviewed the therapist's file for exculpatory material. (R. pp. 8-10). At a March 17, 2011 pre-trial hearing he denied Appellant access to the majority of the file. (R. p. 10, lines 7-10; R. p. 12, lines 15-16). On March 22, 2011 he issued a written order that sealed the documents to which Appellant was denied access. (R. p. 3).

Appellant's trial began on April 4, 2011. The jury returned a verdict of guilty on both charges on April 7, 2011, and Appellant received a total sentence of twenty-five years. (R. p. 207, lines 10-11; R. p. 208, lines 11-19). At the conclusion of a post-trial hearing conducted on June 16, 2011, the trial judge denied Appellant's motion for a new trial. (R. p. 209, lines 2-7). He issued a written order dated July 19, 2011. Appellant filed his Notice of Appeal with this Court on June 17, 2011.

STATEMENT OF THE FACTS

When she disclosed she was the victim of sexual abuse, the child who testified against Appellant was seven years old. (R. p. 15, lines 22-23; R. p. 88, lines 8-11). Her biological parents were divorced, and both had remarried. (R. p. 15, line 3-p. 16, line 25; R. p. 206, lines 3-6). This child and her nine year old sister lived with their biological father and stepmother in North Carolina. (R. p. 16, lines 9-15). They visited with their

biological mother, who was married to Appellant, in Myrtle Beach every other weekend. (R. p. 18, lines 1-11). The child's mother had been married to Appellant for just over two years at the time the first sexual abuse allegation surfaced. (R. p. 88, lines 8-11; R. p. 206, line 6).

In August 2008, the biological father arranged for his daughters to attend therapy sessions with a North Carolina licensed therapist. (R. p. 50, lines 9-10). It was not until November 2008 that the child disclosed an allegation of sexual abuse to her stepmother, not the therapist. (R. p. 39, lines 10-13, R. p. 170, lines 11-24). This disclosure was against Appellant's wife. (R. p. 28, lines 14-19; R. p. 117, lines 18-25). After his daughter's disclosure against his ex-wife, the biological father took his child to the therapist to document the disclosure. (R. p. 79, lines 2-4).

Visitation in Myrtle Beach ceased after this disclosure. (R. p. 28, lines 1-13). Then, in January 2009, while still attending therapy sessions, the child made a second disclosure of sexual abuse. (R. p. 88, lines 5-11). Again she made the disclosure to her stepmother, and this time the disclosure was against Appellant. Id. The child's biological father again took her to the same therapist to document this disclosure. (R. p. 90, line 16).

The file that Appellant sought to access for exculpatory material was the one maintained by the therapist to whom the child repeated the allegations of sexual abuse she first disclosed to her stepmother.

The State and Appellant entered into a consent order under which the therapist provided her file to the trial judge for an in camera review. (R. pp. 4-5). The purpose of the trial judge's review was to determine if the file contained exculpatory material to which Appellant was entitled. Id. The trial judge reviewed the file and excluded the vast

majority of its contents as notes that are not subject to disclosure. (R. p. 10, lines 7-10; R. p. 12, lines 15-16). The only document released to Appellant as a result of his motion was one letter from the therapist to a family court attorney in North Carolina. (R. p. 11, lines 18-23).

ARGUMENT

Appellant's position is that the trial judge failed to conduct a proper in camera review of the records in the therapist's file. The review that did occur exempted all notes in the file from discovery, simply because the trial judge identified those records as notes. This was a violation of Appellant's right to access exculpatory material under Brady v. Maryland. The trial judge's ruling was an abuse of discretion as he committed an error of law in applying a Rule 5 SCRCrimP analysis to Appellant's motion under Brady.

Standard of Review

The abuse of discretion standard controls the trial judge's pre-trial ruling on Appellant's motion for access to exculpatory material. "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007) (citing State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id., 642 S.E.2d at 586 (citing State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

I. The Trial Judge Committed An Error of Law When He Ruled Appellant Was Not Entitled To Access Any Notes In The Therapist's File.

"The rules encompassed in Brady, and its progeny, and Rule 5 are separate and impose different duties. Therefore, separate analysis must be used to determine if either

has been violated." State v. Kennerly, 331 S.C. 442, 542, 503 S.E.2d 214, 219 (Ct. App. 1998). Under Brady, a defendant in a criminal case is entitled to evidence in the State's possession that is favorable and material to guilt or punishment. Id., 503 S.E.2d at 220 (citing U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985). "Once a Brady violation is established, reversal is required." Id. at 453, 503 S.E.2d at 220 (citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995)). On the other hand, "[t]he requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings." Id., 503 S.E.2d at 220.

On the record Appellant requested the judge "to peruse [the therapist's file] to see if there's anything exculpatory in there that I might be entitled to." (R. p. 9, lines 16-18). Upon review the trial judge "excluded the vast majority of what was turned in to me because I do find that those were simply notes that are not subject to disclosure." (R. p. 10, lines 8-10).

This ruling would have been a correct statement of the law in South Carolina had Appellant requested access to the therapist's file under Rule 5 SCRCrimP. See State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996) ("The notes taken during an interview, particularly a mental examination, are merely the raw data from which the expert may later draw the conclusions. . . . [T]here was no violation of Rule 5(a)(1)(D).").

In Trotter the defense argued a Rule 5 violation because the State failed to disclose an exam as required by Rule 5(a)(1)(D). Id. at 541, 473 S.E.2d at 454. The Supreme Court held "counseling sessions such as the ones in this case do not constitute physical or mental examinations. Even if they did, notes made from those examinations would not be subject to disclosure under Rule 5(a)(1)(D)." Id. at 542, 473 S.E.2d at 455

(emphasis in original). The trial judge never cited to Trotter, but his ruling is indicative of a Rule 5 SCRCrimP analysis.

A. Appellant Requested Access To Exculpatory Material In The Therapist's File Under Brady.

Unlike the defense request in Trotter, both Appellant's pre-trial motion and his oral argument at the pre-trial hearing focused on possible exculpatory material in the therapist's file. Appellant's written motion sought discovery of exculpatory material. (R. pp. 6-7). The consent order stated the trial judge would review the file for exculpatory material. (R. pp. 4-5). At the pre-trial hearing, Appellant's trial counsel requested that the judge "continue to peruse [the file] to see if there's anything exculpatory in there that I might be entitled to." (R. p. 9, lines 16-18). This was not a Rule 5, SCRCrimP request. Rather, it was a request pursuant to Brady v. Maryland.

In Brady the Supreme Court held that "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 v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197 (1963). The rule exits to ensure a fair trial. Id., 83 S.Ct. at 1197. A criminal defendant asserting a Brady violation in South Carolina "must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching." State v. Moses, 309 S.C. 502, 515, 702 S.E.2d 395, 402 (Ct. App. 2010) (citing Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)).

B. Under Brady The Trial Judge Should Have Reviewed The Notes In The File For Exculpatory Material.

Appellant asserts that his right to due process required the trial judge to conduct a full review of all the records in the therapist's file for exculpatory material – including the notes the file contained. Appellant's authority is found in the United States Supreme Court case of Pennsylvania v. Ritchie, a post Brady v. Maryland due process case.

Ritchie was accused of committing sex crimes against his daughter. Pennsylvania v. Ritchie, 480 U.S. 39, 44, 107 S.Ct. 989, 994 (1987). Before his trial began, Ritchie filed a motion to access any exculpatory material contained in the files of the state agency that investigated the sexual abuse allegations. Id., 107 S.Ct. at 994. At a hearing on the motion, the trial judge accepted the agency's statement about the lack of such material in the file, did not review the entire file himself, and denied the motion. Id., 107 S.C. at 994.

Portions of Ritchie are only joined by a plurality of Justices, but the following is from the majority opinion of the Court. "It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." Id. at 57, 107 S.Ct. at 1001 (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196). As to the meaning of material, "'[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.'" Id., 107 S.Ct. at 1001 (quoting U.S. v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985)).

The Ritchie Court then noted the impossibility of determining whether any of the records in the state agency's file were material because "neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had

not reviewed the full file." Id., 107 S.Ct. at 1001. The Court concluded that on remand "Ritchie is entitled to have the [ ] file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial." Id., 107 S.Ct. at 1000. But if on remand the trial judge was to find that the records "contain no such information, or if the non-disclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction." Id., 107 S.Ct. at 1000. The Court never identified any subset of records within the file, such as counseling session notes, as completely off limits for review for possibly exculpatory evidence.

In Appellant's case, the transcript from the pre-trial motion hearing supports the view that the trial judge simply refused to turn any notes over to Appellant regardless of whether they contained exculpatory evidence. Two separate times during the pre-trial hearing the trial judge stated, "I do find that those were simply notes that are not subject to disclosure," (R. p. 10, lines 7-10), and "the rest are just notes that I find are not discoverable." (R. p. 12, lines 15-16). He also issued a written order stating "the materials marked as 'Court Exhibit #1' are not discoverable." (R. p. 3).

C. The Trial judge's Failure To Conduct A Proper Review Of The File Was An Error of Law that Violated Appellant's Right to Due Process and Brady.

To establish a Brady violation under South Carolina law Appellant must show that the evidence to which he was denied access: "(1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching." Moses, 309 S.C. at 515, 702 S.E.2d at 402 (citing Riddle, 369 S.C. at 44, 631 S.E.2d at 73 (2006)).

In Appellant's case, the therapist's file was turned over to the State and presented to the trial judge under seal for his review. (R. pp. 4-5). The State was aware of the therapist's file and assumed responsibility for delivering the file to the trial judge, so the second element of the Brady analysis is satisfied. The trial judge, not the prosecution, denied Appellant access to any notes contained in the file, but Appellant asserts that the third element of the Brady analysis is still satisfied. The result of the trial judge's pre-trial ruling was the suppression of exculpatory material to which Appellant may have been entitled.

For purposes of his direct appeal Appellant can only presume the contents of the therapist's file were both favorable to him and material to the outcome of his case. Given that the child merely parroted disclosures she first made to her stepmother when she met with the therapist, the notes in the therapist's file could contain a wealth of both material and favorable exculpatory information, which probably would have changed the outcome of Appellant's trial.

Since his appellate Motion to Unseal the Court Exhibit was denied, Appellant respectfully asks this Court to remand his case back to the trial judge with instruction for him to unseal "Court Exhibit #1" and review the notes in the file for exculpatory Brady material. As was the case in Ritchie, Appellant's trial judge is in the best position to determine whether the therapist's file contains information that probably would have changed the outcome of Appellant's trial. If the trial judge reaches this conclusion, then Appellant would be granted a new trial. By the same token the trial judge could also reinstate Appellant's conviction if he determines the notes in the therapist's file contain

no exculpatory Brady material or if the information in the file is not material to Appellant's guilt or innocence.

II. The Issue On Appeal Is Preserved For Appellate Review.

"In order for an issue to preserved for appellate review, it must have been raised to and ruled upon by the trial judge." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Appellant filed a written motion seeking access to all exculpatory material contained in the therapist's file. (R. pp. 6-7). From this motion emerged a consent order under which the trial judge conducted a review of the file for exculpatory material. (R. pp. 4-5). His review partially took place at the March 17, 2011 pre-trial hearing.

During that hearing and speaking of the therapist's records in question, the trial judge asked, "I don't need to do an in camera review any more, or do you still want me to go through with that?" (R. p. 9, lines 3-5). In response, Appellant requested the trial judge to "continue to peruse [the records] to see if there's anything exculpatory in there that I might be entitled to." (R. p. 9, lines 16-18). Shortly thereafter, the trial judge stated he had reviewed the file and "excluded the vast majority of what was turned in to me because I do find that those were simply notes that are not subject to disclosure." (R. p. 10, lines 8-10).

Appellant raised the issue on appeal when he requested that the trial judge review the therapist's records for exculpatory material. The trial judge then ruled on the issue when he decided what Appellant was entitled to access from the file. Further, on March 22, 2011 he issued a written order that stated "Court Exhibit #1" was not discoverable and sealed the therapist's file only to be opened at the "direction of an appellate court

with jurisdiction in this case." (R. p. 3). As it was raised by Appellant and ruled upon by the trial judge, the issue is preserved for appellate review.

In a recent decision the Supreme Court noted "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." Id., 697 S.E.2d at 595-96 (citing Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939). Under this standard for issue preservation, the issue of Appellant's entitlement to exculpatory material in the therapist's file is properly before this Court.

CONCLUSION

Appellant respectfully requests this Court to remanded his case back to the trial judge with instructions for him to unseal "Court Exhibit #1" and review the entire file, especially the notes contained therein, for exculpatory material. If the trial judge determines the notes in the file are favorable to Appellant and material to his guilt or innocence, Appellant requests that he be granted a new trial in this matter.

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November 5, 2012

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PROOF OF SERVICE

The undersigned attorney hereby certifies that on this, the 6th day of November, 2012, he served a true copy of the Final Brief of Appellant and a true copy of the Reply Brief of Appellant on Julie K. Keeney, Assistant Deputy Attorney General, by U.S Mail with proper postage affixed and addressed as follows:

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November 6, 2012

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CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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