

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. YoungAppellant.

REPLY BRIEF OF APPELLANT

RECEIVED

NOV 07 2012

SC Court of Appeals

Laura L. Hiller, Esq.
Jonathan M. Hiller, Esq.
HILLER & HILLER, PA
1053 London St., Ste. B
Myrtle Beach, SC 29577
843-626-2835

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTSii

TABLE OF CASES..... iii

ARGUMENT..... 1

I. REMAND OF THIS MATTER IS NECESSARY DUE TO THE ERROR OF LAW
MADE BY THE TRIAL JUDGE WHEN HE CONDUCTED HIS REVIEW OF
THE THERAPIST’S FILE FOR EXCULPATORY MATERIAL..... 1

II. REMAND OF THIS MATTER IS ALSO NECESSARY BECAUSE APPELLANT
CANNOT SHOW A BRADY VIOLATION WHEN HE IS DENIED ACCESS TO
THE VERY MATERIAL IN THE THERAPIST’S FILE HE NEEDS TO SHOW A
BRADY VIOLATION.....3

CONCLUSION 5

TABLE OF CASES

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)..... 1

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987)..... 2

State v. Moses, 309 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010)..... 4

The State first argues that the trial judge's review of the therapist's file was not preserved for appellate review by trial counsel. (Resp't's Br. 6-7). Appellant addressed issue preservation in his Final Brief. (Appellant's Br. 8-9). The State argues second that remand is not necessary as Appellant conceded on appeal that the trial judge has already examined the therapist's file for exculpatory material. (Resp't's Br. 8-9). The State's third argument is that Appellant cannot establish a violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). (Resp't's Br. 9-10). Appellant's reply to the State's second and third arguments follows.

I. Remand Of This Matter Is Necessary Due To The Error Of Law Made By The Trial Judge When He Conducted His Review Of The Therapist's File For Exculpatory Material.

Appellant disagrees with the State's allegation that he conceded the very issue he raises and argues on appeal. The record reveals that the trial judge's review of the therapist's file was a review pursuant to Brady for exculpatory material. (R. p. 9, lines 16-18). Appellant's position on appeal is that the trial judge committed an error of law when, during his review of the therapist's file, he denied Appellant access to all of the notes in the file for the simple reason that he identified the notes in the file as "not subject to disclosure." (R. p. 10, lines 7-10).

Even the State admits that "the trial judge indicated that he excluded the vast majority of what the therapist provided him because those documents were notes that he concluded were not subject to disclosure." (Resp't's Br. 5). Denying Appellant access to the vast majority of the file using classification-based logic without an examination of the substance of the notes was an error of law committed by the trial judge. This error was an abuse of discretion that violated Appellant's right to due process of law. Under Brady

and its progeny, Appellant was entitled to any exculpatory documents in the file without regard to the classification assigned by the trial judge. See Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001 (1987) (“Ritchie is entitled to have the [forensic] file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial.”). In Ritchie, the Supreme Court did not exclude therapist’s notes, or any other subset of documents, from this review. Appellant’s trial judge categorically excluded the therapist’s notes from his review in violation of Appellant’s right to due process, and this error of law necessitates remand.

The State argues “nothing in the record suggests that the trial judge did not review the file for exculpatory material.” (Resp’t’s Br. 8). Appellant strongly disagrees with this statement. Twice during the pre-trial hearing, the trial judge stated the notes in the file were not subject to disclosure. (R. p. 10, lines 7-10; R. p. 12, lines 15-16). Thus, the record in this case provides strong support for Appellant’s position that the trial judge never reviewed the substance of the notes in the file for exculpatory content. The trial judge determined all notes in the file were simply not discoverable without giving any consideration to whether the notes, in terms of their substance and content, had exculpatory value. The trial judge reduced his oral ruling to a written, pre-trial order that sealed “Court Exhibit #1” and labeled it as “not discoverable.” (R. p. 3).

If Appellant had conceded that the trial judge’s review of the therapist’s file was proper under Brady and Ritchie, then the State’s second argument may have had some merit. However, as Appellant never conceded this point, the State’s second argument fails, and this case should be remanded to allow the trial judge to review the entire file for exculpatory material to which Appellant was and is entitled.

II. Remand Is Also Necessary Because Appellant Cannot Show A Brady Violation When He Is Denied Access To The Very Material In The Therapist's File He Needs To Show A Brady Violation.

The State argues that Appellant cannot establish a Brady violation as he must presume that the sealed therapist's file is favorable to him and material to his guilt or innocence and characterizes Appellant's presumption as "completely speculative and without basis." (Resp't's Br. 10). First, Appellant has a good faith basis for his forced presumption. The child delay-disclosed against Appellant to her stepmother, not the therapist, several months after she disclosed against Appellant's wife. (R. p. 26, line 19-p. 27, line 6; R. p. 88, lines 5-11). When taken to the therapist, the child understandably repeated what her stepmother claims she disclosed. Under these facts, the notes taken on the date of disclosure when compared with notes taken during other therapy sessions would almost certainly yield favorable, exculpatory information that is material to Appellant's guilt or innocence.

Second, the most serious concern inherent in the State's argument is the fact that Appellant cannot avoid presuming materiality and favorability under the circumstances of his case. This raises a second, related due process concern, in that Appellant is being asked to successfully argue a Brady violation blindly. Appellant has maintained throughout this appeal that he is without the ability to know the substance of the notes in the therapist's file, so he cannot conclusively state whether the content of the notes in the file are favorable to him. Similarly, he cannot demonstrate to this Court that the substance of the notes in the file is material to his guilt or innocence or impeaching.

Appellant is not alone in this dilemma. The therapist's file is sealed at this time, and neither Appellant nor the State, nor even this Court, can know whether the contents

of that file are favorable to Appellant and material to his guilt or innocence. Before he filed his briefs with this Court, Appellant filed a Motion to Unseal Court Exhibit and submitted a memorandum in support of his motion. Appellant asked this Court to unseal the therapist records during the pendency of this appeal. Alternatively, Appellant sought leave to presume the records were favorable to Appellant and material to his guilt or innocence as required to establish a Brady violation. See State v. Moses, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (Ct. App. 2010) (holding a Brady violation requires a demonstration that the evidence was “(1) 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.”). This Court did not grant Appellant’s motion and declined to address the alternative relief Appellant sought in his motion.

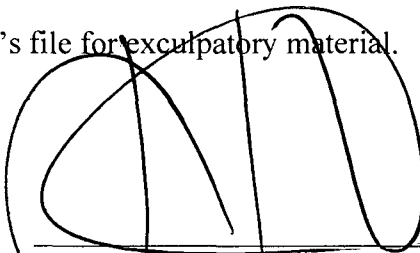
At this juncture Appellant respectfully submits that the best way to determine whether his due process rights were violated is to remand this case back to the trial judge with instruction to unseal the court exhibit and examine the totality of the therapist’s file for exculpatory material to which Appellant was entitled under Brady.

The State argues that the trial judge suppressed the notes in the therapist’s file, not the prosecution. (Resp’t’s Br. 10). This argument completely ignores and overlooks the fact that the prosecution asked the trial judge to suppress the material. As the State’s brief notes, “the State submitted a motion in limine dated March 8, 2011, to exclude the therapist’s records at trial and to deny Appellant access to the records pursuant to State v. Trotter.” (Resp’t’s Br. 4). It is disingenuous to argue that no Brady violation occurred

because the State was not the suppressing agency when the prosecution both consented to the process by which the trial judge suppressed the records and argued for suppression.

CONCLUSION

The record demonstrates that the trial judge's review of the therapist's file did not include a consideration of the content or substance of the notes contained therein. During his review, the trial judge classified the notes as such and then denied Appellant access to all notes based on the classification he assigned, with no analysis of whether the content and substance of the notes had exculpatory value to Appellant. The trial judge's review of the file thus violated Appellant's rights under Brady. The issue of Appellant's access to exculpatory material in the file was raised by Appellant pre-trial and ruled on by the trial judge with finality before the start of trial. Appellant respectfully requests this Court to remand the case back to the trial judge with instructions to unseal and review the content and substance of the notes in the therapist's file for exculpatory material.



Laura L. Hiller, Esq.
Jonathan M. Hiller, Esq.
HILLER & HILLER, PA
1053 London St., Ste. B
Myrtle Beach, SC 29577
P: 843-626-2835
F: 843-626-9690

November 5, 2012

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

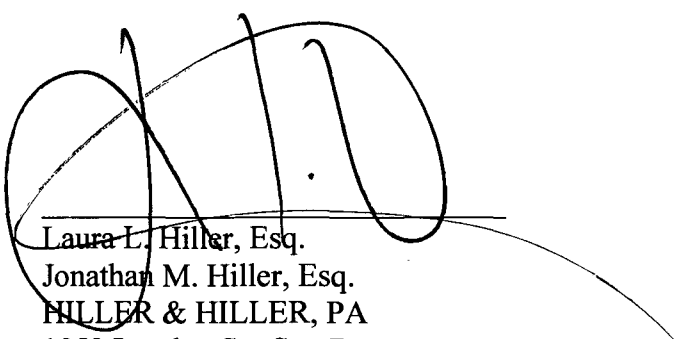
The State of South Carolina.....Respondent,

v.

Timothy E. YoungAppellant.

CERTIFICATE OF COUNSEL

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



Laura L. Hiller, Esq.
Jonathan M. Hiller, Esq.
HILLER & HILLER, PA
1053 London St., Ste. B
Myrtle Beach, SC 29577
P: 843-626-2835
F: 843-626-9690

November 5, 2012

ATTORNEYS FOR APPELLANT