

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

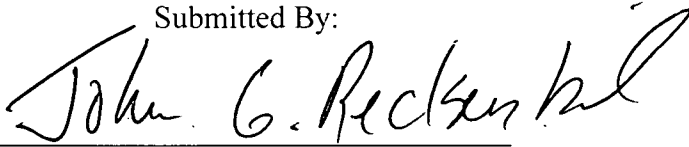
APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
J. Derham Cole, Circuit Court Judge

Case No.: 2012-209946

The StateRespondent.
vs.
Phillip McEntire.....Appellant.

AMENDED APPELLANT'S INITIAL BRIEF
(Anders Brief)

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SC Court of Appeals

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CASES

1. Anders v. California, 386 U.S. 738 (1967)
2. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000)
3. Brady v. Maryland, 373 U.S. 83 (1963)
4. Brady v. United States, 397 U.S. 742, 748(1970)
5. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)
6. State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)
7. State v. Hill, 368 S.C. 649, 657, 630 S.E.2d 274, 279 (2006)
8. Porter v. State, 368 S.C. 378, 384, 629, S.E.2d 353, 356 (2006)
9. Rivers v. Strickland, 213 S.E.2d 97, 98 (1975)
10. United States v. Ruiz, 536 U.S. 622, 628 (2002)

STATEMENT OF ISSUE ON APPEAL

Is the failure by the State to turn over to Defendant or his Counsel video tapes of confidential informant's alleged drug transaction involving defendant a Brady violation? Brady v. Maryland, 373 U. S. 83 (1963).¹ Counsel has researched applicable case law and has found no legitimate ground for appeal. Accordingly, this issue is briefed pursuant to mandate of Anders v. California, 386 U.S. 738 (1967).

STATEMENT OF CASE

On August 12, 2011 J. Patricia Anderson, counsel for the defendant filed a Notice of General Appearance, Brady Motion under Rule 5 of South Carolina Criminal Procedure, and Notice of Motion under Rule 6 of South Carolina Criminal Procedure requesting Discovery from the State for warrant numbers M754321; M753771; M753770; M753821.

Defense Counsel's Brady request contained two pertinent parts:

“Disclosure to the defense of any and all exculpatory information that is now or has been or may come to the attention of the prosecution or police or any person or agency associated with the prosecution, in the subject matter, until the conclusion of this matter by trial and appeal; as required under the mandate of Brady v. Maryland, 373 U. S. 83 (1963)”

“All books, papers, documents, photographs, tangible objects, building or places, or copies or portions thereof, which are in the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.”

On September 20, 2011, the State provided a copy of case file(s) M754321; M753771; M753770; M753821; to Defendant's Counsel. On the “Affidavit(s) of Discovery” provided by

¹ While this Court did not deny our appeal, they reaffirmed in an order, dated May 17, 2013, that all matters not raised to the trial court are barred which ultimately barred our ability to make any legal argument concerning the issue.

the State, there was no indication on Affidavit Sheet that there were any DVD's or videos being turned over to the Defendant or in the possession of the State. In the "fine print" of two incident reports pages 10 and 22 in the packet of seventy (70) pages of disclosed Discovery indicated "Defendant was identified from the U/C videos." These videos along with a SCDMV photo were used to identify the defendant in undercover drug transactions. The confidential informant(s) name(s) was/were blacked out in the chain of custody disclosures. On October 5, 2011, the State sent an email plea offer where upon the Defendant could plea to trafficking cocaine less than one hundred (100) grams and one count of trafficking cocaine more than ten (10) grams with a recommendation of a negotiated sentence of eighteen (18) years. Further in that offer as a result of the plea the State was going to drop one count of possession with intent to distribute marijuana and one count of trafficking more than ten (10) grams of cocaine. On March 8, 2012, the Defendant plead guilty to trafficking cocaine twenty-eight (28) grams or more, but less than one hundred (100) grams-first offense (M753821). Defendant further plead guilty on the same day to trafficking cocaine 10 grams or more but less than twenty-eight (28) grams-second offense (M753771). The Defendant received a term of imprisonment of eighteen (18) years to be run concurrent. Through his counsel Defendant appealed his plea under Brady in a Notice of Appeal filed March 13, 2013. In an Order from this Court filed May 17, 2013 the Court decided to deny the State's motion to dismiss; however, the State's motion to strike matters not present to the plea court was granted.

FACTS

This Defendant was charged with four separate warrants M754321, M753771, M753770, M753821. M753771 date of offense was April 15, 2011, and M753821 date of the offense was

May 6, 2011. The arrest on May 6, 2011 was a result of police units following this Defendant to a Best Buy located in Spartanburg County. Upon the Defendant exiting his vehicle and about to enter the store the Defendant was apprehended by law enforcement. At no time was any video surveillance used during this arrest. The amount of drugs obtained by the law enforcement units on this particular arrest was the charge that this Defendant was facing the most possible jail time. The negotiations between the State and the Defendant(s) counsel focused upon the "Best Buy" arrest. The State made it known that if Defendant did not accept plea negotiations the "Best Buy" case would be tried first and then the other three cases tried subsequently thereafter. At no time were the videos of the undercover drug buys in the other case ever formally disclosed to this Defendant.

LAW AND ANALYSIS

When attempting to determine the voluntary and intelligent nature of a plea, the plea colloquy ordinarily serves as confirmation that a criminal defendant is waiving the right to raise certain constitutional claims by pleading guilty. *See Rivers v. Strickland*, 213 S.E.2d 97, 98 (1975) ("The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea. An accused also waives the right to trial and the incidents thereof and the constitutional guarantees with respect to criminal prosecutions.") However, "[g]iven the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'" *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) (quoting *Brady v.*

United States, 397 U.S. 742, 748 (1970)) (alterations in original). Specifically, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) (emphasis removed) (citing *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980)).

In *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999), we held that an applicant "may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged *Brady* violation." See e.g., *State v. Hill* 368 S.C. 649, 657, 630 S.E.2d 274, 279 (2006) (recognizing the Court's extension of the *Brady* disclosure rule to guilty plea and sentencing procedures). (1) whether the evidence in question was favorable to the applicant; (2) whether the prosecution knew of or had the evidence in its possession; (3) whether the prosecution suppressed the evidence; and (4) whether the evidence was material to Petitioner's guilt or punishment. See *Gibson*, 334 S.C. at 524, 514 S.E.2d at 324.

The Appellant made no objections to the Court. Any guilty plea constitutes a substantial waiver of a defendant's constitutional rights. The Supreme Court has stated waiver of constitutional rights to be valid, it must be "an intentional relinquishment or abandonment of a known right or privilege." The Supreme Court mandated that there must be an affirmative showing that a defendant voluntarily and intelligently entered a guilty plea to the Court.

To plea guilty, the law requires the Court to personally address the defendant, informing the defendant of, and determining the defendant's understanding of, the following: (1) the nature of the charge and the penalties involved, (2) the right of representation by an attorney, (3) the right to a jury trial, (4) that pleading guilty waives the right to a jury trial, (5) the requirement that the defendant answers all questions from the Court truthfully, (6) any terms in a plea

agreement as to promises or coercion, and (7) to address the defendant in open court to determine whether the plea was made voluntarily.

Counsel for Appellant has reviewed the record in this case after the ruling to strike all matters not present to the plea court and is satisfied the Appellant's guilty plea was properly accepted by the trial court. A review of the record shows the trial court thoroughly addressed all issues required. The trial court reviewed the crime Appellant was pleading guilt to and the penalties for the crime. The trial court also addressed the voluntariness of Appellant's plea, making sure the plea had been in no way coerced. The trial court discussed the significant rights Appellant was waiving, and received an affirmative response from Appellant stating his understanding of that waiver.

Counsel has reviewed the record in this case and researched relevant case law. Counsel is satisfied that the guilty plea was valid, and this brief is therefore filed pursuant to Anders v. California, 386 U.S. 738 (1967).

CONCLUSION

As required by *Anders v. California*, counsel has reviewed both the facts and legal issues in this case. *Anders v. California*, 386 U.S. 738 (1967). Based on that review, counsel has determined there are no meritorious issues for appeal. Consequently, I respectfully move to withdraw this appeal in accordance with *Anders* and ask this court to rule on this appeal accordingly. A copy of this brief has been provided to the Appellant, and Appellant has been informed of his right to raise any additional issues within a reasonable time.

RESPECTFULLY SUBMITTED,



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