

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JAMES WRIGHT

APPELLANT

APPELLATE CASE NO. 2014-001960

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether Appellant's right to Due Process was violated when, at the trial for armed robbery and kidnapping, the State lost a surveillance tape from a grocery store showing three men using a debit card stolen during the armed robbery and kidnapping?

STATEMENT OF THE CASE

In October of 2010, the Beaufort County Grand Jury indicted Appellant Wright for armed robbery and kidnapping, incitements #2010-GS-07-1926, 1927. On August 25, 2014, Wright was tried in his absence before a jury with the Honorable Carmen T. Mullen presiding. Scott W. Lee represented Wright at trial. Carra Henderson and Julie Kate Keeney prosecuted the case. The jury returned verdicts of guilty. Judge Mullen sentenced Wright under seal. On September 16, 2014, Wright appeared before Judge Mullen for pronouncement of the sealed sentence. Judge Mullen sentenced Wright to two twenty (20) year concurrent sentences. A timely notice of intent to appeal was served on September 16, 2014. This appeal follows.

STATEMENT OF FACTS

On May 10, 2007, two armed men entered Chavis Moving and Storage and demanded money from the employees. The first man to enter was described as a light skinned black male. He was followed by a dark skinned black male wearing a mask. (R. p. 91, lines 12-19). Nancy Hill, an employee of Chavis Moving and Storage, testified that the first man was wearing red and the second man was wearing yellow. (R. p. 110, lines 15-23). Ms. Hill testified that the men went through her purse, took her debit card and demanded her pin number, which she provided. (R. p. 103, lines 17-24). A finger print consistent with Appellant's finger print was found on a pack on cigarettes from Ms. Hill's purse. Ms. Hill testified that she purchased a carton of cigarettes before coming to work that morning, opened the carton and placed the one pack of cigarettes in her purse. (R. p. 102, lines 1-15).

Sergeant Brian Townsend with the Beaufort County Sheriff's Department took statements from four employees present at the time of the robbery: Lloyd Griffin, Alan Lindsey, Nancy Hill and Nathaniel Williams. (R. p. 87, line 19 – p. 88, lines 1-15). Another employee present, Stephanie Radford, provided a statement to Investigator Foskey at a later date. (R. p. 138, line 19 – p. 139, lines 1-21). Nancy Hill was the only employee to testify at trial.

The co-defendant, Tyshon Barnes, was identified as a suspect and his photo was placed in a photo line up. (R. p. 125, lines 5-11). The police showed the photo line up to five of the employees present at the time of the robbery and two of the five employees, Lloyd Griffin and Nathaniel Williams, identified Barnes as the unmasked man who entered the business first. (R. p. 133, lines 17-22; p. 135, lines 1-24). Barnes' brother was also a suspect and his photo was included in the photo line up. (R. p. 137, lines 3-7). Another

employee, Alan Lindsey, identified Barnes' brother as the first robber. (R. p. 135, line 21 – p. 136, lines 1-8). Four days after the robbery of Chavis Moving and Storage, Barnes and his brother were arrested in connection with the robbery of a post office. (R. p. 195, lines 11-25). The police also placed the Appellant's photo in a line up and none of the employees identified Appellant. (R. p. 132, lines 8-21). The photo line up containing Appellant's photo was not preserved as evidence. (R. p. 132, lines 12-21). The investigator admitted that Appellant's skin tone is lighter than Barnes' skin tone. (R. p. 155, lines 2-22).

Shortly after the robbery, Ms. Hill's debit card was used at a nearby Food Lion grocery store. (R. p. 125, line 18 – p. 126, lines 1-3). Investigator Foskey with the Beaufort County Sheriff's Department obtained and viewed a videotape surveillance tape from the Food Lion. Investigator Foskey testified that the tape showed three black males entering the Food Lion. (R. p. 126, lines 11-14). The investigator could not identify facial features, height or skin tone from the video. (R. p. 126, lines 14-19). The investigator testified that two of the men had on work shirts with a patch on the front. (R. p. 126, line 20 – p. 127, lines 1-4). According to the investigator, he sent the video to the South Carolina Law Enforcement Division [SLED] for possible enhancement. (R. p. 127, lines 5-7). The investigator testified that he never received a response from SLED. (R. p. 127, lines 8-11). At the time of trial the State could not locate the video surveillance tape. (R. p. 127, lines 12-22).

The co-defendant, Tyshon Barnes, testified against Appellant at trial. Barnes pled guilty to the armed robbery and kidnapping at Chavis Moving and Storage and is expected to complete his state sentence in 2016. (R. p. 177, lines 10-25). Barnes testified that after completing his state sentence he faces a thirty nine year federal sentence for the robbery of

the post office. (R. p. 178, line 1 – p. 179, lines 1-5). Barnes admitted that he hoped to receive a downward departure for the federal sentence in exchange for his state trial testimony against Appellant. (R. p. 206, lines 2-13).

According to Barnes, he entered the business first, followed by Appellant who was wearing a mask. Barnes admitted that he knew Terrence Brown, an employee of Chavis Moving and Storage. (R. p. 191, lines 6-10). Brown was not present at the time of the robbery and Barnes denied that Brown had any involvement in the robbery. (R. p. 191, lines 11-25). The investigator admitted that one of the employees present at the time of the robbery, Stephanie Radford, noted that it was odd that Brown left the business right before the robbery. (R. p. 140, lines 11-24). The investigator, however, could not remember if he ever interviewed Brown. (R. p. 141, lines 1-24). The investigator also testified that employee Alan Lindsey, who was present at the time of the robberies, stated that one of the robbers answered the business phone during the course of the robbery. (R. p. 149, line 23 – p. 150, lines 1-23). The investigator admitted, however, that he did not obtain any phone records for the business. (R. p. 150, line 24 – p. 151, lines 1-13).

ARGUMENT

Appellant's right to Due Process was violated when, at the trial for armed robbery and kidnapping, the State lost a surveillance tape from a grocery store showing three men using a debit card stolen during the armed robbery and kidnapping.

Prior to trial Appellant moved to dismiss the armed robbery and kidnapping charges based on the fact that the State lost a video surveillance tape from the Food Lion where a debit card was used belonging to one of the victim employees of the armed robbery and kidnapping that took place at Chavis Moving and Storage. (R. pp. 18-36). Counsel for Appellant stated, "And then, I guess the motion would be to dismiss the case for failure to produce exculpatory evidence." (R. p. 20, lines 2-4). The State acknowledged that Investigator Foskey obtained the tape from Food Lion and viewed the tape but was unable to identify anyone due to the grainy poor quality of the tape. (R. p. 20, line 9 – p. 21, lines 1-10). Investigator Foskey testified that the tape showed three black males entering the Food Lion. (R. p. 24, lines 6-11). The investigator testified that two of the men had on work shirts with a patch on the front. (R. p. 24, lines 14-17).

The State acknowledged a property receipt from when Investigator Chapman received the tape from Food Lion and a report from Investigator Foskey in regard to viewing the tape and his intention to send it to SLED for enhancement. (R. p. 25, lines 10-14). But, as the assistant solicitor stated, "... that's where our paper trail ends." (R. p. 25, lines 14-15). The Beaufort County evidence sheets in connection with this case reflect that the tape was never entered into evidence. (R. p. 30, lines 12-21). SLED had no record of ever receiving the tape for enhancement. (R. p. 20, lines 16-21). Investigator Foskey's supplemental report, marked at Court's Exhibit #1, however, indicates that the tape was sent to SLED. (Court's Exhibit #1, R. p. 339).

Counsel for Appellant argued that the tape was potential impeachment material as the co-defendant, Tyshon Barnes, denied going to the Food Lion. (R. p. 21, lines 11-25). Counsel for Appellant additionally argued that the very short time frame between the robbery and the use of the debit card at Food Lion and the close proximity of the Food Lion and the scene of the robbery made the exculpatory nature of the video tape apparent. (R. p. 32, line 6 – p. 33, lines 1-20). The judge denied the motion to dismiss finding no bad faith and no apparent exculpatory value due to the poor quality of the tape. The judge stated:

The question is whether or not there is any exculpatory value to the tape. And again, as Ms. Henderson stated, case law requires that it must be apparent. Might is not good enough. I further find that, even though it is concerning that the Defense hasn't had the opportunity to see it, it's a videotape of after the event, not the event that he's charged with. So, respectfully, while I do understand Mr. Lee's argument that, potentially, it could be used to impeach the testimony of the co-defendant, again, we don't know that. It's just a might. And we don't know if SLED could have done anything with it, eventually as well, even if they did or did not get it.

(R. p. 36, lines 1-14). The trial judge erred.

At the close of the State's case Appellant renewed the motion to dismiss based on the State's failure to produce the Food Lion video. (R. p. 247, line 23 – p. 248, 249, lines 1-25). Appellant argued that the exculpatory nature of the video tape was now more apparent based on trial testimony from Nancy Hill that the second robber was wearing a black and yellow wind suit. (R. p. 248, lines 13-23). The judge again denied the motion to dismiss. (R. p. 251, lines 5-6). After the jury returned with the verdicts, counsel for Appellant again renewed the motion to dismiss. (R. p. 319, lines 11-12). The judge again denied the motion. (R. p. 319, lines 21-22).

Pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. California v.

Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81, L.Ed. 413 (1984). This standard requires criminal defendants be afforded a meaningful opportunity to present a complete defense. Id. To the extent the Constitution imposes a duty upon the government to preserve evidence, “that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.” California v. Trombetta, 467 U.S. 479, 488-89, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). To satisfy this standard, evidence must: (1) “possess an exculpatory value that was apparent [to the police] before the evidence was destroyed,” and (2) “be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” Id. at 489, 104 S.Ct. 2528. The mere possibility that lost or destroyed evidence could have exculpated a defendant is not sufficient to satisfy Trombetta's requirement that the exculpatory value be “apparent” to the police before its loss or destruction, which is required to establish that the police acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 56 n. *, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

In State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001), the South Carolina Supreme Court wrote:

The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, *supra*; State v. Jackson, *supra*.

The exculpatory value of the video surveillance tape in the present case was apparent to the police before the tape was lost. Witness Nancy Hill told the police that

the second robber who, according to the State's theory of the case, was Appellant, was wearing a yellow and black wind suit. Investigator Foskey testified that two of the men seen in the Food Lion video were wearing work shirts with a patch on the front. (R. p. 24, lines 14-17). There was no testimony that any of the three men were wearing a yellow and black wind suit. Appellant was unable to obtain comparable evidence by other reasonably available means. The fact that the video of the transaction at the Food Lion takes place after the armed robbery does not diminish the exculpatory value of this evidence, especially in light of the time frame and location.

In contrast to the lost exculpatory video surveillance tape in the present case, in State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001), the South Carolina Supreme Court found no due process violation from the destruction of the murder weapon when the weapon contained no exculpatory value. The video tape in the present case is also easily distinguished from the drugs that were destroyed following the guilty plea in State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991). In Mabe the Court wrote, " ... the cocaine was destroyed in reliance on respondent's having pled guilty to trafficking and in accordance with normal procedures after respondent entered his plea. The cocaine had no apparent exculpatory value. Respondent may attack the accuracy of the chemical analyst's methodology and equipment, or introduce any other evidence which might contradict the report of chemical analysis." 306 S.C. at 359, 412 S.E.2d at 389. The video in the present case was not destroyed in accordance with normal procedure. Instead, the video in the present case was lost. The exculpatory value of the tape was apparent before it was lost.

The lost tape in the present case is also different from the surveillance photos of an altercation with a school resource office in a school cafeteria at issue in State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010). Moses argued that the trial court erred in refusing to dismiss the charges due to the State's failure to preserve or disclose videotaped evidence from the incident in the cafeteria which would have been helpful to Moses in identifying student witnesses. In Moses the Court of Appeals wrote:

In this case, defense counsel failed to establish a due process violation resulting from the intentional destruction of, or failure to preserve, relevant evidence. The record fails to establish bad faith on Smith's part. The State argued to the trial court during pretrial motions that the surveillance system in place at Hillcrest High School was very antiquated and only captured still images, not live video. As the State further explained, a live video could not be obtained from the surveillance system because it is a delayed still image process. Instead, if not yet automatically deleted, delayed pictures could be obtained, such as the one produced by Smith to defense counsel. Further, the solicitor indicated to the trial court that she had given a hard copy of the picture and a copy of the disk to defense counsel; this statement was not contested at the time made. The State also invited the defense expert to Hillcrest High School to examine the surveillance system. Thus, based on the information provided, the record supports the trial court's finding that the State did not destroy any evidence in bad faith.

Furthermore, the testimony of record fails to establish the exculpatory value of this evidence. The defense asserts the tape "would most likely" have allowed it to identify witnesses who *may reasonably* have presented favorable evidence or evidence which could have lead the defense to impeachment evidence. Standing alone, this assertion is insufficient. Moreover, Moses failed to show that he could not obtain other evidence of comparable value by other means; in fact, the State provided defense counsel with a high school yearbook to help Moses in identifying other witnesses who were present in the cafeteria. (footnote omitted).

State v. Moses, 390 S.C. 502, 519, 702 S.E.2d 395, 404 (Ct. App. 2010).

In the present case there is no question that a video existed, the police obtained the video and then lost the video. Appellant in the present case does not assert that the

video “would most likely have allowed it to identify witnesses who *may reasonably* have presented favorable evidence or evidence which could have lead the defense to impeachment evidence.” Instead, the video in the present case showed three men, none of whom were dressed as the State believes Appellant was dressed at the time of the robbery shortly before the video taped incident at Food Lion. Appellant was unable to obtain comparable evidence by other reasonably available means. Appellant’s due process rights were violated by the State’s failure to preserve the video surveillance from the Food Lion.

In State v. Hutton, 358 S.C. 622, 633, 595 S.E.2d 876, 882 (Ct.App. 2004) the Court wrote, “While we do not condone the destruction of any statements made by witnesses to the authorities, we consider dismissal of criminal charges a drastic remedy which should rarely be invoked as a sanction for the State's failure to preserve evidence. We still caution the prosecution and law enforcement authorities that the destruction of evidence will be highly scrutinized; however, we cannot find appellant was entitled to a dismissal based on the facts of this case.” The State’s failure to preserve the videotape warrants dismissal under the facts of this case.

The State’s evidence against Appellant consisted of fingerprint evidence on a pack of cigarettes and the testimony of co-defendant Barnes. Although witnesses stated the second robber was the darker skinned of the two (R. p. 91, lines 12-19), Investigator Foskey admitted that Appellant was lighter skinned than co-defendant Barnes. (R. p. 155, lines 2-22). Barnes testified that after the robbery he drove straight to his house with the Appellant. (R. p. 198, line 2 – p. 199, lines 1-6). Barnes denied stopping at the Food Lion. (R. p. 198, line 21 – p. 199, line 1). Barnes testified that he did not see Appellant

give the debit card to anyone. (R. p. 200, lines 4-12). The Food Lion video surveillance tape contained critical evidence. The exculpatory value of the videotape, based on clothing descriptions, time frame and location, was apparent before the tape was lost. Appellant cannot obtain the evidence contained on the videotape by any other means. Due process requires dismissal.

CONCLUSION

Based on the above argument, the convictions and sentences should be reversed and the case dismissed.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of December, 2015.