March 17, 2019

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Donna Boyd v. State of South Carolina
Case No: 2017-CP-23-7725

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them in the enclosed postage paid envelope. Thank you.

Respectfully,

Donna Boyd

DCB/
enclosures

cc: Megan Jameson, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ALEX KINLAW, JR.

2017-CP-23-7725

DONNA BOYD,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

MAR 21 2019

S.C. SUPREME COURT

NOTICE OF APPEAL

Donna Boyd appeals the denial of her Post-Conviction Relief. The Post-Conviction Relief Action was heard by the Honorable Alex Kinlaw Jr., Circuit Judge on October 26, 2018, and Order denying the Appellant's Post-Conviction Relief issued on January 24, 2019 and filed on January 31, 2019. The Appellant received notice of the judgment on February 7, 2019. Pursuant to Rule 59 (e) of the South Carolina Rules of Civil Procedure, the Appellant on February 14, 2019, respectfully moved the Court to alter or amend its Order dated January 24, 2019. The Court received the motion on February 19, 2019, and denied the Appellant's Rule 59 (e) motion on February 20, 2019. The Appellant received the order denying the motion on February 23, 2019, notably Form 4 missing. The Appellant reasserted the Rule 59 (e) motion on March 4, 2019. The Court failed to respond to the Rule 59 (e) motion. The transcript of the hearing held on October 26, 2018, requested on March 14, 2019.

Donna Boyd
Pro Se
Post Office Box 1168
Mauldin, South Carolina 29662
(773)266-2711

Counsel of Record:
Megan Jameson, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

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APPEAL FROM GREENVILLE COUNTY
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2017-CP-23-7725

DONNA BOYD,

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STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid on March 17, 2019, addressed to their attorney of record. Megan Jameson, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated March 17, 2019

Donna Boyd
Pro Se
Post Office Box 1168
Mauldin, South Carolina 29662

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Donna Boyd, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2017-CP-23-7725 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed by Donna Boyd (Applicant) on December 4, 2017, alleging various allegations of prosecutorial misconduct. The State of South Carolina (Respondent) served its return on May 2, 2018, requesting an evidentiary hearing.

An evidentiary hearing was held on October 26, 2018, before this Court at the Greenville County Courthouse. Applicant was present and appeared *pro se*. Respondent was represented by Assistant Attorney General DeShawn H. Mitchell. At the hearing testimony was taken from Applicant and prosecutor George K. Lyall. Following all testimony and argument, this Court offered both parties additional time to submit briefs on three issues: first, the issue of the trial judge answering a jury question in front of the jurors in the jury deliberation room with Applicant and the prosecutor present; second, the issue of a witness's conversation with an alternate jury; and third, the issue of whether the destruction of a video prejudiced Applicant's case. Respondent submitted a brief on November 6, 2018. Applicant did not submit a brief, but did submit a substantive email that she asked be treated as a brief on November 26, 2018.

Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish that on November 16, 2012, Applicant was arrested and charged with filing a false police report of a misdemeanor (Warrant No. 2012A-23-30204055) in Greenville County stemming from an incident on October 30, 2012, wherein Applicant filed a police report that she had been assaulted by Jack Crumpton with Foothills Investigations while he served her with documents and the allegations of assault were later refuted by video evidence. She was originally represented by Michael F. Talley, Esquire, who later moved to be relieved and his requested was granted on April 9, 2014. On June 25, 2014, Applicant proceeded to trial *pro se* before the Honorable Dean E. Ford, magistrate judge, and a jury. The case was prosecuted by George K. Lyall, Esquire. At the conclusion of trial, the jury returned a guilty verdict.

On July 7, 2014, Applicant filed a notice of appeal to the Greenville County Court of Common Plea. A hearing regarding Applicant's appeal was convened on August 12, 2014; however, Applicant did not appear. On August 14, 2014, the Honorable D. Garrison Hill issued an order dismissing Applicant's appeal for failure to prosecute.

Following the dismissal, on August 27, 2014, Applicant filed a *pro se* notice of appeal to the South Carolina Court of Appeals. Applicant then filed a *pro se* initial brief and designation of matter; however, she subsequently retained J. Falkner Wilkes, Esquire, to represent her in this appeal. By Order filed May 21, 2015, South Carolina Court of Appeals granted Mr. Wilkes' motion to "allow counsel to engage in the representation of the Appellant" who has previously proceeded *pro se* and granted his request to withdraw Applicant's *pro se* initial brief and accept an amended initial brief and designation of matter. Mr. Wilkes subsequently filed a brief in support of Applicant's appeal and the State filed a brief in response. On June 15, 2016, the Court of Appeals affirmed the circuit court's dismissal of Applicant's appeal as well as her

conviction in an unpublished opinion. State v. Boyd, Op. No. 2016-UP-299 (S.C. Ct. App. Filed June 15, 2016). Applicant submitted a timely Petition for Rehearing and by Order filed August 18, 2016, the petition was denied.

On September 16, 2016, Applicant submitted a Petition for a Writ of Certiorari to the South Carolina Supreme Court. The State submitted its Return to Petition for Writ of Certiorari on October 13, 2016. On May 30, 2017, the Supreme Court denied Applicant's Petition for Writ of Certiorari. The Remittitur was returned to the circuit court on June 12, 2017.

ALLEGATIONS RAISED IN THE APPLICATION AND AT THE HEARING

In her application for post-conviction relief, Applicant alleged the following claims for relief:

1. Prosecutorial Misconduct
    a. Prosecutorial abuse of discretion/vindictive prosecution
2. No Probable Cause, Failure to Prosecute
    a. No probable cause/one and half year delay to prosecute
3. Brady Violation
    a. State purposely withheld and destroyed evidence

Respondent served a return to this application on May 2, 2018, requesting an evidentiary hearing.

At the evidentiary hearing, Applicant proceeded forward on the following allegations: first, the issue of the trial judge answering a jury question in front of the jurors in the jury deliberation room with Applicant and the prosecutor present; second, the issue of a witness's conversation with an alternate jury; and third, the issue of whether the destruction of a video prejudiced Applicant's case. Applicant testified on her own behalf and Respondent presented testimony from prosecutor Lyall.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses

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presented, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Milledge v. State, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018) (citing Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) and Rule 71.1(e), SCRCP)). Applicant has alleged three instances of prosecutorial misconduct: first, the issue of the trial judge answering a jury question in front of the jurors in the jury deliberation room with Applicant and the prosecutor present; second, the issue of a witness's conversation with an alternate jury; and third, the issue of whether the destruction of a video prejudiced Applicant's case. This Court finds Applicant has failed to meet her requisite burden of proof as to any of these allegations. Each allegation is addressed in detail below:

Allegation that Applicant is entitled to relief based on the trial court entering the jury room

Applicant alleges she is entitled to a new trial because the trial court entered the jury room during deliberations to answer a question from the jury. The uncontroverted evidence presented by both Applicant and Respondent at the evidentiary hearing established that during deliberations, the jury sent a note to the trial court seeking clarification regarding probable cause. In response, rather than having the jury return to the courtroom, the trial court had Applicant and the prosecutor accompany him to the jury room, wherein the trial court responded to the jury question in the presence of Applicant and the prosecutor, then the judge and both parties left the room and the jury continued its deliberations. The prosecutor testified the court did not engage in any other discussion with the jury beyond responding to its question on probable cause. Applicant asserts she is entitled to relief based on the trial court entering the jury room.

Our Supreme Court addressed this issue in State v. Elmore, a capital case where Elmore

was sentenced to death following conviction or murder, first-degree criminal sexual conduct, and burglary. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). In Elmore, the trial judge entered the jury room accompanied by counsel from the Sate and the defense (but without Elmore himself) to answer a jury question during the guilty phase of his capital trial. Id. On appeal, the Supreme Court held, "Although we find no actual prejudice in this instance, we hold this conduct to be reversible error regardless of the presence of counsel. We caution the bench that this procedure is highly improper and also runs counter to the requirement that in a death case **the defendant be present at all stages of trial**." Id. (Emphasis added) (citing State v. Taylor, 261 S.C. 437, 200 S.E.2d 387 (1973); State v. James, 116 S.C. 243, 107 S.E. 907 (1921)).

In the present case, Applicant, who was the defendant in the action, was present in the jury room, and therefore, the trial judge's conduct does not run afoul of Elmore. Applicant has failed to establish that she was deprived her right to a fair trial by the trial judge entering the jury room to answer the jury's question when she was present for the entirety of the discussion. This allegation is denied and dismissed with prejudice.

Allegation that Applicant is entitled to relief based on a witness's conversation with alternate juror while the jury was deliberating the in the jury room after the alternate was excused

Applicant asserts that she is entitled to a new trial because one of the witnesses from trial, Jack Crumpton, approached and spoke to the alternate juror while the jury was deliberating. This was after the alternate juror had been excused from jury service and while the jury was deliberating in the jury room, away from this encounter. The prosecutor testified the encounter between the alternate and Crumpton was brought to the trial court's attention, and thereafter, the court placed Crumpton under oath and questioned him about the encounter. Crumpton informed the court he had no relationship with the alternate and simply asked her what she thought of the case before the alternate drove away. The prosecutor testified the alternate never sat with the jury

and never entered the jury room for deliberations. Applicant presented no evidence that the juror ever took part in deliberations or that the deliberations where in any way impacted by this encounter between the alternate and Crumpton.

"A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature." State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993) (citing State v. Johnson, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990); State v. Wasson, 299 S.C. 508, 511, 386 S.E.2d 255, 256 (1989); State v. Salters, 273 S.C. 501, 504, 257 S.E.2d 502, 504 (1979)). Moreover, "[i]t is the duty of the trial judge to see that a jury of unbiased, fair and impartial persons is impaneled. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998) (citing State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990)).

However, "unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." Kelly, 331 S.C. at 141, 502 S.E.2d at 104. Significantly, in South Carolina, prejudice will not be presumed from improper influences on the jury. State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999) ("The Court of Appeals erred in adopting a 'presumption of prejudice' standard."). Instead, prejudice must be shown by the defendant in order to warrant the grant of a mistrial or the disqualification of any jurors. Id.

In the present case, Applicant presented no evidence that the deliberations where in any way impacted by this encounter between the alternate and Crumpton. This Court finds Applicant has failed to meet her requisite burden of proof of establishing any conditional violations that would warrant a new trial. This allegation is denied and dismissed with prejudice.

Allegation that Applicant is entitled to relief based on the destruction of the surveillance video of the alleged assault between Applicant and Crumpton

Applicant also asserts she is entitled to a new trial based on the destruction of the videotape showing the encounter between Applicant and Crumpton that led to the charge for filing a false police report. Applicant testified she filed a police report after she was assaulted by Crumpton, a process server who served her with documents. She testified a video of the encounter was captured by surveillance cameras and law enforcement told her they had watched the video in determining whether an assault had occurred and deciding to charge her with filing a false police report. She testified she was informed by the prosecutor before her trial that the videotape had been destroyed and was not available.

The prosecutor testified when he began reviewing the casefile to prepare for trial, he noticed there were references to a surveillance video of the encounter between Applicant and Crumpton, but no video was in the file. He testified he immediately contacted Deputy Holloman, the investigating officer, to inquire about the video. He testified Deputy Holloman informed him that when the original assault case was opened based on Applicant's complaint, the video was paired with that file and stored within that file. He testified Deputy Holloman further explained when Applicant was charged with filing a false police report, a new casefile was opened for this charge and the casefile for the assault complaint was administratively closed. He testified the surveillance video was not transferred to or paired with the new casefile for filing a false police report, likely through inadvertence. He testified Deputy Holloman informed him the video was administratively destroyed in compliance with office protocols and procedures for destruction of closed casefiles.

Accordingly, no video of the encounter between Applicant and Crumpton was preserved or available for use at Applicant's trial. However, Crumpton did testify at trial and Applicant, who was the other party to the encounter, was also available at trial. Furthermore, several law

enforcement officers who watched the surveillance video testified at trial.

The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 520, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

Youngblood is factually analogous. In Youngblood, clothes from the child-victim in a sexual assault case were not properly refrigerated. Id. at 53. Experts for Arizona and the defendant confirmed semen on the clothes could have been tested if refrigerated properly. Id. at 54. In that case, unlike the present case, identity was an issue.

Youngblood held as follows:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly requires it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.

Id. at 58.

In the instant case, no evidence suggests law enforcement acted in bad faith. See United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does

not establish 'materiality' in the constitutional sense."). Instead, evidence in the record merely indicates negligence at most. State v. Reaves, 414 S.C. 118, 128, 777 S.E.2d 213, 218 (2015) (finding that although the police investigation was severely flawed with several failures to preserve evidence, "the record . . . contains no indication these flaws were the product of more than mere negligence."). The defendant's burden to show bad faith is not relaxed merely because the lost or destroyed evidence is the defendant's "only hope of exoneration" or is "essential to and determinative of the outcome of the case." Illinois v. Fisher, 540 U.S. 544, 548 (2004).

In support of her allegation, Applicant cites Brady v. Maryland, 373 U.S. 83 (1972) in attempt to conflate the concepts from Brady with Youngblood. The United State Supreme Court compared the two cases in Fisher as follows:

> We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. See Brady v. Maryland, 373 U.S. 83, 83 S.C. 1194, 10 L.E.2d 215 (1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In Youngblood, by contrast, we recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S. at 57, 109 S.Ct. 333. We concluded that the failure to preserve this "potentially useful evidence" does not violate due process "*unless a criminal defendant can show bad faith on the part of the police.*" Id., at 58, 109 S.Ct. 333 (emphasis added).

Id. at 547-48 (finding destroyed narcotics in Fisher were like the "potentially useful evidence referred to in Youngblood, not the material exculpatory evidence addressed in Brady and Agurs."). Applicant is not relieved of Youngblood's demand that she demonstrate bad faith by law enforcement, and therefore, her reliance on Brady is misplaced.

Here, Applicant cannot demonstrate that the State destroyed the video evidence in bad faith. More importantly, Applicant had evidence of comparable value at her disposal. All of the

actors who had a role in the case were available to testify and the jury could consider their testimony. Applicant was present at the trial as she represented herself, Crumpton was present, and so were the officers who viewed the video after Applicant filed her police report. Based on the available parties, Applicant had evidence of comparable value to prove her case. Accordingly, Applicant has failed to meet her requisite burden of proof and this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant her application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 24 day of January, 2019.

ALEX KINLAW JR.
Presiding Judge
Thirteenth Judicial Circuit

Greer, South Carolina

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