APPEAL FORM COMMON PLEAS REGARDING A CONVICTION IN MUNICIPAL COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2018-1291

City of Columbia .....*Appellant,*

vs.

Shasha Rawlinson .....*Respondent.*

INITIAL BRIEF OF RESPONDENT

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Did the Circuit Court Err in Vacating Rawlinson's Conviction?

STATEMENT OF THE CASE/FACTS

On June 23, 2016, Respondent Shasha Rawlinson ("Rawlinson") was charged with giving false information to law enforcement and shoplifting. On July 14, 2016, Rawlinson requested a jury trial and subsequently sent the Appellant City of Columbia ("City") discovery requests pursuant to Rule 5, *SCRCrimP*, and *Brady v. Maryland*, 373 U.S. 83 (1963). However, the City did not respond to Rawlinson's discovery requests.

Prior to the commencement of trial on March 16, 2017, Rawlinson asserted several motions including a motion to dismiss, a motion to suppress any and all evidence that was wrongfully withheld by the City and not produced in discovery, and a motion for a continuance so that Rawlinson could review the City's discovery responses offered at the 11th hour and prepare a defense in her case accordingly. Despite the City's acknowledgement that it had not properly complied with discovery, the City of Columbia Municipal Court summarily denied all of Rawlinson's motions. Rawlinson was thereafter tried and found guilty on both charges, despite her objections to the admission of certain evidence such as videos, witness testimony, etc., which had not been timely produced in discovery. The trial court sentenced Rawlinson to thirty days in jail on each charge, ordered the sentences to run concurrently and to be served on weekends.

Rawlinson timely appealed her wrongful conviction to the Richland County Court of Common Pleas. Thereafter, the municipal court filed its return as required by S.C. Code Ann. §14-25-105 (Sup. 2008). For unknown reasons (totally out of Rawlinson's control), the court reporter from the trial was unable to provide a trial transcript as part of the court's return.

The circuit court, sitting in its appellate capacity (hereinafter "circuit court"), heard oral arguments on April 13, 2018. At the hearing, the City contended that *the only remedy* available to the circuit court was remanding the case for a new trial solely based on the trial court's inability to produce a transcript of the trial. Rawlinson, however, sought to have the conviction vacated *not only* due to the transcript issue but also due to the other defects in the handling of the trial by the trial court.

On June 13, 2018. The circuit court vacated Rawlinson's convictions and dismissed the charges against her with prejudice. The City thereafter timely filed and served its notice of appeal in this matter and it is now before this Court.

ARGUMENT

The Circuit Court Did Not Err in Vacating Rawlinson's Conviction Based on Numerous Factors, Most of Which Are Ignored by the City on Appeal.

I. Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Hewins*, 409 S.C. 93, 102, 760 S.E.2d 814, 819 (2014) (citing *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001)). In *State v. Williams*, the South Carolina Supreme Court held that on appeal, "[t]he findings of the [trial] court are binding . . . unless unsupported by the evidence or clearly wrong, or controlled by an error of law." *State v. Williams*, 326 S.C. 130, 135, 485 S.E. 2d 99, 102 (1997). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (*citing State v. McDonald*, 343 S.C. 319, 540 S.E. 2d 464 (2000)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987).

A *Brady* violation occurs when evidence not produced: "(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*, 390 S.C. 502, 515, 702 S.E. 2d. 395, 402 (2010). If a *Brady* violation has occurred, reversal is required. *State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App.1998) (*citing Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555)). In addition to the mandatory disclosures for the state referenced above, other evidence is also discoverable upon request by a criminal defendant pursuant to Rule 5 of the South Carolina Rules of

Criminal Procedure. Under Rule 5, defendants are entitled to (1) any statements made by the defendant, (2) defendant's prior criminal record, (3) documents and tangible objects that are material to the preparation of the defense, (4) reports of examinations and tests material to the preparation of the defense. *See* Rule 5(a)(1)(A-D) *SCRCrimP.* "For purposes of Rule 5, 'material' is used in the same context as it is in a *Brady* analysis." *Moses*, at 515, 702 S.E. 2d at 402 n.5 (*quoting State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct.App.1998)). "[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." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Once there is a Rule 5 violation, a court will only reverse "where the defendant suffered prejudice as a result of the violation." *Moses*, at 453–54, 503 S.E.2d at 220.

II. The Trial Court Correctly Vacated Rawlinson's Conviction and Declined to Remand This Matter for a Second Trial.

A. The City Conceded It Committed Discovery Abuse Prior to Trial and Any Argument to the Contrary Is Not Properly Before This Court.

The City's sole argument on appeal is that the circuit court, when faced with the knowledge that the trial transcript had either been lost or destroyed (while completely within the City's control), could *only* remand the case for the reconstruction of the trial record or for a new trial. Ignored by the City (other than a tacit reference on the last page of its brief) is this language from the circuit court's Order:

> There is no genuine dispute that discovery in this case was not provided to the [Rawlinson] in accordance with established law, precedent, and constitutional mandate prior to the established trial date for this case. As such, the consideration in this case revolves around the trial court's handling

> of this discovery issue. [Rawlinson] asserts the trial court erred in failing to dismiss this case, that the trial court erred in failing to suppress any and all evidence that had not been timely produced in discovery, and, failed in refusing to grant a continuance in this matter. The [City] consents to a remand of this case based on the lack of an underlying transcript.

Order of the Honorable L. Casey Manning (July 11, 2018). When offered an opportunity to address the discovery or any other issues appealed by Rawlinson at oral argument, the City did not refute Rawlinson's assertions. The City merely stated that, in its view, "the only remedy really before the court today is to remand." *Transcript (April 13, 2018)* at p. 10. The City offered no explanation as to *why* (1) the circuit court should ignore the City's obvious discovery abuse or (2) why the trial transcript was absolutely necessary to address that issue on appeal.

Once the circuit court's order was issued, the City *again* had the opportunity to ask the circuit court to address its determination that discovery abuse was the primary issue before it via Rule 59(e), *SCRCP*, and again failed to do so. Finally, as mentioned above, the City makes only a passing mention in its brief as to the propriety of the circuit court making a determination that it improperly participated in discovery to Rawlinson's detriment. As such, it is apparent that the City was putting all of its eggs in its *"the trial transcript was lost so the circuit court can't do anything but remand"* basket, and in effect waived any argument that it properly participated in discovery so as not to prejudice Rawlinson. "[E]ven if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court." S.C. Dept. of Transp. v. M & T Enter., 379 S.C. 645, 658-59, 667 S.E.2d 7, 15 (Ct. App. 2008). "[I]ssues not argued in the brief are deemed abandoned and will not be considered on appeal." Fields v. Fields, 342 S.C. 182, 191 n.8, 536 S.E.2d 684, 689 n.8 (Ct. App. 2000) (citing First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994));

see also Glasscock, Inc. v. U.S. Fid. and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[A] one sentence paragraph raised in an appellant's brief was insufficient to preserve the issue for appeal."). As such, Rawlinson takes the position that the City has conceded that there was no genuine dispute as to its discovery abuse prior to trial.

B. The City Offers No Reason Why the Case Must Be Remanded Simply Because the City Lost the Trial Transcript.

In its brief, the City offers no argument as to *why* this case must be remanded because the trial transcript was lost by the City itself other than the transcript is needed to affect a complete review of the record in this matter. However, as the City conceded that it committed discovery abuse, Rawlinson contends that any need for the case to be remanded for a new trial or to reconstruct the record has been obviated. In Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), the South Carolina Supreme Court acknowledged that

> Brady is based on a sense of fairness, and a belief that society gains when a defendant is accorded a fair trial. The focus is not on the misconduct of the Prosecutor, but on the fairness of the procedure." New York v. Jackson, 154 Misc.2d 718, 593 N.Y.S.2d 410, 417 (Sup.Ct.1992). As the Supreme Court explained in Brady, "[t]he principle ... is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. ***Society wins not only when the guilty are convicted but when criminal trials are fair***[.]" Brady, 373 U.S. at 87, 83 S.Ct. at 1197, 10 L.Ed.2d at 218.

Id. at 528, 514 S.E.2d at 326–27 (***emphasis*** added).

The relief afforded by the trial court is fully supported without a reconstructed record or a second trial. It is uncontradicted that the trial court abused its discretion by allowing into evidence testimony and other matters that the City failed to turn over during discovery. Consequently, the circuit court properly vacated Rawlinson's convictions. See Graham v. Babb, Op No 2010-UP-298 (Ct. App. 2010) (the South Carolina Court of Appeals

affirmed dismissal on the basis of a discovery violation and cited Rule 37 (b)(2)(C), *SCRCP*, noting that when a party fails to comply with a discovery order, the trial court has the discretion to impose any sanction it deems just, including dismissal of an action).

C. Rawlinson Will Be Severely and Unfairly Prejudiced by This Matter Being Remanded for a New Trial.

Any remand of this matter for a second trial on the same charges would clearly violate Rawlinson's due process right to not be twice subjected to jeopardy of life or liberty. According to the United States and South Carolina constitutions, no person shall be "subject for the same offense to be twice put in jeopardy of life or liberty." U.S. Const. amend. V; *see also* S.C. Const. art. I, § 12. Under the law of South Carolina, "a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005). *See Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089 (1982) (where the governmental conduct in question brought about mistrial, the defendant can raise the bar of double jeopardy to a second trial).

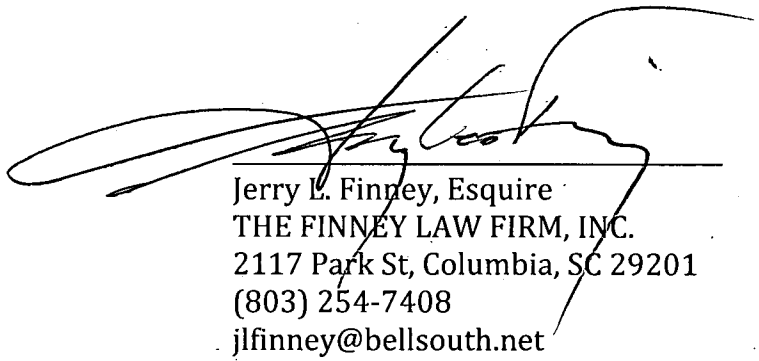
Here, by not preserving the trial record for appeal, the City has deprived Rawlinson of her right, which is a "weighty one," to be subjected to only one trial as to the same charges. Because there is no trial record for the court to consider on appeal, by no wrongdoing of her own, Rawlinson in this matter is suffering the consequences of public embarrassment and indignity from a justice system that expects her to wait, yet another unknown period of time, for a retrial resulting from the City's own shortcomings and unconstitutional treatment of Rawlinson. Not only has the failure to preserve the trial record here created a constitutional concern, it additionally carries significant policy

considerations that should be addressed. Hundreds of criminal proceedings occur in municipal courts around South Carolina on a daily basis, and of those hundreds, many are appealed to the Circuit Court as the case *sub judice*. Not only is it exploitive of defendants when municipal courts fail to preserve their records in preparation of appeals, but it is also a great waste of judicial resources. Any burden of that blunder should be placed on the trial court and not upon the defendant.

In the event the City argues on reply that the puzzling loss of the trial record is a "trial error," thus suggesting that jeopardy was never suspended and that no Fifth Amendment violation occurred, Rawlinson asserts that the loss of a trial record is not trial error, but instead is an unfortunate clerical misstep by the government that unfairly puts the defendant here in the precarious situation of facing an improvident retrial. Depriving Rawlinson of a principal thread making up the protection embodied in the Double Jeopardy Clause certainly should be considered a violation of her Constitutional rights. As such, the City's desire to have this matter remanded for a retrial is clearly outweighed by Rawlinson's right to avoid double jeopardy.

CONCLUSION

The circuit court properly vacated Rawlinson's conviction due to the obvious abuse of discretion committed by the trial court in allowing the City to admit evidence that was never provided to Rawlinson during discovery in violation of Rule 5 and *Brady v. Maryland*. That, coupled with the fact that the City lost/destroyed the trial transcript, certainly justified the circuit court's decision as subjecting Rawlinson to a second trial would have exposed her to double jeopardy.



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March 4, 2019

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PROOF OF SERVICE AS TO INITIAL BRIEF OF RESPIONDENT

I, the undersigned employee of THE FINNEY LAW FIRM, INC., hereby certify that pursuant to Rules 208(a) and 262(b), *SCACR*, I have served the ***Initial Brief of Respondent*** in this matter on all counsel of record by mailing a copy, United States Mail, postage prepaid, on March 4, 2019, to the following addresses:

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IN MEMORIAM
RETIRED CHIEF JUSTICE
SOUTH CAROLINA SUPREME COURT
ERNEST A. FINNEY, JR.
1931-2017

March 4, 2019

Please Reply to Columbia Office

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *The City of Columbia v. Shasha Rawlinson*
App. Case #: 2018-001291

Dear Ms. Kitchings:

Enclosed for filing, please find the original and four (4) copies of the *Initial Brief of Respondent* and the *Designation of Matter to be Included in the Record on Appeal*, along with the Proof of Service of each, relative to the above-captioned matter.

By copy of this letter, I am serving the same on the attorney for the Appellant.

Thank you for your assistance in this matter.

With kind regards, I remain

Sincerely,

Jerry L. Finney
JLF/isj

Enclosures as stated
cc: Jessica Mangum, Esquire

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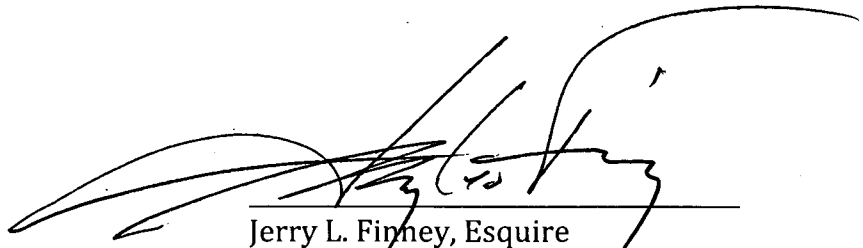
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent hereby proposes the following be included in the Record on Appeal:

- All matters designated by the Appellant
- *Order of the Honorable L. Casey Manning (July 11, 2018)*
- *Transcript (April 13, 2018)*

I hereby certify, pursuant to Rule 209(c), SCRAP, that this designation contains no matter which is irrelevant to this appeal.



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PROOF OF SERVICE AS TO DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

I, the undersigned employee of THE FINNEY LAW FIRM, INC., hereby certify that pursuant to Rules 209(a) and 262(b), *SCACR*, I have served the ***Designation of Matter to Be Included in the Record on Appeal*** in this matter on all counsel of record by mailing a copy, United States Mail, postage prepaid, on March 4, 2019, to the following addresses:

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